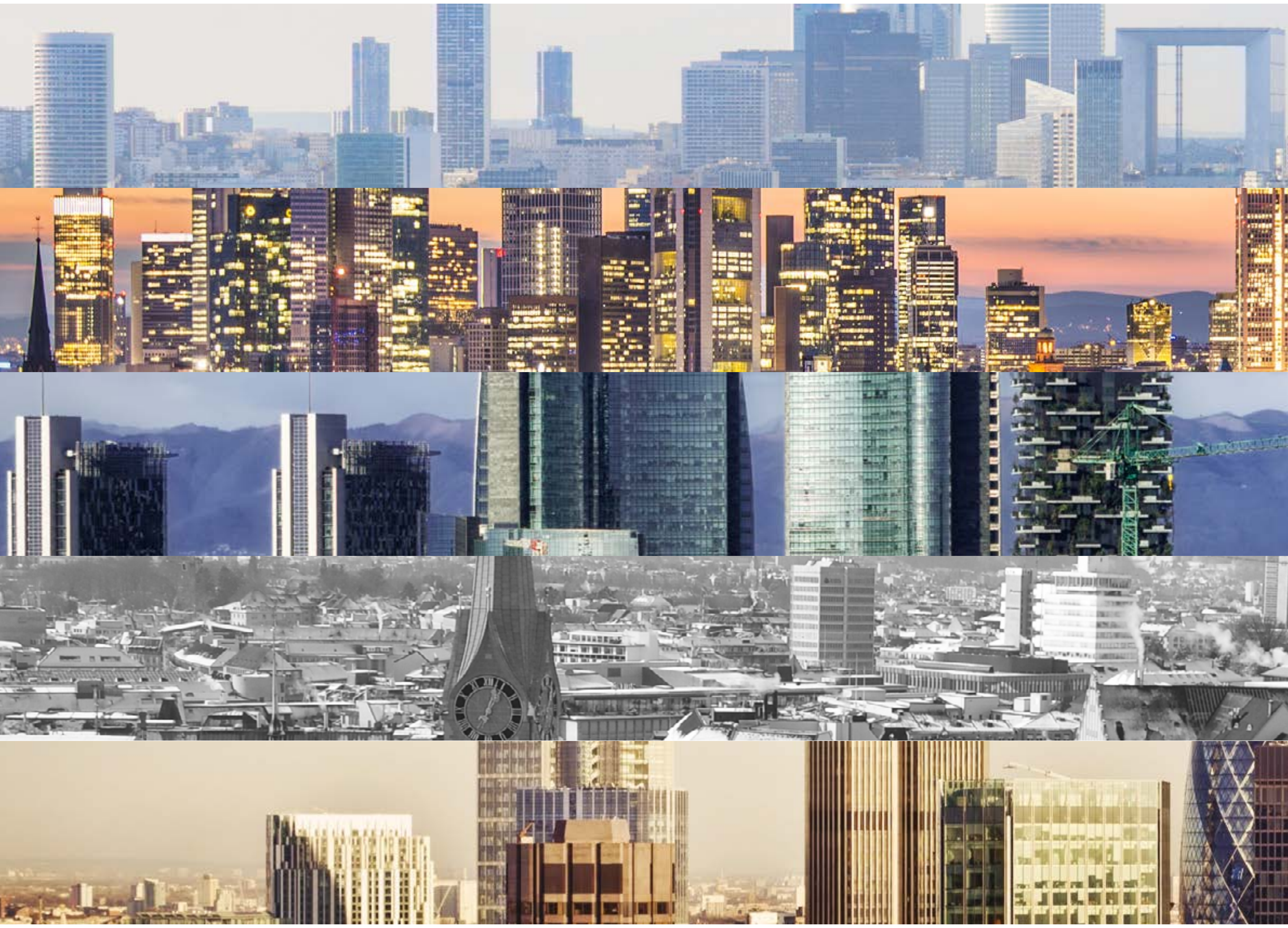
ACTIVIST INVESTING IN EUROPE

2019



Activist Insight

Skadden

THE TEAM

SKADDEN is a global leader among law firms involved in mergers and acquisitions and other corporate transactions, and a top adviser for clients on corporate governance, takeover preparedness, contests for corporate control, proxy fights, and other forms of shareholder activism. We provide clients with an integrated team from different areas of law, including attorneys from our M&A, corporate governance, and litigation practices. Our diversity of experience helps clients address the full spectrum of issues presented by activists and is key to helping our clients prepare for and respond to activist shareholders advocating strategic, financial, or structural changes.

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ACTIVISM IN EUROPE

Josh Black, Activist Insight.

At first glance, activist investing looks to have taken a backward step in Europe. Only 117 Europe-headquartered companies had been publicly subjected to activist demands in the first three quarters of 2019, according to *Activist Insight Online*, compared to 134 in the same period in 2018.
Yet that would be a major simplification. While peripheral countries have witnessed less public activism, multibillion-dollar investments have been announced regularly enough for a sense of "business as usual" to take hold. Moreover, the five countries covered in depth by this report accounted for 81 of the companies publicly subjected to activist demands in 2019. That is the second-highest absolute number at the end of the third quarter and the greatest concentration since 2013. A record year in the U.K., major focus on Germany by Elliott Management, and contentious M&A across the continent ensured that activism was again a major theme in public markets.

Influence at a discount

Activists aren't winning every battle. However, given the great variety in their campaigns – some informed by the U.S. experience, others more locally flavored – the level of sophistication has clearly increased.

Consider Panalpina World Transport, where Cevian Capital ran its first ever proxy solicitation and cleverly cornered the company's largest shareholder to allow a takeover to proceed, or Elliott's lengthy position papers on its German investments. Such tactics have allowed management teams to retain ultimate responsibility for the businesses under their control but expanded the role of shareholders to include issues of strategic importance.

At Barclays, a proxy fight waged by Sherborne Investors spluttered at times but ultimately gave investors a clearer insight into the British high street champion's investment bank and forced CEO Jes Staley to promise improvements that have started to become visible. At FirstGroup, Coast Capital was defeated but many of its best suggestions were coopted by the board.

No deal

Europe's markets retain their idiosyncrasies but opposition to M&A has been a common theme across most of the major ones, as well as in the U.S. since the tail-end of 2018. In Europe as a whole this year, opposition to deals accounted for 9% of all demands, compared to an average of 6% since the beginning of 2013. Levels were much higher in some markets – one-quarter of this year's demands in Switzerland, and 12% in the U.K.

Whether activists continue to oppose M&A into 2020 likely depends on who the acquirers are. Activists have tapped into dissatisfaction with acquisitive companies, based either on performance or the cost of capital required to complete deals. By contrast, many activists privately point to private equity's large supply of dry powder and the potential for public-to-private or carve-out transactions as a source of future profits. Companies that combine businesses with a poor strategic fit or limited exposure to the trade disruptions of either Brexit or U.S. tariffs may make for attractive targets. A slight dip in the proportion of large-cap ($10 billion and up) targets and focus on the $2 billion to $10 billion section of the market in 2019 may be an indication of this. Merlin Entertainments, which sold itself under pressure from ValueAct Capital Partners, could be an early example of what is to come. Ferguson, which has yet to outline exactly how it plans to split itself in two under pressure from Trian Partners, may be another.

Getting on board

Board representation – one of the more common public demands advanced by activists, albeit sometimes as a means to other ends – has ebbed a little in French and Swiss markets and grown in importance in U.K. and German ones. Italy remains a unique case thanks to its "voto di lista" system, which guarantees minority shareholders representation. Thanks to this system, activists in Italy have won 121 seats since 2013 – just shy of the 127 board seats won in the U.K., according to data from *Activist Insight Online*.

“While some trends may plausibly extend into 2020, much depends on the economic outlook.”

A record number of proxy contests and strong upward trend in settlements in the U.K. is particularly notable. However, Pelham Capital’s successful nomination of Christoph Brand at Scout24, as well as a victory for Othello Vier at Lotto24, stood out in Germany. Just a few years ago, activists winning board seats there would have been near-unthinkable.

The road ahead

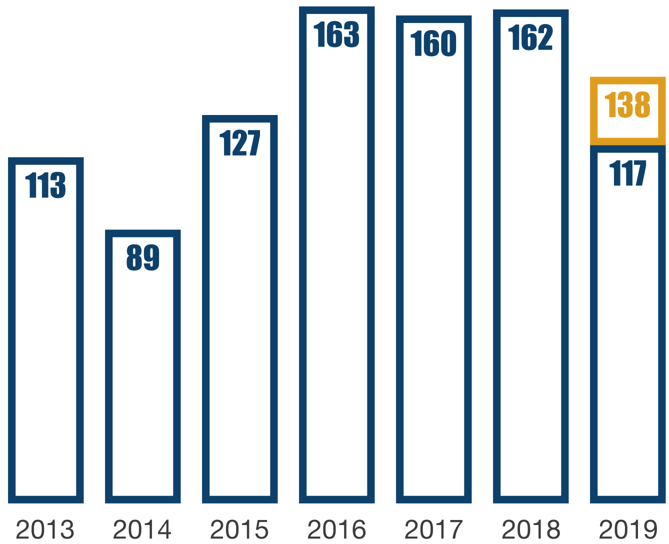
While some trends may plausibly extend into 2020, much depends on the economic outlook. European central banks are looking to artificially increase liquidity, while the U.K. is suffering from a triple whammy of Brexit uncertainty, reduced coverage of smaller companies by sell-side analysts thanks to European directive MiFID II, and the gating of Woodford Investment funds. That provides opportunities for bargains but only for so long. If conditions turn more decidedly negative that could catch up with shareholders.

Continued focus on Germany seems particularly likely. Recent years have apparently unlocked some of the cultural reservations around activism; seeing a company like ThyssenKrupp struggle through successive bosses indicates the hard work ahead. Even so, for activism to take root the market will have to grow beyond Elliott and Cevian.

In France, the picture is murkier thanks to strong government antipathy to activism. That will undoubtedly encourage companies to employ stiffer defenses in some cases, although it is notable that Pernod Ricard has not. In any case, established players such as CIAM and Amber Capital will likely ensure that there is at least some presence in years to come.

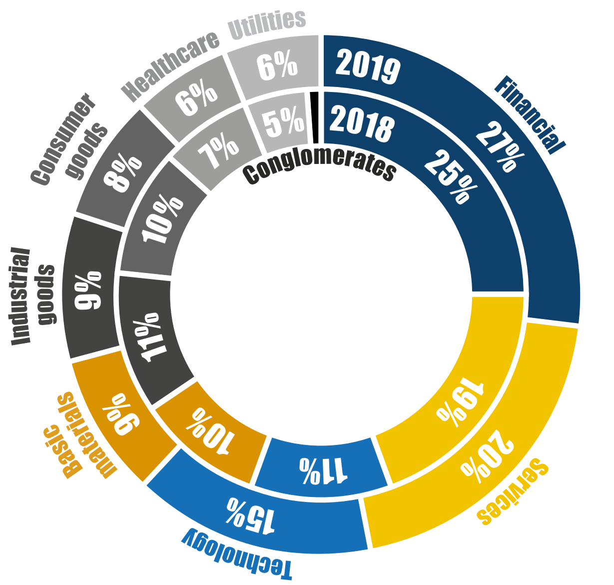
U.S. funds who make ventures into Europe have tended to repeat their incursions once they establish the lie of the land. Others that have yet to make investments have been prowling for opportunities. Thanks to MiFID II and the revised Shareholder Rights Directive, the opportunity set within the European Union is likely to remain a viable proposition.

EUROPEAN TARGETS BY YEAR



Number of Europe-based companies publicly subjected to activist demands. 2019 data as of Sep 30. Figure in yellow box is a 2019 full-year projection.

EUROPEAN TARGETS BY SECTOR



Sector breakdown of Europe-based companies publicly subjected to activist demands between Jan 1, 2018 and Sep 30, 2018, and Jan 1, 2019 and Sep 30, 2019.
Note: Rounding may lead to summation errors.

COUNTRY PROFILE

UNITED KINGDOM

Elana Duré, Activist Insight.

Activism has increased substantially in the U.K. in 2019. Forty-seven U.K.-based companies were publicly subjected to activist demands as of September 30, up from 41 during the same period last year.

Experts interviewed by Activist Insight for this report attributed the increase to a flock of U.S.-based activists. Eleven U.K.-headquartered companies were publicly subjected to U.S. activist demands at the end of the third quarter, slightly down from 12 during the same period last year but up from three in the same period in 2017. Most recently, Nelson Peltz's Trian Partners pressured Ferguson to separate its U.S. and U.K. operations. The activist also reportedly wants the plumbing company to move its listing from London to New York.

Some say U.S.-based activists are attracted to the U.K. market because it offers fresh opportunities now that all the "low-hanging fruit" in the U.S. has been picked over. Others say it is an opportune time to invest in the U.K. because the political uncertainty surrounding Brexit has created a valuation gap.

"The U.K. is full of really good companies and I think historically the valuation may have been fully priced," said Cas Sydorowitz, Georgeson's global head of activism. "With the Brexit uncertainty, the political tumult is taking some valuation off the table."

"I think it'll continue so long as there is a dislocation of the pound," Michael Henson, a senior consultant with Kepler Communications, added, as the falling currency relative to the U.S. dollar makes U.K. shares particularly cheap. "It's an opportunity-rich environment."

Connected with that may be a rise in M&A activism. Activists have advanced 22 M&A demands at U.K. companies in the first three quarters of 2019, up from 14 during the same period in 2018. "I think M&A activism is going to be pervasive," Sydorowitz predicted. "I think that the same reason that U.K. companies are becoming targets of activists will also mean that U.K. companies are becoming targets of takeovers. And anytime there is a takeover, there is an opportunity for bumpitrage."

Headline grabbing M&A-related activism in 2019 included ValueAct Capital Partners' push to take Merlin Entertainments private and Cat Rock Capital's demand that Just Eat merge with an industry peer. Both demands resulted in transactions. Merlin sold itself to a Canadian pension fund and the family that owns the Lego brand. Just Eat is merging with Takeaway.com, although the deal has generated opposition from another activist, Eminence Capital, and a rival bid from Prosus.

Advisers were quick to warn that the common English language – though helpful – is not always enough for U.S. activists to win shareholder support in the U.K., however. Activists may want to "soften" their tactics and show they are in it for the long haul, SquareWell Partners' Louis Barbier told Activist Insight.

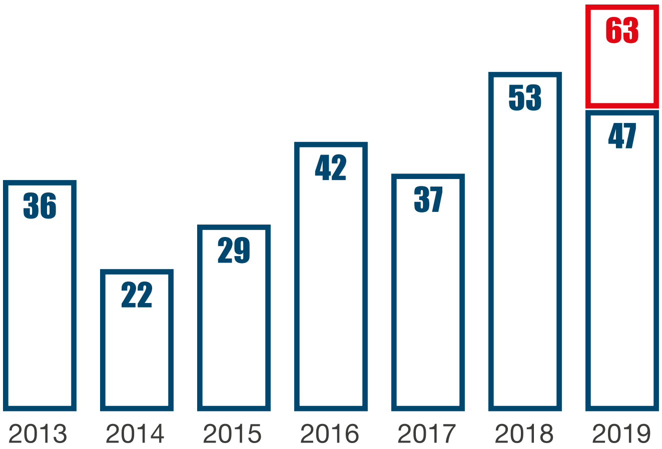
"Unwarranted aggressive activism is not respected and does not sit well amongst the U.K. asset management community," Sydorowitz added, noting that activists in the U.K. must show they have attempted to engage with management in a meaningful way before launching a campaign.

Sherborne Investors failed to convince other shareholders it deserved a seat on the board of Barclays in May; less than 13% of shareholders supported founder Edward Bramson at the annual meeting. The defeat has been ascribed to the activist not providing a detailed plan for improvement and Barclays' appointment of a new chairman, given U.K. shareholders like to give newcomers a chance to prove themselves.

Yet there were also victories. Coast Capital failed to replace six directors of FirstGroup at a special meeting, but saw its nominee appointed to the chairman role after Wolfhart Hauser resigned in response to the high level of shareholder discontent. In total, activists had won 23 seats at U.K.-based companies through votes and settlements by September 30.

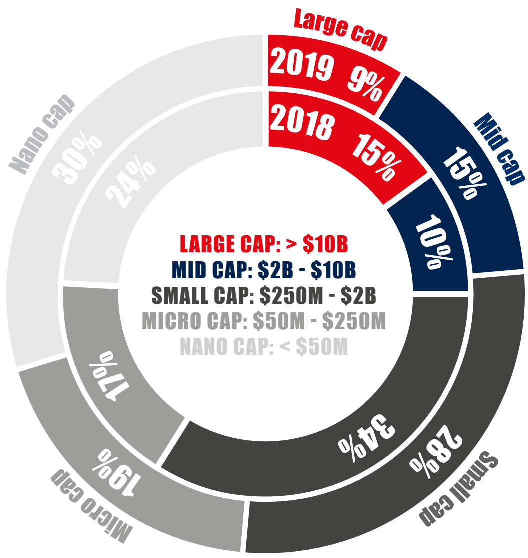
> **“Unwarranted aggressive activism is not respected and does not sit well amongst the U.K. asset management community.”**

U.K. targets by year



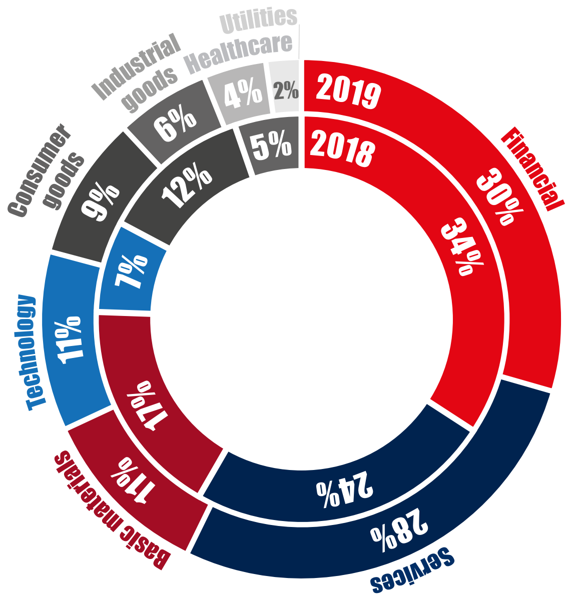
Number of U.K.-based companies publicly subjected to activist demands. 2019 data as of Sep 30. Figure in red box is a 2019 full-year projection.

U.K. targets by market cap



Market cap breakdown of U.K.-based companies publicly subjected to activist demands between Jan 1, 2018, and Sep 30, 2018, and Jan 1, 2019, and Sep 30, 2019.
Note: Rounding may lead to summation errors.

U.K. targets by sector



Sector breakdown of U.K.-based companies publicly subjected to activist demands between Jan 1, 2018, and Sep 30, 2018, and Jan 1, 2019, and Sep 30, 2019.
Note: Rounding may lead to summation errors.

51%

Proportion of resolved public activist demands made at U.K.-based companies in 2019* at least partially satisfied.

23

Number of board seats gained by activist nominees at U.K.-based companies in 2019*.

$5.5B

Capital deployed into U.K.-based activist campaigns by **Elliott Management** since 2014.

*Q1-Q3 2019

LEGAL ANALYSIS

UNITED KINGDOM

Scott Hopkins, Skadden.

As the impending prospect of Brexit (with or without a deal) looms, activist investors continue to take advantage of an increasingly receptive market. Although the number of campaigns has declined slightly across Europe compared to the near-record volumes in 2018, Europe has accounted for between 15% and 19% of the global total of companies publicly subjected to activist demands since 2013, according to *Activist Insight Online* data, and the U.K. has accounted for a larger share of these campaigns in 2019 to date (40%) than in the same period in 2018 (31%).

Activists continue to prioritize catalyzing change at companies at the board level, but as in 2018, this approach has had mixed success. Sherborne Investors' long-standing campaign at Barclays to appoint founder Edward Bramson to the board and convince shareholders that Barclays should focus on its retail arm and drastically shrink its underperforming investment arm was heavily defeated at the annual meeting.

Other campaigns that were defeated by shareholders have been met with compromise. In May, Coast Capital launched a proxy fight at FirstGroup to replace six of the company's 11 directors, including the CEO. The relationship between the company and its investor quickly soured when FirstGroup took the surprising step of banning Coast Capital from its full-year results meeting, despite Coast Capital's 9.7% stake in the company. In June, shareholders sided with the company and voted against Coast Capital's proposals. However, two board members who only received a narrow majority of shareholder support subsequently agreed to step down, and FirstGroup appointed Coast Capital's proposed chairman.

In February, Hammerson settled with Elliott Management and agreed to appoint two independent directors and establish a new investment and disposal committee to help implement the company's aggressive divestment strategy.

In line with a wider global trend, M&A remains a key focus in the U.K as activists seek to leverage transactions as opportunities to generate value. In June, Merlin Entertainments agreed to be taken private by a consortium of investors following private and then public entreaties from its second-largest shareholder, ValueAct Capital Partners. This was an unusual move from ValueAct, which has typically favored private discussions, and shows activists may use unfamiliar tactics if the right opportunity presents itself.

Corporate governance issues have taken more of a back seat in 2019 but will continue to be a key driver of shareholder activism, particularly director remuneration. A recent Deloitte report showed that the average CEO pay at FTSE 100 companies has fallen to its lowest level in five years (3.4 million pounds) as a result of investor pressure, and a number of companies have suffered notable defeats, including Standard Chartered, Ocado, and Standard Life Aberdeen. Although Barclays managed to defeat Sherborne, 30% of its shareholders simultaneously voiced concerns over CEO Jes Staley's pension and bonus arrangements in an annual vote. Similarly, Stagecoach will be bracing itself for shareholder criticism after influential shareholder advisory firm Institutional Shareholder Services (ISS) issued a "red top" alert that the company's bonus awards seemed "inappropriate" in light of its performance.

In August, Burford Capital's share price went into freefall after Muddy Waters Research published a series of reports (including one compiled by ex-CIA operatives) claiming that Burford had been egregiously misrepresenting its returns to investors. The report also criticized Burford's corporate governance practices and the suitability of its AIM listing. In response, Burford confirmed that its chief financial officer would be replaced, two new independent directors would join the board, and an additional listing in the U.S. would be sought to help bolster investor confidence in the company's governance.

Finally, it is worth noting that environmental, social, and governance (ESG) issues continue to be prominent both in the news and amongst investors, and companies should be very much aware that activists may use such issues as levers to pressure a target company or sway other shareholders. We will see the first reporting under the U.K.'s new Corporate Governance Code in 2020, and it will be interesting to see how companies address the Code's revised principles, which include a focus on company culture and their contribution to wider society.

“Statistics do not show that collective engagement is reducing the amount of public activism.”

An interview with Scott Hopkins.

Has private or public activist activity increased in the past year?

The steady increase in activist activity in the U.K. in recent years looks set to continue, despite a slight decline across Europe compared to 2018. The number of U.K. companies publicly subjected to activist campaigns in the first three quarters of 2019 increased by 15% compared to the same period in 2018, enlarging the U.K.’s share of companies targeted worldwide.

Is collective engagement reducing the amount of public activism?

The notion of “collective engagement” is much more advanced in the U.K. than in the rest of Europe. The Investor Forum, in particular, has been instrumental in facilitating dialogue between institutional investors and companies. Statistics do not show that collective engagement is reducing the amount of public activism, but rather that activists have now figured out a way of operating within the U.K. that differs slightly from their U.S. methods. We have seen a better understanding of campaign tactics by U.K. investors and a greater willingness on the part of investors to vote against the board.

Should companies be worried about an increase in campaigns from U.S. activists?

It is increasingly important for companies to be cognizant of, and well-prepared for, activist campaigns, whether instigated by U.S. activists or others. Headlines provoked by rising U.S. activist attention provide an obvious reminder of this fact, and directors of U.K. companies are increasingly mindful of the potential threat this poses. Activism and, more broadly, shareholder engagement are now fundamental parts of the U.K. market, and companies are expected to be in constant dialogue with investors and other stakeholders.

What corporate governance issues should companies be most aware of?

Remuneration and environmental, social, and governance (ESG) issues are in the spotlight, with many companies facing contested shareholder votes on such matters. The impact of high-profile pressure and lower levels of shareholder support (with around one-in-six FTSE 250 companies suffering low votes on their annual remuneration report) has had a particularly demonstrable effect, with CEO pay amongst FTSE 100 companies at its lowest level in five years. While climate-related pressure is widespread, we believe the social in ESG is likely to attract increasing attention.

Why have activists struggled to win proxy fights? Is this comforting for issuers?

The outcome of proxy fights is not necessarily indicative of a lack of activist-induced change within companies due to the softer options available, including private negotiations and settlement. This is most clearly demonstrated by the fact that prominent activist situations have settled without a fight. Uncertainty caused by recent geopolitical tensions may have increased companies’ willingness to resort to settlement, while indications that activists are struggling to create value against benchmark indices in the U.K. may have encouraged a change of tack.

Do companies have adequate remedies against activist short sellers?

Despite EU-wide regulation requiring the disclosure of short selling, the number and impact of short positions can be difficult to gauge. A recent European Securities and Markets Authority study shows that many investors avoid crossing the public disclosure threshold in order to keep their strategies under the radar. In the U.K., the Financial Conduct Authority does have broad powers to address adverse events that pose a serious threat to financial stability or market confidence; however, it does not currently have any short selling restrictions in place. In the event of a short attack, companies should respond quickly and effectively to rebut the short seller’s arguments and proactively engage with investors to gauge if the attack is gaining traction.

ESG ACTIVISM: A NEW PARADIGM

Cas Sydorowitz, Global Head of Activism at Georgeson.

Shareholder activism is simple in some respects; it originates from one or more shareholders that want to initiate change that will create economic value either by increasing the share price or by returning cash to investors. The activist needs to convince other shareholders and proxy advisers to buy into its value creation plan and vote for its proposals.

In the emerging world of environmental, social, and governance (ESG) activism, things are less clear. It is not obvious who the beneficiaries are and how many shares they speak for. Their objectives can be at odds with shareholders whose primary focus is return on investment. With ESG activism, the stakeholders are far more diverse and less obvious.

As climate change takes a more prominent place in politics and corporate discussions, the media has focused first on global school strikes, giant personalities such as Greta Thunberg who speak out against politicians in strong, forceful language, and the Extinction Rebellion protests.

ESG activists follow a similarly offensive approach. Their tools are not investor slide decks or shareholder letters. Instead they use images of glaciers breaking off and sea life getting wrapped up in islands of plastic. Rising global temperatures and extreme weather patterns have hence caught the attention of decision makers within corporates and politics and importantly within the asset management industry.

Politicians are looking at what they should be doing from a regulatory perspective on what companies should be disclosing in terms of key metrics on carbon emissions, environmental impact analysis, and material ES risks to businesses. Companies are responding to countless surveys from ESG rating agencies or indices trying to figure out which ones are relevant. These questionnaires take a huge investment in time, so companies have to prioritize which ones they respond to.

Concurrently, there is an ESG gold rush with investors, NGOs, and activists all looking to capture a piece of the new or additional money flowing into ESG-focused products. Investors do not need to have their own ESG products but the man in the street is looking at their money managers to take a stance on key issues and get involved in campaigns initiated by various NGOs, such as Unfriend Coal or Climate Action 100+. This is a growing field that companies need to be aware of because these organizations don't own shares themselves, but recruit the largest institutional investors to support their initiatives formally or informally. Signatories to the UN Principles for Responsbile Investment are being called out for not supporting environmental resolutions.

Climate Action 100+, for example, is targeting the 100 largest carbon emitters to push them to improve their disclosure and take action to reduce greenhouse gas emissions across their value chain. Unfriend Coal wants insurers to stop covering companies involved in coal extraction and coal-powered thermal power plants. Both organizations recruit institutional investors to sign up and engage with companies to push their agendas. The pressure comes not only from the shareholders that back them but the publicity they create as part of their social mission.

Traditional activists are getting involved in ESG-focused products, with firms such as ValueAct Capital Partners and Jana Partners creating ESG products to attract more of the investible universe. Jana and ValueAct have hired experienced portfolio managers to demonstrate their commitment to ESG investments.

It is getting more complicated for companies, with pressure coming from a more diverse universe of stakeholders. With pressure groups using shareholders, the media, and the public to push for change, it is increasingly difficult to stay on top of the times. Shareholders are only one stakeholder, one whose influence seems to be waning in the growing theater of ESG activism.

"With ESG activism, the stakeholders are far more diverse and less obvious."

Cas Sydorowitz
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COUNTRY PROFILE

FRANCE

Eleanor O'Donnell, Activist Insight.

The number of France-based companies targeted by activists is on course to hit a record number in 2019, after meeting or exceeding 2017's and 2018's full-year totals. Ten French companies were publicly subjected to activist demands year-by the end of September, compared to only seven in the same period last year, making France the third-busiest country for activism in Europe this year after the U.K. and Germany.

Increasing activity recently pushed the Finance Commission of the French National Assembly to publish a report recommending reforms to securities markets regulations regarding shareholder activism and market transparency. One recommendation is to reduce the threshold for disclosure of equity ownership from 5% to 3%, while another is for heightened regulation of short trading.

Although activism is increasing in France, Amber Capital Managing Partner Joseph Oughourlian told Activist Insight that it is still limited compared to the U.S. and the U.K. due to a significant information advantage for corporates when it comes to identifying their entire shareholder structure. "Moreover, corporates spend a lot of money to defend themselves against activist campaigns, and it is their shareholders who are bearing all these expenses," he said.

"In most of the activist situations we get involved in, corporate governance is dysfunctional, with the board of directors or supervisory board not fulfilling their duties," Oughourlian added. "We need more engaged board members who challenge management even if this is not well perceived within boardrooms."

Among the new campaigns are some high-profile situations, notably Elliott Management at spirits producer Pernod Ricard. In December 2018, Elliott disclosed a 2.5% stake in the company and expressed concerns about the Ricard family's influence and the lack of board independence. Since then, the board has appointed two new directors, announced a 1-billion-euro share repurchase program, and considered selling its wine division.

Edouard Dubois, a partner at SquareWell Partners, told Activist Insight that Elliott's involvement at Pernod has been a wake-up call for French companies. According to Dubois, more shareholders are now recognizing activism as a strong market force. Campaigns have become frequent as a result. "More and more shareholders are supporting them because they agree with their concerns," he noted.

Paris and London-based CIAM co-founder Catherine Berjal echoed Dubois' sentiment, adding that corporations have been reluctant to recognize activism but are starting to realize that they have to start making changes. "Six years ago, it was shameful to be an activist in France but today it is becoming more natural," she commented. "Corporations and politicians have begun to understand that we are here, and we don't intend to stop what we have begun."

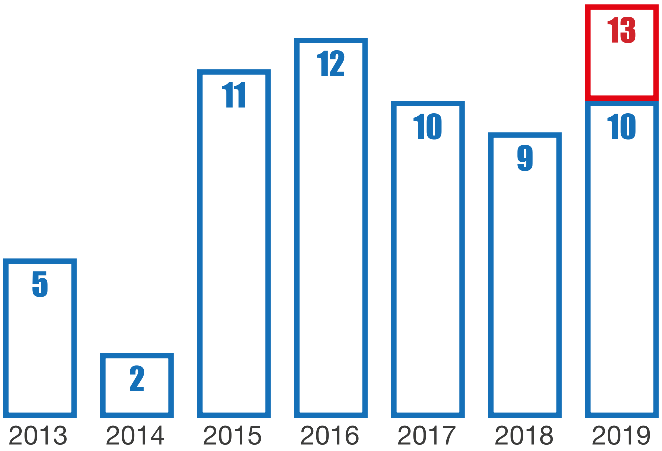
The increase in activism has been complemented by an increase in non-traditional activists speaking up. According to Dubois, "That's very new. In the past it was unusual to see traditional investors go public with demands and speak to other shareholders to get their support." In May, a group of institutional investors led by Comgest and PhiTrust failed in its attempt to place two nominees on the board of EssilorLuxottica in an effort to break the firm's governance deadlock.

The nominees were put forward after the leaders of Essilor and Luxottica failed to agree on the next CEO, each holding eight seats in the merged company formed late last year. Despite the institutional investors' defeat in a proxy contest, Third Point Partners has since begun pushing for governance changes to end the power struggle at the company.

Dubois says French companies need to think more long-term regarding strategy and engage regularly with long-term shareholders. "The solution for companies is not to start thinking like short-term investors. They need to engage with long-term shareholders as partners, as they can provide support in the face of an activist." The adviser explained that environmental, social, and governance hooks are good angles of attack for an activist, as they can garner the support of institutional investors if companies have not already built a relationship with their shareholders.

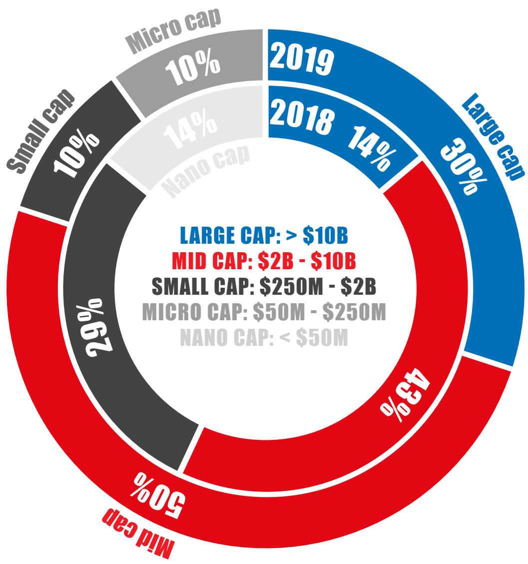
“Six years ago, it was shameful to be an activist in France but today it is becoming more natural. Corporations and politicians have begun to understand that we are here, and we don’t intend to stop what we have begun.”

FRENCH TARGETS BY YEAR



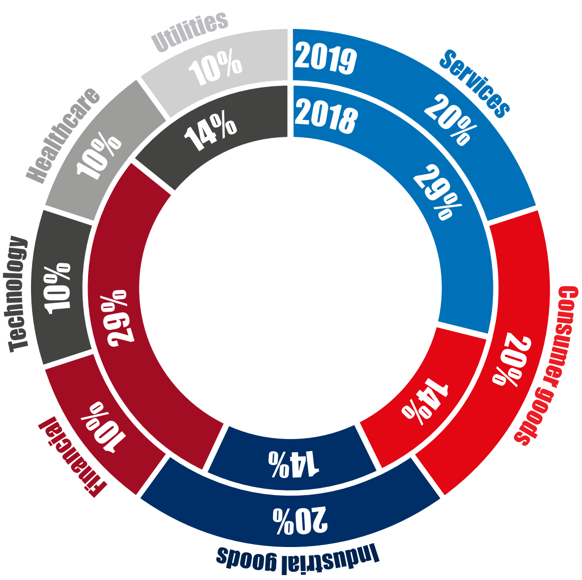
Number of France-based companies publicly subjected to activist demands. 2019 data as of Sep 30, 2019. Figure in red box is a 2019 full-year projection.

FRENCH TARGETS BY MARKET CAP



Market cap breakdown of France-based companies publicly subjected to activist demands between Jan 1, 2018, and Sep 30, 2018, and Jan 1, 2019, and Sep 30, 2019.
Note: Rounding may lead to summation errors.

FRENCH TARGETS BY SECTOR



Sector breakdown of France-based companies publicly subjected to activist demands between Jan 1, 2018, and Sep 30, 2018, and Jan 1, 2019, and Sep 30, 2019.
Note: Rounding may lead to summation errors.

13%

Proportion of resolved public activist demands made at France-based companies in 2019* at least partially satisfied.

0

Number of board seats gained by activist nominees at France-based companies in 2019*.

$1.6B

Capital deployed into France-based activist campaigns by **Southeastern Asset Management** since 2014.

*Q1-Q3 2019

LEGAL ANALYSIS

FRANCE

Armand Grumberg and François Barrière, Skadden.

Activist campaigns in France have returned to past levels after a slower 2018, according to *Activist Insight Online*. There have been 10 companies publicly subjected to activist demands as of the end of September, including a campaign launched by Amber Capital at Suez and CIAM's opposition to the potential merger between Renault and Fiat Chrysler. Although activist campaigns have increased, many have not been successful, including the campaign launched by CIAM at Scor. In addition, recent legislation may create headwinds for activism in France.

PACTE Act: The May 22 Act No. 2019-486, relating to the growth and the transformation of companies (the PACTE Act) reduced the squeeze-out threshold for listed companies to 90%, from 95% previously, aligning it with the existing threshold in 23 EU countries.

In addition to the modification of the threshold level, the PACTE Act modifies prima facie the computation of the threshold. It replaces the terms "95% of the share capital or voting rights" with "90% of the share capital and voting rights," which appears to add an additional requirement to cumulate the capital and voting rights. In reality, however, this amendment is simply proscribing the Financial Markets Council's (CMF) position, which has also been applied by its successor, the Financial Markets Authority. The CMF has considered, in its decision regarding Sté GLM, dated July 29, 1999, that the 95% threshold should be computed with respect to both the share capital and voting rights.

The reduction of the squeeze-out threshold should in principle limit purely opportunistic shareholder engagement, where the sole purpose is to block the squeeze-out in order to negotiate better financial terms for the relevant transaction; indeed, such an engagement would be more costly (requiring an acquisition of a 10% stake instead of a mere 5%), and thus more risky. It should also result in the launching of more public takeover offers, as there will be a higher probability of achieving a squeeze-out.

As a matter of illustration, in the past, Elliott Management managed to block the squeeze-out of XPO Logistics Europe (formerly known as Norbert Dentressangle). Indeed, XPO Logistics acquired an 86.2% stake in XPO Logistics Europe in 2015, and attempted to reach the 95% threshold to request a squeeze-out, but was prevented from doing so by the 7.9% stake held by Elliott Management in XPO Logistics Europe. Apparently, Elliott Management does not intend to sell its shares and still appears to be active in the company (most recently, it submitted a proposal for consideration of the appointment of a new member of the board). The lowering of the threshold could potentially allow XPO Logistics to finally launch a squeeze-out.

In addition, the PACTE Act also implemented in France the EU Directive 2017/828 of May 17, 2017, adopted in order to reconcile shareholders' rights and efficient corporate governance by transposing, among others, the following into French law:

Approval of the remuneration policy for directors by shareholders and preparation of an annual remuneration report: This should result in increased transparency and should thus abate public demands or resolutions by activists regarding executive pay. Such demands are quite common in activist campaigns, either to oust the directors or as a mere political move to disrupt the governance of companies.

Enhanced transparency of proxy advisers: Proxy advisers will now be under an obligation to publish their code of conduct and the relevant feedback regarding its implementation, applying a "comply or explain" principle.

Woerth Report: In October 2019, the Committee on Finance and General Economy of the French National Assembly issued a public report (the so-called Woerth Report) with respect to shareholder activism, which recommends increasing the supervision of short selling and securities lending by increasing the transparency requirements (e.g. lowering the first ownership declaration threshold from 5% to 3%, or including additional debt securities to determine whether thresholds are crossed), granting additional emergency powers to the French Financial Market Authority, and authorizing listed companies to make certain disclosures even during blackout periods.

"Although activist campaigns are at joint-record levels, most have not been successful."

An interview with Armand Grumberg and François Barrière.

Has private or public activist activity increased in the past year?

The number of companies publicly subjected to activist demands has strongly increased in France after falling in 2018. To the best of our knowledge, private activist activity has also increased in 2019. Activism is expected to remain at the same (high) level or even increase. Although activist campaigns are at joint-record levels, most have not been successful, including the campaign launched by CIAM on Scor, or the attempts of PhiTrust, Sycomore Partners, and Valoptec Association to gain board representation at EssilorLuxottica.

Can activism thrive despite the hostility of the government?

Although the PACTE Act implements provisions which aim — to some extent — to prevent shareholder activism, activists continue to use legal rights granted to shareholders in order to implement their campaigns. Legislation can provide companies with increased transparency and thus help prevent campaigns from gaining the support of other shareholders, but it can hardly prevent the launching of activist campaigns altogether. The Committee on Finance and General Economy of the French National Assembly issued a report (the so-called Woerth Report) with respect to shareholder activism in October 2019, containing certain recommendations and underlining that – while it is healthy for shareholders to be active and engage in a strategic dialogue with listed companies – such engagement may be excessive or even harmful in certain circumstances. As laws and regulations are adopted and corporate awareness grows, activist campaigns may become increasingly unsuccessful. This seems to be the trend over the past year: out of 15 public demands by activists this year, two have been successful.

What corporate governance issues should companies be most aware of?

The primary focus of shareholder activists in France has been to either remove the chairman/CEO or other board members, and/or to gain board representation. It is thus crucial for boards to be as transparent as possible with their shareholders about the governance of the company, including the role of board committees, and to communicate regularly with their shareholders in order to retain their support during general meetings.

Should companies considering participating in M&A be wary of activists?

In a large number of cases, activists build stakes in a company participating in an M&A transaction. Indeed, activists can negatively influence M&A transactions through various means, including public opposition to the relevant transaction or threatening to block a squeeze-out. This kind of shareholder engagement will now be prevented, in part, by the lowering of the threshold for a squeeze-out to 90%.

However, activists can still intervene earlier in the transaction and simply oppose its terms and/or gather the support of other shareholders. For instance, this year, Sterling Strategic Value opposed the takeover terms of Searchlight Capital Partners to acquire Latécoère, arguing that the offer did not reflect the growth opportunities of the company; CIAM released a letter sent to the board of Renault in June 2019 claiming it would strongly oppose Renault's contemplated merger with Fiat Chrysler; and Elliott Management has announced that it holds 9.5% of Altran's share capital and opposes Capgemini's takeover terms.

Has executive remuneration continued to be controversial?

Executive remuneration has been widely approved in the French-listed companies composing the CAC 40, even if the approval rate dropped to 82% from 90% last year. However, prominent activists have continued to criticize executive remuneration. For example, CIAM unsuccessfully urged shareholders to vote against the remuneration of Scor's CEO for 2018 (ex-post) and 2019 (ex-ante).

GOING LOCAL

How U.S. activists should adapt in Europe, by Andrew Honnor, founder and managing partner of Greenbrook Communications.

The stereotype is a familiar one: North American activists are noisy corporate raiders and their European counterparts are measured constructivists.

Though perhaps true at one point in the not-so distant past, this stereotype has run its course. Not only is the definition of what constitutes "activism" evolving, investors are increasingly adapting their approach to fit local markets, as several leading North American firms have demonstrated in the U.K., Europe, and Japan to great effect (ValueAct Capital Partners at Rolls-Royce Holdings, for example). Those less interested in abandoning their "one size fits all" approach have seen mixed success.

A common simplification of this localized adaptation is a general tempering of one's approach and striking of a more conciliatory tone. Though helpful to an extent, an inherent skepticism still exists of the "wolf in sheep's clothing." What then are the most important, practical nuances for North American funds to consider when investing across the pond?

An increasingly sophisticated market

North America is undoubtedly a more mature market for activism than Europe, where a burgeoning scene is still developing. Whilst European corporates were once hopelessly ill-prepared for an activist appearing on their shareholder register, this is changing. With more activity comes more advisers – Europe's activism defense market is growing, with investment banks setting up or expanding teams dedicated to this practice or, dare I say it, communications specialists emerging with significant experience of handling activist campaigns. More corporates are willing to pay for boutique advice and scenario planning to prepare for, and pre-empt, the possibility of a shareholder campaign.

North American funds expecting to simply blindside sleepy corporates as they perhaps once could should think again and plan accordingly.

New-found friends

The attitude of traditional long-only investors continues to evolve, some more so than others. Whereas many managers may have previously viewed the actions of North American activists as tiresome at best, today some are far more willing to publicly endorse campaigns, particularly if the intention is to push management teams into delivering improved performance.

U.K. fund manager M&G nominated its first ever dissident slate of directors to the board of Canadian chemicals company Methanex this year. Progressive managers such as Janus Henderson have also publicly backed activists' involvement, praising ValueAct for "shining a light" on Rolls-Royce's value. Others like them are increasingly open to hearing a fellow shareholder's views, which makes the European landscape more palatable for activist investing than ever before.

Freedom of the press

The European media has become more nuanced in its attitude toward activism. Investors from "over there" are no longer immediately painted in a negative light. Activists are forensic in pinpointing the weaknesses of a company, offering a viewpoint the media may often be willing to endorse. Commentators are increasingly open to hearing the evidence and giving a fair trial. Despite this, the subtleties are often still lost, particularly on the U.K.'s dogged tabloid press. North American investors should not always expect the benefit of the doubt – a thick skin is advised.

One must also consider the growing prevalence and sophistication of digital media, including the use of targeted social networks and search engine optimization, now an increasingly common component of European campaigns.

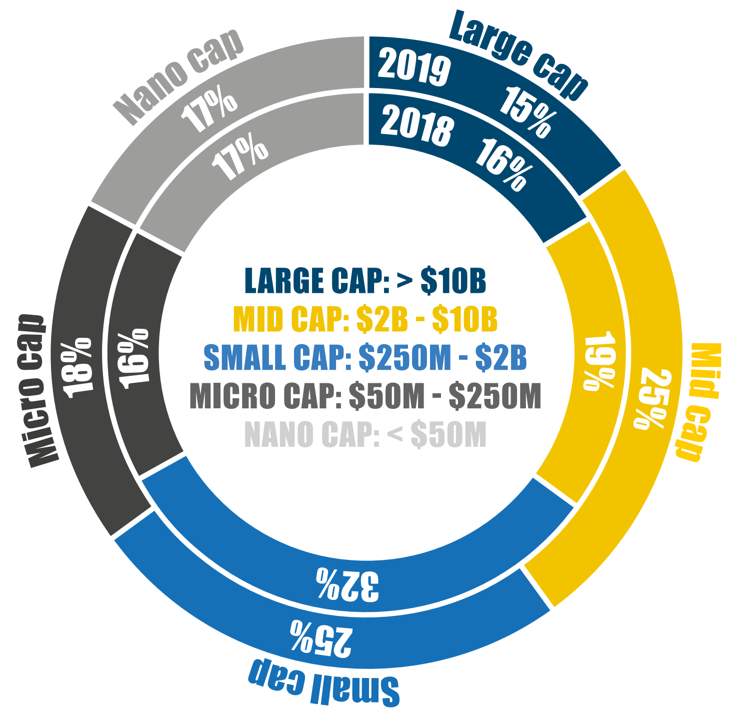
Specialist local advisers can help investors navigate these cultural nuances. My firm has advised on many of the most high-profile engaged shareholder campaigns in Europe over the last five years.

Though these local nuances require careful navigation by North American investors, there has undoubtedly never been such an abundance of attractive opportunities for engaged shareholders in Europe. As attitudes continue to mature, I am confident we will continue to see more U.S. investors enter the European market.

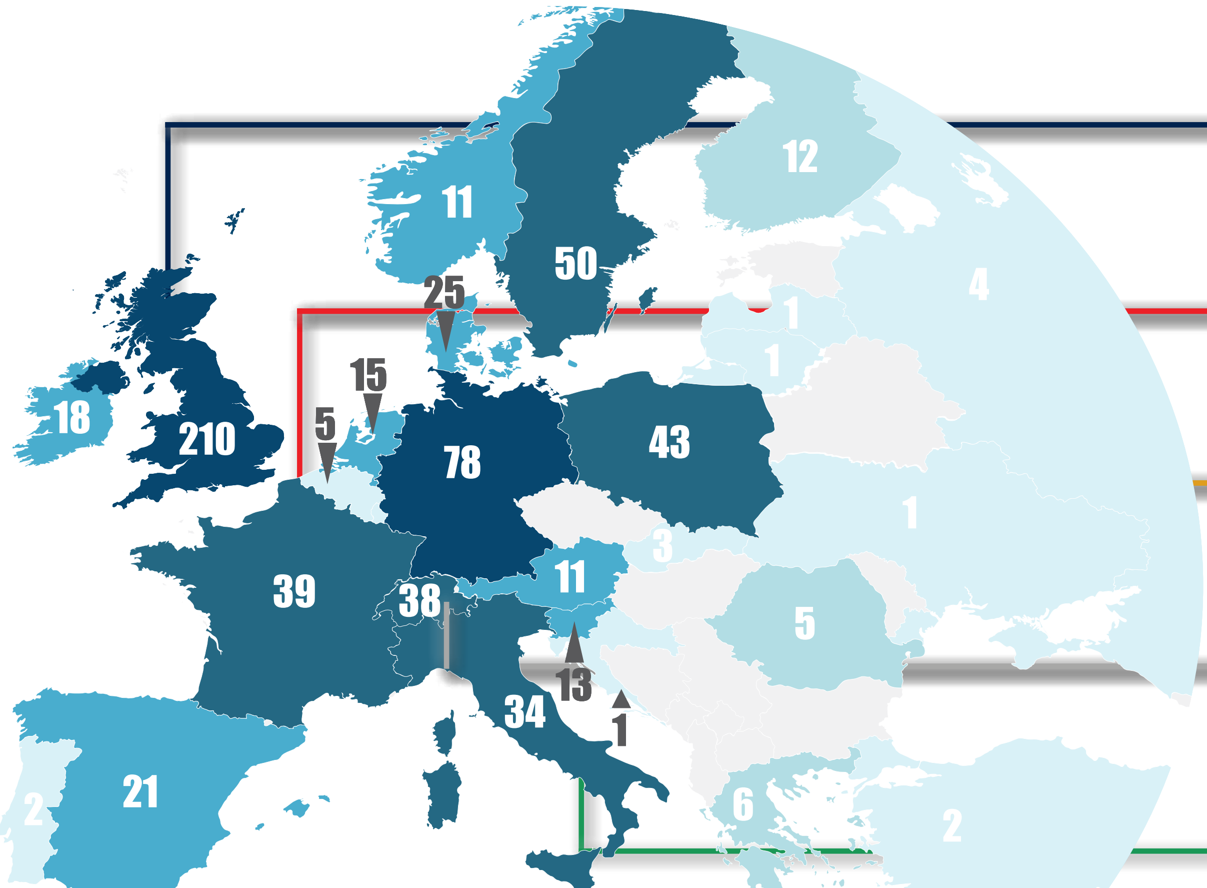
IN NUMBERS

ACTIVISM IN EUROPE

EUROPEAN TARGETS BY MARKET CAP



Market cap breakdown of Europe-based companies publicly subjected to activist demands between Jan 1, 2018 and Sep 30, 2018, and Jan 1, 2019 and Sep 30, 2019.



Number of companies publicly subjected to activist demands by company HQ location between Jan 1, 2013, and Sep 30, 2019.

KEY 2019 CAMPAIGNS

U.K.
Sherborne Investors at Barclays
ValueAct Capital Partners at Merlin Entertainment

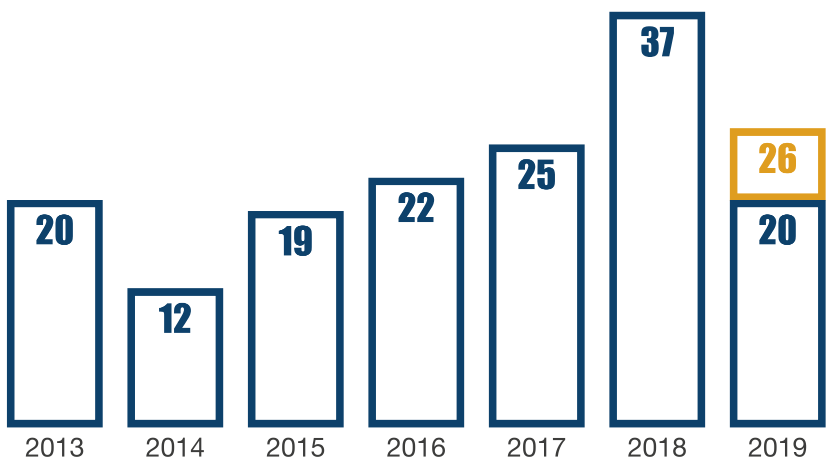
FRANCE
Elliott Management at Pernod Ricard
Amber Capital at Suez

GERMANY
Elliott Management at Bayer
Elliott Management at SAP

SWITZERLAND
Cevian Capital at Panalpina
Freenet at Sunrise Communications Group

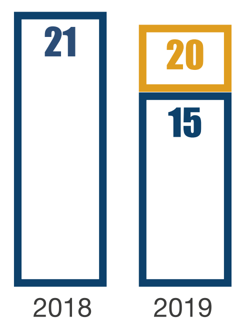
ITALY
Vivendi at Mediaset
Vivendi at Telecom Italia

EUROPEAN TARGETS OF U.S. ACTIVISTS



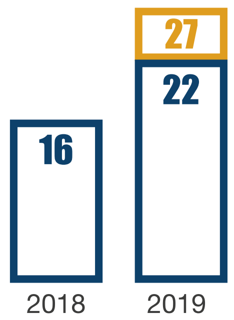
Number of Europe-based companies publicly subjected to activist demands by U.S.-based activists. 2019 data as of Sep 30, 2019. Figure in yellow box is a 2019 full-year projection.

SETTLEMENTS FOR BOARD SEATS IN EUROPE



Number of settlements for board seats at Europe-based companies. 2019 data as of Sep 30, 2019. Figure in yellow box is a 2019 full-year projection.

PROXY CONTESTS REACHING A VOTE IN EUROPE



Number of proxy contests that went to vote at Europe-based companies. 2019 data as of Sep 30, 2019. Figure in yellow box is a 2019 full-year projection.

ACTIVISM IN THE CORE EUROPEAN COUNTRIES

U.K.-, France-, Germany-, Italy-, and Switzerland-based companies publicly subjected to activist demands as a proportion of all Europe-based companies targeted. All data is Q1-Q3 each year.

A SYSTEMATIC SHIFT

Muir Paterson, Global Head, Shareholder Advisory Group, Citigroup.

What is driving the "globalization" of shareholder activism?

Looking back at history, shareholder activism has always been global and has been a persistent phenomenon since the early vestiges of the capital markets. Benjamin Graham (the "father" of value investing) was famous in the 1920s for waging a proxy fight against Northern Pipeline to return capital to shareholders, and more recent "pioneers" of activism (including Martin Ebner in EMEA, Carl Icahn in the U.S., and T. Boone Pickens in Asia) grew more prominent with the growth of global capital markets in the 1980s-2000s.

However, it is fair to note that the level of activism activity grew much faster in the U.S. after this period and levels of activity in other regions of the world have only recently started to catch up. One key factor was the relative growth of the U.S. capital market versus the rest of the world during this period; the U.S. share of the global market capitalization grew from 25% in 1990 to over 50% in 2018 (for comparison, Japan evolved from 40% share in 1990 to around 8% in 2018). Coupled with the fact that Europe and Asia had a higher proportion of controlled companies, there was naturally a greater volume of potentially actionable targets, and therefore market opportunity for activism, in the U.S.

Another key factor was the relatively limited right of shareholders to take action in the U.S., compared to Europe and Asia. Investors therefore needed to agitate publicly through shareholder proposals and proxy fights to bring U.S. corporate governance to closer parity with the rights of investors in other parts of the world.

Beyond the practical effect of these public campaigns "branding" the U.S. as the epicenter for activism, it was arguably this factor that led mainstream investors to be more supportive of activism earlier in the U.S. as investors recognized the need to press for change. For example, the formation of the Council of Institutional Investors (CII) in 1985 was an early foothold in this effort. In contrast, investors in other regions already had many of those shareholder rights and had evolved over time to be more used to private engagement with companies. As a result, investors in Europe may have been slower to support activism, but it is the more recent shift of investor sentiment and growing acceptance of activism in Europe that is now at the root of the re-globalization of activism.

What is driving the growing "acceptability" of activism?

Activists have been called many things over time, including "raiders" and "locusts," but since the governance scandals and financial crisis of 2008/9, phrases like "protectors of corporate governance" and "proponents of value" have slowly become more common for (some) activists. This shift of tone has been driven in an important way by a changing attitude among governments and regulators (both national and regional) that have started to question the historic environment of deference to corporate boards.

The development of national Stewardship Codes (e.g. U.K. - 2010) codified expectations that investors should be engaged and repositioned being "more active" as something that should be viewed as a positive shareholder force. While there are exceptions, and this change of tone is emerging at different speeds across Europe, the trend is clear.

A less visible, but equally important factor, has been the impact of the systemic shift (and flow of capital funds) from active to passive investment management. This shift has substantially intensified the focus of capital providers on fund fees and performance, creating real pressure for asset managers to focus on active solutions for underperforming investments. Increased engagement with companies, and the resultant scrutiny of performance, capital allocation, and strategic actions, has become an important part of many funds' value proposition. As investors are challenged for returns, they have become more willing to push for change and/or align themselves with an activist thesis or alternative strategies.

Encapsulating both these trends is also a systemic generational shift where many investors that have grown up as witness to high-profile corporate governance scandals, increasingly consider active engagement as part of their core mandate, resulting in further potential alignment with activism. An important practical effect of this growing support from mainstream investors is a reduction in the need for activists to rely on public pressure and attack campaigns to pursue change, and in some select situations, has even blurred the line between mainstream and activist investors.

How might the shift to passive investment affect shareholder activism?

As the flow of capital into activist funds has slowed recently and variations in performance have triggered some redemptions, the shift toward passive investment is likely to have more of an impact arguably on shareholder activism going forward than it has historically.

Growth in activism over the next 10 years will be influenced heavily by the changing attitudes (and composition) of the investor base toward more active engagement with companies. One notable effect of the shift to passive investment is greater concentration of public company ownership among a small handful of institutions, resulting in greater concentration of the proxy vote and thereby influence on director composition, strategy, and capital allocation. Another important effect will be a larger market podium from which index funds will be able to advance developments in corporate governance and policies related to sustainability, both of which have been core focal points for these funds historically.

Will activism continue to grow?

Although much of the activity occurs in private and activism occurs in different forms, we expect activism to ebb and flow with an underlying trend of increased active engagement. The fundamental shift of asset managers toward being more actively engaged with their portfolio companies and challenging decisions made by boards is a systemic shift that is here to stay.

We have touched earlier on many of the factors that have shaped and supported the growth of activism over the last few years and these trends are deeply rooted and arguably only in their early stages. Certainly, the focus and form of activism will continue to evolve, but companies in Europe (and the rest of the world) will have to continue to adapt their actions and approach in what will continue to become a more challenging investor marketplace within which to operate.

Citigroup | Shareholder Advisory Group

Thanks to its global reach combined with a strong and pluridisciplinary investment banking franchise, Citigroup is a key strategic partner to its clients and our bankers have advised in over 200 activism defense and contested M&A situations. Through our dedicated Shareholder Advisory Group, we employ a tailored and hands-on approach to anticipating, containing, and responding to activist or hostile/ unsolicited approaches. This includes a seamless integration across the full Citigroup global platform, including leveraging our leading sector coverage, M&A, and capital markets teams.

The Citigroup team has notable recent successes for our clients over the last 24 months, including advising on some of the largest and most complex M&A defense situations in Europe. As the M&A environment gets more challenging, Citigroup has extensive expertise and the capabilities to offer a full suite of solutions to its clients.

Defence

SCOR | Covea

- Citi acted as defence adviser to SCOR in relation to Covea's unsolicited approach
- SCOR remained independent after a high profile four-month public battle

Sellside + Defence

Shire | Takeda

- 2nd largest healthcare and 4th largest cross-border deal in history
- Shire shareholders got a 64% unaffected premium while retaining ~50% ownership
- Longstanding adviser to Shire, advising on ~$200B worth of deals in last six years

Defence

Smurfit Kappa | International Paper

- Successful defence assignment - Smurfit remained independent after a three-month pursuit and two proposals
- "Smurfit handled the situation perfectly throughout" - *The Sunday Business Post*

COUNTRY PROFILE
GERMANY

Josh Black, Activist Insight.

Elliott Management made a series of bold commitments to the German market over the last 12 months, including investing north of a billion euros in each of SAP and Bayer, and nearly 400 million euros in Scout24. That has helped raise the profile of activist investing in the country, according to Till Hufnagel of Petrus Advisers, a London-based activist that invests across Northern Europe.

“Not a day goes by when there isn’t a discussion of one of the larger targets in the press,” Hufnagel told Activist Insight in September. As a result, companies are starting to adopt a less resistant approach to activists, engaging at an earlier stage, he adds.

It has been a long-time coming. Elliott has only gone one calendar year without taking an activist position in a German company since at least 2011 and has a track record of pushing for breakups and higher consideration in takeovers.

Elliott’s campaigns have typically been run out of its London or New York offices, often depending on the target’s sector. There are no guarantees that those out of the U.K. will be gentler; after a failed sales process, Scout24’s CEO Tobias Hartmann received a long and stern letter telling him, “The past year was fraught with poor judgment and suboptimal communication.” In contrast, SAP received praise from Elliott’s New York-based partner, Jesse Cohn, for announcing share repurchases and steeper operating targets.

Elliott is far from the only activist to see Germany as an attractive place to invest. Sixteen German companies received public demands from 20 different activists in the first three quarters of 2019.

One reason Germany may be facing such high levels of activism is that the market has barely advanced in three years of heightened activism. Until recently, the Dax stock index was well below its 2017 peak, despite recent rallies, and with the exception of much-battered Deutsche Bank, companies have reacted cautiously. “Self-help, operating improvements will need to be accelerated” if the economy flatlines, says Hufnagel. “The opportunities have been there. People are starting to go after them.”

Klaus Röhrig, a partner at Luxemburg-based Active Ownership Capital (AOC), suggests successful activism in Germany requires that each side knows what to expect and understands the other. “To obtain the right balance of competencies and skills on the supervisory board, we must understand the company’s mission as well as its value-creation plan,” he told Activist Insight for this report. “AOC has a longstanding track record of following through on our commitments. This provides an excellent basis for finding common ground with all companies that we encounter.”

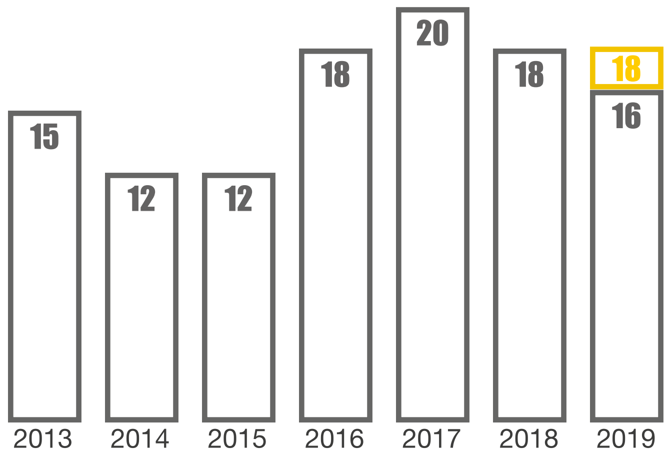
Recently, the only successful proxy contests have been where the activists held a more than 30% stake, as at Tele Columbus (despite opposition from hedge fund Alatus Capital) and Lotto24. And while a breakup is often the obvious answer, securing one is often beyond an activist’s capabilities. Efforts by Elliott and Cevian Capital to reshape ThyssenKrupp were hit first by concerns that the European Commission (a branch of the European Union) could block the merger of its steel unit with Tata Steel on antitrust grounds, and then union opposition to a special dividend.

Those hurdles came even after a change in the engineering company’s leadership. ThyssenKrupp is now planning to divest its elevator unit, reportedly drawing private equity interest, and sell some cash-burning businesses.

Meanwhile utility company Uniper finally overcame obstacles relating to its Russian assets to move forward with a takeover by Finland’s Fortum. Knight Vinke’s proposals to break Uniper in two were set aside at the annual meeting in May, while Elliott withdrew a proposal that Fortum should establish a domination agreement to consolidate power over Uniper. The activists sold their stakes to Fortum in October.

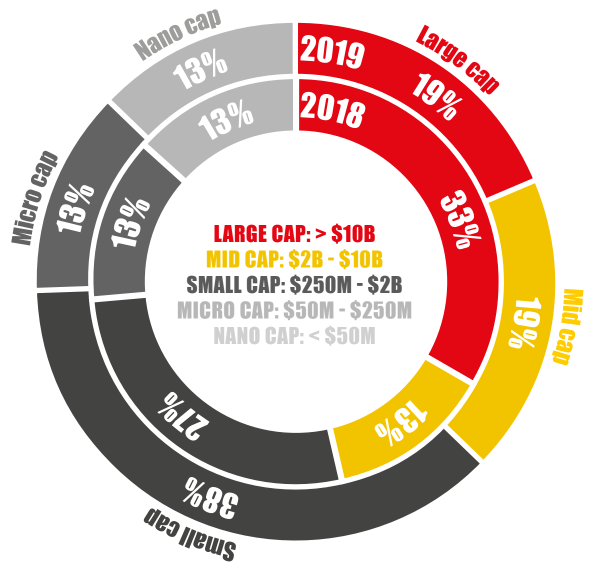
“Elliott is far from the only activist to see Germany as an attractive place to invest.”

GERMAN TARGETS BY YEAR



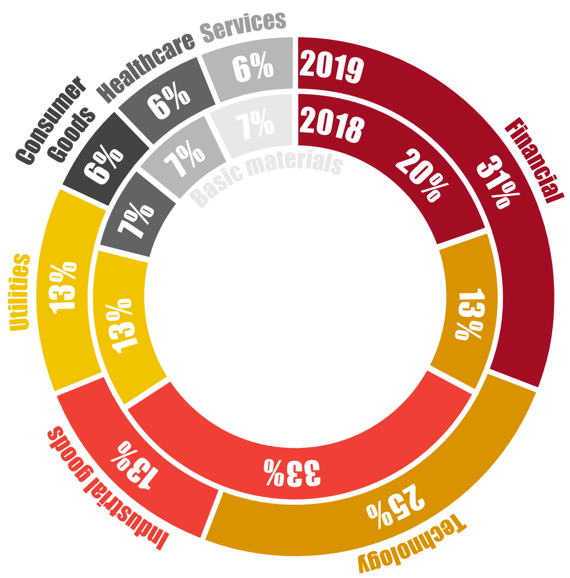
Number of Germany-based companies publicly subjected to activist demands. 2019 data as of Sep 30. Figure in yellow box is a 2019 full-year projection.

GERMAN TARGETS BY MARKET CAP



Market cap breakdown of Germany-based companies publicly subjected to activist demands between Jan 1, 2018, and Sep 30, 2018, and Jan 1, 2019, and Sep 30, 2019.
Note: Rounding may lead to summation errors.

GERMAN TARGETS BY SECTOR



Sector breakdown of Germany-based companies publicly subjected to activist demands between Jan 1, 2018, and Sep 30, 2018, and Jan 1, 2019, and Sep 30, 2019.
Note: Rounding may lead to summation errors.

26%

Proportion of resolved public activist demands made at Germany-based companies in 2019* at least partially satisfied.

14

Number of board seats gained by activist nominees at Germany-based companies in 2019*.

$1.8B

Capital deployed into Germany-based activist campaigns by **Elliott Management** since 2014.

*Q1-Q3 2019

LEGAL ANALYSIS

GERMANY

Matthias Horbach and Holger Hofmeister, Skadden.

2019 has thus far confirmed last year's expectation that shareholder activism in Germany would increase and become more significant. This has held true despite an M&A market that has been declining and despite (or perhaps due to) ongoing macroeconomic uncertainties (including Brexit and the U.S./China tariff controversy).

While activists continue to try to benefit in public takeover transactions, deal parties today know what to expect and prepare accordingly. For example, in the (aborted) public takeover of Scout24, the minimum acceptance threshold was lower than in comparable takeover offers, e.g. the Stada transaction, and the strategic plans were formulated cautiously. Activists were thus given lower leverage than in earlier years.

Nonetheless, although financial investors made a public takeover offer of 46 euros per share to the shareholders of Scout24 in order to gain control of the company and the Scout24 board recommended accepting the offer, the minimum acceptance threshold was not reached and the takeover failed. Meanwhile, activist investor Elliott Management acquired a minority stake and gained a seat on the company's supervisory board, and has put massive public pressure on Scout24's management ever since. In a published letter to the Scout24 management in early August 2019, Elliott proposed a separation of Scout24's real estate classifieds business from its automotive classifieds platform in order to improve company performance. Since Elliott's initial disclosure, the Scout24 share price has increased by 20% by the end of the third quarter.

In addition to their M&A-related activities, activists continue to interact directly with the boards and individual board members (usually the CEO, chief financial officer, or the chairman of the supervisory board) of listed companies, irrespective of a particular transaction, with a view toward exploring and unearthing other value drivers. Often, such interactions do not become publicly known. When Elliott disclosed that it had bought a stake in SAP and publicly supported SAP's recently-announced comprehensive review and new financial targets, SAP applauded Elliott's investment and announced that it was considering share buybacks. Market rumors later suggested that there had been conversations between SAP's management board and Elliott on how to increase the profitability of the company and to boost its share price over a period of several months.

Activists also continue to participate in annual general meetings, and corporations face contested shareholder votes on executive compensation and other management issues. At Bayer's 2019 annual meeting, as a result of the liability issues in the U.S. relating to the company's Monsanto acquisition, shareholders rejected (by a narrow majority) the proposed discharge of the members of the Bayer management board for 2018 — a symbolic but powerful message. Shortly after the general meeting, Elliott disclosed that it held a stake worth $1.3 billion in Bayer.

Specifically, in the context of corporate governance matters, activists gain momentum with, and receive support from, institutional investors. While many institutional investors have traditionally acted rather passively, nowadays they increasingly involve themselves in corporate governance affairs to enhance performance and share value. A prominent example is the support that Active Ownership Capital received from Deutsche Bank's DWS to replace the chairman and most of the members of Stada's supervisory board.

The role of activists in Germany is expected to continue to evolve, and their significance as drivers for M&A transactions and governance-related matters, in particular, will likely increase in the coming years.

> **"While many institutional investors have traditionally acted rather passively, nowadays they increasingly involve themselves in corporate governance affairs to enhance performance and share value."**

“Activists are increasingly reviewing management compensation.”

An interview with Matthias Horbach and Holger Hofmeister.

Has private or public activist activity increased in the past year?

Activists are generally not transparent in their approach. Accordingly, it is not possible to determine with certainty how often activists act behind the scenes. But in the past 12 months, they have increasingly acted openly and done so effectively — often when implementing a strategy that had been planned beforehand and, in many cases, communicated in advance to the boards. Activists continue to pursue opportunities for more significant involvement in decision-making bodies behind the scenes.

What corporate governance issues should companies be most aware of?

Companies should continue to pay attention to their level of transparency and the contents of their communications in order to not make themselves vulnerable. Activists often use unclear decisions or the bases on which decisions are made to craft their approach.

In addition, companies can make it more difficult to replace entire boards, for example by establishing boards with staggered terms both at the supervisory and the management levels. Further, they can draw up action plans that prepare management for the entry of an activist.

Preparations of this kind will help ensure that communications and exchanges take place deliberately and, to the extent possible, no precious time is lost.

Has executive remuneration become more controversial?

Activists are increasingly reviewing management compensation. They frequently argue that executive pay is not aligned with total shareholder returns, and incentives are not clearly identified. German legislative changes on “say on pay” that are expected to come into force in early 2020 should result in more transparent management compensation.

Activists frequently claim that target companies have picked unsuitable peer groups in order to make allegedly excessive compensation practices more palatable to investors. Companies should thus be prepared to explain and defend their peer group selection. Compensation committees can be used, and it is recommended that they be visible in corporate communications to convey transparency. However, the impression should be avoided that the supervisory board has outsourced its responsibility for compensation decisions by using such a committee.

Have activists been deterred by the struggles of some prominent German companies?

To the contrary. As long as the business models of the affected companies are viable, struggles are often regarded as opportunities for change in which activists can engage themselves.

Will deconglomeratization continue to be a theme for activists?

Conglomerates have a reputation for being inefficient due to a lack of focus on core competencies. Eliminating these inefficiencies by focusing on a limited number of activities should lead to better performance. Accordingly, we believe that deconglomeratization will continue as an important strategic goal of activists. Activists will normally not consider companies that are significantly impacted by technological disruption, as they typically look for sound but undervalued entities.

> **“As long as the business models of the affected companies are viable, struggles are often regarded as opportunities for change”**

COUNTRY PROFILE ITALY

Iuri Struta, Activist Insight.

A combination of structural and political factors may have contributed to a dramatic drop in shareholder activism in Italy this year. After peaking in 2016, activity has gradually declined almost to a halt. Absent an abrupt change, 2019 will be the slowest year since 2013, when four companies were publicly subjected to activist demands by the year's end.

Only two issuers were targeted in the first three quarters of 2019 – both reignitions of older corporate battles involving Vincent Bolloré's Vivendi. Vivendi attempted unsuccessfully to wrest control of Telecom Italia's board from Elliott Management, and stop Mediaset's conversion into a Dutch holding trust, which might strengthen the power of its largest shareholder, Silvio Berlusconi's Fininvest (at the time of writing, that campaign was moving to the courts).

The rise of a populist government led by the Northern League and Five Star Movement in 2018 and subsequent clashes with the European Commission over the country's budget has hurt investor sentiment. In addition, discussions to revise concessions for highways and utilities have made Italy less attractive to foreign investors, according to Arturo Albano, a corporate governance specialist at Amber Capital, a $1.6 billion fund that has been active in Italy and Southern Europe.

"Many listed companies [in Italy] show cheap valuations but prices continue to be depressed because of the lack of interest," Albano told Activist Insight. Italy's broad market index, the FTSE MIB, has declined 11% since reaching a multi-year peak in May 2018.

The difficulty in getting things done quickly and prevalence of anchor shareholders may have prompted investors to look elsewhere. "The level of complexity in Italy tends to be high and our experience shows that regulators are not always doing their job," Marco Taricco, a partner at activist advisory Bluebell Partners, which lists Jana Partners and Elliott as clients, told Activist Insight.

More encouraging was the resolution of Elliott's campaign to get a higher price for its shares in Ansaldo STS from acquiror Hitachi. Elliott was richly rewarded for its patience, though the campaign lingered for three years and included bitter court fights before an agreement was finally reached in October 2018.

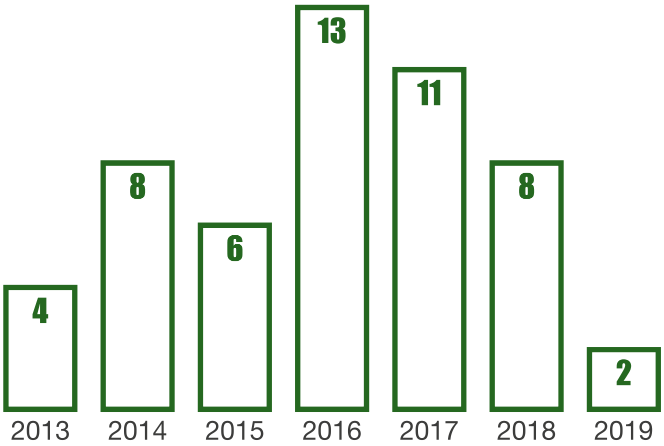
Italy's longstanding appeal – namely its cheap stocks and protections for minority shareholders – could mean the return of activists before too long. Amber founder Joseph Oughourlian said Italy is "one of the most attractive markets in Europe," with its financial sector particularly cheap. With the political environment returning to normal (the new government has signaled a more friendly stance toward the European Union), the "activist wave might come back," Albano believes.

In the meantime, institutional investors and corporate governance specialists are assessing the impact of changes to how shareholders vote on executive remuneration. Starting on June 10, companies are obliged to provide binding votes to shareholders on remuneration policy every three years and annual non-binding votes on actual pay, similar to the U.K. "This is a big change," Fabio Bianconi, a corporate governance specialist at Morrow Sodali, told Activist Insight. "More companies could get dissent at their annual meetings and this can be a trigger for more complex activist campaigns."

"The difficulty in getting things done quickly and prevalence of anchor shareholders may have prompted investors to look elsewhere."

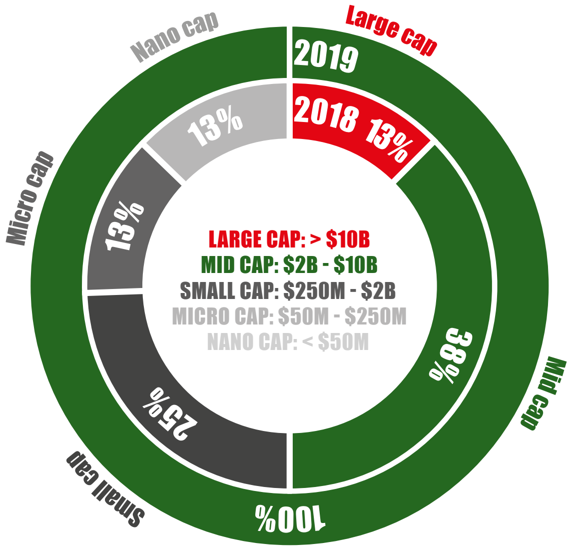
"Many listed companies show cheap valuations but prices continue to be depressed because of the lack of interest."

ITALIAN TARGETS BY YEAR



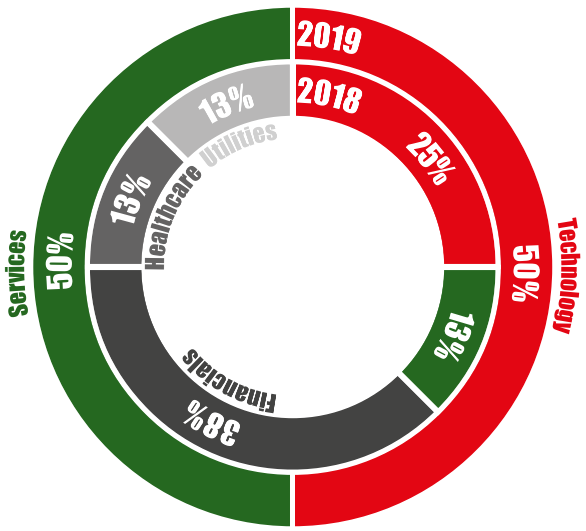
Number of Italy-based companies publicly subjected to activist demands. 2019 data as of Sep 30. Projected 2019 full-year figure is 2.

ITALIAN TARGETS BY MARKET CAP



Market cap breakdown of Italy-based companies publicly subjected to activist demands between Jan 1, 2018, and Sep 30, 2018, and Jan 1, 2019, and Sep 30, 2019.
Note: Rounding may lead to summation errors.

ITALIAN TARGETS BY SECTOR



Sector breakdown of Italy-based companies publicly subjected to activist demands between Jan 1, 2018, and Sep 30, 2018, and Jan 1, 2019, and Sep 30, 2019.
Note: Rounding may lead to summation errors.

17%

Proportion of resolved public activist demands made at Italy-based companies in 2019* at least partially satisfied.

1

Number of board seats gained by activist nominees at Italy-based companies in 2019*.

$3.2B

Capital deployed into Italy-based activist campaigns by **Vincent Bolloré** since 2014.

*Q1-Q3 2019

LEGAL ANALYSIS
ITALY

Lorenzo Corte, Skadden.

From 2016 to 2018, Italy registered more public activist campaigns than several other European countries with larger and more mature capital markets. Signs in 2019, however, indicate lower activity than in the previous three years. This may be associated with the political instability that characterized a substantial portion of the first three quarters of 2019. Notwithstanding this period of uncertainty, we believe that activist campaigns will continue to affect the Italian market, particularly as prices continue to fall.

The ongoing campaign at Telecom Italia demonstrates how activists have become more comfortable operating in the face of a traditionally resistant Italian corporate culture. In 2018, Elliott Management's move to increase its stake in Telecom Italia sparked a reshuffling of the board. This year, Telecom Italia's largest shareholder, French conglomerate Vivendi, attempted to obtain additional board seats until Italian state lender CDP interceded. CDP was able to broker a truce and Vivendi ultimately dropped its demand for a higher number of board seats, indicating the Italian state's pivotal role in corporate matters. The activist campaign itself demonstrates the continued interest of foreign investors in the Italian market, particularly in established Italian companies.

Apart from the lessons of individual campaigns, the influence of activist investors also served to increase the pace of corporate governance reforms at Italian companies. As with their European and global peers, Italian institutions have felt ongoing pressure to increase accountability, transparency, and communication in governance practices, resulting in increased leverage for minority shareholders. The increasing ownership of publicly listed shares by foreign investors, in conjunction with the reduced stakes held by traditional Italian shareholders, is likely to sustain this rebalancing of corporate control and fuel activism.

Diverging performance of economies both within and outside Europe is likely to continue to generate investor interest in vulnerable Italian targets. Even with low economic growth, given the range of entities targeted by foreign funds over the last few years, the role of activism in Italian markets is unlikely to recede and appears to have become a permanent fixture of the market.

Notwithstanding the individual campaigns of the year and the evolution in corporate culture discussed above, it seems likely that the story of 2019 is primarily one of increasing uncertainty and investor restraint.

Global factors are keenly felt in Italy, as they are elsewhere, including the downside risks of Brexit and its effects on the European economy, as well as the disruptions caused by tariffs in the context of global trade conflict. Domestic Italian factors also contribute to uncertainty, particularly the political climate, which is currently characterized by high levels of instability and unpredictability. The makeup of the Italian government, as well as the regulatory and macroeconomic policies of any future Italian government, remain difficult to forecast, weighing on investor confidence.

In the face of this unpredictability, the performance of the Italian economy has continued to be subdued, with lackluster overall economic growth predicted to continue through 2019 and into 2020. Barring the resolution or moderation of these restraining forces, activist activity may remain muted in the short term as actors await clarity in the direction of the market and political environment.

"Barring the resolution or moderation of these restraining forces, activist activity may remain muted in the short term as actors await clarity in the direction of the market and political environment."

"As with their European and global peers, Italian institutions have felt ongoing pressure to increase accountability, transparency, and communication in governance practices."

An interview with Lorenzo Corte.

Has private or public activist activity increased in the past year?

Consistency, rather than growth, characterized activism in the Italian market over the past year, sustaining rather than amplifying the pattern of private and public activism that has been apparent for several years. Following the resumption of international investment campaigns in the post-recession recovery period, the Italian market of the early and mid-2010s generated fertile ground for investors, and those international investors have become an entrenched reality in the Italian system over the last decade.

However, as market conditions and political certainty deteriorated in 2019, investor enthusiasm has dampened. The erosion of the traditional aversion to hostile takeovers in the Italian market, in which high concentration of ownership continues to sustain a general suspicion of investor activism, will provide investors with opportunities in Italy. However, the overall economic and political context of Italy has generated a cautious 2019 for activists.

Do companies have adequate remedies against activist short sellers?

Short sellers have received increasing attention in Italy this year, particularly in the context of Italian financial institutions. The market perception of financial institutions is strongly influenced by the performance of the Italian government bonds they hold, as well as the forecast EU and Italian budgetary policies that have proven politically contentious. Political uncertainty has contributed to the short selling of financial institutions as Italian national finances have taken on increased media prominence.

While the previous Italian government mooted the possibility of regulatory controls on short selling to blunt their distortionary effects on securities trading, no such changes have been forthcoming, and companies are left with few private devices to temper the impact of short sellers.

It is likely that concerns surrounding remedies for activist short sellers will be addressed, if at all, primarily through the prism of government regulation, targeting the speed, extent, and transparency of short selling practices, rather than reforming private tools. Nevertheless, there appear to be no reliable indications that such policy reform is likely to occur in the foreseeable future.

What corporate governance issues should companies be most aware of?

Corporate governance in Italy continues to evolve, particularly in light of new market pressures on domestic companies. Among others, two prominent issues that have come to the fore in the Italian context are the need to proactively address gender diversity in listed entities, and to implement robust cybersecurity preventative and response policies. Pressure to conform with public and investor perceptions of a diverse workforce, as well as to secure sensitive personal or industry information, means these preexisting governance issues have become even more central to companies' governance. Additionally, in light of increasing foreign ownership, the emphasis placed on diversity and cybersecurity in investor countries will reinforce domestic Italian pressure to address these concerns.

Will the state continue to play a role in important industries, and is the political climate conducive to activism in Italy currently?

The Italian state has historically played a significant role in strategic sectors of the Italian economy, such as telecommunications, energy, and defense.

Based on the recent rhetoric by leading Italian politicians, there is little indication that change to the traditional state involvement in industries such as telecommunications, energy, and defense is on the immediate horizon. While any reform in this sphere will be closely watched by investors as potentially generating new investment opportunities, the primary focus of activists will continue to be on the fundamentals of the Italian economy.

COUNTRY PROFILE SWITZERLAND

Josh Black, Activist Insight.

The level of activism at Switzerland-headquartered companies has trended down slightly since 2016's peak, with six companies targeted in the first nine months of 2019, according to *Activist Insight Online*, compared to 11 in the same period three years ago. For the first time since 2014, no companies with a market capitalization of more than $10 billion received a public demand from an activist.

Part of the reason may lie in the fact that the SMI Expanded index, which covers 50 Swiss companies, has performed better than comparable indices around Europe over the past 12 months, thanks to a softer fourth quarter in 2018.

And while the financial sector, in the form of troubled GAM Holding, and industrials, with Panalpina World Transport, were again front and center, 2019 saw a rare brace of campaigns at tech firms. Swiss activist Veraison Capital won its first proxy contest, joining the board of Comet Holding. It had previously lost one contest, at Komax Holding in 2016, and settled with two other companies.

Meanwhile, Sunrise Communications Group's proposed acquisition of cable operator UPC set off a chain reaction through interventions by 24.5% shareholder Freenet and then Luxembourg-based funds Active Ownership Capital (AOC) and Axxion. Coinciding with a wave of anti-M&A activism on both sides of the Atlantic, Freenet wants a rethink, while AOC is also opposing the acquisition and Axxion wants to remove Chairman Peter Kurer and director Jesper Ovesen. Even a sweetening of the deal and a greater shouldering of the risks by seller Liberty Global in mid-October failed to satisfy the dissidents, who consider the financing required to complete it too expensive.

Perhaps the most interesting of recent campaigns though, was Cevian Capital's at Panalpina. Cevian, which operates across Northern Europe but has its origins in Sweden, had been working on an operational thesis at the shipping company and calls for a new chairman had earned the backing of Artisan Partners and Franklin Templeton.

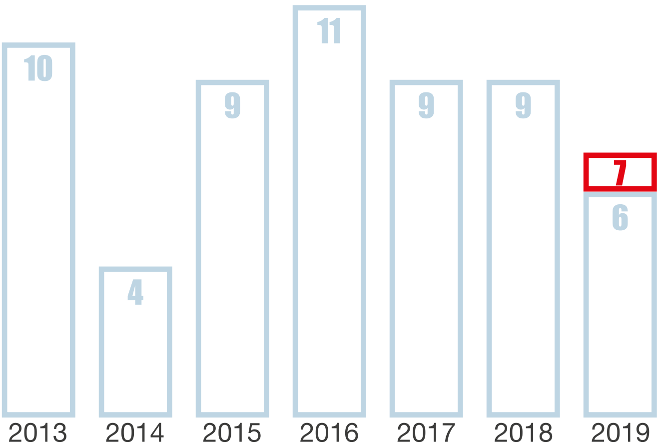
The activist faced a formidable hurdle, however, in 42.6% shareholder The Ernst Göhner Foundation (EGF). While other shareholders were subjected to a 5% voting cap, EGF had been voting its full stake. When Danish rival DSV made a bid for Panalpina, Cevian cleverly cornered the legal market by commissioning multiple studies of the grandfathering of EGF's voting power, which concluded that the original decision to exempt the foundation had been wrong. Cevian also hired a proxy solicitor for a shareholder vote on the cap, the first time it had participated in a solicitation.

Panalpina and DSV reached a deal days before the April 4 special meeting, following recommendations from both Institutional Shareholder Services (ISS) and Glass Lewis in favor of the cap. Like its U.S. peer ValueAct Capital Partners at U.K. theme park owner Merlin Entertainments, Cevian's public support for an industry merger was a rare event, and a sign that activists may be getting more explicit in European campaigns in the pursuit of profit.

Meanwhile, Third Point Partners eased the pressure on Nestlé in the third year of its campaign, expressing confidence in management as a turnaround gathered pace. The consumer products giant has been reviewing asset sales at an increased pace and its stock had risen 36% by the end of the third quarter, allowing it to shrug off grumbling from the wider shareholder base about the role of Chairman Paul Bulcke, who was previously CEO.

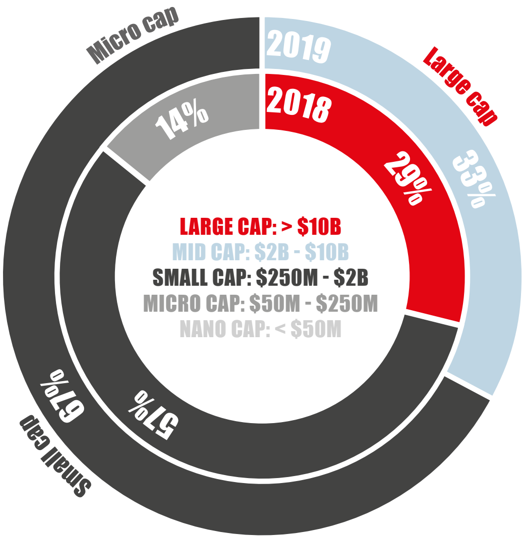
> **"Cevian's public support for an industry merger was a rare event, and a sign that activists may be getting more explicit in European campaigns in the pursuit of profit."**

SWISS TARGETS BY YEAR



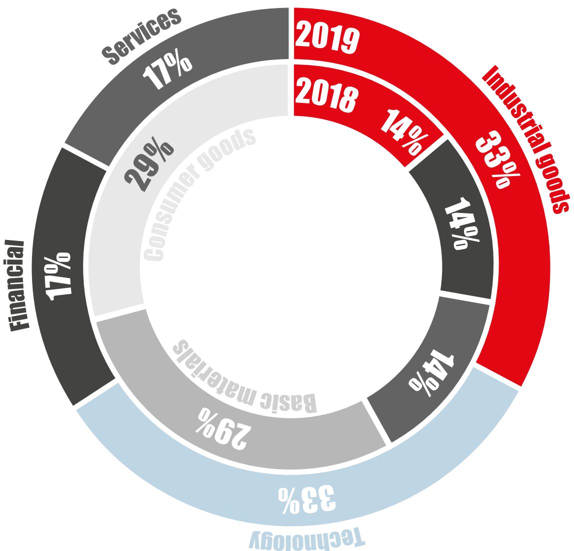
Number of Switzerland-based companies publicly subjected to activist demands. 2019 data as of Sep 30. Figure in red box is a 2019 full-year projection.

SWISS TARGETS BY MARKET CAP



Market cap breakdown of Switzerland-based companies publicly subjected to activist demands between Jan 1, 2018, and Sep 30, 2018, and Jan 1, 2019, and Sep 30, 2019.
Note: Rounding may lead to summation errors.

SWISS TARGETS BY SECTOR



Sector breakdown of Switzerland-based companies publicly subjected to activist demands between Jan 1, 2018, and Sep 30, 2018, and Jan 1, 2019, and Sep 30, 2019.
Note: Rounding may lead to summation errors.

44%

Proportion of resolved public activist demands made at Switzerland-based companies in 2019* at least partially satisfied.

1

Number of board seats gained by activist nominees at Switzerland-based companies in 2019*.

$3.4B

Capital deployed into Switzerland-based activist campaigns by Third Point Partners since 2014.

*Q1-Q3 2019

LEGAL ANALYSIS

SWITZERLAND

Mariel Hoch and Fabienne Perlini-Frehner, Bär & Karrer.

The primary sources of laws and regulations relating to shareholder activism are the Swiss Code of Obligations (CO), governing the rights and obligations of companies' boards of directors and shareholders in general, and the Swiss Financial Market Infrastructure Act (FMIA), enacted on January 1, 2016, containing additional rules for listed companies and their shareholders.

The provisions of the FMIA are set out in more detail in two ordinances, the Swiss Financial Market Infrastructure Ordinance (FMIO) and the Swiss Financial Market Infrastructure Ordinance by FINMA (FMIO-FINMA). Further, the Ordinance against Excessive Compensation in Listed Companies (OAEC) contains specific rules on the compensation of management and boards of directors. The Takeover Ordinance (TOO) sets out detailed rules on public takeover offers including boards' and qualified shareholders' obligations. Companies listed on the SIX Swiss Exchange are also bound by, inter alia, the Listing Rules (LR-SIX), the Directive on Ad hoc Publicity (DAH), and the Directive on Information relating to Corporate Governance (DCG).

Compliance with the CO and the OAEC is primarily enforced by the civil courts. FINMA enforces the FMIA and its ordinances, and the Takeover Board enforces the TOO and the takeover-related provisions of FMIO-FINMA. Compliance with the LR-SIX, DAH, and DCG is enforced by the SIX Exchange Regulation.

According to the CO, any shareholder representing 10% of the share capital or, according to the predominant legal doctrine, representing shares of a par value of at least 1 million Swiss francs, has the right to call an extraordinary shareholders' meeting. Certain companies have introduced lower thresholds in their articles of association. The required threshold may also be reached by several shareholders acting in concert. The request to call an extraordinary shareholders' meeting must be submitted in writing to the company's board and must contain the requested agenda items including the activist's motions thereto.

Shareholders may not act by written consent in lieu of a meeting, but they can be represented by issuing written voting instructions to either the independent proxy or (depending on the articles of association) to another shareholder or a third party, including advisory firms. Prominent Swiss proxy advisers, such as Ethos, SWIPRA, and zRating, publish general proxy voting guidelines, corporate governance principles, and company-specific voting recommendations. If advisory firms do not receive specific voting instructions, such firms will generally exercise votes obtained according to the respective voting recommendation. Also, proxy guidelines issued by internationally known proxy advisers such as Institutional Shareholder Services (ISS) or Glass Lewis have developed considerable influence on the voting behavior at Swiss-listed companies' shareholder meetings.

According to the OAEC enacted on January 1, 2014, Swiss pension funds are obliged to exercise their voting rights related to their participation in listed companies with respect to certain agenda items (e.g. election of the board of directors and its chairman as well as the total compensation of directors and management). Since the exercise of the voting rights must happen in the best interest of the insured persons (and such interest is deemed preserved if the voting behavior is in furtherance of the continuing prosperity of the pension fund), pension funds tend to rely on the recommendations of the aforementioned proxy advisers both for efficiency and potential liability reasons.

The law on stock companies, which forms part of the CO, is currently under review. Several changes have been proposed that could promote shareholder activism, most importantly lower thresholds with regard to listed companies for (i) calling an extraordinary shareholders' meeting (representation of 5% of the share capital or the voting rights instead of 10%), (ii) requesting that a special audit be carried out (representation of 3% of the share capital or voting rights instead of 10%), and (iii) requesting that an item be put on the agenda (representation of 0.5% of the share capital or voting rights instead of 10% or shares with a nominal value of at least 1 million Swiss francs). The changes are not yet final and will come into force in January 2021 at the earliest.

"A common request by activists in recent months has been the divestiture of non-core businesses."

An interview with Mariel Hoch and Fabienne Perlini-Frehner.

Has private or public activist activity increased in the past year?

There has been a trend toward increased shareholder activism in the past year, with Swiss activist investor Veraison Capital being particularly present in recent months (targeting, e.g. Implenia, Ascom Holding, and Comet Holding).

What corporate governance issues should companies be most aware of?

Shareholder activism in Switzerland primarily focuses on board representation and executive compensation. Activist shareholders usually seek representation – either new or enhanced – on the board of directors in order to drive their strategic agenda. It is estimated that in Switzerland, activists use board representation as a tactic more than anywhere else in Europe.

A common request by activists in recent months has been the divestiture of non-core businesses. By way of contrast, environmental, social, or governance (ESG) activism is rarely tabled in activist campaigns. However, there are certain indications that sociopolitical matters, such as board gender diversity or the disclosure of political spending and lobbying, could play a role with regard to governance activism in the future.

Is executive remuneration a source of conflict in Switzerland?

The implementation of the Ordinance against Excessive Compensation in Listed Companies (OAEC) has led to increased attention in executive compensation. Shareholders have a binding vote on the executive compensation of a Swiss company's executive management – one of the most powerful tools to direct management's conduct. It is worth noting, however, that it is rare that shareholders reject the compensation submitted to them by the board of directors. A negative vote does, however, occur occasionally in relation to a consultative (non-binding) vote on the compensation report.

What defense strategies have been learned from recent campaigns?

Many companies have implemented defensive measures, in particular defensive provisions in the articles of association, such as transfer restrictions, voting rights restrictions (3% and 5% are the most common thresholds), super voting shares (i.e., shares with a nominal value reduced by up to 10 times by keeping the one-share, one-vote principle, normally assigned to an anchor shareholder), and super majorities relating to specific resolutions or to a quorum at the shareholders' meeting.

In addition, if an activist shareholder requests that certain agenda items are tabled for a shareholders' meeting, the board of directors can, to a certain extent, influence the decision-making process, i.e., by determining the order in which the agenda items are dealt with, rephrasing the requested agenda item, or adding motions to a requested agenda item.

Do companies have adequate remedies against activist short sellers?

Other than the duty to disclose short selling positions in the instances they exceed 3% of the company's voting rights, there are no effective legal remedies against short selling in place.

"Activist shareholders usually seek representation – either new or enhanced – on the board of directors in order to drive their strategic agenda."

Activist Insight

2019