The Shareholder Rights and Activism Review

Third Edition

Editor
Francis J Aquila

The Law Reviews

THE SHAREHOLDER RIGHTS AND ACTIVISM REVIEW

THIRD EDITION

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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-912228-51-5

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

BAKER & MCKENZIE – CIS, LIMITED

BOWMANS

CLEARY GOTTLIEB STEEN & HAMILTON LLP

DARROIS VILLEY MAILLOT BROCHIER

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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 prominent, and likely permanent, feature of the corporate landscape. Boards of directors, management and the markets have increasingly become more attuned to shareholder activism, and engaging with investors is a priority for boards and management as a hallmark of basic good governance.

Shareholder activism is now 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 continues to expand 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 increasingly 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 third 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 2018

Chapter 1

AUSTRALIA

Quentin Digby and Timothy Stutt[1]

I OVERVIEW

While 2017 heralded the emergence of American hedge fund activists in the Australian market, with Elliott Associates and Elliott International's (the Elliott Funds) campaign against global miner BHP, the first half of 2018 has again been marked by smaller scale activist campaigns, albeit in significantly higher numbers. The number of campaigns targeting companies headquartered in Australia rose a third in the first half of 2018, with a total of 41 campaigns commenced.[2] There was an increased focus on short selling-style campaigns, including a prominent campaign against Blue Sky Alternative Investments (Blue Sky) by American short-seller Glaucus Research Group (Glaucus), which generated high levels of media attention. The Glaucus campaign at Blue Sky came off the back of a successful short campaign against Australian sandalwood-grower Quintis (now in external administration). Overall, throughout 2018, the issues targeted by shareholder activists were rich and varied, including alleged financial mismanagement, criticism of positions taken in relation to takeovers and human rights and environmental concerns. Of particular note was Ariadne Australia's (Ariadne) successful campaign for representation on the board of Ardent Leisure, which saw Ariadne's Dr Gary Weiss assume the role of chair at Ardent Leisure.

Shareholder activism has long been a feature of the Australian corporate landscape, and it is not anticipated to retreat. Australia's shareholder-friendly regulatory regime has supported a robust, and increasing, level of engagement between the country's listed companies and their shareholders over economic, social and governance issues, and this trend is expected to continue for the foreseeable future.

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

1 Quentin Digby is a partner and Timothy Stutt is a senior associate in the head office advisory team at Herbert Smith Freehills. The authors would also like to acknowledge the assistance of Barry Wang, a solicitor in the Sydney corporate practice of Herbert Smith Freehills.

2 Activist Insight, 22 June 2018.

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.

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 email addresses as these are not prescribed details for inclusion in the register under Section 169. A law reform proposal was introduced in 2017 to include email addresses on company registers. However, the Australian Senate rejected the draft legislation in its proposed form, and the proposal has stalled for the time being (see below in Section V for further details).

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.

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 and venue costs). 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 (ACCR) 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). While this position was recently confirmed by the Full Court of the Federal Court of Australia,[3] the Australian Council of Superannuation Investors (ACSI) recently commissioned a report proposing that requisitioned resolutions in the form of non-binding advisory resolutions should be permitted (see 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

3 *Australasian Centre for Corporate Responsibility v. Commonwealth Bank of Australia* [2016] FCAFC 80.

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.[4]

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 his or her case to shareholders by giving the company a written statement for circulation to members and speaking to the motion at the meeting.

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.[5] 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;

4 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.

5 See, for example, the recent case of *RBC Investor Services Australia Nominees Pty Limited v. Brickworks Limited* [2017] FCA 756.

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,[6] limitations are placed on the board's use of company funds to 'campaign' in relation to contested director elections.

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 counterarguments 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 email 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.

6 *Advance Bank Australia Ltd v. FAI Insurances Ltd* (1987) 9 NSWLR 464; 12 ACLR 118.

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 overseas 'economic' activists in Australian market

Traditionally, the Australian experience with shareholder activism has been homegrown and 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, American-style hedge fund activism has become increasingly prominent in the Australian market. As well as 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 value campaigns targeting Australian firms launched by Lone Star Value Management, Janchor Partners, Coliseum Capital Management and the Elliott Funds and short campaigns against Australian companies launched by Glaucus and Viceroy Research.

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$107.24 billion; BHP Billiton Plc market cap: £37.6 billion), Bluescope Steel (market cap: A$10.1 billion), Iluka Resources (market cap: A$4.9 billion), and Brickworks (market cap: A$2.37 billion).[8] This trend is expected to increase as offshore investors gain confidence and become more active in the region.

ii Continued strength of strategic campaigns by local activists

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 60 Australian listed companies each year have received a public demand from investors during the period from 2014 to 2017.[9] Activist shareholders, such as Sir Ron Brierley 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

7 Activist Insight (in collaboration with Arnold Bloch Leibler), 'Shareholder activism in Australia: a review of trends in activist investing' (30 June 2016).

8 Market capitalisations presented as at 7 June 2018.

9 Activist Insight, 22 June 2018.

is Brierley-linked), Ariadne (which is Weiss-linked), MH Carnegie, Sandon Capital, Thorney Opportunities and the local branches of Lazard Asset Management and Aberdeen Asset Management.

As evidenced by the Ariadne campaign at Ardent Leisure described in further detail in Section IV, activist campaigns by local investors continue to be very effective, reflecting local market knowledge and an ability to swiftly seize strategic opportunities. In line with the overall trend for offshore activists, it appears momentum is continuing and, indeed, increasing with recent campaigns from onshore funds, such as Sandon Capital (in relation to Watpac, Iluka Resources and BlueScope Steel), as well as regional funds, such as Janchor Partners (in relation to Vocus Group, Bellamy's Australia and, reputedly, Medibank Private).

iii 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:

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

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 owing 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, 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:

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

iv 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:

a 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
b 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.[10]

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.[11] 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

10 Australian Securities and Investments Commission, Regulatory Guide 128: Collective action by investors (June 2015), [7]–[8].
11 Australian Securities and Investments Commission; see footnote 9.

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 Ardent Leisure and Ariadne

In a campaign that has been described as 'the largest successful activist campaign in Australia for decades',[12] Ariadne's Dr Gary Weiss became Ardent Leisure's Chairman in September 2017 following a successful campaign for election to the board, along with another Ariadne nominee, a month earlier.

Ardent Leisure became the subject of intense media attention after an accident at Dreamworld theme park in 2016 in which a faulty ride caused the death of four visitors. The period that followed saw the temporary closure of the park and a significant decrease in the company's share price. Growing concerns about the performance of the board led Ariadne, a minority shareholder with an approximately 10 per cent interest in the company, to commence a campaign to gain board representation. During the campaign, Ariadne emphasised that it was aligned with the interests of other shareholders given its significant stake and garnered further support by engaging a proxy solicitation firm, establishing a dedicated campaign website and distributing pre-populated proxy forms.

The chairman of Ardent Leisure's incumbent board initially resisted the campaign and refused to work collaboratively with Dr Weiss and the other Ariadne nominee. However, a few months later, when it had become apparent that the two Ariadne candidates were likely to be successfully elected at an extraordinary general meeting requisitioned by Ariadne, the campaign was effectively settled by cancellation of the shareholder meeting with the two Ariadne nominees, Dr Weiss and Mr Richmond, being invited to join the board. One month later, Dr Weiss was elected chairman of the board.

ii Myer and Premier Investments

Premier Investments, Myer's largest shareholder (which acquired a 10.77 per cent stake in the company in March 2017), has been engaged in a campaign for the replacement of the Myer board over concerns about the department store's continued decline in revenue, and share price.

12 Australian Financial Review, 'Ardent Leisure's capitulation the biggest win by activist investors in decades' (4 September 2017).

In October 2017, Premier Investments' proposal for the appointment of nominee directors and an additional director independent of Premier Investments to the Myer board was rejected. In response, Premier Investments voted against the resolutions proposed at the company's 2017 AGM, including the remuneration report, and encouraged other shareholders to do so. As a result, Myer received a 'first strike' against its remuneration report, representing an 'against' vote of more than 25 per cent. A second 'strike' at Myer's 2018 AGM would trigger a resolution for shareholders to vote on a board spill.

The Premier Investments campaign has continued in 2018 with increasingly strident shareholder communications and, in February, Premier Investments offered to collaborate with other shareholders to propose potential candidates for a new board (with the intention that if sufficient support from the institutional investors was obtained, the new board would be put to all shareholders at an extraordinary general meeting convened by Premier Investments). The process of engaging with the other shareholders is still ongoing, as confirmed in a letter to the other shareholders in May in which Premier Investments again encouraged them to hold the board to account.

iii Watpac and Sandon Capital

In February 2018, Watpac's largest shareholder, BESIX, proposed a proportional takeover of the company via a scheme of arrangement under which it would acquire half of the shares that it did not already own, thereby increasing its interest from 28 per cent to a controlling interest. BESIX offered shareholders 92 cents per share, which represented a premium of approximately 40 per cent.

While Watpac's independent board committee members recommended that shareholders vote in favour of the scheme of arrangement, Sandon Capital, an activist shareholder (which held a 3 per cent interest in Watpac), opposed the proposal on the basis that it undervalued the company and would give BESIX a majority shareholding to the detriment of the minority shareholders.

Sandon Capital's campaign received the support of proxy adviser Institutional Shareholder Services, which echoed Sandon Capital's concerns. The campaign was successful, with only 67.24 per cent of the votes cast at the scheme meeting in June 2018 being in favour of the proposed scheme of arrangement, which was below the requisite 75 per cent threshold.

iv Woolworths and the ACCR

In the lead-up to Woolworths' 2017 AGM, the ACCR assisted over 100 shareholders to requisition a resolution that would require the board to annually publish on the company's website a report on the company's due diligence process for identifying, analysing and addressing potential and actual adverse human rights impacts throughout its operations and supply chains.

On the day before the AGM, Woolworths announced that it had reached an agreement with the National Union of Workers on the implementation of a programme to identify and address human rights risks in its fresh food supply chains in Australia. Woolworths also committed to supporting workers in its supply chains to be educated about their workplace rights, have access to an effective grievance mechanism and be protected if they blow the whistle on human rights violations. As a result, the resolution was withdrawn by the ACCR.

v Environmental campaigns

In August 2017, certain shareholders of the Commonwealth Bank of Australia requisitioned a resolution to be considered at its annual general meeting that would require the directors to ensure that the company's business is managed in a manner consistent with the objective of limiting global warming to 2°C above pre-industrial levels. The resolution was not supported by the board and received only 2.94 per cent support.

In the lead up to Origin's AGM in October 2017, a series of resolutions were requisitioned that would require the company to provide information about its exposure to climate change-related risks, plan for transitioning to low-carbon technologies, and strategy for measuring and reducing short-lived climate pollutants. The resolutions were not carried as their validity was dependent on the adoption of a constitutional amendment that failed to pass.

A similar campaign was organised by the shareholders of Rio Tinto in 2018. A resolution was requisitioned for the company's AGM that called on the board to commission a review of the company's climate change advocacy practices through its participation in relevant industry associations (such as the Minerals Council of Australia, which has maintained a strong pro-coal stance). While the campaign failed for the same reason as the Origin campaign, the proposed resolution received 18.03 per cent support, which has been described as the highest vote ever in favour of a shareholder-requisitioned resolution on environmental issues in Australian corporate history.[13]

V REGULATORY DEVELOPMENTS

i Proposal to allow non-binding shareholder-requisitioned resolutions

In the past quarter of 2017, ACSI released a report supporting the use of non-binding shareholder resolutions and calling for changes to allow shareholders to requisition resolutions of this type. ACSI's recommended approach was developed in response to concerns raised by proponents of ESG activist campaigns that the courts' application of the current provisions of the Corporations Act essentially required a requisitioned resolution to be combined with an amendment to the company's constitution. The report galvanised significant debate but little consensus as to whether the reforms were necessary or appropriate.

ii Fourth Edition of the Corporate Governance Principles and Recommendations

On 2 May 2018, the ASX Corporate Governance Council released a consultation draft of the Fourth Edition of the Corporate Governance Principles and Recommendations (the Fourth Edition). As at the time of writing, the Fourth Edition is planned to come into effect on 1 July 2019. There are a number of aspects of the proposed Principles that have the potential to catalyse further activism against ASX-listed companies, including a recommendation for ASX300 entities to have a target of at least 30 per cent of directors of each gender on their boards and additional commentary on the disclosure of material exposure to environmental or social risks by companies (including a statement that companies that believe that they do not have such exposure are now expected to benchmark their disclosure practices against those of their peers and entities that do have such exposure are encouraged to consider implementing the recommendations of the Financial Stability Board's Task Force on Climate-related

13 *Sydney Morning Herald*, 'Rio Tinto delivers strong defence of its climate change stance' (2 May 2018).

Financial Disclosures). The recalibrating of expectations on social and environment practices under the proposed principles, including the enhanced disclosure that is expected to become typical market practice, is likely to catalyse continued activism in relation to these issues.

iii Modern slavery legislation

In 2017, the Joint Standing Committee on Foreign Affairs, Defence and Trade conducted an inquiry on enacting modern slavery legislation in Australia. On 28 June 2018, the Modern Slavery Bill 2018 (Cth) was introduced in the House of Representatives. Among other things, the Bill requires organisations with annual consolidated revenue of greater than A$100 million to publish an annual modern slavery statement that contains information about the modern slavery risks in their supply chains and their due diligence and remediation processes to assess and address those risks.

In parallel, in June 2018, the Modern Slavery Act 2018 (NSW) was passed by the NSW parliament. The NSW legislation provides for a similar obligation for commercial organisations with an annual turnover of more than A$50 million to prepare a modern slavery statement on the steps taken to ensure that their goods and services are not produced in supply chains in which modern slavery is taking place. The NSW Act also provides for the creation of a publicly available register that identifies organisations whose goods or services are or may be produced in supply chains that use modern slavery.

The modern slavery legislation in the form proposed by the federal and NSW governments will improve reporting standards in relation to human rights risks, which is a current area of focus for shareholder activists, as demonstrated by the ACCR's campaign against Woolworths. At this stage, it is unclear if the increased disclosure on these issues will take the heat out of related activism or whether the transparency will prompt the targeting of slow adopters for activist action.

iv Introduction of a bill providing access to shareholders' email 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 email 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 email addresses. Given the printing and postage costs involved in doing physical mail-outs to shareholders, the ability to contact shareholders by email is expected to provide shareholder activists with a significantly more cost-effective communications channel for activist campaigns.

The Senate Economics Legislation Committee reported on the Bill on 11 September 2017 but did not recommend in favour of it. As at the time of writing, the Bill had stalled before the Senate and was still awaiting its second reading.

VI OUTLOOK

As outlined above, the Australian regulatory regime is facilitative to shareholder activism and an increasing number of companies (in particular, an increasing number of larger companies) are being targeted by activist campaigns. We expect that these trends will continue in the future.

Offshore activists will continue to disrupt the traditional practice of 'behind closed doors' activism in Australia, and a lack of responsive reaction by boards to private approaches will increasingly be met with more overt aggression and publicly hostile campaigns. However, most Australian boards have recognised the importance of strategic preparation, self-assessment and challenge as the most effective approach to pre-empting and responding to activist campaigns.

The trend towards greater collaboration and engagement between traditionally passive superannuation long-term investors and activist funds is expected to continue. Partially offsetting that trend will be the support and acceptance of BlackRock's calls for greater focus on long-term value creation and their tempering of support for overtly activist tactics marked by short-termism.

Nevertheless, the increased use of shorting by some shareholder activists, including public 'short' campaigns against specific companies, is expected to continue in the near term given the prevailing low-growth environment, albeit with increasing regulatory scrutiny.

Chapter 2

FRANCE

Jean-Michel Darrois, Bertrand Cardi and Forrest G Alogna[1]

I OVERVIEW

In the event Brexit occurs, Paris will become the most significant securities market in the European Union.

France has a long-standing and vigorous tradition of activism. 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, generally comprised of professional hedge fund activists, including prominent activists from the United States and the United Kingdom. The amounts deployed by US and European activists against European targets in the first quarter of this year surpass 2017, opening up the possibility that European activism may set a new record in 2018.[2]

French and European law and regulation 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 defending company, French law provides stringent disclosure requirements on stake-building, and 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.

II LEGAL AND REGULATORY FRAMEWORK

i 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 report 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

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 Lazard Shareholder Advisory Group, *Review of Shareholder Activism 1Q 2018*, pp. 1, 2 (April 2018).

was crossed.[3] In addition, 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).[4] 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 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.[5] 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.[6] 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.[7]

ii 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* (including a *société européenne*) 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. That said, 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).[8]

3 C. com. Article L. 233-7 I-II; C. com. Article R. 233-1; AMF Règlement général, Article 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. Article L.233-9 I 4 *bis*; AMF Règlement général, Article 223-11 III.

4 EU Regulation No. 236/2012 on short selling and certain aspects of credit default swaps, Articles 5 and 6 (14 March 2012).

5 C. com. Article R. 233-1-1.

6 C. com. Article L. 233-7 III.

7 C. com. Article L. 233-11 Paragraph 1.

8 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.[9]

In addition, shareholders holding 5 per cent as well as certain minority shareholder associations may request the president of the commercial court on an *ex parte* basis to convene a shareholders' meeting in the event that the company has failed to call the relevant meeting following a specific request.[10] The same process can be used to appoint an independent expert to investigate one or more past or contemplated management decisions.

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.[11] In addition, all shareholders have the right to participate in the discussion of issues raised at a shareholders' meeting,[12] in accordance with the topics set forth in the agenda for the meeting.[13]

Proxies and concerted action

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.[14] In practice, large scale proxy solicitation campaigns are rare in France, although, the influence of proxy adviser firms is growing.

An activist may find itself acting in concert with other shareholders who come to share its views.[15] 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.

'Say-on-pay' requirements

French law was modified in December 2016, and now imposes that shareholders annually approve the compensation of senior management in binding votes.[16] This involves an *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 *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 *ex post* shareholder vote. The *ex ante* vote is then followed by an *ex post* vote at the next annual meeting relating to

9 C. com. Articles L. 225-18; L. 225-105.
10 C. com. Article L. 225-103 II 2.
11 C. com. Article L. 225-108.
12 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).
13 C. com. Article L. 225-105, al. 3.
14 C. com. Article L. 225-117.
15 See C. com. Article L. 233-10.
16 C. com Art. L. 225-37-2.

the compensation of the same executives. This *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 *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, 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 the right to directly remove or appoint the CEO, which is the province of the board.[17]

Double-voting rights and the abandoning 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.[18] 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 play the long term'.[19] 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.[20] Given its recent vintage, a conflict with an activist about the extent of the board's powers in this respect may raise novel issues.

Corporate governance code

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

17 C. com. L. 225-51-1 et seq.

18 As opposed to bearer form. Shares may be registered with the issuer itself or with a broker.

19 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).

20 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/.

annual report for any non-compliance.[21] 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.[22]

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 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.

Activist obligations

Depending on the activist's tack, certain recurrent issues may expose the activist to potential liability. This includes insider trading, market manipulation,[23] dissemination of false information,[24] as well as potential violations relating to financial analysts and investment research.[25]

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 primarily comprise both financial and industrial perspectives, and include occasional as well as persistent activists. The former include investment funds and individuals such as Amber Capital (UK-based but with founders with strong French ties), CIAM (Charity Investment Asset Management), SFAM, Wendel 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.[26] Finally, 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.

21 C. com. Article L. 225-37.

22 Id.

23 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.

24 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.

25 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.).

26 Jean-Baptiste Jacquin, 'Renault: l'Etat "activiste", pour quoi faire ?', *Le Monde* (16 April 2015) available at www.lemonde.fr/economie/article/2015/04/16/renault-l-etat-activiste-pour-quoi-faire_4617225_3234.html.

Foreign activists are primarily comprised of long financial activists, notably including in recent years Cevian (Sweden), Elliott Management (US), Pardus Capital Management (US), TCI (UK), Third Point (US) and Trian (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 are eight for 2017,[27] and vary from seven to eight in 2016 and two to 10 in 2015),[28] 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, Lagardère, 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, Fnac Darty, Groupe Latécoère, 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:

a 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);

b militating for improved performance (Nexans, Rexel, Carrefour);

c 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

d 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:

a seeking to add items to the agenda of a shareholders' meeting or propose new resolutions[29] (Wyser-Pratte regarding Lagardère, TCI in Safran-Zodiac);

b seeking board seats[30] (Cevian in relation to Rexel, CIAM as regards Alès Group, Pardus Capital Management regarding Valeo, Pardus and Centaurus Capital in relation to Atos Origin, SFAM as regards FNAC Darty);

c seeking a court-appointed independent expert (Elliott in its countersuit against XPO);

27 Lazard Shareholder Advisory, European Shareholder Activism: 2017 in Review, at 2.

28 Compare FTI Consulting, global shareholder activism map (for France, estimating 10 campaigns in 2015 and eight campaigns in 2016) available at http://fti.digital/global-shareholder-activism-map/countries/france/ and Activistmonitor, Activism in Europe 2016 (2017) (for France, estimating two campaigns in 2015 and seven campaigns in 2016). This can be compared with an estimated 645 campaigns in the United States in 2016. AFP, L'Europe nouvelle cible des fonds activistes américains, Capital.fr (30 June 2017).

29 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.

30 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, CIAM against Altice).

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,[31] 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

31 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 advisery 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 SA – Cevian Capital AB (2016–2017)

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:

a providing further transparency regarding the identity of shareholders;
b 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.

Other expected developments in France include the proposed reduction of the squeeze-out threshold from 95 per cent to 90 per cent, consistent with a limited number of other European jurisdictions.[32] This would render more difficult the activist hold-out strategy of blocking a squeeze-out unless it is paid a premium over the takeover offer price. In the context of the same legislative project, the government commissioned a report on the notion of *intérêt social* (the corporate interest). The concept of corporate interest arises in a variety of contexts in French law, and management's failure to pursue the corporation's corporate interest can result in significant civil and criminal penalties. The report raises a number of proposals designed to foster a longer-term perspective among shareholders, including by memorialising in statute the duty of boards and managers to manage the corporation primarily in the corporation's own interest, taking into account employee and environmental interests.[33]

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 (Financière de l'Echiquier in its team-up with Sterling Strategic Value (SSV) concerning Latécoère) 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);[34] and
d more sophisticated and increasingly M&A-focused activist campaigns.[35]

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32 Other EU jurisdictions with 90 per cent squeeze-out thresholds include Austria, Denmark, Germany (only for mergers), Hungary, Ireland, Poland, Spain, Sweden and the UK.
33 Nicole Notat et Jean-Dominique Senard, L'entreprise, objet d'intérêt collectif (9 March 2018). Cf. Lynn Stout, *The Shareholder Value Myth* (2012).
34 See, e.g., Alon Brav et al., Robert H Smith School Research Paper No. RHS 2529230; European Corporate Governance Institute (ECGI), Wolf Pack Activism (1 April 2017) available at SSRN: https://ssrn.com/abstract=2529230.
35 See generally JP Morgan, 'The 2017 Proxy Season Globalization and a new normal for shareholder activism' (July 2017).

We may also see an increase in activism against targets that had previously been sheltered by the French state as the French state reduces its exposure in certain listed companies;[36] In addition, as activism becomes commodified, an increase in local activism may occur, as a new generation of smaller European and French players join the fray.[37] It remains to be seen whether Elliott Management's victory in Telecom Italia[38] may encourage activists to become more aggressive *vis-à-vis* companies with reference shareholders that lack outright control (a shareholder structure that is relatively common in Europe), or whether that matter will remain an outlier based on its very specific circumstances.[39]

36 Cf. Hélène Fouquet, 'Macron's Unfinished Job at Renault Heralds Future Assets Sales', Bloomberg (20 June 2017) accessible at www.bloomberg.com/news/articles/2017-06-19/macron-s-ministers-meet-french-executives-as-state-stocks-soar.

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

38 Elsa Bembaron, Le fonds Elliott prive Vivendi du contrôle de l'opérateur Telecom Italia, *Le Figaro* (5 May 2018) (discussing the victory of Elliott Management – a 9 per cent shareholder – over Vivendi – a 23.9 per cent shareholder – in Telecom Italia's shareholder meeting, in which shareholders voted in favour of Elliott's slate of 10 board members, leaving Vivendi with just five seats).

39 See, e.g., Sahil Mahtani, Groupe Bolloré and Elliott go head-to-head over Telecom Italia, *Financial Times* Alphaville (3 May 2018).

Chapter 3

GERMANY

Michael J Ulmer[1]

I OVERVIEW

Shareholder activism has come to Germany, and now is here to stay. Only a few years ago, German managers perceived shareholder activism as a feature of the US and, to a certain extent, the UK market. Germany, they thought, was not interesting enough for activists they had heard of only in the international media, if at all. Further, the German market was understood to be sheltered from such inconvenience.

During the last decades of the twentieth century, corporate Germany was a close-knit community with a comparatively small number of listed companies. Debt, rather than equity financing, dominated corporate finance, and listing on a stock exchange was not necessarily the main goal of a thriving business. Cross-shareholdings were common among listed entities. Such cross-shareholdings and the ubiquitous German banks led to supervisory boards being filled with representatives of a company's business partners. Low attendance at shareholders' meetings and depository banks exercising the voting rights of free-float shareholders created a friendly, albeit encrusted, environment. Strategy and business decisions of the executive board were only discussed with the supervisory board. Investor relations were not deeply embedded in the corporate culture.

This situation has changed fundamentally, as the 'Deutschland AG' gradually broke up. Cross-shareholdings were largely abandoned, supervisory boards have become much more diverse and equity capital markets now play a significant role in company finance. Indeed, more, and much smaller, companies tap this resource. Listings now often take place earlier in a company's history. These developments, together with the significant scope of minorities protection afforded under German corporate law, offer an enticing environment for shareholder activism that even a two-tier board system and co-determination cannot curb.

An invitation like this could not be ignored by activists, often US hedge funds, that are on the lookout for new opportunities. Low interest rates and past successes allow these funds to raise even more capital. In the US, however, activist campaigns no longer lead to the same level of return as they once did. There, companies are now much better prepared, have turned into sophisticated communicators of their strategies and often preemptively take measures activists would usually press for.[2] On the other hand, the less aggressive approach of active ownership recently followed by many activists resonates well with German corporate

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2 For current developments in the US, refer to the Cleary M&A and Corporate Governance Watch (Mergers and Acquisitions, Corporate, Shareholder Activism), available at https://www.clearymawatch.com/.

culture, traditionally fostering mid- to long-term perspectives. Finally, not least because of large compliance cases and 'Dieselgate', shareholders proactively engaging with management are increasingly seen as playing a healthy role within the German market.

Against this backdrop, it is no surprise that shareholder activism has established itself as a mighty force in Germany. In recent years, the number of activist campaigns has increased significantly. Shareholder activism is currently seen as one of the key market trends, making its way onto the agenda of boards and advisers alike. These days, the mere possibility of activists looking at a specific situation may lead to unforeseen changes in corporate strategy or trigger huge transactions. Shareholder activism has taken to the German stage – and it will not go away.

II LEGAL AND REGULATORY FRAMEWORK

The German legal and regulatory framework relevant to activist campaigns is manifold. While the corporate constitution of publicly traded companies exhibits features that could serve as protection against outside attacks, far-reaching minority rights offer activist shareholders starting points or even inroads; and be it only for creating a nuisance in support of their campaigns. Obligations of current or potential future shareholders towards the company, however, are limited. A tight regime of disclosure requirements leads to transparency with respect to stakebuilding, thereby creating a level playing field for both management and activist.

i Corporate constitution

The corporate constitution of German public companies is characterised by a two-tier board system, consisting of the *Vorstand* (management board) and the *Aufsichtsrat* (supervisory board), as well as by a separation of powers within the company that is often described as a system of 'checks and balances'.[3]

The management board runs the company independently and free from instructions by the supervisory board or the shareholders. The management board's decisions must be guided exclusively by the best interests of the company, with the board being granted a certain level of discretion with respect to this assessment. In consequence, the management board in general cannot bindingly commit itself to take a specific measure in the future. The overall situation or the board's assessment might change in the meantime, and the respective measure, therefore, may no longer be perceived as being in the company's best interests.

The members of the management board are appointed and removed by the supervisory board, whose members are in turn elected by the shareholders' meeting with a simple majority.[4] Unless there is a vacancy within the supervisory board that needs to be filled by court appointment at short notice, it is the supervisory board that suggests to the shareholders'

3 The focus of this article is the German *Aktiengesellschaft* (AG), the archetypal entity under German law, whose shares can be listed on a stock exchange, and by far the most common form of publicly traded companies in Germany. The *Kommanditgesellschaft auf Aktien* (KGaA) and the *Societas Europaea* (SE), whose shares can also be listed, are not addressed. The KGaA is a special entity mainly used by 'family enterprises' to strictly limit external influence even in the event of listing. The SE can take several forms, and as a German listed entity often resembles the AG.

4 In the case of a company that is subject to co-determination, the employees' representatives on the supervisory board are determined by means of special procedures.

meeting whom to vote onto the supervisory board. However, under certain circumstances, the supervisory board could agree with a shareholder to suggest a specific candidate to be voted for by the shareholders' meeting. Depending on the number of the company's employees, one third or even half of the members of the supervisory board are determined by the company's employees.[5]

The allocation of responsibilities between management board, supervisory board and shareholders of publicly traded companies is rather inflexible, and decisions to be taken by the management board cannot be made subject to prior shareholder approval. A limited number of significant acts of management, however, can be made subject to prior approval by the supervisory board.

The supervisory board is not entitled to share any confidential information with the shareholders of the company. The management board is also bound by confidentiality obligations, but within certain limitations could share confidential information with shareholders or even with third parties. As a basic principle, all shareholders must be treated equally, and information provided to one shareholder must in general also be shared with the other shareholders. Each shareholder has a respective claim, to be brought at the shareholder's meeting. Insider information can hardly ever be shared prior to public disclosure.

ii Minority rights

The protection of minorities is a guiding principle under German company law. Fundamental measures require an approving shareholders' resolution cast with a qualified majority. Further, shareholders with small holdings, sometimes even holders of a single share, are granted a wide range of protective rights.

With a threshold of 95 per cent, squeeze-out resolutions require the highest qualified majority; this threshold is reduced to 90 per cent in the event of a merger-related squeeze-out. Other fundamental measures like mergers, spin-offs, other reorganisations or the sale of the company's whole business require shareholders' approval by a majority of 75 per cent at the shareholders' meeting, as do capital increases, amendments of the company's articles, concluding a domination and profit and loss transfer agreement and the removal of a supervisory board member.

Even a single share entitles its holder to speak at the shareholders' meeting. Each such shareholder could also submit counter-proposals for shareholders' resolutions, challenge shareholders' resolutions or make a counter-proposal for an individual to be voted onto the supervisory board. The right to request a court decision on the appointment of a special auditor to independently audit specific acts of management requires a shareholding of 1 per cent of the company's nominal capital, or shares representing €100,000 thereof. Holding shares representing 5 per cent of the company's share capital, or €500,000 thereof, grants the right to request amendments to the agenda of a shareholders' meeting, and a 5 per cent shareholding grants the right to request that a shareholders' meeting be convened.

5 Having more than 500 employees leads to one-third of the supervisory board members to be determined by the company's employees, whereas more than 2,000 employees results in half of the board members being employees' representatives.

Shareholders can team up to pass the respective thresholds, and proxies can be sought. Other than the management board of the company, a shareholder seeking proxies or general support by other shareholders has to rely on publicly available information and tools to establish contact. Management can use the company's information base when canvassing support among shareholders.

Finally, minimum pricing rules under German takeover law also need to be understood in the context of the protection of minorities. In a takeover scenario for a publicly traded company, the bidder must offer all shareholders a price per share at least equal to the highest price the bidder paid for shares of the company in the six months prior to the offer.[6] In the event of a squeeze-out, a merger or conclusion of a domination and profit and loss transfer agreement, all shareholders are entitled to trade in their shares for what the law describes as 'adequate' compensation.

iii Disclosure requirements

When building a stake in a publicly traded company, activists face a tight regime of disclosure obligations. Acquiring shares and reaching the thresholds of 3, 5, 10, 15, 20, 25, 30, 50 and 75 per cent of the total voting rights within a company requires the shareholder to immediately notify the German Federal Financial Supervisory Authority (BaFin) as well as the respective company, which in turn must inform the market about such transactions.[7] In the context of its 10 per cent notification, the acquiring shareholder must inform the company about the underlying objectives behind the acquisition: classification of the investment as strategic or financial, intention to increase the stake within the next year and intention to influence the composition of the company's boards or to significantly change the company's financing structure. Acquiring shares representing 30 per cent or more of voting rights is deemed to be taking over control of the company. A shareholder reaching this 30 per cent threshold is required to submit a public takeover offer for all shares in the company pursuant to the WpÜG (the Takeover Act).

When determining the percentage of voting rights a shareholder holds, certain voting rights are attributed that do not result from shares held by the shareholder. Among others, voting rights resulting from shares held by subsidiaries, from shares that are held for the benefit of the shareholder or that could be acquired by the shareholder unilaterally need to be added to the directly held voting rights. Further, voting rights held by shareholders acting in concert with respect to more than singular situations are attributed to all such shareholders.

Starting with the 5 per cent threshold, the aforementioned notification obligations also apply where an investor acquires financial instruments that either grant the investor an unconditional right to acquire shares with voting rights in the company, or that relate to the shares and have an economic effect comparable to financial instruments. Voting rights resulting from shares and related to these financial instruments are also added when determining the total percentage of voting rights held by a shareholder. In consequence, a combined stake of close to 3 per cent of voting shares and financial instruments related to

6 Should the weighted average stock exchange price of the shares during the three months prior to the notification about the upcoming offer be higher, such higher price would be the minimum price to be offered to all shareholders.

7 BaFin and the company need to be informed without undue delay and no later than within four trading days. The company, in turn, must inform the market without undue delay and no later than within three trading days.

shares granting up to 2 per cent of the voting rights in a company would fall just short of the notification requirements, and could be built and kept secretly. Failure to comply with disclosure obligations could lead to voting rights resulting from respective shares not being exercisable.

Besides voting rights, short positions in a company's shares are also subject to disclosure obligations. Starting with 0.2 per cent of the issued share capital of a company, covered net-short positions must be notified to the BaFin. Thereafter, each 0.1 per cent increase triggers further notification requirements. As of 0.5 per cent of the issued share capital, notifications of covered net-short positions must also be made to the public.[8] Taking uncovered short positions in shares of a publicly traded company is prohibited.

iv Shareholder obligations

While the rights of shareholders under the German legal and regulatory framework are far-reaching and even holders of single shares benefit from minorities protection, the obligations of current or potential future shareholders towards the company are limited.

As long as the disclosure obligations applicable to covered short positions are complied with, no inaccurate or misleading information is disseminated in the course of a campaign and existing conflicts of interests are made public by the activist in a correct and effective manner, even attacks by short sellers are considered legal.

Fiduciary duties also binding minority shareholders are discussed; however, for an activist to become liable, intentionally causing harm to the company would be required. In this context, it also needs to be taken into account that short sellers, when running their campaigns, usually do not hold shares in the companies they attack.

III KEY TRENDS IN SHAREHOLDER ACTIVISM

Shareholder activism in Germany exhibits many features, and campaigns seen most often follow different approaches. With their attacks, short sellers aim to bring down the target's share price to maximise individual short-term profit. Other activists take a medium- to long-term perspective and try to create value for all shareholders by changing the way the company is managed. This might range from changing corporate governance structures to breaking up the company. Special situation activists make use of takeover scenarios or corporate measures that cannot be implemented without their shareholdings and entail payment of adequate compensation to affected shareholders. Owing to the general principle of German corporate law that shareholders must be treated equally, raising the price to be paid for the company's shares ultimately benefits all shareholders exposed to the respective situation.

i Short sellers

Short sellers are increasingly active in Germany. Their campaigns start with the activist identifying a promising target. Complex business models and unclear strategies, opaque accounting and potential irregularities in financial reporting and close financial or personal links between management and major shareholders often serve as basis for their attacks.

8 All notifications must be made by 15:30 hours on the trading day following the respective transaction.

The short seller then bets on a falling share price, using financial instruments. Often the activist, with the help of financial institutions, borrows shares in the target company and sells them immediately with the intention of repurchasing the shareholding at a lower price once the campaign has its effect. Following the sale of the lent shares, the activist publishes a report on the target company, sharing the analysis of the company's potential weaknesses and making the case that the company is overvalued and its share price inflated. Usually, such reports are accompanied by managed media coverage. Short selling campaigns gain additional momentum once the falling share price triggers stop-loss orders. Further, in cases where the target's share price rose quickly in the past, shareholders that bought cheap are generally willing to exit quickly once they observe the first signs of a downward trend. Sometimes, several activists proceed together right from the beginning of an attack. More often though, the short seller will already have repurchased the shareholding for a then lower price and transferred it back to the lender, when other activists join the campaign, waiting for a second wave or just hoping to benefit from the momentum created by the attack.

While the target of a short selling campaign needs to allocate significant resources to counter the attack, suffers from a falling share price and may take a long time to recover, short selling cannot be qualified as an outright negative. As long as applicable disclosure requirements are met, no inaccurate or misleading statements are disseminated and existing conflicts of interests are made public, campaigns can contribute to transparency and thereby increase overall market efficiency. This effect is mediated by the fact that negative consequences of an attack cannot be controlled so as to remain commensurate with the overall situation.

ii Value-driven activists

Value-driven activists' aim is to achieve the opposite. They hope their campaigns will increase the target company's value and the price of its shares. Companies with a low valuation, conglomerates perceived as sedate and enterprises that have not adapted to the fast-moving markets they operate in all qualify as potential target for their campaigns. Some activists have a special focus on executive compensation, compliance or good governance; others construe value more broadly and also pursue ethical or ecological objectives.

The main aim of most value-driven activists is to push management to run the company's business in a way they deem more efficient, thereby raising its valuation. Campaigns often challenge business models and corporate strategy. Changes within the boards are sought to gain direct influence on respective decision-making. Press campaigns and open letters to all shareholders accompany such efforts. Executive compensation is frequently identified as an inappropriate cost factor and good governance construed as the means to achieve the final goal. In this context, activist shareholders do not shy away from suggesting significant cost cuts, share buy-backs, changes to the company's financing structure or the sale of less profitable businesses. Breaking up conglomerates to increase the valuation of its individual parts by creating more flexible and focused entities that are managed at a level closer to their business is in many cases the ultimate ambition.

While activist shareholders following this approach take minority stakes in the target company, they use several tools to increase their influence. Media campaigns that denounce inefficiencies and demand measures with an alleged direct impact on the share price help to win over other shareholders. More passive investors, such as asset managers, pension and mutual funds are more and more often backing such campaigns, either in full or at least those elements that are within the focus of their investment guidelines, such as good governance or executive compensation. An increasing number of institutional investors announced their intention to more actively pursue such goals in the future.[9] With most shareholders' interest in increasing the value of their investment being aligned with this main objective of the activists, even a campaign based on a small shareholding can find majorities at shareholders' meetings, especially given that proxy advisory services are now regularly seen in the German market.

iii Special situation activists

For years now, special situation activists have achieved a certain notoriety in Germany. They make use of scenarios where their shareholding is required to either allow a takeover to succeed or to implement specific corporate measures.

The qualified majorities required to take a company private by way of a squeeze-out (95 per cent, or 90 per cent in the event of a merger-related squeeze-out), to merge or to reorganise a company (75 per cent) or to enter into a domination and profit and loss transfer agreement with the company (75 per cent), provide the platform for their campaigns. The latter threshold is of utmost significance, especially in takeover scenarios. Without a domination and profit and loss transfer agreement being in place with the target company after a takeover, the major shareholder cannot instruct the management of a publicly traded company on how to run its business. Measures required to realise synergies could, therefore, not be implemented. In addition, the company's cash flows could not be used to refinance the acquisition. This is one reason most public takeover offers are subject to the condition that 75 per cent of the company's shares are tendered.[10] Given that a significant number of shareholders usually ignore a takeover offer or deliberately keep all or parts of their shareholdings, even a stake well below 25 per cent could lead to a takeover offer failing. Special situation activists build such stakes when a takeover is announced, or once corresponding rumours become more reliable. In the course of the takeover process they agree a price with the bidder for which they would tender their shares, thereby significantly increasing the likelihood of the takeover offer being successful. Pursuant to the pricing rules under German takeover law, such price, on a per share basis, would also need to be offered to all other shareholders.

This approach is also used by special situation activists in the event of corporate measures that are not directly related to a takeover. The activists build and sell a stake that is required to implement upcoming corporate measures like a squeeze-out, a merger, other reorganisations or entering into a domination and profit and loss transfer agreement. These corporate measures imply that all shareholders are made an offer to trade in their shares for an adequate compensation. The valuation of the company performed to calculate such compensation aims at determining the intrinsic value of the company. While the price the shares trade at on the stock exchange plays an important role in this respect, other than in a takeover scenario, the price paid for shares held by an activist does not generally have to be taken into account.

Each shareholder is entitled to challenge the adequacy of the compensation offered in these contexts. The compensation finally decided by the courts to be adequate is owed to all shareholders that traded their shares. In consequence, special situation activists successfully challenging and increasing the original compensation offered help all shareholders to realise the full value of their investment.

9 *Handelsblatt*, 'Der neue Druck der Investoren', 13 April 2018, p. 24.

10 Including the shares held by the bidder already that usually count against this 75 per cent condition.

IV RECENT SHAREHOLDER ACTIVISM CAMPAIGNS

In recent years, the number of campaigns run by activist shareholders in Germany increased significantly, and shareholder activism is now perceived as one of the key trends in the market. The following recent campaigns are of particular interest.

i Ströer/Muddy Waters; Aurelius/Gotham City; ProSiebenSat.1/Viceroy

Advertising company Ströer, financial investor Aurelius and media group ProSiebenSat.1 all recently came under attack from short sellers.

In the case of Ströer (2016), activist Muddy Waters, having built a short position, publicly made the case that the equity story of the company's IPO had not been followed up on, and entering the digital media sector rather than fostering international expansion was not convincing. Further, the company's accounting was challenged and transactions between board members and the company were questioned, accompanied by hints at the lavish life styles of the CEO and members of the founder's family. Muddy Waters liquidated its short position once the company's share price had fallen significantly.

Financial investor Aurelius was attacked by Gotham City (2017). Building up a short position was followed by the publication of a research report that claimed shares were trading at a highly inflated price. The company's business model was challenged and the way it accounted, in particular, for the profits of portfolio companies was described as inappropriate. Adding that the management had already sold their shares in the company below market increased the blow to the share price. Subsequently Gotham City liquidated its short position.

Viceroy ran a short-selling attack against ProSiebenSat.1 (2018) briefly after it became known that the media group had to leave the leading German index DAX 30. The activist claimed the company's shares were trading at four times their real value. The practice of investing in young enterprises, in connection with granting them free slots for TV advertisements, was cited as a means to inflate profits. Further, the media group's business strategy acting in a quickly changing and internet-dominated environment was heavily criticised. As to be expected, within minutes the falling share price had destroyed a significant portion of investors' wealth.

ii ThyssenKrupp/Cevian

As previously with Bilfinger, where Cevian some years ago became the biggest shareholder, took two seats on the supervisory board and transformed the struggling building conglomerate into a more focused industrial service provider, the Swedish activist is now pressing for radical change at industrial giant ThyssenKrupp (2017/2018).

Second only to Krupp Stiftung, Cevian holds a large stake in ThyssenKrupp and a seat on the company's supervisory board. For some time already, ThyssenKrupp's management has been working on a new strategy for the group that is active in diverse business areas, including steel production, trading, plant construction, as well as ship and elevator building.

Against the background of financial results that persistently fail to meet Cevian's expectations, the activist is now demanding a break-up of the group, arguing that overall valuation could be increased significantly by creating more focused and efficient, independently-managed enterprises. The first steps toward such a break-up are under way. It has been agreed that the steel business will be contributed to a joint venture with Tata Steel.

The future of the trading business is under discussion. However, the group's management has ruled out the sale of the highly regarded elevator business. Major shareholder Krupp Stiftung currently opposes a total break-up of the group.

iii STADA/AOC and Elliott

Pharmaceutical company STADA is the most prominent example of a German company being targeted by activist shareholders in recent years (2016/2017). With its two business segments, generic and over-the-counter products, a CEO holding office for over 20 years, being entitled to one of the more generous compensation packages on the market, a rather reclusive supervisory board chairman and a less than optimal financial performance, STADA offered many features to pique activists' interest.

Thus, AOC, together with others, built up a stake of approximately 5 per cent in the company and pressed for cost-cutting and improved performance. Further, they aimed to replace nearly all shareholders' representatives on the supervisory board. Both the management and the activist applied sophisticated media strategies to win over the shareholder majority for their respective case. Finally, the company's general counsel took over from the CEO, and the chairman as well as other members of the supervisory board were replaced.

Whether solicited by the activist or solely attracted by separable business units and unrealised upside potential, STADA drew strong and increasing interest from several private equity investors. This was when the new CEO decided to run a structured sales process for the company, ending in Bain and Cinven submitting a public takeover offer for all STADA shares. As usual, the offer was made subject to 75 per cent of the shares being tendered so a domination and profit and loss transfer agreement could be put in place, and the company's cash flows used to partly refinance the acquisition.

Another activist entered the scene. Elliot acquired a stake in STADA big enough to hinder this condition to be met, even with a finally lowered acceptance threshold. The takeover offer fell through. Based on an exemption granted by the BaFin, the private equity houses followed up with a second attempt in which the offered price was acceptable to Elliott. At this stage, AOC had already sold its shares with a high profit. To miss no opportunity, Elliott then bought further STADA shares and made clear they would in any case challenge the adequacy of the compensation offered to shareholders in the context of the domination and profit and loss transfer agreement to be entered into following the takeover.

V REGULATORY DEVELOPMENTS

Among recent regulatory developments the following should have an impact on campaigns run by activist shareholders.

At the end of 2017, the BGH (German Federal Court of Justice) held that the price paid by a bidder for bonds convertible into shares in the target in the context of a public takeover offer must be taken into account when determining the minimum offer price, at least if such bonds are convertible into shares in the target at short notice. [11] McKesson, when taking over pharma wholesaler Celesio, bought bonds convertible into Celesio shares from Elliott, which had built such stake to finally be bought out by the bidder. The prices paid by

11 BGH, judgment of 7 November 2017, II ZR 37/16 – Frankfurt am Main.

the bidder for both shares and convertible bonds of the target were held to be relevant with regard to the minimum pricing rules. This judgment will thus influence the tactics of activist shareholders focusing on special situations when building a stake in the respective target.

When the newly appointed CEO of STADA announced that, in light of informal offers by financial investors to take over the company, the management would start a structured sales process for STADA, he created the impression that the management board of a publicly traded company under these circumstances would or at least could be obliged to run a sales process. Unlike US law, German corporate law does not foresee such an obligation. Even if a company has been put 'in play', the management board when taking its decisions must be guided exclusively by the company's best interests, and under German law in general there is no protected interest in the company's shareholder structure. It can be expected though that this prominent precedent will lead to other management boards in comparable situations considering a potential obligation to follow this approach. Especially in cases where activists threaten to bring damage claims against management, the boards might decide to run a sales process, if only as a defence against a liability allegedly resulting from not doing so. Adding the tool of putting the company 'in play' by orchestrating offers, or at least serious communications of interest, provides activist shareholders interesting new perspectives.

VI OUTLOOK

Not least because of the considerable success of recent campaigns, market participants agree that shareholder activism in Germany will play an even bigger role in the future. Its legal framework and corporate culture as well as factual circumstances led to Germany being identified as a new playground for activists. Many of their goals resonate well with other shareholders that, therefore, support their campaigns, and even formerly passive institutional investors have now announced their intention to become more actively engaged with the management of the companies they invest in.

The increasing awareness of what an activist campaign would mean for a company that is hit unprepared, leads many to expect changes within corporate culture in Germany. Good governance is already heading the agenda. Steps towards more open communication and discussions of a company's strategy, as well as growing receptiveness regarding criticism by key shareholders can be expected. The value of supportive anchor investors is increasing further.

Besides such general developments within corporate culture, many companies are seriously considering preemptively taking defensive measures that have proven effective in the US market. Such measures include white paper exercises with the company's management taking the position of an activist shareholder. Based on benchmark studies, risks for sustainable growth are identified and addressed. Further, early warning systems are being implemented. They focus on changes in the shareholder structure, trading volumes of the company's shares and related financial instruments, changes in the investment and voting policies of major shareholders as well as analysts' reports or critical statements by stakeholders. Finally, defence manuals are being compiled that set out in detail which internal departments and which external advisers are to be involved in the event of an imminent attack, which steps need to be taken at a specific phase of a campaign and which approaches should be followed with respect to the activist, the key shareholders and the media.

Thus, in the long run, shareholder activism could arguably have a steering effect, also leading to more transparency and efficiency of the German market. From a macro perspective, creating value for shareholders and transparency for market participants can only be perceived as positive. When becoming the target of an activist campaign, however, this assessment differs. Awareness and preparation allow for an overall positive effect to materialise, while not individually paying too high a price for this to happen.

Chapter 4

INDIA

Nikhil Narayanan[1]

I OVERVIEW

India's corporate and regulatory environment 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, until recently, Indian market dynamics meant that most promoters did not fear the loss of control (even if their businesses did not perform). 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, a number of these historic dynamics are changing. 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. Various proxy firms are now active in the Indian market, and the media has also emerged as a key stakeholder in certain situations.

Consequently, investors have been increasingly more willing to make their voices heard. Much of this dissent has been event-driven (opposing related party transactions, share repurchases and acquisitions) and limited to the larger listed companies. However, since the last quarter of 2016, there has been a broadening of shareholder engagement to cover other areas such as executive remuneration, strategy, succession planning and business underperformance. This period has seen the Tata Group and Infosys, two of India's better governed groups, undergo changes in management, the CEO of ICICI Bank face investigations, a director of Fortis Healthcare being removed by its shareholders and the chair of one of India's leading financial groups face significant opposition to his reappointment as a director of the group holding company. There have been recent instances of investors seeking board positions and challenging transactions that are perceived to have enriched promoters. Also, while long-term institutional investors historically led shareholder engagement, certain recent activist campaigns have been led by other funds. In addition, a large and multi-bidder takeover has recently played out in the market.

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These dynamics have chipped away at the general position of strength of controlling shareholders in the Indian market, which does, nevertheless, remain. Therefore, the Indian market remains very different from the US and the UK from an activism perspective, and activism and shareholder activism in India is nascent, but it is clear that promoters can no longer take their 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 jurisdictions. 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,[2] 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.[3] 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. Historically, investors have not sought board access, outside situations such as private equity investments, but over the past year various funds have sought board appointments (see Section IV).

In addition to the traditional board appointment route discussed above, investors do have access to the board of an Indian listed company, in a manner that is not possible in England and Wales. An investor 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.[4] There has been one recent attempt by activist investors to use this provision. In August 2017, Alembic (a pharmaceutical company) received a proposal from over 1,000 small shareholders, led by Unifi Capital, seeking the appointment of a small shareholder director.[5] Although the board successfully resisted this (as the small shareholders were allegedly clients of Unifi Capital), this attempt illustrates that activists are thinking creatively about gaining access to board seats.

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.[6] In May 2018, institutional investors and certain funds removed a director of Fortis Healthcare in this manner (see Section IV). This is perhaps the first example of an activist campaign leading to changes on the board.

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 Ingovern, India Proxy Season 2017.

6 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).

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), 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 his directorship did need shareholder approval).

ii 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 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.[7]

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.[8]

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).

iii The ability to requisition shareholders' meetings and postal ballots

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),[9] 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).[10] If the directors fail to convene an EGM following a valid requisition notice, they become liable for any requisition-related expenses.[11] 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.

Indian company law does not expressly provide shareholders' the ability to pass written resolutions, but there are provisions permitting postal ballots.[12] In 2017, a public shareholder sought appointment as a non-executive director unsuccessfully through electronic voting (see Section IV.iv).

iv Shareholders' influence over corporate strategy

Under Indian company law, directors are delegated the authority to manage company affairs, subject to the 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 promoters in check.

7 Allirajan Muthsamy, 'Shareholder Activism stalls promoter moves', *Economic Times*, 5 July 2014.
8 Section 197 of CA 2013 and Schedule V of CA 2013.
9 Section 100(2)(a) of CA 2013.
10 Section 100(4) of CA 2013.
11 Section 100 (6) of CA 2013.
12 Section 110 of CA 2013 and Rule 22 of the Companies (Management and Administration) Rules 2014.

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 shares[13] by all companies, public or private, on a non-pre-emptive basis (which will affect non-cash consideration in M&A transactions), any transfer of an undertaking by a public company[14] (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, free reserves and securities premium (which will affect the financing of M&A transactions).[15]

In addition, qualifying related party transactions require shareholder approval (simple majority) under both company law[16] and the Listing Regulations.[17] 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.

v The position of shareholders and boards in public M&A situations

In theory, Indian law confers considerable power on minority shareholders in public M&A situations. There are restrictions on the board taking frustrating action,[18] and so defences such as poison pills are difficult to implement. In addition, although there is no formal obligation under Indian takeover regulations to treat shareholders equally in a bid situation, equality of treatment is a guiding principle under the Listing Regulations, so it would be difficult for a target to provide selective information to certain bidders.

Also, just as in England and Wales, M&A transactions can be structured through court schemes, which need to be approved by a majority in number and 75 per cent in value of

13 Sections 62(1)(b) and 62(1)(c) of CA 2013. Note that private companies and international financial service centre (IFSC) public companies offering shares to employees under an employee benefits scheme need only pass an ordinary resolution (and not a special resolution).

14 '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.

15 Section 180(1)(c) of CA 2013.

16 Section 188 of the CA 2013.

17 Regulation 23(4) of the Listing Regulations.

18 Regulation 26 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 2011.

the shareholders.[19] 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.

Despite the availability of these rights, the strength of promoters' controlling stakes and the fact that hostile takeovers have historically been extremely rare have meant that minority shareholders have seldom been able to exercise strong leverage (outside of delisting situations). In connection with a recent public M&A situation involving Fortis Healthcare, activist shareholders succeeded in removing a director (see Section IV), but it is still too early to draw broad conclusions from that transaction.

vi 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 that 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.

CA 2013 provides for slightly amended versions of remedies under the preceding Companies Act 1956 (CA 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.[20] However, the history of the CA 1956 indicates that claimants found success difficult.[21] There is limited experience under CA 2013, but the Tata affair (discussed in Sections III and IV) suggests that utilising these provisions may not be straightforward either.

However, CA 2013 has introduced a significant change in that Indian company law now includes a 'class action' concept.[22] Shareholders who hold a threshold level of shareholding[23] can 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*.[24] However, given the state of the litigation process in India, the effectiveness of this remedy in practice remains to be seen.

19 Section 230(6) of CA 2013.

20 Section 213 of the CA 2013.

21 Umakanth Varottil, 'The Advent of Shareholder Activism in India', Journal on Governance, Vol 1 No. 6, 2012.

22 Section 245 of the Companies Act 2013.

23 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.

24 (1843) 2 Har 361. Previous Indian company law (CA 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 21).

vii Other 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 Indian 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).

Finally, although companies do not have a general obligation to provide investors with details of specific shareholders' holdings, companies do need to maintain a register of members that is available for inspection.[25] As far as listed public companies are concerned, certain significant acquisitions and disposals do need to be reported to the market, and there are periodic disclosures of promoter positions. In addition, like other jurisdictions, Indian company law has recently introduced the concept of a register of significant beneficial owners, which shareholders are able to inspect.[26]

III KEY TRENDS IN SHAREHOLDER ACTIVISM

These are still very early days for shareholder activism in India, but some initial trends are summarised below.

i Most effective strategies

Historically, litigation strategies have 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 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 Sections 241 and 244 of CA 2013 (for oppression and mismanagement) were dismissed by the NCLT,[27] and the Bombay High Court refused to entertain a separate representative suit against Ratan Tata (Cyrus Mistry's predecessor) for damages.[28] Similarly, litigation by minority shareholders of Cadbury in relation to the valuation in a minority squeeze-out scheme failed as the court ruled against the minority shareholder group.[29] A more effective technique that certain shareholders have used is to register complaints with regulatory authorities.

25 Section 88 of CA 2013.

26 Section 90 of CA 2013.

27 *Cyrus Investment Private Limited and others v. Tata Sons Limited and others*, (2017) 2 CompLJ 295, *Cyrus Investment Private Limited and others v. Tata Sons Limited and others*, (2017) 2 CompLJ 332 and *Cyrus Investments Private Limited and another v. Tata Sons Limited and others*, order dated 12 July 2018 of NCLT (Mumbai bench) in CP No. 82 (MB)/2016.

28 *Pramod Premchand Shah and others v. Ratan N Tata and others*, 2018 (1) ALLMR 255.

29 Khushboo Narayan, 'Bombay HC asks Cadbury to pay Rs. 2,014.50 per share for buyback', Livemint, 18 July 2014.

Given that promoters remain very much in control, the more effective strategies are likely to be those involving investors working with the promoters or seeking to curb obvious abuses, such as self-dealing, where there is likely to be greater institutional investor and regulatory support (as discussed in Section IV).

ii Proxy firms

Several proxy advisory firms are now active in the Indian market. They regularly issue voting recommendations and maintain high visibility. Proxy advisory firms recommended that shareholders vote against the Tata Motors' executive remuneration resolutions in 2014 and claimed credit for the outcome.[30] They have also been vocal on governance matters, such as the leave of absence taken by the CEO of ICICI Bank (while allegations of impropriety are investigated). While they do not have the same level of influence as in the US, they are emerging as an important constituency in India.

These firms themselves have also faced criticism around perceptions of their own conflicts of interest, and some business leaders in India have suggested that they be regulated. Therefore, it remains to be seen if these firms face greater regulation as their influence grows.

iii Role of the media

Although public campaigns by shareholders seeking strategic changes are not common,[31] the media has emerged as a key player, for instance, in the engagement that Narayan Murthy, a founder of Infosys, had with its board in 2016 and 2017 (see Section IV).

iv Greater investor participation

In the past, collective action issues held back shareholder activism, with investors preferring to simply exit their investments. However, mutual funds and other long-term investors in the Indian market now more actively 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 provide voting reports on a quarterly and annual basis.[32] Efforts by India's insurance regulator to encourage market engagement by insurance companies (as summarised in Section V) are likely to continue this trend.

In addition to these long-term investors, certain funds have sought to take activist positions over the past year, seeking board appointments (albeit unsuccessfully) and successfully removing a director (in the case of Fortis Healthcare).

30 'Shareholders reject Tata Motors pay plan', *The Business Standard*, 4 July 2014.

31 The only real example was in 2012 when the CLSA wrote to the then CEO of Infosys, challenging its business model, but that did not result in any meaningful change or shareholder engagement.

32 SEBI circular SEBI/IMD/CIR No. 18/198647/2010 dated 15 March 2010, SEBI circular CR/IMD/DF/05/2014 dated 24 March 2014, and SEBI circular SEBI/HO/IMD/DF2/CIR/P/2016/68 dated 10 August 2016.

IV RECENT SHAREHOLDER ACTIVISM CAMPAIGNS

i Fissures in corporate India

Ironically, in two high-profile cases, activism has been used by founders or key shareholders against management.

In late 2016 and 2017, Infosys, a US and Indian listed IT company, faced a period of sustained pressure from its original founder shareholders, which ultimately contributed to the resignation of its CEO. The founders originally criticised the level of severance payments to certain departing executives and the US$200 million Panaya acquisition, leading to an investigation by an international law firm (which reportedly exonerated the management team). 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.

The Tata conglomerate was also subject to a battle for control in late 2016 and early 2017. Following differences between Cyrus Mistry, then chairman of Tata Sons, and Ratan Tata, the former chairman, on 24 October 2016, Cyrus Mistry was removed from his position as chairman of Tata Sons board through a board resolution. This was followed by allegations and counter allegations between the two individuals. 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. Various legal challenges by Cyrus Mistry did not succeed.

ii Blocking transactions

There have been a number of instances where shareholders have been able to block transactions perceived to be adverse to the shareholders' interests.

For instance, in July 2017, the shareholders opposed a related party transaction between Raymond Limited and its promoters (involving the sale of an asset at a significant undervalue). More than 97 per cent of the votes cast were against the transaction.[33]

Since shareholders with an interest in related party transactions cannot vote to approve them, minority shareholders are sometimes very strongly placed. For instance, in 2018, shareholders of Tata Sponge, holding just 3.77 per cent of the votes, were able to defeat the related party approval resolutions for this reason.

Similarly, in November 2015, after pressure from its shareholders, Sun Pharma withdrew from a potential US$225 million investment in the United States.[34]

Finally, in 2017, HDFC and Max Life announced a merger to create the largest private insurer in India. One of the deal terms was the payment of a 8.5 billion rupee non-compete fee to one of the promoters. Ultimately, the deal did not complete owing to regulatory concerns, but various proxy firms had recommended that investors oppose the payment of this fee.

iii Forcing renegotiation of terms

In certain cases, shareholders have been able to force a renegotiation of terms on large transactions.

33 Ingovern, Inda Proxy Season 2017.

34 'Sun Pharma drops wind energy investment plan', *Business Standard*, 25 November 2015.

In 2014, Maruti Suzuki's proposed manufacturing contract with a shareholder, Suzuki, was criticised by public shareholders and proxy firms (who also criticised the fact that Maruti Suzuki 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.[35] 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.

Similarly, in August 2014, the shareholders of Siemens India voted down the proposed sale of its metal technologies business to Siemens AG for 8.57 billion rupees. 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.

iv Changes to board composition

Over the past 12 months, certain activist funds have sought board seats, but this has proved hard to achieve. For instance, the attempt of a 20 per cent investor to seek board representation in relation to MRO-TEK and the attempt by Florintree Advisers to seek a seat on the board of PTC India did not succeed. Some investors have persisted in unusual ways, such as the provisions for a 'small shareholder' director by Unifi Capital (described in Section II).[36]

Although this is still the exception rather than the norm, on occasion, shareholders have opposed the reappointment of senior incumbent management as directors. For instance, in July 2018, 22.68 per cent of the shareholders of HDFC Limited voted against the reappointment of Deepak Parekh, the group chair, as a director. Although his reappointment was ultimately approved, this scale of opposition in relation to one of the most senior figures in corporate India has attracted attention.

Litigation has also been used as a strategy to attempt to force a change in board composition. For instance, two investors (IDBI Trusteeship Services and Horizon Fund) have litigated to prevent a proposal by Religare to invest 5 billion rupees in a loss-making subsidiary. In this case, the promoters were able to secure shareholder approval, but the litigants are seeking the removal of the board. This matter is yet to be resolved.

Investors have had one notable success in the form of removing a director of Fortis Healthcare in May 2018.[37] This was in the context of investor concerns as to the board assessment of certain bids for the company, so this is a significant landmark in relation to shareholder activism in India.

V REGULATORY DEVELOPMENTS

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

35 Himank Sharma and Aradhana Aravindhan, 'Big Indian funds challenge Maruti Suzuki over Indian Suzuki plant', Reuters, 24 February 2014.

36 Ingovern, Inda Proxy Season 2017.

37 https://www.vccircle.com/fortis-shareholders-vote-out-former-ranbaxy-ceo-brian-tempest-as-director/.

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 to 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, SEBI recently announced that it will implement a number of recommendations of the Kotak Committee on corporate governance. This committee, constituted in June 2017, has suggested a number of governance improvements including in relation to board composition, related party contracts and various board committees. The changes are expected to improve the corporate governance landscape in India.

VI OUTLOOK

Until recently, India was a market without any meaningful shareholder activism, but that picture has rapidly changed. There has been a period of greater shareholder engagement by institutional shareholders, which has evolved into nascent activism involving a wider set of participants and funds, and some of the familiar activist names from the US are reported to have taken positions in some Indian companies.

That said, this has been limited to the 'large cap' and bigger names in corporate India, and that is likely to remain the case in the near term. The market is still a long way from that in the US, so it is likely that some adaptation of activist strategies will be necessary in the Indian context. The more interesting debate is around engagement by corporate India. Boards of Indian companies should start considering more meaningful shareholder engagement by setting up investor relations teams, improving their governance systems and providing information to the market to support board strategy, particularly as far as large transactions are concerned. In the years ahead, corporate India will need to adapt accordingly.

Chapter 5

JAPAN

Akira Matsushita[1]

I OVERVIEW

In recent years, the corporate governance of listed companies in Japan has gradually changed for various reasons. Japan's Corporate Governance Code (the Governance Code) issued on 1 June 2015 and amended on 1 June 2018, and Japan's Stewardship Code (the Stewardship Code) issued on 26 February 2014 and amended on 29 May 2017, have worked as 'the two wheels of a cart' to promote and achieve effective corporate governance in Japan. The management of listed companies in Japan may also be experiencing changes because the ownership of shares in listed companies in Japan by foreign entities has increased (this was more than 30 per cent as of 31 March 2018)[2] in comparison to the ownership of such shares by individual shareholders, which has decreased. Under such circumstances, shareholder activism in Japan has grown in the recent several years. Especially, activist shareholders with bases in foreign countries, such as the United States and other Asian countries, have been increasing their investments in the stock market in Japan. As a result of the growth of shareholder activism in Japan, the management of listed companies in Japan needs to consider the possibilities or effects of shareholder activism when managing these companies.

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]

1 Akira Matsushita is a partner at Mori Hamada & Matsumoto.
2 Tokyo Stock Exchange Inc., et al., Result of Survey of Distribution Condition of Shares in 2017, 26 June 2018.
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.

Inspection rights

Shareholders have the right to request a company to provide relevant access for them to inspect or copy the shareholder registry, with certain exceptions.[4] This request right enables activist shareholders to access the information on other shareholders in the company when waging a proxy fight.

Shareholders also have the right to request a company to provide relevant access for them to inspect or copy minutes of board of directors' meetings by obtaining the permission of the court if the access is necessary for the purpose of exercising the rights of a shareholder.[5] Shareholders having 3 per cent or more of the votes of all shareholders or shareholders having 3 per cent or more of outstanding shares have the right to request the company to provide relevant access for them to inspect or copy accounting books, with certain exceptions.[6] Activist shareholders may gather information by utilising these inspection rights for use in gaining leverage against or exerting pressure on the management of the company.

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.[7] 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.[8]

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.[9] 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.

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, in February 2018 the subcommittee of the Legislative Council of the

4 Article 125, Sections 2 and 3 of the Companies Act.
5 Article 371, Section 2 of the Companies Act.
6 Article 433 of the Companies Act.
7 Articles 303 and 305 of the Companies Act.
8 Article 304 of the Companies Act.
9 See Tokyo High Court, judgment, 19 May 2015, Kinyu Shoji Hanrei No. 1473 at 26.

Ministry of Justice issued an intermediate draft for amendments to the Companies Act to limit the number of shareholder proposals that each shareholder can submit and to prohibit shareholders from submitting shareholder proposals that have contents that are considered abusive.

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 of 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.[10]

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.[11] 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.[12] 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[13] and the right to inspect or copy accounting books of the company.[14]

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

10 Article 297 of the Companies Act.
11 Article 360 of the Companies Act.
12 Article 847 of the Companies Act.
13 Article 371, Section 2 of the Companies Act.
14 Article 433 of the Companies Act.

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 under 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 Financial Services Agency (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.[15] 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.[16]

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.[17] However, a solicitation of a proxy with

15 FSA, Clarification of Legal Issues Related to the Development of the Japan's Stewardship Code, 26 February 2014, at 11.

16 FSA, Q&A Regarding Large Scale Shareholding Report of Share Certificates, etc., 31 March 2010, at 10.

17 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).

respect to shares in 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 The Governance Code

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.

The Governance Code was amended on 1 June 2018. The amended Governance Code expressly provides that companies should disclose their policies regarding the reduction of cross-shareholdings. It also provides that the board should annually assess whether or not to hold each individual cross-shareholding, specifically examining whether the purpose is appropriate and whether the benefits and risks from each holding cover the company's cost of capital.

iv Rules for directors

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

Settlement agreement

Settlement agreements with activist shareholders, 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 settlement 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,[18] 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 '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 decreased in recent years (as of 31 July 2017, 413 listed companies have adopted takeover defence measures),[19] 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

18 Articles 120 and 970 of the Companies Act.

19 Miki Mogi & Koji Tanino, Introduction situation of countermeasures to hostile takeovers: based on shareholders' meetings held in June 2017, Shoji-homu No. 2152, at 31 (2017).

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.

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[20] 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 '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 disclosed transactions, and demand that the company amend certain terms that are, in their view, inappropriate. This deal activism may result in a change in the acquisition structure or increase of acquisition costs for the transaction. 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 have been targeted by short selling activist funds. These 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.

20 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 is permitted.

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 these 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.

iv 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, placing web advertisements, 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. 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 the 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 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. In such cases, companies should promptly issue 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.

Litigation

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 the 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.

Reno, Inc, which is considered to have some connection with the well-known Japanese activist fund 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. This case is an example 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.[21] 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 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.

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 interest between a

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

controlling shareholder and minority shareholders. For example, Oasis Management waged a public campaign in 2016–2017 against the acquisition by Panasonic Corporation of its listed subsidiary, PanaHome Corporation. Panasonic Corporation changed the structure of the acquisition from a share consideration transaction through a share exchange to a cash consideration transaction through a tender offer after Oasis Management commenced the public campaign. Oasis Management is also waging a public campaign against the integration of a business through a share exchange in which Alps Electric Co, Ltd will acquire all shares in its listed subsidiary, Alpine Electronics Inc, and which is scheduled to be effective on 1 January 2019. Elliott Advisors, the US-based activist fund, purchased shares in Hitachi Kokusai Electric Inc, which represented approximately 8.6 per cent of the issued shares of the company, after the public announcement by KKR of a tender offer for the shares in Hitachi Kokusai Electric Inc. KKR eventually increased the tender offer price by approximately 25 per cent.

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, 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. The Legislative Council of the Ministry of Justice established a subcommittee in April 2017 to discuss and consider appropriate amendments to the Companies Act, and in February 2018 the subcommittee issued an intermediate draft amendment that includes changes in the shareholder proposal rights.

In addition, 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.

As discussed above, the Governance Code was amended by the Tokyo Stock Exchange on 1 June 2018. On the same date, the FSA issued the Guidelines for Investor and Company Engagement, which is intended to be a supplemental document to the Governance Code and the Stewardship Code. The guidelines provide agenda items for engagement that institutional investors and companies are expected to focus on.

The FIEA was amended on 1 April 2018. 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, the company shall disclose the information to the public at the same time. Listed companies need to take into account this fair disclosure rule as well as the insider trading rules under the FIEA when they communicate with activist shareholders and other institutional investors.

VI 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. The concerns and actions of institutional investors have become, and will likely become more, similar to those of activist shareholders, such that the demands and voting behaviour of institutional investors with respect to companies in which they own shares will become more strict or demanding. 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. As a result, the influence of shareholder activism on the management and direction of companies may increase further. 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.

Chapter 6

LUXEMBOURG

Margaretha Wilkenhuysen and Zsófia Varga[1]

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,[2] 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),[3] the Market Abuse Regulation[4] and the Shareholder Act.

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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2 Act of 24 May 2011 on shareholders rights in listed companies, as last amended by the Act of 18 December 2015 and implementing Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies.

3 Act of 10 August 1915 on Commercial Companies.

4 Regulation (EU) No. 596/2014 of the European Parliament and of the Council on market abuse as complemented by the Act of 23 December 2016 on Market Abuse implementing Regulation (EU) No. 596/2014, Directive 2014/57/EU and Directive 2015/2392/EU.

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.

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 and December 2017 (fourth edition), [5] provide guidelines on best practice in corporate governance for all companies listed on the LuxSE and all Luxembourg companies whose shares are admitted to trading on a regulated market operated by the LuxSE.[6] Luxembourg companies listed abroad often find inspiration in these principles of good governance. The LuxSE Principles refer to general corporate governance issues, such as duties of the management board, the management structure, conflicts of interest provisions, remuneration and reporting issues. They also aim to enable the shareholders of listed companies to be actively involved in the company's activities. The LuxSE Principles are highly flexible and adaptable to the activity, size and culture of individual companies. The LuxSE Principles consist of general principles that must be complied with (i.e., 'compliance') and recommendations that, although obligatory in principle, may be deviated from when justified in specific circumstances, provided that adequate explanation is provided (i.e., 'comply or explain'). The recommendations are supplemented by guidelines on how a company should implement or interpret them. The obligation to comply or explain does not apply to the guidelines, which are indicative but not binding.

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.

5 Available at www.bourse.lu/corporate-governance.

6 As an exception, the 10 Principles do not apply to regulated investment companies with variable capital and funds, to which specific regulations apply.

iv The board of directors

Structure

Although the Act of 25 August 2006 introduced the possibility for public limited liability companies to choose a two-tier board structure,[7] the one-tier board structure[8] 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. The supervisory board's responsibilities include the appointment and the permanent supervision of the management board members, as well as the right to inspect all company transactions.[9] No person may at the same time be a member of both the management board and the supervisory board.[10] Members of the supervisory board are liable towards the company and any third party in accordance with general law.[11] 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;[12] the maximum number of directors is undefined (the LuxSE Principles advise 16 directors as a reasonable limit).[13] While the directors are appointed by the shareholders of the company,[14] the directors choose a chair among their members.[15]

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.[16]

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

7 Article 442-1 of the Companies Act.
8 Articles 441-1 to 441-13 of the Companies Act.
9 Article 442-1 et seq. of the Companies Act, in particular, Articles 442-2, third Paragraph, 442-3, first Paragraph, 442-7, first Paragraph, and Articles 442-11 to 442-16.
10 Article 442-17, Paragraph 1 of the Companies Act.
11 Article 442-16 of the Companies Act.
12 Article 441-2, first Paragraph of the Companies Act.
13 LuxSE Principle 3, guideline to Recommendation 3.3.
14 Article 441-2, third Paragraph of the Companies Act.
15 Article 444-3, second Paragraph of the Companies Act.
16 Article 4 of the Shareholder Act.

the director's judgement'.[17] 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, a Recommendation of the LuxSE Principles 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.[18] 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, according to the LuxSE Principles companies should 'establish a policy of active communication with the shareholders' and allow shareholder dialogue with the board and the executive management.[19]

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 accordance with the general provisions on civil liability[20] and the provisions of the Companies Act, [21] 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 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 articles of association. 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.[22]

The Luxembourg legislature has remained silent on what should be considered a company's best corporate interest. In its judgment delivered in 2015, [23] 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

17 LuxSE Principle 3, Recommendation 3.5.
18 LuxSE Principle 2, Recommendation 2.4.
19 LuxSE Principle 10.
20 Articles 1382 and 1383 of the Luxembourg Civil Code.
21 Article 441-9 of the Companies Act.
22 Articles 441-7 and 441-12 of the Companies Act.
23 Luxembourg District Court, 23 December 2015, Nos. 145 724 and 145 725.

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[24] and the Market Abuse EU Regulation, [25] in addition to the LuxSE regulations and principles. In terms of the LuxSE Principles, the board of a listed company is bound by a fiduciary duty to its company and shareholders, and 'shall act in the corporate interests and shall serve all the shareholders by ensuring the long-term success of the company'.[26]

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. Creditors of a company may, under certain circumstances, institute action on behalf of the company if the latter fails to do so and if that failure harms the company's creditors.[27]

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. This 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.

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. 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

24 Act of 11 January 2008 on Transparency Requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, as last amended by the Act of 23 December 2016.

25 Regulation (EU) No. 596/2014 of the European Parliament and of the Council on market abuse as complemented by the Act of 23 December 2016 on Market Abuse implementing Regulation (EU) No. 596/2014, Directive 2014/57/EU and Directive 2015/2392/EU.

26 LuxSE Principle 2.

27 Article 1166 of the Civil Code.

articles of association 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 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.[28]

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 as references for interventions by Denimor during 2018 and 2017. However, given the confidential character of most cases, the names of the companies are redacted. This makes it almost impossible to identify the companies concerned, but it is quite likely that they already have or will target Luxembourg listed companies.[29]

On a side note, Luxembourg hosts a number of funds that 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.[30]

V 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

28 See www.nytimes.com/2006/06/26/business/worldbusiness/26arcelor.html?pagewanted=all&mcubz=1).

29 See the internet site https://sgs.deminor.com/en/references/.

30 See www.reuters.com/article/us-stada-shareholders-aoc-idUSKCN1111AD).

principle of equal treatment of shareholders.[31] 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.[32] In 2016, the Companies Act amended the previous rule that one vote is in principle attached to one share, henceforth allowing the company to provide for different voting rights for different shares.

In addition, the LuxSE Principles provide that 'the company shall respect the rights of its shareholders and shall ensure that they receive equal treatment. The company shall define a policy of active communication with its shareholders and shall establish a related structured set of practices'.[33]

The powers of shareholders to influence the board

The Companies Act reserves the management of the company to its board.[34] Should a shareholder be directly involved in the management of the company, he or she may be deemed a *de facto* director and face civil or criminal liability, or both, and generally be liable under the same circumstances as the appointed directors.

Shareholders do, however, control the appointment of the board (and, therefore, its composition) via a majority decision of over 50 per cent of the capital to appoint or revoke directors.[35] 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.[36]

Furthermore, 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.[37]

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 articles of association, questions may be asked as soon as the convening notice for the general meeting is published. The company's articles of association will furthermore provide the cut-off time by which the company should have received the written questions.[38]

Apart from several specific circumstances (e.g., in the 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.

31 Article 2 of the Shareholder Act.
32 Article 2 of the Shareholder Act.
33 LuxSE Principles, Principle 10.
34 Article 441-5 of the Companies Act.
35 Article 441-2, Paragraph 3 of the Companies Act.
36 Article 450-1(6) of the Companies Act.
37 Article 7 of the Shareholder Act.
38 Article 3(2) of the Shareholder Act.

The Act also allows shareholders to submit questions to management outside of a meeting.[39] 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.[40]

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).[41]

Furthermore, if 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.[42]

Decisions reserved to shareholders

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,[43] with the exception of the actions specifically reserved by law to the shareholders' meeting. Such actions include, *inter alia*, any amendments to the company's articles of association, the approval of annual accounts and the allocation of the company's results, which 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.

Seeking invalidation of a shareholder decision by dissenting shareholders is only possible on the basis of five grounds specified in the Companies Act: (1) procedural irregularity that influenced or could have influenced the outcome of the decision; (2) violation with fraudulent intent of the rules governing general meetings; (3) an *ultra vires* act or abuse of power affecting the decision; (4) exercise at a general meeting of voting rights that have been suspended by legislation other than the Companies 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 Companies Act.[44]

In addition, minority shareholders enjoy a sell-out right under certain conditions. According to the Squeeze-out Act, in the event of an individual or legal entity acquiring at

39 Article 1400-3 of the Companies Act. This new management evaluation procedure, inspired by French law, was introduced to the Companies Act by the Act of 10 August 2016.

40 Luxembourg District Court, 18 November 2016, No. 1809/2016. This judgment clarified the scope of application of this provisions, and, in particular, the questions that can be asked by the shareholders, and the answers provided by the management that are to be considered satisfactory.

41 Article 441-7, Paragraph 2 of the Companies Act.

42 Article 444-2 of the Companies Act.

43 Article 441-5 of the Companies Act.

44 Article 100-22 of the Companies Act.

least 95 per cent of the share capital of the company and subject to certain conditions, the remaining minority shareholders are entitled to exercise a sell-out right within three months of the required notification and publication of the acquisition.[45]

However, the extension of the protection of minority shareholders by stipulating provisions in the company's articles of association (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. Providing such additional protection in favour of minority shareholders, whether in the articles of association or otherwise, is common in Luxembourg, particularly among international joint ventures and groupings that use a Luxembourg company structure to promote mutual business activities.[46]

In this respect, the use of shareholders' agreements of a purely contractual nature is far more common than providing for relevant provisions in the articles of association. Since the amendment of the Companies Act in 2016, the use of shareholders' agreements is now explicitly recognised in Luxembourg law. 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.[47] 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.[48] While the use of shareholders' agreements does allow for discretion and flexibility, any compulsory implementation of this type of arrangement remains at risk.

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 articles of association, or both.

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 articles of association 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.

45 Article 5 of the Squeeze-out Act.

46 For further analysis on minority shareholders rights, see also Marc Elvinger, 'Les minorités en droit des affaires: rapport luxembourgeois', *Annales du droit luxembourgeois*, No. 15 (2005).

47 Article 450-2(1) of the Companies Act.

48 Article 450-2(2) of the Companies Act.

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.[49]

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 Investment[50]. 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 Bid Act.[51] 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 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

49 Article 5 of the Squeeze-out Act.

50 Further information available at www.unpri.org. The principles are an investor initiative in partnership with the United Nations Environmental Programme Finance Initiative and the United Nations Global Compact.

51 Act of 19 May 2006 implementing the Directive 2004/25/EC, as last amended by the Act of 18 December 2015.

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.

It should be noted, however, that measures aimed at frustrating bids in the long term are not generally deemed to be admissible under Luxembourg legislation. It would, therefore, not be possible to repeat defensive measures whenever the bid is repeated or to take defensive measures that have a long-term effect.

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.[52] The authorisation to do so is only valid for a period of five years, but may be renewed by the general meeting of shareholders.[53] 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.[54] 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.

v Contact with shareholders

Pursuant to the Shareholder Act, listed companies must give at least 30 calendar days' notice before holding a meeting[55] (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.[56] Should the quorum not be met at the first meeting, a second meeting must be convened at least 17 calendar days before

52 As a result of the entry into force of the Luxembourg Act of 10 August 2016, the articles of association of Luxembourg private limited liability companies may now also include an authorisation to the board of managers to issue shares, provided that the shares so issued are either issued to existing shareholders or to a third party that has been approved in accordance with the law.

53 Article 420-22 of the Companies Act.

54 Article 441-2, fourth Paragraph of the Companies Act.

55 Article 3(1) of the Shareholder Act.

56 Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies.

the meeting is held.[57] 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.[58] 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: (1) 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 articles of association, the procedure to vote by electronic means; (2) the postal and email addresses that can be used to obtain documents in relation to the meeting; (3) 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 (4) the company's website address, which must contain all of the above information, as well as a full copy of the draft resolutions.[59]

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 articles of association. 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.[60]

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.[61]

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.

57 Article 3(1), second Paragraph of the Shareholder Act.
58 Article 3(1), second Paragraph of the Shareholder Act.
59 Article 3(3) of the Shareholder Act.
60 Article 6 of the Shareholder Act.
61 Article 8 of the Shareholder Act.

Chapter 7

NETHERLANDS

Paul Cronheim, Willem Bijveld and Frank Hamming[1]

I OVERVIEW

Shareholder activism is a hot topic in many Dutch boardrooms. In recent years, there has been a rise of shareholder activism in the Netherlands, in line with developments across Europe.[2] In 2017 and 2018, several activist campaigns aimed at Dutch multinationals made headlines in the Netherlands as well as abroad, including in particular Elliott's campaign against AkzoNobel and the Boskalis versus Fugro battle. Discussions between boards and shareholders on matters such as strategy, corporate governance, executive compensation and ESG are a regular feature within Dutch listed companies. Aside from shareholder activism, we have also seen numerous (unsuccessful) hostile approaches, including for PostNL, Unilever and AkzoNobel. Finally, the global wave of increased protectionism has also reached the Netherlands with both public sentiment and the government calling for increased protection of (certain) Dutch 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 board (one- or two-tier) 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 boards 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

1 Paul Cronheim is a partner, and Willem Bijveld and Frank Hamming are senior associates at De Brauw Blackstone Westbroek NV in Amsterdam. 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.

2 Lazard's 'Review of Shareholder Activism - 1H 2018', available at: https://www.lazard.com/media/450655/lazards-review-of-shareholder-activism-1h-2018.pdf.

company and its business, as well as culture. This fits into the Dutch stakeholder model of corporate governance and can be an important element for companies in encounters with activist shareholders. The Corporate Governance Code applies, in principle, to all Dutch listed companies on a comply-or-explain basis.[3]

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 takeovers of listed companies. The FMSA has implemented numerous EU directives, such as the Transparency Directive and the Takeover Directive. In 2016, several market abuse provisions were removed from the FMSA, and are now dealt with in the Market Abuse Regulation (MAR), which has direct effect in all EU Member States.

EU Shareholder Rights Directive

In 2017, the European Council adopted a revised version of the EU Shareholder Rights Directive, applicable from June 2019.[4] 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 respect of related party transactions. The Dutch Ministry of Justice and Security and the Ministry of Finance published a draft bill for consultation on the amended Shareholder Rights Directive in February 2018. In line with the amended directive, Dutch pension funds, insurers and asset managers published the first Dutch Stewardship Code in July 2018.[5] The Stewardship Code sets forth certain principles on institutional shareholder engagement, among others aimed at stimulating institutional investors to cast informed votes at shareholder meetings, to engage with listed companies on strategy, performance and ESG topics, and to be transparent on its voting policy and history. From book year 2019 onwards, asset owners and asset managers are expected to apply the principles of the Code and report on the implementation of it.

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.

3 For detailed commentary on the new Dutch Corporate Governance Code, see: RH Kleipool, M van Olffen and BW Roelvink, *Corporate Governance in the Netherlands – A practical guide to the new Corporate Governance Code* (2017).

4 Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement.

5 First Dutch Stewardship Code available at www.eumedion.nl/en/news/first-dutch-stewardship-code-published.

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.[6] 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 by the DCC and the company's articles of association. For example, in principle, a decision of the general meeting is needed for resolutions concerning an 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, 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).

6 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.

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 various levels of aggression of these tools.

Table 1

Level of aggression	Tools
Least aggressive	Private discussions and engagement with the company
	Public engagement with the company
	Stakebuilding
	Right to participate in and vote at general meeting
	Right to place an item on the agenda
	Right to convene a meeting
Most aggressive	Initiate litigation

Private discussions and engagement with the company

In the Netherlands, the vast majority of shareholder activism starts with the activist engaging with the board 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. Typically, 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 by publishing investor presentations or websites dedicated to the activist campaign.

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 paint producer PPG Industries.

Stakebuilding

For an activist shareholder to ramp up the pressure on the company's boards, building a significant stake may be a critical element in its strategy. Stakebuilding may enable an activist shareholder to add weight to its opinions and to be taken as a serious threat by the company, especially when the activist shareholder reaches the threshold for placing items on the agenda of the general meeting or for convening a general meeting (see below). Even with a small stake (e.g., 1 per cent), 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.[7] A possible new development in this context is the intention of the Dutch Cabinet to give listed companies with a turnover of more than €750 million the possibility to request shareholders with a 1 per cent interest to notify this to the Dutch regulatory AFM. According to recent correspondence of the Minister of Economic Affairs, more clarity on this proposal will be provided in 2018. This intention was included In the Dutch coalition agreement in 2017.

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.[8]

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. In the Netherlands, shareholders sometimes also express their dissatisfaction by voting against discharge of the board – which is normally granted by the general meeting with an overwhelming majority.

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 of 1 per cent, which relates to the former statutory threshold for submitting agenda items. 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 both 2017 and 2018 social activist FollowThis put a 'green' resolution

7 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.

8 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.

on the agenda of the general meeting of oil giant Shell in which it requested Shell to set and publish targets that are aligned with the goal of the Paris Climate Agreement to limit global warming to well below 2°C. Although the resolution was voted down each time, it gained more support from institutional investors in 2018 than in the year before, in line with institutional investors' higher prioritisation of environmental, social and governance (ESG) issues (see Section III.v).

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 board refuses to do so, such shareholders could request authorisation from the district court to call a general meeting. The court will decide whether the shareholder has a legitimate interest in convening a shareholders' meeting. The board can refuse to call a general meeting if it is 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, which was rejected by the boards of AkzoNobel. In subsequent court proceedings, the Enterprise Chamber and the Amsterdam district court rejected Elliott Advisors' request to convene a general meeting (see section IV.iv).

Initiate litigation

Shareholder litigation typically takes place in inquiry (mismanagement) proceedings before the Enterprise Chamber.[9] Any shareholder that alone or acting jointly holds sufficient shares[10] may initiate inquiry proceedings and request the Enterprise Chamber to order an inquiry into the policy of the company by independent court-appointed investigators.

9 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.

10 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

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.

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. In fact, it is not uncommon that the Enterprise Chamber postpones a decision to order an inquiry into the policy of the company and only rules on the requested interim measures.

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 hostile approaches. 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.[11] See Table 2 for the various levels of aggression regarding these tools.

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.

11 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.

Table 2

Level of aggression	Tools
Least aggressive	Enter into a dialogue with the activist shareholder
	Get the company's message out to shareholders
	Relationship agreement
	Just say 'No'
	Invoke the response time
	'Put up or shut up' rule
	Issue ordinary shares
	Sale of treasury shares
	Trigger call-option on anti-takeover preferred shares
Most aggressive	Initiate litigation

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. In recent years, we have seen several examples of Dutch listed companies announcing a revised or updated strategy following an unsolicited offer or approach from an activist shareholder.

Relationship or standstill 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 shareholder in order to gain support for the company's strategy. Relationship agreements are typically concluded with activist shareholders with a very significant shareholding (typically more than 10 per cent), but also with non-hostile cornerstone investors in the context of an IPO.

Although concluding a relationship agreement may reduce, or channel, the pressure exercised by a shareholder, the board must be aware of the fact that representation of an activist shareholder on the board inevitably has an impact on the boardroom dynamics. 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).

In an activist situation, a company may also seek to enter into a pure standstill agreement to reach a (temporary) ceasefire with an activist shareholder. An example is AkzoNobel agreeing to a standstill with Elliott Advisors in August 2017 to end pending litigation and gain support for the proposed change in its board composition, which included new supervisory board members that were nominated by AkzoNobel following consultation of their large shareholders.

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. The government is considering a 250-day statutory time out period for companies confronted with proposals from shareholders concerning a fundamental change to the company's strategy, as included in the 2017 government coalition agreement (see Section V).

'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 above, 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 without preemptive rights for 'general corporate purposes' (often 10 per cent) and a certain percentage for the purpose of 'mergers and acquisitions' (often

10 per cent).[12] To defend itself from activist shareholders or hostile bidders, the executive board could decide to issue shares (without preemptive rights) 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. An interesting development is that in January 2018, ISS published its new voting guidelines in which it recommends voting against authorisation for the executive board to issue more than 10 per cent of shares without preemptive rights. This development may lead to boards confining themselves to request an authorisation to issue shares only up to 10 per cent.

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-takeover 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 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), *Mexichem/Wavin* (2012) and *Cargill/Nutreco* (2014).

12 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.

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 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.

The Netherlands has also seen a surge in shareholder activism in recent years as a result of market and economic conditions, a boost in M&A activity and increased attention from US- and UK-based hedge funds for European targets. This follows the global trend of a growing number of activist campaigns: JPMorgan reported 606 campaigns globally in 2017 versus 389 campaign globally in 2012.[13] In recent years, shareholders have also become more vocal on matters relating to governance, executive compensation and ESG topics.

Since 2010, we have seen numerous publicly known activist shareholder campaigns in the Netherlands. The total level of shareholder activism is most likely significantly higher, however, since shareholder activism in the Netherlands often takes place behind closed doors. Accordingly, companies that are not directly facing shareholder activism, typically prepare for the threat of potential activist campaigns.

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 compared to the US and the UK, 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. Pure-play activist hedge funds typically have an event-driven investment strategy, in which M&A plays a crucial role (see also below). These activist hedge funds often seek to initiate M&A activities by 'suggesting' a company to split-up or to sell a division, and also become active in pending

13 See, for instance, JPMorgan 2017, 'The 2017 Proxy Season Globalization and a new normal for shareholder activism', available at: www.jpmorgan.com/jpmpdf/1320739681811.pdf.

M&A transactions to push for a better price. 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:

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

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 collectively they currently hold approximately €1,346 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. In recent years, 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 in the interests of the beneficiaries rather than to protect Dutch listed companies.

Activism from institutional investors in the Netherlands typically cannot be characterised as 'aggressive'. Institutional investors tend to focus 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. Globally, we see increased activism amongst institutional investors, with several examples of traditional long-only funds embracing activist tactics and other institutional investors publicly supporting activist campaigns.[14]

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, nearly 20 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.

14 See, for instance, JPMorgan 2017, 'The 2017 Proxy Season Globalization and a new normal for shareholder activism', available at: www.jpmorgan.com/jpmpdf/1320739681811.pdf.

M&A situations

M&A continues to be a fertile hunting ground for activist shareholders: pushing for sales processes, intervening in announced transactions (i.e., 'bumpitrage') and forcing break-ups and divestitures are illustrious objectives from an activist's playbook. TCI's public 'Dear Board' letter to ABN AMRO is notorious is 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 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. Elliott Advisors was found on the other side of the gamble at NXP, where it opposed the recommended offer made by Qualcomm for NXP arguing that it undervalued NXP.

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.

v Higher prioritisation of ESG issues

Another global trend that arrived in the Netherlands is that shareholders increasingly demand companies to address ESG issues. ESG issues have become a major corporate governance topic in recent years, reflecting sentiments from a broad group of stakeholders, including customers, employees, suppliers and society at large. Activist shareholders and institutional investors alike have taken note of these sentiments and are keen to include ESG matters in their campaigns and investment policies. In 2018, for example, Dutch pension fund ABP took a next step in its sustainable and responsible investment policy with its announcement to exclude tobacco and nuclear weapons products from its investments. ABP stated that it reached its decision 'after extensive consultation at board level, based on the insights shared by participants, employers, and various special interest organizations.'[15]

vi Tactics used by activist shareholders

Following the landmark cases concerning ABN AMRO in 2007 and ASMI in 2010, 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

15 Press release, 'ABP Pension Fund excludes tobacco and nuclear weapons', 11 January 2018.

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 telecoms 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.[16]

iii Boskalis v. Fugro (2016)

Dutch dredging contractor Boskalis built up an unsolicited 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. Fugro agreed to put the proposal of Boskalis on the agenda of the annual general meeting

16 Press release, 'AMG signs Relationship Agreement with its largest shareholder RWC European Focus Master Inc', 9 March 2015.

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. In April 2018, the Supreme Court confirmed that shareholders do not have a right to table voting items on the agenda of a public company's general meeting in respect of matters that are for the board to decide upon, including the policy and strategy of the company.

iv Elliott Advisors v. AkzoNobel (2017)

In 2017, Dutch paint producer 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 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. AkzoNobel subsequently convened an EGM on its own motion, to be held In September 2018, where AkzoNobel would give a further explanation regarding its response to the proposals made by PPG. The dismissal of the chairman of AkzoNobel was not tabled on the agenda of that EGM. In early August 2017, the Amsterdam District Court rejected the request from Elliott to convene an EGM for an EGM regarding the dismissal of the chairman and ruled that should await the explanation AkzoNobel were to give regarding its response to PPG's proposals during the EGM in September 2018, before requesting the dismissal of the chairman of AkzoNobel. On 16 August 2017, AkzoNobel announced that it reached a standstill agreement with Elliott.[17]

17 Press release, 'AkzoNobel reaches agreement with Elliott', 16 August 2017.

v 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.

vi Elliott Advisors v. NXP and Qualcomm (2018)

On 27 October 2016, Dutch chipmaker NXP Semiconductors and US technology company Qualcomm announced that they had reached agreement on Qualcomm's acquisition of NXP at a price of US$110 per share; this valued NXP at US$47 billion, making it Europe's largest ever tech deal. The announcement of the transaction attracted attention, both from the investor community and from regulators around the globe, and showed the growing importance of antitrust and state intervention in M&A deals.

In August 2017, Elliott Advisors joined the party by acquiring approximately 6 per cent of NXP's stock. During its campaign, which showed levels of aggression reminiscent of its AkzoNobel campaign, Elliott argued that NXP's board did not achieve the best deal for NXP's shareholders; in Elliott's words, the consideration offered by Qualcomm 'dramatically undervalued' NXP. Elliott's tactics included launching a website with analyses of its claim in an effort to persuade NXP shareholders not to tender their shares 'for less than fair value'. Later that year, on 6 November 2017, Singapore-based Broadcom raised the number of players to four, announcing an US$130 billion bid for Qualcomm. Broadcom's unsolicited bid for its rival would create the largest tech company in the world. Broadcom's offer was indifferent on Qualcomm completing its bid for NXP, turning the scene into a classic capitalist multiplayer chess game.

The battle of NXP and Qualcomm versus Elliott – a textbook example of 'bumpitrage' – eventually ended with Qualcomm improving the terms of the transaction. Qualcomm increased the cash consideration payable to the NXP shareholders to US$127.50 per share – an increase of 16 percent, or approximately US$5.9 billion in aggregate equity value, on the prior offer price. In exchange, Elliott and eight other NXP shareholders collectively owning approximately 28 per cent of NXP's stock (including New York-based hedge fund Soroban Capital Partners) supported the new deal. In response, Broadcom cut its offer consideration for Qualcomm – which had, by then, been increased – to US$117 billion, and was eventually forced to withdraw its bid after President Trump issued an executive order blocking the proposed transaction. President Trump acted on a recommendation by the Committee on Foreign Investment in the United States (CFIUS) which, after reviewing the combination, concluded that Broadcom 'might take action that threatens to impair the national security of the United States'. Later in 2018, Broadcom completed its redomiciliation to the US.

Qualcomm's pursuit of NXP also attracted regulatory scrutiny, particularly from the Chinese regulator.[18] In June 2018, after Qualcomm had extended the offer period multiple times, the Chinese regulator refused to grant clearance for the proposed deal. Subsequently, Qualcomm chose not to close the transaction, incurring an US$2 billion break-up fee payable to NXP.

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 cybersecurity company Fox-IT by UK-based information assurance firm NCC in 2015, a draft bill of the Telecom Act was published, enabling the Dutch government to prevent takeovers of 'telephony, data centres, hosting services and internet' companies that are 'of vital importance to national security and public order'. After 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 captains of industry, the Minister of Economic Affairs proposed giving 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. In 2017, the cabinet announced that it will propose the introduction of a response time of 250 days in the Dutch Civil Code for Dutch public companies that are confronted with proposals from shareholders concerning a fundamental change to the company's strategy. Companies invoking the response time should use this period to consult all stakeholders of the company, to consider alternatives and to account for their policy towards the general meeting. A draft bill has not yet been published. In March 2018, the Minister of Economic Affairs stated that a proposed bill, introducing a statutory response time, has been delayed. The draft bill will first be sent to the Council of State for advice on European law aspects on this topic. It remains to be seen whether this will ultimately lead to legislative changes and if so, in what form.

The rise of protectionist political sentiments in the Netherlands is consistent with the global trend in this respect. Not only in the US, where the CFIUS has intervened in several high-profile transactions (e.g., Qualcomm, Lumileds, Aixtron and Lattice), but also across Europe various initiatives are being deployed that should protect countries' 'national champions' against undesirable control by third parties. On a European level, Commission President Juncker presented a draft EU Regulation in September 2017, establishing a framework for the review of foreign direct investments into the EU. The Commission will in the future pay particular attention to investments affecting projects or programmes that receive extensive EU funding or relate to certain critical industries.

18 On 17 March 2018, China's National People's Congress passed legislation to consolidate the three existing antitrust bodies – MOFCOM (merger control), NDRC (price-related violations) and SAIC (non-price-related violations) – into one. The new antitrust authority, the State Administration for Market Regulation (SAMR), was officially established on 21 March 2018.

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 continues the trend begun by the Supreme Court in the *ABN AMRO* and *ASMI* cases. In its activist campaigns against AkzoNobel and NXP, Elliott Advisors has been, however, considerably more aggressive than other recent campaigns in the Dutch market.

We expect that shareholder activism will remain at least at current levels, with an increased focus on M&A, corporate governance and ESG matters. Shareholder activism in recent years has increased the contrast between short- and long-term value creation and between stakeholder interests and (immediate) shareholder value. We expect a continued emphasis by Dutch companies on stakeholders' interests and long-term value creation. A continued rise of shareholder activist campaigns and unsolicited takeover attempts, mixed with the geopolitical trend of protecting a national economies, could result in additional protection of Dutch listed companies against hostile approaches, both from bidders and from activist shareholders.

Chapter 8

RUSSIA

Max Gutbrod[1]

I OVERVIEW

Shareholder activism in the Western sense had relevance in Russia between 2000 and 2008. In the 1990s, some isolated issues, such as improving financial reporting, had been focused on by institutional investors. Since around 2008, shareholder activism has been dying down. There have only been some wavers of seemingly politically dominated disclosure of events linked to state companies and some individual corporate conflicts. While regulators from time to time voice concern about the lack of liquidity in capital markets, neither in the legislative nor in the practical context are there are any credible plans to change the situation. Also, in some there is a tendency to – for special purposes that typically have been linked to the political tensions between Russia and the West – allow that information be kept confidential.

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.[2] More frequently, however, the corporate forms used are Russian. Sometimes, there is a conflict between the rules in Russia and the listing rules.[3] In the event of a conflict, the manner in which Russian law and practice treat questions and issues is likely to prevail in that it will be difficult to implement any decision that would be taken under non-Russian law and implement it in Russia. Accordingly, in the following we are discussing Russian law, because it is Russian law that 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,

1 Max Gutbrod is a partner at Baker McKenzie – CIS, Limited.

2 See Vimpelcom. Group Highlight. www.vimpelcom.com/Profile/Understanding-VimpelCom/Group-highlights/ (accessed on 5 September 2016).

3 In the public domain, a conflict between Kazakh and international listing rules has played some part, 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.

capital increases and transactions that exceed a certain value. Generally, decisions are to be taken with a simple majority of votes, with some, like in the case of the increase in charter capital, requiring a 75 per cent majority. Accordingly, activist shareholders could in general potentially influence decision-making. Anecdotal evidence, however, suggests that Russian listed companies are typically owned by a single or a few shareholders, and those are present at shareholders' meetings. As a consequence, it is unlikely that activist shareholders will 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 preselected, 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 some modifications being in place and the board of directors having supervisory power. Boards are typically entrusted with substantial power relating to the ongoing business of the company. As a consequence and given the comparatively high importance that boards typically have in Russian companies, 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] Also, independent directorship had prominent and outspoken supporters, like Mr Borys Fyodorov.[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]

4 As a casual example of a bigger issuer that might be seen characteristic www.e-disclosure.ru/portal/event.aspx?EventId=DW8pjssHfU65IWf4cPwyjg-B-B, www.sberbank.com/ru/investor-relations/corporate-governance/general-shareholders-meeting/annual-meeting-2016, www.nsd.ru/ru/db/news/ndcpress/?id36=669403 (accessed: 5 September 2016).

5 Characteristic in his regard is Kirill Galetski. Independent directors on the rise, *The Russia Journal*, issue 438, 2002. URL: http://russiajournal.com/node/12117 (accessed: 5 September 2016).

6 Andrew Jack. Gazprom Feuding Factions Fight PR Battle, *Financial Times*, 27 June 2001. URL: www.sovereignglobal.com/p_5.asp?ItemID=150 (accessed on 5 September 2016).

7 Oleg Anisimov. Boris Fedorov about Gazprom, Sberbank and himself, Finance Journal. URL: www.ippnou.ru/print/000072/ (accessed on 5 September 2016), Boris Fedorov, *The Economist*, 27 November 2008. URL: www.economist.com/node/12675842 (accessed on 5 September 2016).

8 Characteristic in this regard is board representation at Sberbank, including the independent board members having impressive careers as politicians, scientists and managers, but not having any track record as investors and in some cases only having a relatively short term of office http://www.sberbank.com/investor-relations/corporate-governance/supervisory-board (accessed on 20 June 2018).

9 See www.prnewswire.com/news-releases/investigation-against-surgutneftegaz-asgty-for-possible-failure-to-pay-required-dividends-being-conducted-by-bernstein-liebhard--lifshitz-llp-73176852.html (accessed on 5 June 2018).

Furthermore; when purchasing 30 per cent or more of the stock of shares, the shareholder taking over must make an obligatory tender offer.[10] Accordingly, shareholders could, by being aggressive, try to prompt such an offer. However, the number of related offers has been decreasing in recent years.[11]

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.[12] Political tensions have been given as a reason for the proposal to declare further information as being confidential.[13]

Additional limitations of information rights have been introduced by court practice. For instance, a company has been recognised as being 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.[14] Additionally, court practice has allowed a company to refuse the shareholder information in cases of lack of 'legitimate interest' to receive the requested information.[15] Moreover, companies can refuse to provide information to their shareholders referring to commercial confidentiality, and sometimes companies use this right extensively.[16]

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 attracting the attention of the population at large. Since the main aim of market reforms was to distribute what was seen as being the people's wealth to the people, shares were distributed to the population at large through voucher auctions, and, therefore,

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 20 June 2018) with the filter in the 'Выбрать тип сообщения' dropdown list 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 требовании о выкупе'. Significantly, with these said statistics referencing only one mandatory offer in between 21 October 2013 and 20 June 2018 and thus appearing to lack representativeness, the author is aware that while in 2014 there were more 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 the report at https://themoscowtimes.com/news/russia-dodge-sanctions-secret-contracts-61764, accessed on 22 June 2016.

14 See Decision of the Constitutional Court of RF dd. 18 January 2011, No. 8-O-П.

15 See, e.g., Decision of the Arbitrazh Court of the Central District dd. 30 June 2015, No. F10-1836/2015.

16 See e.g., Dan'shin A. Shareholders' rights to information about the acticity of the company, *Economics and Life*, 2011. No. 6 (9372). URL: www.eg-online.ru/article/126635/ (accessed 5 September 2016). See also similar limitations being turned into law by the Duma adopting Draft Law No. 558976-5 in third reading on 19 July 2017.

protection of the many recipients of such vouchers should have been a major concern.[17] However, attention to the detail of implementation of such rights was low, and no stable funds or associations to represent minority shareholders emerged.

In the early years of stabilisation (2000–2005),[18] 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 for some time been associated with Mr Bill Browder.[19] 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,[20] and in particular the US imposing countersanctions against individuals allegedly involved.[21] 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,[22] 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.[23] In addition, in my opinion regulators tend to dislike controversy and

17 Maxim Boycko, Andrei Shleifer, Robert W Vishny. 'Privatizing Russia', *Brookings Papers on Economic Activity*, 2:1993. p. 151. URL: www.brookings.edu/wp-content/uploads/1993/06/1993b_bpea_boycko_shleifer_vishny_fischer_sachs.pdf, (accessed 5 September 2016).

18 See a brief account of economic history in: Pekka Sutela. Russia's Economic Prospects, Getty, 28 March 2011. URL: http://carnegieendowment.org/2011/03/28/russia-s-economic-prospects-pub-43290 (accessed: 5 September 2016).

19 See: William Browder. Hermitage Capital, the Russian State and the Case of Sergei Magnitsky, Chatham House, 15 December 2009. URL: www.chathamhouse.org/sites/files/chathamhouse/public/Research/Russia%20and%20Eurasia/151209browder.pdf (accessed: 5 September 2016) and Amir Manzoor. Hermitage Fund: Shareholder Activism and Corporate Governance, *Journal of Business Studies Quarterly*, 2013, Volume 4, Number 4. URL: http://jbsq.org/wp-content/uploads/2013/06/June_2013_2.pdf (accessed: 5 September 2016).

20 See: Lilia Shevtsova, David J. Kramer. What the Magnitsky Act Means, The American Interest. 18 December 2012. URL: www.the-american-interest.com/2012/12/18/what-the-magnitsky-act-means/ (accessed date: 5 September 2016), Magnitsky Sanctions Listings // US Department on Treasury. URL: www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20130412.aspx (accessed date: 5 September 2016); Tara McKelvey. William Browder: The man behind the Magnitsky List, *BBC News Magazine*, 10 December 2013. URL: www.bbc.com/news/magazine-25190975 (accessed: 5 September 2016).

21 See: 'Russia strikes back with Magnitsky list response' www.rt.com/news/anti-magnitsky-list-russia-799/ (accessed 5 September 2016).

22 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).

23 See: The Domestic Context of Russian Foreign Policy. URL: Philip Hanson. Reiderstvo: Asset-Grabbing in Russia, Russia and Eurasia PP 2014/03. URL: www.brookings.edu/wp-content/uploads/2016/07/Chapter-One-12.pdf, page 23. (accessed: 5 September 2016).

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.

In addition, in parallel with the above, regulators appeared to be particularly concerned with inappropriate action of aggressive shareholders leading to a loss of assets.[24] As a consequence, options for shareholders to act 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[25] or to a shareholders' meeting.[26] Also, there has been some argument that shareholders have a right to correction of the accounts of companies.[27] However, in the light of existing legislation there is little basis for such an argument, and related lawsuits have been dismissed as would have been expected.

Some funds continue to be involved in asset tracing.[28]

V REGULATORY DEVELOPMENTS

There have been many changes in corporate law recently, and, similarly to what was concluded in another context,[29] it is not always easy to determine what purpose the many changes in

24 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).

25 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=6H5g392kHiS6dE2aXAl18UgZvsI&hl=ru&sa=X&ved=0ahUKEwj-x5bV-evOAhVLKcAKHaeDBxEQ6AEILTAC#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.

26 Information about important act. 12 August 2012. URL: www.transneft.ru/u/important_fact_file/5902/15-08-2016.pdf (accessed on 5 September 2016).

27 Veronika Goryacheva. Auditors are brought into the court, Kommersant. 17 August 2016. URL: www.kommersant.ru/doc/3065415 (accessed on 5 September 2016), Eugeny Kalyukov. The minority shareholder of 'Gazprom' filed a claim against an auditor of the company. RBK, 17 August 2016. URL: www.rbc.ru/business/17/08/2016/57b42a029a7947187007b011, Gazprom shareholders demand recognition of the FBK audit report as incorrect. Pravo.ru, 17 August 2016. URL: https://pravo.ru/news/view/132602/, the court confirmed dismissal of the claim to the auditor of Gazprom in relation to the report. Rapsi news, 25 May 2017. URL: http://rapsinews.ru/arbitration/20170525/278699933.html (all accessed on 30 June 2017). A claim of an offshore company to collect 217 million roubles from Deloitte & Touche CIS was dismissed, see RAPSI News, 25 January 2018 www.rapsinews.ru/arbitration/20180125/281738896.html (accessed on 22 June 2018).

28 See: Prosperity Capital Management challenged a deal. URL: www.arbitr.ru/press-centr/press_arb_sud/50188.html (accessed on 5 September 2016).

29 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/scr/2016/cr16233.pdf (accessed on 5 September 2016). '2. . . . While some have argued that the absence of overarching

relevant laws have had.[30] 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[31] would lead to more attention on and openness to shareholder activism, but this does not seem to have materialised in the first half of 2018.

VI OUTLOOK

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

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.'

30 A different (more positive) assessment of the legal framework appears to be displayed relating to corporate governance in http://www.ebrd.com/documents/legal-reform/russia-country-law-assessment.pdf&usg=AFQjCNH0wixFsX_xzrjv9WD0R2TeCF0ulQ&sig2=NQ1Yu5bBARDclCFyUwNzXw&cad=rjt Corporate governance assessment, EBRD. URL: page 14. (accessed on 5 September 2016).

31 While currently pension funds do not hold many shares, see Guidelines for the Development of the Russian Financial Market in 2016–2018, Bank of Russia. URL: www.cbr.ru/eng/finmarkets/files/development/DRFM_1618.pdf (accessed on 5 September 2016), An effort to increase their investment abilities appears to be planned, see: Alexey Lossan. Russia mulls investing pension funds in start-ups, Russia and India Report, 31 August 2016. URL: http://in.rbth.com/economics/finance/2016/08/31/russia-mulls-investing-pension-funds-in-start-ups_625683 (accessed on 5 September 2016).

Chapter 9

SINGAPORE

Lee Suet-Fern[1]

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 a legitimate interest in the governance of a company and a right to hold the board accountable. Management has historically been able to push through its agenda without much shareholder resistance in Singapore, but the trend is changing, and we are seeing, like elsewhere in the world, growing shareholder activism.

2018 has seen a rise in shareholder activism in Singapore; noteworthy cases include Noble Group Limited and YuuZoo Corporation, described in more detail below.

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 Exchange (the Listing Manual), the Singapore Code of Corporate Governance 2012 (the Governance Code) and the Singapore Code on Takeovers and Mergers (the Takeover Code).

The Listing Manual sets out the obligations (including disclosure obligations) that companies have to comply with in order to be listed on the Singapore Exchange. It empowers RegCo, the Singapore Exchange's regulatory unit, to issue enforcement and administrative orders to ensure that the market is fair, orderly and transparent, including: (1) requiring a company to make specified disclosures; (2) objecting to the appointment of individual directors or executive officers for a period not exceeding three years; (3) requiring an issuer to appoint special auditors, compliance advisers, legal advisers or other independent professionals for specified purposes; and (4) halting or suspending trading of listed securities of a company.

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

1 Lee Suet-Fern is the senior director at Morgan Lewis Stamford LLC.

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 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 a 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 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 or she 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 public as well as 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 in Singapore is very developed 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

The corporate landscape in Singapore is changing 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 that often have a lot of cash or reserves because of 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, these 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

The Securities Investors' Association (Singapore) (SIAS) seeks to empower retail shareholders by guiding them to ask relevant questions at annual general meetings (AGMs). SIAS analysts, 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 SGXNet. 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. SIAS has often stated that it prefers a conciliatory approach to resolving investors' rights 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. 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 Noble Group Limited

Noble Group Limited (Noble) announced a debt restructuring plan on 14 March 2018, which would dilute existing shareholders to a 10 per cent stake (with an option to acquire a further 7.5 per cent) in the restructured entity. On the other hand, Noble's management stood to receive a 10 per cent stake (with an option to acquire a further 7.5 per cent) in the restructured entity without providing any capital injections. Noble's proposed debt restructuring aroused widespread concern among shareholders, including substantial shareholder Goldilocks Investment Company Limited (Goldilocks), and perpetual bondholders. To compound matters, Noble's debt restructuring plan came on the back of a record US$4.938 billion loss for the 2017 financial year and a payout of over US$35 million to four directors. RegCo eventually issued a notice of compliance requiring Noble to appoint an independent financial adviser to opine on whether the debt restructuring plan was fair and equitable to shareholders. Goldilocks also commenced a derivative action against Noble's previous and incumbent directors and management for breaches of fiduciary duties, and sought to requisition for the nomination of five non-executive directors at Noble's AGM on 30 April 2018. However, Noble refused to acknowledge Goldilocks' requisition on the basis that the Central Depository (and not Goldilocks) was reflected on Noble's member register. This culminated in Goldilocks applying for and obtaining an injunction against Noble's holding of the AGM. The restructuring is now progressing following a settlement between Goldilocks and Noble, which is a positive outcome for both shareholders and creditors of Noble.

ii Yuzoo Corporation

YuuZoo Corporation (YuuZoo) faced public scrutiny over potential lapses in its unaudited financial results for the 2017 financial year, which were announced in early 2018. This eventually led to RegCo issuing a notice of compliance requiring YuuZoo to appoint a statutory auditor to provide an opinion on the veracity and reasonableness of its unaudited financial results for the 2017 financial year. Although YuuZoo sought to engage shareholders through a dialogue session moderated by SIAS, YuuZoo was unable to comply with the notice of compliance resulting in RegCo suspending YuuZoo's shares from trading on the Singapore Exchange. Subsequently, YuuZoo's office was raided by Singapore's Commercial Affairs Department on suspicions of possible breaches of the SFA.

iii Various shareholder-initiated general meetings

Another indicator of growing shareholder activism in Singapore is the increasing number of shareholder-initiated meetings. 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 many instances resolutions proposed by the shareholders were eventually passed.

V REGULATORY DEVELOPMENTS

i Multiple proxies

A multiple-proxies regime has been 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 that 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

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. Subject to certain safeguards, dual-class share structures are now permissible for companies listed on the Singapore Exchange, and pending conclusion of the review, the existing policy of Singapore Exchange 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. This is a recognition in Singapore that such listings are increasingly being considered in industries such as information technology and life sciences.

iii Increase in transparency of ownership and control

Unless exempted, all Singapore companies, foreign companies and limited liability partnerships are now required to maintain and keep up-to-date a register of controllers that will have to be made available to the Accounting and Corporate Regulatory Authority (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 or her nominee status and nominator to his or her 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

Two key changes have recently been made in audit reports to help investors and other users in their decision-making by giving them more pertinent information on companies. 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. 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 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.

VI OUTLOOK

Shareholder activism has risen and is expected to continue to increase 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[1]

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 Chapter 5 of the Companies Regulations, 2011 promulgated thereunder (the Takeover Regulations), regulates 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

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Regulation Panel (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 in Southern Africa (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 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 this 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 in the 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

Section 164 of the SA Companies Act 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 the 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. The shareholder should first have indicated prior to the meeting that it intended voting against the resolution and subsequently indeed voted against the 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 a 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; Sygnia Asset Management; Value Capital Partners; Foord Asset Management; 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. Some JSE-listed companies have indeed been forced to reconsider their remuneration policies following shareholder resistance. Others have had to change the make-up of their board, including Group Five Limited (Group Five) and Adcorp Holdings Limited. Shareholders normally give their views on such matters by voting against resolutions at annual general meetings. However, some shareholders follow the strategy of proactively engaging 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. An example is Allan Gray's involvement in the executive remuneration scheme proposed by Sasol Limited (Sasol), the largest energy and chemical company listed on the JSE.

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, 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 for merger approvals from a competition/anti-trust perspective or other regulatory approval processes) 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 Group Five

Allan Gray, an activist shareholder in JSE-listed construction company Group Five, 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 July 2017, all of the non-executive directors resigned from the board and were replaced by eight new non-executive directors at an extraordinary general meeting.[2]

ii 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.[3] 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.[4] Allan Gray welcomed the announcement of the CEO's resignation, but just as quickly expressed its discontent when it discovered the payout he was to receive. It was reported that the then CEO would receive a substantial payout in order to vacate his position and would also continue to earn a monthly salary from Net1 as a consultant. Allan Gray stated that it had previously put forward proposals that shareholder approval should be required for golden handshakes and large payouts. Renewed shareholder pressure, particularly from Allan Gray, resulted in Net1 terminating the consulting agreement.[5]

iii PPC

South Africa's largest cement company, PPC Limited (PPC), has already been the subject of one of the most prominent examples of shareholder activism in South Africa. During 2014, a group of shareholders requisitioned a special shareholders' meeting to consider the removal of

2 Eyewitness News: 'Activist shareholder says loses faith in SA's Group Five after resignations', 27 June 2017 (internet source, accessed 10 July 2017); ENSafrica: Chevan Daniels, George van Niekerk and Koos Pretorius, 'Group Five board shake-up: the legal framework for shareholder activism in South Africa', 28 July 2017, https://www.ensafrica.com/news/Group-Five-board-shake-up-the-legal-framework-for-shareholder-activism-in-South?Id=2715&STitle=ENSafrica%20newsflash (internet source, accessed 14 May 2018).

3 *Daily Maverick* 'Net1: Lipstick on a pig or fundamental shift?', 25 May 2017, www.dailymaverick.co.za/opinionista/2017-05-25-net1-lipstick-on-a-pig-or-a-fundamental-shift/#.WWPG3mcUncv (internet source, accessed 10 July 2017).

4 Eyewitness News 'Shareholder Allan Gray would welcome stricter grant controls', 22 March 2017, http://ewn.co.za/2017/03/12/net1-shareholder-allan-gray-would-welcome-stricter-grant-controls (internet source, accessed 10 July 2017).

5 *Mail & Guardian*. 'How Serge beat Net1's shareholders', 2 June 2017, https://mg.co.za/article/2017-06-02-00-how-serge-beat-net1s-shareholders (internet source, accessed 10 July 2017); *Daily Maverick* 'Net1: Lipstick on a pig or fundamental shift?', 25 May 2017, www.dailymaverick.co.za/opinionista/2017-05-25-net1-lipstick-on-a-pig-or-a-fundamental-shift/#.WWPG3mcUncv (internet source, accessed 10 July 2017); *Eyewitness News* 'Shareholder Allan Gray would welcome stricter grant controls', 22 March 2017, http://ewn.co.za/2017/03/12/net1-shareholder-allan-gray-would-welcome-stricter-grant-controls (internet source, accessed 10 July 2017).

the entire board of PPC and to replace it with the nominees of the requisitioning shareholders. The measures successfully forced the board to engage with the requisitioning shareholders' concerns. In 2018, PPC once again received the attention of activist shareholders, particularly asset managers such as Prudential Investment Managers and Value Capital Partners. The cement company was the subject of a merger attempt by a consortium comprising its smaller rival AfriSam and a Canadian investment house, Fairfax Financial Holdings. This failed as a result of shareholder resistance to a perceived undervaluation of PPC. Increasing shareholder pressure ultimately led to the chairman of PPC stepping down in March 2018. Value Capital Partners ensured that two of its own directors were appointed to the reshuffled PPC board. Further changes to the board may follow at PPC's annual general meeting in August 2018.[6]

iv 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. The relevant shareholder subsequently 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.

In 2018, Naspers was the target of corporate governance-focused shareholder activism driven by Allan Gray. Allan Gray made it clear that it would be voting against the proposed remuneration policy at the Naspers annual general meeting on the basis that, leaving aside Naspers' underlying investment in Tencent, the remuneration policy did not align with the performance of the company.[7]

v Steinhoff

Steinhoff International Holdings NV (Steinhoff) has been the subject of a highly publicised matter stemming from accounting irregularities that sent the share price of the company spiralling in December 2017. Some stakeholders have cited the multinational owner of

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6 *Financial Mail*: Nick Hedley, 'PPC Shareholder vote: How the chips may fall', 6 November 2014; *Rand Daily Mail*: Sikonathi Mantshantsha, 'The odds are stacked against Ketso Gordhan's PPC comeback', 16 October 2014; *Times Live*: Ann Crotty, 'PPC fallout cements need for oversight', 6 December 2014 (interest source, accessed 18 August 2016); *Moneyweb*: Ray Mahlaka, 'PPC's watershed moment of shareholder activism'. 5 March 2018. (internet source, accessed 11 May 2018); *Moneyweb*: Ray Mahlaka, 'Why the PPC, AfriSam tie-up is facing shareholder rebellion', 9 October 2017, https://www.moneyweb.co.za/news/companies-and-deals/why-ppc-afrisam-tie-up-is-facing-shareholder-rebellion/ (internet source, accessed 29 May 2018).

7 *Moneyweb*: Patrick Cairns 'The significance of Allan Gray speaking out on Naspers', 24 August 2017, https://www.moneyweb.co.za/moneyweb-opinion/the-significance-of-allan-gray-speaking-out-on-naspers/ (internet source, accessed 14 May 2018).

Poundland and Pepkor as evidence of the need for increased shareholder activism. Among those calling for greater shareholder activism is Coronation, a substantial shareholder of Steinhoff, which reportedly lost up to 14 billion rand as a result of the accounting irregularities fallout. Coronation indicated that it would be applying a 'higher level of scepticism' to its investment approach, and it is reported to have recently sold its remaining position in Steinhoff.[8] Furthermore, in a move that appears to be linked to recent events, a number of Steinhoff's shareholders voted against the reinstatement of incumbent directors Steve Booysen (the head of Steinhoff's audit and risk committee) and Angela Kruger-Steinhoff (the daughter of Steinhoff's founder), such that the two directors were reappointed with only 56 per cent and 59 per cent support, respectively.[9] This will be a precedent-setting example in the ongoing debate around the appropriate levels of shareholder involvement in matters concerning the management of a company, a function that was previously left in the hands of the board.

V REGULATORY DEVELOPMENTS

The introduction of updates to the King Code (which came into effect in respect of financial years commencing on or after 1 April 2017) built 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

8 *Business Day*: Ann Crotty, 'Steinhoff investors will not recoup billions lost In accounting scandal' https://www.businesslive.co.za/bd/companies/retail-and-consumer/2018-06-15-steinhoff-investors-will-not-recoup-billions-lost-in-accounting-scandal/ (internet source, accessed 15 June 2018).

9 Huffington Post, 'Steinhoff Under Fire: Coronation Fund Plans To Sue', 14 May 2018, https://www.huffingtonpost.co.za/2018/05/14/steinhoff-under-fire-coronation-fund-plans-to-sue_a_23433844/ (internet source, accessed 22 May 2018); Business Day: Hanna Ziady, 'Once bitten, twice shy for Coronation after Steinhoff bloodbath', 23 May 2018, https://www.businesslive.co.za/bd/companies/financial-services/2018-05-23-coronation-promises-to-exercise-more-scepticism/ (internet source, accessed 23 May 2018); Bloomberg: Janice Kew, 'Biggest Steinhoff shareholder is said to oppose two directors', 24 April 2018, https://www.fin24.com/Companies/Retail/biggest-steinhoff-shareholder-is-said-to-oppose-two-directors-20180424-2 (internet source, accessed 23 May 2018).

value. This includes disclosure and engagement as recommended by the King Code, particularly in the context of listed companies. Recent events have resulted in shareholder bases that are less apathetic in their approach to management accountability and the pursuit of shareholder value, and demand greater levels of accountability, transparency and return on their investment. Failure to engage with modern sophisticated, informed and activist shareholders and provide them with the levels of transparency demanded 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[1]

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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ii The Swedish market for publicly traded companies

There are more than 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.

v 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; and

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;

c conducting regular strategic reviews to identity areas of interest to activists;
d monitoring the company's shareholder base to identify beneficial ownership, increased levels of stock borrowing and the use of derivatives;
e 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; and
f 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 restricts disclosure of 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 'obliges 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 on 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 *d* 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:

Q2 Year 1	Q1 Year 2	Q2 Year 2
Appointment of nomination committee	Propose matters to the AGM agenda in ample time before publication of the AGM notice.	Give notice to attend the AGM. Attendance at the AGM.

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.

Amaranth Capital/ Lindex (2004–2007)	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.
Cevian/Skandia: (2004–2006)	Cevian, together with Carl Icahn, acquired 3 per cent of Skandia's shares in December 2004. Cevian gained board representation in 2005 and used this position to support a takeover bid by Old Mutual. The bid was eventually successful (in 2005–2006).
Violet Partners/Volvo (2006–2007)	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.
Muddy Waters/Telia Company (2015)	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).

Norges Bank (2015/2016)	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.
Elliot Capital/Canon (2015)	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.
Elliot Capital/EQT (2016)	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.
Elliot Capital/GE	In 2016, GE made a takeover offer for Arcam. During the acceptance period, Elliot Capital took a corner position of more than 10 per cent of the issued share capital preventing GE from squeezing out the remaining minority shareholdings. In 2017, GE acquired Elliot Capital's stake and Arcam 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.

A consultation paper setting out proposed legislation to transpose the amended Shareholder Rights Directive into Swedish law was published in May 2018. The general approach of the consultation paper is to avoid gold plating, although there are a few limited exceptions.

In addition to proposed implementing legislation, the consultation paper sets out, among other things, a proposal to restrict the shareholders' right to require the inclusion of a matter on the agenda of a notice to convene a general meeting. Under the proposed legislation, the right to require the inclusion of a matter on the agenda of a general meeting would require an ownership of at least one 10,000th of the share capital or that the request is made by at least 25 shareholders.

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.

Chapter 12

SWITZERLAND

David Oser and Karin Mattle[1]

I OVERVIEW

The number of campaigns by activist shareholders in Switzerland is still relatively low compared with other jurisdictions, in particular the United States. In the past years, however, the Swiss market has seen a growth of shareholder activism, including high-profile campaigns against large multinational companies. Furthermore, since the general assembly season 2017 there is 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.

1 David Oser is a partner and Karin Mattle is a senior associate at Homburger AG.

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 of 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 until 2016 and a stabilisation in 2017.[3] 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).

i 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). Owing 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.

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 website to promote their

3 'Activist Investing in Europe – 2017 Edition', Harvard Law School Forum on Corporate Governance and Financial Regulations, 10 January 2018.

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 Nestlé

A shareholder activist campaign initiated last year is the campaign of the hedge fund Third Point, a company led by activist shareholder Daniel Loeb against Nestlé AG (Nestlé). On 25 June 2017, Third Point announced in a public letter to shareholders that it had invested over US$3.5 billion in Nestlé. Third Point tried 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 after Third Point's letter, 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. Although Third Point admitted in its letter published on 22 January 2018 that CEO Dr Mark Schneider had begun to take the needed steps to move Nestlé forward, in particular, the plans to add three outsiders to Nestlé's board were well received, with its letter published on 1 July 2018 Third Point continues to put pressure on Nestlé. Third Point is requesting the internal split of Nestlé into three units: beverages, nutrition and grocery, and continues to request the sale of non-core businesses.

iv Clariant

Another activist shareholder campaign initiated last year 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 (White Tale) 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 pressured Clariant to seek alternatives to the Huntsman Corporation (Huntsman) deal announced on 22 May 2017. The activists argued that the planned merger of equals aiming to create a global speciality chemicals company with a combined enterprise value of approximately US$20 billion lacked strategic rationale and undervalued the shares of Clariant. As a consequence of the continued accumulation of Clariant shares by White Tale, and the resulting uncertainty as to whether Clariant would be able to secure the two-thirds majority required under Swiss law for shareholder approval of the transaction, Clariant announced on 27 October 2017 that Huntsman and Clariant jointly decided to abandon the merger of equals. After Clariant abandoned the merger of equals, White Tale continued to put pressure on Clariant requesting the engagement of another investment bank to conduct a strategic review process as well as three board seats. In January 2018, Clariant confirmed that White Tale had sold its stake in Clariant, which in the meantime had increased to 24.99 per cent, to SABIC.

v Credit Suisse

After its activist shareholder campaigns against asset manager GAM and airline caterer Gategroup, RBR Capital Advisers AG (RBR) announced in October 2017 that it had acquired a 0.2 per cent stake in Credit Suisse Group AG (Credit Suisse). RBR is requesting the split up of Credit Suisse into three independent and focused companies, namely a private and business bank, an independent investment bank and an independent asset manager, as well as the creation of a new IT platform. Although the annual shareholders' meeting of Credit Suisse would have been an ideal platform for RBR to present its arguments, according to a Credit Suisse representative RBR did not hold any shares entered in the share register in April 2018.[4]

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,

4 *Cash*, 'Investor RBR hält keine registrierten CS-Aktien mehr', 18 April 2018.

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 delisting 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[1]

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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1 Gavin Davies and Mark Bardell are partners at Herbert Smith Freehills LLP.

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, which are not very prevalent and are most frequently used by action groups, 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. 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-preemptive 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 reappoint 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 Burberry, Clarkson, Kier Group and Liberty Global 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). The ruling of the Takeover Panel in respect of 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

2 Takeover Panel Statement 2017/10.

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 recent years, save for last year (2017) when fewer companies were publicly targeted, although the companies that were targeted tended to be larger than in previous years. These trends are also true of the UK in 2017. In 2017, the number of companies targeted by activists worldwide was 805, compared to 843 in 2016. 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 2017, 344 companies outside the United States were publicly subjected to activist campaigns, compared to 302 in 2016. Of these 344 companies, 58 were in Australia and 47 were in Canada.[3] 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. 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 recent times: 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 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

3 Activist Insight – The Activist Investing Annual Review (2018), p. 6.

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 2017, 14 per cent of activist campaigns launched in Europe (including the UK) were related to company M&A or other company balance sheet concerns.[4]

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, as shareholders, 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.

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.

4 Analysis from Activist Insight – Activism in the UK – June 2018.

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:

a an agreed set of actions to be taken by the company, which may include the appointment of board representatives for the activist investor;

b a standstill agreement in relation to the activist's share ownership in the company;

c 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

d 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.

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.[5] 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'.[6] 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 Trian 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, 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.

vii Focus on larger cap companies

Activists are increasingly targeting larger cap companies with the view increasingly appearing to be that 'no-one is too big' if they present a valuable opportunity, and even household names and 'national champions' are the subject of activist intervention. Reasons that shareholder activism at larger cap companies appears to be becoming more common include: (1) larger

5 Carol Hymowitz, 'Icahn, Loeb and other Activists Overlook Women for Board Seats', Bloomberg, 8 March 2016.

6 The Equality and Human Rights Commission, 'How to improve board diversity' (2016).

cap companies are thought to be more prone to inefficiency and poor corporate governance than smaller companies and there may be inefficiencies created by the 'conglomerate effect'; and (2) activist funds are of an increasingly large size and are able to take advantage of the increasing support for activism from fellow shareholders and the fact that their ideas and input are becoming more widely accepted. Some of the more notable activist situations involving large cap companies in recent years include Elliott at AkzoNobel, Trian in relation to Proctor & Gamble and Third Point in relation to Nestlé. In the UK, large cap companies currently in focus include Barclays and Whitbread.

viii Focus on 'proxy plumbing'

While UK shareholder votes are generally passed on comfortable margins, there have been some close votes recently on high-profile matters (e.g., bids by Melrose for GKN and CVC and Blackstone for Paysafe), increased focus on 'proxy plumbing' and the role of proxy solicitation agents in helping to get votes through the back office to ensure that they are taken into account. Where the result of the vote will be or is likely to be close, there is also the right that exists under the Companies Act for a shareholder who holds at least 5 per cent of a company's issued share capital to require the directors of a company to obtain an independent report on any poll taken or to be taken at a general meeting of the company (Section 342).

IV RECENT SHAREHOLDER ACTIVISM CAMPAIGNS

i Rolls-Royce

ValueAct Capital Partner's investment into Rolls-Royce Holdings Plc provides an 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 was 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.

The relationship agreement expired on 3 May 2018, and it was replaced with an agreement relating to confidentiality, the board representative's compliance with applicable law, Rolls-Royce's codes, policies and guidelines and the right of the representative to attend committee meetings.

ValueAct now holds an approximate 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 stakebuilding 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 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).

The relationship agreement between Oasis Management and Premier Foods was terminated in April 2018 with the Oasis Management representative stepping down from the board. More recently Oasis Management publicly announced its intention to vote against the re-election of Premier Food's CEO at its AGM held in July 2018.

iv Bowleven

The Monaco-based Crown Ocean Capital fund's successful campaign against African oil explorer Bowleven, is an 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.

v 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.

vi Johnston Press

Two activist shareholders in Johnston Press, Crystal Amber and Custos Group, engaged the board in 2017 with various demands, including removal of its chair and CEO, reform of executive pay and moving its headquarters from London to Scotland. Custos Group proceeded to serve a requisition in November 2017 proposing removal of the chair and one other director and the appointment of two non-executive directors of the company. The requisition was subsequently determined by the company to be invalid. In May 2018, the CEO resigned and was replaced by the CFO.

vii Whitbread

Whitbread is an example of activists attempting to unlock value at a company by pushing for a break-up or demerger.

After disclosing an interest in Whitbread in December 2017, Sachem Head publicly urged Whitbread in January 2018 to spin off its Costa Coffee chain from its hotels and restaurants business. On 16 April 2018, Elliott Management disclosed an approximate 5 per cent holding in Whitbread. On 25 April 2018, Whitbread announced that it was committed to a demerger of its hotel and coffee chain businesses and that the demerger of Costa would be pursued as quickly as practical and appropriate to optimise value for shareholders.

viii London Stock Exchange

The London Stock Exchange is an example of an activist using a directive resolution to attempt to force the board to take certain actions.

In October 2017, the London Stock Exchange announced that its CEO would leave the group by the end of December 2018 and that the board had initiated a process to find a successor. In November 2017, TCI Management Limited sent the London Stock Exchange a letter questioning the announcement regarding the CEO's departure and subsequently requisitioned a general meeting of the London Stock Exchange to consider: (1) an ordinary resolution to remove the chair; and (2) a special resolution to direct the board to terminate the search for a new CEO and permit the current CEO to remain in office as a director and CEO until 2021 on no less favourable terms than his existing arrangements. Subsequently in November 2017, the London Stock Exchange announced that the CEO would step down with immediate effect (having been asked to do so at the board's request) and that he would not be returning under any circumstances and also that the chair would not stand for re-election at the 2019 AGM. In light of those events, TCI withdrew the requisition relating to the CEO at the London Stock Exchange's request, but not the resolution to remove the chair. Some 79 per cent of shareholders present and voting at the general meeting voted against the resolution to remove the chair that had been requisitioned by TCI.

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 2017, the Investor Forum was asked to review 14 UK companies with 10 reviews resulting in comprehensive collective engagement.[7] Recent examples include BT Group, London Stock Exchange and Worldpay. Given that the Investor Forum's 41 members represent approximately 29 per cent of the FTSE All Share market capitalisation, the next 12 months will likely see it continue its efforts to foster collective engagement.

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

7 The Investor Forum – 2017 Review of Activities.

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.

Another 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 that 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 June 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, although it is proposed that EU law will continue to apply for a transitional period.

A further more recent development is the introduction of the Investment Association's Public Register, which is an aggregate list of publicly available information regarding meetings of companies in the FTSE All-Share who have received significant shareholder opposition to proposed resolutions (votes of 20 per cent or more against any resolution) or withdrew a resolution prior to their Annual General Meeting. The Investment Association introduced the Public Register in response to the government's green paper on corporate governance reform with the aim of highlighting those companies that receive a high vote against, or withdraw, a resolution and to understand the process used by those companies to identify and address the concerns of their shareholders. The Investment Association announced[8] that the analysis of the data from the AGMs and general meeting held in 2017 by more than 640 FTSE All-Share companies revealed that over one in five (22 per cent) companies listed on the FTSE All Share feature on the Public Register, owing to having at least one resolution that received over 20 per cent dissent or that was withdrawn prior to the meeting.

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

8 Investment Association, 19 December 2017, 'Over one fifth of FTSE companies listed on public register'.

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.

Concerns over high-profile corporate issues mean that there is now an increasing focus in the UK on corporate governance and the ethical standards of companies and anticipation that shareholders will become more involved in these issues going forwards. The final text of the new UK Corporate Governance Code is expected to be published shortly (July 2018) and will apply to accounting periods commencing on or after 1 January 2019 while a detailed consultation on the future direction of the Stewardship Code commenced in February 2018.

Chapter 14

UNITED STATES

Francis J Aquila[1]

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. Although there was a slight decrease in the number of activist campaigns in 2017, the number of large 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 and increased support from prominent institutional investors, combined 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.

1 Francis J Aquila is a partner at Sullivan & Cromwell LLP. The author thanks Lauren S Boehmke for her assistance in drafting this chapter and overall assistance with this project.

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 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$84.4 million for 2018.[2] 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'.[3] 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.[4] 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.[5]

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. 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.

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,

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.
4 See 43 Fed. Reg. 33,450, 33,465 (1978).
5 See US Department of Justice press release, 'Justice Department Obtains Record Fine and Injunctive Relief against Activist Investor for Violating Premerger Notification Requirements', dated 12 July 2016.

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.[6] 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 take a 'what's the harm' approach and 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 some change is warranted at the company. ISS has made continued efforts to improve its proxy voting guidelines in accordance with shareholders' needs and views. In 2017, ISS recommendations matched the ultimate outcome of the vote in 73 per cent of proxy contests, reversing the declining trend in the prior three years.[7]

Although the gap between the voting practices of ISS and institutional shareholders has narrowed, 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 increasingly 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.

6 *Unocal Corp v. Mesa Petroleum Co*, 493 A.2d 946 (Del. 1985).

7 For further information, refer to the Sullivan & Cromwell LLP publication, 'Review and Analysis of 2017 U.S. Shareholder Activism', dated 26 March 2018 (S&C 2017 Shareholder Activism Review), available at https://www.sullcrom.com/review-and-analysis-of-2017-us-shareholder-activism-03-26-18, at page 22.

iv 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 prepare for 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 preparation and 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] 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 hedge fund activists invest

8 For further information, refer to Francis J Aquila, 'Adopting a Poison Pill in Response to Shareholder Activism', *Practical Law The Journal*, April 2016, at page 22, available at www.sullcrom.com/publications-aquila-column-issues-considering-adoption-poison-pill-published-practical-law-journal-2016.

9 S&C 2017 Shareholder Activism Review, at page 7.

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 the 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, 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.[10] Other 2017 Rule 14a-8 proposals included social and political proposals as well as compensation proposals, which have a very low pass rate.[11] The vast majority of Rule 14a-8 proposals are targeted at S&P 500 companies.[12]

Traditional institutional investors such as BlackRock, Fidelity, State Street and Vanguard may be considered shareholder activists as well. The concentration of ownership among these large institutional investors has continued to grow. As of June 2017, one of BlackRock, Vanguard or State Street was the largest single shareholder in 438 companies out of the S&P 500.[13] 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.'[14] 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. BlackRock's Larry Fink's 2018 annual letter to CEOs advised companies to be focused on and prepared to speak to investors about long-term strategy.[15]

Environmental, social and governance (ESG) parameters have recently played a prominent role in the public discourse of both Rule 14a-8 activists and institutional investors. For example, in May 2017, a proposal requiring ExxonMobil to be more open about the effects of climate change on its business passed with supporting votes from BlackRock, Vanguard and State Street. This focus on ESG has caused some hedge fund activists to tack toward these topics as well.[16]

10 For further information, refer to the Sullivan & Cromwell LLP publication '2017 Proxy Season Review', dated 17 July 2017 (S&C 2017 Proxy Season Review), available at www.sullcrom.com/2017-proxy-season-review.

11 Id.

12 Id.

13 Fichtner, Heemskerk, and Bernardo-Garcia, 'Hidden power of the Big Three? Passive index funds, re-concentration of corporate ownership, and new financial risk,' *Business and Politics*, 25 April 2017, available at https://doi.org/10.1017/bap.2017.6.

14 F William McNabb III's keynote address at the Lazard 2015 Director Event, 'Shareholder Expectations: The New Paradigm for Directors', as posted to the Harvard Law School Forum on Corporate Governance and Financial Regulation on 24 June 2015.

15 See Larry Fink's 2018 Annual Letter to CEOs, 'A Sense of Purpose', available at https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter.

16 Id., at pages 3 and 6.

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 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., ADP, General Electric, General Motors, Nestlé and Procter & Gamble), proving that no company is immune to activism. In 2017, more frequent activists appeared to focus on the largest companies, with activists targeting large-cap companies in over 21 per cent of all campaigns (up from 19 per cent in 2016) and companies with market capitalisations greater than US$50 billion making up 6 per cent of total campaigns (while representing only 3 per cent of public companies).[17] All industries are susceptible to activism, with real estate development, financial conglomerates, semiconductors, medical specialities and movies and entertainment being the particular industries targeted in 2017 more than in prior years.[18]

iii The activist campaigns

While the number of campaigns by shareholder activists decreased slightly in 2017, there was an increase in the number of campaigns at the largest companies, which corresponds with the growing concentration of activity amongst a small number of frequent activists. 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. In 2017, activist campaigns focused more on balance sheet issues and board-related governance issues, with business strategy issues and M&A actions less of a focus in comparison to prior years.

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

17 Id., at pages 1, 10 and 13.
18 Id., at page 14.

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. While shareholder activists have become increasingly adept at using the media to their advantage, 2017 saw a decline in the public airing of concerns most likely owing to the increased focus by companies on engagement and settlements with shareholders before demands are made public.[19]

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 at least a majority of the board of directors in what is commonly known as a control slate contest. 2017 notably represented the lowest proportion of control slate contests since 2013.[20] Given the limited success of control slate contests in recent years, shareholder activists may have become more selective when pursuing these contests. 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.

iv Paths to resolution

Activist campaigns continued to achieve high levels of success in 2017.[21] 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 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. The percentage of settlement agreements that have been filed with the SEC for 2017 campaigns decreased from 2016 levels, perhaps in part because companies are considering shareholder activist demands more carefully before settling in light of criticism of quick settlements and the 'short-termism' of activist objectives from institutional investors.[22] In many cases, companies are nonetheless 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

19 Id., at page 17.
20 Id., at page 19.
21 Id.
22 Id., at page 23.

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.[23]

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 most 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. Activist designees that receive board seats are also staying on the boards for long periods of time. Since 2010, prominent activist fund insiders who became directors following a settlement agreement stayed on the relevant board for an average of approximately two years longer than the minimum provided for in the settlement agreement, and many insiders in this subset are still on the relevant board.

IV RECENT SHAREHOLDER ACTIVISM CAMPAIGNS

While there are many recent US shareholder activism campaigns worthy of discussion in this chapter, this section highlights two campaigns by US activist hedge funds against US public companies that helpfully demonstrate the varying nature and objectives of shareholder activists.[24]

i The Procter & Gamble Company/Trian Partners

The biggest corporate proxy fight in history took place in 2017 at The Procter & Gamble Company (P&G), a company with a market cap above US$190 billion and the largest-ever US public company target of a proxy contest. Costs expended in connection with the proxy contest are estimated to have reached US$60 million. In July 2017, activist hedge fund Trian Partners (Trian) disclosed an approximately 1.5 per cent stake in P&G and filed a preliminary proxy statement nominating Nelson Peltz, the CEO and founding partner of Trian, to the P&G board of directors. Trian disclosed that it had determined to move forward with the proxy contest because of P&G's continuous rejection of Trian's request to add Mr Peltz to the board after numerous constructive discussions. Trian was critical of what it considered to be P&G's lagging innovation, insularity and overly complex organisational structure. Trian emphasised that it was not interested in breaking up P&G or replacing the CEO or other directors, but rather wanted a seat at the table. In response, P&G emphasised the company's improved profit margin and leaner structure and criticised Trian for its lack of new or actionable ideas to drive additional value. Trian's nomination was ultimately backed by the recommendation of proxy advisory firms ISS, Glass Lewis and Egan-Jones. The proxy contest went to a vote in October 2017. Although it was initially reported that P&G had won the contest based on preliminary voting results, it was later revealed that Mr Peltz had in fact

23 For further information, refer to Francis J Aquila, 'Negotiating a Settlement with an Activist Investor', *Practical Law The Journal*, April 2015, at page 22, available at www.sullcrom.com/publications-aquila-column-negotiating-settlement-activist-investor-appears-practical-law-the-journal-2015.

24 The campaign detail included in this section was sourced from SharkRepellent, FactSet Research Systems Inc and other public filings.

managed to secure the votes required for a seat on the board. The inspector of elections took 66 days to finalise the vote count after proxies were carefully recounted in what is referred to as the 'snake pit'. Mr Peltz was appointed to P&G's board of directors on 15 December 2017.

ii EQT Corporation and Rice Energy Inc/JANA Partners

EQT Corporation (EQT) and Rice Energy Inc (Rice) announced entry into a merger agreement on 19 June 2017, with EQT to acquire Rice for cash and stock consideration valued at US$6.7 million. The parties noted expected synergies and cost savings from the combination of the two large natural gas companies. In July 2017, JANA Partners (JANA) announced an approximately 5.8 per cent stake in EQT and its opposition to the proposed merger. JANA claimed that EQT was overstating the financial benefits of the merger and stated JANA's preference for EQT to separate its pipeline operations. JANA also criticised EQT's management for being influenced by EQT's executive compensation plans, rather than a desire to maximise production growth or shareholder value. In September 2017, DE Shaw, which owns approximately 4 per cent of EQT, announced its support for the merger with Rice but advocated for other changes (including the separation of EQT's midstream and production business) to be completed in the first half of 2018. A special shareholder meeting to consider the merger was scheduled for November 2017. Approximately one week prior to the meeting, ISS, Glass Lewis and Egan-Jones announced their recommendations in favour of the transaction. Following the proxy advisory firms' recommendations, JANA announced that it was withdrawing its proxy materials and would cease soliciting proxies but still planned to vote against the merger. Shareholders of EQT and Rice approved the merger at the meeting on 9 November 2017, and the transaction closed on 13 November 2017. In February 2018, EQT announced a plan to spin off its midstream business into a stand-alone public company.

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.[25] 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

25 See S&C 2017 Proxy Season Review.

director candidates nominated by both the company and the shareholder activist. Universal proxies would result in a significant change to voting practices in US proxy contests, but it is not on the SEC's near-term agenda.[26]

VI OUTLOOK

All indications are that shareholder activism will continue to play a prominent, and most 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.

26 S&C 2017 Shareholder Activism Review, at page 3.

Appendix 1

ABOUT THE AUTHORS

FORREST G ALOGNA

Darrois Villey Maillot Brochier

Forrest Alogna is a partner at Darrois Villey Maillot Brochier specialising in cross-border mergers and acquisitions and corporate governance, including litigious and hostile situations. He is admitted to practise in Paris and New York and began his career at Wachtell, Lipton, Rosen & Katz in New York, prior to relocating to Paris in 2006.

FRANCIS J AQUILA

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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 its '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

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Willem Bijveld is a senior associate in De Brauw Blackstone Westbroek's corporate department. Willem concentrates on advising large multinational corporations on corporate law, private and public mergers and acquisitions, corporate governance and securities law. He has particular experience in bilateral and auction sale processes, 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 has a well established international corporate practice, representing listed companies, large multinationals and private equity firms. His 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/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 past 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 specialist 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 mergers and acquisitions. Frank regularly advises listed companies, large multinationals and private equity funds on complex public and private transactions in a variety of industries.

LEE SUET-FERN

Morgan Lewis Stamford LLC

Lee Suet-Fern is the senior director of Morgan Lewis Stamford LLC and a partner of Morgan, Lewis & Bockius, where she chairs the international leadership team and is a member of the global board. 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 in 2007, the Lifetime Achievement Award by *Chambers Asia-Pacific* in 2016 (becoming the first ever female recipient) and the Lifetime Achievement Award by Euromoney in 2017. Euromoney also honoured her with its Asia Women Business Law Awards for mergers and acquisitions and private equity in 2012 and 2013, and *Best Lawyers Mergers & Acquisitions* named her Lawyer of the Year in those years. In 2018, IFLR1000 launched its global *IFLR1000 Women Leaders* guide and has recognised Suet-Fern as one of 300 leading practitioners. She has served as a member of the board of directors of various publicly listed companies in Singapore and the region. Currently amongst others, she sits on the board of global healthcare company Sanofi and one of the world's largest independent financial advisory groups, Rothschild & Co. As a contributor to the community, Suet-Fern has taken a leadership role in a number of organisations, including as a member of the board of the World Justice Project, an independent multidisciplinary organisation working to advance the rule of law around the world. In Singapore, her public service activities in Singapore include serving as a member of the advisory board of the Law School at Singapore Management University, where she also chairs the Centre of Cross-Border Commercial Law in Asia's Expert Panel; she is also a trustee for Nanyang Technological University in Singapore. She is a former president of the Inter-Pacific Bar Association and the former chair of the Asian Civilisations Museum and a member of the Singapore National Heritage Board. She was also a member of the Accounting Advisory Board at National University in Singapore and a member of the executive committee of the Senate of the Singapore Academy of Law, where she also chaired the committees on convergence and harmonisation of laws in Asia as well as the cluster of committees on legal education and studies. 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 international trade law. She was 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.

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 listing rules-related, disclosure-related and corporate governance issues. Nikhil received his BCL degree from St Catherine's College, Oxford (where he was a Radkhakrishnan/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 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.

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 (Hons.) and Bachelor of Commerce from Monash University, Melbourne.

MICHAEL J ULMER

Cleary Gottlieb Steen & Hamilton LLP

Dr Michael J Ulmer is a partner at Cleary Gottlieb Steen & Hamilton. His practice focuses on domestic and international private and public M&A transactions, joint ventures, general corporate advice and private equity transactions.

His work extends to a broad range of industries and clients, including leading German corporates, *Mittelstand* companies, and domestic and international financial and strategic investors. He has vast experience in assisting clients from the Middle East with outbound investments.

Mr Ulmer is widely published. Amongst others, he is the author of the quarterly released Cleary Gottlieb M&A Telegram and co-author of the Cleary Gottlieb publication 'Public Bids and Squeeze-Outs in Germany, a Statistical Survey (2002-2016)'.

JUVE, the leading publication on German law firms, distinguishes Mr Ulmer as an 'M&A Heavyweight' and frequently recommended lawyer for M&A and corporate, and *Chambers Europe* recommends him as a notable practitioner for Corporate/M&A: High-end Capability and describes him as 'really good at finding and labeling risks and knows how to translate the legal aspects into business language'.

Mr Ulmer joined Cleary Gottlieb as a partner in 2016. He started his career at Hengeler Mueller and joined Allen & Overy as a partner in 2006.

ZSÓFIA VARGA

NautaDutilh

Zsófia Varga is a professional support lawyer at NautaDutilh Avocats Luxembourg. She ensures that the firm is fully up-to-date with all the latest developments in corporate, banking, finance, intellectual property and competition law. She furthermore contributes to various newsletters and publications, and she coordinates and assists on local and global projects focused on know-how, business development and innovation.

Ms Varga holds a master's degree in translation and interpretation (Hungary, 2009), and law degree, obtained from the ELTE University of Budapest (Hungary, 2005). She also holds a doctorate in EU Law from the same university (2016). Ms Varga is the author of several articles published in international peer-reviewed legal journals, as well as a monograph on EU Law.

Ms Varga joined NautaDutilh in 2017. Prior to joining NautaDutilh Luxembourg, she worked as a law clerk for the Regional Court of Appeal in Hungary, and as a knowledge management lawyer and law clerk for the Court of Justice of the European Union in Luxembourg.

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* (2012–2018)). 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 a member of the International Bar Association, the European Private Equity and Venture Capital Association and the Duke Alumni Association.

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ISBN 978-1-912228-51-5