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The International Comparative Legal Guide to:

Mergers & Acquisitions 2014

8th Edition

A practical cross-border insight into mergers and acquisitions

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General Chapters:

Country Question and Answer Chapters:

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Country Question and Answer Chapters:

EDITORIAL

Welcome to the eighth edition of *The International Comparative Legal Guide to: Mergers & Acquisitions*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of mergers and acquisitions.

It is divided into two main sections:

Four general chapters. These are designed to provide readers with a comprehensive overview of key issues affecting mergers and acquisitions, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in mergers and acquisitions in 46 jurisdictions.

All chapters are written by leading mergers and acquisitions lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor Michael Hatchard of Skadden, Arps, Slate, Meagher & Flom (UK) LLP for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The International Comparative Legal Guide series is also available online at www.iclg.co.uk.

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The Global Phenomenon of Shareholder Activism

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Shareholder activism has risen significantly since the start of the financial crisis, with global shareholder campaigns increasing by 62 per cent since 2010. This growth is partially driven by activist hedge funds reaping outsized returns of 19.9 per cent compound annual growth rate on investments since 2009 versus 12.7 per cent CAGR for S&P and just 7.6 per cent for all hedge funds. Shareholders have engaged companies in all sectors — although in certain geographic areas, activists have focused principally on a limited number of industries — and are targeting increasingly larger companies. Europe has begun following U.S. trends: the United States, long the bastion of shareholder activism, has found a willing export market.

The U.S.

In the U.S., increasingly, activist shareholders have absorbed the ethos of mainstream institutional investors. While activists historically have focused their efforts on smaller, underperforming companies, in 2013 activists turned their attention to large-cap and diversified businesses with multiple operating segments, including companies performing consistently with their peers: companies once thought to be sufficiently large so as to be immune to these efforts. Although every activist campaign is unique, an increasing number of engagements involve activists presenting operational and longer-term strategic changes rather than short-term financial gimmickry.

Activist shareholders historically have been at odds with traditional institutional investors, who understand that they do not necessarily know better than the board and management how a particular company should manage its businesses. But increasingly, where a company has had long-term underperformance, institutional investors have become more open to hearing from, and supporting, "activist" investors who have amassed significant investments in companies and provoke actions solely directed to in their view increase shareholder value de-coupled from pre-existing strategy. In part, the reason for activists' increased credibility with institutional investors is that they are hiring experienced financial, legal and public relations advisers and nominating candidates for boards who bring significant industry expertise and other strong credentials.

This implicit or explicit alliance of activists and institutional investors can and will use the full arsenal of corporate governance tools to scrutinise boards of directors. Where applicable, they will seek to influence board decisions or, when necessary, seek to change board composition. In one of the more interesting developments of the past year, a shareholder activist and a traditional institutional investor directly and very publicly teamed up to push a company to make an important strategic change. Relational Investors and the California State Teachers' Retirement System (CalSTRS) joined forces to pressure Timken Company to separate its steel business from its bearings business. Relational presented its views to Timken management and CalSTRS submitted a shareholder proposal requesting that the company engage an investment bank to effectuate a spin-off of the steel business (a so-called 14a-8 proposal). That proposal received the support of 53 per cent of the votes cast at the annual meeting and, shortly thereafter, Timken announced that the board had created a strategy committee to explore the separation of the steel business and the committee had retained an investment banker. In early September, Timken announced that it would spin-off its steel business in 2014.

Activist funds and arbitrageurs made their presence known in the public company M&A arena and, in several instances, led campaigns to improve deal economics — most notably Carl Icahn in his rival bid for Dell Inc. A trend capturing attention in boardrooms and the deal community in 2013 was shareholder activism in the context of opposing announced transactions, such as Soft Bank/Sprint/Clearwire, Plains Exploration/Freeport-McMoRan and Dell. Transaction parties should be prepared in advance to address shareholder concerns and should not assume that an arm's length, heavily negotiated, carefully analysed, good-faith determination to enter into a transaction will lead to shareholder approval without controversy.

Europe

The wave of activity in the U.S. has hit the shores of the old continent, resulting in Europe's own mix of shareholder activism. Before the global financial crisis, shareholder activism in Europe could be characterised by spurts of activity in a handful of EU Member States and complete absence in most others. Shareholder activism now is on the rise across the continent, with activity increasing in the more than $100 million category from 22 campaigns in 2010 to 54 in 2013 and in the more than $1 billion category from 12 campaigns in 2010 to 28 in October 2013.

Activism has been most prominent in the United Kingdom, accounting for more than one half of all activity in Europe, followed by France and smaller dynamic economies such as Switzerland, the Netherlands, Belgium and Finland. In Germany and Italy, activism appears to be on the rise despite the fact that many listed companies have concentrated ownership structures.

European markets' prolonged weakness since 2009 and poor performance among large European strategic players during that period has laid the groundwork for the recent rise of shareholder activism. U.S. hedge fund activists turned to Europe, seeking opportunities outside North America to replicate their successful

U.S. campaigns. At the same time, European hedge funds and other players analysed the success of prominent activist investor campaigns across the Atlantic, particularly those supported by more traditional institutional investors, and realised that they could leverage their knowledge of European mechanisms and dynamics through their own campaigns.

European institutional investors have been supportive of shareholder activist campaigns in Europe and generally the number of players in the market that are prepared to entertain activist shareholders and support their campaigns has grown in recent years. Corporate governance matters and, specifically, executive pay, have been at the center of attention of lawmakers, regulators and shareholders since the beginning of the global financial crisis, resulting, for example, in the adoption of binding and nonbinding say-on-pay regulations being adopted in several EU Member States. Influential proxy solicitors, such as Institutional Shareholder Services (ISS) and Glass Lewis, generally are supportive of executive pay and corporate governance campaigns brought by activists. A momentous shift in the composition of the shareholder base of large EU companies also has occurred, with the proportion of U.S. institutional investors with a sympathetic ear for activist campaigns increasing significantly in recent years. We believe these are lasting factors that will cause shareholder activism to continue to expand in Europe.

Shareholder activists, however, continue to face an uphill battle against established European strategic players. Europe remains a very fragmented market, with 27 Member States and rules, regulations and practices that largely require harmonisation by EU institutions. Europe lacks a common set of proxy rules or rules on corporate governance. Europe's securities markets do not rely on disclosure and related judicial scrutiny as much as such markets do in the United States. As a result, European markets generally suffer from lower transparency than those in the U.S. with regard to board/company actions and shareholder transactions and intentions. The European system generally is more reliant on intervention by securities regulators. At the same time, the sophistication and initiative of regulators in Europe varies dramatically from country to country.

Activists also face material challenges borne out of the structure of capital markets in much of Continental Europe. In several European countries (including Germany, France and Italy), the ownership structure of listed companies is concentrated — for example, listed companies are controlled by founding families or their foundations — and, therefore, not favourable to shareholder activism. Also, shareholder activists favour liquid stocks. The absence of a liquid derivatives market in many European markets is a significant hurdle for activist shareholders.

Looking to 2014

All indications, including the activist community's fundraising efforts and commentary, point to a continuation of activism in 2014 and beyond in the U.S. and Europe. As a result, boards and management are reassessing the strategic fit of noncore businesses, and activists are reinforcing this boardroom trend, often resulting in divestitures or spin-offs. Although activists will continue to be challenged by the characteristics of the European market, they have become a regular feature and the search for value will continue to draw hedge funds and other players, regulation and policies friendly to minority shareholders, reinforcing Europe's own brand of shareholder activism.

Boards should not underestimate the risk of attack and should be prepared to handle activist requests appropriately and avoid being caught by surprise. Among the key steps boards need to take before an activist enters the landscape is shareholder engagement. Institutional shareholders should know that the board and management have a strategy to create shareholder value and are actively executing on that strategy. Ongoing engagement and relationship building with a company's long-term shareholders can help the board establish the credibility it needs when the benefits of strategies are not realised as quickly or as completely as originally envisioned or other unforeseen circumstances damage corporate performance. Engagement also provides an important avenue for companies and boards to hear investor concerns and attempt to address them before they develop into problems that damage a board's credibility or call into question the board's composition or strategic decisions.

Robust shareholder engagement has become, and will continue to be, an important part of the corporate governance landscape in 2014 and beyond.

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Mr. Simpson's European M&A assignments have included representing AAR in the $56 billion sale of TNK-BP to Rosneft; Outokumpu in a business combination involving the $3.5 billion acquisition of Germany's ThyssenKrupp's stainless steel unit; Colfax Corporation in its $2.4 billion acquisition of Charter International plc; Fresenius SE, in its agreement to acquire APP Pharmaceuticals Inc for $5.6 billion; Basell Polyolefins in its $22.2 billion acquisition of Lyondell Chemical Company; International Paper in its acquisition of a 50 per cent equity interest in Ilim Holding; and Tele Atlas N.V. in connection with an agreed takeover proposal from TomTom N.V. and an unsolicited takeover proposal from Garmin Ltd.

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Lorenzo Corte concentrates in cross-border mergers and acquisitions, including contested takeovers, private sales and acquisitions, and joint ventures. His M&A assignments included acting for: Assicurazioni Generali in connection with its $3.3 billion acquisition of the stake in its joint venture with PPF Group it did not already own; Altimo in connection with its acquisition of $3.6 billion of shares in VimpelCom from the Sawiris family and, previously, Vimpelcom Limited's $7 billion acquisition of the assets of Weather Investments S.p.A.; Alpha Bank A.E., in connection with its proposed, but terminated, merger with EFG Eurobank A.E.; Portugal Telecom SGPS SA in the $9.8 billion acquisition by Telefónica S.A. (Spain) of Portugal Telecom's 50 per cent stake in Vivo Participacoes S.A. (Brazil); and Arcelor in its defense against an unsolicited $22.8 billion bid from Mittal Steel Company NV and in their subsequent $33.8 billion merger.

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Skadden has one of the leading M&A practices in the world and has developed a first-rank mergers and acquisitions capability in Europe over 20 years with a focus on complex, cross-border transactions. We have significant and unique experience in structuring and executing challenging transactions throughout our network of European offices.

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