Switzerland

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General

1 What are the primary sources of laws and regulations relating to shareholder activism and engagement? Who makes and enforces them?

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 1 January 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 board 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).

The CO and FMIA are enacted by the national parliament, the FMIO and the OAEC by the Swiss Federal Council, the FMIO-FINMA by the Swiss Financial Market Supervisory Authority FINMA (FINMA), the TOO by the Swiss Takeover Board and the LR-SIX as well as the DAH by SIX Exchange Regulation.

Compliance with the CO and the OAEC is primarily enforced by the civil courts. FINMA enforces the FMIA as well as 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.

2 What are the other primary sources of practices relating to shareholder activism and engagement?

Prominent Swiss proxy advisers, such as Ethos, SWIPRA and zRating, publish general proxy voting guidelines, corporate governance principles as well as company-specific voting recommendations. Additionally, shareholders may delegate their voting rights to the company's independent proxy based on a written instructions. A delegation of votes to certain advisory firms is also possible. In the absence of specific 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 the Institutional Shareholder Services Inc (ISS) or Glass Lewis have developed considerable influence on the voting behaviour at Swiss-listed companies' shareholder meetings.

According to the OAEC enacted on 1 January 2014, Swiss pension funds are obliged to exercise their voting rights related to their participation in listed companies with respect to certain agenda items (eg, election of the board of directors and its chairman as well as the total compensation of the directors and the 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 behaviour 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.

3 Are some industries more or less prone to shareholder activism? Why?

With more than 20 shareholder actions between 2010 and 2016, Switzerland is a key European target for activist shareholders. Since 2012, actions in Switzerland have doubled. It seems like basic materials and services are regularly targeted industries; the financial industry, industrial goods and the healthcare sector have also attracted interest from activists. Due to the variety of reasons that have attracted activist shareholders in the basic materials industry, a general conclusion that this industry is particularly prone to activist campaigns should not be drawn. Also, there are no regulatory reasons that facilitate shareholder activism in certain industries over others.

4 What are the typical characteristics of shareholder activists in your jurisdiction?

Swiss public companies have been mainly targeted by international hedge funds, but Swiss hedge funds have also engaged in a number of situations.

Although it is hardly possible to make a general statement regarding the short- or long-term orientation of the inhomogeneous group of activists present on the Swiss market, it is probably fair to say that they are naturally rather mid- to long-term oriented. Typically, activist shareholders aim at giving all supporting shareholders a voice at the board table. They may raise different issues that ultimately ensure companies to be managed in the (may it be short or long-term) interest of their owners. However, there has been an increasing level of more contentious activist interests in recent years. These activists are focused on ensuring that any value being invested for the long-term benefit of the company is immediately released for the investing public (eg, by cutting investments with long-term returns, closing or spinning off separable divisions or increasing payout ratios). There is no clear pattern as to whether traditional large shareholders support activists in their endeavours. This partly depends on whether the activists benefits from recommendations of leading proxy advisers.

5 What are the main operational, governance and sociopolitical areas that shareholder activism focuses on?

Shareholder activism in Switzerland primarily focuses on governance issues (particularly board representation and executive compensation) as well as on strategic and operational matters (particularly dividends and divestitures). Activist shareholders usually seek a (stronger) representation in the board of directors. It is estimated that in Switzerland activists use board representation as a tactic more than anywhere else in Europe. In particular, the implementation of the OAEC has led to increased attention placed at executive compensation-related governance issues: activist shareholders have a binding vote on the executive compensation of the Swiss company's executive management – one of the most powerful tools to direct the management's conduct. It is worth noting, however, that it is extremely rare that shareholders reject the compensation submitted to them by the board of directors.

By way of contrast, social activism is rarely tabled in any 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.

Shareholder activist strategies

6 Describe the general processes and guidelines for shareholders' proposals.

All shareholders have the right to attend shareholders' meetings, the right to vote and to request information and inspect documents (to the extent company interests requiring confidentiality do not prevail). The right to information is regularly used by activist shareholders to increase pressure prior to shareholders' meetings. The board is obliged to respond to such questions during the shareholders' meeting. All shareholders have the right to propose motions and counter-motions (eg, regarding board elections) at shareholders' meetings and may request a special audit or a special expert committee to investigate certain facts and behaviours of the board or management.

Furthermore, any shareholder (or group of shareholders) representing shares of a par value of at least 1 million Swiss francs (the articles of association may contain a lower threshold) is entitled to demand that certain agenda items be tabled at the next shareholders' meeting. Any shareholder (or group of shareholders) representing 10 per cent of the share capital (again, a lower threshold may be contained in the articles of association), may request that an extraordinary shareholders' meeting be convened. According to the predominant legal doctrine, these thresholds should be regarded as alternative criteria (ie, shareholders representing 10 per cent of the share capital are also entitled to put forward an agenda item and shareholders representing shares of a par value of at least 1 million Swiss francs may call an extraordinary shareholders' meeting).

The current draft for a revision of Swiss corporate law suggests to lower the thresholds for shareholders to benefit from certain minority rights (eg, to request items to be added to the agenda). The revision has not yet been passed into law.

In case a shareholder demands that an agenda item be tabled for the next shareholders' meeting, the respective deadline for such submissions is contained in the articles of association and ranges typically between 40 and 55 days prior to the meeting. The company is obliged to include the item and the shareholders' motion relating thereto in the invitation to the shareholders' meeting. The board will add its own motion to such item.

Shareholders representing at least 33.3 per cent of the voting rights may block special resolutions (capital transactions, mergers, spin-offs, etc), shareholders holding at least 50 per cent of the voting rights may force ordinary resolutions (eg, appointment of a director) and shareholders representing at least 66.6 per cent of the voting rights may force special resolutions (eg, amendments to the articles of association). As these thresholds typically relate to the total votes represented at the shareholders' meeting and given that shareholder representation typically ranges between 45 and 65 per cent, the shareholdings required to pass the aforementioned thresholds are much lower.

Under the CO and OAEC a number of corporate decisions such as the amendment of the articles of association, capital increases, the approval of the annual accounts and resolutions on the allocation of the disposable profit, the election of board members, the chairman and the members of the compensation committee as well as board and management compensation fall into the mandatory competence of the shareholders' meeting. According to the OAEC, elections (or re-elections respectively) of board members must take place annually and elections must take place individually. Therefore, activist shareholders aiming at deselecting members of the board of directors are not required to request an extra agenda item for this purpose, but may simply vote against the re-election tabled by the company.

Except for the request for a special audit and an extraordinary shareholders' meeting, it is not possible to request that additional agenda items be tabled during the shareholders' meeting. However, any shareholder may make motions relating to any agenda item during the shareholders' meeting. This is particularly relevant with respect to any election items as additional persons may be proposed for election. Against the background that a significant number of shareholders cast their votes via the independent proxy without giving specific instructions as to ad hoc motions (or by instructing the independent proxy to follow the board's recommendation in such case), ad hoc motions generally have a low likelihood of succeeding.

Other than with respect to the number of votes or percentage of the capital, Swiss law does not distinguish processes depending on the type of shareholder submitting a proposal.

7 What common strategies do activist shareholders use to pursue their objectives?

Shareholder activism normally starts with building up a relatively small stake of shares avoiding triggering the disclosure obligations pursuant to the FMIA (especially the first threshold of 3 per cent). Prior to increasing its stake, a common activist will make private contact with the company's executive management or board representatives in order to present and discuss its ideas and specific demands. Such private negotiations are also the reason why it is believed that almost 50 per cent of all activist campaigns never become public.

If the private negotiations fail, an activist may launch a public campaign to divulge the key requests towards the company and by doing so obtain the support of other shareholders (since shareholders do not have a right to access the share register the only way of reaching out to other shareholders holding less than 3 per cent is through the media). As psychology plays an important part in the fight for control, gaining the support of the public opinion is a crucial element in winning the battle. The share price is likely to increase following the publication of the key elements of the campaign as it is likely to attract new investors. In the run-up to the shareholders' meeting the composition of shareholder base of the target company may change towards increased support of the activist's campaign. Based on the public support and also depending on the support from professional proxy advisers, the activist shareholder may be in a position to find an attractive compromise with the board.

Fruitless settlement attempts may lead to proxy fights at and outside the shareholders' meeting (including the enforcement of the information rights, freezing entries in the commercial register and challenging allegedly non-compliant shareholders' resolutions) or even result in litigation (eg, liability claims) and criminal charges.

Ahead of the shareholders' meeting the activist shareholder may decide to form a group with one or more other key shareholders. According to the FMIA, any person who reaches, exceeds or falls below 3, 5, 10, 15, 20, 25, 33.3, 50 or 66.6 per cent of the voting rights of the target company must notify the target company and the stock exchange (the SIX Disclosure Office for SIX listed companies). The activist may use such disclosure as signal of determination to the company and financial markets. It typically also triggers an additional round of media reports.

Although irrelevant to win a proxy fight but helpful to the communication strategy, the activist shareholder often uses the shareholders' meeting to speak publicly and reiterate their requests for improved performance.

8 May shareholders call a special shareholders' meeting? What are the requirements? May shareholders act by written consent in lieu of a meeting?

Any shareholder – individually or acting in concert – representing 10 per cent of the share capital (or, according to the predominant legal doctrine, representing shares of a par value of at least 1 million Swiss francs; see question 6) 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.

9 May directors accept direct compensation from shareholders who nominate them?

There is no Swiss law or regulation preventing shareholders from paying direct compensation (ie, remuneration in addition to the compensation bindingly resolved by the shareholders' meeting) to their directors. However, the shareholders may not derive any special rights from this

contribution as the directors are always obliged to act in the best interest of the company (duty of loyalty to the company) and generally to treat all shareholders equally. The board member will need to disclose and handle resulting conflicts of interest according to the company's regulations and the company may have to disclose the compensation in the annual report and pay social security contributions on all such amounts.

10 May shareholders nominate directors for election to the board and use the company's proxy or shareholder circular infrastructure, at the company's expense, to do so?

Any shareholder is entitled to nominate a director for election to the board, usually as a motion within the agenda item 'election of the members of the board of directors'. In this context, if the motion is filed with the company in a timely fashion, the board is obliged to publish the shareholder's motion in the company's invitation to the shareholders' meeting at the company's expense. However, shareholders may not directly access the share register and divulge their requests via a special proxy access tool.

Activists typically use the media and/or a dedicated web page for their campaigns once their intentions are publicly disclosed.

11 May shareholders bring derivative actions on behalf of the corporation or class actions on behalf of all shareholders? What defences against, or policies regarding, strike suits are applicable?

Shareholders may in principle not file lawsuits on behalf of the corporation or on behalf of all shareholders. However, they may file liability actions against directors and members of the executive management where the payment of damages is directed to the company. In addition, any shareholder may challenge shareholders' resolutions made in violation of the laws or the articles of association with effect for the entire company. Also, certain post-M&A appraisal actions under the Swiss Federal Merger Act have erga omnes effect (ie, all shareholders in the same position as the claimant receive the same compensation). The cost of such proceedings must generally be borne by the company (ie, the defendant).

In general, class actions are not specifically addressed in the Swiss civil procedure. Nevertheless, it allows for a joinder of plaintiffs or defendants: several parties may join their lawsuits in case the same court has jurisdiction and all claims are based on the same set of facts and questions of law. This approach reduces costs and avoids conflicting judgments, but increases complexity. Another corporate litigation tactic worth noting is launching a single litigation test case in order to have a precedent for multiple actions involving the same set of facts and questions of law.

Shareholders are not able to directly prevent the company from accepting a private settlement with an activist shareholder. They may only challenge the board's settlement resolution on the grounds that such decision was void or bring liability actions against the directors should the board have breached their directors' duties and should they have caused damage to the company by doing so.

Company response strategies

12 What advice do you give companies to prepare for shareholder activism? Is shareholder activism and engagement a matter of heightened concern in the boardroom?

As shareholder activism has gained traction in Switzerland, larger listed companies are investing more time and resources in activist engagement in order to deal with activists' concerns appropriately. Accordingly, the preparation and implementation of preventive as well as defending measures against activists' attacks have become part of a corporation's routine. This increased attention may be regarded as an impact resulting from shareholder activism.

Preventive measures aim at minimising the risk of a campaign. In particular, the board may identify and reduce existing exposures of the company to activist shareholders. As a first step the board will examine the company's exposure and analyse issues that are likely to be addressed by an activist investor. Key features of an exposed company are, inter alia, (i) undervaluation (which can be addressed by value-adding sale possibilities of separable divisions or non-core assets), (ii) board instability (especially decreasing support by the shareholder base), (iii) large cash reserves combined with a comparably low dividend payout ratio, and (iv) M&A transactions involving the company. Additionally, the executive management should continuously monitor and assess the company's shareholder base to identify potential shareholder activists. At this stage, the board may also consider appointing a (stand-by) task force comprising specialists in public relations, finance and law. However, even if the board manages to implement effective preventive measures, a complete elimination of the risk of becoming a target of activists is – in light of the various activists' interests – not possible.

Once an activist investor emerges and expresses its concerns to the company's board, which usually occurs in a private setting at first, the board should be in a position to revert to a set of prepared tools. First, a board is well advised to listen open-mindedly and attempt to engage politely in a constructive dialogue with the activist investor addressing and considering the activist's legitimate concerns. Following a close examination of the issues raised, the dialogue should continue and a dismissive or confrontational stance should be avoided. Consistency in the board's engagement is important to preserve credibility.

Where no satisfactory solutions can be reached during the private conversations, the board may revert to its defence tools which include (i) responding clearly and comprehensively to the activist (ignoring the issues addressed is usually not an option), (ii) using committed and consistent board communication (direct and public engagement with the shareholders, especially by issuing a White Paper illustrating the company's position), and (iii) engaging in dedicated dialogue with the company's major shareholders and significant proxy advisory firms (in order to secure their support). The company may be able to identify an investor who would go public in support of the board. An approach that has proven effective in past activist campaigns is to slightly relent towards the position of the activist with a moderate alternative proposal in order to steal the activist's thunder.

As a long-term defence measure, some target boards consider gaining a friendly long-term anchor shareholder who is supportive of the current board's strategy.

13 What structural defences are available to companies to avoid being the target of shareholder activism or respond to shareholder activism?

The potential target company may implement a set of defensive measures, particularly defensive provisions in the articles of association concerning, inter alia, transfer restrictions, voting rights restrictions (3 and 5 per cent are the most common thresholds), super voting shares (ie, 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. Such structural defences may be an efficient tool to hinder short-term interested shareholders. In addition, Swiss regulation already provides for certain effective impediments an activist must overcome including, especially, the disclosure requirements (see question 7) and the mandatory tender obligation (at 33.3 per cent) pursuant to the FMIA as well as the lack of access to the company's share register. It is a difficult balancing act for the activist to engage in conversations with other shareholders and to avoid triggering disclosure obligations or even a mandatory bid obligation due to an acting in concert. Target boards will sometimes use this legal risk to destabilise the activist shareholder and shareholders showing sympathy with his or her actions.

A structural feature that makes a corporation more likely to be the target of shareholder activism is, in particular, the implementation of an opting-out clause (or an opting-up clause, respectively) regarding mandatory bid obligations. The release of an investor building up a majority stake from the duty to launch a public tender offer means an elimination of a main legal impediment that activists face in Switzerland.

Although not picked up by the recently published draft revision of Swiss corporate law, criticism with respect to the instruments of super voting rights and opting out has been voiced in relation to the ongoing battle for control over Swiss listed company Sika.

14 May shareholders have designees appointed to boards?

If a company decides to cooperate with an activist shareholder and to grant the activist a representation on the board, the company and activist usually enter into a (formal or informal) agreement stating that the company will support the election of a board representative at the

Update and trends

RBR Capital Advisors AG engaged in a public activist campaign from 2014 until 2016. The campaign aimed at various strategic and operational changes as well as changes in the board composition of gategroup Holding AG. The majority of the board was changed at the AGM 2015 and renewed efforts of the activist ahead of the AGM 2016 became redundant when HNA Group Co Ltd launched a public tender offer for all publicly held shares in gategroup Holding AG.

Another recent example of an activist campaign in Switzerland was led by Cevian Capital, a high-profile investment vehicle mainly investing in publicly traded securities of allegedly undervalued companies. In June 2015, ABB, a Swiss public engineering group, revealed that Cevian Capital had bought a stake of more than 3 per cent and since then increased it to over 5 per cent. Cevian Capital aims at enhancing efficiency, agility and simplifying the business units. Recently, presumably due to the activist's involvement, ABB decided to combine its power systems and products – which are regarded to have few synergies with the rest of ABB's business – into a new division, which is likely to be spun off in the future. Cevian Capital is also considering nominating a member to the board of directors if the spin-off of the new division is not conducted. Looking at the preceding investments of Cevian Capital, it invests, as a long-term operational and strategic activist, in companies which are considered to have the potential to double the value of its investment within three to seven years. From the point of view of the shareholder base, this example of activism shows the potentially positive impact of this rising – in the past often perceived as a negative – trend of activism in the financial market.

Another example is the engagement of activist Teleios Capital Partners with Charles Vögele Holding AG. Teleios exited its participation of approximately 15 per cent of the share capital before a few months later, Sempione Retail AG launched a public tender offer for all publicly held bearer shares of Charles Vögele. Based on these examples and others, shareholder activism is increasingly seen as an efficient means to maximise profit to the benefit of all shareholders and to improve the company's performance in a broader sense.

Since the enactment of the OAEC, executive compensation has become one of the most publicly discussed governance issues shifting the balance of power more in favour of shareholders. However, the board's position will remain strong. Additionally, the newly introduced duty for pension funds to vote at shareholders' meetings in the interest of their insured persons (see question 2) will probably increase the influence of proxy advisory firms.

shareholders' meeting and possibly that the company will call a special shareholders' meeting for such purpose (see also question 16). Such agreement may also contain a standstill provision.

If an agreement is reached, the company is typically obliged to publish a respective ad hoc release as all changes to the board composition are deemed price-relevant facts from an ad hoc regulation's perspective.

Disclosure and transparency

15 Are the corporate charter and by-laws of the company publicly available? Where?

The articles of association of any company with its registered seat in Switzerland are publicly available and can be obtained from the relevant cantonal commercial register authority. In addition, SIX-listed companies typically publish their articles of association on the company's website. There is no duty to disclose the by-laws (organisations rules) of the company, but the majority of the SIX-listed companies publish them on their website.

16 Must companies, generally or at a shareholder's request, provide a list of registered shareholders or a list of beneficial ownership? How may this request be resisted?

The shareholders' register of a Swiss company is not publicly available and the shareholders may therefore not receive a list of the registered shareholders from the company. However, any shareholder holding at least 3 per cent in a listed company has to disclose, inter alia, the number of shares represented and the legal and beneficial owner. This information is available on the website of the respective stock exchange (eg, of the SIX Swiss Exchange). To foreign investors it may come as a surprise that they are, as shareholders, not entitled to address their concerns with other shareholders by directly or indirectly using the company's share register or by including in the company's proxy materials.

17 Must companies disclose shareholder engagement efforts or how shareholders may communicate directly with the board? Must companies avoid selective or unequal disclosure? When companies disclose shareholder engagement efforts, what form does the disclosure take?

Corporate law requires the board of directors to treat all shareholders equally under equal circumstances. Hence, valid reasons are required in order to allow for a selective information policy. Against the background that shareholders have no fiduciary duties towards the company, the board will rarely have valid reasons to selectively disclose confidential information to an activist shareholder within a proxy fight ahead of a shareholders' meeting.

The board is not obliged to disclose its engagement with activist shareholders for as long as no agreement is entered into. In the event that, for example, an activist shareholder requests that an agenda item be tabled at the next shareholders' meeting or that an extraordinary shareholders' meeting be convened, the board must make an ad hoc publication. For SIX listed companies any such announcement must be distributed to SIX Exchange Regulation, at least two widely used electronic information systems, two Swiss daily newspapers of national importance, the webpage of the company and any interested party requesting to be included in the electronic distribution list.

18 Do companies receive daily or periodic reports of proxy votes during the voting period?

In general, the company itself is not entitled to request to receive and review proxy forms returned to the independent proxy or proxy advisory firms (see question 2) prior to the shareholders' meeting. However, proxy advisers tend to get in contact with the company (if the company has not itself reached out to the proxy advisers) to discuss their voting recommendation prior to releasing them. This dialogue with proxy advisers gives the company a rough indication of how votes might be cast at the shareholders' meeting.

19 Must shareholders disclose significant shareholdings?

Any shareholder or group of shareholders acting in concert must disclose if it attains, falls below or exceeds the threshold percentages of 3, 5, 10, 15, 20, 25, 33.3, 50 or 66.6 of the voting rights of the company (irrespective of whether the voting rights may be exercised or not). This applies to direct or indirect holdings of shares as well as to the holding of financial instruments with such shares as underlying. Shareholders are considered to be acting in concert if they are coordinating their conduct by contract or by any other organised method with a view to the acquisition or sale of shares or the exercise of voting rights.

The disclosure entails the number and type of securities, the percentage of voting rights, the facts and circumstances which triggered the duty to disclose the date the threshold was triggered, the full name and place of residence of natural persons or the company name and registered seat of legal entities as well as a responsible contact person.

The disclosure must be made towards the company and the stock exchange within four trading days following the triggering event. The company must publish the required information within another two trading days.

The maximum fine that may be imposed on non-reporting parties amounts to 10 million Swiss francs in case of intentional conduct and 100,000 Swiss francs in case of negligence. The Federal Department of Finance (FDF) is the competent authority to issue such fines. In most instances the FDF commences its procedures following a criminal complaint made by FINMA.

20 Are shareholders acting in concert subject to any mandatory bid requirements in your jurisdiction?

Shareholders acting alone or in concert with other shareholders with the intention to control the relevant company are obliged to launch a mandatory bid if they exceed the threshold of 33.3 per cent of the voting

rights of a listed company. The articles of association of a company may raise the relevant threshold up to 49 per cent of the voting rights (opting up) or may put aside the duty to launch a takeover offer completely (opting out).

21 What are the primary rules relating to communications to obtain support from other shareholders? How do companies solicit votes from shareholders?

As activist shareholders do not have access to the share register of the company, they may publish their intentions on their website or in the media (eg, with open letters to shareholders or by approaching significant shareholders). Where the intentions of the activist shareholder are deemed as insider information, they may not disclose such information to other shareholders prior to making it public unless the communication to other shareholders is required to comply with legal obligations or in view of entering into an agreement. Activists will get in contact with proxy advisers to try to obtain their recommendations.

Generally, companies are free to approach their shareholders (eg, by way of letters to shareholders, public statements or individual approaches). As soon as the activist approach is publicly known, the media play an important role in shaping shareholder opinion in the run up to a shareholders' meeting. The board usually engages with the key shareholders in order to gain their support, which may require that the board compromises on certain issues. This shareholder engagement by the board must occur within the limits of the law, in particular, the transparency rules and rules on equal treatment (see question 17).

The board will also engage with proxy advisers in order to gain their support (possibly in the form of a special situations report) and, if successful, to make the proxy advisers' recommendation public to underline the viability of the board's position with its shareholders.

22 Is it common to have organised shareholder engagement efforts as a matter of course? What do outreach efforts typically entail?

Joining forces with regard to an activist campaign is not uncommon. By reference to a recent case, RBR Capital and the English hedge fund Camox Master have built a disclosed group that controls more than 10 per cent of the Swiss public company gategroup Holding AG.

Organised shareholders customarily conclude a shareholder agreement at first to outline their joint concerns and plan of action. Such agreements typically entail voting commitments regarding shareholders' meetings, how to handle disclosure notification issues pursuant to the FMIA (disclosure only needs to be made by one member of the group), provisions to avoid triggering the mandatory bid obligation (see question 20), a communication policy and confidentiality obligations. Such jointly organised engagement allows shareholders to publicly announce their group with a joint approach which can increase the pressure on the company. Even without a formal shareholder agreement, the acting in concert of several shareholders is likely to trigger disclosure obligations. Swiss law does not provide for any formal requirements in how activist shareholders must approach the company. Depending on their campaign strategy and their general policies they will either engage with the company in confidential conversations or take the public route (which is typically precede by confidential discussions). The levels of success of these approaches depend on the specific characteristics of target including the industry it belongs to.

23 Are directors commonly involved in shareholder engagement efforts?

Once the initial private conversations between the activists and the target company turn out to be fruitful, it is common to contractually fix the framework conditions regarding the further approach (eg, relating to a supported board representation). It is common for activists to approach not only the chairman of the company's board but also those board members they already know or who they have been introduced to through their networks.

Fiduciary duties

24 Must directors consider an activist proposal under any different standard of care compared with other board decisions? Do shareholder activists, if they are a majority or significant shareholder or otherwise, owe fiduciary duties to the company?

Directors must apply the same standard of care to an activist proposal as to any other proposal or matter. They have to act and resolve in the best interest of the company and must treat all shareholders equally under equal circumstances. Also, board members (formally or informally) representing a shareholder on the board of directors must appropriately deal with their conflicts of interests when facing their shareholder's activist campaign.

In contrast, shareholders, including significant or majority shareholders, do not owe any duty of loyalty to the company.

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