THE SHAREHOLDER RIGHTS AND ACTIVISM REVIEW

The Shareholder Rights and Activism Review
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THE SHAREHOLDER RIGHTS AND ACTIVISM REVIEW
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Editor
Francis J Aquila
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PREFACE

Over the years since the financial crisis, shareholder activism has been on the rise around the world. Increasingly institutional shareholders are taking a range of actions to leverage their ownership position to influence public company behaviour. Activist investors often advocate for changes to the company, such as its corporate governance practices, financial decisions and strategic direction. Shareholder activism comes in many forms, from privately engaging in a dialogue with a company on certain issues, to waging a contest to replace members of a company’s board of directors, to publicly agitating for a company to undergo a fundamental transaction.

Although the types of activists and forms of activism may vary, there is no question that shareholder activism has become a more prominent, and likely permanent, feature of the corporate landscape. Boards of directors, managements and the markets have increasingly become more attuned to shareholder activism, and engaging with investors has become a priority for boards and managements as a hallmark of basic good governance.

Shareholder activism has become a global phenomenon that is effecting change to the corporate landscape not only in North America but also in Europe, Australia and Asia. While shareholder activism is still most prevalent in North America, and particularly in the United States, shareholder activism is expanding its reach across the globe. This movement is being driven by, among other things, a search by hedge funds for new investment opportunities and a cultural shift toward increased shareholder engagement in Europe, Australia and Asia.

As both shareholder activists, and the companies they target, become more geographically diverse, it is important for legal and corporate practitioners to understand the legal framework and emerging trends of shareholder activism in the various international jurisdictions facing activism. The Shareholder Rights and Activism Review is designed as a primer on these aspects of shareholder activism in such jurisdictions.

My sincere thanks to all of the authors who contributed their expertise, time and labour to this second edition of The Shareholder Rights and Activism Review. As shareholder activism continues to diversify and increase its global footprint, this review will continue to serve as an invaluable resource for legal and corporate practitioners worldwide.

Francis J Aquila
Sullivan & Cromwell LLP
New York
August 2017
Chapter 1

ARGENTINA

Bárbara Ramperti, Diego Krischcautzky and Lorena Aimó

I OVERVIEW

Over the last 70 years and at least once per decade, the Argentine economy has suffered severe economic, financial or political crises, if not all of the above together. A country that was once comparable in terms of GDP, development and income per capita to Australia, it lost its way due to lack of long-term policies, irrational public spending, political instability (after the then-unusual military coup of 1930, the first democratic-to-democratic presidential transition took place only in the late 1980s) and war. This slide-to-the-bottom process peaked in early 2002, following the resignation of the incumbent president in the middle of his four-year term and amid the virtual crack of the Argentine financial system. The country stopped its sovereign debt payments in what gave rise to the then-largest sovereign default ever. Only recently, 15 years later, has Argentina reached a settlement with the last significant group of holdout bondholders and returned to a certain level of normal status, financially speaking. However, in the interim time Argentina isolated itself and became the pariah of the international capital markets. The inward-looking approach functioned as a barrier for local companies trying to obtain financing in the equity or corporate finance markets. Increased foreign exchange regulations effectively helped to put an end to cross-border financing and reaching out to international equity markets became a dream for the privileged few.

At local level, things were not different. The number of IPOs in the Buenos Aires Stock Exchange in the years running from 2005–2016 was less than 15, and within the same period of time a greater number of companies actually took the delisting route. As a matter of fact, 40 years ago the Buenos Aires Stock Exchange (the largest and most important of the country) had over 370 listed companies, while the current number hardly exceeds 100.

The absence of clear rules, a history of high inflation rates and the lack of fiscal discipline also explain why Argentines have historically distrusted their own currency. The US dollar is the currency in which the most significant transactions (real estate, company acquisitions, etc.) are negotiated. Therefore, mid to long-term investment in local currency-denominated equity has been traditionally regarded as highly speculative and risky. Then, unlike what happens in other mature markets, the Argentine equity market is not widely regarded as a valid saving option for households and is left to a little group of savvy traders.

1 Bárbara Ramperti and Diego Krischcautzky are partners, and Lorena Aimó is a senior associate at Marval, O’Farrell & Mairal.
In addition to macroeconomic concerns, there are legal constraints that conspire against the development of the equity market: mainly, the historical perception that our legal system does not provide adequate protection for minority shareholders or small investors. Even after some regulatory efforts to the contrary in the recent past, the 2017/2018 Scorecard published by the Latin American Private Equity and Venture Capital Association still ranks Argentina in the lower brackets when considering the ‘minority shareholder right protection’ item across the region.

The unfortunate combination of economical and legal obstacles results in little room for a sophisticated large capital market. The aggregate capitalisation market was in 2014 less than 12 per cent of the Argentine GDP, compared to 35 per cent in Brazil, 37 per cent in Mexico and 90 per cent in Chile. Of the listed companies, none could actually be described as purely public in the sense that shareholder power is atomised and no controlling group exists. On the contrary, except for a very limited number of companies, a controlling shareholder or control group is easily identifiable in each of the listed companies on the Buenos Aires Stock Exchange.

In an environment like ours it is hardly surprising that shareholder activism be rather limited. There was an incipient activity in the mid-1990s when the pension system was privatised and several pension funds entered the market. With relatively significant holdings in listed companies there were attempts, which never fully materialised, to improve corporate governance for the benefit of the ultimate beneficiaries of the funds. However, a change in political direction led in 2008 to the takeover by the Argentine state of the whole pension system. Such reform consolidated all of the holdings then disseminated among the private pension funds in a single hand: the Argentine state. The resulting scenario was anything but attractive: few listed companies, all with single or identifiable group of controlling shareholders and a new large minority shareholder with powers much greater than voting: taxation and regulation powers.

The co-existence proved in many cases difficult. Boards made efforts to accommodate the state’s needs and requirements and majority holders accepted to have one or more state-nominated members of the Board and Supervisory Committee.

In late 2015, prior to an anticipated change of administration, a law was passed requiring two-thirds of Congress member votes in order to dispose of those holdings in listed companies. In mid-2016, already with a new, more business-friendly administration in place, the aforesaid law was repealed requiring simple majority Congress approval for the disposition of holdings. This was probably the first step in the right direction: a state focused on running policies for the achievement of the common good instead of interfering in the management of listed corporations.

In an environment like ours, there does not seem to be fertile ground for shareholder activism these days. However, in line with international trends, and with the will to play a more economically and politically relevant role in the region and in the world, Argentina will have no option but to adapt to international standards and improve its capital market, structurally, economically and legally.

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A natural consequence of that should be the generation of increased room for shareholder activism. However, although our current government has an open market policy and intends to promote a business environment, there are still no substantial changes in the subject.

II LEGAL AND REGULATORY FRAMEWORK

The Argentine Companies Law No. 19,550 as amended (ACL) is the legal framework applicable to companies incorporated in Argentina, whether they are listed companies in the country or not.

In the case of listed companies, besides being subject to the ACL, they are ruled by the Argentine Capital Market Law No. 26,831 as amended (ACML).

Besides the above, it is worth mentioning that Argentina has recently enacted its new Civil and Commercial Code (CCC), which within its provisions establishes a prevailing order for the application of rules to companies incorporated in Argentina. Said order is as follows:

a. ACL/ACML mandatory provisions, as applicable;
b. CCC mandatory provisions;
c. company by-laws and amendments;
d. ACL/ACML supplementary provisions, as applicable; and
e. CCC supplementary provisions.

The ACL provides a specific system based on the principle of majorities to adopt decisions within the company. This system is aimed at guaranteeing investors and shareholders minimum rules and procedures, and therefore, rights. Notwithstanding that the ACL contains certain provisions that are mandatory (e.g., quorum for ordinary shareholders’ meetings in the first call), the ACL provides the shareholders with freedom to agree on the rules applicable to the companies, to the relation between the company and its shareholders, as well as the relation between the members of the board of directors and the shareholders, always within the ACL specific system and parameters.

Notwithstanding that Argentina’s legal and regulatory framework provides minority shareholders and investors with broad rights – which are briefly analysed below – the fact that currently in Argentina the capital is concentrated in certain groups of control, means that there is not much place for shareholder activism. This is even true in non-listed companies. To illustrate the above, we will briefly walk the reader through the following matters:

a. appointment and removal of directors;
b. conflict of interest;
c. basic shareholders’ rights; and
d. special considerations concerning ACML.

i Appointment and removal of directors

The general principle stated in the ACL (Section 234, subsection 2) is that the members of the board of directors are appointed by shareholders gathered in a general ordinary shareholders’ meeting by an absolute majority of votes of the attending shareholders unless the company’s by-laws establish a different mechanism.

Notwithstanding the aforementioned, and in order that not only the will of the majority prevails over the minority shareholders, the ALC authorises the appointment of directors by cumulative vote or classes of shares.
Appointment of directors by classes of shares (Section 262 of the ACL): it is one of the mechanisms provided by the ACL in order to allow minority shareholders to have representation on the board. In this regard, companies are able to include in their by-laws the provisions that recognise the existence of classes of shares that represent as many groups of shareholders in the share capital as may exist, and determining the mechanism of appointment of the companies’ directors based on the existence of different classes.

Accordingly, each of the minority groups may appoint the number of members of the board in proportion to the number of shares of the group or the total votes that may correspond to them in the shareholders’ meeting.

The existence of classes of shares do not determine or entitle the shareholders to appoint directors by this mechanism but needs to be expressly provided in the companies’ by-laws.

**Appointment of directors by cumulative vote (Section 263 of the ACL)**

Shareholders are entitled to elect up to one-third of the seats to be filled on the board of directors by means of cumulative voting. This method consists of multiplying the number of votes held by each shareholder by the number of vacancies to be filled, and distributing the obtained result in the most convenient way for the shareholder, that is to say, which grants him or her the greatest representation.

The shareholder wishing to cast cumulative votes must give notice of intention to do so to the company at least three business days prior to the date of the shareholders’ meeting at which the members of the board of directors are to be chosen; such notice must specify those shares to be so exercised. Once notice has been received that one shareholder has elected to use this system, all the other shareholders are also empowered to use this system, should they consider it advisable.

Same as providing the ACL the shareholders with the right to appoint the members of the board of directors, it provides the right to revoke their appointment with or without cause at any time (Section 256 of the ACL). The shareholders’ meeting is not obliged to justify the cause of revocation.

The removal with no justified cause provides the removed director with no right to judicially challenge the shareholders’ decision, as the shareholders’ meeting has the right to revoke the appointments even without cause. This alternative does not affect the right of the company and of its shareholders to file a legal action against the director within the term provided by applicable laws.

The removal with justified cause needs to be based on the violation of law, fraud, abuse of power or gross negligence or any other justified cause. It is necessary to clearly state the justified cause that gives sufficient grounds to remove a member of the board from his or her office and companies should have sufficient evidence to such extent. Under this scenario, the member of the Board that has been removed may judicially challenge the cause justifying his or her removal.

As may be noticed, the shareholders’ meeting is the corporate body entitled to appoint and remove, with or without cause, the members of the board of directors following the procedures and majorities required by the company by-laws and the ACL. This differs substantially from other jurisdictions and explains why the real power lies within the controlling group rather than within the board.

The shareholders’ meeting is also the corporate body entitled to appoint and remove the members of the supervisory committee or the statutory supervisors.
ii Conflicts of interest

The ACL and CCC impose a duty on directors to act loyally toward the company and its shareholders and to perform their responsibilities with the diligence of a ‘good businessman’ (Section 59 of the ACL). Any failure to adhere to these standards will result in the imposition of unlimited and several liabilities for damages arising therefrom.

The concept of loyalty encompasses the obligation to meet the standard of an ‘honest person’ and defend the interests of the company. Thus, and according to the provisions set forth in Section 272 of the ACL, this duty prohibits any director from participating in the discussion of any matter at board meetings in which he or she has an interest that conflicts with the interest of the company.

Furthermore, according to Section 273 of the ACL, the directors cannot participate on their own or on behalf of third parties in activities that imply competing with the company, unless prior express authorisation of the shareholders’ meeting is granted.

Moreover, Section 159 of the CCC states that the directors cannot pursue or promote interests that are contrary to the ones of the entity.

If, in a certain matter, a director has an interest that conflicts with the company’s interest, he or she should communicate said circumstance to the other members of the board and refrain from intervening in any matter related to that operation.

The board should implement preventive measures to reduce the risk of conflicts of interest in its relations with the company.

iii Basic shareholders’ rights

Rights of all shareholders

Right to be informed in advance as to the matters to be discussed in the shareholders’ meeting (Section 246 of the ACL)

All the matters to be discussed at a shareholders’ meeting must be included in the agenda of the meeting. Otherwise, any decisions made on matters that were not included in the agenda are void, except, *inter alia*, (1) unanimous shareholders’ decisions; that is, decisions taken by the affirmative vote of all the shareholders; (2) the decision to initiate legal actions against directors as a direct consequence of a matter included in the agenda.

Notice of meetings are to be published in the Official Gazette (legal newspaper) and in a newspaper with nationwide coverage for five days, at least 10 but no more than 30 days prior to the date on which the meeting is to be held. The notice should include the type of shareholders’ meeting, the date, time and place of the meeting, the agenda of the meeting and any other provisions required by the by-laws for the attendance of shareholders. If a quorum is not available at the first meeting, notice must be published for a meeting on second call, which must be held within 30 days of the date for which the first meeting was called. Notice for a meeting on second call must be published for three days, at least eight days before the date of the second meeting. In the case of simultaneous notifications, if the meetings are convened on the same day, the meeting shall be convened not less than an hour from the time fixed for the first meeting. Shareholders’ meetings may be validly held without the need to publish notices if shareholders representing all the outstanding share capital of the company are present and resolutions are adopted unanimously.

The shareholders have the right to request copies of all documents and information related to the matters to be dealt with at the shareholders’ meetings.
Right to discuss and vote at the shareholders’ meetings

All shareholders, regardless of their ownership percentage in the company are entitled to participate and vote at all shareholders’ meetings, except in those cases provided by the ACL.

Right to obtain copies of the minutes of shareholders’ meetings (Section 249 of the ACL)

Any shareholder may request, at his or her own expense, signed copies of the minutes of shareholders’ meetings.

Pre-emptive right (Section 194 of the ACL)

As a general principle subject to certain exceptions provided by the ACL, holders of common shares have a pre-emptive right to subscribe to new shares of the same kind in proportion to his or her shareholding in the company.

The company must make an offer to the shareholders by publishing notice thereof for three days in the Official Gazette, and also in a leading newspaper in the case of certain companies (inter alia, companies whose capital exceeds 10 million Argentinian pesos and companies that operate public concessions or services). The shareholders may exercise their pre-emptive rights within 30 days following the date of the last publication.

If the company violates the shareholders’ pre-emptive rights, the affected shareholder may initiate legal actions against the company to obtain the cancellation of share issuance or, if that were not possible, the shareholder may seek indemnification for damages in an amount not lower than three times the face value of the shares to which he or she had the right to subscribe.

Right to object to the resolutions of the shareholders’ meeting (Section 251 of the ACL)

Resolutions of the shareholders’ meeting adopted in violation of the law, by-laws or internal regulations, may be judicially challenged by the shareholders who did not vote in favour of them and by absentee shareholders who evidence their status as shareholders at the time of the resolution objected to. The shareholders who voted in favour of such a resolution may object to it, if their vote is voidable due to defects in consent. Any claim in this respect must be filed within three months of the relevant meeting.

Right of withdrawal (Section 245 ACL)

The shareholder’s right to separate from the company with reimbursement of the value of his or her shares may be exercised by any shareholder disagreeing with the resolutions approved by the shareholders’ meeting on the following matters:

- change in the form of organisation;
- extension of the company’s term or decision to continue if the company has started the winding-up process;
- transfer of the legal domicile of the company to a foreign country;
- fundamental change of the corporate purpose;
- total or partial reimbursement of capital;
- capital increases decided by extraordinary shareholders’ meetings that require contributions from the shareholders;
- voluntary withdrawal of the company from the public offering regime or delisting of shares from the stock exchange; and
continuation of the company, should the extraordinary shareholders’ meeting resolve to avoid winding up the company due to cancellation of the public offering or listing of its shares.

In the case of mergers and spin-offs, the right of withdrawal may not be exercised by the shareholders of the absorbing company. Likewise, the right of withdrawal may not be exercised in the winding up of a company prior to the date of expiry of its normal term.

The right of withdrawal may only be exercised by shareholders who voted against the resolution of the shareholders’ meeting at which the above decisions were adopted, within five days from the adjournment of the shareholders’ meeting; and by absentee shareholders who evidence their status as shareholders at the time of the meeting, within 15 days from the adjournment of the shareholders’ meeting.

Shares shall be reimbursed in accordance with the value resulting from the company’s most recent balance sheet or the balance sheet to be drawn up in compliance with applicable legal provisions.

Right to action against directors (Section 277 of the ACL)

Shareholders may individually initiate legal actions against the directors for breach of duties, violation of the law, by-laws or other internal regulations, or for any other damage caused by willful misconduct, abuse of authority or gross negligence.

Right to request receivership (Section 113 of the ACL)

Any acts or omissions of the directors that may seriously endanger the company entitles any shareholder to request judicial receivership of the company as a protective measure, after showing his or her status as a shareholder, the existence of the danger and its seriousness, the fact that the shareholder has exhausted all remedies provided in the by-laws and the filing of an action for their removal.

Additional rights of shareholders holding at least 2 per cent of the share capital

Right to obtain information (Section 294, subsection 6 of the ACL)

The statutory supervisor has the duty to provide information on any subject within the scope of his or her duties, to shareholders representing at least 2 per cent of the share capital, upon their request.

If the company does not have statutory supervisors, the shareholders may examine the corporate books and papers, and request the relevant information from the board of directors pursuant to Section 55 of the ACL.

Right to report irregularities (Section 294, subsection 11 the ACL)

The statutory supervisor must investigate all written complaints filed by shareholders representing at least 2 per cent of the share capital. When the statutory supervisor deems that the situation under investigation has not received appropriate treatment from the board of directors and that the matter requires prompt action, he or she must immediately call for a shareholders’ meeting to resolve the matter.
Argentina

**Additional rights of shareholders representing at least 5 per cent of the share capital**

*Right to request that shareholders' meetings be called (Section 236 of the ACL)*

Unless the by-laws establish a lower percentage, shareholders representing at least 5 per cent of the share capital may request shareholders' meetings to be called. The request must specify the matters to be considered at the meeting and the board of directors or the statutory supervisor must call the meeting to be held within 40 days of receipt of such request. Should such meeting fail to be held, the meeting may be called by the Public Registry of Commerce or by the competent judge.

*Right to object to the expiry of directors’ and managers’ liability (Section 275 of the ACL)*

In principle, directors' liability to the company expires by approval of the performance of their duties or by express waiver or settlement, resolved by the shareholders’ meeting, except in case of violation of the law, the by-laws or internal regulations, and provided that there is no objection from shareholders representing at least 5 per cent of the share capital.

*Right to object to the statutory supervisor’s dismissal without cause (Section 287 of the ACL)*

The shareholders’ meeting may revoke the appointment of the statutory supervisor without cause only if there is no objection from shareholders representing 5 per cent of the share capital.

**Additional rights of shareholders representing at least 10 per cent of the share capital**

*Right to request surveillance by the enforcement authority (Section 301 of the ACL)*

The regulatory authority (i.e., the Public Registry of Commerce) may exercise surveillance duties over companies not included within Section 299 of the ACL, when requested by shareholders representing 10 per cent of the share capital. In this case, the control shall be restricted to the facts constituting the grounds for the request.

*Right to request partial distribution during winding up (Section 107 of the ACL)*

During the winding-up process, shareholders representing 10 per cent of the share capital may request partial distribution of the remaining assets of the company, provided that all corporate obligations are sufficiently guaranteed.

**iv Special considerations concerning the ACML**

The ACML provides certain rights to protect minority shareholders in listed companies.

The ACML grants minority shareholders certain exit rights in the event that a single shareholder or group of shareholders take control of a listed company. In this case, a mandatory tender offer must be made before the takeover.

The mandatory tender offer will have to comply with all the requirements imposed by the laws and the securities exchange commission in Argentina (CNV) and will be supervised by it.

The procedure will need to ensure and provide, among other requirements, equal treatment among the shareholders of the same class, a fair price, a reasonable period of acceptance by the addressees of the offer, and the offeror's obligation to provide the investors with all the necessary information for them to make a decision.
On the other hand, the ACML also provides for a squeeze-out mechanism in favour of a quasi-total controlling shareholder, provided certain additional requirements are met. According to the ACML ‘quasi-total control’ means holding 95 per cent or more of the company’s share capital.

Also, minority shareholders are entitled to benefit from any payable control premium. CNV’s regulations impose a number of objective criteria to be complied with in order to ensure equal and fair treatment of minority shareholders.

Also, all mandatory tender offer rules apply upon change of control, thus ensuring minority shareholders that they will not be prejudiced by the payment of any control premium or differential pricing for selected shareholders.

III KEY TRENDS IN SHAREHOLDER ACTIVISM

While it is clear that shareholder activism is basically a greenfield in our country and mostly everything is to be done, there are initial positive signs that the protection of minority interest rights has begun to be taken seriously. The relatively recent rejection by the board of directors of Solvay Indupa of the mandatory tender price offered by Braskem in late 2013 and the fallout of the transaction as a whole (a fact that would have been daily news anywhere else, but in Argentina was a novelty) initiated a course from which there is no turning back. This does not qualify as shareholder activism exactly (board activism would be more appropriate), but the underlying concept is that the implied powers and rights of the shareholders, as described elsewhere herein, are growing and are here to stay.

IV REGULATORY DEVELOPMENTS

As mentioned above, the latest major development in terms of regulating the capital markets was the ACML (December 2012), which incorporated the mandatory tender offer and strengthened the rights of small investors and minority shareholders. Among these innovations it also gave the CNV the right to ask for reports, documents, conduct investigations and when as a result the CNV deems that the interest of minority shareholders or other holders of publicly listed securities have been affected, such agency has the power to either appoint overseers of the issuer’s board of directors with veto rights (appealable only before the head of the CNV) or even remove the board of directors for a maximum of 180 days. This decision is appealable before the Finance Minister. At the time the draft bill was under discussion in Congress, these discretionary powers were greatly criticised but they still made their way into the ACML. At the issuer’s level, many feared that minority shareholders would try to increase their leverage by leading the CNV into exercising these discretionary powers. However, this did not happen. The CNV preferred to have those powers as deterrent weapons against controlling shareholder abuse and refrained from actually removing members of the Board or appointing overseers. Still, the mere possibility of governmental intervention in listed companies reflected a high level of interventionism (even if potential) that counted as a negative factor.

On 16 November 2016 the Executive Branch sent a bill to Congress to amend, among others, the ACM (the Capital Market Bill). The Capital Market Bill aims to achieve the development of the Argentine capital market by increasing the number of investors and companies participating in it, within the framework of a market with clear and transparent rules, to finally achieve a modern financial regulatory framework that will contribute to the
development of the Argentine economy. The Capital Market Bill has yet not been considered by the Congress. Considering the importance of the bill, and the fact that Argentina will have Congress elections in October 2017, the Capital Market Bill is not expected to be considered until then.

The Capital Market Bill proposes, among others, to substantially modify the mandatory tender offer regime (OPA), with the main objective of protecting the investor in the public offering regime and to also address certain conflictive situations. The Capital Market Bill proposes to eliminate the mandatory OPA in those cases not involving the acquisition of a controlling interest. It also provides that the mandatory OPA procedure is \textit{ex post}, and that should be carried on within one month as from the date on which the controlling interest has been acquired. The Capital Market Bill also provides more precise parameters for the determination of the ‘fair price’ and its calculation in the mandatory OPA in the event of change of control, delisting and squeeze-out. With regard to voluntary OPAs, it is established that the offeror may set the price at its own discretion without the fair price guidelines being applied.

Another proposal refers to the CNV’s supervisory powers on the external auditors of the entities subject to the public offering regime; the Capital Markets Bill establishes new and main powers of this entity. Among them, it is worth mentioning the following: (1) the implementation of a registry in which agents are registered; (2) the organisation of a supervisory system on the external audits, being empowered by the CNV to request information, carry out inspections and request clarifications; (3) the application of sanctions, which may consist of warnings (with or without publication in the legal newspaper), fines, disqualification of up to five years to perform certain functions, among others. In accordance with the fundamentals of the Capital Market Bill, the proposals mentioned above imply an increase of the supervisory powers of CNV, granting additional protections to the investor, in line with the recommendations of specialised international organisations.

The nature of the Capital Market Bill implies that, in essence, the ownership structure of the local entities is not expected to change in the near future. If the Capital Market Bill is approved, the focus is to further protect minority shareholders, and accordingly that control structure is expected to stay the way it is now. Stricter scrutiny might be imposed on controlling shareholders and boards but other than that nothing extraordinary should be expected. Control and ownership will continue to go hand in hand for a long while.

V OUTLOOK

In a given scenario like ours, the chances that we will see shareholder activism in the American fashion are highly unlikely. However, the veracity of the preceding statement may be proved wrong if certain things happen.

We know the current administration wants to boost internal and foreign investment. The international perception of Argentina as a friendlier business environment and a better relationship with the capital exporting countries are already an undeniable fact. An expected stronger recovery of the Argentine economy in the next few years should attract institutional investors to our local markets.

Political constraints make the return to a local institutional investor presence (at least in the form of pension funds) unrealistic. Insurance companies may play a part but their history has been one of passive investment and little activism due to regulatory restrictions. However, an improvement of the general macroeconomic conditions might make Argentine
securities attractive for foreign institutional investors. If this happens, the chances that activism is imported into the country will substantially increase, therefore driving regulations to contemplate this and even promote a healthy level of activism.

If and until that happens, the focus has to remain on making sure that boards and controlling shareholders of listed companies pursue the collective interest of all of the shareholders rather than their own. Thus, all efforts to that end in the upcoming legislation and by our courts will be welcome.
I  OVERVIEW

Shareholder activism has long been a feature of the Australian corporate landscape. From corporate ‘raiders’ in the 1980s and 1990s to retail shareholder activists throughout the 2000s, Australia’s shareholder-friendly regulatory regime has supported a robust level of engagement between the country’s listed companies and their shareholders over economic, social and governance issues.

However, even in the context of this long-standing tradition of activist engagement, 2017 was a standout year for shareholder activism in Australia. It was the year the nation saw the American hedge fund activist playbook in action, with Elliott Associates and Elliott International (the Elliott Funds) launching an activist campaign against ‘the Big Australian’, global miner BHP. Because of the prominence of the target – BHP is one of the country’s largest companies and its most recognisable brands – the ongoing campaign by the Elliott Funds has elevated the topic of hedge fund activism to become a mainstream area of focus for boardrooms across Australia.

II  LEGAL AND REGULATORY FRAMEWORK

The Australian regulatory framework is conducive to activist campaigns with clear statutory rights afforded to shareholders in respect of accessing the company’s register of shareholders and contacting its shareholders, nominating and removing directors, and requisitioning resolutions and calling shareholders’ meetings. Further, Australian listed companies are not permitted to have ‘poison pills’ and almost universally have a single class of ordinary voting shares, as required by the Australian Securities Exchange (ASX). However, in spite of this, there are certain defences and structural advantages available to boards and management of listed companies in Australia when responding to activist campaigns.

i  Contacting shareholders

Under the Corporations Act 2001 (Cth) (the Corporations Act), companies are required to allow anyone to inspect their register of shareholders. The Corporations Act also provides a process for people to request copies of the register of shareholders. This statutory right is commonly used by shareholder activists for the purposes of gathering shareholders’ contact details to write to them regarding activist proposals or to solicit votes in respect of upcoming shareholders’ meetings.

1  Quentin Digby is a partner and Timothy Stutt is a senior associate at Herbert Smith Freehills.
By accessing the register (or obtaining a copy of the register), a person would obtain each shareholder’s name and address, as well as details regarding their holding in the company (Section 169 of the Corporations Act). At present, the information does not include e-mail addresses as these are not prescribed details for inclusion in the register under Section 169. However, there is currently a proposal for reform in this area, discussed below in Section V.

It is an offence to use information about a person listed in the register to contact or send material to them, unless the use or disclosure of that information is relevant to the shareholding of that person or to the rights attaching to the shareholding (Sections 177(1) and (1A) of the Corporations Act). However, in most cases, activist proposals will comply with this requirement as they would typically be relevant to the exercise of votes by shareholders. Where shareholder activists send material to shareholders that is inaccurate or that the company’s board considers is misleading, there are a number of avenues open to the board, including taking action against the activists for engaging in misleading or deceptive conduct or, potentially, defamation.

In Australia, the register of shareholders only contains the names and details of the legal holders of shares (i.e., not the underlying beneficial holders). This can create a significant barrier to shareholder activists contacting shareholders, as it means that they are reliant on the timely relay of information by intermediaries and custodians. A separate register of relevant interests held in the company’s shares, including beneficial interests, is also required to be kept by the company under the Corporations Act. However, such registers only contain information regarding shareholders’ beneficial interests where it has been specifically requested by the company pursuant to a ‘tracing’ notice and the data is often not helpful to shareholder activists and other users (as companies are only required to share the ‘raw data’ and not their internal analysis of underlying beneficial interests, which provides a greater insight into the company’s ownership).

Of course, as a substitute for corresponding with each shareholder, activists typically limit their direct engagement to the key underlying institutional shareholders and then rely on print and social media for indirect engagement with the balance of the register, including retail shareholders (as well as to exert pressure on the board).

### ii Calling shareholders’ meetings

It is relatively straightforward for shareholder activists to call or requisition a meeting of shareholders under the Corporations Act for the purposes of formally considering and voting on activist proposals. The Corporations Act also includes a process for shareholders to requisition additional resolutions for consideration at an upcoming scheduled shareholders’ meeting.

Shareholders holding 5 per cent of the votes in a company can requisition a shareholders’ meeting under Section 249D of the Corporations Act. Where a meeting is duly requisitioned according to this process, the company’s directors are compulsorily required to convene the meeting within two months of the requisition and the company must meet the relevant costs of holding it. A shareholder request for these purposes must be in writing, state any resolution to be proposed at the meeting, be signed by the members making the request and be properly given to the company. Failure to follow these procedural requirements can invalidate the requisition and companies can, and commonly do, refuse to convene meetings where they are not complied with. The directors may also refuse to convene the requisitioned meeting where the subject of the meeting is a matter that is not validly within the power of shareholders, as discussed further below in Section V.
Where a meeting is requisitioned using the process in Section 249D, decisions regarding the content of the notice of meeting will be determined by the board of the company (as in the normal course). The shareholder is entitled to request that a statement be included with the notice of meeting setting out its views (Section 249P) and there are limited grounds on which companies may refuse to comply with this requirement. Companies may refuse the request where the statement is more than 1,000 words long or defamatory. Although the shareholder would be requisitioning the meeting, almost without exception the company’s chairman would have the right to chair the meeting under the company’s constitution. Accordingly, companies are able to control the conduct of proceedings of the meeting including any debate on an item of business, subject to the usual rules regarding the conduct of meetings and duties of the chair.

The Corporations Act also includes an alternative process for shareholders to convene a meeting, in which case they would be in a position to determine the time and venue of the meeting and the content of the initial notice of meeting but also be liable to pay the expenses of calling and holding the meeting themselves (e.g., printing, postage, venue costs, etc). Under Section 249F, shareholders with at least 5 per cent of the votes that may be cast at a general meeting of the company may call, and arrange to hold, a meeting. Calling a shareholders’ meeting according to this process provides activists with a strategic advantage in that they can control the timing and location of the meeting (subject to the overriding requirement that it be held at a reasonable time and place), as well as the content of meeting materials, including the notice of meeting. Again, the chairman of the company is likely to be able to chair the meeting under the company’s constitution and control the conduct of the meeting. Despite its advantages for shareholder activists, this alternative process is infrequently used in Australia given the considerable costs it can entail for the convening shareholder.

iii Requisitioning additional resolutions for scheduled shareholders’ meetings

Where there is already a shareholders’ meeting in contemplation (e.g., the company’s annual general meeting), an alternative process, commonly used by retail shareholder activists, is to requisition additional resolutions for consideration at that upcoming meeting. Under Section 249N of the Corporations Act, 100 shareholders or shareholders with 5 per cent of the company’s votes may give a company notice of a resolution that they propose to move at a general meeting.

Similar to requisitioned meetings, the notice must be in writing, set out the wording of the proposed resolution and be signed by the members proposing to move the resolution. The company need not give notice of the resolution if it is more than 1,000 words long or defamatory. However, it is otherwise required give notice to shareholders that the resolution will be considered at the next general meeting that occurs more than two months after the notice is given and, provided it is received in time, the company must meet the costs of giving shareholders notice of the requisitioned resolution.

Because this process allows for 100 shareholders (with shareholdings of any size) to requisition resolutions, it is the preferred mechanism for social and environmental shareholder activists to agitate for changes in company’s operations and policies. With the power of social media continuing to increase, what was once a significant logistical hurdle has become a far simpler requirement for social and environmental activists to meet. As a result, campaigns from groups such as the Wilderness Society and the Australasian Centre for Corporate Responsibility have become relatively common for ASX-listed companies.
As a matter of procedure (though it can also be relevant to strategy), where a requisition is received from a shareholder, irrespective of whether it is valid, the company is required to make an ASX release within two business days. This creates significant timing pressure for companies in developing their response strategy to a requisition.

Under Australian law, the board can dismiss a requisitioned resolution if it purports to direct the board how to exercise its powers of management (as set out in its constitution). Generally, in order to supplant the powers vested in the board, such ‘directions’ would be required to be enshrined in the constitution (with a special resolution requisitioned to amend the constitution for that purpose). This position has recently been confirmed by the Full Court of the Federal Court of Australia and is discussed further below in Section V.

iv Nominating and removing directors

Australian companies typically have very low thresholds in their constitutions for shareholders to nominate a person for election to the board of the company. Unlike other comparable jurisdictions, Australian law does not mandate a threshold level of shareholder support for an external candidate to be nominated to the board of a listed company. In most cases, a single shareholder (with a holding of any size) will be able to nominate a person for election to the board of a company and need only comply with the specific timing requirements in the relevant company’s constitution.

Because of the simplicity of this nomination process (which requires no minimum baseline level of support), it has occasionally been used by shareholder activists in place of requisitioning resolutions as a platform to advance criticisms of the company or agitate for changes to the company’s processes or operations. For the company, an external nomination can involve additional expense and distraction beyond that which would be otherwise required with a requisitioned resolution or statement. In particular, additional care and attention is required, from a governance perspective, in dealing with any director nomination.

The external candidate will typically be elected if they secure a simple majority of votes cast at the shareholders’ meeting, unless the company is at its constitutionally mandated maximum board size. Where the company is at its maximum number of directors, the candidate will need to outpoll one of the incumbent directors standing for re-election at the meeting.

The Corporations Act also sets out a specific process for shareholders that wish to remove a director from the board of a public company. This process applies regardless of anything in the company’s constitution, though in some cases the constitution may provide additional avenues for removing directors.\(^2\)

In order to validly requisition a resolution to remove one or more directors, the shareholder must give notice of its intention to move the resolutions and comply with the process for requisitioning a resolution (outlined above). The notice of intention must be given to the company at least two months before the meeting is to be held (Section 203D(2) of the Corporations Act). The company must give the relevant director or directors a copy of the notice as soon as practicable after it is received and the director is entitled to put their case to shareholders by giving the company a written statement for circulation to members and speaking to the motion at the meeting.

\(^2\) See, for example, the recent case of State Street Australia Ltd in its capacity as Custodian for Retail Employees Superannuation Pty Ltd (Trustee) v. Retirement Villages Group Management Pty Ltd [2016] FCA 675.
v Other avenues available to activist shareholders

Public listed companies in Australia are required under the ASX Listing Rules to hold an election of directors each year at their annual general meeting and this provides an opportunity for activist shareholders to lodge a ‘protest’ vote against particular directors or block the re-election of incumbent directors to agitate for board succession.

Australian listed companies are also required to put an advisory resolution to their shareholders for adoption of the remuneration report at each annual general meeting and, in recent years, this mechanism has been co-opted by some activist shareholders as a ‘protest’ against the company’s current management or operations (i.e., for issues outside of executive remuneration). Additionally, where a company receives an ‘against’ vote of at least 25 per cent of the votes cast in two consecutive years (better known in Australia as receiving ‘two strikes’), a board spill resolution must be put to shareholders that, if passed, will require that the non-executive directors of the company stand for re-election at a special ‘board spill meeting’ of the company if they wish to continue in office. Although intended to address issues related to the remuneration practices of companies, this mechanism is open to abuse by shareholder activists as an indirect means of suggesting a spill of the board and placing pressure on the company’s directors. The ‘two strikes’ rule can also be practically difficult for directors from a duties perspective, given that it essentially relies on directors being influenced by factors extraneous to the core principle of what is in best interests of the company.

In extreme circumstances, shareholder activists may bring derivative proceedings against the company’s directors under Section 236 of the Corporations Act (being a claim brought on behalf of the company) or seek court orders to address conduct that is oppressive to shareholders under Section 233 of the Corporations Act.3 Although these types of proceeding rarely proceed to trial in Australia, hostile shareholder activists will occasionally put the company on the notice they are contemplating such proceedings as a means of ‘encouraging’ the swift resolution of issues under negotiation. In some cases, proceedings may be instituted, however, this is a ‘high-stakes’ manoeuvre for activist shareholders as the courts have the power to award costs against the party bringing the action (including full costs indemnification, where appropriate). The Corporations Act includes a process for shareholders or persons bringing derivative actions to apply to the court for access to the company’s documents. Although any such application must be made in good faith and for a proper purpose, it can be used by shareholder activists to help them build a case against the incumbent board or management, including as a way to build their case for instituting a derivative action.

vi Considerations for boards in responding to activist campaigns

In responding to any activist campaign, the board of the relevant company must have regard to their duty to act in the best interests of the company and for proper purposes. Relevantly, under the principles set out in the *Advance Bank* case,4 limitations are placed on the board’s use of company funds to ‘campaign’ in relation to contested director elections.

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3 See, for example, the recent case of *RBC Investor Services Australia Nominees Pty Limited v. Brickworks Limited* [2017 FCA 756] (discussed below in Section IV).
4 *Advance Bank Australia Ltd v. FAI Insurances Ltd* (1987) 9 NSWLR 464; 12 ACLR 118.
It is relatively unusual in Australia for high-profile companies to be subject to contested director elections involving shareholder mail-outs and extensive lobbying by activist investors. For that reason, the legal limits on how companies can respond to such campaigns are not well defined. However, case law in Australia (including the Advance Bank case) does allow for:

a. directors to make recommendations to shareholders where they genuinely believe that it is desirable for shareholders to know their views on matters before the meeting; and
b. the communication to shareholders of information that is material to their decision on how to vote on the external nomination or shareholder requisitioned resolutions.

Directors have a duty to provide shareholders with any material information they have in relation to a shareholder activist proposal to ensure that voting proceeds on an informed basis. This permits the directors to rebut inaccurate aspects of activist proposals or present counter arguments for consideration by shareholders (i.e., ‘informing’ shareholders). It will not, however, extend to the board telling shareholders how to vote on proposals (i.e., ‘urging shareholders’) or engaging in debates over issues of personality.

The board’s ‘toolkit’ for responding to a contested director election scenario or other activist proposal would typically include:

a. formulation of a board recommendation in relation to the external nomination or shareholder requisition;
b. high-level meetings between directors and substantial shareholders;
c. sending specific hard copy or e-mail communications to shareholders; and
d. establishment of a shareholder hotline to receive inbound calls from shareholders to answer questions regarding the external nomination or shareholder requisitioned resolutions.

In some cases, companies may also engage a proxy solicitation firm for the purposes of making outbound calls to shareholders. This involves a higher level of risk from an Advance Bank perspective, unless it is strictly limited in scope to ensuring that shareholders are aware of the issue (and the relevance of their vote) and the costs involved are reasonable. However, depending on the intensity of the activist campaign, the company may be justified in taking more assertive steps to ensure that shareholders are receiving balanced and accurate information, including the use of proxy solicitation firms.

III KEY TRENDS IN SHAREHOLDER ACTIVISM

i Increased prominence of ‘hedge fund’ shareholder activism

Traditionally, the Australian experience with shareholder activism has been marked by strong activism at the retail level – in particular, small shareholders relying on mechanisms in the Corporations Act to provide them with a platform to agitate for social or environmental change. Even against a backdrop of falling attendances at annual general meetings in Australia, this form of small shareholder activism has continued to thrive and indeed grow, with many of the country’s most prominent companies receiving director nominations from external candidates (e.g., Macquarie, BHP, Fairfax, Woolworths, Commonwealth Bank of Australia and Ten Network Holdings) or requisitioned resolutions from retail shareholders (e.g., Santos and Commonwealth Bank of Australia).
However, in a break with tradition, hedge fund activism has clearly taken centre stage in 2017 with what Credit Suisse has described an ‘eruption of activism in Australia’.\(^5\) While the most prominent example of hedge fund activism in Australia was the Elliott Funds’ very public campaign against BHP launched in April 2017, there are a number of other activists in the region that have been generating significant media attention – including onshore funds, such as Sandon Capital (in relation to Iluka Resources and BlueScope Steel), as well as offshore funds, such as Janchor Partners (in relation to Bellamy’s Australia and, reputedly, Medibank Private).

Despite their recent increased prominence, hedge fund activism and other forms of ‘economic’ activism are not new phenomena in Australia. Activist Insight data suggests that at least 50 Australian listed companies each year have received a public demand from investors during the period from 2013 to 2016.\(^6\) Activist shareholders, such as Sir Ron Brierly and Dr Gary Weiss, have been in the market for decades through various investment vehicles and prominent local activist shareholders include Allan Gray, Mercantile Investment (which is Brierly-linked), Ariadne Australia (which is Weiss-linked), MH Carnegie, Sandon Capital, Thorney Opportunities, and the local branches of Lazard Asset Management and Aberdeen Asset Management. Activist campaigns by offshore investors have been rare in Australia until fairly recently, however, it appears momentum is increasingly in this respect with campaigns targeting Australian firms launched by Lone Star Value Management, Janchor Partners, Coliseum Capital Management and the Elliott Funds.

The emergence of offshore shareholder activists with access to larger pools of capital has resulted in a broader range of targets for activist campaigns. During the period from 2013 to 2016, the vast majority of activist campaigns against Australian companies were waged against small-cap companies, with as few as 9 per cent of targets being large or mid-cap companies.\(^7\) However, recent campaigns have targeted much larger companies, such as BHP (BHP Billiton Limited market cap: A$80.7 billion; BHP Billiton Plc market cap: £27.5 billion), Bluescope Steel (market cap: A$7.9 billion), Iluka Resources (market cap: A$3.8 billion), and Brickworks (market cap: A$2 billion).\(^8\) This trend is expected to increase as offshore investors gain confidence and become more active in the region.

\section{ii Characteristics of shareholder activist campaigns in Australia}

Similar to the United States and United Kingdom, hedge fund or ‘economic’ activists operating in Australia typically seek to make an economic gain on an investment (usually in the short term) through means that are not aligned with the current strategy of the company. Common activist goals include:

\begin{itemize}
  \item \textit{a} persuading companies to make a capital return or pay a special dividend;
  \item \textit{b} changes in business strategy (which the activist may seek to effect through a change in management or board composition);
  \item \textit{c} a restructure or sale of a significant asset; or
  \item \textit{d} putting the company ‘in play’ or seeking to extract a higher price in a change of control situation.
\end{itemize}

\textsuperscript{5} Credit Suisse, ‘Australian Investment Strategy: Activist Alpha’ (13 June 2017).

\textsuperscript{6} Activist Insight (in collaboration with Arnold Bloch Leibler), ‘Shareholder activism in Australia: a review of trends in activist investing’ (30 June 2016).

\textsuperscript{7} Activist Insight; see footnote 6.

\textsuperscript{8} Market capitalisations presented as at 15 July 2017.
Some activists may also ‘bet against’ companies that they perceive to be overvalued, looking to encourage a downward correction in the share price so they can close out a short position at a profit.

While opportunities are most often identified by shareholder activists based on their own investment theses and research, in some cases they may be the result of institutional shareholders making a ‘request for intervention’. Requests for intervention are most often made in respect of Australian companies’ with high levels of passive ownership through superannuation and pension funds, given those investors are often prevented from effecting changes at their portfolio companies themselves due to resourcing and reputational considerations.

Until recently, the vast majority of activist campaigns in Australia have been conducted ‘behind closed doors’, with private approaches made by shareholder activists to companies’ boards. Where the activist holds a significant stake, or is aligned with the board and management on a particular issue, then it is common for the board to reach an understanding or negotiated outcome with the shareholder, in which case the matter would not usually become public. Often, at this stage, the activist would privately engage with members of the investment community (institutional shareholders, other significant investors and analysts) for the purpose of building momentum for change and increasing pressure on the company’s board.

In Australia, it has historically been rare for shareholder activists to take the next step of publicly advocating for their proposed course of action (e.g., through ‘white papers’, open letters to the board, their own website and the media). However, recent activist campaigns have borrowed more heavily from the American hedge fund activist playbook, with tactics including:

- **public criticism of the board, individual directors and management;**
- **formation of informal investor alliances and voting blocs;**
- **proposing or supporting candidates for appointment to the board;**
- **advocating for (or formally proposing) removal of existing directors;**
- **requisitioning shareholder resolutions and members’ statements;**
- **requisitioning extraordinary general meetings of shareholders; and**
- **encouraging unsolicited offers for the company or its assets.**

### iii Limitations on collaboration by shareholder activists

Under the Corporations Act, investors may become ‘associates’ for takeover and substantial holding notice purposes where they act together in relation to a common portfolio company. This provides an important protection for Australian companies in respect of the ‘wolf pack’ type tactics sometimes seen in the United States, as it prevents shareholder activists from taking control of a company in circumstances where other shareholders are uninformed about this passing of control and are not given any opportunity to obtain a control premium (or other benefits that would be paid if control were to pass legitimately).

Under the Corporations Act, an investor can become an associate of another investor if they propose to:

- **enter into, or have already entered into, a relevant agreement with the other investor for the purpose of controlling or influencing the composition of the entity’s board or the conduct of the entity’s affairs; or**
- **act, or are acting, in concert in relation to the entity’s affairs.**
As stated by the Australian Securities and Investments Commission (ASIC), investors concerned about common issues may become ‘associates’ or be regarded as having entered into a ‘relevant agreement’ for the purposes of the takeover or substantial holding provisions. This is because these provisions are not only concerned with the power of individual investors in relation to the voting and disposal of shares in companies, but also the aggregated voting power of groups of investors who are either related or associated with each other in relation to some aspect of the entity’s affairs. Depending on the aggregated voting power of the group, investors acting collectively in this way may be required to lodge substantial holding notices relating to the group, may be prohibited from acquiring further interests in the entity under the takeover prohibition in Section 606 of the Corporations Act or may even breach the takeover provisions.9

In June 2015, ASIC released a regulatory guide to clarify the circumstances in which investors acting collectively will and will not be taken to be ‘associates’ for the purposes of the takeover and substantial holding notice provisions of the Corporations Act.10 Conduct with is ‘permissible’ and unlikely to cause issues includes holding discussions with other investors, making recommendations to other investors in relation to voting, and making individual or joint representations to the company’s board. Conduct that is likely to raise issues with associateship includes jointly signing requisitions for shareholders’ meetings or resolutions, formulation of joint proposals in relation to board appointments or strategic issues, accepting inducements to vote or act in a specific way, agreeing on a plan concerning voting or limiting their freedom to vote (e.g., by granting another investor their irrevocable proxy).

Another aspect that is unique to Australian law, especially relative to the United States, that renders ‘wolf pack’ tactics high risk are the country’s broad insider trading rules that apply in relation to trading while in receipt of any material information in respect of a company (irrespective of whether it was sourced from a company insider or not). Prohibitions on ‘tipping’ similarly apply in relation to any material information regardless of its source. Knowledge of an activist hedge fund’s intent to target a company on ‘governance’ grounds could, in the context of a clear track record of being able to force a significant corporate transaction, constitute materially price sensitive information.

IV RECENT SHAREHOLDER ACTIVISM CAMPAIGNS

i BHP and the Elliott Funds

The Elliott Funds’ ‘value unlock plan’ in relation to BHP is the highest profile example of hedge fund activism in Australia and has generated an enormous amount of public interest, both in Australia and overseas.

BHP became the subject of intense media attention when the Elliott Funds published a letter to the company outlining their ‘value unlock plan’ that proposed a number of changes to BHP’s structure and operations, including:

a collapsing the group’s dual listed structure;

b demerging the group’s onshore United States and Gulf of Mexico deepwater assets into a separate New York Stock Exchange-listed vehicle; and

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9 Australian Securities and Investments Commission, Regulatory Guide 128: Collective action by investors (June 2015), [7]–[8].
10 Australian Securities and Investments Commission; see footnote 9.
proposing an off-market buy-back of at least US$6 billion, followed by a series of subsequent buy-backs.

The Elliott Funds publicly argued that the changes would unlock US$46 billion for BHP shareholders and sought to capitalise on the media following the release of their plan by criticising the board and management of BHP.

BHP responded to the Elliott Funds’ proposals by issuing its own detailed 28-page response, outlining the costs and associated risks of the Elliott Funds’ proposals and suggesting that they would significantly outweigh any potential benefit. The proposals also attracted the ire and attention of the Australian government with the Australian Treasurer issuing a public statement that ‘should BHP Billiton implement the Elliott Associates proposal… it may commit a criminal offence and could be subject to civil penalties under the Foreign Acquisitions and Takeovers Act 1975’.

The Elliott Funds have since issued a revised proposal and continue to make further public comment in the media, however it is clear that they are still coming to grips with some of the relatively unique aspects of an Australian activist campaign with such a high-profile ‘local champion’ as the target.

ii Brickworks and Perpetual Investment Management

Perpetual Investment Management’s (Perpetual) six-year campaign to dissolve the cross-shareholding structure between Brickworks and Washington H Soul Pattinson (WHSP) is one of the highest profile examples of a shareholder activist seeking recourse to Australian courts.

Perpetual has long contended that the cross-shareholding between Brickworks and WHSP is unfairly oppressive towards minority shareholders because:

a. the directors of each company prioritise the maintenance of the cross-shareholding over the interests of shareholders; and

b. the Millner family (members of which are directors and shareholders of both companies) are using the structure to entrench control over the companies.

In 2013, Perpetual, which has traditionally been a relatively passive long-term fund manager, agreed to act in concert with a well-known activist, MH Carnegie, with a view to requisitioning meetings of shareholders of both companies to vote on a proposal to dissolve the cross-shareholding structure and elect a new independent director of Brickworks (the Proposal). The Proposal failed due to a failure to obtain a favourable tax ruling on the restructure and a shareholder vote against the election of the independent director.

Ultimately, Perpetual took the matter to the Federal Court of Australia,11 with Jagot J finding against Perpetual in July 2017 on the grounds it failed to establish that the cross-shareholding structure was unfair or oppressive for minority shareholders. Jagot J also confirmed the court’s reluctance to second guess the judgement of directors in relation to commercial matters in the absence of clear evidence that they had acted unreasonably.

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11 RBC Investor Services Australia Nominees Pty Limited v Brickworks Limited [2017 FCA 756].
iii Praemium and former CEO

Praemium is an example of shareholder activism successfully orchestrating a board spill and the return of a removed CEO back into office.

In February 2017, the board of Praemium terminated the employment of the company’s CEO (which had the effect of removing him from the board as well), publicly stating that someone with a ‘different skill set’ was needed in the role. The removed CEO responded by entering into a cooperation deed with a number of Praemium’s institutional shareholders, creating a bloc with approximately 17.3 per cent of the company’s shares. The voting bloc requisitioned an extraordinary general meeting and put forward a resolution to remove all of the company’s directors and replace them with nominees of the voting bloc. A highly public and hostile campaign ensued, with the voting bloc writing to all shareholders publicly, and both the removed CEO and the board of Praemium making public statements.

The extraordinary general meeting of Praemium shareholders was held in May 2017, with the incumbent directors being removed and the voting bloc nominees being elected as directors. The new directors have since re-appointed the CEO. Institutional shareholders who provided support for the spill included Paradice Investment Management, Australian Ethical and the Abercrombie Group.

iv Spark Infrastructure and James Dunphy

James Dunphy’s campaign for a seat on the board of Spark Infrastructure is an example of a small shareholder taking advantage of topical issues, like investment decisions or remuneration, to seek support of key stakeholders and proxy advisers.

Mr Dunphy nominated himself for election as a director of Spark Infrastructure on a platform that was critical of Spark Infrastructure’s A$734 million equity investment for a 15 per cent stake in the New South Wales electricity transmission business, TransGrid. He argued that with his experience in investment banking and as a company director, he would be better placed to bring change to the board’s ‘acquisition-driven’ strategy, which in his opinion would improve Spark Infrastructure’s securities price.

Through a dedicated website ‘MakeThemAccountable.com.au’ and considerable media coverage, Mr Dunphy was initially able to garner support from some institutional shareholders and proxy advisers and managed to secure 21.23 per cent of securityholders’ votes at the 2016 annual general meeting (AGM).

Mr Dunphy continued his campaign into 2017 and again nominated himself for election to the board at the 2017 AGM. However, the board's engagement with securityholders in the intervening period had clearly been effective, with support for Mr Dunphy’s campaign to join Spark Infrastructure’s board dropping significantly. Mr Dunphy secured less than 1 per cent of votes in favour of his election at the 2017 AGM.

v Bellamy’s Australia and Black Prince, Delta Partners and Janchor Partners

Black Prince Private Foundation’s (Black Prince) campaign to spill the board of Bellamy’s Australia Limited and elect new directors is another recent example of a dissident shareholder successfully executing an overhaul of a company’s board due to performance concerns.

On 2 December 2016, Bellamy’s share price dropped 42.7 per cent after the board released an unexpected profit downgrade citing a ‘temporary dislocation’ of sales due to Chinese regulatory reform. This prompted Black Prince, a substantial shareholder with a
14.48 per cent interest in Bellamy’s, to requisition an extraordinary general meeting of the company to spill the board (except for the chairman) and elect new directors including its own nominee.

The requisition from Black Prince generated a lot of media coverage in Australia as it was not initially clear who was behind the Black Prince investment vehicle. After Bellamy’s issued a directive under the Corporations Act requiring Black Prince to disclose the holders of relevant interests in its Bellamy’s shares, Black Prince revealed its relationship to charitable investment vehicles linked to one of the Black Prince nominations for director, Jan Cameron.

During the two months preceding the general meeting Black Prince and Jan Cameron increased their combined holding to 17.67 per cent. In the same period, investment firm Delta Partners built an interest in the company of 8.79 per cent and Hong Kong-based Janchor Partners built an interest of 5.4 per cent. These shareholders were all reported in the media as being involved in discussions regarding changes to the board in the lead up to the general meeting.

All but one of Bellamy’s existing directors departed the board (including the chairman): some by resignation before the meeting and the others as a result of the removal resolutions receiving more than 50 per cent of the vote in favour. At the meeting, shareholders elected a nominee director for Black Prince, Rodd Peters, and a further independent non-executive director, although Jan Cameron’s nomination did not succeed. Rodd Peters was subsequently appointed chairman of the board. Janchor Partners’ chief investment officer, John Ho, was also appointed to the board one month after the general meeting and later assumed the chairman role from Rodd Peters.

V REGULATORY DEVELOPMENTS

i Confirmation of board’s ability to reject requisitions usurping board powers

In June 2016, the Full Court of the Federal Court of Australia in Australasian Centre for Corporate Responsibility v. Commonwealth Bank of Australia12 (ACCR v. CBA) confirmed existing case law that companies’ boards can reject shareholder requisitioned resolutions that purport to ‘direct’ the board and management on matters that are properly within their powers, such as operational or management decisions.

In ACCR v. CBA, the Australasian Centre for Corporate Responsibility used social media to gather 100 CBA shareholders to requisition a resolution for inclusion in CBA’s 2014 notice of AGM. In its letter to CBA, ACCR presented three alternative resolutions (in order of ACCR’s preference):

- the first two (ACCR preferred) resolutions were ‘advisory’ resolutions. Both were expressed as statements of shareholder opinion or concern regarding the level of disclosure by CBA in relation to ‘greenhouse gas emissions that the bank is responsible for financing’; and
- the third resolution sought to amend CBA’s constitution to require it to include information on greenhouse gas emissions in its yearly directors’ report.

CBA included the third resolution in its 2014 notice of annual general meeting, explaining to ACCR that the first and second proposed resolutions were ‘matters within the purview of the board and management of the Bank’, and accordingly the resolutions were ‘not valid and capable of being legally effective’.

ACCR sought to challenge this view and applied to the Federal Court for relief in the form of declarations that the first two resolutions were valid (as well as the third resolution, which was not in contention), an injunction to compel CBA to put the first two resolutions at its next annual general meeting and a declaration that the board or management of CBA acted outside its powers in publicly commenting on the third proposed resolution and recommending that members vote against it.

In the first instance, ACCR’s case failed on all grounds and Davies J declined to grant the relief sought. Davies J found that the first and second proposed resolutions were not referable to any power other than to the power of management vested exclusively in the CBA board and that it followed that the CBA board was not required to put those resolutions to the annual general meeting. Importantly, in respect of ACCR’s claim that the board or management of CBA acted outside its powers in publicly commenting on the third resolution, Davies J found that (to the extent the claim was pleaded), she accepted CBA’s submissions that the power of the directors to make such statements is derived from its constitution and the duty to inform shareholders.

ACCR appealed the decision to the Full Court of the Federal Court of Australia but lost the appeal and had costs awarded against them. The Full Court clearly confirmed that boards are not required to submit shareholder requisitioned resolutions to an annual general meeting if the resolution would not be legally effective and binding if it was passed.

In bringing its claim and subsequent appeal, ACCR was clearly intending to create a precedent for Australian shareholders to be able to requisition ‘advisory’ shareholder resolutions on matters relating to management. If successful, this would have brought Australia in line with North America, where the practice is well established. Although Australia has, to a large extent, been insulated from a proliferation of shareholder requisitioned resolutions thus far, the ACCR v. CBA case was a timely endorsement of the principle that shareholders cannot by resolution express an opinion as to how a power vested by the company’s constitution in the directors should be exercised.

ii Introduction of a bill providing access to shareholders’ e-mail addresses

On 14 June 2017, Senator Nick Xenophon introduced a Bill into Parliament to amend the Corporations Act to require companies’ registers of shareholders to include e-mail addresses for each shareholder. At present, only shareholders’ names, physical addresses and shareholding information form part of the register.

The proposed Bill would provide persons requesting access to the register of shareholders, including activist shareholders, the means to electronically contact shareholders using their e-mail addresses. Given the printing and postage costs involved in doing physical mail-outs to shareholders, the ability to contact shareholders by e-mail is expected to provide shareholder activists with a significantly more cost-effective communications channel for activist campaigns.

The Bill was introduced following a members’ campaign against the leadership of Australia’s professional body for certified practising accountants, CPA Australia Limited. The
dissident members were critical of CPA Australia for not providing members’ e-mail addresses to them, given that it was going to be cost prohibitive for them to send physical mail-outs to its 160,000 members worldwide. In the media, Senator Xenophon was quoted as saying:

…the Corporations Act needs to be brought into the 21st century by allowing members to access e-mail addresses of other members. Right now a lot of entities know that they are insulated from member or shareholder action by virtue of the prohibitive cost of contacting them all by mail.13

Debate on the Bill was adjourned following its second reading in the Senate and it has been referred to the Economics Legislation Committee that will report on the Bill by 11 September 2017.

VI OUTLOOK

As outlined above, the Australian regulatory regime is facilitative to shareholder activism and an increasing number of companies, and increasingly larger companies, are being targeted by activist campaigns. We expect that these trends will continue in the future, with more campaigns from offshore hedge funds and ‘economic’ activists bringing additional pools of capital into the relatively uncrowded Australian market.

We expect that offshore activists will disrupt the traditional practice of ‘behind closed doors’ activism in Australia and that where there is a lack of responsive reaction by boards to private approaches this will be met with more overt aggression and publicly hostile campaigns. This trend is likely to be supported by the proposed reforms to provide access to shareholders’ e-mail addresses, which will open up more cost-effective communications channels for shareholder activists and result in ‘hard-fought’ campaigns with escalating rounds of criticism and counter-criticism.

Longer term, we expect that traditionally passive investors will become increasingly activist themselves – both by making requests for intervention and by taking action in their own right. BlackRock, Vanguard and State Street are active participants in the global governance conversation and have high levels of ownership of Australian companies. With the growth in passive assets under management, we expect that their views will increasingly inform Australian activism trends, though we expect that an increasing recognition of the importance of long-term value creation will temper their support for overtly activist tactics or campaigns marked by short-termism. As public campaigns become ‘normalised’, we expect that other traditionally passive investors, such as the Australian superannuation and pension funds, will also become increasingly prominent in shareholder activist campaigns as an extension of their stewardship responsibilities.

Finally, we also anticipate an increase in the use of shorting by shareholder activists, including public ‘short’ campaigns against specific companies. Shareholder activists are increasingly employing short strategies and this is expected to continue given the prevailing low growth environment. With the aid of new tools, such as the forensic accounting services now offered by some proxy advisory firms, we expect that past corporate disclosures will be combed through for points of leverage and shareholder activists will publish progressively sophisticated research on short campaign targets.

13 Australian Financial Review, ‘Xenophon intervenes in CPA Australia CEO Alex Malley dispute’ (2 June 2017).
Chapter 3

FRANCE

Jean-Michel Darrois, Bertrand Cardi and Forrest G Alogna

I OVERVIEW

There is a long-standing and vigorous tradition of activism in France. Historically, French activism has involved a variety of local actors, including financial investors but also industrial concerns. More recently, and consistent with worldwide trends, activist profiles have become increasingly international and sophisticated, generally comprised of professional hedge fund activists, and often from the United States or the United Kingdom.

Activism occurs within a framework of French and European law and regulation relating to the rights and responsibilities of investors and companies’ boards and management in a number of areas. Taken together, these regimes furnish both activist and the target company’s board and management with a variety of tools. As discussed below, French shareholders enjoy significant rights, such as the right for holders of as little as 0.5 per cent of a company’s shares to include proposed resolutions in the ‘proxy’ materials circulated by the company to shareholders. In addition, directors may be removed and replaced by a simple majority at any shareholders’ meeting. For the company, French law’s expansive concept of a company’s corporate interest may provide a strong basis for a board of directors and management to resist an activist’s purely short-term financial strategy when appropriate. It also may be challenging under French law for shareholders to trigger directors’ liability.

US-based activists continue to raise significant capital, and with the relative saturation of the American market and a long string of successes in North America, many have set their sights abroad. Continental Europe may attract foreign activists for a variety of additional reasons, notably including a regulatory regime that is generally favourable to shareholder rights, and as of this writing, the relatively cheap euro, low interest rates, growing exports and

1 Jean-Michel Darrois is the founding partner and Bertrand Cardi and Forrest G Alogna are partners at Darrois Villey Maillot Brochier. The authors and their partners have served as counsel in a majority of significant activist matters in France in recent years. The authors wish to thank Olivia Goudal, a foreign associate of the firm, for her assistance in preparing the present chapter.

2 See, e.g., ‘Les investisseurs activistes débarquent en Europe’, Le Journal du dimanche (30 April to 6 May 2016) (referring to arrival of activists in Europe as they seek new opportunities in light of saturated American market); Miles Johnson, ‘US hedge funds hope to bridge European cultural divide’, Fin’l Times (20 August 2014) (‘So-called activist investors . . . are now arriving in force on European shores in search of opportunity.’).
increasing excitement regarding contemplated French and European reforms. The planned divestment of the French state of its participations in certain listed companies may also open new opportunities for activists.

II LEGAL AND REGULATORY FRAMEWORK

i Disclosure obligations

Issuer disclosure obligations

The French disclosure regime is a rigorous one, providing shareholders with sound information. Issuers of listed securities have both periodic and permanent disclosure obligations to the public. The permanent disclosure obligations notably consist of the requirement for issuers to disclose to the public, as soon as possible, any ‘privileged’ information. This is information of a precise nature that has not been made public, which concerns directly or indirectly one or more issuers or one or more financial instruments, and which if made public could have a material effect on the market price of the relevant financial instruments. The information provided to the public must be accurate, precise and fairly presented.

In addition, issuers are required to make periodic disclosures of annual and semi-annual financial reports, the Chairman’s report, and other information.

ii Threshold crossing

The current primary disclosure obligations in France require that any person acting alone or in concert with others that comes to hold more than 5, 10, 15, 20, 25, 30, 33.3, 50, 66.6, 90 or 95 per cent of the share capital or voting rights in a listed company reports the crossing of these ownership thresholds (in either direction) to the company and the AMF no later than the close of market on the fourth trading day following the date on which the threshold was crossed. Failure to comply with these disclosure requirements may result in significant penalties, including AMF publication of the failure, a fine of up to €100 million, or 5 per cent of annual revenue or ten times the gain (or loss avoided) attributable to the failure if determinable, or the loss of voting rights (with respect to the shares in excess of the relevant threshold) for a period ending two years after the date on which the failure was corrected, as well as potential criminal fines, although less common.

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3 See, e.g., ‘Corporate Europe is giddy with optimism’, The Economist (15 June 2017).
5 C. com. art. L. 233-7 I-II; C. com. art. R. 233-1; AMF Règlement général, art. 223-14 I. ‘Share capital or voting rights’ include among other things cash-settled or physically-settled derivative instruments providing an economic exposure equivalent to a long position in the underlying shares. C. com. art. L.233-9 I 4 bis; AMF Règlement général, art. 223-11 III.
6 C. mon. fin. art. 621-14, I.
7 C. mon. fin. art. 621-15, III bis. A variety of factors are taken into account in determining the penalty, including the seriousness and duration of the failure, the role and degree of involvement of the person at issue, the person’s resources, cooperation with the AMF, and efforts to avoid future violations. C. mon. fin. art. 621-15, III ter.
The AMF also imposes disclosure requirements that extend to other categories and levels of interests. For example, persons holding temporary interests in 2 per cent or more of the voting rights in a listed company incorporated in France must notify the issuer and the AMF of these holdings. In addition, net short positions in shares must be reported to the AMF upon crossing the threshold of 0.2 per cent of issued share capital (and every 0.1 per cent above that), and disclosed to the public when they reach 0.5 per cent of issued share capital (and every 0.1 per cent above that). More generally, AMF regulations require that persons preparing a financial transaction that may have a significant impact on the market price of public securities must disclose the transaction as soon as possible. The failure to adhere to these reporting obligations may also result in significant sanctions.

Further, the disclosure obligations require that any holder that comes to hold 10, 15, 20 or 25 per cent of the share capital or voting rights of an issuer is required to report to the AMF its intentions for the next six months with respect to the issuer and its shareholding, no later than the close of market on the fifth trading day following the crossing of the relevant threshold. To the extent any such statement of intentions becomes inaccurate, the holder in question is required to rapidly communicate its new intentions to the public.

In addition to the statutory thresholds, the company’s articles of incorporation may provide that shareholders must declare to the company the crossing of additional ownership thresholds below 5 per cent in increments of no less than 0.5 per cent. Finally, any agreement that provides preferential rights with respect to the sale or purchase of shares representing at least 0.5 per cent of the share capital or voting rights of a publicly listed company must be reported to the AMF within five days of its signature.

iii Shareholder rights

France has a strong legal tradition of vigorous shareholder rights, which continues to evolve.

Rights at shareholders’ meetings

Shareholders enjoy significant rights in shareholders’ meetings that can provide useful aids to an activist. For example, shareholders’ meeting the applicable minimum shareholding threshold in a French société anonyme or société en commandite par actions (the types of entities that may be listed in France), as well as qualifying minority shareholder associations, may add items for discussion to the agenda for any shareholders’ meeting or propose additional draft resolutions to be included in ‘proxy’ materials distributed to shareholders. Nevertheless, the fundamental principle under French law of the proper competence of the respective organs of corporate governance may permit the board to resist proposing an item that does not fall within the competence of the shareholders’ meeting (for example, a change of strategic direction or approval of certain transactions).

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10 EU Regulation No. 236/2012 on short selling and certain aspects of credit default swaps, Articles 5 and 6 (14 March 2012).
12 C. com. art. L. 233-7 III.
14 See, e.g., Safran, Addendum to the Meeting, Ordinary and Extraordinary Shareholders’ Meeting of Thursday, 15 June 2017, p.9.
Further, any director may be removed (and replaced) at any shareholders’ meeting by a simple majority vote of the shareholders, upon proposal of any single shareholder, even if the subject is not on the agenda for the relevant shareholders’ meeting and regardless of the term of office for which the director was originally appointed.\textsuperscript{15}

In addition, shareholders holding 5 per cent as well as certain minority shareholder associations may request the president of the commercial court on an \textit{ex \ partes} basis to convene a shareholders’ meeting in the event that the company has failed to call the relevant meeting following a specific request.\textsuperscript{16} The same process can be used to appoint an independent expert to investigate one or more past or contemplated management decisions.

\textbf{Right to responses to written questions and right to participate in shareholders’ meetings}

Any shareholder may timely present written questions to which the board of directors must respond during the shareholders’ meeting or on the company’s website.\textsuperscript{17} In addition, all shareholders have the right to participate in the discussion of issues raised at a shareholders’ meeting,\textsuperscript{18} in accordance with the topics set forth in the agenda for the meeting.\textsuperscript{19}

\textbf{Proxies}

Under French law there is no prohibition on a shareholder soliciting proxies from other shareholders, and the requirements and restrictions on proxy solicitation (and the resulting expense) are relatively limited. All shareholders have a legal right to review the attendance sheets for shareholders’ meetings for the prior three years.\textsuperscript{20}

An activist may find itself acting in concert with other shareholders who come to share its views.\textsuperscript{21} This may trigger disclosure obligations with respect to the concert’s aggregate shareholding, as well as the obligation to make a mandatory tender offer for all the issuer’s shares in the event the concert exceeds 30 per cent. In practice, large scale proxy solicitation campaigns are rare in France, although, the influence of proxy adviser firms is growing.

\textbf{AFEP-MEDEF governance code and ‘say-on-pay’ requirements}

France has adopted the ‘comply or explain’ framework with respect to corporate governance practices. French listed companies must either comply with the provisions of a corporate governance code prepared by a corporate association or provide an explanation in their annual report for any non-compliance.\textsuperscript{22} In the event that the company does adhere to such a corporate governance code, the annual report must also provide an explanation of the reason for failing to follow any provisions of that code.\textsuperscript{23}

A significant percentage of French listed companies adhere to the AFEP-MEDEF governance code. Since 2013, the AFEP-MEDEF code has included a High Committee

\textsuperscript{15} C. com. art. L. 225-18; L. 225-105.
\textsuperscript{16} C. com. art. L. 225-103 \textit{II} 2.
\textsuperscript{17} C. com. art. L. 225-108.
\textsuperscript{18} C. civ. 1844 alin. 1; C. com. L.242-9 alin. 1er (€9,000 fine for blocking a shareholder from participating in a shareholders’ meeting).
\textsuperscript{19} C. com. art. L. 225-105, al. 3.
\textsuperscript{20} C. com. art. L. 225-117.
\textsuperscript{21} See C. com. art. L. 233-10.
\textsuperscript{22} C. com. art L. 225-37.
\textsuperscript{23} Id.
on Corporate Governance to assist in evaluating governance issues and monitoring the implementation of the AFEP-MEDEF governance code. The High Committee is also responsible for proposing amendments to the AFEP-MEDEF code in light of changing practices, recommendations made by the French market regulator or investors.

The ‘say-on-pay’ provision in the AFEP-MEDEF governance code is quite similar to the English rule, essentially composed of a precatory shareholder vote. However, in the event that the shareholders vote is negative, the board is required, after consultation with the remuneration committee, to consider the subject at its next meeting and ‘immediately’ thereafter make public on the company’s website the steps that it intends to take in response to the shareholder vote.\(^{24}\)

French law was modified in December 2016, and now goes beyond the AFEP-MEDEF governance code. French law now imposes that shareholders annually approve the compensation of senior management in binding votes.\(^{25}\) This involves an \textit{ex ante} vote regarding the principles and criteria for determining, allocating and paying fixed, variable and exceptional components of senior management’s total compensation and any other benefits of any nature. In the event the \textit{ex ante} vote is negative, the resolution fails and the previously approved principles and criteria remain applicable. In addition, variable and exceptional compensation must be conditioned upon an \textit{ex post} shareholder vote. The \textit{ex ante} vote is then followed by an \textit{ex post} vote at the next annual meeting relating to the compensation of the same executives. This \textit{ex post} vote is individualised, with distinct resolutions relating to the compensation of each relevant executive. In the event that the vote is negative, the variable and exceptional compensation is not payable. The first \textit{ex post} shareholder votes under the new law will occur in 2018.

If the American and English experiences with say-on-pay are any guide (and there is no reason at this point to think that they will not be), using say-on-pay provisions as a basis to orchestrate a no confidence vote may be a powerful tool in an activist’s arsenal. That said, the ‘no’ vote against Carlos Ghosn (of Renault) in 2016 did not appear to have a meaningful immediate impact on his leadership or his relationships with his board. Notably, French public shareholders do not have a right to directly remove or appoint the CEO, which is the province of the board.\(^{26}\)

\textbf{Double-voting rights and the abandon of the passivity rule}

France also recently adopted the ‘Florange’ law, which introduced automatic double voting right for shares that have been held by a shareholder for more than two years in registered form.\(^{27}\) Prior to the Florange law, French issuers were able to provide in their articles of incorporation for double-voting rights for shareholders having held their shares in registered form for at least two years. The Florange law reversed this principle for listed companies, so that the attribution of double voting rights is automatic by operation of law except if the articles expressly provide otherwise.

The expressed goal of this change to the law was to free companies from ‘demands – often focused on the short term – of the financial markets’ and to ‘favour’ [shareholders] who

\(^{24}\) AFEP-MEDEF, Code de gouvernement d’entreprise des sociétés cotées, art. 26.


\(^{26}\) C. com. L. 225-51-1 et seq.

\(^{27}\) As opposed to bearer form. Shares may be registered with the issuer itself or with a broker.
play the long term’. It is unclear whether the impact of this reform will be consistent with these expressed intentions. Under certain circumstances, this provision may actually increase the influence of activist shareholders.

The Florange law also abandoned the board passivity rule during offer periods, changing the equilibrium for M&A-driven activism. As a result of the change, a board of directors is now able to take measures aimed at frustrating a hostile bid. Given its recent vintage, a conflict with an activist about the extent of the board’s powers may raise novel issues.

**Activist obligations**

Depending on the activist’s tack, certain recurrent issues may expose the activist to potential liability. This includes insider trading, market manipulation, dissemination of false information, as well as potential violations relating to financial analysts and investment research.

### III KEY TRENDS IN SHAREHOLDER ACTIVISM

French native activism has been complemented in recent years by an increase in interventions by foreign activists.

French native activists are primarily comprised of financial activists and industrial activists. The former include investment funds and individuals such as Wendel, CIAM (Charity Investment Asset Management), Amber Capital (UK-based but with founders with strong French ties) and Guy Wyser-Pratte (based in New York, but born in France). An example of the latter is LVMH in its acquisition of a significant position in Hermès. Certain commentators have on occasion characterised the French state as an activist, for example under the Hollande administration voting against management compensation in say-on-pay and golden parachute votes, or in the defence of double-voting rights at Renault. Finally,

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28 Opinion from the social affairs commission of the Parliament, quoting the Gallois report on competitiveness of the French industry (submitted to the French prime minister on 5 November 2012).

29 The board’s exercise of its discretion is subject to the principles of the AMF takeover regime, the articles of incorporation and the limits of the powers granted by the shareholders’ general meeting, as well as of the corporate interest of the company. For more background regarding the new French takeover regime, please refer to our 2 March 2015 memorandum, ‘Recent Legal Developments Affecting French Tender Offers’, available at http://xbma.org/forum/french-update-recent-legal-developments-affecting-french-tender-offers/.

30 French law and regulation prohibits transactions or trading orders that (1) are likely to or actually gives false or misleading signals as to the market for or price of public securities, (2) have the effect of setting or maintaining an artificial price for public securities, or (3) involve fictitious or deceptive devices or methods.

31 This includes disseminating information that gives or may give false, imprecise or misleading signals as to French securities, including spreading rumors, although the person knew, or should have known that the information was false or misleading.

32 This includes requirements that (1) reasonable diligence be exercised to ensure that information is presented in an objective manner, (2) the obligation to expressly disclose possible conflicts of interest, as well as (3) the obligation to clearly distinguish between factual and nonfactual matters (interpretations, estimates, opinions, etc.).

French associations of minority shareholders such as the Defence Association of Minority Shareholders (ADAM) and SOS Small Holders, continue to play a role, including in litigation, sometimes in partnership with other activists.

Foreign activists are primarily comprised of long financial activists, notably including in recent years Cevian (Sweden), TCI (UK), Trian, Pardus Capital Management and Elliott (US). The US-based short-seller Muddy Waters has also been active in France.

Given the relatively small number of activist interventions in France (estimates vary from two to 10 in 2015, and seven to eight in 2016), it is difficult to draw definitive conclusions about the profiles of French companies most likely to be targeted by activists. Consistent with worldwide trends, French-listed targets have clearly grown larger in recent years (e.g., Accor, Airbus, Carrefour, Danone, Safran, Vivendi). That being said, companies with a market capitalisation between €500 million and €5 billion continue to be prime targets (e.g., Euro Disney, Nexans, Rexel, SoLocal, Technicolor, XPO Logistics Europe), as well as companies with lower capitalisations.

Activists’ strategies and objectives in France are typically a function of the relevant situation, and commonly include:

- seeking an exceptional dividend or spinoff (Airbus as regards its stake in Dassault, Nestlé as regards its stake in the French company L’Oréal, Vivendi as regards an exceptional dividend and the sale of Universal Music, Altamir Amboise as regards a significantly improved dividend, Technicolor as regards a break-up of the company);
- militating for improved performance (Nexans, Rexel, Carrefour);
- seeking to extract additional value or otherwise intervening in the context of an M&A transaction (Safran-Zodiac, XPO-Norbert Dentressangle, Euro Disney, Etablissements Maurel & Prom-MPI); and
- abandoning takeover protections (Lagardère).

Tactics can take a variety of forms, evidently determined in light of the strategy and situation, typically involving implementing certain of the tools referred to in the preceding sections, including:

- seeking to add items to the agenda of a shareholders’ meeting or propose new resolutions (Wyser-Pratte regarding Lagardère, TCI in Safran-Zodiac);
- seeking board seats (Cevian in relation to Rexel, Pardus Capital Management regarding Valeo, Pardus and Centaurus Capital in relation to Atos Origin);
- seeking a court-appointed independent expert (Elliott in its countersuit against XPO);


35 There has been a steady increase from 2014 to 2016 in the number of external resolutions being proposed by shareholders. In 2016, 45 external resolutions in 12 companies were proposed by shareholders, compared to 2015 where 30 external resolutions were proposed in nine companies and 2014 where 13 external resolutions were proposed in eight companies. Proxinvest, Assemblées Générales et Activisme Actionnarial saison 2016-Tome 1, Section 2.3.2.

36 In 2016, 67 per cent of activist projects in France involved affecting the composition of the board of directors or the supervisory board (an increase from 54 per cent in 2015). Id.
d ‘no’ campaigns on executive compensation (the French state in relation to Alstom, Renault and Safran (resulting in ‘no’ votes in 2016 against the compensation of Carlos Ghosn and Patrick Kron, the CEOs of Renault and Alstom respectively));

e blocking a squeeze-out (Elliott in both APRR and XPO Logistics Europe);

f orchestrating a public relations campaign, including letter-writing (including lobbying individual board members or relevant regulators), press interviews and most crucially, lobbying of proxy advisers; and

g in relatively rare cases, initiating litigation (CIAM in Euro Disney).

In our experience, a strong response to an activist by the board and management and their advisers often includes, among other things:

a advance planning, to deliver strong teamwork in a crisis by and among the board, management and advisers as well as other key internal constituencies;

b ongoing monitoring and rapid response to warning signs;

c in the event of a public attack, implementing communication that is coherent on all fronts;

d maintaining dialogue with relevant regulators, proxy advisers and other key constituencies, including other significant shareholders;

e careful analysis of missteps by the activist or weaknesses in its approach;

f in certain cases seeking regulatory intervention and even initiating litigation; and

g avoiding legal or other missteps that will be seized upon by the activist or others (including the AMF) at a time of heightened focus upon the company and its conduct.

Outcomes may vary significantly depending on the strategy and tactics of the activist, and the target’s response. Most shareholder resolutions are rejected, and the vast majority of company resolutions are approved. But, victory is not counted in votes alone, and shareholders may also exert discipline in other ways. Key variables include: the size of the activist position, whether the issue is ultimately submitted to a shareholder vote, the presence and preferences of any reference shareholders, the recommendations of proxy advisers and the substance of the critique and the company’s response, as well as the effectiveness of communication.

IV RECENT SHAREHOLDER ACTIVISM CAMPAIGNS

This section provides a few examples of recent activist campaigns that provide insight into current trends in French activism.

**Vivendi P Schoenfield Asset Management (PSAM) (2014–2015)**

After having acquired 0.8 per cent of the capital of Vivendi in December 2014, PSAM, a global asset manager based in New York and London, requested the sale of Universal Music and then, in the spring of 2015, the distribution of a €9 billion exceptional dividend. To counter PSAM and ensure rejection of the resolutions proposed by PSAM to Vivendi’s AGM of April 2015, Vincent Bolloré, chairman of the board and biggest shareholder of Vivendi increased his participation in the capital of the media group from 5.15 to 14.52 per cent in

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37 Id. (in 2016, of 45 external resolutions, 30 were rejected and eight adopted with the remainder either unavailable or otherwise distinct).
March and April 2015. Shortly after Vivendi’s management obtained the support of a large proxy advisory firm for its proposed resolutions at the AGM, PSAM and Vivendi settled the matter, with Vivendi agreeing to raise its exceptional dividend from €5.7 billion to €6.75 billion and PSAM withdrawing its proposed resolutions for the AGM. A shareholder proposal by Phitrust to avoid the Florange law default double-voting regime did not prevail, but received significant shareholder support.

**Euro Disney SCA**

CIAM (Charity Investment Asset Management) (2015–2017). In late 2014, Euro Disney SCA announced receipt of an offer from Walt Disney agreeing to bail out the company from its debt commitments and bid for the 60 per cent of shares that it did not already own, including offering €1.25 per share to minority shareholders. In opposition to the offer, CIAM, a French asset manager, as holder of a 1.4 per cent stake in Euro Disney SCA, engaged in battle on multiple fronts including the commencement of civil and criminal legal proceedings, contacting other shareholders and directly agitating the board. In February 2017, Walt Disney increased its offer to minority shareholders to €2 per share, but CIAM rejected this offer as still too low and at the time of writing it is still continuing to make demands to the board for a minimum price of €2.50 to be offered per share.


Rexel, a French electronics service provider, has been under scrutiny by Cevian, a Swedish activist investment firm. Cevian began as a holder of a 5.44 per cent in Rexel in February 2016 and built its stake up to 10.47 per cent by July 2016. Cevian’s campaign has been swift with multiple changes to the board and governance structure occurring since Cevian disclosed its stake in Rexel. For example, in June 2016, there was the adoption of a new governance structure and split of the duties of Chairman and CEO, with the then Chairman and CEO Rudy Provoost stepping down. There have been further changes to the composition of the board following Cevian’s intervention, most notably in May 2017 Rexel appointing a partner of Cevian, Marcus Alexanderson as a board director.

**V REGULATORY DEVELOPMENTS**

As discussed above, there have been a number of recent developments in France that provide further rights to shareholders, such as the institution of a legal ‘say on pay’ requirement and a default regime of double-voting rights.

Looking forward, a variety of factors are putting increasing pressure on institutional investors in Europe to actively exercise voting rights within their control. French law requires asset management companies to affirmatively inform their investors in the event that the asset manager fails to exercise voting rights, as well as more generally to exercise such voting rights in the sole interest of their investors. More recently, the Council of the EU adopted significant amendments to the Shareholder Rights Directive earlier this year. Relevant provisions include:

- providing further transparency regarding the identity of shareholders;
- a say-on-pay provision relating to the policy for director compensation;
c a comply or explain requirement for institutional investors and asset managers to develop and disclose a shareholder engagement policy (including among other things policies to manage conflicts of interests between the investor or manager and the target company);

d new transparency requirements for proxy advisers (as well as a code of ethics); and

e ensuring that material transactions with related parties are approved by shareholders or by the administrative or supervisory body of the company pursuant to procedures that prevent the related party from taking advantage of its position and provide adequate protection for the interests of the company and of other shareholders.

Member States will have up to two years to incorporate the new provisions into domestic law.

VI OUTLOOK

If current conditions and trends continue, activism appears poised to continue to play a vibrant role in France. Based on worldwide trends, we may expect a maturing of the international component of French activism, including:

a more major activist interventions in France;

b nonactivist institutional becoming more ‘active’, ranging from supporting activists campaigns to themselves opportunistically going activist (e.g., occasional activist PSAM in its Vivendi campaign);

c companies becoming the targets of distinct serial activist interventions (in addition to wolf packs),

d more sophisticated and increasing M&A-related activist campaigns.

In addition, as activism becomes commodified, we may see an increase in local activism, as a new generation of smaller European and French players join the fray.


40 Id. (discussing high activity of smaller first-time activists in the United States in 2017).
Chapter 4

INDIA

Nikhil Narayanan

I OVERVIEW

India has a unique corporate and regulatory environment that has traditionally not been conducive to shareholder activism. First, there is little separation of ownership and management in India. Many Indian listed companies are controlled by ‘promoters’ (i.e., their original founders) or are closely held by ‘promoter groups’. The advent of listing often has little effect on their management and they often continue to be run as family businesses, with the interests of public (or non-promoter) shareholders being secondary to those of the promoters. Second, although India has a public M&A market and a supporting regulatory framework, Indian market dynamics mean that most promoters face little realistic prospect of a loss of control (even if their businesses do not perform). Therefore, in practice, there is a very weak public M&A market control mechanism to incentivise performance by incumbent management of listed companies. Third, the institutional investor base in India is not as organised as in the United States or the United Kingdom and has traditionally been passive. Finally, previous laws and the historic judicial approach has not been supportive of classical shareholder activism.

However, the environment is changing as certain recent legal changes have provided greater power to shareholders. The Companies Act 2013 (CA 2013) and certain regulations issued by India’s securities markets regulator, the Securities and Exchange Board of India (SEBI), have improved minority shareholder rights, created new shareholder remedies, codified directors’ duties and raised the bar in relation to corporate governance standards. Investors are increasingly more willing to make their voices heard and even other regulators (see Section V below) are encouraging more active shareholder engagement. Finally, a number of proxy firms are now active in the Indian market.

As a result of these changes, even the largest Indian companies have now faced shareholder dissent on a range of issues such as executive remuneration, strategy, related party transactions, share repurchases, acquisitions and succession planning. In addition, the Tata Group and Infosys, two of India’s better governed groups, have faced recent changes in management. Proxy firms have characterised these developments as constituting the beginnings of shareholder activism in India, although they are better described as being examples of institutional shareholder engagement and, in the case of the Tata Group and Infosys, of promoter or founder influence. These are still early days and it may be some time...
before the techniques adopted by traditional US activist funds are viable strategies in the
Indian market, but, it is clear that Indian promoters can no longer take public shareholders
for granted.

II LEGAL AND REGULATORY FRAMEWORK

i The ability of shareholders to appoint and remove directors

In India, directors are appointed by shareholders, just as they are in many other common law
dependencies. However, there is no mandatory annual re-election requirement for directors
of public companies (whether listed or otherwise). Independent directors are appointed
for a term of up to five years and, absent any special provisions in the articles (which are
uncommon), one-third of all non-independent directors are subject to retirement and
re-election by rotation every year. This contrasts with the position in England and Wales,
where the requirement under the UK Corporate Governance Code on a ‘comply or explain’
basis for all FTSE 350 listed companies to annually reappoint directors serves as a powerful
governance tool to keep directors in check.

There is, however, a little-known provision that could potentially provide an activist
shareholder with simple access to the board of an Indian listed company, in a manner that
is not possible in England and Wales. An activist shareholder can seek board representation
as a ‘small shareholder’ by acquiring a very small number of shares and then petitioning the
company with the support of the lower of 1,000 other small shareholders or 10 per cent
of the total number of small shareholders. This provision has not been used in an activist
calendar context to date, but the potential for such use should concern boards of listed companies.

The removal of a director prior to expiry of his or her term normally requires an
ordinary shareholders’ resolution (i.e., approval by a simple majority) and the director must
first have been given an opportunity to be heard. Although the right to remove directors is a
classic shareholder activist tool, ironically, it was recently used in India by a promoter group
to strengthen its position (see Section IV below).

There is also currently no impediment to companies removing additional responsibilities
or designations conferred upon directors. This issue attracted attention in the recent Tata
affair (see Sections III and IV below), where the company’s articles did not require shareholder
approval for the removal of the incumbent from his role as chairman of the board (although
the removal of a his directorship did need shareholder approval).

i Control over executive remuneration

‘Say on pay’ has been a topical corporate governance issue in many jurisdictions. Although
this is less of an issue in India, there have been a few instances in India of shareholders voting

2 Section 149(10) of CA 2013.
3 Section 152(6)(c) of CA 2013. There is also a rarely used alternative in Section 163 of CA 2013, which
allows for the concept of proportionate representation for at least two-thirds of the board.
4 Section 151 of CA 2013 and Rule 7 of the Companies (Appointment of Directors) Rules 2014. For these
purposes, a ‘small shareholder’ is one who holds shares in a listed company, the nominal value of which is
less than 20,000 rupees or any other government-prescribed sum.
5 Section 169(1) of CA 2013. The reference to ‘normally’ above is because this does not apply to directors
appointed by proportional representation (which is very uncommon).
down executive remuneration packages, such as the rejection of executive remuneration resolutions in Tata Motors’ annual general meeting in 2014 and the withdrawal of executive remuneration resolutions by Seamac and ARSS Infrastructure in 2011.6

The Indian position is a by-product of certain dated (and commercially unhelpful) restrictions that Indian company law continues to place on the levels of payment of managerial remuneration by public companies. Changes require shareholder approval (and also government approval in certain cases).7

In addition to the above, in early 2017, Infosys, one of India’s leading IT companies, was criticised by its founders for the levels of severance payments made to exiting executives (see Section IV below).

ii The ability to requisition shareholders’ meetings
In certain circumstances, shareholders have the ability to ‘go over the heads of the board’. Shareholders holding at least one-tenth of voting paid-up share capital can notify the board to requisition an extra-ordinary general meeting (EGM),8 and if the board does not call the EGM within 21 days of the requisition notice, the shareholders may themselves call the EGM (to be held within three months).9 If the directors fail to convene an EGM following a valid requisition notice, they become liable for any requisition-related expenses.10 While this right provides shareholders with a useful tool, its successful use by activist shareholders in the Indian context may be challenging. Indeed, the requisitioning of EGMs was used in the recent Tata affair to strengthen the promoters’ position.

iii Shareholders’ influence over corporate strategy
Under Indian company law, directors are delegated the authority to manage company affairs, subject to satisfaction of their duties. Public campaigns by third parties to encourage a change of strategic direction are uncommon, but shareholders do have certain powers to keep management and the promoters in check.

Although there is no Indian equivalent as comprehensive as the ‘class tests’ under the UK Listing Authority’s Listing Rules, the SEBI (Listing Obligations and Disclosure Requirements) Regulations 2015 (the Listing Regulations) require shareholders’ special resolutions (i.e., a 75 per cent approval threshold) for any disposal of a controlling interest in a ‘material subsidiary’ or any transfer of a significant portion of such subsidiary’s assets.

Also, regardless of listing status, minority shareholders holding more than 25 per cent of a company’s voting power can influence a number of transactions that are subject to special resolution approval requirements. These include the issue of new shares11 by all companies, public or private, on a non-pre-emptive basis (which will affect non-cash consideration in

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7 Section 197 of CA 2013 and Schedule V of CA 2013.
8 Section 100(2)(a) of CA 2013.
9 Section 100(4) of CA 2013.
10 Section 100 (6) of CA 2013.
11 Sections 62(1)(b) and 62(1)(c) of CA 2013. Note that private companies offering shares to employees under an employee benefits scheme need only pass an ordinary resolution (and not a special resolution).
M&A transactions), any transfer of an undertaking by a public company\textsuperscript{12} (which is the most direct statutory control over M&A), and any borrowing by a public company in excess of that company’s paid-up share capital and free reserves (which will affect the financing of M&A transactions).\textsuperscript{13}

In addition, qualifying related party transactions require shareholder approval (simple majority) under both company law\textsuperscript{14} and the Listing Regulations.\textsuperscript{15} The regimes are overlapping and similar, but while the company law rule applies to certain qualifying related party transactions (those satisfying certain threshold tests) the Listing Regulations apply to all related party transactions that are considered ‘material’ by a listed company (note that transactions whose value exceeds 10 per cent of annual turnover are deemed material).

Finally, the Listing Regulations do set out certain principles that have relevance in an activist context, including the rights of shareholders to ‘participate in, and to be sufficiently informed of, decisions concerning fundamental corporate changes’ and a principle requiring the ‘protection of minority shareholders from abusive actions by, or in the interest of, controlling shareholdings either directly or indirectly, and effective means of redress’. These principles have not been used by activist shareholders, but boards of listed companies do need to be wary of potential investor complaints to SEBI in the future.

\textbf{iv \hspace{1em} Shareholder rights of relevance to event driven strategies}

In theory, minority shareholders have considerable leverage in public M&A situations. Indeed, the power they have under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 2011 (the Takeover Regulations) and the SEBI (Delisting of Equity Shares) Regulations 2009 makes take-private transactions extremely difficult in practice.\textsuperscript{16}

Also, just as in England and Wales, M&A transactions can be structured through court schemes in India, which need to be approved by a majority in number and 75 per cent in value of the shareholders.\textsuperscript{17} In contrast to England and Wales, the practice of obtaining irrevocable undertakings is not a feature of the Indian public M&A market, so there is no further segregation of classes of shares (beyond the classes that already exist). Therefore, a 25 per cent shareholder will be able to block a scheme.

However, these powers have historically not been used by activist investors in practice. The regulations have discouraged attempts at take-private transactions, which, in turn, have hindered event-driven strategies.

\textbf{v \hspace{1em} Legal remedies available to shareholders}

The advent of CA 2013 is perceived as having significantly improved shareholders’ legal remedies in India. While it is true new remedies have been created, the lengthy nature of the litigation process in India and the judicial history of enforcing shareholder rights should temper expectations.

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\textsuperscript{12} ‘Undertaking’ is defined as any undertaking in which the company’s investment exceeds 20 per cent of the company’s net worth (as of the audited balance sheet of the preceding financial year) or which generated at least 20 per cent of the company’s total income during the preceding financial year.

\textsuperscript{13} Section 180(1)(c) of CA 2013.

\textsuperscript{14} Section 188 of the CA 2013.

\textsuperscript{15} Regulation 23(4) of the Listing Regulations.

\textsuperscript{16} Section 230(6) of CA 2013.
CA 2013 provides for slightly amended versions of remedies that existed under the preceding Companies Act 1956. For example, the ability of minority shareholders to claim relief against oppression and mismanagement by the majority on the ground that the company’s affairs are being conducted in a prejudicial manner, and the ability of shareholders with the support of at least 100 members, or shareholders holding 10 per cent voting power, to apply to the National Company Law Tribunal (NCLT) in certain circumstances to seek an investigation.17 However, the history of the Companies Act 1956 indicates that claimants found success difficult.18 There is limited experience under CA 2013, but recent experience from the Tata affair (discussed in Sections III and IV below) suggests that the ability to utilise these provisions may not be easy under CA 2013 either.

However, CA 2013 has introduced a significant change in that Indian company law now includes a ‘class action’ concept.19 Shareholders who hold a threshold level of shareholding20 have the ability to institute class action suits if they believe that the company’s management or affairs are being conducted in a manner that is prejudicial to the interests of the company or its shareholders. The NCLT has the power to issue a broad range of directions and can also order damages. This moves Indian company law away from the restraints of the exceptions to the rule in Foss v Harbottle.21 However, given the state of the litigation process in India, the effectiveness of this remedy in practice remains to be seen.

vi Other shareholder engagement issues

Just as in other jurisdictions, shareholders need to be aware of insider dealing concerns when engaging with a listed company, under the SEBI (Prohibition of Insider Trading) Regulations 2015, as well as the SEBI regulations restricting manipulative, fraudulent and unfair dealings in shares.

With regard to ‘concert party’ issues, these have been less relevant in India in comparison to other jurisdictions. The test of ‘concertness’ under the Takeover Regulations is by reference to a common objective to acquire shares or voting rights in, or control over, a listed target and shareholders rarely come together for this purpose in India (they usually cooperate on corporate actions requiring shareholder approval).

III KEY TRENDS IN SHAREHOLDER ACTIVISM

Shareholder activism in India is still evolving and exists in the context of other dynamics in the Indian market. These are summarised below.

17 Section 213 of the CA 2013.
19 Section 245 of the Companies Act 2013.
20 The threshold for shareholders to be able to trigger this protection (i.e., a shareholding percentage) is the lower of 100 shareholders or a percentage of shareholders to be prescribed. Draft rules had proposed a 10 per cent threshold for this latter threshold, but this proposal is, at the date of publication, not yet in force.
21 (1843) 2 Har 361. Previous Indian company law (the Companies Act 1956) did not recognise derivative action, so claimants needed to establish a case on the basis of common law. Academic studies have shown that this had little success (see note 19).
Most effective strategies

Historically, litigation strategies have historically proved to be less effective. For instance, the litigation strategy employed by the Children’s Investment Fund (TCI) against the directors of Coal India for breach of their fiduciary duties between 2012 and 2014 did not meet with success. In 2014, TCI withdrew its court claims and sold its holdings in the Indian market. Equally, recent attempts by Cyrus Mistry, the deposed chairman of Tata Sons, to seek relief under Section 241 of CA 2013 (for oppression and mismanagement) and Section 244 (protection against defrauding shareholders) was dismissed by the NCLT22 and the Bombay High Court refused to entertain a separate representative suit against Ratan Tata (Cyrus Mistry’s predecessor) for damages.23

Public campaigns by shareholders seeking strategic change in a listed company are still uncommon. There is only one obvious example involving a large Indian company. In 2012, CLSA wrote to the then CEO of Infosys, challenging its business model, but that did not result in any meaningful change or shareholder engagement.

The strategy that has had some success is that of long-term fund investors coming together and engaging with the management of Indian companies (sometimes by writing to them) to oppose actions that they see as being adverse to their interests, such as related party transactions or adverse corporate transactions. These efforts are usually complemented by recommendations issued by proxy advisory firms. Some examples of these are set out in Section IV of this chapter.

The advent of proxy firms

Several proxy advisory firms have now taken root in the Indian market. They regularly issue voting recommendations and maintain high visibility. Proxy advisory firms did recommend that shareholders vote against the Tata Motors’ executive remuneration resolutions in 2014 and claimed credit for the outcome.24 The jury is still out on the extent to which their recommendations are followed by institutional investors, but they are emerging as a key market participant.

These firms themselves have also faced criticism around perceptions of their own conflicts of interest. Therefore, it remains to be seen if these firms face greater regulation as their influence grows.

Greater investor participation

As in many other jurisdictions, collective action issues held back shareholder activism in India in the past. Investors historically preferred to exit their investments rather than pursue any other action. However, there now appears to be a greater willingness on the part of mutual funds and other long-term investors in the Indian market to engage with promoters (see Section IV below). Part of this has been driven by regulation. Indian-regulated mutual funds are now required by SEBI to vote on resolutions involving their portfolio companies and to

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provide voting reports on a quarterly and annual basis.\textsuperscript{25} Efforts by India’s insurance regulator to encourage market engagement by insurance companies (as summarised in Section V) are likely to continue this trend.

IV RECENT SHAREHOLDER ACTIVISM CAMPAIGNS

i Infosys
Infosys, a US listed IT company, faced a period of sustained pressure from its original founder shareholders, which ultimately contributed to the resignation of its CEO on 18 August 2017. The founders (who remain very influential) originally criticised the level of severance payments to certain departing executives. The founders also raised questions in relation to the US$200 million Panaya acquisition, leading to an investigation by an international law firm (which reportedly exonerated the management team from suggestions of wrongdoing). Following this, in July 2017, the board of Infosys indicated its willingness to work with its founders. However, on 18 August 2017, Vishal Sikka, the incumbent CEO, resigned. Without naming the founders, he indicated that the criticism he faced made his role untenable. This episode highlights some of the contradictions in the Indian market: while on the one hand this might be seen as example of shareholder activism, it also demonstrates the difficulty that management of professionally run listed Indian companies face in distancing themselves from their founders or promoters.

ii Tata tussle
The tussle for control of the Tata conglomerate has been the key corporate governance development of the past 12 months, although this is really an example of promoter power rather than shareholder activism. Differences between Cyrus Mistry, the then chairman of Tata Sons, and the former chairman, Ratan Tata, came to a head on 24 October 2016, when Cyrus Mistry was removed from his position as chairman of the Tata Sons board by a board resolution. This was followed by allegations and counter allegations, as between the two, playing out in the Indian press. Cyrus Mistry was removed as director from the various Tata Group companies between November and December 2016 and, ultimately, removed as a director of Tata Sons pursuant to an EGM held on 6 February 2017. Cyrus Mistry attempted to challenge the February 2017 EGM before the NCLT, but the NCLT refused to intervene and even his other shareholder claims, as summarised above, were denied. This highlights the strengths of promoters in India and demonstrates that litigation strategies (even as a defence) have their limitations.

iii Maruti Suzuki
In 2014, Maruti Suzuki announced a proposed contract manufacturing arrangement with one of its shareholders, Suzuki. The terms of this transaction were criticised by public shareholders and proxy firms, who were also critical of the fact that Maruti Suzuki apparently did not intend to seek shareholder approval for this transaction. Some of the largest funds in India, HDFC Asset Management, Reliance Capital Asset Management, ICICI Prudential Asset

Management, UTI Asset Management, DSP Blackrock Investment Managers, SBI Fund Management and Axis Asset Management all wrote a letter to Maruti Suzuki challenging the proposed transaction. Even Life Insurance Company of India, a state-owned insurer known to be a passive investor, reportedly engaged with the company in this regard.26 Press reports suggest that the transaction terms were modified, and the company ultimately did obtain shareholder approval, as a related party transaction matter, in 2015.

iv Cadbury

In 2009, Cadbury India applied to the High Court of Bombay to obtain approval for certain reductions in its share capital. From 2006 onwards, Cadbury India had undertaken multiple share repurchases to increase the Cadbury Group’s shareholding. This occurred after Cadbury India delisted from Indian stock exchanges in 2002 and the reductions were intended to buy out the remaining minority shareholders. The initial valuation proposed by Cadbury India was rejected by certain minority shareholders, so the court asked for a second valuation, to which Cadbury India agreed. A minority shareholder group persisted with its valuation-related objections. This matter was litigated for six years before the court decided against the minority shareholder group and upheld the second valuation.27

v Siemens

In August 2014, Siemens India put to a shareholder vote, the proposed sale of its metal technologies business to Siemens AG for 8.57 billion rupees. The sale was rejected in September 2014 by 46 per cent of the shareholders (at the time the matter required a special resolution, although recent amendments in company law have reduced this threshold to an ordinary resolution). Siemens India amended the terms of the transaction in November 2014, such that the sale price was increased to 10.23 billion rupees, and finally obtained shareholder approval in December 2014.

vi Sun Pharma

In November 2015, Sun Pharma withdrew from a potential US$225 million investment in the United States, reportedly due to pressure from investors and other stakeholders, who were concerned about the company’s foray into a non-core business and also about a related party transaction involving the company’s promoters that Sun Pharma would have entered into in relation to the proposed investment.28

vii Holcim

In 2013, Holcim had proposed to restructure its ownership of two listed Indian subsidiaries, Ambuja Cements and ACC, using a complicated structure. This was heavily criticised by market participants and the transaction would have been dilutive to the Ambuja Cements

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shareholders.\textsuperscript{29} Under the applicable rules, the transaction required approval of a majority of ‘public shareholders’. Although the transaction was ultimately approved, approximately 30 per cent of the public shareholders had voted against the transaction.

\section*{V REGULATORY DEVELOPMENTS}

Two regulatory developments are likely to have bearing on shareholder activism in India going forward.

First, in March 2017, the Insurance Regulatory and Development Authority of India published its ‘Stewardship Code’ relating to investments by insurance companies in listed securities. These principles include requirements for insurers to monitor investments in their investee companies in respect of performance, leadership effectiveness, succession planning and corporate governance, among others. They also require insurers to have a clear engagement strategy (of their own choosing) with such companies. There are also other principles requiring insurers to have a policy governing collaborations with other institutional investors and also have a clear voting policy. These are likely to encourage insurers, who constitute a significant proportion of the institutional investor community in India, to be more engaged.

Second, in June 2017, SEBI constituted a committee to further consider governance issues. Its report and recommendations will undoubtedly have a bearing on shareholder engagement involving listed companies in India.

\section*{VI OUTLOOK}

While India is unlikely to become a hotbed for classical shareholder activism in the near term, corporate India and their promoters now operate in a changed landscape. Regulatory and market dynamics are leading to more shareholder engagement. For the near term, it is likely that this will continue to be led by long-term institutional investors rather than traditional activist funds. It is also unlikely that litigation-led strategies will be successful in the Indian market and, despite all the changes, promoters are likely to continue to dominate corporate India for the foreseeable future. Indeed, recent changes of leadership in the Tata Group and Infosys highlight the strength of promoters and founders even in professionally run companies. This means that activist shareholders would be well advised to employ consensual approaches, working together with promoters rather than taking them on.

\textsuperscript{29} PR Sanjai, ‘Ambuja gets shareholders’ approval to buy stake in Holcim’, Livemint, 25 November 2013.
I OVERVIEW

A decade ago in Japan, there was much media attention on shareholder activism that often took a hostile approach against the managements of companies. Such shareholder activism significantly decreased due to the worldwide economic crisis in 2008. Over the past few years, shareholder activism in Japan has grown again due to certain developments in corporate governance policies and the economy in Japan and the increase in assets under management (AUM) of global shareholder activists. While there were few cases of shareholder activism that gained public attention in 2016, it does not mean that shareholder activists did not act in Japan.

Pursuant to the structural reform prong of Abenomics (the label for the economic policies advanced by Japanese Prime Minister Shinzō Abe) and to improve corporate governance of listed companies in Japan, the Tokyo Stock Exchange issued Japan’s Corporate Governance Code (the Governance Code) on 1 June 2015. The Governance Code promotes five general principles to guide listed companies in conducting good governance. One of the principles provides that listed companies should engage in constructive dialogue with shareholders. In addition, a council of experts established by the Financial Services Agency (FSA) released Japan’s Stewardship Code (the Stewardship Code) on 26 February 2014 that sets forth principles considered to be helpful for institutional investors who behave as responsible institutional investors in fulfilling their stewardship responsibilities. The Stewardship Code provides that institutional investors should fulfil their stewardship responsibilities through enhancing the medium to long-term investment returns for their clients and beneficiaries through constructive engagement or purposeful dialogue with investee companies. The Stewardship Code was amended on 29 May 2017 as a result of discussions in the Council of Experts Concerning the Follow-up of Japan’s Stewardship Code and Japan’s Corporate Governance Code, which was established by the FSA in 2015 for the purpose of following up with the adoption of the Stewardship Code and the Governance Code and to further improve the corporate governance of all listed companies. The Governance Code and the Stewardship Code are expected to work as ‘the two wheels of a cart’ to achieve effective corporate governance in Japan.

Historically, the management of listed companies in Japan tended to not fully consider or heed the voices of shareholders in the companies because the shareholders are often stable shareholders who do not sell their shares and support the management in the ordinary course in any case. However, the Governance Code provides that companies who hold shares of other

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listed companies in cross-shareholding structures should disclose their policies with respect to such cross-shareholding structures. As a result, the number of such stable shareholders in companies has decreased. For example, in November 2015, three megabanks in Japan released their plans to substantially reduce their cross-shareholdings within a few years. In addition, the ratio of ownership of shares in listed companies in Japan by foreign entities has increased, and such ratio was more than 30 per cent as of 31 March 2016. The foregoing developments mean that shareholders who may be supportive of shareholder activism might have increased in the Japanese market.

This chapter discusses details of shareholder rights and shareholder activism with respect to a stock company that has shares listed on a financial instruments exchange.

II LEGAL AND REGULATORY FRAMEWORK

i Shareholder rights

In Japan, rights of shareholders are provided under the Companies Act (Act No. 86 of 26 July 2005). Outlines of the shareholder rights that may typically be exercised by shareholders in the context of shareholder activism, among others, are set out below.\(^3\)

**Shareholder proposals**

The Companies Act provides shareholder proposal rights that are quite favourable to shareholders. A shareholder of a listed company who owns, consecutively for the preceding six months or more, at least 1 per cent of the voting rights of all shareholders in the company or at least 300 votes may demand directors of the company to present proposals submitted by the shareholder as an agenda at the shareholders’ meeting and demand the directors to describe the summary of the proposals in convocation notices of the shareholders’ meeting by submitting such demand to the directors no later than eight weeks prior to the day of the shareholders’ meeting (Articles 303 and 305 of the Companies Act). Additionally, a shareholder attending the shareholders’ meeting may submit proposals at the shareholders’ meeting with respect to the matters that are within the purpose of the shareholders’ meeting (Article 304 of the Companies Act).

Under the Companies Act, the number of proposals that an eligible shareholder can submit is not limited. The company may not refuse a shareholder proposal unless it does not satisfy the requirements set out in the Companies Act or its content violates the law or is considered abusive.\(^4\) If the shareholder notifies the company of the reasons for its shareholder proposal, the company shall describe such reasons in a reference document accompanying the convocation notice dispatched to its shareholders, regardless of the content of the shareholder proposal, unless such reasons are obviously false or the proposals are made solely for defamation or insult. The company may set an appropriate limit for the character count of the description of the shareholder proposal set forth in the reference document.

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3 The numerical requirements under the Companies Act that are described below may be changed by a company by setting out the changed numerical requirements in the company’s articles of incorporation.
4 See Tokyo High Court, judgment, 19 May 2015, Kinyu Shoji Hanrei No. 1473 at 26.
In this way, a shareholder who submits proposals to the company can deliver the proposals to the other shareholders at the company's expense, and cause the other shareholders to vote on the shareholder proposals using the voting card mailed by the company without conducting a proxy solicitation by itself at its expense.

In response to recent cases of abusive exercises by shareholders of such shareholder proposal rights, the Legislative Council of the Ministry of Justice established a subcommittee in April 2017 to discuss and consider appropriate amendments to the Companies Act, among others, to prevent such abusive exercises.

**Calling of a shareholders’ meeting**

A shareholder of a listed company who owns, consecutively for the preceding six months or more, at least 3 per cent of the voting rights of all shareholders in the company may demand the directors of the company to call a shareholders’ meeting regarding any matter that the shareholder calling the meeting is entitled to vote on. If (1) the calling procedure is not effected without delay after the demand or (2) the notice calling the shareholders’ meeting that designates the date of the shareholders’ meeting to be a date falling within the period of eight weeks from the date of the demand is not dispatched, the shareholder who made the demand may call the shareholders’ meeting by itself with the permission of the court (Article 297 of the Companies Act).

**Enjoinment of acts of directors**

In the event a director of a company engages, or is likely to engage, in any act in violation of laws and regulations or the articles of incorporation, if such act is likely to cause irreparable damage to the company, a shareholder who owns the shares consecutively for the preceding six months or more may enjoin such director's act usually by obtaining an order of provisional disposition from the court (Article 360 of the Companies Act). Violations of a director's duties of care and loyalty may constitute a violation of such laws and regulations.

**Derivative actions**

A shareholder who owns shares consecutively for the preceding six months or more may demand that the company file an action to recover for damages and liabilities caused by its director, and in the event the company does not file such action within 60 days of the date of such demand, such shareholder may file a derivative action on behalf of the company (Article 847 of the Companies Act). A shareholder who contemplates filing a derivative action and satisfies certain requirements under the Companies Act may gather evidence by exercising its shareholder rights, such as the right to inspect or copy minutes of meetings of the board of directors of the company or its subsidiaries with the permission of the court (Article 371, Section 2 of the Companies Act) and the right to inspect or copy account books of the company (Article 433 of the Companies Act).

**Dissenting shareholders appraisal rights**

Shareholders who object to certain agenda items at the shareholders' meeting, such as a merger, certain consolidation of shares or certain amendments to the articles of incorporation that may be related to a mergers and acquisitions transaction, may demand that the company purchase their shares in the company at a fair price. If dissenting shareholders and the
company cannot reach agreement on the price of the shares within a certain period, the dissenting shareholders or the company may file a petition to the court for a determination of the price.

ii Regulations on shareholder activism

Large-scale shareholding report

A shareholder is generally required to file a large-scale shareholding report with the relevant local finance bureau within five business days of the shareholder’s shareholding ratio in a listed company exceeding 5 per cent (Article 27-23 of the Financial Instruments and Exchange Act (Act No. 25 of 13 April 1948) (FIEA)). The shareholding ratio is calculated by aggregating shares held by such shareholder with any other shareholders with whom the shareholder has agreed to jointly acquire or transfer shares in the company, or to jointly exercise the voting rights or other rights as shareholders of the company (a joint holder). After filing the report, if the shareholding ratio increases or decreases by 1 per cent or more, an amendment to the report must be filed within five business days from the date of such increase or decrease.

Certain financial institutions that do not intend to take actions to materially influence the business activities of the company are required to file the report only twice a month.

The FSA expressed its position that in the event different shareholders communicate to each other their plans to exercise their voting rights in a certain manner and their plans happen to be the same, such event does not cause such shareholders to be deemed as joint holders because an ‘agreement’ means an undertaking to act (whether in writing or orally and explicitly or implicitly) rather than the mere exchange of opinions. Therefore, activist shareholders may not be required to file a large-scale shareholding report even if they communicate with each other privately and act in the same manner without explicit agreement.

Under the FIEA, rights to request delivery of shares under a sales and purchase contract as well as options to purchase shares and borrow shares are subject to the large-scale shareholding reporting obligations. However, the holding of equity derivatives that are cash-settled and that do not involve the transfer of the right to acquire shares would likely not trigger the reporting obligations. The FSA released guidelines that provide that derivatives that transfer only economic profit and loss in relation to target shares, such as total return swaps, are generally not subject to the disclosure obligations, provided that holding such cash-settled equity derivatives may trigger such obligations if a holder purchases long positions on the assumption that a dealer will acquire and hold matched shares to hedge its exposure.

Proxy regulations

Any person who intends to solicit a proxy with respect to shares in a listed company shall deliver a proxy card and reference documents containing the information specified in the Cabinet Office Ordinance to the person solicited (Article 194 of the FIEA and Article 36-2 of the Order for Enforcement of the Financial Instruments and Exchange Act (Cabinet Order No. 321 of 30 September 1965)). However, a solicitation of a proxy with respect to shares in

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5 FSA, Clarification of Legal Issues Related to the Development of the Japan’s Stewardship Code, 26 February 2014, at 11.
6 FSA, Q&A Regarding Large Scale Shareholding Report of Share Certificates, etc., 31 March 2010, at 10.
a listed company that is made by persons other than the company or the officers, including
the directors and the executive officers, thereof and in which the solicited persons are less than
10 persons is exempt from the proxy regulations.

When a solicitor has delivered the proxy card and reference documents to the solicited
persons, the solicitor shall immediately submit a copy of such documents to the relevant
local finance bureau, provided that if the reference documents and form of voting card are
delivered by the company to all of the shareholders of the company who are entitled to
vote with respect to the relevant shareholders’ meeting pursuant to the Companies Act, the
solicitor does not have to submit those documents to the relevant local finance bureau. No
solicitor may make a solicitation of a proxy by using a proxy card, reference documents or any
other documents, or an electromagnetic record, in each case that contains false statements or
records on important matters, or that lacks a statement or record on important matters that
should be stated, or a material fact that is necessary to avoid a misunderstanding.

iii Rules for directors

Directors’ duties

Directors facing shareholder activism must abide by their duties of care and loyalty and treat
all shareholders equally under the Companies Act.

The Governance Code has had a major effect on the corporate governance of listed
companies in Japan since its release in June 2015. The Governance Code does not adopt a
rule-based approach, rather, it adopts a principle-based approach that is not legally binding
on companies with a ‘comply or explain’ approach (i.e., either comply with a principle or, if
not, explain the reasons why the company is not complying).

The Governance Code provides that companies should, positively and to the extent
reasonable, respond to requests from shareholders to engage in dialogue, and the board of
directors should establish, approve and disclose policies relating to measures and organisational
structures that aim to promote constructive dialogue with shareholders. Specifically, the
senior management or directors, including outside directors, are expected to be more directly
involved in dialogue with shareholders. Furthermore, while listed companies cannot accurately
know their substantive shareholder ownership structure without conducting shareholder
identification searches due to indirect shareholding, such as shareholding through trusts or
custodians, the Governance Code provides that companies should endeavour to identify their
shareholder ownership structure as necessary in order to promote constructive dialogue with
their shareholders.

Stand-still agreement

Stand-still agreements, which may include agreements regarding agenda items of shareholders’
meetings, the exercise of voting rights and restraint in acquiring additional shares in the
company, have not often been entered into between activist shareholders and listed companies
in Japan. There are several precedents of such stand-still agreements though, such as the case
of Aderans Holding Ltd entering into an agreement with Steel Partners, a US-based hedge
fund, regarding a slate of directors to be submitted to the extraordinary shareholders’ meeting
in 2008.

Since the Companies Act prohibits a company from giving any property benefits to
any person in connection with the exercise of shareholder rights, including voting rights
(Articles 120 and 970 of the Companies Act), the company generally cannot agree to reimburse any costs incurred by activist shareholders from their shareholder activism campaigns in connection with their entering into any voting agreement.

**Takeover defence measures**

The board of directors of a company may adopt takeover defence measures to deter the building of a large stake in the company by activist shareholders. Most common takeover defence measures adopted by Japanese listed companies are the so-called ‘advance-warning’ type of defence measures. Under such defence measures, a company establishes rules that must be followed by any potential acquirer who intends to acquire more than a certain level of shares (typically, 20 per cent) in the company, and the company publicly announces such rules before an acquirer actually emerges. No rights or stock options are issued upon the adoption of such rules. If an acquirer violates such rules or an acquisition is considered to be harmful to the corporate value of the company or the common interest of the shareholders of the company, the company would allot stock options to all shareholders without contribution that are only exercisable by, or callable for new shares by the company from, those shareholders other than the acquirer.

Although the number of takeover defence measures adopted by listed companies has gradually decreased in recent years (as of 31 July 2016, 455 listed companies have adopted takeover defence measures), many corporate law practitioners still consider takeover defence measures to be effective safeguards against shareholder activism.

### III KEY TRENDS IN SHAREHOLDER ACTIVISM

**i  Profile of activist shareholders**

Activist shareholders who engage in shareholder activism in Japan are mainly domestic and global hedge funds and individual investors. In particular, in recent years, foreign activist funds have invested in the Japanese market.

**ii  Types of companies targeted by activist shareholders**

Activist shareholders in Japan have targeted companies of different sizes and in all types of industries. In particular, activist shareholders are more likely to target companies that own a large amount of surplus cash or other assets, have a low return on equity (ROE) or have share prices that are undervalued by the market. Until the end of 2007, activist shareholders often focused on building large stakes in small-cap or mid-cap companies to apply pressure on the managements of those companies. In recent years, activist shareholders have also been targeting large prominent companies, including companies with market capitalisation of over US$20 billion. Another source of targets for activist shareholders is listed companies that have a parent company or a controlling shareholder, and in which there is a structural conflict of interest between the controlling shareholder and minority shareholders.

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iii Objectives of shareholder activism

The most common objective of shareholder activism in Japan is to improve capital efficiency of Japanese companies. ROEs of many Japanese companies are low compared to the average ROEs of US companies. Activist shareholders usually demand that Japanese companies conduct a buy-back of their shares or increase the amount of dividends to improve their ROEs. Moreover, activist shareholders urge the companies to carve out their non-profitable businesses and sell their assets that are not utilised or not related to their primary business, including cross-holding shares. A lot of activist shareholders tend to take these activities to gain returns on their investments in the short term.

In recent years, proposals for companies by activist shareholders to conduct potential mergers and acquisitions transactions with another company or to undertake changes in business strategy of companies are becoming common in Japan. Some activist shareholders usually conduct detailed due diligence on the company’s business prior to engaging in such kind of shareholder activism.

Improving corporate governance is also a common objective of shareholder activism. Although the corporate governance of many listed companies have changed as a result of the application of the Governance Code, which, for example, recommends that listed companies appoint at least two independent directors, activist shareholders have continued to advocate for changes in the corporate governance of companies such as with respect to increasing the number of independent directors and adopting stock-price-linked remuneration of directors.

Furthermore, activist shareholders often bring attention in their campaigns to incidents and actions in which directors are not abiding by their duties of care and loyalty. For instance, as activist shareholders often acquire large amounts of shares in companies that have a controlling shareholder, the activist shareholders speak against transactions that may involve conflicts of interest between the controlling shareholder and minority shareholders.

Activist shareholders are also engaging in so-called ‘deal activism’ with respect to mergers and acquisitions transactions, including mergers, share exchanges or tender offers, in which the support of a certain number of shareholders is necessary to successfully complete such transactions. Activist shareholders may speak against the transactions, and demand that the company amend certain terms that are, in their view, inappropriate. Some activist shareholders also exercise their appraisal rights as dissenting shareholders, and file a petition to the court for a determination of the fair price for the relevant shares.

Some Japanese companies were targeted by short selling activist funds during 2016. Such funds short the shares of a target company by borrowing shares of the target company, and then issuing reports to the public stating that shares in the target company are overvalued. After the price of the target company’s shares drop, the funds purchase the shares to make a profit through the difference between the price of such purchased shares and the price of the borrowed shares.

There are also activist shareholders who take actions mainly in consideration of social issues, which is different from the more common type of shareholder activism that focuses on the increasing shareholder value of the company. For example, shareholder proposals concerning nuclear power generation have been submitted to electric power companies.

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8 As a result of the tax reform in 2017, the deferral of taxation arising from certain spin-off transactions in which a part of the company’s business is carved-out and shares in such business are distributed to its shareholders through dividend in kind will be permitted.
Tactics used by activist shareholders

**Closed engagements**

An activist shareholder typically initiates contact with the company in which it has acquired shares by sending a letter to the company describing its demands, after which the shareholder and company engage in private communications. An activist shareholder usually requests quarterly or biannual meetings with the management of the company. Some activist shareholders try to resolve issues of the company by proposing alternatives or solutions or providing advice in a friendly manner, and are reluctant to make their engagement with the company public.

**Public campaigns**

If activist shareholders decide that they cannot achieve their objectives through non-public engagements with the company, they may wage public campaigns with the aim of attracting the support of other shareholders for their objectives. Elements of public campaigns include issuance of press releases, postings of relevant information on websites prepared by them for the campaigns, dissemination of letters to shareholders, provision of information through the media and holding information sessions for other shareholders. Given that the support of public opinion is important in the public campaigns, the tools used by activist shareholders to conduct public campaigns are becoming more sophisticated as ways to deliver information to the public have become more diverse. To access other shareholders, activist shareholders may make a request to companies for inspection or copying of their shareholder registries (Article 125, Section 2 of the Companies Act). If the company and the activist shareholder reach agreement prior to submission of a shareholder proposal and commencement of a proxy fight, the activist shareholder can avoid bearing the expenses relating to such proxy fight.

**Shareholder proposals and proxy fights**

To effect changes in companies, activist shareholders can use the right of shareholder proposals under the Companies Act. Moreover, activist shareholders may conduct proxy solicitation in accordance with the FIEA to obtain votes for the shareholder proposals or votes against agendas proposed by companies that are opposed by the activist shareholders. As explained above, activist shareholders who intend to obtain an approval for certain agenda at the shareholders’ meeting do not necessarily have to make a proxy solicitation because they can communicate their proposals and the reasons for such proposals to other shareholders by having the company dispatch the convocation notice and reference documents describing such proposals and reasons at the company’s expense. However, there are practical advantages for an activist shareholder to engage in proxy solicitation for certain reasons, including (1) the submission by shareholders of a voting card to the company that is left blank is generally treated as a vote in favour of the company’s proposal and against the shareholders’ proposal, (2) the reason for the shareholder proposal that is set forth in the company’s reference

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9 According to Nikkei, 10 June 2017, the number of agendas proposed by shareholders for annual shareholders’ meetings of companies whose business year ends in March 2017 increased by approximately 25 per cent from 2016.
documents is subject to a character count limit set by the company, but there is no such limit in the case of a proxy solicitation, and (3) a proxy can authorise a procedural motion at a shareholders’ meeting.

If an activist shareholder conducts the proxy solicitation, it often approaches and tries to persuade proxy advisers, such as Institutional Shareholder Services Inc (ISS), which is considered influential, especially on US-based institutional investors, and Glass, Lewis & Co, LLC (Glass Lewis), which is considered less influential than ISS, to support its cause. The proxy advisers often recommend that investors vote against proposals made by the board of directors and that they vote for shareholder proposals. During June 2017, more than 10 companies issued press releases stating their objections against recommendations by the proxy advisers.

**Empty voting and morphable ownership**

Empty voting (i.e., votes by shareholders who have more voting rights of shares than economic ownership in the shares because the shareholders own voting rights of shares that are decoupled from the economic ownership of such shares) may be used by activist shareholders. Empty voting may be implemented by, among other means, equity swaps or record date capture by borrowing shares. Empty voting deviates from the principle of one-share-one-vote in stock companies, and may result in resolutions of shareholders’ meetings that are not properly aligned with the interests of the company or its shareholders as a whole because empty voters’ voting rights in the company are not in proportion to their economic interests in the company. Thus far, there has been no reported case in Japan in which a grossly improper resolution was made or a proper agenda item was voted down at a shareholders’ meeting as a result of empty voting.

As a related issue, an activist shareholder may substantively own shares in the company without disclosure by using equity derivatives. Given that dealers that sell equity derivatives usually purchase matched shares in practice to hedge their risks involved in the equity derivatives, activist shareholders, when necessary, may have the ability to terminate the equity derivatives and purchase the matched shares held by the dealers (morphable ownership). activist shareholders may suddenly emerge in this way as shareholders owning a large amount of the shares without giving the company adequate time to prepare for the shareholder activism.

**Litigations**

Activist shareholders sometimes engage in litigation as a tactic of shareholder activism, such as seeking an order of provisional disposition for enjoinment of directors’ actions and bringing a derivative action against directors of the company to recover for damages and liabilities caused by such directors. Activist shareholders often place pressure on the directors by expressing their willingness to bring actions to the courts to achieve their goals.

**Hostile takeovers**

The most aggressive approach of shareholder activism is a hostile takeover, which is an acquisition of shares in a company by an activist shareholder without consent of the management of the company through on-market transactions or tender offers. However, few hostile takeovers have been successfully consummated in Japan partly because there have been stable shareholders in the companies subjected to such takeovers and public opinion in Japan has been generally against hostile takeovers thus far.
IV RECENT SHAREHOLDER ACTIVISM CAMPAIGNS

Activist shareholders have recently targeted large-cap companies in Japan as in the case with the United States and other countries. One of the most well-known activist hedge funds in the US, Third Point, has held shares of several Japanese large-cap companies. For example, Third Point proposed to the electronic company Sony Corporation (market cap as of August 2013: approximately US$20 billion) that it should carve out its entertainment business and make an offering of shares in the entertainment business to the public, although Sony Corporation ultimately announced that it refused to undertake such proposal in August 2013. According to public information, Third Point also urged the machinery manufacturing company Fanuc Corporation (market cap as of April 2015: approximately US$43 billion) to repurchase a large amount of its shares and to increase the amount of dividends to improve its capital efficiency. Third Point’s conduct may have prompted Fanuc Corporation to take actions to increase its shareholder returns during 2015 when Fanuc Corporation made a buy-back of its shares and paid a large amount of dividends.

C&I Holdings Co, Ltd, which has some connection to the well-known Japanese activist fund Murakami Fund, made a demand in June 2015 to the electronic trading company Kuroda Electric Co, Ltd to convene an extraordinary shareholders’ meeting and submitted a shareholder proposal to elect four outside directors nominated by C&I Holdings Co, Ltd. Although the shareholder proposal was not passed at the extraordinary shareholders’ meeting, ISS recommended voting for the shareholder proposal (whereas Glass Lewis recommended voting against the shareholder proposal), and shareholders who owned almost 40 per cent of the voting rights in the company voted for the shareholder proposal. Reno, Inc, which is also considered to have some connection with the Murakami Fund and owned approximately 35 per cent of the shares in Kuroda Electric Co, Ltd with Reno, Inc's joint holders, submitted a shareholder proposal to elect an outside director designated by Reno, Inc for the annual shareholders’ meeting of Kuroda Electric Co, Ltd in June 2017, which was approved at the shareholders’ meeting. These cases are examples suggesting that shareholders in Japan are becoming comfortable with, and supportive of, shareholder activism.

Effissimo Capital Management, a Singapore-based activist fund, has acquired a number of listed companies who have a parent company. Effissimo Capital Management, which owned approximately 30 per cent of shares in automaker Nissan Shatai Co, Ltd, brought a derivative action to recover for damages caused by directors of the automaker and sought an injunction in court against certain acts of the directors on the grounds that the directors were violating their duties of care and loyalty. The fund claimed that the directors were violating their duties because Nissan Shatai Co, Ltd deposited a large amount of cash in a subsidiary of Nissan Motor Co, Ltd, which is a parent company of Nissan Shatai Co, Ltd by participating in the cash management system (CMS) of the Nissan Motor group without reasonable reasons, and the directors of Nissan Shatai Co, Ltd did not manage its cash efficiently. Yokohama District Court dismissed the case in favour of the directors in February 2012. According to news reports, a Hong-Kong based activist fund, Oasis Management Company Ltd, filed a provisional injunction against the directors of Toshiba Plant Systems & Services Corporation with the Yokohama District Court in March 2017 to prevent them from depositing funds with the parent company, Toshiba Corporation. As a result, Toshiba Plant Systems & Services

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10 Yokohama District Court, judgment, 28 February 2012, not cited in digests.
Japan

Corporation withdrew the deposit amount, which was, as of 31 March 2016, approximately US$760 million, from Toshiba Corporation. These cases indicate that activist shareholders are willing to engage in court and litigation procedures to accomplish their goals.

An example of a case in which shareholder activism hampered a mergers and acquisitions transaction is the proposed share exchange between Tokyo Kōtetsu Co, Ltd and Osaka Steel Co, Ltd, which was rejected at the shareholders’ meeting of Tokyo Kōtetsu Co, Ltd in 2007 as a result of a proxy fight waged by the Japanese activist fund Ichigo Asset Management, which opposed the share exchange. Also, the number of cases of shareholder activism with respect to mergers and acquisitions involving a listed company has recently increased in which activist shareholders in the company assert through a public campaign or private discussions that the consideration to be paid is insufficient because the consideration is lower than the fair value of their shares to be acquired. Such cases often occur in transactions involving conflict of interests between a controlling shareholder and minority shareholders.

V REGULATORY DEVELOPMENTS

The Companies Act was amended on 1 May 2015. One of the purposes of the amendment is to enhance the corporate governance of companies. For example, although the amended Companies Act does not require companies to elect outside directors, directors of a listed company have to explain at the company’s annual shareholders’ meeting why it is not appropriate for the company to have any outside director if the company does not have any outside director. To prompt companies to have outside directors, the amended Companies Act allows a company to adopt a new governance structure in which the company has an audit and supervisory committee. An audit and supervisory committee audits the activities of directors of the company, and a majority of the members of the committee must be outside directors.

In addition, as discussed above, the Governance Code was issued in June 2015 and the Stewardship Code was issued in February 2014. Consequently, 2015 is often referred to as the first year of corporate governance for listed companies in Japan, and the corporate governance of Japanese companies has in fact improved to some extent. The Stewardship Code was amended on 29 May 2017 to provide, among others, that institutional investors should disclose their voting records for each of its investee companies on an individual agenda item basis in order to enhance visibility of the consistency of the voting activities of institutional investors with their stewardship policies. This amendment may affect the voting behaviour of institutional investors, and consequently, supportive votes for listed companies may decrease. The amendment to the Stewardship Code also provides that in addition to institutional investors engaging with investee companies independently, it would be beneficial for the institutional investors to engage with investee companies in collaboration with other institutional investors (collective engagement) as necessary.

The Partial Amendment to Financial Instruments and Exchange Act was promulgated on 24 May 2017, and will be in effect within one year. This amendment provides a fair disclosure rule pursuant to which if a listed company transfers certain of its unpublicised material information to certain persons, including investors, such company shall disclose such information to the public at the same time. Listed companies will need to take into account such fair disclosure rule when they communicate with activist shareholders.
V OUTLOOK
The Governance Code has prompted, and will continue to prompt, listed companies to place greater importance on establishing and maintaining dialogue and relationship with their shareholders. If more cross-shareholdings are dissolved in the future, the number of shareholders who support the managements of companies may decrease and the number of shareholders who are supportive of activist shareholders may increase. The amendment to the Stewardship Code pursuant to which institutional investors should disclose voting records for each of its investee companies may have a strong impact on voting behaviour of institutional investors who have been supportive of listed companies. As a result, the influence of shareholder activism on the management and direction of companies may be further enhanced. Therefore, managements of listed companies should operate the companies, including conducting proactive engagement and communications with the companies’ shareholders, and make appropriate preparations to take into account increasing shareholder activism in the event they are actually targeted by activist shareholders.
I OVERVIEW

Unlike certain neighbouring countries, in Luxembourg listed companies are often controlled by one or more major shareholders, rendering it difficult to provide examples of shareholders or investors having taken public and adversarial approaches. Probably the most memorable example of shareholder activism in Luxembourg is in relation to the ArcelorMittal merger in 2007. Furthermore, a significant number of Luxembourg companies are listed abroad and these entities often need to apply Luxembourg law as well as the rules of the foreign exchange (e.g., NYSE or Nasdaq). Recent changes to Luxembourg law, including the Shareholder Act, marked an important step in Luxembourg CSR legislation and provided shareholders with more statutory rights enabling them to play a more active role in listed companies.

II LEGAL AND REGULATORY FRAMEWORK

i The Luxembourg corporate governance regime

Luxembourg’s main statutes on corporate governance include the 10 August 1915 act on commercial companies (the Companies Act), which was revamped in 2016 in order to modernise Luxembourg corporate law, the Market Abuse Regulation2 and the act of 24 May 2011 (the Shareholder Act).

Shareholder rights and governance in Luxembourg are statute-based, consisting primarily of the Civil Code, the Companies Act and, for listed companies, the Shareholder Act and the rules and regulations of the Luxembourg Stock Exchange (LuxSE).

The Shareholder Act came into force on 1 July 2011. It implemented Directive 2007/36/EC on the Exercise of Certain Rights of Shareholders in Listed Companies, aiming to increase shareholders’ activism and setting out a number of shareholders’ rights. The Shareholder Act applies to companies that have their registered office in Luxembourg and whose shares are admitted to trading on a regulated market in a Member State of the European Union, and to Luxembourg companies whose shares are traded on a regulated market outside the European Union if such companies have elected to opt into the rules of the Shareholder Act. The Shareholder Act goes beyond Directive 2007/36/EC’s requirements,

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1 Margaretha Wilkenhuysen is a partner and Steven van Waas is an associate at NautaDutilh.
and aims to increase shareholders’ active participation in their companies by enabling them to exercise their voting rights, ensuring their right to place items on shareholders’ meetings’ agendas and to ask questions.

Shareholder rights and governance in Luxembourg are statute-based, consisting primarily of the Civil Code, the Companies Act and, for listed companies, the rules and regulations of the Luxembourg Stock Exchange (LuxSE). However, the statutory law provisions only give very general governance rules or principles. More specific corporate governance is generally based on a flexible ‘comply or explain’ system, enabling the specific circumstances of companies, such as their size, shareholding structure, activities, exposure to risks and management structure, to be accounted for.

As a supplement to the general statutory law, the LuxSE’s 10 Principles of Corporate Governance (the LuxSE Principles), as modified in October 2009 and revised in March 2013 (third edition), provide guidelines on best practice in corporate governance for all companies listed on the LuxSE. Luxembourg companies listed abroad often find inspiration in these principles of good governance.

ii The Luxembourg market for publicly traded companies and Luxembourg-based companies traded abroad

Many companies’ shares are traded on the LuxSE, but there are also a number of entities whose shares are listed either on a regulated market within the European Union, other than the LuxSE, such as Euronext and the Warsaw Stock Exchange, but also on the New York Stock Exchange or Nasdaq. In the case of Luxembourg entities listed abroad, the board of such entities needs to reconcile and combine the Luxembourg rules with the rules of such exchange, which in some cases may be challenging.

iii The corporate bodies

The Companies Act and the Shareholder Act provide in general the rules and the framework for shareholders to become active. The Companies Act contains the provisions on the governance of commercial companies, including the powers and responsibilities of the board of directors and the shareholders.

iv The board of directors

Structure

Although the Act of 25 August 2006, which introduced Article 60bis-1 into the Companies Act, provides the possibility for public limited liability companies to choose a two-tier board structure, the one-tier board structure remains by far the preferred option in Luxembourg, with the company being managed exclusively by a board of directors invested with the broadest powers to act in the name and on behalf of the company.

In a two-tier system, the company is managed by two bodies: the management board, charged with the day-to-day management of the company, and a supervisory board. Article 60bis-1 et seq of the Act details the supervisory board’s responsibilities, which include permanent supervision and appointment of the management board members, the right to inspect all company transactions. No person may at the same time be a member of both the management board and the supervisory board. Members of the supervisory board are liable

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3 www.bourse.lu/corporate-governance.
towards the company and any third party in accordance with general law. However, there is no specific guidance relating to the exercise by members of the supervisory board of their duties.

**Composition of the board**

The board is composed of appointed members (the company’s directors). The Companies Act requires a minimum of three directors; the maximum number of directors is undefined (the LuxSE Principles advise 16 directors as a reasonable limit). While the directors are appointed by the shareholders of the company, the directors choose a chair among their members.

Even if director nomination is typically made via the company’s nomination committee, any shareholder holding at least 5 per cent for listed entities falling within the scope of the Shareholder Act or 10 per cent for the other entities, as the case may be, has the right to amend a notice to the shareholders’ meeting and add the nomination of directors for election.

Although no general legal obligations are in place, the LuxSE Principles require that listed companies’ boards have a sufficient number of independent directors (the number depends on the nature of the company’s activities and share ownership structure), defining independent directors as not having ‘any significant business relationship with the company, close family relationship with any executive, or any other relationship with the company, its controlling shareholders or executive managers which is liable to impair the independence of the director’s judgement’. While there are no specific legal provisions regarding independent directors, it is generally understood that all directors, including independent directors, should be provided with timely information for the proper performance of their duties.

**Separation of CEO and chair roles: chair’s role and responsibilities**

While the roles of CEO and chair tend to be separated in practice, there are no legal provisions or guidelines pertaining to a separation of roles or responsibilities. For listed companies, LuxSE Principle Recommendation 2.4 requires that the chair prepares the board meeting agendas after consulting the CEO and ensures that the procedures for preparing meetings, deliberations, decision-making and the implementation of decisions are correctly applied. Under this non-compulsory guideline, the chair should ensure the proper application of the rules of governance and provide advice to the board.

Luxembourg law does not currently provide for a specific procedure for direct communication between the CEO or the chair and the shareholders.

For listed companies, under LuxSE Principle 10 companies should ‘establish a policy of active communication with the shareholders’ and allow shareholder dialogue with the board and the executive management.

**Responsibilities of the board of directors**

The directors’ duties are owed to the company and as such they may be held liable towards the company both on civil and criminal grounds. They are jointly and severally liable in

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4 LuxSE Principle 3, Recommendation 3.5.
accordance with the general provisions on civil liability and the provisions of the Companies Act, both towards the company and towards all third parties for any damage resulting from a violation of the Companies Act or of the articles of association (AoA) of the company.

Directors must act in the best corporate interests of the company and are obliged to comply with the Companies Act and with the company’s AoA. This includes the obligation to act as reasonably prudent businesspersons. They must manage the company’s business in good faith, with reasonable care, in a competent, prudent and active manner, at all times in the company’s best interests, and must refrain from doing anything that does not fall within the scope of the company’s corporate objectives. The Companies Act also imposes certain general duties on directors, including the general management of the company, representation of the company towards third parties and upholding their duty to avoid any conflict of interests.

The Luxembourg legislature has remained silent on what should be considered a company’s best corporate interest. In its judgment of 23 December 2015, the Luxembourg District Court made some observations on this notion. It explained that it is an adaptable concept of which the exact interpretation depends on the company concerned and the nature of its activities. For some companies, the corporate interest is aligned to the interests of a company’s shareholders. For other companies, it includes the interest of the legal entity as a whole, including the interests of shareholders but also those of employees and creditors. The Court remarked that for companies that are used for purposes of financing and pure holding companies, the interest of the company’s shareholders will be of overriding importance as the focus of the company’s activities is on the rate of return of its investments.

However, it should be noted that directors of LuxSE-listed companies are held to a number of more specific duties under the Transparency Act and the Market Abuse Regulation, in addition to the LuxSE regulations and principles. Under LuxSE Principle 2, the board of a listed company is bound by a fiduciary duty to its company and shareholders, and must act in the company’s best interests and protect the general interests of the shareholders by ensuring the company’s long-term success.

In the event of misconduct, according to prevailing doctrine and case law, the shareholders’ meeting must decide whether to make any claim against a director in connection with faults committed by such director in the performance of his or her functions.

Directors’ liability towards the company is exonerated further to cover the discharge granted to the board by the annual shareholders’ meeting approving the annual accounts. Such discharge is valid for the period covered by the accounts presented to and approved by the general meeting of shareholders, provided that they do not contain any omission or false statement of a material fact. Although a discharge given by the general meeting of shareholders extinguishes the board members’ liability towards the company, it is important to note that proceedings initiated by third parties are not affected by such discharge.

The company as well as third parties (including any shareholder or creditor with a legitimate interest) may bring an action against a director. Shareholders may, however, only seek compensation for a prejudice that is distinct from the company’s collective damage, and that can be defined as an individual and personal damage. The possibility for a (minority) shareholder to sue a director has recently been given an explicit legal basis in Luxembourg law.

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5 Articles 1382 and 1383 of the Luxembourg Civil Code.
6 Article 59 of the Companies Act.
7 Luxembourg District Court, 23 December 2015, Nos. 145,724 and 145,725.
If the shareholders have suffered collective damage, it is up to the shareholders’ meeting to demand compensation, in which case an action must be brought by the shareholders’ meeting on behalf of the company (an action initiated by a single shareholder will be dismissed). The legal basis for the action differs depending on whether the proceedings are invoked by the company or by third parties.

Any action by the company has a contractual basis, whereas an action by third parties will be brought on the grounds of tort liability. Whereas, under contractual liability, only reasonably foreseeable damage is to be repaired (except in cases of fraud), under tort liability all damage caused by the misconduct must be repaired. In order to elude collective liability, a director must prove that he or she has not taken part in the breach of the Companies Act or of the AoA of the company, that no misconduct is attributable to him or her and that he or she reported the breach at the first shareholders’ meeting following his or her discovery or knowledge of the breach.

For listed companies, the LuxSE rules and regulations provide a series of sanctions in the event its rules are breached, including fines or compensation for damage caused to the stock market.

III KEY TRENDS IN SHAREHOLDER ACTIVISM

There is a trend in Luxembourg law, as is described below in more detail, for more transparency, accountability and increased shareholder rights, especially in listed companies. In addition, minority shareholders have additional rights further to the changes to the Companies Act in 2016. It is hard to predict whether these changes will lead in practice to more public campaigns led by activist shareholders or not. It is certain that boards will, however, have to take into account the potential involvement and action from their shareholders, including minority shareholders.

IV REGULATORY DEVELOPMENTS

i Shareholder rights and powers

Equality of voting rights

The Shareholder Act came into force on 1 July 2011 aiming, inter alia, to strengthen the exercise of minority shareholders’ voting rights in listed companies in order to improve the corporate governance of such companies. The Shareholder Act explicitly refers to a principle of equal treatment of shareholders. This principle is limited to the participation of shareholders at the general meeting of shareholders and the exercise of their voting rights at that meeting.

The powers of shareholders to influence the board

Article 53 of the Companies Act reserves the management of the company to its board. Shareholders do, however, control the appointment of the board (and therefore its composition) via a majority decision of over 50 per cent to appoint or revoke directors. In addition, shareholders representing 10 per cent of a company’s share capital may force the board to postpone a general meeting of shareholders for a period of up to four weeks.8

8 Article 67(5) of the Companies Act.
Furthermore, it should be noted that during the annual general meeting, the shareholders can question the board on all aspects of the company’s management, accounting and so forth throughout the year, and may withhold granting discharge. Although previously, shareholders were in practice already allowed to ask questions during the meeting and to receive answers to their questions, the Shareholder Act and the Companies Act now expressly lay down that shareholder right in relation to the items on the agenda of the meeting.

Under the Shareholder Act, in addition to the right to ask questions orally during a meeting, shareholders may have the right to pose written questions about the items on the agenda before such meeting is held. If provided for in a company’s AoA, questions may be asked as soon as the convening notice for the general meeting is published. The company’s AoA will furthermore provide the cut-off time by which the company should have received the written questions.

Apart from several specific circumstances (e.g., in case of confidential information), the company must answer any questions addressed to it. Should several questions relate to the same topic, the company may publish a detailed question and answer document on its website, in which case the chair should draw the shareholders’ attention to the publication.

The Act also allows shareholders to submit questions to management outside of a meeting. Any shareholder representing at least 10 per cent of the company’s share capital or voting rights can ask the board of directors or management body questions about the management and operations of the company or one of its affiliates, without the need for extraordinary circumstances. If the company’s board or management body fails to answer these questions within one month, the shareholder may petition, as in summary proceedings, the president of the district court responsible for commercial matters to appoint one or more independent experts to draw up a report on the issues to which the questions relate.9

Certain matters must also be reported to the shareholders, such as any director’s conflict of interest relating to voting on a resolution (see Section II).

Furthermore, in case a minority shareholder finds that directors and members of its management and supervisory boards of a public limited liability company are negligent or simply not diligent in the performance of their duties, it may sue them. Such an action may be brought by one or more shareholders or the holders of founders’ shares representing 10 per cent or more of the company’s voting rights.10

**Decisions reserved to shareholders**

Article 53 of the Companies Act provides that a company’s management board has the most extensive powers to perform all actions necessary or appropriate to fulfil the company’s corporate objective, with the exception of the actions specifically reserved by law to the shareholders’ meeting (*inter alia*, appointment and revocation of directors, all amendments to the company’s AoA, approval of annual accounts and allocation of the company’s results are reserved to the company’s shareholders).

**Rights of dissenting shareholders**

The Companies Act currently recognises only a few rights of action on behalf of the company in favour of individual shareholders.

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9 Article 154 of the Companies Act.

10 Article 63 *bis* of the Companies Act.
The extension of the protection of minority shareholders by stipulating provisions in the company’s AoA (e.g., the right of a minority coalition to propose directors, provisions for a more stringent majority for certain decisions, approval clauses or share transfer restrictions) is well recognised insofar as such arrangement does not conflict with Luxembourg’s public policy rules.

The use of shareholders’ agreements of a purely contractual nature is far more common than providing for relevant provisions in the AoA. The use of shareholders’ agreements is now explicitly recognised in Luxembourg law. It is important to note that the Companies Act does not state that these types of arrangements need to be limited in time. However, it does set out three types of voting arrangements that are null and void: (1) a shareholders’ agreement that violates the provisions of the Companies Act or that is contrary to a company’s corporate interest, (2) an undertaking by a shareholder to vote in accordance with instructions given by the company itself, a subsidiary or any corporate organ of such entities and (3) an undertaking by a shareholder to those same companies or corporate organs to approve proposals made by the company’s corporate bodies. If votes are cast at a general meeting of shareholders pursuant to an invalid voting arrangement, the votes shall be considered null and void along with any resolutions taken, unless the votes did not affect the final outcome. While the use of shareholders’ agreements does allow for discretion and flexibility, any compulsory implementation of this type of arrangement remains at risk.

Providing additional protection in favour of groups of minority shareholders, whether in the AoA or otherwise, is quite common in Luxembourg, particularly among international joint ventures and groupings that use a Luxembourg company structure to promote mutual business activities.

As a last resort, dissenting shareholders may seek to invalidate a shareholder decision that has been taken on the basis of five grounds that are specified in the Companies Act: (1) a procedural irregularity that influenced or could have influenced the outcome of the decision, (2) a violation with fraudulent intent of the rules governing general meetings, (3) an ultra vires act or abuse of power affecting the decision, (4) the exercise at a general meeting of voting rights that have been suspended by legislation other than the Act, provided the quorum or majority required to adopt the decision would not have been met but for the unlawful exercise of these voting rights, and (5) any other cause provided for by the Act.

Also of note is the sell-out right in favour of minority shareholders. Under the Squeeze-out Act, in the event of an individual or legal entity acquiring at least 95 per cent of the share capital of the company and subject to certain conditions being met, the remaining minority shareholders are entitled to exercise a sell-out right within three months of the required notification and publication of the acquisition.

**Benefits for long-term shareholders**

The Companies Act does not provide for any specific benefits (e.g., extra votes or dividends) for long-term shareholders, although such facilities may be agreed upon in a shareholders’ agreement or incorporated into the AoA.

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11 Article 67 bis of the Companies Act.
12 For further analysis on minority shareholders rights, see also Marc Elvinger, ‘Les minorités en droit des affaires’, Rapport Luxembourgeois (1) in Annales du droit luxembourgeois, 2005.
13 Article 12 septies of the Companies Act.
Shareholder approval of board decisions

While the Companies Act does not set out any specific areas in which board decisions must be approved by the shareholders, the AoA of the company may provide that all or certain board decisions must be ratified by the shareholders. It is, however, quite uncommon in listed entities for the board to need approval or seek ratification of its decisions that do not fall in the scope of statutory shareholder rights.

ii Shareholders’ duties and responsibilities

Controlling shareholders’ duties and liability

All shareholders have certain obligations by law, including the payment of shares, a proportional contribution to any losses suffered by the company and an obligation of loyalty.

In addition, the controlling shareholders are notably prevented from dictating or imposing an increase of the other shareholders’ obligations without their prior consent, although such principle has been considerably attenuated by the Squeeze-out Act, which granted the right to force the acquisition of shares held by minority shareholders to shareholders controlling at least 95 per cent of the share capital.

Institutional investors’ duties and best practice

While institutional investors must bear in mind potential reputational repercussions relating to their investments, there are no particular duties imposed specifically on institutional investors and no requirement for institutional investors to specifically consider third-party impacts in their investment decisions. However, a number of Luxembourg-based investors have signed the United Nations-supported Principles for Responsible Investment14 (an investor initiative in partnership with the United Nations Environmental Programme Finance Initiative and the United Nations Global Compact). The first of these six principles is to incorporate environmental, social and corporate governance considerations into investment analysis and decision-making processes. Furthermore, a growing number of investors – while not being signatories to the Principles for Responsible Investment – are taking the private initiative to take such risks into account.

Code of best practice for shareholders

Luxembourg has no official code of best practice for shareholders, although companies may draw up internal codes of best practice for their shareholders.

iii Shareholder activism

Shareholder activism is not a defined notion under Luxembourg law, and neither derivative actions nor proxy battles are common practice in Luxembourg.

iv Takeover defences

Takeover bids are covered by the Luxembourg Takeover Act of 19 May 2006 (transposing Directive 2004/25/EC). The scope of this act is limited to companies whose shares are traded on a regulated market in one or more Member States of the European Union. Although

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14 www.unpri.org.
Luxembourg law admits the principle of defensive measures, there has been no case law specifically covering the question as yet. In implementing any defensive measures, the board has an obligation to act in good faith with respect to the shareholders’ interest.

In the absence of a specific provision in a company’s articles of association requiring shareholder approval, the board may adopt defensive measures (e.g., issuing new shares within the limits of authorised capital or selling key assets) without the approval of the shareholders, provided that these measures are taken in the best interests of the company. The board may not prohibit the shareholders from accepting an offer.

**Shareholder and voting rights plans, and similar measures**

As a general rule, any increase of a Luxembourg company’s share capital is decided upon by the general meeting of shareholders. However, the articles of association of a Luxembourg public limited liability company may authorise the board of directors to increase the share capital up to a designated amount in one or more instalments. The authorisation to do so is only valid for a period of five years, but may be renewed by the general meeting of shareholders. As an inducement for an existing shareholder to purchase more shares, it may be decided to abandon any payment of share premium. Beyond that, there is no possibility for a company to offer a discount on the par value of shares to be issued.

**White knight defence**

In Luxembourg practice, the board of any company that is the subject of a takeover bid may seek out a third party with the purpose of such party making a counter-offer that is more favourable to the company. It can do so without the need for approval by the company’s shareholders.

**Staggered boards**

Directors of a Luxembourg public limited liability company shall be appointed for a term of office that may not exceed six years. However, directors may be removed from office by the general meeting of shareholders at any time and without stating reasons. As a result, a staggered board does not constitute a major obstacle for a hostile acquirer holding sufficient shares to make changes to the composition of the board.

**Contact with shareholders**

Pursuant to the Shareholder Act, listed companies must give at least 30 calendar days’ notice before holding a meeting (notwithstanding particular requirements under the Takeover Bid Act). By doing so, Luxembourg’s parliament has imposed a longer notice period than the 21-day notice period required under Directive 2007/36/EC. Should the quorum not be met at the first meeting, a second meeting must be convened at least 17 calendar days before the meeting is held. The convening notice must be published in the electronic compendium of companies and associations, a Luxembourg newspaper and other media in a manner that ensures the effective distribution of the information to the public throughout the European Economic Area. In the event that all the shares are registered, convening notices may be sent by registered letter to the shareholders, members of the board (or the management board and the supervisory board) and the statutory auditors. The Shareholder Act requires that, in addition to the agenda, date and place of the general meeting to be held, convening notices must also include:
a a clear description of the shareholders’ rights to put items on the agenda and to table draft resolutions, the procedure for voting by proxy and a form to be used for such purpose and, if provided for in the company’s AoA, the procedure to vote by electronic means;

b postal and email addresses that can be used to obtain documents in relation to the meeting;

c where applicable, a copy of the ‘record date’ as defined by the Shareholder Act (i.e., the date by which shareholders must register their shares in order to participate and vote at the general meeting). The date for listed companies is set at midnight CET on the 14th calendar day before the meeting. The shareholder must notify the company at the latest by such date of its intention to participate in the meeting; and

d the company’s website address, which must contain all of the above information, as well as a full copy of the draft resolutions.

The Shareholder Act and the Companies Act allow distance voting by shareholders in advance of the meeting, provided that the company expressly recognised this possibility and has outlined the related requirements in its AoA. The Shareholder Act details the content of the ballot paper, which must include, inter alia, the full identity of the shareholder, the content of the vote cast in advance, the agenda of the meeting and the deadline before which the ballot paper must be received.

The Shareholder Act imposes that proxy voting be offered to shareholders, under certain conditions, with the proxy holder having the same rights as the shareholder. The company has no obligation to verify that the proxy holder votes in accordance with the shareholder’s instructions.

V RECENT SHAREHOLDER ACTIVISM CAMPAIGNS

There are very few publicly available examples of shareholder activism in Luxembourg listed companies. The most prominent example was the takeover of Arcelor by Mittal, which was only finally made possible following the pressure of the shareholders. This concrete example, however, is already more than 10 years old, since the takeover took place in 2006.15

Furthermore, Deminor, a firm that is actively engaged in shareholder activism by representing minority shareholders and enforcing their claims accordingly, refers to a couple of Luxembourgish companies on its website. Their names are redacted for obvious disclosure reasons, which makes it almost impossible to identify the companies concerned, but it is quite likely that they already have or will target Luxembourg listed companies.16

On a side note, Luxembourg host a number of funds who invest in companies worldwide and are active as shareholders in these entities. As an example, Active Ownership is a fund, based in Luxembourg, that managed to replace certain members in the supervisory board of STADA.17

VI OUTLOOK

While there are not many publicly known campaigns of activist shareholders in Luxembourg, there is a trend in Luxembourg law for more transparency, accountability and increased shareholder rights, especially in listed companies, as described in more detail above. Whether the changes in Luxembourg law will lead to more public campaigns led by activist shareholders, time will tell. It is certain that boards will, however, have to be aware of potential involvement and action from their shareholders.
Chapter 7

NETHERLANDS

Paul Cronheim, Willem Bijveld and Frank Hamming

I OVERVIEW

Shareholder activism is a hot topic in many Dutch boardrooms. In 2017 alone, several activist campaigns aimed at Dutch companies made headlines in the Netherlands as well as abroad. Discussions between boards and shareholders on matters such as strategy, corporate governance and executive compensation are a regular feature within Dutch listed companies. This chapter gives an overview of the Dutch regulatory and legal framework in which listed companies and their shareholders operate, points out the key trends concerning shareholder activism in the Dutch market, and zooms in on a few topical battles between companies and activist shareholders.

II LEGAL AND REGULATORY FRAMEWORK

i Primary sources of law, regulation and practice

Dutch Civil Code

Book 2 of the Dutch Civil Code (DCC) is the primary source of law with regard to Dutch corporate law. As such, the DCC also covers the rights and duties of, and the division of powers between, the (one or two-tier) board and the general meeting of shareholders.

Dutch Corporate Governance Code

The Dutch Corporate Governance Code complements the DCC as it lays down principles and best practice provisions that regulate the relationship between the board and the general meeting. The Corporate Governance Code was revised in December 2016. The new Corporate Governance Code places greater focus on long-term value creation for the company and its business, which fits into the Dutch stakeholder model of corporate governance. The Corporate Governance Code applies on a comply-or-explain basis to, briefly stated, all Dutch listed companies.

Dutch Financial Markets Supervision Act and Market Abuse Directive

The Dutch Financial Markets Supervision Act (FMSA) contains, among others, disclosure obligations for listed companies, major shareholders and board members, and rules on

1 Paul Cronheim is a partner, and Willem Bijveld and Frank Hamming are senior associates at De Brauw Blackstone Westbroek NV. The authors have been involved in several cases described or referred to in this chapter. The authors do not express an opinion on these cases. This chapter takes into account events and developments in the Netherlands until 16 August 2017.
takeovers of listed companies. The FMSA has implemented numerous EU directives, such as the Transparency Directive and the Takeover Directive. As of 3 July 2016, several market abuse provisions have been removed from the FMSA, and are now dealt with in the Market Abuse Regulation (MAR). The MAR has direct effect in all EU Member States.

EU Alternative Investment Fund Managers Directive
For hedge funds and private equity funds specifically, the Alternative Investment Fund Managers Directive (AIFMD) is also relevant as it sets out rules and requirements for the authorisation, ongoing operation and transparency of AIFMs.

ii Division of powers – roles of the executive board, the supervisory board and the general meeting
Most Dutch public limited liability companies with a listing on the Amsterdam Stock Exchange have a two-tier board, consisting of an executive and a supervisory board.\(^2\) In a two-tier board governance model, the roles of the main corporate bodies can be summarised as follows:

The executive board manages the company and is in charge of the company’s aims, strategy, risk profile, results and corporate social responsibility issues. The executive board is accountable to the supervisory board and the general meeting of shareholders.

The supervisory board is charged with supervising and advising the executive board. The supervisory board has certain rights regarding the appointment, suspension and dismissal of executive board members, and the approval of the supervisory board is required for certain important resolutions. The supervisory board is accountable to the general meeting.

The general meeting monitors the performance of the executive and supervisory boards and can exercise the rights vested upon it in the DCC and the company’s articles of association. For example, in principle, a decision of the general meeting is needed for resolutions concerning issuance of shares, dissolution of the company, adoption of the annual accounts, board compensation, or amendment of the company’s articles of association. Transactions regarding an important change in the company’s identity or character (e.g., sale of a large division) require prior approval of the general meeting. The general meeting also has the power to appoint and dismiss board members. The company’s articles of association, however, may limit this power by providing that the appointment and dismissal occurs only upon a (binding) proposal from the executive or the supervisory board, or can only be taken with an increased majority requirement.

iii Stakeholder model as the guiding principle for the company’s boards
Under Dutch law, the executive and supervisory boards must always act in the best interests of the company and all its stakeholders, with a focus on long-term value creation. In practice, this means that Dutch boards have a fiduciary duty towards a wide range of stakeholders, including shareholders, employees, customers and suppliers, as well as the communities in which the company operates. This is in contrast with the shareholder model of corporate governance.

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\(^2\) Dutch law gives companies the option to structure their boards based on a one-tier model (single board with both executive and non-executive board members) or a two-tier model (separate executive and supervisory boards). One-tier board structures are often seen with Dutch public limited liability companies with a listing on the NYSE or NASDAQ, for example, Mylan NV, NXP Semiconductors NV and Unilever NV.
governance, in which the company’s main interest is to promote shareholder value; this model is predominant in jurisdictions with an Anglo-Saxon legal tradition. The Dutch stakeholder model also applies in takeover situations. When determining whether or not to support an unsolicited takeover proposal, the target’s boards must be guided by the interests of the company and all its stakeholders with a view to long-term value creation. As a logical consequence, the target company’s boards can reasonably reject an unsolicited takeover proposal even if this proposal is supported by (a majority of) shareholders. This guiding principle was recently confirmed in the case of *Elliott Advisors v. AkzoNobel* (see Section IV.iv).

**iv The activist shareholder’s toolbox**

This section provides an overview of tools that activist shareholders commonly use in pursuing their agenda. See Table 1 for the different levels of aggression of these tools.

**Table 1**

<table>
<thead>
<tr>
<th>Level of aggression</th>
<th>Tools</th>
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<tbody>
<tr>
<td>Least aggressive</td>
<td>Private discussions and engagement with the company</td>
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<td>Public engagement with the company</td>
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<td></td>
<td>Stakebuilding</td>
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<td>Right to participate in and vote at general meeting</td>
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<td></td>
<td>Right to place an item on the agenda</td>
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<tr>
<td>Most aggressive</td>
<td>Right to convene a meeting</td>
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<td></td>
<td>Initiate litigation</td>
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</table>

*Private discussions and engagement with the company*

In the Netherlands, the vast majority of shareholder activism starts with the activist engaging with the boards of the company in a private setting. This could take the form of informal one-on-one discussions or conference calls with the company’s CEO to discuss strategy and measures to maximise shareholder value, or more formal communication by sending private ‘Dear Board’ letters.

*Public engagement with the company*

When a shareholder activist is not satisfied with the company’s response to issues raised in private discussions, starting a public campaign may be an alternative strategy to realise its agenda. Generally, this includes the use of both traditional and social media, teaming up with other shareholders and institutional investors, and gaining support from the investor community at large.

In the Netherlands there have been numerous public campaigns by activist shareholders. The most notorious examples in this respect are the 2007 campaign of UK-based hedge fund, The Children’s Investment Fund against ABN AMRO and, more recently, the campaign of Elliott Advisors, the British arm of Paul Singer’s US hedge fund, against AkzoNobel in the context of an unsolicited approach from US paints maker PPG Industries.
**Stakebuilding**

For an activist shareholder to ramp up the pressure on the company's boards, enlarging its stake could be an effective tool. Even with a small stake, an activist shareholder may have significant influence.

When buying shares, the activist shareholder must observe the rules on disclosure of substantial shareholdings. Pursuant to the FMSA, a shareholder must immediately notify the AFM if its percentage of capital interest or voting rights exceeds (or falls below) a number of specific thresholds. Currently, the thresholds are: 3, 5, 10, 15, 20, 25, 30, 40, 50, 60, 75 and 95 per cent.³

An activist shareholder building up its stake should also be aware of the mandatory offer rules. Under the FMSA, a mandatory offer is triggered by a person, or a group of persons acting in concert, acquiring 'predominant control' (at least 30 per cent of voting rights). When a shareholder reaches this threshold it is, in principle, obliged to make an offer for all remaining shares of the target company.⁴

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³ For non-EU entities with a listing on the Amsterdam Stock Exchange that choose the Netherlands as their EU home Member State, the thresholds are: 5, 10, 15, 20, 25, 30, 50 and 75 per cent.

⁴ A mandatory offer will not be required if, within 30 days following the acquisition of control, the controlling party reduces its stake below the 30 per cent voting rights threshold, provided that the voting rights held by that controlling party have not been exercised during this period and the shares are not sold to another controlling shareholder of the company. The Enterprise Chamber may extend this period by an additional 60 days.

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**Right to participate in and exercise right to vote at general meeting**

Every shareholder has the right to participate in and exercise its voting right at the company's general meeting. Generally, the holder of one share is entitled to one vote. The articles of association may stipulate a voting record date 28 days prior to a general meeting. The record date therefore determines which shareholders are entitled to vote at a general meeting. Shareholders may vote in person or by proxy, which may be granted electronically.

In the Netherlands a 'vote no' campaign has been seen on numerous occasions. In 2016, hedge fund Highfields Capital Management opposed the plans of insurer Delta Lloyd to pursue a rights offering. Another example is the 2016 'vote no' campaign of Dutch shareholders' association VEB against the pay package for Shell board members.

**Right to place an item on the agenda**

Shareholders holding individually or jointly 3 per cent of the company's stock have a right to submit items for the agenda of the general meeting. The company's articles of association can prescribe a lower percentage. The company can refuse to put an item on the agenda of the general meeting if this contravenes the standards of reasonableness and fairness. The Corporate Governance Code stipulates that a shareholder may exercise this right only after it has consulted the executive board. See in this respect also the company's right to invoke a 180-day response time (see below).

A notable example in this respect is the case concerning ASMI, a Dutch multinational active in the semiconductor industry. Hedge funds Fursa and Hermes put a proposal on the agenda of the 2008 general meeting to replace the CEO and most of the supervisory board members. Further, in 2017, Dutch civil rights group Follow This put a 'green' resolution on
the agenda of the general meeting of oil giant Shell in which it requested to set and publish targets for reducing greenhouse gas emissions in alignment with the goal of the Paris Climate Agreement to limit global warming to well below 2°C.

Shareholders can submit items for the agenda either as a voting or as a discussion item. However, shareholders cannot force the board to put an item on the agenda as a voting item if the general meeting does not have the power to resolve upon the topic; in other words, shareholders cannot use this right to organise referenda or ‘motions’ on topics belonging to the primacy of the boards. See the 2016 case of Boskalis v. Fugro, discussed below in Section IV.iii.

**Right to convene a shareholders’ meeting**

Shareholders holding individually or jointly 10 per cent of the company’s stock (the company’s articles of association can prescribe a lower percentage) may request the company’s boards to call a general meeting and put such items on the agenda as requested by these shareholders. If the boards refuse to do so, such shareholders could request authorisation from the district court to call a general meeting. The boards can refuse to call a general meeting if they are of the opinion that the request contravenes the standards of reasonableness and fairness, or does not meet the ‘legitimate interest’ test. A prominent example of activists exercising this right is Centaurus and Paulson & Co, who called shareholders’ meetings at Dutch industrial conglomerate Stork to vote on alternative strategies, including a public-to-private transaction, and on the dismissal of the entire executive board. In 2017, Elliott Advisors also invoked the right to call a general meeting in its crusade against AkzoNobel.

**Initiate litigation**

Shareholder litigation typically takes place in inquiry (mismanagement) proceedings before the Enterprise Chamber. Any shareholder that alone or acting jointly holds sufficient shares may initiate inquiry proceedings and request the Enterprise Chamber to order an inquiry into the policy of the company by independent court-appointed investigators.

The Enterprise Chamber may order an inquiry into the policy of a company if it is demonstrated that there are reasonable grounds to believe that there is mismanagement. This may consist of, for instance, abuse of minority shareholders, insufficient disclosure to shareholders, conflicts of interest of board members, or the unjustified use of takeover defences.

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5 A shareholder can also initiate summary proceedings before the competent Dutch district court. However, summary proceedings are much less common, since the Enterprise Chamber is regarded as the specialised court regarding corporate litigation.

6 If the company’s issued share capital does not exceed €22.5 million of aggregate nominal value, persons who alone or acting jointly hold shares representing at least 10 per cent of the issued share capital or representing an aggregate nominal value of at least €225,000; or if the company’s issued share capital exceeds €22.5 million of aggregate nominal value, persons who alone or acting jointly hold shares representing at least 1 per cent of the issued share capital or, if the shares are listed, representing an aggregate value of at least €20 million based on the closing price of the last trading day.

The threshold for an activist shareholder to have standing in the Enterprise Chamber can be extremely high as a result of the capital structure of the company. This was the case at Mylan (which was the subject of an unsolicited approach by Teva) where the nominal value of each share was set at €0.01 and the aggregate nominal value of the issued share capital did not exceed €22.5 million. As a result, a shareholder wanting to initiate inquiry proceedings would at the time need to hold shares with a market value of more than US$1 billion to reach the threshold of €225,000 in aggregate nominal value.
The Enterprise Chamber may at any time during the proceedings order interim measures. The interim measures ordered by the Enterprise Chamber may play an important role in takeover situations and activist campaigns. Interim measures may include suspending executive or supervisory board members, appointing interim executive or supervisory board members, and suspending shareholders’ voting rights. These interim decisions tend to carry great weight and, despite being provisional, are often decisive in the outcome of the matter.

The Enterprise Chamber has repeatedly demonstrated its willingness to act promptly and take rigorous action in takeover and activist situations. In the context of takeovers of public companies, shareholder interest groups and other activist shareholders often use (the threat of) inquiry proceedings to protect the interests of minority shareholders, for example, against the boards of the target company (some or all members of which may no longer be regarded as independent) or a majority shareholder.

v The company’s toolbox

Dutch corporate law provides for several structural mechanisms that enable a company to prevent or deter shareholder activism. Many Dutch listed companies have adopted such mechanisms in their articles of association. Examples include the use of listed depositary receipts without voting rights, priority shares with certain control rights, shares with double or multiple voting rights, voting caps, the use of change of control clauses in financing arrangements, golden parachutes, and structures that limit shareholders’ control of the board. However, no company is immune to shareholder activism even with such structural mechanisms in place. In the following, we describe some typical response measures that a targeted company could use.\(^7\) See Table 2 for different levels of aggression regarding these tools.

<table>
<thead>
<tr>
<th>Level of aggression</th>
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<tr>
<td>Least aggressive</td>
<td>Enter into a dialogue with the activist shareholder</td>
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<td></td>
<td>Get the company’s message out to shareholders</td>
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<td></td>
<td>Relationship agreement</td>
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<td></td>
<td>Just say ‘No’</td>
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<td></td>
<td>Invoke the response time</td>
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<td></td>
<td>‘Put up or shut up’ rule</td>
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<tr>
<td></td>
<td>Issue ordinary shares</td>
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<tr>
<td></td>
<td>Sale of treasury shares</td>
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<tr>
<td>Most aggressive</td>
<td>Trigger call-option on anti-takeover preferred shares</td>
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\(^7\) According to the Dutch Supreme Court, defensive measures can be justified if they are necessary with a view to the (long-term) continuity of the company and its various stakeholders, provided that the measures are taken in order to maintain the status quo, and provided that they constitute an adequate and proportional response. Implementing defensive measures for an indefinite amount of time, generally, will not be justified.
Enter into a dialogue with the activist shareholder

The most informal response measure for a company is to enter into a dialogue with the activist shareholder. This provides the opportunity for the company’s boards to assess the activist’s views on the company’s strategy, and shows their willingness to listen to the activist shareholder’s concerns and suggestions. Building a relationship of trust and creating consensus with the activist shareholder can be a strong tool from which the company can benefit in the long run. Entering into discussions with the activist shareholder may give the boards ‘breathing space’ and time to determine its strategy if private discussions do not result in a long-term solution.

Get the company’s message out to shareholders

A company dealing with shareholder activism could reiterate and emphasise the company’s current or revised strategy (in combination with a ‘just say no’ strategy). The executive board can give presentations to (key) shareholders and potential investors in which it explains that its current or revised strategy is in the best interest of the company and is the preferred path to maximise value for its shareholders. Gaining the support of (other) shareholders might prove pivotal in fending off an activist shareholder.

Relationship agreement

A growing trend in the Dutch market is that listed companies conclude relationship agreements with large and vocal shareholders. In a relationship agreement, the company and the shareholder agree on topics such as strategy, governance, financing and exchange of information. The company could give one or more supervisory board seats to the activist shareholder in order to gain support from the activist for the company’s strategy. Although the concluding of a relationship agreement provides a (temporary) ceasefire between a company and an activist shareholder, the boards must be aware of the fact that the representation of the activist shareholder on the board inevitably has an impact on the dynamics in the boardroom. Examples include the relationship agreements between telecom company KPN and its Mexican suitor América Móvil (see Section IV), and between critical materials company AMG and hedge fund RWC (see Section IV).

Invoke response time

Pursuant to the Corporate Governance Code, the executive board may invoke a 180-day response time when shareholders request certain agenda items that could lead to a change in the company’s strategy, such as the request to appoint a new CEO or dismiss an executive or supervisory board member. The executive board must use the response time for further deliberation and constructive consultation with the shareholder involved, and to explore alternatives. Case law has further defined that, in principle, shareholders must respect the response time as invoked by the executive board; the response time may only be set aside if there are sufficiently important reasons for this. The response time provides the executive board with some ‘breathing space’ and the opportunity to enter into a dialogue with the activist or seek alternative measures.

‘Put up or shut up’ rule

The objective of the ‘put up or shut up’ rule is to prevent a listed company from being the object of rumour and speculation regarding a potential public offer for its securities. At the
request of the potential target company, the Dutch financial markets supervisor AFM can impose disclosure obligations on an entity or person that has published information that could create the impression that it is considering the preparation of a public offer. This could be, for example, an activist shareholder who is building up a stake in a company. Following the AFM’s instructions, the potential bidder must ’put up’ or ’shut up’, that is, within a given period either announce a public offer for the target company, or indicate that it does not intend to launch a public offer, in which case it will be prohibited from announcing or launching an offer for the target company for a period of six months.

**Issue ordinary shares**

As noted earlier, the general meeting has the power to issue ordinary shares. However, pursuant to the DCC, the general meeting may delegate this power to another corporate body for a period of up to five years. The same applies for the limitation and exclusion of pre-emptive rights of existing shareholders. Typically, as is the case for the vast majority of Dutch listed companies, the general meeting authorises the executive board to issue ordinary shares. In general, the authorisation stipulates that the executive board can issue a certain percentage of shares for ‘general corporate purposes’ and a certain percentage for the purpose of ‘mergers and acquisitions’. To defend itself from activist shareholders or hostile bidders, the executive board could decide to issue shares to a ‘friendly’ third party – for example, a long-time strategic party. Although perceived as aggressive, such an issuance dilutes the activist shareholder’s stake in the company, and accordingly reduces its influence.

**Sale of treasury shares**

When a company holds a certain number of its own shares (for example, as a result of a share buy-back) and these shares have not yet been cancelled (treasury shares), a company may sell these to a ‘friendly’ third party. As a result, similar to issuing ordinary shares, the third party acquires a stake in the company and dilutes the shareholding of the activist shareholder. Alternatively, a company could use treasury shares as consideration when purchasing certain assets from a third party. Depending on the specific situation, the company’s boards must be aware that this defensive measure, similar to issuing ordinary shares, is likely to be perceived as aggressive not only by existing shareholders, but also by the investor community and regulators.

**Defence foundation: issuing anti-taking preferred shares**

The most common Dutch defensive measure consists of the possibility for a company to issue preferred shares to an independent, yet ‘friendly’, foundation. The company grants the foundation a call option, pursuant to which the foundation can effectively obtain up to 50 per cent of the votes.

The board of the foundation must be independent from the company. Accordingly, the company is not able to determine whether, and if so when and to what extent, the call option is exercised – the foundation has to make its own decision in accordance with its objectives.

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8 In general, a prospectus is required for both the offering and the listing of shares. Under Dutch law, companies can make use of an exemption to publish a listing prospectus if it issues less than 10 per cent of the company’s stock to qualified investors during a 12-month period, or to publish an offering prospectus if it issues shares to fewer than 150 retail investors.
as stated in its articles of association. In general, the foundation’s articles of association state that the foundation serves the interest of the company and its stakeholders by safeguarding, among others, the continuity, independence and identity of the company and its business.

Foundations rarely exercise their call option, which may perhaps be partly explained by the fact that the presence of a defence foundation alone may have a deterrent effect on a hostile bidder. One of the few and most recent of examples in which a defence foundation exercised its call option concerns the defence foundation of KPN, which exercised its call option as a reaction to the announcement of América Móvil to launch a hostile bid. Another example is the defence foundation of global pharmaceutical company Mylan NV (which has its registered office in the Netherlands), which made use of its call option in order to deter Teva Pharmaceutical Industries. Examples of hostile approaches where a foundation was in place, but the foundation did not exercise its call option, include Staples/Corporate Express (2008), Boskalis/Smit (2009), and Mexichem/Wavin (2012).

Initiate litigation

Although not common, a targeted company can also initiate summary proceedings before the district court or enquiry proceedings before the Enterprise Chamber. In such proceedings, the company can request interim or provisional measures to neutralise the attack or campaign of an activist shareholder.

III KEY TRENDS IN SHAREHOLDER ACTIVISM

i General overview

Shareholder activism is a hot topic in boardrooms in the Netherlands, even though in absolute terms the number of activist shareholder campaigns is relatively limited when compared to those in the US and the UK. Shareholder activism reached its first peak between 2000 and 2007, when various US and UK-based hedge funds targeted listed companies in the Netherlands. Examples included the financial conglomerate ABN AMRO, Dutch industrial giants ASMI and Stork, and other well-known multinationals such as Ahold and Philips.

Shareholder activism is currently approaching pre-crisis levels as a result of market and economic conditions and a boost in M&A activity in the past few years. Market studies mention in particular the following key drivers for increasing post-crisis shareholder activism in Europe:9

a access to debt financing against historically low interest rates;
b high levels of cash on company balance sheets;
c stagnating revenues resulting in increased pressure from investors to create shareholder value through dividend policy, operational improvements and changes in strategy;
d peak in M&A activity that supports activists in pushing companies to merge, acquire or be acquired, divest, or spin off non-core businesses; and
e less tolerance among the public and investors for poor governance and high executive compensation.

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9 See, for instance, JP Morgan 2014, ‘Knocking on the door – shareholder activism in Europe’.
Since 2010, we have seen nearly 20 publicly disclosed activist shareholder campaigns in the Netherlands. The total level of shareholder activism is most likely higher, since shareholder activism in the Netherlands predominantly takes place behind closed doors.

In this section, we describe the activist shareholder landscape in the Netherlands, as well as the main trends observed in the past decade. Given the relatively low number of activist shareholder campaigns in the Netherlands, trends described in this section are not only based on statistics, but also on more subjective observations and anecdotal evidence.

ii Activist shareholders: the usual suspects

Activist shareholders in the Netherlands are predominantly US or UK-based hedge funds with a European or global investment focus. Activism comes from both pure-play activist hedge funds, which acquire a stake in a company and subsequently put pressure on the management to adopt their views to maximise shareholder value, and multi-strategy hedge funds, for which shareholder activism is only one of their strategies. Over the past decade, some of the largest global activist hedge funds have been active in the Netherlands; the most prominent examples are listed below:

<table>
<thead>
<tr>
<th>Activist shareholder</th>
<th>Targets</th>
<th>Objective</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Children's Investment Fund</td>
<td>ABN AMRO</td>
<td>Pushing for a sale of ABN AMRO</td>
</tr>
<tr>
<td>Centaurus</td>
<td>Stork, Ahold (together with Paulson &amp; Co) and SBM Offshore</td>
<td>Pushing for a split-up (Stork); sale of US activities (Ahold); requesting a different financing structure (SBM Offshore)</td>
</tr>
<tr>
<td>Hermes</td>
<td>ASMI, and Océ (together with Orbis)</td>
<td>Pushing for a split-up and changes in board composition (ASMI); litigation against recommended takeover (Océ)</td>
</tr>
<tr>
<td>Third Point</td>
<td>DSM and Philips</td>
<td>Suggesting a split-up (DSM); stakebuilding (Philips)</td>
</tr>
<tr>
<td>RWC</td>
<td>Corbion and AMG</td>
<td>Stakebuilding (Corbion); discussions about strategy, board composition and board compensation (AMG)</td>
</tr>
<tr>
<td>Paulson &amp; Co</td>
<td>Stork (together with Centaurus), KPN and Ahold (together with Centaurus)</td>
<td>Pushing for a split-up (Stork); stakebuilding (KPN); sale of US activities (Ahold)</td>
</tr>
<tr>
<td>JANA Capital</td>
<td>Philips and TNT Express</td>
<td>Talks on performance and capital structure (Philips); pushing for a sale and changes in board composition (TNT Express)</td>
</tr>
<tr>
<td>Highfields Capital Management</td>
<td>Delta Lloyd</td>
<td>Vote ‘No’ campaign against Delta Lloyd’s proposed rights offering</td>
</tr>
<tr>
<td>TT International</td>
<td>TomTom</td>
<td>Suggesting a split-up of TomTom into parts</td>
</tr>
<tr>
<td>Eminence Capital</td>
<td>ASMI</td>
<td>Pushing for sale of ASMI’s 34% stake in Asian subsidiary ASM PT</td>
</tr>
<tr>
<td>Elliott Advisors</td>
<td>AkzoNobel; NXP</td>
<td>Pressing for a takeover by PPG (AkzoNobel); contesting the agreed offer price in the takeover by Qualcomm (NXP)</td>
</tr>
<tr>
<td>PGGM, CalSTRS and City of New York and State of New York Pension Funds</td>
<td>Mylan</td>
<td>Vote ‘No’ campaign regarding board nominees and executive compensation package</td>
</tr>
</tbody>
</table>

Besides these usual suspects, we have seen increased attention to shareholder activism from institutional investors. The (potential) role of Dutch pension funds is especially noteworthy, since together they hold approximately €1,200 billion in assets under management (AUM) and hold substantial equity positions in Dutch listed entities.
After the crisis, European and Dutch politicians called upon institutional investors to take a more active role as shareholders. Even though this did not result in legislative changes, the pressure fuelled the increased engagement of Dutch pension funds in the debate with the companies they invest in. Recently, Dutch politicians reiterated that Dutch pension funds should, as shareholders, support (Dutch) companies with a focus on long-term value creation. Dutch pension funds responded negatively to this open invitation, stating that their (sole) duty is to properly manage their investments rather than to protect Dutch listed companies.

Activism from institutional investors in the Netherlands focuses generally on corporate governance issues, such as remuneration policy and corporate social responsibility. Most activism from institutional investors takes place behind closed doors. Nevertheless, an example of institutional investors publicly expressing their position in a takeover situation is the 2014 public campaign that Dutch pension fund manager APG, together with Dutch insurer NN, waged against animal and fish feed company Nutreco. APG and NN disagreed with the board’s decision to sell the company to SHV, claiming that the offer significantly undervalued Nutreco’s business while, at the same time, Cargill and private equity firm Permira had expressed their interest in Nutreco (although they did not make an offer). In a public letter, APG and NN questioned the Nutreco boards’ decision to sell the company to SHV. Eventually, SHV raised its offer and APG and NN sold their shares.

Although we see that institutional investors are not unwilling to play a more active role as shareholders, institutional investors typically refrain from exercising public pressure on the companies they invest in and do not tend to carry out aggressive campaigns in the same way as pure-play activist hedge funds.

iii Targets for activist shareholders: size is no deterrence

One of the recent global trends also observed in the Netherlands is activist shareholders expanding their focus to some of the largest companies. This trend is largely driven by the increased financial capacity of the large activist hedge funds. In the early 2000s, there were only a few activist funds with AUM in the US$10–15 billion range. Currently, more than 10 funds manage over US$10 billion. On aggregate, activist funds worldwide are estimated to hold at least US$200 billion in AUM.

In the Netherlands, this trend was first observed with hedge funds targeting Ahold in 2006 (market cap at that point over €10 billion in 2006), ABN AMRO in 2007 (market cap at that point over €50 billion) and Philips in 2007 (market cap at that point over €30 billion). More recently, Shell (market cap over €180 billion) was targeted in 2016 and 2017 by activist shareholders who were pushing for more focus on sustainable energy and a business model that is more climate-change proof. AkzoNobel (market cap around €20 billion) and NXP (market cap around €36 billion) were targeted by Elliott Advisors in 2017. A company’s large size thus does not seem to deter activist shareholders.

iv Objectives of activist shareholders: five common themes

We see five common themes in activist campaigns in the Netherlands, largely in line with US and UK practice.

**Conglomerate discount**

Several Dutch companies were pressured by shareholders to unlock shareholder value by divesting or spinning off non-core divisions or breaking up the company. The most well-known examples include Ahold, where Paulson & Co and Centaurus demanded the
sale of Ahold’s US activities; Stork, where Paulson & Co and Centaurus pushed to break up the company; DSM, where Third Point pushed for a split-up; and ASMI, where Hermes campaigned for a split-up of the company’s front-end and back-end activities.

**M&A situations**

Although less common, there are examples of activist shareholders pushing for mergers and acquisitions, such as a sale of the company. TCI’s public ‘Dear Board’ letter to ABN AMRO is notorious in this respect as it brought the bank into play, resulting in the largest ever takeover battle in the Netherlands. Other notable examples include AkzoNobel, where hedge fund Elliott Advisors pressured the company’s boards to engage with PPG after PPG’s unsolicited proposals to takeover AkzoNobel, and ASMI, where Eminence Capital urged management to sell the company’s 34 per cent stake in Asian subsidiary ASM PT.

**Strategic**

Activist investors have pushed companies to make strategic changes and to improve their performance. This is often part of campaigns aimed at breaking up or selling the company, as discussed directly above. A prominent example is ASMI, where activist hedge funds Hermes and Fursa criticised the front and back-end strategy of ASMI.

**Inefficient balance sheet**

In several cases activist investors demanded a return of capital to the shareholders in the form of a share buy-back or dividend payment. Well-known examples include Philips, where shareholders demanded that the capital raised by spinning off Philips’ semiconductors unit NXP be returned to the shareholders; and SBM Offshore, where Centaurus pressured the board to adopt a different financing structure for its fleet.

**Governance or board composition**

Activist shareholders often target the governance structure and composition of the company’s boards. Demands made by activist shareholders may include being represented on the supervisory board, dismissal of certain board members, amending executive compensation, or challenging the company’s defence measures. Examples include TNT Express, where hedge fund JANA Capital requested the appointment of three new supervisory board members, AMG, where RWC questioned AMG’s governance and remuneration practices, and Boskalis, which requested Fugro to dismantle (one of) its defence mechanisms.

**Tactics used by activist shareholders**

Another trend we observe, following the landmark cases concerning ABN AMRO in 2007 and ASMI in 2010, is that activist shareholders deploy different strategies to force changes in the strategy of target companies.

**Tactics used until ABN AMRO (2007) and ASMI (2010): proposals at general meetings to change the company’s strategy**

Between 2005 and 2010, several large activist hedge funds initiated aggressive US-style campaigns in the Netherlands. These hedge funds typically started their campaigns with
‘Dear Board’ letters in which they presented their ideas to the company. As a next step in their campaign, these hedge funds generally submitted shareholder proposals at the general meeting to split up or sell the company or to change the company’s strategy.

In several cases, the activist shareholders and the company ended up in court to determine who had the final say on the matter. In landmark cases ABN AMRO and ASMI, the Dutch Supreme Court ruled that the company’s strategy is within the remit of the executive board, subject to the approval of the supervisory board. As a result, shareholders cannot impose on the executive board a strategy that must be followed. If shareholders disagree with the execution of the strategy by the executive board, or otherwise disagree with how the executive board is running the company, they may attempt to exercise the specific powers vested in them in the DCC and the company’s articles of association, such as the power to appoint and dismiss board members. These landmark cases most likely led to a change in how activist shareholders approach Dutch listed companies.

**Tactics used in recent years: private and public engagement with the boards to force a change in the company's strategy**

After ABN AMRO and ASMI, activist shareholders rarely put forward shareholder resolutions directly aimed at forcing a change in strategy or breakup of the company. Instead, activist shareholders tend to build up pressure on the company by acquiring a stake, sometimes demanding seats on the board, and trying to influence the company’s strategy through private or public engagement with the boards.

Typically, activists aiming to change the company’s strategy put pressure on the boards by challenging them on a broad spectrum of matters, such as the appointment and dismissal of board members, operational performance, and board compensation. In an aggressive campaign, activist shareholders may demand that their own candidates replace current board members.

As an example, this strategy was followed by US-based activist hedge fund JANA Capital against TNT Express. JANA put pressure on the board of TNT for a long period of time, both publicly and privately, in an effort to improve TNT’s operational performance, likely to prove its potential to possible buyers. JANA demanded seats on the supervisory board, including one for a former M&A executive of UPS, which may have been seen by some as an attempt by JANA to arrange a deal between TNT and UPS (TNT was eventually acquired in a friendly deal by FedEx in 2016). More recently, the tactic of trying to influence the strategy of the company by putting pressure on the boards was adopted by Elliott Advisors against AkzoNobel.

In summary, direct confrontations between boards and activist shareholders at general meetings are now generally restricted to topics on which the general meeting has the power to resolve, such as board composition, annual accounts, compensation policy and board members’ compensation. This trend seems to be largely influenced by landmark cases ABN AMRO and ASMI, case law that was recently confirmed by the Enterprise Chamber in Elliott Advisors v. AkzoNobel. In addition, in the Fugro case, Dutch courts barred shareholders from putting pressure on the executive board by demanding a ‘referendum’ vote on a topic on which the general meeting cannot resolve.
IV RECENT SHAREHOLDER ACTIVISM CAMPAIGNS

In this section, we describe some illustrative examples of the trends regarding shareholder activism in the Netherlands.

i América Móvil v. KPN (2014)

An example of a strategic party acting as an activist shareholder is found in the América Móvil v. KPN case. Over the course of two years, América Móvil built up a stake of 29.9 per cent (through a partial public offer) and eventually announced a hostile offer for all KPN shares in order to gain full control. The takeover was countered by KPN’s defence foundation based on, among others, purported national security interests. In its battle, KPN deployed numerous defensive mechanisms, including divesting its crown jewel E-Plus to Telefónica, and eventually KPN concluded a relationship agreement with América Móvil in an effort to (at least temporarily) bury the hatchet. América Móvil did not pursue its offer, and it eventually sold its stake and moved on to acquire full control of Telekom Austria in order to gain a foothold in the European telecom market.

ii RWC v. AMG (2015)

Hedge fund RWC, run by former managers of hedge fund Hermes, built up a stake of approximately 20 per cent in global critical materials company AMG and initiated discussions regarding AMG’s strategy, governance and remuneration practices. AMG and RWC eventually reached a ceasefire and signed a relationship agreement. The relationship agreement included the endorsement of AMG’s strategy by RWC, the nomination of RWC’s managing director and another person for appointment as member of AMG’s supervisory board, and the undertaking of AMG to review its prevailing executive compensation policy.10

iii Boskalis v. Fugro (2016)

Dutch dredging contractor Boskalis built up a stake of more than 20 per cent in Dutch geoscience service provider Fugro and subsequently submitted an agenda item for the general meeting to urge the boards to take down one of Fugro’s defence measures. The board of Fugro agreed to put the proposal of Boskalis on the agenda of the annual general meeting for discussion, but not as a voting item, since decisions regarding defensive measures are the exclusive domain of the boards. Boskalis challenged this decision in court, but without success in both first instance and on appeal.

iv Elliott Advisors v. AkzoNobel (2017)

In 2017, Dutch paints maker AkzoNobel received three unsolicited takeover proposals from its US competitor PPG Industries. Hedge fund Elliott Advisors demanded that AkzoNobel entered into discussions with PPG. After AkzoNobel rejected the first two proposals from PPG, Elliott Advisors requested – together with certain other shareholders – AkzoNobel to convene a shareholders’ meeting with the sole agenda item being the dismissal of the chairman of the supervisory board of AkzoNobel. This request was rejected by AkzoNobel. After AkzoNobel subsequently rejected PPG’s third proposal, Elliott filed a petition with the

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Enterprise Chamber in Amsterdam requesting an inquiry into AkzoNobel’s conduct and policies, and the introduction of certain interim measures, including an extraordinary general meeting to vote on the dismissal of the chairman of AkzoNobel’s supervisory board, whom Elliott believed was standing in the way of a discussion with PPG. The Enterprise Chamber dismissed Elliott’s requests and set out important viewpoints for corporate governance in takeover situations. Firstly, the Enterprise Chamber ruled that a company’s response to an unsolicited takeover proposal falls under the authority of the executive board to determine the company’s strategy, under the supervision of the supervisory board. The company’s boards do not have to consult shareholders prior to its response to an unsolicited takeover proposal (although it remains accountable to its shareholders for its corporate actions). Secondly, the ruling made clear that there is no general obligation for a target company to enter into substantive discussions or negotiations with a bidder that has made an unsolicited takeover proposal, even in the case of a serious bidder making a serious bid. Whether substantive discussions or negotiations with a bidder are required depends on the actual circumstances, for example, to what extent the company can assess the proposal without substantive discussions, the bidder’s strategic intentions, and whether or not the target company has decided to abandon its standalone strategy. After this landmark ruling by the Enterprise Chamber, on 1 June 2017, PPG announced the withdrawal of its takeover proposal for AkzoNobel.

In July 2017, Elliott initiated proceedings before the Amsterdam District Court requesting an extraordinary general meeting with the dismissal of the chairman of AkzoNobel as sole agenda item. The Amsterdam District Court rejected such request in early August 2017. On 16 August 2017, AkzoNobel announced that it reached a standstill agreement with Elliott.11

PGGM, The California State Teachers’ Retirement System (CalSTRS), and City of New York and State of New York Pension Funds v. Mylan (2017)

Four pension funds from the Netherlands and the US initiated a public ‘vote no’ campaign against pharmaceuticals company Mylan (which is incorporated in the Netherlands). The pension funds campaigned against the nomination of six long-standing directors (11.8 years tenure) and the executive compensation package proposed by Mylan’s board, arguing that these directors should be held accountable for its costly record of compensation, risk and compliance failures. The ‘vote no’ campaign was initiated against the backdrop of a public and regulatory debate triggered by the price-hiking controversy involving Mylan’s EpiPen. The campaign had limited success. The appointment of the six contested directors was approved at the annual general meeting but a significant majority of the general meeting voted against the executive compensation package; the latter vote was, however, non-binding and only of an advisory nature.

V REGULATORY DEVELOPMENTS

i Sentiment towards more protection for Dutch multinationals

The relatively high number of takeover attempts involving Dutch multinationals in recent years has fuelled a political debate whether those companies should be more protected against foreign takeover threats. At first, after the takeover battle for KPN in 2014 and the

acquisition of Dutch cyber security company Fox-IT by UK-based information assurance firm NCC in 2015, a draft bill was published aimed at safeguarding particular sectors that are of vital importance to national security and public order, such as the telecommunications sector, against undesirable control by third parties. After recent unsolicited takeover attempts involving Dutch giants PostNL (2016), Unilever (2017) and AkzoNobel (2017), the focal point of the political debate has expanded to protection of Dutch companies in general. Backed by numerous (former) captains of industry, the Minister of Economic Affairs proposed to give companies more tools to fend off hostile bidders and activist shareholders that pose an actual threat to the company’s objective to serve the interest of all stakeholders with a focus on long-term value creation. At this stage, the Minister of Economic Affairs indicated that the preferred option under consideration is to include a one-year response time in the Dutch Civil Code. It remains to be seen whether the current political debate will ultimately lead to legislative changes.

ii   New Dutch Corporate Governance Code
On 8 December 2016, a new Dutch Corporate Governance Code was introduced. The Code has been significantly revised in both structure and content, and is based on a number of specific themes. It places greater emphasis on long-term value creation and risk management, and it introduces culture as a new element. With regard to the latter, the company’s executive board should actively promote a culture of openness and approachability within the organisation, and involve the supervisory board in this. It should promote the company’s values through leading by example. Together with the company’s obligation to formulate a strategy in line with long-term value creation, this fits into the Dutch stakeholder model of corporate governance.

iii  EU Shareholder Rights Directive
At the European level, the European Council adopted a revised version of the EU Shareholder Rights Directive, applicable as from June 2019. Topics include the identification of shareholders, rules that require investors to be transparent about how they invest and how they engage with companies they invest in, voting rights concerning executive compensation (say on pay), and transparency on and shareholder engagement in related party transactions.

VI  OUTLOOK
Over the past decade, there have been a number of high-profile cases where activist shareholders have pushed companies to break up, to sell divisions and to change their corporate governance structures. Following decisions of the Dutch Supreme Court in ABN AMRO and ASMI, activist shareholders (while still pursuing the same objectives), seem to have shifted their approach to some extent from confrontations over the company’s strategy in general meetings, to private and public engagement with the boards in order to change the target company’s direction. The 2017 landmark case concerning AkzoNobel

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12 For detailed commentary on the new Dutch Corporate Governance Code, see: RH Kleipoool, M van Olffen and BW Roelvink, Corporate Governance in the Netherlands – A practical guide to the new Corporate Governance Code (2017).
continues the trend begun by the Supreme Court in the *ABN AMRO* and *ASMI* cases. In its activist campaign against AkzoNobel, Elliott Advisors has been, however, considerably more aggressive than other recent campaigns in the Dutch market. Shareholder activism is expected to continue to be a hot topic in many Dutch boardrooms. Apart from the usual suspects, such as hedge funds, mutual funds and other event-driven institutions, institutional investors and shareholder lobby groups seem poised to take a more active role in the corporate governance debate within Dutch listed companies.
I OVERVIEW

Shareholder activism in the Western sense existed in Russia between 2000 and 2008. In the 1990s, some isolated issues had been focused on by institutional investors. Since around 2008, shareholder activism has been dying down, except for some action against state companies that is politically influenced, and there are currently no signs of a revival or of changes in law favourable to investors being adopted. Although the Russian government has conducted and announced privatisation plans that would benefit from an increase in investor interest, there is no sign that the Russian government intends to facilitate shareholder activism.

II LEGAL AND REGULATORY FRAMEWORK

Companies with their main business in Russia frequently use foreign stock exchanges to attract investors. Sometimes that is linked with foreign corporate vehicles being used for the listing. More frequently, however, the corporate forms used are Russian. Sometimes, there is a conflict between the rules in Russia and the listing rules. In case of a conflict, the manner in which Russian law and practice treat questions and issues is likely to prevail. Accordingly, the following discussion of Russian corporate law, in our view, is relevant for companies with their main business in Russia. In addition to Russian corporate law, sometimes, Russian rules on listing would be likely to be relevant to questions related to shareholder conflicts.

Under Russian joint stock law (only joint stock companies are entitled to list), each shareholder has the right to participate in the shareholders’ meeting. Such shareholders’ meeting is to be held in person and to deal with the main issues relating to the life of the company, such as, for instance, annual reports, the approval of the activity of management, capital increases and transactions that exceed a certain value. Generally, decisions are to be taken with a simple majority of votes, with some, like the increase in charter capital, requiring a 75 per cent majority. Accordingly, activist shareholders could potentially influence decision making. Anecdotal evidence, however, suggests that the shareholders who own the majority

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1 Max Gutbrod is a partner at Baker McKenzie – CIS, Limited.
3 In the public domain, a conflict between Kazakh and international listing rules has played some role, see: www.londonstockexchange.com/exchange/news/market-news/market-news-detail/KMG/12917715.html (accessed on 5 September 2016). Most of the information here and in the following footnotes is general information that is in the public domain as there does not seem to be a consistent overview of shareholder activism in Russia.
of the voting shares are normally represented at the shareholders’ meetings. Indeed, typically Russian companies are owned by a single or a few shareholders. As a consequence, it is unlikely that activist shareholders obtain a majority at voting. Also, decisions will be invalidated only if they would not have been taken had it not been for the violation. Accordingly, reversal of decisions of a shareholders’ meeting is the exception rather than the rule. As a consequence of all this, not many substantive discussions take place at shareholders’ meetings.4

For the election of the board of directors, shareholders have as many votes as directors are elected (see Article 66 Section 4 Sentence 2 JSL-Law). In other words, minority shareholders, by putting all their votes on the few candidates they have pre-selected, can have their candidates elected even if the shareholders with controlling votes do not agree. In general terms, the German dual system of division of responsibilities applies to the governance of Russian JSCs, with the board of directors having supervisory power. Normally boards of directors meet frequently. Also, boards are typically entrusted with substantial power relating to the ongoing business of the company. As a consequence, it would be possible to exert substantial influence by being a member of a board. Indeed, some hope has been put in independent directorship.5 In particular, in the period from 2000 to 2004 some issues seemed to have been resolved through the activity of independent directors,6 and some prominent persons, like Mr Borys Fyodorov, publicly stressed the importance of independent representation on boards.7 None of the independent board representations, however, currently seems to have a focus on active shareholder representation. Significantly, where independent members of boards are mentioned, it seems that mostly they do not specialise in active representation of shareholders’ interests.8

Shareholders have a right to dividends. Sometimes, this right has been seen as not being complied with by issuers, and accordingly, a few shareholder activists have focused on implementation of this right.9

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8 See the board representation at Sberbank comprising analysts and active and former bank managers, but not really investors www.sberbank.com/investor-relations/corporate-governance/supervisory-board (accessed on 20 September 2016).
Furthermore; when purchasing 30 per cent or more of the stock of shares, the shareholder taking over must make an obligatory tender offer. Accordingly, shareholders could, by being aggressive, try to prompt such an offer. However, the number of related offers has been decreasing in recent years.

Also, information rights for shareholders that in the early fashion of joint stock law had been very broad have been gradually reduced. Namely in 2001 the law clarified that only shareholders with more than 25 per cent of shares are entitled to receive the accounting documents and minutes of the meetings of the collective executive body.

Additional limitations of the information rights have been introduced by court practice. For instance, a company is entitled to limit the right of shareholders with less than 25 per cent of shares to get information on issues of extended competence, that is, the exclusive competence of the board of directors, as opposed to the competence of the executive bodies of the company. Additionally, court practice has allowed a company to refuse the shareholder to get information in case of lack of ‘legitimate interest’ to receive the requested information. Moreover, companies can refuse to provide information to their shareholders referring to commercial confidentiality, and sometimes companies use this right extensively.

III KEY TRENDS IN SHAREHOLDER ACTIVISM

When, market reforms began in the early 1990s, minority shareholders’ rights, in a certain sense, were a key issue requiring people’s attention. Since the main aim of market reforms was to distribute the people’s wealth to the people, shares were distributed to the population at large through voucher auctions, and therefore protection of the many recipients of such vouchers should have been a major concern. However, concern with the detail of implementation of such rights was low, and no stable funds or associations to represent minority shareholders emerged.

10 Federal Law dd. 26 December 1995, No. 208-FZ on Joint Stock Companies, Article 84.2.
11 Statistics regarding voluntary tender offers, mandatory tender offers and squeeze-out requests is available at www.e-disclosure.ru/poisk-po-soobshheniyam (accessed on 30 June 2017) with the filter to be set on ‘Сведения о поступившем эмитенту (ОАО) добровольном или обязательном предложении’ plus ‘Сведения о поступившем эмитенту (ОАО) уведомлении о праве требовать выкупа или требования о выкупе’) significantly, while in 2014 there were than 100 such takeovers, in the first half-year of 2017 the number was not more than 20.
12 See also the Decision of the Constitutional Court of RF dd. 16 June 2004, No. 263-O, which considered this rule as being constitutional.
13 See Decision of the Constitutional Court of RF dd. 18 January 2011, No. 8-O-II.
In the early years of stabilisation (2000–2005), there were some signs that shareholder activism would play a major role going forward. In particular, some of the major corporates implemented major internal reforms, and some of those reforms were encouraged by pressure by shareholder activists. Also, part of some government programmes, such as electricity and pension reforms, was raising or investing in capital through stock exchanges.

Publicly, shareholder activism has frequently been associated with Mr Bill Browder. Mr Browder, after having maintained a high public profile for some time, came under attack from sources that must have been close to government, which culminated in accusations of brutality against the people involved on the side of Mr Browder, and in particular the US imposing countersanctions against individuals allegedly involved. While Mr Browder’s shareholder rights-related activity may have substantially contributed to the aggressiveness of the reaction towards him and his allies, the evidence presented for the shareholder activism having been the only reason for the pressure against Mr Browder and his allies does not appear plausible to me. Rather, the actions against Mr Browder are likely to have had different sources. In any case, it appears that the reaction to Mr Browder has showcased some of the risks of action and accordingly interest in shareholder activism has only been renewed where a political motive for the activism was at least likely, and such initiatives have been marginalised. In addition, in my opinion regulators tend to dislike controversy and misunderstand the value of such controversy for corporate governance. In any instance, this difference of assessment does not make any difference to the result, namely that investors’ rights are limited to an extent that does not seem to allow activist investment.

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21 A summary of controversial proceedings also in: John Lough. End of an Era for BP in Russia, Chatham House, 7 June 2012. URL: www.chathamhouse.org/media/comment/view/183859 (accessed date: 5 September 2016).

In addition, in parallel with the above, the regulators appeared to be particularly concerned with inappropriate action of aggressive shareholders leading to a loss of assets. As a consequence, legal options for shareholders have substantially decreased over time.

Furthermore, and as mentioned before, majority ownership in listed companies has mostly been consolidated.

IV RECENT SHAREHOLDER ACTIVISM CAMPAIGNS

Technically, and for the reasons described, shareholder activism is limited to random phenomena like simple access to information or to a shareholders’ meeting. Also, there has been some argument that shareholders have a right to correction of the accounts of companies. However, in the light of existing legislation there is little basis for such an argument.

Some funds continue to be involved in asset tracing.

V REGULATORY DEVELOPMENTS

There have been many changes in corporate law recently, and, similarly to what was concluded in another context, it is not always easy to determine what purpose the many changes in

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23 An examination of the practices that lead to such concern can be found in www.chathamhouse.org/sites/files/chathamhouse/home/chatham/public_html/sites/default/files/20140300AssetGrabbingRussiaHanson1.pdf (accessed: 5 September 2016).

24 Peter B. Maggs, Olga Schwartz, William Burnham. Law and Legal System of the Russian Federation. Juris Publishing, Sixth Edition. URL: https://books.google.ru/books?id=J0jwCQAAQBAJ&pg=PA428&lpg=PA428&dq=transneft+access+to+shareholders+meeting&source=bl&ots=uN-Vp7Km9j&sig=6H5g392kHiS6dE2aXA18UgZvsl&hl=ru&sa=X&ved=0ahUKEwjx5bV-evOAhVI.KcAKHaeD8xeEQ6AEILYAC#v=onepage&q=transneft%20access%20to%20shareholders%20meeting&f=false (accessed on 5 September 2016), in the cases reported, the interest appears to mainly be politically (as opposed to economically) caused.


28 See: Report on the Observance of Standards and Codes on IOSCO Objectives and Principles of Securities Regulation for the Russian Federation, July 2016. URL: www.imf.org/external/pubs/ft/sr/2016/cr16233.pdf (accessed on 5 September 2016). ‘2. ... While some have argued that the absence of overarching provisions is an inevitable consequence of the principles of Russian law, others have correctly pointed out that there are some overarching obligations already in the legal framework and steps are being taken to develop the approach to legislation on these lines.’
relevant laws have had. Our impression is that even where it seems that options for minority shareholders are to be strengthened, in fact, the control of the management and majority shareholders over the procedure is increased.

On the other hand, while earlier privatisation attempts have not led to the expected results, in 2016 there was some hope that the difficulty with planned sales of Russian state assets and the concern with increasing the investor base would lead to more attention on and openness to shareholder activism, but this does not seem to have materialised in 2017.

VI OUTLOOK

There has not been much shareholder activism recently, and it remains to be seen whether there will be any over time.

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29 A different (more positive) assessment of the legal framework appears to be displayed relating to corporate governance in http%3A%2F%2Fwww.ebrd.com%2Fdocuments%2Flegal-reform%2Fruussia-country-law-assessment.pdf&usg=AFQjCNH0wxixFsX_xzrjv9WD0R2TeCF0ulQ&sig2=NQ1Yu5bBARDeICFyUwNZxW&cad=rjt Corporate governance assessment, EBRD. URL: page 14. (accessed on 5 September 2016).

I OVERVIEW

Shareholders play an important role in preserving balance in the corporate governance of a company. While shareholding is intended to enable passive investment participation in a company, shareholders have legitimate interest in the governance of a company and a right to hold the board accountable. Management have traditionally often been able to push through their agenda without much shareholder resistance in Singapore, but the trend is changing slowly but surely.

II LEGAL AND REGULATORY FRAMEWORK

Shareholder rights and engagement in Singapore are regulated by a combination of statutory and non-statutory instruments as well as under common law. The Companies Act (CA) and the Securities and Futures Act (SFA) make up the relevant core statutory framework, which is supplemented by non-statutory instruments such as the Listing Manual of the Singapore Stock Exchange (Listing Manual), the Singapore Code of Corporate Governance (Governance Code) and the Singapore Code on Takeovers and Mergers (Takeover Code). The full breadth of the legal options, strategies and pitfalls relevant to an activist shareholder is beyond the scope of this publication, but key considerations are summarised below.

i Requisitioning or calling a general meeting

The CA empowers shareholders to either requisition for a general meeting, or directly call a general meeting, if they have not less than 10 per cent of the total number of issued shares of the company. The key difference between requisitioning for, and calling, a general meeting respectively, is that requisitioning shareholders will need to give the company’s directors up to 21 days to proceed to convene a general meeting at a date no later than two months after the receipt by the company of the requisition, and only if the directors fail to act within the specified 21 days, will the requisitionists (or any of them representing more than 50 per cent of the total voting rights of all of them) may themselves convene a general meeting at a date no later than three months from the requisition date. In contrast, shareholders wishing to directly call for a general meeting may do so under a more expedited procedure without having to exhaust any timeline given to the directors to act. However, while the company must pay the requisitionists all reasonable expenses incurred to call a general meeting (in the

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1 Lee Suet-Fern is the managing director and Elizabeth Kong Sau-Wai is a director at Morgan Lewis Stamford LLC.
event of a failure by the directors to do so), no equivalent provision exists in relation to the direct calling of a general meeting by shareholders. A meeting will require 14 days’ notice or such longer period as is provided in the constitution of the company, unless it is convened for the passing of a special resolution, which requires at least 21 days’ notice.

ii Shareholder transparency

An activist shareholder of a listed company will be able to identify all key shareholders having an interest in not less than 5 per cent of the total voting shares of the company, as well as the shareholding interest that any of the company’s director or chief executive officer may have in the company, information that is required to be publicly disclosed under the CA and the SFA.

iii Removal of director

Unlike a private company where it is possible for the directorship of a person to be entrenched in the constitution, a director of a public company can always be removed by an ordinary resolution of its shareholders, regardless of anything to the contrary in the company’s constitution or in any agreement between the company and such director. The person proposing the resolution must give a special notice to the company at least 28 days before the meeting to be convened to approve the resolution, and a copy of the resolution must be sent to the director concerned, who will be entitled to be heard on the resolution at the meeting.

iv Concert party obligations

Where shareholders act in concert to obtain or consolidate effective control of a company, implications arising under the Takeover Code should be borne in mind, including the obligation to make a general offer for the shares in the company upon crossing sensitive shareholding thresholds. Shareholders voting together on resolutions at a general meeting would not normally be regarded as an action that would lead to an offer obligation, but coordinated voting patterns in more than one general meeting may be taken into account as an indication that the shareholders are acting in concert. Shareholders who requisition or threaten to requisition the consideration of a ‘board control-seeking’ proposal at a general meeting will generally, however, be presumed to be acting in concert with one another and with the proposed directors, such that subsequent acquisitions of shares of the company by any member of the concert party group could give rise to an obligation to make a general offer for the company under the Takeover Code.

v Derivative action

Directors who have committed wrongdoings or have otherwise breached their fiduciary duties to the company would naturally have little incentive to procure the company to bring an action against themselves. To ensure accountability, the CA provides for a statutory derivative action that gives shareholders an ability to bring an action on behalf of the company against errant directors or third parties in respect of the directors’ conduct, which is subject to obtaining leave of court and is dependent on the company itself having a claim, given that the action is brought in the company’s name. The complainant is required to give 14 days’ notice to the board of his or her intention to apply for the action if it is not pursued by the board, and is required to demonstrate that he is acting in good faith and that the action is prima facie in the interests of the company. The statutory derivative
action is available to all companies incorporated in Singapore, including listed companies. While foreign-incorporated companies do not currently fall within the scope of the statutory derivative action regime, they may avail themselves of the common law derivative action, the requirements of which entail the complainant establishing that the errant directors committed fraud on the minority.

vi Oppression or unfair prejudice
Shareholders may also apply to court for what is commonly known as the ‘oppression remedy’ under the CA if they can establish essentially that they have been treated in a manner that is ‘commercially unfair’, which is an exception to the principle of ‘majority rule’ in companies. As contrasted with a statutory derivative action, the ‘oppression remedy’ is not brought in the name of the company but is personal to the complainant. However, the ‘oppression remedy’ is often considered difficult to succeed and is usually a remedy of last resort. It is very rarely seen in the context of listed companies.

vii Market manipulation and insider dealing
When pursuing any activist strategy, shareholders should be careful not to fall afoul of regulations against market manipulation, making false or misleading statements or fraudulently inducing persons to deal in securities, among other offences relating to dishonesty, all of which attract civil and criminal penalties under the SFA. Where an activist shareholder engages with the board on matters not otherwise made available by the board to the rest of the shareholders, it is possible that insider information may have been divulged, in which case the shareholder must not deal or encourage another to deal in the company’s securities until such price-sensitive information has been disseminated to the public.

viii Defamation
An activist shareholder wishing to launch a media campaign and level criticisms against a company or other individuals in the public domain should be aware of the risk of defamation. While defences such as justification and fair comment are available, the law in this area is complex and an activist shareholder should ideally seek expert advice on what is legally permissible in order not to end up at the wrong end of a libel action.

III KEY TRENDS IN SHAREHOLDER ACTIVISM
i Hedge fund activism
Corporate raids, which were common during the 1980s in the US, where hedge fund activists buy a large stake in a company and then engage in proxy fights for control of the board to break up the company, have hitherto been rare in Singapore. It appears that only 15 per cent of activist hedge funds focus their activities in the Asia-Pacific region2 and less than one-fifth of the city state’s approximately 750 public listed companies have a free float

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in excess of S$200 million, limiting its appeal to institutional investors. Where there is hedge fund activism, media campaigns are more commonly used in the local context to influence shareholders and to put pressure on the target’s board of directors and its management.

However, the corporate landscape in Singapore may change as new hedge funds are now being set up with the exclusive focus on influencing the way local listed companies are run. Smaller construction and engineering companies, which often have a lot of cash or reserves due to the recent building boom may be targeted by activists, who may push for payment of special dividends or share buy-backs by way of open confrontation or with much less fanfare through the exercise of voting power. While such activist pressure on Singapore companies are, when exerted responsibly, generally welcome by minority shareholders, such demands may not always be successful given that it is not uncommon for founder shareholders in many smaller to mid-cap issuers to hold a significant block of shares in such companies.

ii Influential investor lobby groups

In July 2016, Securities Investors’ Association (Singapore) (SIAS) launched an initiative to empower retail shareholders by guiding them to ask relevant questions at annual general meetings (AGMs). The initiative kicked off with SIAS engaging a team of analysts to research the annual reports of 200 listed companies, which will be gradually increased over the course of the next five years to cover all listed companies in Singapore, subject to funding. The analysts will, based on the annual reports of the companies, compile relevant questions to be asked, which will primarily focus on strategy, financials, and corporate governance. Companies are encouraged to address SIAS’s questions at their AGMs and publish the answers on SGX. SIAS also conducts workshops on how to analyse annual reports for retail and novice investors to help them ask relevant questions at AGMs.

SIAS actively advocates progressive industry practices and organises investor education programmes through collaborative arrangements with financial institutions and listed companies interested in investor education as part of its corporate social responsibility agenda. On an annual basis, SIAS tracks and grades listed companies for their corporate governance practices and rewards those who have excelled with the Singapore Corporate Governance Award.

SIAS is one of the biggest investor lobby groups in Asia and has mediated many high-profile shareholder issues in Singapore and the region. The association was formed in 1999 during the Central Limit Order Book (CLOB) saga when, as part of Malaysia’s capital control measures, the Malaysian authorities froze the shares of more than 100 Malaysian listed companies worth more than US$4.47 billion, which were held by 172,000 minority shareholders in Singapore. When negotiations between Malaysia and Singapore were deadlocked for months, SIAS canvassed a global media campaign to convey the public angst and outcry in Singapore. However, Malaysia refused to relent even when foreign investors.

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3 Thomson Reuters Starmine; ‘Cheap buyout plans in Singapore? Not so quick, say minority shareholders’, The Straits Times (Reuters), 28 March 2016.
4 Klaus Wille, ‘New Singapore activist hedge fund seeks to shake up companies’, Bloomberg, 4 February 2015.
5 Lorna Tan, ‘AGMs need not be Annual Gluttons’ Meetings’, The Straits Times, 19 June 2016.
6 Ibid.
threatened to withdraw their existing investments from Malaysia, US-based MSCI Index declined to admit Malaysia and foreign direct investments into the country declined. SIAS subsequently approached the Singapore authorities to consider taking the issue to the World Trade Organization, a course of action that had already been within the contemplation of Singapore and was subsequently announced in Parliament. Eventually in 2000, Malaysia and Singapore agreed to settle the issue by a staggered release of the affected shares back to the minority shareholders in Singapore.

SIAS continues to champion investor rights today and has often stated that it prefers a conciliatory approach to resolving investors’ right issues. However, in the wake of recent market and corporate governance lapses in listed companies, SIAS fired warning shots for the first time that SIAS will not hesitate to take errant companies to court on behalf of their minority shareholders if the situation warrants it. Representative actions are available in Singapore to enable an individual or a large number of people to sue, for themselves and on behalf of others, a wrongdoer for a common harm inflicted upon all of them provided that there is a common interest among the claimants. SIAS has commented that it may set up a litigation fund to which minorities can contribute, although SIAS itself, as a registered charity, may not contribute to the fund. Nonetheless, SIAS emphasised that representative actions should be a last resort to avoid unnecessary adverse publicity for the board and the company, which has serious consequences for share value.

iii The media’s catalytic role

The media has played a catalytic role in the ascendancy of shareholder activism in Singapore, with corporate governance analysts and commentators often being the first to highlight shortfalls in corporate governance best practices, define issues and set the agenda for change. Shareholders are thus galvanised to hold the relevant boards and management to account, with companies caught in the crosshairs of the media often feeling compelled to respond publicly to concerns raised. Unrelenting media storms have sometimes created enough damage to public perceptions of the targeted companies and their boards that the relevant directors announce their retirement from their positions even before shareholders vote on whether to keep the incumbents in office at the next re-election cycle.

Companies whose board composition does not meet best practice expectations, such as where it lacks diversity, or where existing directors have served for very long periods, continue to come under the spotlight. While the Governance Code recommends progressive renewal of the board and discourages the reappointment of independent directors who have served for more than nine years, the nine-year mark is not a hard line, unlike other jurisdictions. Indeed, more than a quarter of independent directors in Singapore have tenures that exceed nine years, although as pointed out by the Singapore Institute of Directors, some of these companies have nonetheless outperformed large-cap companies in Australia and the UK.

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9 See footnote 5.
10 Michelle Quah, ‘SIAS says it will take errant companies to court if need be’, The Business Times, 19 April 2016.
11 Ibid.
12 Ibid.
in terms of total shareholder returns. There are now calls for independent directors who have served beyond nine years to be subject to annual election or to an annual vote on their independence, and the regulators have also been exhorted to consult stakeholders as to whether some form of ‘say on pay’ for senior executives should be introduced.

IV RECENT SHAREHOLDER ACTIVISM CAMPAIGNS

i Metro Holdings
Activist investor, Quarz Capital Management, which is reported to hold between 15 and 20 positions in companies in Germany, Austria, Switzerland and the US, has turned its sights to Singapore because of the reliability and transparency of the country’s accounting and regulation, and has disclosed that it ‘has a pipeline of stocks which it intends to target’ as it considers Singapore ‘as a treasure trove of undervalued small and mid-cap companies’. For a start, Quarz Capital Management has, in October 2016 in an open letter to the management and board, called on retailer and real-estate developer Metro Holdings, to return excess cash to investors by way of a one-off dividend that would translate into Metro deploying S$175 million of its cash, highlighting that the company’s net cash accounts for more than half of its market capitalisation. Quarz has accumulated a stake of about 2 per cent in Metro since the beginning of 2016 and at the time of the letter, Metro shares traded about 40 per cent below book value. Quarz’s open letter resulted in the highest increase in Metro’s share price in more than seven years, and also elicited a formal response from Metro, which clarified that the excess cash was a recent occurrence due to the divestment of properties over the past one to two financial years. Metro said that it continues to evaluate new projects to reinvest capital, and expects its net cash levels to decline as it capitalises on property development and investment opportunities when they materialise.

ii Geo Energy
In October 2016, Dektos Capital’s founder expressed in an interview with Bloomberg that coal miner Geo Energy was ‘massively undervalued’ by as much as 60 per cent, and his fund had urged the company to change its debt structure and pay a dividend once earnings recover. Geo Energy announced a coal management agreement a few days later, sending its share price to an 11 per cent two-day gain. Dektos had sold its stake in Geo Energy before it made its comments but subsequently sought to invest in convertible bonds in the company.

iii Various shareholder-initiated general meetings
Another indicator of growing shareholder activism in Singapore is the increasing number of shareholder-initiated meetings. While there were several general meetings requisitioned or

called by shareholders of six listed companies in 2015, shareholders requisitioned or called for meetings in eight listed companies in 2016, namely in Cordlife Group, Magnus Energy, Imperium Crown, Oriental Group, SBI Offshore, International Healthway Corporation, Tritech Group, and Natural Cool Holdings. All of such shareholder-initiated meetings involved, among others, proposals to remove one or more existing directors and to appoint new directors on the board of the relevant companies. In some cases, requisition notices were later withdrawn or the meetings not held as originally planned, but in up to half of them, at least some, if not all, resolutions proposed by the shareholders were eventually passed.

V REGULATORY DEVELOPMENTS

i Multiple proxies
In January 2016, a multiple-proxies regime was introduced in the CA. Previously, nominee shareholders were limited to appointing only two proxies, as a result of which not all the views of their indirect investors can be represented. Under the new regime, specified intermediaries, such as banks whose business includes the provision of nominee services and that hold shares in that capacity, and capital markets services licence holders providing custodial services and which hold shares in that capacity, are allowed to appoint more than two proxies to attend and vote at general meetings. The legislative change enfranchises indirect investors by enabling them to participate in shareholders’ meetings with the same voting rights as direct shareholders, and also raise any queries they may have to the board of the company. This may potentially enhance attendance at shareholders’ meetings and increase the number of shares that are voted.

ii Dual-class share structure
With effect from January 2016, public companies in Singapore may offer shares with different voting rights to investors, subject to the rights of such shares being clearly specified in the company’s constitution and certain other safeguards, including requiring the approval of shareholders by way of special resolution for the issuance of such shares, and requiring holders of non-voting shares to have equal voting rights for resolutions on winding-up or resolutions to vary the rights of non-voting shares. The dual-class share structure provides greater flexibility in capital management and gives investors a wider range of investment opportunities. However, to be clear, the Monetary Authority of Singapore (MAS) and SGX are still reviewing whether dual-class share structures should be permitted for companies listed on the SGX, and pending conclusion of the review, the existing policy of SGX of not listing issuers with dual-class share structures will continue to apply. Proponents of dual-class share structures argue that weighted voting would allow founding shareholders more protection to pursue their long-term vision for the company against shareholder demands for short-term returns. Detractors point out that such structures remove a significant channel of accountability by the management, who are typically the ones holding shares with superior voting rights, and who could potentially exercise untrammelled control over the company despite owning much less equity than the rest of the investors. Nevertheless, recognising that such listings are increasingly being considered in industries such as information technology

and life sciences, the Committee on the Future Economy (CFE) recommended that dual class structures be permitted with appropriate safeguards. In February 2016, SGX released a public consultation paper to seek feedback on possible safeguards against risk that come with such a listing structure, including among other things, a proposal that the multiple-vote share be automatically converted to one-vote shares when it is sold or transferred, and a sunset clause, where the dual class structure is converted into a single class at a future date. If market consensus positive, SGX will in due course issue a follow-up consultation paper to amend the listing rules to accommodate a dual-class share structure.

iii Increase in transparency of ownership and control
With effect from 31 March 2017, unless exempted, all Singapore companies, foreign companies and limited liability partnerships are required to maintain and keep up-to-date a register of controllers that will have to be made available to ACRA or law enforcement authorities upon request. A foreign company is required to keep a register of its members at its registered office in Singapore or at some other place in Singapore. A nominee director of a company, unless exempted, is also required to disclose his nominee status and nominator to his company. The company must keep a register of nominee directors and make it available to ACRA and law enforcement authorities upon request.

iv Enhanced audit disclosure
From 2017 onwards, two key changes will be made in audit reports to help investors and other users in their decision-making by giving them more pertinent information on companies. The enhanced auditor reporting standards announced by the Accounting and Corporate Regulatory Authority (ACRA) and the Institute of Singapore Chartered Accountants (ISCA) will take effect for audits of financial statements for periods ending on or after 15 December 2016. First, auditors will be required to comment on ‘key audit matters’ (KAMs) in their financial statement report beyond the current ‘pass or fail’ opinion. KAMs are matters that, in the auditor’s judgement, are of the most significance in the audit of the financial statements, and are typically areas that involve difficult or complex auditor judgements. Auditors are required to describe each KAM, include a reference to related financial statement disclosures if any, and address why the matter is considered to be one of significance in the audit and how it is addressed in the audit. Auditors are also expected to take into account areas of higher risk of material misstatement, and the effect on the audit of significant events or transactions that occurred during that year. Second, auditors are required to ensure that a company has made adequate disclosures on a going concern even if the circumstances do not lead to any material uncertainty. This is more stringent than the current standard, which only requires auditors to highlight issues that result in a material uncertainty over a company’s going concern, such as the loss of a major customer. These two changes have been deemed by market observers as ‘a big step forward’ to encourage company directors and management to become more transparent in their engagements with shareholders.²⁰ Currently, KAMs are communicated by auditors to the audit committees of companies but are otherwise kept largely out of the public domain. The move to compel the disclosure of KAMs to the public will enable investors to gain insights on the significant

²⁰ Michelle Quah, ‘Enhancing the audit report: the good, the bad and the (far from) ugly,’ The Business Times, 2 August 2016.
audit risks identified and to have more focused and meaningful discussions with the board. To ensure that KAM reporting is relevant and useful, ACRA has assured investors that it will be focusing its audit inspection on auditors’ compliance with the enhanced standards and has also issued an audit practice bulletin to guide auditors on ACRA’s expectations on these standards.

v Stewardship principles

In November 2016, the ‘Singapore Stewardship Principles (SSP) for Responsible Investors’ was launched to promote good stewardship practices among the investor community.21 The SSP is drafted by the Singapore Stewardship Principles Working Group, which comprises industry players and organisations representing various relevant constituencies in the Singapore investment community, and supported by the MAS and the SGX. The SSP provides a view on the activities and functions that stewards should carry out, and how these principles relate to the boards and management of investee companies. The principles are not intended to be rigid rules to be enforced or prescriptive measures to be adhered to, nor are they intended to constitute a code but are intended as broad principles, with suggested ways that they could be applied. There is growing expectation that institutional investors should step up to undertake more responsibility towards improved stewardship and corporate governance as they are in a better position than retail investors to make a difference, given their sophistication, resources, as well as their international experience and influence to push for change in companies in which they have investments. The failure of institutional investors to adequately engage with their investee companies was seen by many as a material contributory factor to the global financial crisis in 2008.

VI OUTLOOK

Shareholder activism is expected to continue to rise in Singapore as a result of a confluence of factors, including the flood of facilitative regulatory changes, increasing investor sophistication, louder voices by investor lobby groups, and Singapore’s growing role as one of Asia’s leading economic and financial hubs. In the wake of such an unmistakable trend, companies and their boards need to prepare themselves for a changing corporate landscape by proactively developing a shareholder engagement plan so that mutual understanding and different expertise can converge through conciliatory dialogues. It is crucial for any company to understand its shareholder base, appreciate that their interests are not monolithic, and critically assess its own performance, practices and risk factors from time to time in preparation for the contingency of any activist campaign.

Chapter 10

SOUTH AFRICA

Ezra Davids and Xolani Ntamane

I OVERVIEW

Historically, shareholder activism has not been an important force in South Africa. It is more common to see activism in the South African context from interested parties such as trade unions, rather than shareholders. More recently, following global trends attributable to an increasingly internationalised shareholder base, for instance, shareholder activism has been on the rise and the market has started to take note of the influence shareholders can wield. The regulatory framework in South Africa, which creates platforms for shareholder engagement and the enforcement of shareholder rights, has created a somewhat enabling environment for shareholder activism that is being embraced with increasing levels of participation. While much of the publicised shareholder activism in South Africa has focused on aspects of corporate governance and executive remuneration, there has also been shareholder activism influence, although to a lesser extent, on mergers and acquisitions. While in most deals there is no legal obligation to consult with trade unions and other potential activists in advance of a transaction, it is often in the best interests of the parties to do so, since these activists often use the media and regulatory approval processes as hurdles to getting a deal through.

II LEGAL AND REGULATORY FRAMEWORK

The South African Companies Act 71 of 2008 (the SA Companies Act) is the main source of company law in South Africa and contains the majority of the provisions that relate to shareholder rights, activism and engagement. The main regulatory authorities under the SA Companies Act include the Companies and Intellectual Property Commission (CIPC), tasked broadly with powers of enforcement under the SA Companies Act (including receiving, initiating and investigating complaints concerning alleged contraventions) and the Companies Tribunal.

Chapter 5 of the SA Companies Act read together with the Companies Regulations, 2011 promulgated thereunder (the Takeover Regulations), regulate takeovers and other affected transactions (i.e., mergers, schemes, asset disposals, etc.). These Takeover Regulations are applicable in respect of public companies and state-owned companies. They also have limited application to private companies (i.e., where there has been a transfer of 10 per cent or more of the private company’s shares within the past 24 months). The primary regulatory authority tasked with enforcing the Takeover Regulations is the Takeover Regulation Panel.

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1 Ezra Davids is the chairman of the corporate and M&A practice and Xolani Ntamane is a senior associate at Bowmans.
(TRP). The TRP ensures, among other things, that shareholders have the same information from an offeror during the course of an affected transaction and are afforded enough time to consider the information in order to make an informed decision. The TRP also investigates complaints where necessary in relation to affected transactions.

The Listings Requirements (the Listings Requirements) of the Johannesburg Stock Exchange Limited (JSE), enforced by the JSE, apply to entities whose shares are listed on the JSE. These Listings Requirements, among other things, provide for the fair and equal treatment of shareholders, access to information, certain voting thresholds and pre-emptive rights.

The King Report on Governance for South Africa 2016, issued by the Institute of Directors (the King Code) contains various principles of corporate governance, many of which deal with shareholder rights and engagement. For instance, the King Code recommends that the board of directors must encourage shareholders to attend general meetings and that the board of directors should engage with the shareholders through various means such as websites, advertising and press releases. Certain parts of the King Code have been incorporated into legislation by reference and it has been recently updated to introduce greater disclosure recommendations, including in respect of board committees (which would include a remuneration committee) and CEOs (for example, in respect of notice periods, contractual conditions relating to termination and succession planning). Importantly, recent updates to the King Code specifically introduce recommendations relating to executive remuneration and particular disclosures in this regard. This includes the recommendation that companies should produce and disclose, in respect of a reporting period, a remuneration policy and implementation report (which deals with the implementation of the remuneration policy). This remuneration policy and the implementation report must be tabled annually for a separate non-binding advisory vote by shareholders at the company’s annual general meeting. In the event that 25 per cent or more voting rights are exercised against any part of the remuneration policy, the board must engage with shareholders in good faith and with best reasonable effort, in order to understand shareholder dissatisfaction and the reasons for dissenting votes. The board is required to appropriately address reasonable and legitimate concerns raised evaluation of performance. Although the advisory vote given to shareholders is non-binding, this vote coupled with increased disclosure enables greater shareholder activism in that it encourages the board to engage with shareholders, promotes transparency and provides shareholders with a platform to express their dissatisfaction.

Although not intended as a regulatory means for shareholder activism, certain other regulatory avenues indirectly create platforms for shareholder engagement and the enforcement of shareholder rights and related agendas. As an example, shareholders may use the ‘public interest’ considerations factored in by the Competition Commission and the Competition Tribunal in determining whether or not to approve a merger from a competition perspective as a means to trip up a transaction.

We have set out below some of the regulatory avenues for shareholder activism.

i  Dissenting shareholders

The SA Companies Act in Section 164 provides for appraisal rights that allow dissenting minority shareholders, in the context of a scheme of arrangement, a merger or a sale of all or a greater part of the assets or undertaking of the target, to require the target company to
purchase such dissenting shareholders’ shares at fair value. These appraisal rights are available to dissenting shareholders that have objected to a resolution to approve such a transaction in advance of it being voted on, and that have voted against the resolution.

Also, in accordance with the provisions of Section 115 of the SA Companies Act, if 15 per cent or more of the shareholders vote against a resolution proposed for implementing a scheme of arrangement, a merger or a sale of all or a greater part of the assets or undertaking of a target company, any dissenting shareholder may within five days of the resolution being passed require the company, at its expense, to obtain court approval before implementing the resolution. Even if less than 15 per cent of the shareholders vote against such resolution, a shareholder who can satisfy a court that there is a prima facie case for review, may within 10 days apply to court for a review of the resolution. Such shareholder should first have indicated prior to the meeting that it intended voting against such resolution and subsequently indeed voted against such resolution. A court may only set aside the resolution if it is satisfied that there is manifest unfairness to shareholders or a material procedural irregularity.

ii Actions and remedies

Pursuant to Section 161 of the SA Companies Act, a shareholder may apply to court for an order necessary to protect any right or rectify any harm done to the securities holder by the company (as a consequence of an act or omission that contravened the SA Companies Act or the constitutive documents of the company) or the directors of the company (to the extent that they are liable for a breach of their fiduciary duties).

Similarly, pursuant to Section 163 of the SA Companies Act, a shareholder may apply to court for relief from oppressive and unfairly prejudicial conduct of the company or a related person. The court has a wide range of remedies including restraining the conduct, declaring a person delinquent or under probation or setting aside transactions.

In accordance with the provisions of Section 165 of the SA Companies Act, a shareholder (and other stakeholders such as trade unions and directors) may bring proceedings in the name of and on behalf of a company to protect the legal interests of the company.

iii Shareholder approvals

Certain corporate actions require shareholder approval prior to adoption. This may be by way of an ordinary resolution (supported by more than 50 per cent of the voting rights exercised on the resolution) or a special resolution (supported by at least 75 per cent of the voting rights exercised on the resolution). These thresholds may be adjusted in the constitutive documents of the company (upwards for an ordinary resolution and up or down for a special resolution), provided that there is always a 10 per cent margin between the lowest threshold for passing a special resolution and the highest threshold for passing an ordinary resolution.

In certain instances, the SA Companies Act also imposes additional approval requirements or restrictions. For example, in respect of any resolutions to be passed approving a disposal of all or a greater part of the assets or undertakings of a company, a merger or amalgamation or a scheme of arrangement and certain buy-backs, not only must the resolution be approved at a meeting (affording minorities an opportunity to attend and ask questions) but only the votes of disinterested shareholders will be taken into consideration (i.e., any voting rights controlled by an acquiring party, a person related to an acquiring party, or a person acting in concert with either of them, must not be included in the calculation). Similarly, in respect
of companies listed on the JSE, for example, votes of related parties and their associates will not be taken into account in relation to any resolution in connection with the related party transaction.

A shareholders’ meeting must be called if 10 per cent of all voting rights entitled to vote on a matter submit a demand for a shareholders’ meeting (or such lower threshold as stipulated in the constitutive documents of the company), unless a court finds the demand frivolous or vexatious. Any two shareholders may propose that a resolution be submitted to shareholders for consideration.

A resolution may not be taken at a shareholders’ meeting on a matter unless persons are present to exercise in aggregate at least 25 per cent of all voting rights entitled to be exercised in respect of that matter (subject to a lower or higher threshold stipulated in the constitutive documents of the company); and if the company has more than two shareholders, at least three shareholders must be present. At an adjourned meeting, adjourned for lack of quorum, the shareholders present will constitute a quorum.

iv Protection for making disclosures

Section 159 creates protection for shareholders who disclose information to the relevant regulators where the shareholder reasonably believed at the time that the company or a director had contravened the SA Companies Act; failed to comply with a statutory obligation; engaged in conduct that endangered or harmed an individual or the environment; unfairly discriminated against a person; or contravened other legislation that could potentially place the company at risk. These shareholders are immune from any civil, criminal or administrative liability and the relevant shareholder has qualified privilege in relation to the disclosure made, which would encourage shareholder activists seeking to hold the board accountable for their conduct.

v Defences available to companies and director’s duties

There are several defences available to companies when faced with instances of shareholder activism, for example, by planning ahead for various scenarios from a legal and commercial perspective, evaluating a company’s shareholding profile and anticipating the concerns or needs of each group of shareholders. Strategic private engagements with various stakeholders, tactics such as ‘bear hugs’ and accounting for potential shareholder activist activity in the course of creating transaction timelines will also play an important role in preventing or resolving shareholder activist issues in a transactional context. The SA Companies Act generally excludes some of the aforementioned platforms for activism in the event that they are exercised in a manner that is vexatious, frivolous or without merit.

Directors need to take care not to engage in any conduct that is directed at frustrating an offer made in good faith. Directors have a duty to act in the best interests of the company and shareholders at all times.

III KEY TRENDS IN SHAREHOLDER ACTIVISM

i Profile of activist investors

In broad terms, a distinction can be drawn between shareholder activists who are economic activists and governance activists.

Economic activists in South Africa primarily comprise institutional investors and fund managers who have been active in seeking out greater shareholder value. Some examples
of economic activists in South Africa include the Public Investment Corporation (SOC) Limited (PIC), an investment management company that is wholly owned by the South African government and is focused on managing government employees’ pension funds; and other institutional and pension funds that hold sizeable stakes in companies listed on the JSE.

Governance activists in South Africa are mainly shareholders seeking to influence policy and improve corporate governance principles, such as transparency and increased shareholder involvement on issues such as executive remuneration. Although there is some overlap in the distinction between economic activists and governance activists, some examples of shareholders who have engaged in governance activist activity in South Africa include: the PIC; Allan Gray; Foord Asset Management, a privately owned investment management company; and certain key individuals who have queried a number of companies on aspects such as good corporate governance, ethics and executive compensation.

Although not yet commonplace in South Africa, shareholder activist activity has been on the rise in companies engaged in a variety of sectors, as shareholders with diversified portfolios seek to enhance shareholder value and activists with various public interest drivers seek to achieve their goals.

A number of recent shareholder activism campaigns have focused on management and executive compensation and remuneration policies. An example is Allan Gray’s involvement in the scheme proposed by Sasol Limited (Sasol), an energy and chemical company listed on the JSE. The strategy of shareholder activist involvement by funds such as Allan Gray is to proactively engage with the board and executives of companies in which the fund has invested, with the aim of shaping the relevant companies into better and more sustainable long-term financial prospects, which they believe is likely to unlock shareholder value.

Allan Gray acquired shares in Sasol over the course of 2010 and 2011. After scrutinising Sasol’s executive remuneration scheme, Allan Gray was of the view that the executive remuneration scheme was sub-optimum and recommended that its clients vote their shares in Sasol against the scheme at the 2011 annual general meeting. Allan Gray’s concerns with the scheme included the minimal level of disclosure, low performance targets and the fact that the majority of the long-term incentives were not subject to performance conditions and simply vested over time.

Allan Gray engaged with Sasol’s Remuneration Committee (Remco) with a view to improving the scheme. This included analysis and benchmarking of the remuneration scheme, meeting with the Remco and further formal correspondence with Sasol’s board, culminating in Allan Gray’s recommendation to its clients that they vote their shares in favour of Sasol’s remuneration scheme in 2012, 2013 and 2014 on the basis that disclosure had been enhanced, performance targets required for incentives to vest had been made more challenging, all the long-term incentives were subject to stringent performance conditions and executives were formally required to build substantial shareholdings in the company. Allan Gray believes that these changes went a long way towards ensuring that executives act in the long-term best interests of shareholders.

Another example of shareholder activism, but in the context of public interest considerations, is the case of Woolworths Holdings Limited (Woolworths), where consumer activists acquired a minority shareholding in the company for the purposes of attending shareholders’ meetings and raising governance, transparency, political and ethical issues.

A relatively novel shareholder activism tactic that was recently used by a shareholder is a request for information under the South African Promotion of Access to Information
Act 2 of 2000 (PAIA). In broad terms, PAIA allows persons to access any information held by the state, and information held by private bodies, where such information is required for the exercise or protection of any rights.

An individual shareholder, who held one share in Coronation Fund Managers (Coronation) at the relevant time, requested further details on Coronation’s remuneration policy on the basis that the information set out in Coronation’s annual report was not sufficiently detailed. He was not satisfied with the level of detail provided by Coronation and subsequently used PAIA to launch an information request at Coronation’s annual general meeting in January 2016. Coronation refused that PAIA request on the basis that it believed it had complied fully with JSE and SA Companies Act requirements to disclose information related to remuneration to its shareholders. The refusal has not been contested in court, but this tactic, coupled with other forms of pressure applied on Coronation ultimately led to Coronation agreeing to disclose details of its remuneration policy.

In the context of mergers and acquisitions, activists have also been seen to use the rights and remedies afforded to them under the SA Companies Act (as discussed above) or other regulatory procedures (such as the public interest considerations that regulators take into consideration when deciding to allow a merger from a competition perspective or other regulatory approval process) to delay or thwart the implementation of a transaction. Trade unions and other shareholders focused on guarding employee interests, for example, have appealed to the competition authorities to address public interest concerns such as the effect that a merger will have on a particular industrial sector or region, employment, the ability of small businesses, or firms controlled by historically disadvantaged persons, to become competitive and the ability of national industries to compete in international markets. Public interest concerns are generally resolved by the imposition of conditions rather than the prohibition of a merger.

ii Outcomes and the path to resolution

Recent shareholder activist examples indicate that shareholder activists have had an impact on the manner in which South African companies engage with their shareholders. As shareholders become increasingly concerned with executive remuneration policies, transparency and other corporate governance issues, companies will need to pay closer attention to adherence with principles of good governance and engagement in the context of mergers and acquisitions. This is especially so in the context of changes introduced by the King Code.

IV RECENT SHAREHOLDER ACTIVISM CAMPAIGNS

Examples of other recent shareholder activism campaigns in South Africa are set out below.

i Sovereign Foods

At the 2016 annual general meeting for poultry group Sovereign Food Investments Limited (Sovereign Foods) the company intended to obtain approval for a share buy-back scheme comprising members of the executive management team, other and newly introduced shareholders. Minority shareholders, dissatisfied with the costs and structure of the scheme, indicated their intention to exercise their appraisal rights (discussed above). Sovereign Foods then attempted to introduce a revised, smaller transaction that appeared to exclude the minority shareholders’ appraisal rights. The minority shareholders took Sovereign to task on
the matter and were successful in obtaining a court judgment that Sovereign Foods’ conduct in denying the minority shareholders fair participation in its affairs was oppressive and unfairly prejudicial to their rights and interests.2

ii  PPC

The most prominent example of shareholder activism in South Africa unfolded from the highly publicised activities in PPC Limited (PPC), the largest cement company in South Africa, during 2014 where a group of shareholders requisitioned a special shareholders’ meeting to consider the removal of the entire board of PPC and to replace it with the nominees of the requisitioning shareholders.

The board had refused to back the decision of the then chief executive officer to dismiss PPC’s chief financial officer. The chief financial officer had been appointed by and reported to the board.

The chief executive officer had developed a strong relationship with the employees of PPC and had pioneered initiatives in the Company aimed at redressing the economic differences between employees and management. Following the lack of support from the board, he resigned and following an unsuccessful retraction of his resignation, he approached major shareholders encouraging them to reappoint him and reconstitute the entire board.

Certain minority shareholders of PPC collectively met the minimum threshold required to force a special shareholders’ meeting in terms of the SA Companies Act and requisitioned a meeting of the shareholders for 8 December 2014. The aim of the meeting was to remove the existing board by a majority vote of the shareholders and then appoint new directors (PPC’s constitutive documents only allowed shareholders to propose directors for nomination if there are no directors).

In the interim, the board, mindful of key corporate governance principles and led by the acting executive chairman, engaged with a number of shareholders, including the requisitioning shareholders, and decided to embark on the process of reconstituting the board at the next annual general meeting, thus cancelling the meeting called by the requisitioning shareholders.

The board successfully countered a ‘public bear hug’ approach adopted by the shareholder activists, with targeted engagements with various stakeholders. This allowed the board to refocus on its role as ultimate custodian and fiduciary of the company, its stakeholders and all its shareholders (in contrast to narrow possible short-term interest of a small but vocal group of shareholder activists).

A noteworthy point to consider is that PPC employees also held a minority shareholding in PPC and had indicated their support for the chief executive officer, had the board not been able earn the trust of the requisitioning shareholders, the outcome of the meeting that was to be held on 8 December 2014 may have resulted in a different outcome.3

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2 In Justpoint Nominees (Pty) Ltd and Others v Sovereign Food Investments Limited and Others (BNS Nominees (Pty) Ltd and Others Intervening) (ECP) (unreported case No. 878/16, 26-4-2016) (Stretch J).

iii  AngloGold Ashanti

In 2014, following public disapproval by one of its shareholders, AngloGold Ashanti Limited (AngloGold), a leading global gold producer, abandoned a planned demerger and rights offer just five days after making the announcement. AngloGold intended to split its international assets from its South African mines to form a new London-listed company. In addition, a rights offer was planned to reduce the high debt of the company.

The proposed transaction was common practice in the industry and was accepted by analysts and shareholders alike, specifically given that the industrial upsets in South Africa tarnished the country's reputation as an attractive destination for mining investment.

A hedge-fund that held a minority shareholding in AngloGold had been one of the most outspoken critics of the proposed transaction. That entity, while supportive of the concept of restructuring, found the limited benefits of the rights issue would be outweighed by the dilution.4

The effect of the actions of the hedge fund, apart from causing the company to abandon the rights issue, almost instantly caused a general negative reaction when the proposed transaction was announced.

iv  Adcock

Another example of shareholder activism in South Africa, which took place in 2014, was the PIC’s involvement in pharmaceuticals firm Adcock Ingram Holdings Limited’s (Adcock) proposed takeover by a Chilean competitor. The PIC held shares in both Adcock and in the Bidvest Group Limited (Bidvest). Bidvest, with the support of the PIC (its shareholder) put in a last-minute bid to become a significant shareholder of Adcock. Suffice it to say, the deal with the Chilean entity fell through.

v  Naspers

A showdown occurred between the chairman of Naspers Limited (Naspers) and a prominent shareholder activist at Naspers’ annual general meeting in August 2016. Naspers is the largest listed company on the JSE by market capitalisation. The cause of the tension was the activist shareholder’s request for specific documentation that detailed certain management and specialist incentives, and that had been available to shareholders previously. Naspers had consistently taken the view that the time period in which shareholders were entitled to view these documents had closed, and refused to make an exception in this case. The activist shareholder, however, contended that shareholders were entitled to view the documents in terms of Naspers’ constitutional documents. The conflict resulted in the activist shareholder being threatened with ejection from the meeting.5 The relevant shareholder subsequently

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engaged a lawyer in order to pursue the matter further and Naspers ultimately confirmed through its legal representatives that the shareholder would be given access to the requested documentation.6

vi Coronation
After two years of persistent pressure from a well-known shareholder activist, together with increased pressure from the CIPC regarding the SA Companies Act requirement to disclose details of remuneration paid to directors and prescribed officers (which is specifically catered for in the SA Companies Act, while remuneration to non-board level executive management is not), Coronation gave shareholders their first opportunity to vote on its remuneration policy at the February annual general meeting.7

vii Group Five
Activist shareholder in JSE-listed construction company Group Five Limited, Allan Gray, expressed doubt that the construction company's board was still able to act in the firm's best interests after a number of executive and non-executive directors, including the CEO, resigned from the company's board between February and June 2017. Allan Gray, which owns a significant minority stake in the company, requested an extraordinary general meeting in May to reconstitute the board. Allan Gray proposed new board members but faced opposition from the existing board. In late June, five directors (including the then chairperson) resigned ahead of the extraordinary general meeting.8

viii Net1
Pressure from shareholder activist Allan Gray, with an approximate 16 per cent stake in Net1 UEPS Technologies (Net1), played a big role in the resignation of Net1’s long-standing CEO at the end of May 2017.9 Net1 is the ultimate parent company of social grant payment provider Cash Paymaster Services, whose social grant contract with the South African Social Security Agency came under scrutiny in the South African Constitutional Court in March 2017. As the problem surrounding payments of social grants grew to crisis levels, and with strong public sentiment against the conduct of Net1, Allan Gray publicly placed pressure on Net1.10 Allan Gray openly celebrated the announcement of the CEO’s resignation, but just as quickly expressed its discontent when it discovered the pay out he was to receive. It was reported that the then CEO would receive a substantial pay out in order to vacate his

position and would also continue to earn a monthly salary from Net1 as a consultant. Allan Gray has stated that it has previously put forward proposals that shareholder approval should be required for golden handshakes and large pay-outs.\textsuperscript{11}

V REGULATORY DEVELOPMENTS

The introduction of updates to the King Code (which are effective in respect of financial years commencing on or after 1 April 2017) builds on previous versions of the King Code and encourages shareholder activism while further developing principles such as shareholder engagement through some of its recommendations. The King Code provides an opportunity for a framework for the responsibilities of shareholders to be incorporated in the corporate governance system of checks and balances. Some of the more recent shareholder activism campaigns mentioned above have emphasised issues relating to what is regarded as excessive executive remuneration, and it is possible, given the more stringent standards for disclosure and engagement that the most recent King Code iteration had an impact on shareholder activists and their modes of engagement with companies.

VI OUTLOOK

In the course of preparing for increased shareholder activism in South Africa, companies need to monitor their shareholder portfolio and anticipate the kinds of activists that are likely to emerge, as well as the type of demands that these shareholders are likely to make, on a case-by-case basis. However, as discussed above, shareholder activists who hold insignificant stakes in companies are also afforded certain rights and protections, and companies will need to ensure that they practise good corporate governance and proactively participate in the appropriate level of shareholder engagement with particular focus on unlocking shareholder value. This includes disclosure and engagement as recommended by the King Code, particularly in the context of listed companies. Failure to do so may leave the board exposed to shareholder disapproval sparked by shareholder activists who are armed with an increased amount of information and a variety of regulatory rights and protections.

Chapter 11

SWEDEN

Eva Hägg and Patrik Marcelius

I OVERVIEW

The traditional strategy among activists in the Swedish market has been private approaches and until recently there have been few examples of investors having taken public and adversarial approaches. There are, however, clear signs of a growing trend of activism with recent examples of both public and adversarial strategies. This has resulted in a heightened awareness among listed companies.

II LEGAL AND REGULATORY FRAMEWORK

i The Swedish corporate governance regime

To understand the legislative and regulatory landscape for shareholder engagement and shareholder activism, the Swedish corporate governance regime should be considered. Corporate governance of Swedish listed companies is regulated by a combination of legislation, self-regulation and codes of practice, statements by self-regulatory bodies and generally accepted practices. The main source of corporate legislation is the Swedish Companies Act (the Companies Act). Other regulatory sources include the Swedish Corporate Governance Code (the Code), the rules of regulated markets and multilateral trading facilities, such as Nasdaq Stockholm’s rule book for issuers, as well as statements and rulings by the Swedish Securities Council on what constitutes good practice on the Swedish securities market. Other legislation also forms a part of the regulatory framework, including the Annual Accounts Act, the Swedish Securities Market Act and the EU Market Abuse Regulation.

The Swedish Corporate Governance model recognises the benefit of long-term engaged controlling shareholders, but is at the same time neutral in respect of ownership structures. The right of a majority shareholder to exercise control over a company is counterbalanced by certain minority protection.

The Swedish corporate governance model is based on a hierarchical governance structure where each body can issue directives to a subordinated body and to a certain extent take over the subordinated body’s decision-making authority. The different bodies are the shareholders’ meeting, the board of directors appointed annually by the shareholders and the managing director appointed by the board of directors. The shareholders’ meeting is the highest decision-making body of the company, which also reflects the shareholders’ strong position in Swedish corporate governance.

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1 Eva Hägg and Patrik Marcelius are partners at Mannheimer Swartling.
ii The Swedish market for publicly traded companies

There are around 300 companies whose shares are traded on a Swedish regulated market. The ownership structure of Swedish publicly traded companies has undergone significant changes over the past half-century during which the direct share ownership by private households has decreased. Instead, domestic institutional investors, such as pension funds, life insurance companies and mutual funds, have picked up households’ savings in listed shares. This has led to an increasing institutional ownership that plays a significant role on the Swedish stock market. More recently there has been a significant increase in foreign ownership stakes of mainly UK and US-based institutional investors. Despite the institutionalisation of ownership, several listed companies have one or limited number of majority shareholders and, with respect to ownership concentration, approximately two-thirds of the listed companies have at least one shareholder in control of more than 20 per cent of the voting rights. The Swedish Companies Act permits different classes of shares with differentiated voting rights. Several of the listed companies have two classes of shares, where one of the classes may have up to 10 times the voting power of the other class.

Majority owners in Swedish listed companies often take an active ownership approach and engage in the governance of the relevant company, in particular by being represented on the board. Also domestic institutional investors are engaged in the governance of companies, normally through representation on nomination committees and participation at shareholders’ meetings.

iii The corporate bodies

The Companies Act provides the statutory background against which shareholders’ engagement and activism will be framed. The Companies Act sets out fundamental provisions regarding the governance of a company, including the responsibilities and authority of each corporate body.

iv The board of directors

Powers

The board structure in Sweden has one tier. Swedish law does not include provisions for a separate controlling body or supervisory board. The board of directors is responsible for the company’s organisation and the management of the company’s affairs. A limited number of issues are, according to the Companies Act, reserved exclusively for the board, but other than those the shareholders’ meeting can pass resolutions on any company matter, including issuing instructions to the board. Swedish boards are invariably non-executive. Instead, the executive power rests with the managing director, who is appointed by the board.

Election of board members

A particular characteristic of Swedish corporate governance is the engagement of shareholders in the nomination processes to appoint the boards of directors and the auditors through the participation in companies’ nomination committees. Nomination committees are not regulated by the Companies Act, but by the Code. Under the Code, which is based on the comply or explain principle, all Swedish companies listed on a regulated market must put in place a nomination committee pursuant to a shareholder resolution that either appoints the committee members or sets out the principles on the basis of which the committee members are to be appointed.
The nomination committee is typically composed of representatives of the three to five largest shareholders. Under the Code the majority of the nomination committee members must be independent from the company and management and at least one of its members should be independent, both in relation to the company's largest shareholders but also from a cooperating group of shareholders. The Code sets out certain independent requirements in respect of composition of the board. There are also requirements aimed at encouraging gender balance on boards.

Even though director nomination is typically made through the nomination committee, any shareholder can nominate directors for election to the board and have the nomination included in the notice to the general meeting. Furthermore, any shareholder has the right to propose a candidate as late as at the meeting itself (provided board election is on the meeting agenda).

**Responsibilities of the board**

The board of directors has wide discretion to regulate its own work, typically through the rules of procedure that the board is required to adopt each year. The board members hold fiduciary positions in relation to the company and must therefore exercise due care and act in the best interests of the company. They are required to comply with the Companies Act and other applicable rules and regulations and with the company's articles of association.

The Companies Act sets out certain general principles, primarily the general clause and the principle of equal treatment, the purpose of which are to protect minority shareholders. The general clause provides that the board of directors or any other representatives of a company may not adopt resolutions that are liable to unduly benefit a shareholder or another party to the disadvantage of the company or another shareholder. Resolutions by the shareholders’ meeting are also subject to the general clause. Under the principle of equal treatment all shares have equal rights in the company, if not provided otherwise by the articles of association.

If a board member intentionally or negligently causes the company harm, he or she may be liable for damages. Board members may also in certain circumstances be liable to third parties, including individual shareholders, creditors and employees, if the relevant board member intentionally or negligently breaches the Companies Act, the Annual Accounts Act or the articles of association.

**The shareholders**

**Shareholder rights**

Under the Companies Act, the shareholders’ meeting is the highest decision-making body of the company. At the shareholders’ meeting the shareholders participate in the supervision and control of the company. There are a number of matters where a resolution must be passed by the shareholders’ meeting such as, alterations of the company's articles of association and changes to the company's share capital, mergers and demergers of the company.

To balance the power of major shareholders, the Companies Act provides for certain protection of minority shareholders. Some rights under the Swedish Companies Act may be exercised by each shareholder (i.e., regardless of the number of shares owned or the number of votes they represent) whereas some rights may only be exercised by a shareholder whose shareholdings represent 10 per cent or more of the share capital. There are also certain rights that can be exercised by various majorities of shareholders.
Shareholders with a single share may attend, express views and vote at general meetings; introduce matters to the agenda and present proposals for resolutions at general meetings; and take court actions against the company to set aside or amend a resolution on the grounds that it has not been duly passed or that the correct procedure for its adoption was not followed. Also, as is described further below, anyone (i.e., not only shareholders) can request a copy of a company’s share register, which shows all holdings of 500 shares or more.

Shareholders with 10 per cent of the shares, or more, may:

a. requisition an extraordinary shareholders’ meeting;

b. block a decision to discharge board members or the managing director from liability for damages;

c. bring derivative claims against any board member, managing director, auditor or shareholder;

d. block the squeeze-out of minority shareholders following a takeover offer;

e. block certain mergers or demergers;

f. request the appointment of one or more special examiners to investigate the company’s management, accounts or certain measures taken by the company or a minority shareholders’ auditor; and

g. request that the general meeting resolves on a dividend of at least a portion of the distributable profit.

Shareholders with more than one-third of the shares may block certain shareholder resolutions (including resolutions to alter the articles of association, issue shares, warrants or convertible instruments on a non-pre-emptive basis, buy back shares or reduce the share capital).

**Shareholder responsibilities**

Under Swedish law, a shareholder can be subject to claims in relation to damage caused to the company, a shareholder or a third party as a consequence of participating, intentionally or though gross negligence, in any breach of the Swedish Companies Act, the Annual Accounts Act or the company’s articles of association. A shareholder may not vote in respect of legal proceedings against him or her, or his or her discharge from liability for damages or other obligations towards the company. Claims against shareholders based on the liability rules in the Companies Act are very uncommon. Other than as set out above shareholders do not have any statutory fiduciary duties under Swedish law and therefore have no general obligation to act in the best interest of the company. Nor is there any code of best practice for shareholders. Even if there are no particular duties resting with controlling shareholders or institutional investors from a corporate governance perspective, controlling shareholders nevertheless often engage in the corporate governance of the company.

### III KEY TRENDS IN SHAREHOLDER ACTIVISM

There are clear signs of a growing trend of shareholder activism in Sweden. Recent examples of activist campaigns have also heightened the awareness among Swedish companies. These examples are not limited to attempts to influence corporate events, such as the outcome of a takeover, but include for instance open letters about the alleged lack of transparency and attempts to influence the contents of the agenda of annual general meetings. Furthermore, recent shareholder engagement has moved into the area of sustainability, aiming for instance
to improve the company’s environmental or social policies. On this basis, many companies actively monitor their share registers and put in place response manuals that address not only the receipt of a takeover offer but also approaches by activists.

i Shareholder engagement and activism

With one or a few majority owners in many Swedish listed companies, there are few examples where shareholders other than the majority owners have tried to influence the companies in which they own shares. This has, to a certain extent changed during the past decade, arguably following the increase in shareholder activism in the US and generally as a result of the globalisation of the financial markets.

ii Initiatives

Where shareholders do engage in activist strategies, they may include the following:

a Purchasing shares in a company to build a stake that can be voted to influence decisions at shareholders’ meeting. This could be combined with stock borrowing, which enables a borrower of shares to exercise voting and shareholder rights.

b Purchasing shares or other long positions using CFDs or other derivatives to influence decisions at shareholders’ meetings.

c Requesting a copy of the company’s share register with a view to contacting and cooperating with other shareholders to voice concerns and obtain support for actions that a company should take.

d Making a private approach to a company’s board to convey concerns and potentially bring about changes to the strategy or management.

e Purchasing shares in a company to qualify for a seat on the company’s nomination committee and, as a result, to influence the composition of the board.

f Using public announcements, press articles, open letters or social media to voice concerns and propose actions that a company should take.

g Exercising minority rights, such as requisitioning an extraordinary shareholders’ meeting to consider resolutions to effect changes, such as changes to the composition of the board and the return of funds to the shareholders.

h Threatening or taking legal action, such as a derivative action, for breach of directors’ duties or a claim for unfair treatment of minority shareholders.

i Seeking to have the company taken over to realise a premium to the share price.

j Seeking to have a company undertake a specific transaction.

The preferred response to an activist initiative is fact specific and dependent on the particular strategy (or combination of strategies) used by the activist. The way the company deals with the situation can affect the reputation of the company and the board of directors and it may impact the general view of the company’s engagement with its shareholders.

iii Preparing for activist approaches

There are a number of steps that a company could take prior to being targeted by a shareholder activist. Such steps may include the following.

a Maintaining a good relationship with its major shareholders and communicating its strategy clearly and how it is maximising long-term shareholder value.

b Monitoring press, research reports and social media in respect of both the company and its industry.
Conducting regular strategic reviews to identify areas of interest to activists.

Monitoring the company’s shareholder base to identify beneficial ownership, increased levels of stock borrowing and the use of derivatives.

Maintaining good corporate governance standards, including complying with legal and regulatory requirements and best practice, including ensuring that proper procedures, systems and controls are in place.

Generally identifying and anticipating areas of vulnerability.

**iv Rules and processes impacting activism**

**Stakebuilding and disclosure requirements**

Monitoring the shareholder base of the company could form part of an activist’s strategy and stakebuilding scheme. Information about the shareholder base, individual shareholders' investment horizon and investment strategies could be used by an activist to plan acquisitions and sales to fit stakebuilding processes. Information about the shareholder base could also be a useful tool in initiatives that involve cooperation with other shareholders.

Monitoring trades, shareholders and shareholdings is also useful for a company to determine whether relevant disclosure or mandatory bid thresholds are reached or exceeded. The company could monitor the activist shareholder's behaviour and the shareholdings closely to see whether relevant thresholds are crossed and the consequences this may bring, such as making a disclosure or having to make a mandatory bid. Furthermore, two or more activists or other shareholders pursuing a common strategy may be acting in concert. If this is the case, their shares may be aggregated for the purposes of these requirements.

The ownership structure of Swedish listed companies is in theory transparent. Pursuant to the Swedish Companies Act, all companies must, through their appointed central securities depositories, maintain a public share register, comprising shareholders with a shareholding of more than 500 shares in the company. However, in practice, the use of nominee or custody accounts will often reduce the transparency of the share register. The share register may not therefore reveal the true identity of beneficial holders.

The Swedish regime on shareholding disclosure implements the EU Transparency Obligations Directive (as amended). The regime requires the purchase and sale of shares to be notified to the Financial Supervisory Authority as well as to the target within three trading days where any of the following thresholds is reached, exceeded or fallen below: every 5 per cent up to and including 30 per cent; 50 per cent; two-thirds; and 90 per cent of the total number of shares or voting rights (including any shares held in treasury). The Financial Supervisory Authority will make the relevant information public by no later than at noon on the next trading day following receipt by the Financial Supervisory Authority of the notification. These disclosure rules do not only apply to shares. They also apply to financial instruments that entitle the holder to acquire shares that have been issued as well as long cash-settled derivatives (holdings through cash settled-derivatives are calculated on a delta-adjusted basis). However, warrants and convertible debt instruments that entitle the holder to subscribe for newly issued shares are not caught by the shareholding disclosure rules. Also stock-lending could be used, allowing a borrower of shares to exercise voting and shareholder rights without incurring a long-term economic exposure to the value of the shares. Disclosure requirements apply when the holdings of borrowed stock reach, exceed or fall below the relevant thresholds according to the above.
Market Abuse Regulation
The EU Market Abuse Regulation requires listed companies to announce any price-sensitive information as soon as possible unless they are able to delay such disclosure requiring that there is a legitimate interest to delay the disclosure, that the public is not being misled and that confidentiality can be ensured. On the one hand, an activist could use the argument of diligent application of the rules as a tool to force disclosure. On the other hand, since the Market Abuse Regulation prevents the board and management from disclosing inside information selectively, these rules could be used to resist information requests from an activist. Furthermore, an obvious concern in relation to dealings on the basis of confidential information is where the activist or shareholder has been in discussions with the board and, as a result, has received inside information. While individual dealings by an activist on the basis of its own intentions and knowledge of its own strategy would not typically be abusive, certain other activities could constitute market abuse. If the activist has received inside information from the company, dealings in shares or other financial instruments may constitute an insider dealing offence. In addition, where false rumours and expectations are generated to take advantage of short-term price movements, this could constitute a market abuse offence.

Shareholder concertedness
A shareholder activist who cooperates with other shareholders will need to consider the implications of acting in concert for the purposes of the shareholding disclosure requirements and the mandatory bid requirement.

In particular, where the parties have entered into an agreement that ‘oblige[s] them to adopt, by concerted exercise of the voting rights they hold, a lasting common policy towards … management’, such an agreement would generally qualify as relevant concertedness for the purposes of both the shareholding disclosure requirements and the mandatory bid requirement.

In this context it may be worth noting that the European Securities and Markets Authority (ESMA) has published a statement that addresses the extent to which shareholders may cooperate on governance issues without being regarded as ‘acting in concert’ under the EU Takeovers Directive. The statement includes a ‘White List’ of activities that are deemed not to be acting in concert. However, ESMA stresses the importance of early consultation with the relevant national authority where there is any uncertainty. If there are additional facts that indicate that the shareholders should be regarded as acting in concert, then the national authority should take those facts into account for the purposes of determining whether or not the parties are acting in concert, even if the relevant activity is on the White List. As a result, each case will be determined on its own facts.

The activities in the White List include:

\(a\) entering into discussions with each other about possible matters to be raised with the company’s board;

\(b\) making representations to the company’s board about company policies, practices or particular actions;

\(c\) other than in relation to board appointments, exercising shareholders’ statutory rights in relation to general meetings (e.g., the right to call a general meeting, adding items to the agenda and tabling draft resolutions); and
other than in relation to board appointments, and insofar as such a resolution is provided for under national company law, agreeing to vote the same way on a resolution put to a general meeting (e.g., to approve or reject a proposal relating to directors’ remuneration or rejecting a related-party transaction).

**Duties of the board of directors and management**

Since the Swedish corporate governance landscape is strongly based on the principle of equal treatment of all shareholders, the board has a duty to act in the best interests of the company. A board member owes his or her duties to the company as a whole (i.e., to all shareholders, and not to a particular shareholder). On this basis it may, therefore, be legitimate to resist any activist pressure to accept initiatives, propose dividends, give a recommendation in favour of a bid or proposal or allow access for due diligence in such a process. Further, the legal duties only require that the interests of the shareholders are taken into account and not those holding derivatives. Activists may, however, challenge the exercise of directors’ duties by bringing derivative claims for damages but such claims will in practice often prove to be unpredictable and will rarely result in any immediate effect. The use of litigation is therefore typically not regarded as a key tool for activists in Sweden.

**Shareholder resolutions**

With few exceptions, the general meeting of shareholders may decide on any issue that does not expressly fall within the exclusive authority of another corporate body. The strategy of an activist shareholder could therefore involve engaging in the shareholders’ resolution process, including with the aim of being represented in the company’s nomination committee. Typically, the nomination committee members are appointed by the three to five largest shareholders in the company. The nomination committee instructions normally include principles for the appointment of the members, who are usually appointed by the shareholders identified as the largest at a set time well before the annual general meeting. This implies that an activist may stakebuild in order to be among the largest shareholders at the specified time.

A shareholder could also take activist initiatives by requisitioning resolutions at the shareholders’ meeting. A shareholder may also request information at the shareholders’ meeting.

Each shareholder has the right to attend the shareholders’ meeting and shareholders who are not able to attend in person could be represented by a proxy. Proxy solicitation by the company is not permitted. The Companies Act, however, provides for the proxy voting, but this is a possibility that is rarely used by Swedish companies. To introduce proxy voting, the company must alter its articles of association, by introducing a provision on proxy voting. This would enable the distribution of proxy forms where the shareholders may indicate their votes (as ‘yes’ or ‘no’) regarding the relevant proposals, which are then executed without the shareholders being present at the shareholders’ meeting.

A timeline for shareholders’ resolution initiatives could look as follows:

<table>
<thead>
<tr>
<th>Q2 Year 1</th>
<th>Q1 Year 2</th>
<th>Q2 Year 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>Appointment of nomination committee</td>
<td>Propose matters to the AGM agenda in ample time before publication of the AGM notice.</td>
<td>Give notice to attend the AGM. Attendance at the AGM.</td>
</tr>
</tbody>
</table>
Furthermore, an activist shareholder holding 10 per cent or more of the shares in the company may exercise or threaten to exercise minority rights to put pressure on the board of directors. Such minority rights include requisitioning an extraordinary shareholders’ meeting, blocking decisions to discharge liability, bringing claims for damages, requesting a special examiner or requiring certain minimum dividend payments.

**Generally accepted market practice**

In addition to the regulatory framework described above, self-regulation has long characterised the Swedish securities market.

The self-regulating body, the Swedish Corporate Governance Board, is responsible for managing and administrating the Code and generally promoting good governance of listed companies in Sweden. The Code is a form of self-regulation and compliance with it is mandatory for all Swedish companies listed on a regulated market subject to the ‘comply or explain’ principle.

The Code has received general acceptance on the Swedish market and a majority of companies report no or only minor instances of misapplication of the Code.

Another self-regulation body is the Swedish Securities Council. The role of the Swedish Securities Council is to promote good practices on the Swedish stock market by issuing statements on points of interpretation of the Takeover Rules and what constitutes good market practice. The Swedish Securities Council is consequently an important rule-maker in this context. Any action by a Swedish limited company that has issued shares listed on a regulated market in Sweden or by a shareholder of such a company may be subject to the Swedish Securities Council’s assessment.

### IV RECENT SHAREHOLDER ACTIVISM CAMPAIGNS

Examples in activism in Sweden include the following.

<table>
<thead>
<tr>
<th>Activist</th>
<th>Campaign</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Amaranth Capital/Lindex</td>
<td>(2004–2007)</td>
<td>In October 2003, Amaranth Capital (now Cevian) acquired 10.4 per cent of Lindex shares, thereby becoming its second-largest shareholder. Amaranth Capital gained board representation in 2004. Board and management changes were initiated, as well as changes to the companies and strategy. Amaranth Capital sold its stake in 2006 and 2007.</td>
</tr>
<tr>
<td>Violet Partners/ Volvo</td>
<td>(2006–2007)</td>
<td>In September 2006, Violet Partners (a JV between Parvus and Cevian) acquired shares representing 5.3 per cent of the voting rights in Volvo. Violet Partners sought to gain a position on the board and pushed for changes to the capital structure and amendments to the composition of the board. Violet Partners gained a seat on the nominations committee but did not succeed in its attempt to gain board representation. Parvus eventually left the JV.</td>
</tr>
<tr>
<td>Muddy Waters/ Telia Company</td>
<td>(2015)</td>
<td>In 2015, the activist Muddy Waters declared a short position in an open letter questioning the extent of the Swedish phone company’s transparency about its Eurasian businesses. Telia Company shares fell the most in more than three years. Telia Company responded that it fully cooperated with ongoing investigations in Sweden, the Netherlands and the United States, that it was as open and transparent as possible with respect to listing requirements and the investigations, that it had not received any claims from US authorities and that its financial statements were in accordance with international financial reporting standards (IFRS).</td>
</tr>
<tr>
<td>Norges Bank</td>
<td>(2015/2016)</td>
<td>In 2015/2016, a number of the large institutional investors (including Norges Bank Investment Management) campaigned for individual board election and transparency of voting at the shareholders’ meeting. According to the investors it should be mandatory to present proposals to the board of directors as a set of individual proposal and that voting should take place individually and be announced for, for each proposed candidate, as opposed to bundled elections commonly undertaken.</td>
</tr>
</tbody>
</table>
In 2015, Canon made a recommended public takeover offer for the Swedish listed surveillance camera manufacturer Axis. During the acceptance period Elliot Capital took a corner position of just over 10 per cent of the issued share capital preventing Canon from squeezing out the remaining minority shareholdings. Axis is still listed despite Canon’s stake of around 86 per cent and Elliot Capital’s corner position. Elliot has exercised a number of minority rights, including requiring certain minimum dividends, the appointment of a special examiner and a minority auditor.

In 2016, EQT made a mandatory takeover offer for IFS, following the purchase of around 63 per cent of the shares in IFS. During the acceptance period, Elliot Capital took a corner position of just over 11 per cent of the issued share capital, preventing EQT from squeezing out the remaining minority shareholdings. Elliot has exercised a number of minority rights, including requiring certain minimum dividend, the appointment of a special examiner and a minority auditor. In 2017 EQT acquired Elliot Capital’s stake and IFS was delisted.

V REGULATORY DEVELOPMENTS

As discussed above, the Swedish stock market has a long history of long-term engaged controlling shareholders that are typically willing to invest time and resources in the governance of companies. Corporate governance reforms, such as the introduction of the Code, have been undertaken in order to make legislation superfluous. While self-regulation has become more difficult to uphold, following the introduction of EU legislation in this area, the introduction of EU legislation is not likely to generally have any major impact on activism and its potential impact on Swedish companies. The amended Shareholder Rights Directive, which must be transposed in the Member States on 10 June 2019 at the latest may, however, have some impact. In particular, the Directive will, among other things, increase the possibilities for a company to identify its shareholders and require institutional investors and asset managers to be transparent about how they invest and engage with the investee companies.

VI OUTLOOK

While Europe is generally regarded to be significantly behind the US in terms of activism, there are clear indications of a growing trend of shareholder activism in Sweden and elsewhere in Europe. From a Swedish perspective it is likely that this increased activism is a long-term phenomenon. From a regulatory perspective, increased transparency and accountability are likely to reinforce this trend and may potentially strengthen activists. While the traditional strategy among activists in Sweden has been private approaches, we have seen several recent examples of public campaigns to voice concerns or propose actions. This will in turn likely increase the attention of listed companies to activism as a continuing and increasing issue.
I OVERVIEW

The number of campaigns by activist shareholders in Switzerland is still relatively low compared with other jurisdictions, in particular the United States. More recently, however, the Swiss market has seen a growth of shareholder activism, including high-profile campaigns against large multinational companies. Furthermore, the general assembly season 2017 showed an increasing willingness of shareholders to express their dissatisfaction with the board of directors (the board) or the management by rejecting board proposals regarding directors or executive management compensation in ‘say-on-pay’ votes. We expect this change of mindset and the consequential potential increased support base for activist shareholders to further foster shareholder activism in Switzerland.

The key factors that have contributed to Swiss companies appearing on the radar screen of activist shareholders are not materially different from the drivers in other parts of the world:

a The company has underperformed its peers, in particular based on its shareholder return.

b The company has a low market value relative to its book value, but is profitable.

c The company’s cash reserves are relatively high historically and relative to its peers, but the company is not prepared to make material adjustments to its distribution policy or has not committed to a significant share buy-back.

d Underperformance of a particular business segment.

e Corporate governance issues, in particular if the company does not meet ‘best practices’ recommended by proxy advisory firms.

II LEGAL AND REGULATORY FRAMEWORK

i Primary sources of law and regulations

*Swiss Code of Obligations*

The most important tools available to an activist shareholder in Switzerland are included in the Swiss Code of Obligations (CO). The corporate law contained in the CO governs shareholders’ rights, the duties of the board and the division of power between the board and the shareholders’ meeting.
The Swiss Ordinance against Excessive Compensation

The Swiss Ordinance against Excessive Compensation (the Ordinance), which entered into effect on 1 January 2014, introduced additional shareholders’ rights that may be used by activist shareholders of listed companies. The most prominent elements of the Ordinance are the binding ‘say-on-pay’ votes on directors and executive management compensation. Further, the Ordinance limits the term of office of board members of listed companies to one year, thus abolishing the staggered board structure many companies used as a defence mechanism. The Ordinance gives shareholders the right to elect the members of the board’s compensation committee directly and obliges certain pension funds to exercise their voting rights with respect to certain agenda items, in particular the election of the members of the board, the chairman of the board and the compensation of the directors and the executive management. The Ordinance further provides that any institutional representation of shareholders can be done only through an independent proxy elected annually at the shareholders’ meeting, and no longer through a company representative.

The Swiss Financial Market Infrastructure Act, the Swiss Financial Market Infrastructure Ordinance, the Financial Market Infrastructure Ordinance of FINMA and the Takeover Ordinance

An activist shareholder building its stake will have to comply with the disclosure rules included in the Swiss Financial Market Infrastructure Act (FMIA) and the Financial Market Infrastructure Ordinance of FINMA (FMIO-FINMA), which apply to companies incorporated in Switzerland with a primary or secondary listing on a Swiss stock exchange (or foreign companies with a primary listing on a Swiss stock exchange). Pursuant to these rules, persons who directly, indirectly or in concert with other parties acquire or dispose of shares of a company listed on a Swiss stock exchange, or purchase or sell rights or obligations relating to such shares (including call options, put options, derivative instruments and cash-settled financial instruments), and, thereby, directly, indirectly or in concert with other parties reach, exceed or fall below a certain threshold relative to the company’s voting rights (whether exercisable or not) must notify the issuer and the stock exchange of such acquisition or disposal. Unlike in most other jurisdictions, the initial threshold that triggers a disclosure obligation is not set at 5 per cent, but at 3 per cent (calculated by reference to the relevant company’s share capital registered in the commercial register). The additional disclosure thresholds are set at 5, 10, 15, 20, 25, 33.3, 50 and 66.6 per cent.

If an activist shareholder, directly, indirectly or acting in concert with third parties, acquires equity securities that, when added to the equity securities already owned, exceed the threshold of 33.3 per cent of the voting rights of a target company, whether exercisable or not, the activist shareholder must submit a mandatory public tender offer to all shareholders of the company to acquire all listed equity securities of such target company. Target companies may raise this threshold to 49 per cent of the voting rights in their articles of association or exclude the obligation of submitting a mandatory offer entirely. Only few Swiss companies have done so.

Listing Rules of SIX Swiss Exchange (ad hoc)

The obligation of companies listed on the SIX Swiss Exchange (SIX) – Switzerland’s pre-eminent stock exchange – to disclose price-sensitive, non-public facts as set out in the
SIX Listing Rules and the SIX’s Directive on Ad hoc Publicity (DAH) may have an impact on the extent to which the discussions between the company and the activist shareholders or the campaign of an activist shareholder can be held confidential.

**The activist shareholder’s toolbox**

The following section provides an overview of the variety of tools available to an activist shareholder in Switzerland.

**Private discussion and engagement with the company**

Typically, the first tool that activist shareholders utilise are discussions with the management and the board in an effort to seek consensus with respect to specific changes that activist shareholders believe the company should adopt. Swiss companies targeted by activist shareholders have traditionally engaged in this form of communication with activists. Subject to limited exceptions (e.g., equal treatment of shareholders and non-disclosure of insider information), Swiss law generally permits this kind of interaction between the management or the board and shareholders. Shareholders do not have any possibility, however, to force management or the board to engage in discussions if they refuse to do so.

**Public campaigns and contact with shareholders**

Following or in parallel with the discussions with the board or the management, activist shareholders usually launch public campaigns, through print and online media specifically dedicated to such shareholders’ campaigns, in particular the ‘vote no’ campaigns where an investor (or coalition of investors) urges shareholders to withhold their votes from one or more of the board nominees, reject board proposals regarding directors and executive management compensation, or engage in an actual proxy contest, for example by nominating own board candidates or proposing corporate governance changes (e.g., changes to capped voting rights provisions, the rules regarding board composition or the size of the board, or a change to the proposed distribution to shareholders).

As shareholders of a Swiss company have no right to request direct access to the company’s shareholder register, direct contact by the activist shareholder with other shareholders is limited to those shareholders whose interest in the issuer is publicly known, for example, owing to public filings such as those disclosed on the SIX ‘significant shareholder’ platform, or through searches of other publicly available sources (Bloomberg, FactSet). Hence, contact with most of the shareholders must occur through media campaigns, special website or proxy advisers.

Even if the other shareholders are known, depending on an activist shareholder’s interest in a company and its willingness to disclose its shareholdings or to submit a public tender offer, an activist shareholder is well-advised to carefully consider the form of discussions it engages in with other shareholders prior to a shareholders’ meeting. Discussions among shareholders may qualify as ‘acting in concert’, with the consequence that disclosure obligations and mandatory offer obligations could be triggered if the thresholds for the disclosure obligations or mandatory offers are reached or crossed.

**Right to participate in and exercise of voting rights at the general meeting**

Every shareholder registered in the share register at the relevant record date has the right to participate in and exercise its voting right at the company’s general meeting. In addition, each
shareholder, including shareholders having requested the inclusion of an item on the agenda, is entitled to explain its position regarding a certain agenda item or submit proposals with respect to duly notified agenda items (Article 700, Paragraph 4 CO). The board may restrict the length of speeches, but must treat all shareholders equally.

Although this right to speak gives activist shareholders a platform to communicate with other shareholders and promote their campaign, its benefit is limited because of the fact that the decision-making process has shifted from the general meeting to the run-up to the general meeting. The independent proxy, who is obliged to vote in accordance with the shareholder's instructions, typically represents the majority of the votes at the general meeting. Hence, any activist shareholders' speech, no matter how persuasive, is unlikely to change the outcome of the shareholders' vote at the general meeting. This holds true all the more for proposals submitted at the general meeting itself, as proxy forms typically provide, as part of the general voting instructions, that absent specific voting instructions, the independent proxy would vote on the shares for which proxy is granted in accordance with the recommendations of the board.

**Right to request the inclusion of an item on the agenda of a general meeting and right to call an extraordinary general meeting**

For a shareholder to be able to request the inclusion of an item on the agenda of a general meeting or to call an extraordinary general meeting, the shareholder must hold, as an owner of record, the number of shares required pursuant to the company's articles of association. Absent specification in the articles of association, the default rule is – companies are not permitted to introduce stricter provisions – that shareholders holding shares with a par value worth in the aggregate 1 million Swiss francs or more have a right to request the board to put a specific item on the agenda of a general meeting. According to a significant view in Swiss legal writing – a persuasive authority under Swiss law – shareholders who hold 10 per cent of the company's share capital – a reference to the issued share capital, rather than outstanding shares – may also request the inclusion of an item on the agenda of a general meeting.

Unless the articles of association provide for a lower threshold, shareholders who hold 10 per cent of the share capital have the right to request the board to call an extraordinary general meeting. Also here, a significant part of legal writing has adopted the view that, alternatively, shareholders holding shares with a par value worth at least 1 million Swiss francs would have the right to call an extraordinary general meeting.

Upon receipt of a request to call an extraordinary general meeting, the board must comply with the request within a reasonable period of time. According to precedents, this generally means between four and eight weeks, depending on the circumstances. If the board does not comply with the request, the shareholder would have to seek a court order to enforce its request. The court would either require the board to call a meeting within a certain time or, in exceptional circumstances, call the meeting itself.

If a valid and complete request for inclusion of an item on the agenda has been submitted to the board, the board is in principle obliged to include the agenda item and the proposal in the proxy card.
Shareholders do, however, have no right to request the inclusion of explanatory notes in the company’s proxy card.\(^2\) In practice, many companies would, however, include a short explanatory statement of the activist shareholder.

**Share register, information and inspection rights, special audit**

Under the CO, a shareholder has the right to inspect the share register with regard to its own shares (but not with regard to the shares of other holders) and otherwise to the extent necessary to exercise its shareholder rights. No other person has a right to inspect the share register.

The books and correspondence of a Swiss company may be inspected with the express authorisation of the general meeting or by resolution of the board and subject to the safeguarding of business secrets. At a general meeting, any shareholder is entitled to request information concerning the affairs of the company. Shareholders may also ask the auditor questions regarding its audit of the company. The board and the auditor must answer shareholders’ questions to the extent necessary for the exercise of shareholders’ rights and subject to prevailing business secrets or other material interests of the company.

In addition, if the shareholders’ inspection and information rights as outlined above prove to be insufficient, any shareholder may propose to the general meeting that specific facts be examined by a special commissioner in a special investigation. If the general meeting approves the proposal, the company or any shareholder may, within 30 calendar days after the general meeting, request the court at the company’s registered office to appoint a special commissioner. If the general meeting rejects the request, one or more shareholders representing at least 10 per cent of the share capital or shares in an aggregate par value of at least 2 million Swiss francs may ask the court to appoint a special commissioner. The court will issue such an order if the petitioners can demonstrate that the board, any member of the board or an officer of the company infringed the law or the company’s articles of association and thereby damaged the company or the shareholders. The costs of the investigation would generally be allocated to the company and only in exceptional cases to the petitioners. Although rarely used, Article 731a CO provides for the right of a shareholder to also request the general meeting to appoint an expert to examine the management or parts thereof. Unlike the special commissioner pursuant to Article 697a CO, the expert may assess and appraise facts and is not limited to fact finding.

**Litigation**

Within two months of a general meeting, any shareholder may challenge shareholders’ resolutions adopted in violation of applicable laws or the company’s articles of association. Resolutions of the board, however, are not challengeable, except if such resolutions were to be considered void.

An effective tool available to activist shareholders, at least temporarily, is the blockage of commercial register entries. Under Swiss law, many corporate actions, such as capital increases in connection with the issuance of new shares, statutory mergers or more generally amendments to the articles of association, require registration with the commercial register to be effective. Such a blockage can be obtained through the submission of a written objection

\(^2\) Such an obligation could, however, be introduced with the revision of Swiss corporate law; see Article 700 Paragraph 2 ch. 4 Swiss Corporate Law Reform Bill published on 23 November 2016.
to the commercial register. The initial blockage would then need to be prosecuted through an application for provisional measures in court and subsequent court challenge of the shareholders’ resolution that is underlying the commercial register entry. Even if ultimately unsuccessful, blockage actions have the potential to significantly delay the process, thus adding significant nuisance value to the tool box of an activist shareholder.

Shareholders may also file liability law suits against members of the board and the management for breaches of their fiduciary duties. Directors and the persons engaged in the management of the company are liable to the company, the shareholders and, in bankruptcy, the creditors for any losses arising from any intentional or negligent breach of their duties. A rule similar to the business judgement rule applies. There are almost no reported cases of directors’ and officers’ liability outside insolvency matters. In addition, Switzerland is a non-litigious environment partly due to the fact that class actions are not permitted and a plaintiff has to bear court costs in a shareholder lawsuit and has to reimburse the defendant for attorney’s fees if the shareholder loses the case. Liability claims against directors and executives are typically derivative in nature, and therefore the remedy would be to seek damages payable to the company. Only in extraordinary circumstances could direct damages (payable to the shareholder submitting the liability claim) be requested.

Structural defences and director duties

Many companies have included structural defences in their articles of associations designed to make activist campaigns more difficult. The key elements available to Swiss companies are capped voting rights, and qualified presence quorums and supermajority.

Capped voting rights

Where a company may limit the voting rights of shareholders to a certain percentage (usually between 2 and 5 per cent), above which the registration with voting rights in the company’s share register may be refused. Through this feature, a company may also be able to limit coalitions between shareholders. As a consequence, the shareholders’ voting rights are capped at the relevant percentage limit.

Qualified presence quorums and supermajority

Swiss law does not stipulate any presence quorum requirements; however, the company’s articles of association may do so, for example, for matters such as increase in the board size, or the removal of board members. Once qualified presence quorum provisions have been introduced, the board does not have the authority to waive quorum requirements stipulated in the articles of association. Under the CO’s default rules and subject to certain supermajority requirements, the shareholders generally pass resolutions and make elections by the affirmative vote of an absolute majority of the shares represented and voting at the general meeting. The articles of association may, however, include increased majority requirements (e.g., two-thirds of the shares entitled to vote) for matters such as dismissal of board members or the increase in the size of the board to prevent the election of additional board members. Note that there are a number of corporate actions that under Swiss law by default require a qualified majority of two-thirds of the votes and an absolute majority of the par value, each as represented at the general meeting. Among other things, share capital increases without pre-emptive rights, the introduction of authorised share capital and merger transactions fall into this category.
Defences against public tender offers

There are relatively strict limitations to the board’s ability to take defensive measures on its own, without authorisation of the general meeting, at least once a public tender offer has been submitted. However, a board may seek authorisation in the authorised share capital included in the articles of association to issue shares under withdrawal of the shareholders’ preferential subscription rights. While there have been a number of companies that have included such provisions in their articles, there have not been any instances where these types of provisions have been used to issue shares to white knights.

III KEY TRENDS IN SHAREHOLDER ACTIVISM

In line with the global increase of shareholder activism in recent years, Switzerland has seen a significant increase in campaigns of activist shareholders. Both international hedge funds, mainly from the United States, and Swiss hedge funds have acted as activists. While it is difficult to make a general statement about the long-term or short-term orientation of activists in Switzerland, most of the activist investors appear to be invested in the target companies for more than one year. Shareholder intervention historically focused on board representation, share repurchases, distributions and more generally on the company’s strategy. With the introduction of the binding ‘say-on-pay’ votes, board and executive remuneration has also become a target of activist shareholders’ campaigns. Apart from these classical topics, Switzerland has also seen activist campaigns focusing on the board reaction to public tender offers (Syngenta/Monsanto).

Influence of proxy advisers

In recent years, Switzerland has seen a significant increase in the influence of institutional proxy advisers. One of the reasons for this trend is the introduction of the obligation of certain pension funds to exercise their voting rights on specific agenda items. Given that the votes must be exercised in the interest of the insured persons and that pension funds do often not have sufficient resources to thoroughly analyse the relevant agenda items, many of the pension funds pay institutional proxy advisers for advice regarding the exercise of voting rights.

The most influential proxy advisers in Switzerland are Institutional Shareholder Services Inc (ISS) and Glass Lewis & Co LLC (Glass Lewis). ISS influences around 20 per cent of the shares represented at a general meeting and Glass Lewis around 10 per cent. Due to their increasing influence, discussions with proxy advisers have become one of the main elements of shareholder activism campaigns. With the support of institutional proxy advisers, winning a shareholders’ vote will become possible even with taking a limited stake in the company only. While a general trend is not yet apparent, it is possible that this will bring funds with less assets under management into play as activist shareholders.

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ii Use of dedicated websites

As recent shareholder activism campaigns have shown that not all activists and target companies are able to attract the same media attention. As an alternative or as supplement to media campaigns, activist shareholders have started to use dedicated websites to promote their message more broadly. Although possible, websites have not yet been used to solicit proxies directly, but rather to publish voting recommendations or disclosing voting recommendations of proxy advisers.

IV RECENT SHAREHOLDER ACTIVISM CAMPAIGNS

i Transocean

Transocean Ltd (Transocean) is special among Swiss companies, as it qualifies as a US issuer that is subject to the US proxy rules. Accordingly, Carl Icahn and his group (Icahn) were able to use activist shareholder tools that would otherwise not be available to shareholders of a Swiss company, when Transocean came onto his radar in 2013. Also, Transocean made public filings with the SEC, thereby disclosing its interaction and communication with Icahn and its own campaign strategy.

Icahn requested a significantly higher dividend payout, board declassification and the election of three director candidates. In pursuit of his requests, Icahn was able to reach an agreement with Transocean to send out a separate ‘gold’ proxy card to its shareholders – the alternative, giving Icahn access to the share register directly, is not permissible under Swiss law. The ‘gold’ proxy card only included the agenda items and proposals requested by Icahn, whereas the Transocean proxy card, in line with Swiss law requirements, included all agenda items and proposals, including the Icahn proposals. At the annual general meeting at which the Icahn proposals were subject to a shareholder vote, Icahn did not succeed with its increase in dividend request; however, Icahn did achieve the election of one board member, and in the course of the campaign run by Icahn in the run-up to the annual general meeting, Transocean’s chairman of the board had resigned. Subsequent to the annual general meeting, Transocean and Icahn entered into a settlement agreement, in which Transocean’s board agreed to propose and support at the next annual general meeting that the company’s shareholders approve an increased dividend, two Icahn representatives be elected as directors, and the board size be decreased. Icahn in return agreed to certain standstill restrictions and committed to vote in favour of the board directors nominees and certain other board proposals.

ii Holcim

In connection with Holcim and Lafarge’s merger of equals in 2014/5, a coalition of investors started challenging the merger of equals after the deal was announced. The demands came after a divergence in the performances of the two companies. Holcim’s operating performance and share price had outperformed those of Lafarge’s since the deal was struck. The board of Holcim ultimately renegotiated some of the deal terms, in particular the exchange ratio, thus giving Holcim shareholders a greater share of the combined entity.

iii Gategroup

A recent activist shareholders’ campaign that attracted significant media attention, was the joint campaign of RBR Capital Advisers AG, representing various RBR funds (RBR) and Cologny Advisers LLP, representing the Camox Master Fund (Cologny) against gategroup
Holding AG (gategroup). One specific feature of RBR and Cologny’s campaign was the use of a dedicated website, which was used, in particular, to publish letters and email exchanges between gategroup and the activists as well as open letters to shareholders. RBR and Cologny requested changes in the board composition, a reduction of executive compensation and the implementation of a cost-saving programme. While initially, the board, with the support of ISS and the Ethos Foundation, a local proxy adviser, rejected RBR’s request to elect representatives of RBR to the gategroup board at the general meeting 2015, it entered subsequently on behalf of gategroup into a settlement agreement with RBR and Cologny, pursuant to which gategroup’s board revised its proposal and recommended the election of two of the candidates proposed by RBR and Cologny as new board members.5 These two candidates were elected as new board members by the annual general meeting 2015. At the annual general meeting 2016, the shareholders did not elect the additional shareholder nominees and did not approve the special audit requested by RBR and Cologny. RBR and Cologny were, however, successful in getting gategroup’s board to submit to shareholders a revised proposal for the executive management compensation.

RBR and Cologny’s campaign ended with the public tender offer of the HNA Group Co Ltd (HNA) for all publicly held registered shares of gategroup. The public tender offer was settled in December 2016. While RBR’s and Cologny’s campaign against the public tender offer of HNA may have caused the relatively low success rate after the initial acceptance period, they did not succeed in getting HNA to agree to an increase in the offer price.

iv Nestlé
One shareholder activist campaign still at the very beginning is the campaign of the hedge fund Third Point, a company led by activist shareholder Daniel Loeb. On 25 June 2017, Third Point announced in a public letter to shareholders that it had invested over US$3.5 billion in Nestlé AG (Nestlé). Third Point is trying to influence Nestlé’s strategy by requesting, inter alia, the sale of Nestlé’s 23 per cent stake in L’Oréal, the repurchase of shares, and the sale of non-strategic activities. Only two days later, Nestlé announced a share buy-back programme of up to 20 billion Swiss francs. Pursuant to Nestlé’s press release, this was a consequence of a comprehensive review of the company’s capital structure initiated already in early 2017.

v Clariant
The latest activist shareholder campaign published is the campaign of activist Keith Meister, controlling the general partner of Corvex Master Fund LP and Corvex Select Equity Master Fund LP (Corvex) and David Winter and David Millstone, both controlling persons of the investment manager of 40 North Latitude Master Fund Ltd (40 North) against Clariant AG (Clariant). In July 2017 Corvex and 40 North increased their stake through White Tale Holdings LP to at least 10.06 per cent of the voting rights of Clariant, corresponding to an investment of around 800 million Swiss francs. Corvex and 40 North aim to pressure Clariant to seek alternatives to the Huntsman Corporation (Huntsman) deal announced on

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22 May 2017. The activists argue that the planned merger of equals leading to a global specialty chemicals company with a combined enterprise value of approximately US$20 billion lacks strategic rationale and undervalues the shares of Clariant. As the deal is subject to shareholders’ approval, a heated debate in view of the general meeting is to be expected.

V REGULATORY DEVELOPMENTS

We do not currently expect a significant overhaul of the rules and regulations governing activist shareholders’ campaigns. There is, however, a corporate law bill pending in Parliament, which, among other things, intends to strengthen the rights of minority shareholders. The thresholds for requesting a shareholders’ meeting and the inclusion of an item on the agenda would be lowered to 5 and 0.5 per cent, respectively, of the capital or voting rights (from 10 per cent currently) of private and listed companies, respectively. In private companies, shareholders with 5 per cent or more would have the right to ask the board questions not only at shareholders’ meetings (as currently), but also between meetings. The de-listing of a company’s shares, which today is in the board’s authority, would require shareholder approval with two-thirds of votes and half of the capital, each as represented at the general meeting. It is currently unclear in what form the bill will ultimately be adopted. We would expect the bill to come into effect in 2020 at the earliest.

VI OUTLOOK

Based on the recent high-profile campaigns launched by US activist shareholders and the trend for shareholders of Swiss companies in general to become more engaged with the company they are invested in, we expect campaigns of shareholder activists to increase and become more of a mainstay of Swiss corporate law. We also believe that the growing importance of online services and social media will continue to facilitate shareholder activists’ campaigns in Switzerland, in particular as a way to overcome the limitations shareholder activist currently have because of the lack of a direct access to the company’s share register.
Chapter 13

UNITED KINGDOM

Gavin Davies and Mark Bardell

I OVERVIEW

Shareholder activism continues to grow in prevalence and significance in the UK, in common with global trends. While shareholder activism is not a new concept in the UK market, the type of investors undertaking activism, the companies that they are targeting and the outcomes that they are seeking to achieve have continued to evolve over recent years, influenced in large part by the development of such activity in the US.

Shareholder activism is a generic term that is usually used to describe an approach by a shareholder or shareholder group to a company’s board, and if necessary to its fellow shareholders, seeking to effect change within a company. While shareholder activism in the UK has historically been focused on obtaining board representation, activist investors have begun to utilise the legal and regulatory tools available to them to achieve a more diverse range of outcomes, short of a full control transaction.

Shareholder activism campaigns in the UK can be categorised in many different ways. One simple approach is to distinguish between: (1) event-driven activism, where an activist shareholder will seek to assert its influence on a company’s then-current corporate activity, particularly in relation to a takeover or other M&A situation; and (2) strategic or operational activism, where outside a company’s then-current corporate activity, a shareholder activist seeks to address operational performance, balance sheet or other strategic issues, or some other longer-term concern at a company, such as governance or remuneration. While strategic or operational activism is often associated with management or leadership changes, achieving control in the strict company law sense is not usually an objective and paying a control premium is something activists will seek to avoid.

Just as the type of shareholder activism can vary broadly, there is no one type of shareholder activist in the UK, and the term can cover a wide range of investors. Some activists are specific investment funds with activism as their business model, and it is these investors that are generally classed as ‘activist’ shareholders. Equally, existing shareholders may become ‘active’ shareholders, for example, where they consider that the company is underperforming or they disagree with the decisions being made by the company’s board. Traditionally, institutional investors in the UK have refrained from voicing their concerns or criticisms of management in the public domain and the vocal activist community has historically been composed of hedge funds, specific investment funds and other alternative investors. Increasingly, however, institutional investors and other shareholders are becoming more prepared to air their concerns in the open, or to lend their support (publicly or

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privately) to those who are more willing or able to do so, when they feel that their concerns are not being registered by management. ‘Activist’ shareholders are sometimes described as performing a ‘lightning rod’ role for such dissent in the public market; they can sometimes provide a useful channel for such dissatisfaction felt by a wider group of shareholders.

The specific shareholder activist funds operating in the UK are generally well researched, tactically astute and determined, and come armed with the funds needed to support their campaigns. Such activists will be prepared for a hostile response (and will not shy away from public disagreement) but may prefer to reach a consensual agreement with a board if they can. They are persistent (some with multi-year time horizons on their investment) and relatively resistant in the face of an initial knockback (with a number of examples of activists willingly reiterating arguments and returning to shareholders for a second shareholder vote).

This chapter considers: (1) the legal and regulatory framework relating to shareholder activism campaigns in the UK; (2) the key trends in shareholder activism in the UK that have emerged in recent years; (3) examples of recent shareholder activist campaigns in the UK (4) regulatory developments that may affect shareholder activism in the UK; and (5) the outlook for shareholder activism in the UK.

II LEGAL AND REGULATORY FRAMEWORK

The global focal point of shareholder activism over the past decade has been and remains the US market, where activist investors have been ready and willing to employ the legal means available to them to achieve their objectives. In the UK, corporate law has always provided a strong basis of shareholder rights from which to challenge management. This, together with concerted efforts over many years by UK regulators and policymakers to encourage more active shareholder engagement (particularly following the failures identified in the global financial crisis), has resulted in a legal and regulatory framework in the UK that is arguably the most benign framework for possible activist activities in Europe. This position is likely to increase in a post-Brexit environment.

The most important legal tools available to an activist shareholder are enshrined in English company law (the Companies Act 2006), which provide an activist shareholder with the means of amplifying its influence beyond the size of its shareholding (which in some cases may be quite small) and becoming the ‘lightning rod’ for the shareholder voice of change referred to above. The most powerful tool in an activist shareholder’s toolkit is the ability to call for a general meeting of a company. Provided that a shareholder holds at least 5 per cent of a company’s issued share capital, it may requisition a general meeting of its fellow shareholders and propose one or more resolutions to be considered at that meeting (Section 303). Alternatively, shareholders holding at least 5 per cent, or a group numbering at least 100 shareholders, may requisition specific resolutions to be considered at a company’s annual general meeting (Section 338). It is this ability to introduce a resolution, taken with the ability of a simple majority of those voting at the relevant meeting to remove or appoint a new director, that gives the shareholder its most potent threat. Accordingly, in strategic and operational as well as governance and pay situations, the requisition will be to remove existing directors from the board or appoint new directors nominated by the activist investor, to ensure new voices on the board to help achieve the desired outcome. However, provided that it relates to a matter that is not defamatory or vexatious and, if passed, would be effective
(noting that merely ‘directive’ resolutions by shareholders to the board are not generally regarded as such), there is no limit to the type or wording of a resolution that an activist may propose.

Ordinary resolutions of a company may be passed by a simple majority (50 per cent plus one share), whereas special resolutions require a majority of 75 per cent. This means that a group of shareholders holding 50 per cent of the shares voted at a meeting have the power to pass ordinary resolutions, or conversely, a minority bloc of 25 per cent may block special resolutions. These thresholds refer to percentages of shareholders present and voting at the meeting, so in fact a much smaller overall bloc of shareholders may be able to pass or block resolutions, depending on turnout. It is generally thought that FTSE 350 shareholder turnout is around the 70 per cent mark. For example, the National Association of Pension Funds (now the Pensions and Lifetime Savings Association) 2015 AGM Report cited average voting turnout across FTSE 350 AGMs that year at nearly 73 per cent.

It should also be noted that for a UK listed company, in particular, one with a premium listing, certain significant corporate transactions will require shareholder approval (for example, a class 1 major transaction under the UK Listing Rules or where non-pre-emptive issuances of consideration shares are required). Therefore, significant corporate activity will often present a voting opportunity for a shareholder to intervene (and likewise on a takeover, by exercising votes on a scheme of arrangement, or accepting or not a contractual takeover offer).

The Companies Act 2006 contains a number of other ancillary rights that may also assist a shareholder in conducting its activist campaign. Under Section 116, Section 809 and Section 811, shareholders have the right to inspect and copy a company’s register of members and any register of beneficial interests, which can allow other shareholders to be identified and subsequently communicated with, or (in circumstances where the directors of a company have failed to comply with a shareholder’s requisition) allow the activist shareholder to call the general meeting itself at the company’s expense (Section 305).

In addition, any shareholder has the right to attend and speak at a general meeting of a company (whether that meeting has been requisitioned or is being held in the ordinary course of business), giving that shareholder the opportunity to state a view or ask difficult questions to the directors. This right may be exercised by a representative of the shareholder or via a proxy.

Listed companies in the UK are required to hold an annual general meeting each year, which will include re-election of directors by rotation and, in the case of FTSE 350 companies, will typically propose resolutions to re-appoint each of their directors in order to comply with the UK Corporate Governance Code. This can provide shareholders with an annual opportunity to effect change. Another common means of activist shareholders voicing their discontent with how a company is run has been to vote against the annual directors’ remuneration report, the subject of an annual advisory vote at each AGM (high-profile examples include Smith & Nephew, Shire, Babcock and Anglo-American in 2016 and Crest Nicholson in 2017). The introduction in 2013 of a binding AGM vote every three years on the directors’ remuneration policy provides another more significant opportunity for shareholder ‘say-on-pay’ intervention.

In extreme cases, an activist shareholder may decide to exercise its right under the Companies Act 2006 to take legal action in the form of a derivative claim against a company’s
directors (which is a claim on behalf of the company) (Section 260) or an unfair prejudice petition (Section 994). Such shareholder litigation is very rare in the UK in relation to listed companies.

While the legal and regulatory framework in the UK is generally favourable to activist shareholders, the UK has tended to see a higher level of cooperation between activists and boards of directors when compared with the US. In a substantial majority of cases, a disgruntled investor in a UK company will begin by reaching out to the board of that company and attempt to persuade the directors of its view, or to take certain actions, through informal engagement in the first instance. A host of other soft or ‘non-legal’ options are open to activists, including private discussions with other shareholders and public press or social media campaigns. The shareholder activist will gauge support for certain resolutions that a group of investors may come together to require the board to propose at a general meeting (as discussed above), or to cooperate in opposing certain resolutions proposed by the board.

While shareholders are generally free, and indeed encouraged by policy (such as the Stewardship Code) to talk to one another, it is important to take account of the regulatory context for any such discussions. As further discussed below, investors will need to be careful that they do not unlawfully disclose any inside information (as defined in the EU Market Abuse Regulation (EU 596/2014) or MAR) in relation to their intentions, or (if they have such information) the company, which could amount to market abuse under MAR.

A strategy often employed by activist funds, acting individually, is to build up a stake in a company to increase its leverage to call for change. Such stake-building exercises require particular care. Under the City Code on Takeovers and Mergers (the Code), a person will be required to make an offer for all of the remaining shares of a company subject to the Code for a price not less than the price paid for any shares by the potential controller during the previous 12 months in the event that he or she (together with any persons ‘acting in concert’ with him or her) becomes interested in shares carrying 30 per cent or more of voting rights. Although shareholders will not generally be deemed to be acting in concert as a result of agreeing to vote on resolutions in a certain way, the Code states that where a group of shareholders requisition a ‘board control seeking’ resolution (or threaten to do so), and subsequently acquires shares taking the aggregate interest of the group above 30 per cent, a mandatory offer will be required (Note 2 on Rule 9.1; see also Practice Statement No. 26 for further guidance). A recent ruling of the Takeover Panel (Petropavlovsk Plc in June 2017\(^2\)) confirms that if the resolutions requisitioned by activists propose the appointment of directors who are truly independent of the activists then the resolutions will not be ‘board control seeking’ for the purposes of Note 2 on Rule 9.1 and so the acting in concert provisions of the Code will not apply.

Activist investors building a stake will, in the usual way, need to consider their disclosure obligations under the FCA’s Transparency Rules. Where a shareholder’s interests in shares in a listed UK issuer reach or fall below 3 per cent, and every 1 per cent increment thereafter, such person must notify the issuer, who is then required to announce to the market. For these purposes, indirect and derivative interests will both be counted as well as direct holdings. This prevents an activist from building up a significant stake in secret. Limited exemptions may apply (for example, investment firms will only be required to disclose from 5 per cent). The disclosure thresholds are less onerous for companies that are listed in the UK but incorporated in another country.

The activist wishing to deal in shares will also need to be well advised on the restriction contained in MAR on dealing on the basis of inside information, and the criminal offence of insider dealing under the Criminal Justice Act 1993. If the only inside information in a stakebuilder's possession is its own intentions, a safe harbour is available under MAR (and the FCA's Market Watch 20 publication has also generally been regarded as clear that this will not amount to market abuse). However, care needs to be taken where information is obtained from the target or from other shareholders.

Institutional investors in UK listed companies should have regard to the Stewardship Code, which sets out good practice for their duties to engage as shareholders, and is applied on a 'comply or explain' basis. It recommends that institutional investors establish clear guidelines on when and how they will escalate stewardship activities. It says engagement is likely to begin with confidential discussions but may be escalated where a company does not respond constructively. The Stewardship Code recognises the role that activism may play in improving corporate governance.

The board of a company facing an approach from activist shareholders is unlikely to sit idly by, but may select from various strategies to defend its position. Some of these are 'legal' defences. For example, a company may refuse to allow a resolution to be requisitioned on the grounds that it is 'frivolous or vexatious' or defamatory, or it may challenge a requisitioned resolution on technical grounds. In the long run, such an approach is generally unlikely to be effective, since the impression given is one of a board unwilling to openly engage with shareholder concerns. An engagement on the substantive issues of concern and a demonstration that directors are open to measured and thoughtful challenge is generally regarded as an approach more likely to dissipate activist pressure.

III KEY TRENDS IN SHAREHOLDER ACTIVISM

Globally, shareholder activism has seen a substantial increase over the past five years. In 2016, the number of companies targeted by activists worldwide increased to 758, compared to 673 in 2015. Shareholder activism has been a long-term feature of US markets; however, it is increasingly being exported overseas as funds look for new markets that have not yet been fully explored. In 2016, 302 companies outside the United States were publicly subjected to activist campaigns, compared to 255 in 2015. Of these 302 companies, 60 were in Australia and 49 were in Canada, while Asia also saw an increase in activist activities. The European and UK markets are also at the forefront of this global trend: between 2010 and 2015, the number of shareholder activist campaigns in Europe (including the UK) was thought by one report to have increased by 126 per cent, with 43 UK companies being publicly subjected to activist campaigns in 2016, compared to 27 in 2015. This is evidenced in the increased activities of US funds such as Elliott Management, Third Point and ValueAct in continental Europe. Indeed, it seems that this US-Europe activism has increased in the past 12 months: see, for example, Elliott Management’s campaign against the Akzo Nobel board in respect of the latter’s stance on the proposed takeover by rival PPG; and Third Point’s campaign against the board of Nestlé, which resulted in the board announcing a US$21 billion share buy-back.

Both historically, and reinforced by the introduction of ‘say-on-pay’ legislation, shareholder intervention in the UK has been focused on board-related matters such as executive remuneration and requests for board representation. In July 2017 YTD, requests for

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board representation and issues with executive remuneration or other corporate governance matters accounted for 57 per cent of all shareholder activism activities in Europe (including the UK). In January 2017 BlackRock issued a letter to the chairmen of more than 300 UK companies stating that pay rises for executives should not go beyond the level of such rises in respect of other employees without a strong rationale. Given that BlackRock owns a stake in every company in the FTSE 100, this represented a potential catalyst for further shareholder intervention in remuneration issues.

The number of activist matters relating to company M&A and other corporate activities is, however, also on the increase (as outlined in further detail below).

i Event-driven activism

As outlined above, shareholder activism in the UK market has been traditionally focused on the performance and remuneration of executive directors and requests for board representation by activists. Over the past decade, however, the type and objectives of shareholder activists have evolved and an increasing number of activist campaigns have been event driven, involving company M&A (both private and public) or other corporate activity (including the return of value to shareholders by means of dividends or share buy-backs). In July 2017 YTD, 32 per cent of activist campaigns launched in Europe (including the UK) were related to company M&A or other company balance sheet concerns.

Whenever a company is required to obtain prior shareholder approval to acquire or dispose of a company or business (for example, if the transaction is a class 1 or related party transaction for the purposes of the UK Listing Rules), shareholders are given the ability to reject a deal after it has been conditionally agreed by the company’s board. In M&A situations that are dependent on shareholder approval, activists may seek to influence a particular outcome through public criticism, proxy solicitation, lobbying of institutional investors or proposing alternative transactions.

Activists may also seek to instigate or put pressure on a company to undertake an acquisition or disposal or otherwise return value to its shareholders, particularly if a company is perceived to be sitting on too much cash, or shareholders would prefer a return of cash to it being spent on a transaction that they do not support.

In public takeover situations, where the ultimate decision as to whether to proceed with the transaction rests with the shareholders of the target company (by shareholder vote on a takeover by scheme, or acceptance of the offer on a takeover by contractual offer), activist investors can have a significant influence. This is the case even at the early stages of a potential bid, by encouraging a target board to negotiate with the bidder or, on the other hand, indicating that they will not accept an offer below a certain minimum level to attempt to encourage an increase in the bidder’s offer price.

ii Activism as a more acceptable activity and name-calling

Shareholder activism has historically had pejorative connotations in the UK with activists being stereotypically cast as opportunistic and aggressive ‘corporate raiders’ concerned with realising short-term returns at the expense of long-term shareholder interests.

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4 Analysis from Activist Insight Online – Activist Trends (2017).
5 Analysis from Activist Insight Online – Activist Trends (2017).
Both the rise of an activism advisory community in the UK, and the terminology being used suggest that, as in the US, in the UK there is increasing acceptance of activism as a valid and indeed desirable public market business model, as evidenced by the more neutral language used.

In the UK, in addition to the traditional broker role for the company, financial advisers have been establishing specialist teams to advise listed companies on activist situations. Specialist proxy solicitation agents have moved across from the US to support the hunt for votes on both sides. The Big Four accountancy firms have built up teams to support their listed clients, and, like the financial advisers, the PR consultancies are increasingly seeing activism as a specialist area of advice. Interestingly the terminology has changed; a few years ago terms such as ‘corporate defence’ were prevalent among this type of advisory work. Now ‘corporate preparedness’, ‘shareholder engagement’ and ‘valuation solutions’ are the sort of terms in widespread use.

Similarly in the US, a new nomenclature shows a change in attitudes. ‘White hat’ has been introduced in recent years to identify a less contentious form of ‘constructive activism’ with a focus on medium to long-term value creation. ‘White-hat’ activists are characterised as typically favouring more collaborative measures conducted in private (usually on a consensual basis) and as only instigating a public activist campaign as a last resort.

iii US-style tactics and developments – the adoption of the settlement agreement

The global focal point of shareholder activism over the past decade has been and remains the US market, with activist investors such as Carl Icahn, Pershing Square Capital Management, ValueAct Capital Partners and Elliott Management playing prominent and well-publicised roles in the US activist community.

While some of the tactics and approaches developed by US activist investors have been adopted in the UK market, regulatory and legal limitations on the type of influences activists can have on UK boardrooms has meant that many of the bolder forms of US activism have not translated across the Atlantic. However, one US trend that is beginning to be implemented in the UK is the use of settlement agreements or ‘activist relationship agreements’.

Settlement agreements have been in use in the US over the past decade and provide a means of settling a potential contest between an activist investor and a company, while avoiding the significant drain on resources that a protracted proxy battle may entail. US-style settlement agreements typically include the following basic components:

- an agreed set of actions to be taken by the company, which may include the appointment of board representatives for the activist investor;
- a standstill agreement in relation to the activist’s share ownership in the company;
- a standstill agreement in relation to certain corporate governance matters (e.g., a restriction on the activist from taking certain actions designed to gain additional board representation); and
- other material provisions, which may include non-disparagement clauses, remedy provisions and the term of the agreement.

An example of a US-style settlement agreement with an activist investor being adopted by a UK company was announced by Rolls-Royce in March 2016, considered further below, even though the company labelled it a ‘relationship agreement’, which is more familiar and more neutral sounding to a UK audience familiar with such agreements. These agreements are required under the UK Listing Rules for shareholders with interests of 30 per cent or
more of voting rights, a level of shareholding ValueAct had not reached. Another example includes the terms reached between Elliott Management and the board of Alliance Trust in April 2015, also further described below.

iv Use of dedicated websites and microsites
A practice that has become more common among activist shareholders in the UK is the use of dedicated websites or microsites as a platform to promote their message more widely. Such sites provide activists with the means of collating their arguments (generally from RNS press releases, shareholder circulars, etc.) with other supporting data and third-party resources in a public forum that is easily accessible for other shareholders, journalists and the public in general.

Well-advised activist shareholders will carefully evaluate the legal and regulatory basis on which such information is made available. They will consider financial services and market abuse law and regulation, as well as defamation issues, just as they would with any public release or circular. They will also consider the full range of legal challenges as they would for contents of any website or microsite before it is launched to avoid breaching any copyright, third-party confidentiality or data protection laws.

v Board diversity
A topic that is not yet widely raised in relation to activist campaigns, but may become more important is the role of gender diversity on the boards of listed companies.

According to a study conducted by Bloomberg, between 2011 and 2016 the five biggest US activist funds have only nominated women for a board seat in seven out of 174 occasions.6 In the UK, the charge of ‘male, pale and stale’ has been levelled in the context of a proposed board slate, and the Equality and Human Rights Commission has published a good practice guide on ‘How to improve board diversity’.7 With increasing focus being given to the diversity of company boards by regulators, policy-makers and investors, the question of diversity, both of existing boards and whether nominees of activist shareholders improve or worsen that position, may be raised more often.

vi Focus on the consumer sector
Activists seek out value in listed companies, whether by balance sheet restructuring, encouraging corporate events, or through business turn-around, wherever they see the most valuable opportunity. But there can be phases of the economic cycle where certain sectors become a particular focus for funds (e.g., historically Opco/Propco separation or conglomerate break-ups). Activism in the consumer sector is not new: in 2007 Cadbury Schweppes announced a demerger of its confectionery and soft drinks business at a stage when Trias was holding 3 per cent of the company’s shares and leading calls for such a change. Large international consumer companies currently face challenges around focuses and efficiencies, against a background of slowing sales growth and thinning margins. Activists are currently looking at opportunities for value to be created in such consumer companies.

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through cost-cutting, the use of leverage and other tools. This has seen campaigns be led
by Trian (in relation to Procter & Gamble) and, in Europe, by Third Point (in relation to
Nestlé). Consumer companies in the UK will be watching this trend carefully.

IV RECENT SHAREHOLDER ACTIVISM CAMPAIGNS

i Rolls-Royce
ValueAct Capital Partner’s investment into Rolls-Royce Holdings Plc provides a recent
example of white-hat activism and the adoption of a US-style settlement agreement.

Following several months of stake-building, in July 2015 ValueAct became Rolls-Royce’s
largest shareholder with a shareholding of 5 per cent. ValueAct positioned itself as an ‘engaged
investor’ not an ‘activist’ and began to exert pressure on Rolls-Royce privately. Following an
initial rejection of board representation in November 2015, on 2 March 2016, Rolls-Royce
announced that it had entered into a ‘bespoke relationship agreement’ with ValueAct, which
contained the following key terms:

\[ a \] ValueAct to be granted one representative on the Rolls-Royce board, subject to certain
conditions relating to ValueAct’s shareholding;

\[ b \] a standstill in relation to ValueAct’s share ownership (ValueAct cannot acquire more
than a 12.5 per cent shareholding);

\[ c \] a standstill on certain corporate governance matters, including restrictions on ValueAct
requisitioning general meetings, soliciting proxies, proposing mergers or other change of
control transactions, proposing changes to Rolls-Royce’s strategy or publicly criticising
or disparaging Rolls-Royce; and

\[ d \] a commitment from ValueAct to vote in accordance with the board’s recommendation
on ‘customary resolutions’ at general meetings.

ValueAct now holds an 11 per cent shareholding and has one seat on the board.

ii Electra Private Equity
Sherborne Investors’ activist campaign in relation to Electra Private Equity Plc is a high-profile
example of a contentious proxy battle for board representation, in furtherance of a call for an
operational turnaround.

Following a period of stake-building and a public rebuttal of its request for board
representation, in October 2014 Sherborne requisitioned a general meeting for shareholders
to vote for the appointment of two Sherborne nominee directors to the board of Electra
and the removal of one existing director. Sherborne’s campaign was centred on the belief
that it had identified significant value in the Electra portfolio that the existing board had
failed to realise and that could be unlocked by certain changes to the company’s strategy. The
proposals were defeated at the general meeting and Electra’s board subsequently announced
its own strategic review.

Following the release by the company of its strategic review and a further period
of stake-building in Electra, Sherborne requisitioned a second general meeting in
November 2015. At that meeting, Electra shareholders voted in favour of the appointment
of two Sherborne nominee directors to the board of the company.
iii Alliance Trust

Elliott Management’s public campaign against Alliance Trust Plc in 2015 is an example of an activist using its right to requisition resolutions at a company’s AGM.

Arguing that Alliance Trust had underperformed its peers, Elliott Management sought to appoint three new non-executives to the board at the company’s AGM to improve governance and focus the directors on raising returns. Elliott Management and Alliance Trust came to an agreement prior to the AGM in which Alliance Trust undertook to appoint two new non-executive directors (as nominated by Elliott Management) in return for Elliott Management supporting the board on all other resolutions. Elliott Management also agreed not to agitate against the company, its board or management publicly until after the company’s 2016 AGM.

On 27 January 2017, Alliance announced a targeted buy-back of the shares in which Elliott Management was interested as part of their buy-back programme at a total cost of £620 million over five tranches.

iv Poundland

Elliott Management’s involvement in the £600 million takeover of Poundland by South African retailer Steinhoff is a recent example of an event-driven activist intervention.

In July 2016, Steinhoff announced a recommend takeover bid for Poundland priced at 220p per share (plus a 2p dividend) valuing the business at £597 million. Shortly after the announcement of the takeover offer, Elliott Management (an existing shareholder in Poundland) announced that it had increased its stake to 17 per cent. As the takeover offer required the vote of 75 per cent of shareholders to proceed (excluding Steinhoff’s 23 per cent holding), Elliott Management’s increased stake would have been enough to block the takeover. Although Elliott Management did not make its intentions regarding Poundland public, following the announcement of Elliott Management’s increased stake, Steinhoff increased its offer by 5p to 225p per share (plus a 2p dividend).

v Premier Foods

The campaign by Hong Kong-based activist Oasis Management in relation to Premier Foods is an example of how M&A events can create opportunities for operational-focused activists.

In May 2016 Premier Food’s board rejected a takeover approach from McCormick at 65p per share; however, in the following months their shares generally traded at between 40p and 45p per share (bar a rise in the summer of 2016), with a profit warning subsequently issued in January 2017. Following the rejection of the McCormick approach, and in an atmosphere of shareholder discontent, Oasis Management began to build its stake and the pressure on the board: it reached a 5 per cent holding in October 2016 and increased this to 8 per cent by March 2017. Subsequently, Premier Foods agreed to appoint an Oasis Management representative as a non-executive director on its board, pursuant to a relationship agreement whereby Oasis Management agreed to further raise its shareholding in Premier Foods to 10 per cent by 30 June 2018 (but no higher than 15 per cent).

vi Bowleven

The Monaco-based Crown Ocean Capital fund’s successful campaign against African oil explorer Bowleven, is a recent example of activists focusing on operational and strategic changes within a company.
In early 2017, Crown Ocean Capital made repeated calls for Bowleven to be restructured from an exploration company to a holding company, in order to return just under £100 million in cash to shareholders. Crown Ocean Capital also raised concerns over the independence of the Bowleven board. Throughout its campaign Crown Ocean Capital grew its shareholding, from 13 per cent in November 2016 to 22 per cent in March 2017. Crown Ocean Capital subsequently requisitioned a general meeting resulting in five directors and the CEO of Bowleven being removed. The narrow majority in favour of their removal ranged from approximately 51 per cent to 54 per cent. At the same time, two Crown Ocean Capital representatives were appointed to the Bowleven board, having captured approximately 55 per cent and 52 per cent of the vote.

vii AB InBev/SABMiller

Elliott Management’s involvement in the AB InBev/SABMiller takeover, is an example of a ‘hold-out’ approach through which activists seek to profit during live takeover situations. It is particularly noteworthy given the size of the transaction.

In November 2015 AB InBev made a formal £71 billion offer for SABMiller. However, after a sharp fall in the value of sterling following the result of the referendum in the UK on whether or not to leave the EU in June 2016, the value of the cash offer fell below the value of the alternative offer consisting primarily of shares in AB InBev’s new holding company, which appeared to have been designed for the benefit of SABMiller’s two largest shareholders. Elliott Management in July 2016 acquired (through derivative contracts) an interest in SABMiller and argued for AB InBev to make an offer on improved terms. As a result of Elliott Management’s campaign, AB InBev increased its cash offer by 100p per share to 4500p per share valuing SABMiller at £79 billion.

viii Severn Trent/Dee Valley Group

The recent decision concerning Severn Trent’s takeover of Dee Valley is also of relevance to activists in terms of considering the validity of share splitting (where a single holding of shares is divided between nominees to create sufficient legal persons holding shares to meet a Companies Act threshold). There, the High Court found on the facts that the share splitting that took place in an attempt to defeat a scheme of arrangement of Dee Valley on the majority in number of shareholders test was an abuse of the court’s process. The decision was however limited to the facts and in the context of a scheme where a court’s discretion was involved. The judgment does not mean that share splitting will always be impermissible.

ix The Investor Forum

The Investor Forum was launched in 2014 as an investment industry body of institutional investors to facilitate shareholder engagement. Since then it has steadily increased its activity: in 2015–2016, the Investor Forum was asked to review 14 UK companies with eight reviews resulting in comprehensive collective engagement. Recent examples include Mitie, Cobham and Sports Direct. Given that the Investor Forum’s 33 members represent approximately

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8 Re Dee Valley Group plc [2017] EWHC 184 (Ch).
35 per cent of the FTSE All Share market capitalisation, the next 12 months will likely see it continue its efforts to foster collective engagement, both in relation to the aforementioned companies and the wider market.

V REGULATORY DEVELOPMENTS

Perhaps the most significant recent change in the regulatory landscape as far as shareholder activism is concerned was the coming into force of MAR on 3 July 2016. MAR, as an EU Regulation, has direct effect in each Member State without the need for any implementing measures by national legislatures. It aims to impose a more uniform market abuse regime across the European Union than that possible under its predecessor, the Market Abuse Directive, and is also broader in scope. It governs, among other things, market abuse and the obligation on issuers to disclose inside information regarding themselves or their financial instruments to the market. There are some detailed changes with potential relevance to shareholder activism, in particular, the introduction of formal provisions regarding market sounding.

A market sounding is defined for the purposes of MAR as the communication of information (whether or not inside information) prior to the announcement of a transaction in order to gauge the interest of one or more potential investors in the transaction or by a bidder to sound out target shareholders on a takeover. Detailed requirements apply to all persons who disclose information in a market sounding. These include requirements for an assessment of whether the information is inside information, the use of scripts, recorded telephone lines (if available), sounding lists, cleansing and recorded keeping. While the market sounding regime will be most relevant to a company being targeted by an activist, it will be important for all parties to an activist campaign to ensure continued compliance with MAR.

The aspects of the regime that are most important to shareholder activism (i.e., market abuse and disclosure of inside information by issuers) have not been altered materially by MAR from the previous regime applicable in the UK (and indeed much of the case law is likely to remain informative for interpretation). However, there are areas that active shareholders, and companies targeted by them will focus on. These include questions of inside information (including inside information of the shareholder itself), and the applicability of the new investment recommendation regime to shareholder activist situations.

A further more recent development is the formal adoption of certain amendments to the Shareholder Rights Directive (2007/36/EC). The Shareholder Rights Directive is the source of many of the shareholder rights discussed above which have been given effect in English company law through amendments to the Companies Act (including shareholders’ rights to requisition meetings and resolutions). The amendments adopted in April 2017 (to be implemented by April 2019) introduce new rules for proxy advisers who will now be subject to transparency requirements and a code of conduct. The question of the timing for the implementation of the Directive into UK national law may mean the relevance of these potential changes becomes a question of the UK’s Brexit timetable.
VI  OUTLOOK

The legal and regulatory framework in the UK relating to shareholder rights and engagement has continued to evolve to encourage active shareholder engagement, and will continue to provide a benign environment for shareholder activists. The market will continue to develop, as activists increasingly seek to distinguish themselves, and as institutional shareholders, listed companies, advisers, commentators and the investment community more widely become more accepting of this activity and seeks to understand the nuances between its various protagonists.

For a number of market structural reasons, shareholder activism in the UK market is unlikely to reach the prevalence currently seen in the US. But it will be interesting to see if this is the year in which US funds appear in the UK in force, a widely anticipated development that has not yet fully materialised. The UK remains a fertile ground for activists to continue to seek targets for strategic campaigns, as well as companies with a range of corporate events in which they will choose to intervene, and sectors such as the consumer sector, which are viewed as representing a particular opportunity for campaigns. While the extent of the change to the UK’s legal and regulatory framework resulting from Brexit is impossible to judge at this stage, it will certainly provide activists with new opportunities as listed company boards seek to address their own business strategies in an economically turbulent post-Brexit environment.
Chapter 14

UNITED STATES

Francis J Aquila

I  OVERVIEW

Shareholder activism is and will continue to be a prominent feature of the corporate landscape in the United States. Following a wave of corporate scandals in the early 2000s (most memorably Enron Corporation), there was a sea change in US corporate governance. Subsequently enacted federal regulations that focus on corporate governance have dramatically changed the face of US corporate boards of directors; shareholder engagement has become a priority for companies and a hallmark of basic good governance; and a number of other legal and cultural changes have increased the power of shareholders of US public companies.

Shareholder activism historically referred to an asset class of hedge funds that raided and agitated US publicly traded companies. In present times, however, there is broader recognition that shareholders more generally have a desire to engage with management and boards of directors regarding governance reforms and other aspects of a company’s business. This trend has caused the lines between the traditional shareholder activists and other shareholders of public companies to blur, thereby diluting the brand of shareholder activism. There is now an increased expectation that shareholders will seek to have more influence over governance and strategic decisions made by public companies, although it is still the case that certain activist campaigns become a public display of the differences of strategic vision between the shareholder activist and its subject company.

While the term ‘activist’ may have become diluted by more types of shareholders entering the mix, the increased acceptance of activism in the corporate landscape has by no means decreased its frequency. To the contrary, activist activity in the US continues to steadily rise. The number of shareholder activists and the number of US public companies that have been subject to a public activist demand is more pronounced than ever. Those numbers do not even tell the entire story: for every public activist demand, there may be another activist campaign that never becomes public knowledge. Success by activist hedge funds in raising capital, coupled with activists achieving their objectives and gaining board seats at public companies (through both settlements with companies and proxy contests), has fuelled increased activity. As a result, US public company boards of directors and management teams have intensified their focus on understanding shareholder activism as well as working to prevent, and preparing to respond to, activist campaigns.

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II LEGAL AND REGULATORY FRAMEWORK

The legal and regulatory framework relating to shareholder rights, activism and engagement in respect of US publicly traded companies is primarily comprised of federal laws and regulations and state corporations laws. US public companies also must comply with the listing rules of their stock exchange (either the New York Stock Exchange or NASDAQ Stock Market), which include corporate governance requirements. Additional sources of practice with respect to shareholder activism and engagement include proxy advisory firms and guidelines set forth by other investment community members. Taken together, the applicable laws and regulations, as well as other influential sources of practice govern, the means by which a shareholder activist pursues an activist campaign and the structural defences against shareholder activists available to US public companies.

i Federal laws

Federal securities laws relating to shareholder activism and engagement include the Securities Act of 1933, the Securities Exchange Act of 1934 (Exchange Act), the Sarbanes-Oxley Act of 2002 (the Sarbanes-Oxley Act) and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the Dodd-Frank Act). The federal securities laws, and the rules and regulations promulgated thereunder, are administered by the Securities and Exchange Commission (SEC). A key focus of the federal securities regulations is on disclosure and ensuring that shareholders and the market have the information required to make fully informed investment decisions.

The Exchange Act provides the SEC with broad authority to regulate the securities industry. Pursuant to Section 13(a) of the Exchange Act, the SEC requires periodic and current reporting of information by public companies, and companies must consider these disclosure requirements in reporting on corporate governance matters. Section 13(d) of the Exchange Act requires reporting by persons who have directly or indirectly acquired beneficial ownership of more than 5 per cent of an outstanding class of a company’s equity securities. An activist investor that crosses the 5 per cent threshold must file a report with the SEC within 10 calendar days disclosing its ownership and certain additional information, including its activist intentions. Section 13(d) also governs whether investors are considered a ‘group’ for purposes of acquiring, holding and disposing of a company’s securities, a very relevant consideration for shareholder activists who may form a ‘wolf pack’ to work together on an activist campaign.

Section 14(a) of the Exchange Act imposes disclosure and communications requirements on proxy solicitations, or the materials used to solicit shareholders’ votes in annual or special meetings held for the election of directors and the approval of other corporate actions. Shareholder activists that wage a proxy contest to nominate directors for election in opposition to a company’s slate of director nominees must comply with these proxy solicitation rules. These rules apply to, and require the timely filing of, all written communications made as part of the solicitation, including investor presentations, transcripts of speeches and certain interviews, and social media postings. Further, the Exchange Act governs disclosure by anyone seeking to acquire more than 5 per cent of a company’s securities by means of a tender offer.

Regulation Fair Disclosure (Regulation FD), which aims to promote full and fair disclosure by ensuring that companies do not engage in selective disclosure, requires a public company to make public disclosure of any material non-public information disclosed to certain individuals, including shareholders, who may trade on the basis of that information.
Regulation FD applies to discussions between a company and a shareholder activist and, therefore, companies must be mindful of this regulation when holding discussions with an activist.

The Sarbanes-Oxley Act, enacted in response to the corporate scandals in the early 2000s, mandated numerous reforms to enhance corporate responsibility and financial disclosures. The Dodd-Frank Act implemented further reforms, including with respect to trading restrictions, corporate governance, disclosure and transparency. Both statutes have had a significant influence on corporate governance and shareholder activism and engagement.

In addition to the federal securities laws, the Hart-Scott-Rodino Antitrust Improvements Act (HSR Act) may apply to an investment by a shareholder activist in a public company if such investment exceeds a certain size threshold, currently set at US$80.8 million for 2017. If an activist will cross the size threshold with respect to the amount of voting securities of a company it intends to acquire, the activist is required to make a filing with US antitrust authorities and observe a waiting period prior to completing the transaction. The HSR Act provides an exemption from reporting requirements for acquisitions that result in the acquiror holding 10 per cent or less of a company's outstanding voting securities if made 'solely for the purpose of investment'. This investment-only exception has been construed narrowly; it does not apply if an investor intends to participate in and influence business decisions, which is often the case with shareholder activists. In July 2016, activist hedge fund ValueAct Capital agreed to pay a record US$11 million fine to settle a lawsuit filed by the US government alleging that ValueAct violated the HSR Act by improperly relying on the investment-only exception in connection with its US$2.5 billion investment in Halliburton Company and Baker Hughes Inc.

ii State laws
State corporations law governs actions by companies in the state's jurisdiction and establishes the fiduciary duty regime that applies to a company's directors and officers. This chapter focuses on corporate law in the state of Delaware because it is the most popular state of formation for legal entities and its laws significantly influence corporate law in other states. Many provisions of the Delaware General Corporation Law (DGCL) govern the relationship between a corporation and its shareholders, impacting the processes by which a shareholder activist may pursue, and a company may defend against, an activist campaign.

The DGCL includes laws governing, among other things, the composition of the corporation's board of directors, annual and special meetings of shareholders, actions by written consent, voting thresholds for approving corporate actions, requests by shareholders for books and records and appraisal rights. Certain activist investors are known to exercise appraisal rights in the context of a merger as an arbitrage strategy. As described further below, a corporation may use its organisational documents (certificate of incorporate and by-laws) to customise certain elements of its corporate governance to the extent not inconsistent with the DGCL.

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2 The current threshold, which is adjusted annually for inflation by the Federal Trade Commission, is available at www.ftc.gov/enforcement/premerger-notification-program/current-thresholds.
3 See 15 U.S.C. Section 18a(c)(9) and 16 C.F.R. Section 802.9.
All directors and officers of Delaware corporations owe the company and its shareholders fundamental fiduciary duties of care, loyalty and good faith. Subject to certain exceptions, when reviewing a company’s decision the Delaware courts apply the ‘business judgement rule’, which presumes directors satisfied these fiduciary duties, and will not second-guess the directors’ decision if it has a rational business purpose. However, enhanced judicial review applies in certain circumstances, including when a board of directors takes defensive measures in response to a perceived threat to corporate control. Under the Unocal test, a board that has implemented a defensive measure has the burden of demonstrating that (1) it had reasonable grounds to believe a threat to corporate policy and effectiveness existed and (2) its defensive response was reasonable in relation to the threat posed. The Unocal test is particularly relevant to shareholder activism because it applies to defensive measures such as shareholder protection rights plans, commonly known as poison pills. Shareholder activists may, as part of their campaign strategy, file lawsuits against a corporation and its directors and officers alleging fiduciary duty violations.

iii Additional sources of practice

Shareholder activism and engagement are influenced by other sources of practice and various members of the investment community. Although their impact has waned somewhat in recent years, proxy advisory firms such as Institutional Shareholder Services (ISS) and, to a lesser extent, Glass Lewis have an impact on a company’s corporate governance policies and may affect the outcome of a proxy contest with a shareholder activist. These advisory firms set forth policy guidelines as well as make recommendations with respect to proposals to be voted upon at a shareholders’ meeting, such as director elections, fundamental transactions and other governance matters. As an adviser to many institutional shareholders, ISS is keen on shareholder engagement and is often inclined to recommend in favour of at least one activist director candidate in a proxy contest for minority representation on the board of directors if the shareholder activist has demonstrated that change is warranted at the company.

Large traditional institutional investors such as Blackrock, Fidelity and Vanguard have generally stopped relying on the analysis of proxy advisory firms and have instead developed internal proxy advisory functions to make decisions in proxy contests and put forth corporate governance initiatives. Given that the stock ownership of many US public companies is concentrated at a relatively small number of these large institutions, it is critical for both the company and the shareholder activist to garner the support of these investors. Other members of the investment community, such as TIAA-CREF, CalSTRS, and the Council of Institutional Investors, also set forth policy guidelines and express opinions on governance and activism. In July 2016, a group of 13 executives from some of the largest US public companies and asset managers, as well as shareholder activists, public pension funds and mutual fund companies, released a statement of corporate governance principles for public companies, their board of directors and shareholders, which the group named the Commonsense Principles of Corporate Governance.

**Company defences**

A company’s best defence against shareholder activism is strong financial performance, a solid record of shareholder engagement and adoption of corporate governance best practices. A company must also adopt a proactive strategy to anticipate and defend against the potential for an activist campaign, including actively monitoring the company’s shareholder base and conducting regular and thorough reviews of the company’s business plan, strategic alternatives and intrinsic value. In the current environment, in which there is now an expectation that shareholders will be more involved in governance and strategic decisions made by public companies, it is crucial for companies to maintain a positive dialogue, relationship and credibility with its shareholders, particularly key institutional investors and other large holders. Practising consistent shareholder engagement, including articulating the company’s current and long-term vision for creating shareholder value and practising good governance, will pay dividends for the company in terms of both understanding investor concerns and securing support in the face of future shareholder activism campaigns. A shareholder activist may face an uphill battle if the company already has a strong relationship with, and the support of, its large institutional shareholders.

The prevalence of shareholder activism in the US has created an entire cottage industry of firms, such as proxy solicitors, dedicated to helping companies monitor their shareholders and set up meetings with institutional investors. Investment banks and law firms also have groups of professionals dedicated to activist defence. A company facing an activist investor requires a core response team of outside advisers, including a law firm, proxy solicitor, investment bank and public relations firm. The most prepared companies create these teams in advance and establish procedures that are ready to be implemented on a moment’s notice should an activist come knocking. In addition to monitoring a company’s shareholders and facilitating shareholder engagement, a company’s adviser team can assist the company with ‘thinking like an activist’ by routinely assessing the company’s strengths and vulnerabilities to activism, reviewing its structural defences and keeping current on the evolving corporate governance practices and preferences of its shareholders and the broader market.

Companies have structural governance defences that may protect them against shareholder activists. It is important to note that the value of any particular structural defence will depend on the specific activist situation and no defence will fully protect a company against activism. As mentioned above, a company may customise certain governance elements in its organisational documents. For example, most public companies have by-laws that require a shareholder to provide advance notice and certain information to the company before it is permitted to nominate a director for election to the company’s board of directors or propose business before a shareholders’ meeting, and these by-laws eliminate the possibility of surprise from last-minute proposals. Companies also specify in their by-laws that the board of directors has the sole right to determine its own size and fill vacancies, both of which prevent activist shareholders from packing the board of directors with their preferred candidates. Companies may also restrict its shareholders’ ability to call special meetings or take actions by written consent, either entirely or below certain ownership thresholds.

Some companies have adopted even more stringent structural defences, such as having two classes of stock (one of which has additional voting rights and is not publicly traded, limiting an activist’s ability to obtain voting power) or creating a classified board of directors (directors are divided into three classes with staggered, multi-year terms, making it more difficult for an activist to replace board members). Companies may also adopt a poison pill, which can be triggered by the company to dilute the equity and voting stake of
a shareholder activist that has purchased over a certain percentage of the company's stock by allowing all other shareholders to purchase additional shares at a steep discount. Most large US companies have abandoned these harsher defences in recent years in light of scrutiny from the institutional investor community and proxy advisory firms. It is recommended that companies keep a poison pill "on the shelf" and ready to be implemented in response to a threat from a particular activist (note the Unocal defensive measures discussion above), although the company must weigh the possibility that it will lose some credibility in the market even if it successfully blocks an activist campaign.8

DGCL Section 203 includes an anti-takeover provision that prevents a corporation from entering into certain business combination transactions with an interested shareholder (generally one that owns more than 15 per cent of the company's stock) for a period of three years after becoming an interested stockholder unless the business combination is approved in the manner prescribed by the statute.

The HSR Act requires an investor to provide written notice to a company before acquiring shares that are subject to the HSR Act's filing requirements, which may serve as the first warning to the company that an activist intends to take a significant stake in the company and advocate for change, or alternatively that an existing shareholder has altered its intentions with respect to the company from passive to active and plans to increase its stake.

III KEY TRENDS IN SHAREHOLDER ACTIVISM

i The shareholder activists
Shareholder activists primarily fall into two categories: hedge fund activists and Rule 14a-8 activists. Hedge fund activists are investors whose investment strategy is to identify what they consider to be vulnerabilities at certain companies and purchase a sizeable minority stake in those target companies with the view that changes they recommend and agitate for, if successful, will increase shareholder value and result in a financial gain for their investment portfolio. Rule 14a-8 activists are shareholders that submit proposals to companies under Rule 14a-8 under the Exchange Act, a rule that requires a public company to include a shareholder proposal in its proxy materials for a shareholders' meeting if certain requirements are met by the shareholder. A company's preparation for and response to activism will differ depending on the type of shareholder activist it faces.

Hedge fund activists are the main focus of this chapter. Hedge funds pursuing activist strategies have had tremendous success in raising capital in recent years, with aggregate assets under management of hedge funds engaged in activism exceeding US$100 billion since 2014.9 This trend is expected to continue in the near term and has been instrumental in driving increased activist activity. Each hedge fund activist has its own strategy, objectives, personality and frequency of engaging in activism. Some activists, such as Carl Icahn and Third Point, are long established, while others are second generation. The investment horizon of an activist hedge fund can range from very short term to somewhat longer term. Certain

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hedge fund activists invest their own funds, while others invest third-party funds. Additionally, an activist hedge fund’s redemption policy (e.g., whether investors have the right to redeem their funds quarterly or have longer-term ‘lock up’ commitments) may impact its behaviour and investment strategy.

Rule 14a-8 activism is often socially driven, with activists including retail shareholders, advocates of social issues (e.g., environmentalists), religious organisations, pension funds and a variety of other groups. During the 2017 proxy season to date, corporate governance related proposals continued to represent approximately half of the Rule 14a-8 proposals voted on, and approximately 25 per cent of such proposals received sufficient shareholder support to pass. Other 2017 Rule 14a-8 proposals included social and political proposals as well as compensation proposals, which have a very low pass rate. The vast majority of Rule 14a-8 proposals are targeted at S&P 500 companies.

Traditional institutional investors such as Blackrock, Fidelity and Vanguard may be considered shareholder activists as well. These institutions have developed internal proxy advisory functions and are displaying an increased willingness to directly express their views on governance matters in recent years. These investors are long-term shareholders by nature, and their inability to exit investments nimbly increases their incentive to advocate for changes that will increase enterprise value and protect their investment. F William McNabb III, the president and chief executive officer (CEO) of Vanguard, has explained, ‘we are permanent stockholders. … That is precisely why we care so much about good governance.’ Traditional institutional investors also increasingly support activism, although in certain cases there may be a tension between the institutional investor’s long-term outlook and a shareholder activist’s near-term focus. In October 2016, State Street Global Advisors issued a market commentary that pointedly raises the concern that, under pressure from shareholder activists, companies may pursue short-term interests at the expense of longer-term results.

ii The target companies
Hedge fund activists target companies in which they think there is potential to increase shareholder value, and often look for traditional ‘red flags’ such as stock price underperformance, operational challenges relative to peers, significant unused cash on the balance sheet, perceived management weakness, multiple business lines, undervalued assets or perceived excessive executive compensation. However, more recently shareholder activists have also been targeting companies that have performed in line with or better than their peers. A company’s liquidity and size of its market cap can play a role in its susceptibility to activism; it is inherently more difficult for a shareholder activist to amass a large enough stake

11 Id.
12 Id.
to influence a company with illiquid stock or a large market cap. Nevertheless, activists have been successful with small stakes (under 1 per cent) and have targeted even the largest and most well-run companies (e.g., AIG, Apple, DuPont, General Electric and Procter & Gamble) as they have gained more capital and credibility, proving that no company is immune to activism. In 2016, 104 S&P 500 companies were publicly subjected to activist demands. All industries are susceptible to activism, with investment vehicles, pharmaceutical companies, software companies, other commercial service providers and regional or mid-sized banks being the most popular targets in recent years.

### The activist campaigns

The number of campaigns by shareholder activists has continued to increase each year as the activists have become empowered by their success in achieving their objectives and gaining board seats at public companies. Shareholder activists pursue a variety of objectives, including pursuing a company’s sale to a third party (or conversely seeking to block a planned merger), pushing for another type of fundamental transaction such as a spin-off, balance sheet demands such as dividends or share repurchases, operational and capital structure demands and governance demands. Shareholder activists frequently pursue multiple objectives in the same campaign, with governance demands – particularly board representation or seeking changes in management – often used as a means of achieving economic objectives.

Shareholder activists utilise a number of different strategies to achieve their objectives, depending on factors such as the activist itself (many have a consistent modus operandi) and the subject company’s defensive posture. The standard activist ‘playbook’, while not applicable to every campaign, follows a series of escalating tactics with the key objective of creating an impression of inevitability. A shareholder activist often begins a campaign by engaging in a private dialogue with the company’s management before its stake in the company becomes public. If successful, these discussions can avoid further agitation by leading to either an informal or formal settlement between the company and the shareholder activist. If private discussions fail, the shareholder activist may initiate a public campaign to apply pressure on the company through press releases, open letters to management, the board of directors and shareholders, issuing ‘white papers’ presenting its investment thesis and analysis, and using other means of communication to rally the company’s other shareholders to support its cause. Shareholder activists have become increasingly adept at using the media to their advantage.

The shareholder activist may then threaten and eventually initiate a proxy contest for representation on the company’s board of directors. Shareholder activists seek to gain representation by either replacing only a minority of the company’s directors or, in more extreme scenarios, trying to replace a full board of directors. If a shareholder activist is well funded, it may also commence a lawsuit (sometimes in conjunction with other tactics) to obtain information from the company, reverse board decisions or redeem the company’s poison pill, among other claims. With some notable exceptions, shareholder activists do not usually make an offer for the entire company, although hostile offers have been made by hedge fund activists in past campaigns.

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iv Paths to resolution

Activist campaigns have continued to achieve high levels of success, although activists did face some headwinds in 2016.¹⁷ Shareholder activists place a high value on the public perception of a successful campaign, including a partial victory or settlement, even without achieving an outright ‘win’ for all of its demands. Partial success can entail the shareholder activist receiving at least one board seat (either through a settlement or proxy contest that goes to a vote) or the company agreeing to pursue one of the activist’s economic objectives.

As shareholder activism and campaigns by activist hedge funds have become more mainstream, it has also become increasingly common for a company and shareholder activist to settle and enter into a cooperation agreement. The typical cooperation agreement provides the shareholder activist with minority board representation and includes customary standstill restrictions for the benefit of the company, such as prohibiting the activist from soliciting proxies in opposition to management prior to the company’s next annual meeting. Recently a trend has evolved toward settlements being announced shortly after the shareholder activist has publicly announced its stake in a company or even prior to any public disclosure. In many cases, companies are concluding that settling with a reputable activist is preferable to expending significant time and resources on a protracted and distracting proxy contest. A company’s board of directors has an interest in appearing firm but open-minded about an activist’s credible suggestions to its other shareholders and the investment community at large. Most shareholder activists also have an interest in creating working relationships with the company’s board of directors and building a public reputation for playing fair, which can facilitate future negotiations with the company and the future subject companies.¹⁸

Companies must recognise that providing a shareholder activist with board representation is simply the beginning and not the end of the company’s discussions with the shareholder activist. Once the shareholder activist is represented on the board of directors, it will likely seek changes that it believes are in the best interests of the company and its shareholders. In addition, the presence of the activist’s director designees may alter boardroom dynamics.

IV RECENT SHAREHOLDER ACTIVISM CAMPAIGNS

While there are many recent US shareholder activism campaigns worthy of discussion in this chapter, this section highlights three campaigns by US activist hedge funds against US public companies that helpfully demonstrate the varying nature and objectives of shareholder activists.¹⁹

i Yahoo! Inc/Starboard Value LP

Starboard first contacted Yahoo’s CEO Marissa Mayer and board of directors in September 2014, urging the board to take a series of steps outlined by Starboard to unlock shareholder value. Over the next year, during which Yahoo abandoned a plan to spin off its minority equity stake in Alibaba, Starboard continued to express public concern that Yahoo’s

¹⁷ See S&C 2016 Shareholder Activism Review.
¹⁹ The campaign detail included in this section was sourced from SharkRepellent, FactSet Research Systems Inc.
core business was in major financial distress as its revenue and profit continued to decline. Starboard became increasingly frustrated with what it considered to be Yahoo’s dismissive approach to its concerns and agitated the company to hire a financial adviser to sell the core business. In February 2016, Yahoo formed a special committee of independent directors to help the company continue to explore strategic alternatives. In March 2016, Starboard disclosed that it was seeking to replace Yahoo’s entire board of directors (including Mayer) at the 2016 annual meeting, citing the current board’s failure to deliver results and lack of perspective to make decisions in the best interests of Yahoo’s shareholders. In April 2016, Yahoo and Starboard announced an agreement to settle the potential proxy contest, pursuant to which Yahoo agreed to appoint four of Starboard’s director nominees to the board of directors (out of 11 total directors up for election). Yahoo agreed to reimburse Starboard for up to US$2 million of expenses, including legal expenses. In July 2016, Yahoo ended the speculation surrounding a very public sale process by announcing that it had agreed to be acquired by Verizon Communications. Following almost a year of uncertainty and a significant reduction in the deal price, the transaction closed on 13 June 2017.

ii  Xerox Corporation/Carl Icahn

In November 2015, Carl Icahn filed a Schedule 13D with the SEC disclosing a 7.13 per cent stake in Xerox Corporation. Within the Schedule 13D filing, Mr Icahn stated his intent to engage in discussions with representatives of the company’s board of directors and management regarding improving operational performance and pursuing strategic alternatives, including the possibility of seeking board representation. In January 2016, following completion of a review of the company’s portfolio and capital allocation options made public in October 2015, Xerox announced that its board of directors approved a plan to separate Xerox into two separate publicly traded companies. The same day, Xerox announced that it had reached an agreement with Mr Icahn relating to one of the future companies, pursuant to which three of the nine board members would be chosen by Mr Icahn (at least one of which is an Icahn insider). Xerox also agreed that Mr Icahn would have an observer to oversee the CEO selection process for that company.

iii  United Continental Airlines/Altimeter Capital Management LP and PAR Capital Management, Inc

Two long-time airline investors that do not typically engage in activism teamed up against United in one of only three campaigns in 2016 that targeted companies with a market cap above US$10 billion. In January 2016, Altimeter and Par filed Schedule 13Ds with the SEC disclosing that they had formed a ‘group’ and collectively hold a 5.5 per cent stake in United. The Schedule 13D stated that the shareholder activists were engaging in discussions with United’s board and management regarding capital structure and allocation, corporate governance, board composition and strategic alternatives to enhance shareholder value. In March 2016, United announced that it expanded its board to appoint three new independent directors. The next day, Altimeter and Par sent a letter to the board announcing their intent to nominate six candidates to United’s board of directors at the 2016 annual meeting, citing a company record of sustained underperformance and an underqualified, ineffective and entrenched board. United responded publicly that it was disappointed Altimeter and Par had become hostile and noted that the company had offered to negotiate a settlement and even
United States

amend its by-laws to extend its director nomination deadline. After further public dialogue, in late April 2016, the two sides entered into a cooperation agreement to revamp the composition of the board and add three new independent directors approved by the activists.

V REGULATORY DEVELOPMENTS

The US corporate regulatory and governance landscape is constantly undergoing reform. Proxy access, which was the defining corporate governance matter in the 2015, 2016 and 2017 US proxy seasons, is the latest in a series of initiatives by shareholders to effect structural changes that facilitate increased accountability of directors. Proxy access provides one or more shareholders (almost always up to 20 shareholders) that hold a required percentage of shares (almost always 3 per cent) for at least a specified time period (almost always three years) with the right to nominate a certain percentage of directors to a company’s board (almost always the greater of two directors or 20 per cent) and to include those nominees in the company’s proxy materials.20 The proponents of proxy access are Rule 14a-8 shareholder activists. In each of 2015, 2016 and 2017, the New York State Comptroller put forth a sizeable proportion of the proxy access proposals. Companies that have not yet received a proxy access proposal should prepare for the possibility of a future proxy access initiative and consider proactive implementation of proxy access.

In October 2016, the SEC released a proposal for universal proxies, which would require the use of a proxy card in contested elections at listed US public companies that includes the director candidates nominated by both the company and the shareholder activist.21 Universal proxies would result in a significant change to voting practices in US proxy contests, but it is uncertain whether or not this proposal will move forward under the direction of the new SEC commissioner.

President Donald J Trump took office on 20 January 2017. It remains to be seen how and to what extent the new administration’s legislative and administrative agenda will influence the US corporate landscape, including the shareholder activism and engagement regimes, moving forward into 2018 and beyond.

VI OUTLOOK

All indications are that shareholder activism will continue to play a prominent, and likely permanent, role in the US corporate landscape. US public companies are increasingly devoting considerable resources to shareholder engagement and activism preparedness, and their enhanced focus on corporate governance and strategic review may further push the envelope of good governance practices. It is important to remain alert to developments in shareholder activism as the types of activists, companies targeted by activism and activist campaigns evolve.

21 See S&C 2016 Shareholder Activism Review.
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Frank Aquila is a partner in Sullivan & Cromwell’s general practice group and a member of the firm’s management committee. Mr Aquila has a broad multidisciplinary practice that includes extensive experience in negotiated and unsolicited mergers and acquisitions and corporate governance. He has been engaged in many high-profile matters that include activism and takeover defence, proxy contests, complex cross-border transactions, global joint ventures, leveraged buyouts and private equity transactions. He regularly counsels boards of directors and board committees on corporate governance matters, crisis management and matters affecting corporate policy and strategy.

Mr Aquila is consistently recognised as one of the world’s leading mergers and acquisitions lawyers, including as one of a small number of lawyers ranked by Chambers Global in Band 1 (the top tier), as an American Lawyer ‘Dealmaker of the Year’ and as a recipient of the Atlas Award as ‘Global M&A Lawyer of the Year’ and as a three-time Law360 MVP. Mr Aquila is widely acknowledged as an innovator and thought leader in the
profession. In 2015 the Financial Times recognised his representation of Kraft in its merger with Heinz to form The Kraft Heinz Company as one of the most innovative in North America. For his work in corporate governance, Mr Aquila has been regularly named by the National Association of Corporate Directors (NACD) to their ‘Directorship 100’ – one of the 100 most influential people in corporate governance and inside the boardroom. Best Lawyers in America has named Mr Aquila as its 2017 corporate governance law ‘Lawyer of the Year’. In 2014 Global M&A Network recognised Mr Aquila as one of the top 50 lawyers in the world.

MARK BARDELL
Herbert Smith Freehills LLP
Mark is a corporate partner with considerable experience across a wide variety of advisory and transactional work, comprising domestic and cross-border, corporate finance and M&A, including public takeovers, private M&A, joint ventures and corporate governance.

He has a particular focus on advising companies listed on the main market in the UK or traded on AIM and is frequently involved in advising on significant challenges that face boards including board or governance disputes, regulatory investigations and corporate transactions.

Mark is recommended in The Legal 500 for M&A premium deals and noted for his public takeover expertise. In September 2011, he completed a two-year secondment as secretary to the UK’s Takeover Panel.

WILLEM BIJVELD
De Brauw Blackstone Westbroek NV
Willem Bijveld is a senior associate in De Brauw Blackstone Westbroek’s corporate department. Willem concentrates on advising multinational corporations on corporate law, private and public mergers and acquisitions, corporate governance and securities law. He has particular experience in public takeovers, corporate governance and matters concerning shareholder activism.

BERTRAND CARDI
Darrois Villey Maillot Brochier
Bertrand Cardi is a partner at Darrois Villey Maillot Brochier. He joined the firm in early 2010, after having been a partner at Linklaters since 2004. He is one of the leading experts in mergers and acquisitions, securities and capital market laws (and also has experience in related litigation, arbitration and regulatory investigations). He has acted for industrial clients or investment funds in numerous major French or cross-border transactions. He also advises companies (listed or not) in financial difficulties and acts regularly on public law matters.
PAUL CRONHEIM
De Brauw Blackstone Westbroek NV
Paul Cronheim is a partner in De Brauw Blackstone Westbroek’s corporate department. Paul’s practice focuses on corporate law and mergers and acquisitions, including corporate governance, and shareholder matters. Paul has handled a wide range of Dutch and cross-border public takeovers, private acquisitions and disposals, auctions and joint ventures. He has also acted as counsel or arbitrator in numerous ICC, AAA and NAI arbitrations.

JEAN-MICHEL DARROIS
Darrois Villey Maillot Brochier
Jean-Michel Darrois founded the firm in 1987. Considered one of the most influential attorneys in France, he advises businesses, boards of directors and senior management, as well as high net worth individuals, in major transactions and disputes.

EZRA DAVIDS
Bowmans
Ezra Davids is the chairman of corporate and M&A at Bowmans specialising in mergers and acquisitions, capital markets and securities law.

GAVIN DAVIES
Herbert Smith Freehills LLP
Gavin is a corporate partner with 22 years of experience in public and private equity M&A. He acts on cross-border M&A, JVs, VC and other investments, as well as governance, across Europe and Africa. Gavin represents financial investors, corporates and government agencies. His matters regularly involve complex or novel structures, contentious situations or distressed situations.

Gavin has particularly strong experience in shareholder activism situations in the UK, having acted on a number of the most significant campaigns in the UK in the last 10 years.

Gavin is cited as a leading M&A lawyer in The Legal 500 and is identified in Who’s Who Legal as a leading practitioner in the field of international M&A.

QUENTIN DIGBY
Herbert Smith Freehills
Quentin is a partner in Herbert Smith Freehills’ Sydney corporate practice and established the firm’s head office advisory team (HOAT) in 1998. HOAT specialises in strategic corporate governance issues including board reporting and advice, market disclosure (both continuous and periodic), director and executive appointments, remuneration and disclosure, and shareholder communications and relations.

HOAT has established an unparalleled reputation for providing focused advice and guidance on not only legal and regulatory requirements but also market practice and emerging trends. HOAT now advises 60 per cent of the ASX 20 companies on corporate governance issues and approximately 40 per cent of ASX 100 companies.
Quentin acts as a trusted adviser for the corporate secretariat and general counsel teams and boards of a number of the firm’s significant ASX-listed clients and is the delegate for the Law Council of Australia on the ASX Corporate Governance Council.

MAX GUTBROD
Baker & McKenzie – CIS, Limited

Dr Max Gutbrod is a German trained lawyer working in Russia for more than 20 years. He started his career in Stuttgart in 1990 with Gleiss & Partner and moved to Russia in 1995. He has represented shareholders and investors in mergers and acquisitions, and disputes, and has negotiated and drafted charters for joint venture companies, shareholders and investment contracts, and given advice on regulatory matters relating to securities holderships, depositary business, securities settlement issues and related disputes. In addition, he has frequently advised on legislative issues related to corporate, banking and capital markets law as well as corporate governance, and has participated in discussions aimed at improving the infrastructure of Russian capital markets. Furthermore, Mr Gutbrod was a member of the group that drafted the CIS Model Law on Joint-Stock Companies, has published comments on the draft law in a specialised journal and has been a member of the Commission on Corporate Governance. Currently, Mr Gutbrod is focusing in particular on ICOs and blockchain-related issues.

EVA HÄGG
Mannheimer Swartling

Eva Hägg is the chairman of the public M&A and equity capital markets practice group. She specialises in securities and company law, and works specifically with public company transactions. Such transactions include IPOs, mergers and acquisitions, and capital market transactions such as stock exchange listings, the raising of capital and recapitalisation. Her work also includes corporate governance, company law issues, information issues and regulatory issues concerning the stock market.

FRANK HAMMING
De Brauw Blackstone Westbroek NV

Frank Hamming is a senior associate in De Brauw Blackstone Westbroek’s corporate department. Frank has a primary focus on corporate law, including corporate governance, shareholder activism and private and public M&A. Frank previously worked as senior associate in the firm’s corporate litigation practice, where he worked on a broad range of cases relating to shareholder activism, anti-takeover responses and securities litigation.

ELIZABETH KONG SAU-WAI
Morgan Lewis Stamford LLC

Elizabeth Kong Sau-Wai manages a wide range of corporate matters that include mergers and acquisitions, equity fund raising, corporate finance and securities regulation. Clients routinely trust her with some of the largest and the most complex cross-border corporate transactions in Asia. Her strong negotiation skills, strategic thinking and consummate dedication in pursuing her clients’ goals have earned her recognition in an array of regional and international legal industry publications. IFLR Asia Awards and Asian Legal Business
Southeast Asia Law Awards have recognised the complexity of her deal work. Singapore Business Review named her one of the most influential lawyers aged 40 and under, and Prestige Singapore magazine included her on its list of 40 under 40. Chambers Asia-Pacific, The Legal 500 Asia Pacific, Asialaw Leading Lawyers, Lawyer Monthly and Acquisition International have noted and acknowledged Ms Kong’s impressive record of corporate transactions. Prior to joining Morgan Lewis Stamford, she worked as a management associate and legal counsel in the Singapore and Belgium offices of the PSA Group, and was involved in various cross-border joint ventures, acquisitions and tender projects in Europe and Asia. Ms Kong graduated with a double-first in law from Cambridge University, where she won university prizes for best performance in contract law, company law and administrative law, as well as various college prizes and scholarships for outstanding overall performance. She qualified as an advocate and solicitor in the Supreme Court of Singapore, and also sits on the board of trustees of Cambridge Assessment Singapore.

DIEGO KRISCHCAUTZKY
Marval, O’Farrell & Mairal

Diego Krischcautzky joined Marval, O’Farrell & Mairal in 1997 has been a partner of the firm since 2006. His practice is focused on business law, mainly on mergers and acquisitions. He has extensive experience in M&A transactions, structuring and financing of private equity investments, and counselling on and structuring of local and international investments. He works regularly with companies and investment funds.

PATRIK MARCELIUS
Mannheimer Swartling

Patrik Marcelius specialises in securities law, and his principal areas of practice include public takeovers and mergers. His practice also includes equity offerings and IPOs. Patrik also advises listed companies on corporate governance and disclosure matters.

AKIRA MATSUSHITA
Mori Hamada & Matsumoto

Akira Matsushita is a partner at the Tokyo office of Mori Hamada & Matsumoto. He focuses on cross-border and domestic mergers and acquisitions transactions, corporate governance, shareholder activism, takeover defence and general corporate and securities law matters. He has extensive experience in advising listed companies subject to shareholder activism, proxy fights or unsolicited takeovers, and in representing clients in high-profile inbound and outbound cross-border mergers and acquisitions transactions.

Mr Matsushita was admitted to the Japanese Bar in 2006 and the New York Bar in 2013. He received his LLB from Keio University in 2005 and his LLM from Cornell Law School in 2012. He also worked at Kirkland & Ellis LLP, Chicago, from 2012 to 2013.
KARIN MATTLE  
_Homburger AG_

Karin Mattle is a senior associate in Homburger’s corporate and M&A practice team. She joined Homburger in 2014 after completing her MBA at the Australian Graduate School of Management (AGSM) and London Business School (LBS) in 2014. Her practice focuses on corporate and commercial law, mergers and acquisitions as well as capital markets law. She advises clients in connection with public takeovers, private M&A transactions as well as shareholder activism campaigns. Her practice also includes private share placements and IPOs. She is a member of Homburger’s Employment Law working group, whereby her main focus in this area are employee participation plans and transfers of employees in connection with business transfers.

NIKHIL NARAYANAN  
_Khaitan & Co_

Nikhil Narayanan is a partner in Khaitan and Co.’s corporate practice. He has extensive international and cross-border experience, having advised corporate clients, financial sponsors and investment banks on high-value and often market leading ECM and M&A transactions, both in London and in India. He also has depth of public company experience, having advised international listed clients on a listing rules related, disclosure related and corporate governance issues. Nikhil received his BCL degree from St. Catherine’s College, Oxford (where he was a Radhakrishnan/Chevening Scholar) and his MBA degree from London Business School (where he was a Merrill Lynch scholar).

XOLANI NTAMANE  
_Bowmans_

Xolani Ntamane is a senior associate in Bowmans’ corporate department. He specialises primarily in mergers and acquisitions, capital market transactions and general corporate law.

DAVID OSER  
_Homburger AG_

David Oser joined Homburger in 2003 and has been a partner in Homburger’s corporate and M&A practice team since 2009. His practice focuses on domestic and international mergers and acquisitions (both public and private M&A), capital markets, corporate governance, and general corporate law matters. He is the co-author of the leading treatise on the Swiss Ordinance against Excessive Compensation. At Homburger, he heads Homburger’s regional focus group on Japan. David Oser was admitted to the Bar in 1998 (Basel, Switzerland) and 2001 (New York) and received his LLM from Columbia Law School in 2000.
BÁRBARA RAMPERTI
Marval, O’Farrell & Mairal

Bárbara Ramperti was promoted to partner in 2012. She has 18 years’ experience in corporate law and is an expert in M&A, joint ventures, reorganisations, and general corporate and contractual matters. She has advised national and international clients within different industries and participated as leading counsel in high-profile M&A transactions and complex cross-border deals, providing support in the negotiation process, analysis of corporate structures and funding mechanisms. She also provides advice on a daily basis to Fortune 500 companies.

TIMOTHY STUTT
Herbert Smith Freehills

Timothy is a senior associate in Herbert Smith Freehills’ head office advisory team (HOAT), where he advises publicly listed companies on corporations law, governance, executive remuneration, and shareholder engagement and activism matters. Timothy also has previous experience in the financial industry, having worked as an analyst for an investment manager based in the San Francisco Bay Area.

As a senior member of HOAT, Timothy advises ASX-listed companies on market disclosure and shareholder engagement issues, including in relation to sales downgrades, contentious general meetings, ESG and economic shareholder activism and proxy adviser engagement. Timothy is a regular presenter on governance and remuneration matters for clients and at industry seminars (including at the Governance Institute of Australia).

In 2010, Timothy was one of two Australians to receive a Young Leaders Program scholarship from the Japanese Ministry of Education to study for his master’s in business administration (MBA) in Tokyo. He also holds a Bachelor of Laws (honours) and Bachelor of Commerce from Monash University, Melbourne.

LEE SUET-FERN
Morgan Lewis Stamford LLC

Lee Suet-Fern is the managing director of Morgan Lewis Stamford LLC. Ms Lee advises clients on mergers and acquisitions, equity and debt capital markets, and corporate finance. She routinely leads some of the largest corporate transactions in Singapore and the Asia-Pacific region. She has been involved in many significant corporate transactions and has been named a leading practitioner in numerous professional publications including Chambers Global Guide to the World’s Leading Lawyers, Euromoney World’s Leading M&A Lawyers, Euromoney World’s Leading Capital Markets Lawyers, PLC Cross-Border’s Equity Capital Markets and Who’s Who Legal – Capital Markets Lawyers. She was also awarded the inaugural Asian Legal Business Life Time Achievement Award. She has served as a member of the board of directors of various publicly listed companies in Singapore and the region. She currently serves as director on the boards of global Fortune 100 companies AXA and Sanofi, as well as Macquarie International Infrastructure Fund Ltd. She is a former president of the Inter-Pacific Bar Association and a council member of the International Bar Association. Ms Lee graduated with a double-first in law from Cambridge University in 1980, where she was a senior scholar at her college and won various book prizes. She qualified as a barrister-at-law at Gray’s Inn, London in 1981 among the top candidates at the London Bar examinations and also won the prize for
the best performance in international trade law. She was later admitted to the Singapore Bar in 1982, winning the prize for the top candidate at the Singapore Bar examinations as well as the prize for professional ethics.

STEVEN VAN WAAS

NautaDutilh

Steven van Waas is an associate in the corporate practice of NautaDutilh Avocats Luxembourg. He assists clients on various corporate matters including M&A, private equity, corporate finance and general corporate and commercial advice.

Mr Van Waas graduated from Utrecht University in 2010 with an LLM degree in Dutch civil law and an LLM degree in corporate, social and economic law. In 2011, he obtained an LLM degree in European Law from Panthéon-Assas University (Paris II).

MARGARETHA WILKENHUYSEN

NautaDutilh

Margaretha (Greet) Wilkenhuysen is a partner in the corporate practice of NautaDutilh Avocats Luxembourg. She specialises in cross-border corporate transactions, with a particular focus on mergers and acquisitions, joint ventures and international corporate restructurings and corporate finance. Her clients include major international corporations and she has represented both domestic and international clients in a variety of high-end transactions. Her extensive experience and knowledge resulted in her being nominated from 2011 through 2017 as a ‘Leading Lawyer’ for the IFLR1000.

Ms Wilkenhuysen received her law degree from the University of Leuven in 1991, a master’s degree in business and tax law from the Free University of Brussels in 1993 and an LLM from Duke Law School in 1996. She joined NautaDutilh in 1997 and was named partner in 2007.

Ms Wilkenhuysen is a frequent writer and speaker and has published various books and articles (e.g., Due Diligence (2011 – new edition), Cross-Border Mergers (2011) and Capital Directive (2014)), Corporate Governance (2017). She also published an article on cross-border mergers in ‘Un siècle d’application de la loi du 10 août 1915 concernant les sociétés commerciales’ (2015). She is also a member of the International Bar Association, the European Private Equity and Venture Capital Association and the Duke Alumni Association.
Appendix 2

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