Shareholder Activism & Engagement 2021

Contributing editors
Willem Calkoen and Stefan Wissing

LEXOLOGY
Getting The Deal Through

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development manager
Adam Sargent
adam.sargent@gettingthedealthrough.com

Published by
Law Business Research Ltd
Meridian House, 34-35 Farringdon Street
London, EC4A 4HL, UK

First published 2016
Sixth edition
ISBN 978-1-83862-717-1

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

Shareholder Activism & Engagement 2021

Contributing editors
Willem Calkoen and Stefan Wissing
NautaDutilh

Lexology Getting The Deal Through is delighted to publish the sixth edition of *Shareholder Activism & Engagement*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on China.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Willem Calkoen and Stefan Wissing of NautaDutilh, for their continued assistance with this volume.

LEXOLOGY
Getting The Deal Through

London
April 2021

Reproduced with permission from Law Business Research Ltd
This article was first published in April 2021
For further information please contact editorial@gettingthedealthrough.com

Contents

Switzerland

Mariel Hoch
Bär & Karrer

GENERAL

Primary sources

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 Code of Obligations (CO) governing the rights and obligations of companies' boards of directors and shareholders in general and the 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 Financial Market Infrastructure Ordinance (FMIO) and the Financial Market Infrastructure Ordinance by the Financial Market Supervisory Authority (FMIO-FINMA). Further, the Ordinance against Excessive Compensation in Listed Companies (OAEC) contains specific rules on the compensation of management and the 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 the FMIA are enacted by Parliament, the FMIO and the OAEC by the Federal Council, the FMIO-FINMA by the Financial Market Supervisory Authority FINMA (FINMA), the TOO by the Takeover Board, and the LR-SIX and 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, the DAH and the DCG is enforced by the SIX Exchange Regulation.

Shareholder activism

2 How frequent are activist campaigns in your jurisdiction and what are the chances of success?

Compared with other jurisdictions, in particular the United States, the number of activist campaigns involving Swiss companies is still moderate. However, Switzerland is a key European target for activist shareholders. With three live campaigns in 2020, down from 10 in 2019, market observers expect an increase in activism for 2021 in Switzerland. Also, the numbers do not reflect the full picture given the increase in private engagement. Since 2012, actions in Switzerland have more than doubled. The chances of success depend on the content of the campaigns and cannot easily be measured among others because targets may announce changes in operations or strategic adjustments as their own (pre-existing) plans happen to coincide with the requests of the activist shareholder. Proxy fights at shareholders' meetings are rarely successful, but occasionally activists win them (eg, Veraison and Cobas at Aryzta's 2020 EGM, which led to the replacement of a number of board members including the chairman). The chances of success are typically higher if proxy advisers, such as the Institutional Shareholder Services and Glass Lewis, issue voting recommendations in support of the activist's requests.

3 How is shareholder activism generally viewed in your jurisdiction by the legislature, regulators, institutional and retail shareholders and the general public? Are some industries more or less prone to shareholder activism? Why?

The corporate community is generally critical of shareholder activism because of its rather short-term orientation. The legislator and regulators have not expressed a position on shareholder activism but tend to lower the hurdles of shareholder minority rights. Retail shareholders and the general public will form an opinion on a case-by-case basis. Institutional shareholders will analyse the requests of the activists and decide whether to support them. Only in rare instances will they vote with the activist.

It seems that basic materials, technology and services are regularly targeted industries; the financial industry, industrial goods and the healthcare sector have also attracted interest from activists. Owing to a variety of reasons that have attracted activist shareholders in the basic materials industry, it should not be concluded that this industry is particularly prone to activist campaigns. There are also no regulatory reasons that facilitate shareholder activism in certain industries over others.

In recent years Switzerland has seen shareholder activists engage in campaigns, including:

- Veraison and Cobas collectively held 17.8 per cent in Aryzta and successfully changed the majority of the board of directors in 2020 and pushed for the sale of the Americas business;
- the US-based investment fund Third Point, with its founder Daniel Loeb, acquired a 1.3 per cent stake in Nestlé at the end of June 2017;
- the investor group White Tale Holdings acquired a stake in Clariant and then, in July 2017, increased the stake to more than 20 per cent and successfully prevented the merger between Clariant and Huntsman and eventually exited its investment by selling its stake to the Saudi chemical firm SABIC International Holdings BV;
- RBR Capital Advisors, with its manager Rudolf Bohli, acquired a stake of 0.2 to 0.3 per cent in Credit Suisse and requested that Credit Suisse be split into three businesses, an investment bank, an asset manager and a wealth management group;
- Active Ownership Capital's successful support of Freenet in its opposition of Sunrise's planned takeover of UPC in 2019; and
- Cevian's complex campaign at Panalpina requesting board changes and, in parallel, attacking the exemption from the voting rights restriction of 42.6 per cent shareholder Ernst Göhner Foundation.

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 are managed in their owners' interests (whether short- or long-term interests). 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 benefit from the recommendations of leading proxy advisers.

5 What are the main operational governance and sociopolitical areas that shareholder activism focuses on? Do any factors tend to attract shareholder activist attention?

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 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 campaign in Switzerland. However, there are indications that environmental, social and governance matters such as board gender diversity, environmental matters or the disclosure of political spending and lobbying will play a role in governance activism in the future.

SHAREHOLDER ACTIVIST STRATEGIES

Strategies

6 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 Financial Market Infrastructure Act (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 to present and discuss its ideas and specific demands. These private negotiations are also the reason why it is believed that roughly half of all activist campaigns never become public. However, attention should be paid to the duty of equal treatment of all shareholders and the duty of ad hoc publicity.

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 the shareholder base of the target company may change towards increased support of the activist's campaign. Based on public support and 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 the disclosure as a 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 its requests for improved performance.

Processes and guidelines

7 What are the general processes and guidelines for shareholders' proposals?

All shareholders have the right to attend shareholders' meetings, 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. Under the revised Code of Obligations (the Revised CO), which will likely come into force in 2023, the threshold to add an item to the agenda will be 0.5 per cent of voting rights or capital.

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). Under the Revised CO, the threshold to request an extraordinary shareholders' meeting will be 5 per cent of voting rights or capital (threshold for listed companies).

If a shareholder demands that an agenda item be tabled for the next shareholders' meeting, the respective deadline for the submission 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 the 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 Code of Obligations and the Ordinance against Excessive Compensation in Listed Companies (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 and; the election of board members, the chair 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 that aim to deselect 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 an extraordinary shareholders' meeting or a special audit and the appointment of an auditor at the request of a shareholder, 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.

8 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 or a dedicated web page for their campaigns once their intentions are publicly disclosed.

9 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) has the right to call an extraordinary shareholders' meeting. Under the Revised CO (expected to come into force in 2023), the threshold to request an extraordinary shareholders' meeting will be 5 per cent of voting rights or capital. 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. The Revised CO will allow for virtual shareholder meetings and other more shareholder-friendly possibilities to the way shareholder meetings are called for, conducted and documented.

Litigation

10 What are the main types of litigation shareholders in your jurisdiction may initiate against corporations and directors? May shareholders bring derivative actions on behalf of the corporation or class actions on behalf of all shareholders? Are there methods of obtaining access to company information?

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 Merger Act have erga omnes effect (ie, all shareholders in the same position as the claimant receive the same compensation). The cost of the 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 if 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 is launching a single litigation test case 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 the 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.

Every shareholder has the right to request information and to 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 those questions during the shareholders' meeting.

Under the Revised CO, the right to request a special audit if the shareholders' meeting has rejected a respective motion will be lowered to 5 per cent of votes or capital from the current 10 per cent.

SHAREHOLDERS' DUTIES

Fiduciary duties

11 | Do shareholder activists owe fiduciary duties to the company?

Shareholders, including shareholder activists holding a significant or majority stake, do not owe any fiduciary duties or duty of loyalty to the company. They may, in particular, cast their votes in their own (short-term) interest irrespective of whether those interests are contrary to the company's long-term interests.

Compensation

12 | May directors accept compensation from shareholders who appoint 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 those amounts.

Mandatory bids

13 | Are shareholders acting in concert subject to any mandatory bid requirements in your jurisdiction? When are shareholders deemed to be acting in concert?

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). Shareholders are deemed to act in concert with respect to the mandatory bid obligation if they coordinate their behaviour, by contract or other organised procedure or by law, and this cooperation relates to the acquisition or sale of shareholdings or the exercising of voting rights.

Disclosure rules

14 | Must shareholders disclose significant shareholdings? If so, when? Must such disclosure include the shareholder's intentions?

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 those shares as underlying ones. 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 that triggered the duty to disclose, the date the threshold was triggered, the full name and place of residence of the natural persons or the company name and registered seat of legal entities as well as a responsible contact person. The shareholder's intentions must not be disclosed.

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 those fines. In most instances, the FDF commences its procedures following a criminal complaint made by the Financial Market Supervisory Authority.

15 | Do the disclosure requirements apply to derivative instruments, acting in concert or short positions?

The disclosure requirements apply to all derivate instruments (eg, conversion rights and option rights), and long as well as short positions need to be disclosed. In addition, if shareholders are acting in concert, their shareholdings or holdings of derivate instruments are aggregated, and they need to make the disclosure as a group. For purposes of the notification of significant shareholdings, parties are deemed to act in concert if they coordinate their behaviour, by contract or other organised procedure or by law, and this cooperation relates to the acquisition or sale of shareholdings or exercising of voting rights.

Insider trading

16 | Do insider trading rules apply to activist activity?

Insider trading rules apply to activist activity; that is, if the intentions of the activist shareholder are deemed as inside information, the activist shareholder may not communicate the information to anyone, including other shareholders, before making it public unless the communication to other shareholders is required to comply with legal obligations or in view of entering into an agreement. An activist wanting to purchase shares in a company does not constitute insider trading. As the campaign typically includes more than just the purchase of target shares (eg, a change in board composition and a request of corporate actions), activist shareholders need to carefully structure their campaign and the building up of their stake to avoid risks of insider trading.

COMPANY RESPONSE STRATEGIES

Fiduciary duties

17 | What are the fiduciary duties of directors in the context of an activist proposal? Is there a different standard for considering an activist proposal compared to other board decisions?

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.

Preparation

18 | 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 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 minimise 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:

- undervaluation (which can be addressed by value-adding sale possibilities of separable divisions or non-core assets);
- board instability (especially decreasing support by the shareholder base);
- large cash reserves combined with a comparably low dividend payout ratio; and
- 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 (standby) 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:

- responding clearly and comprehensively to the activist (ignoring the issues addressed is usually not an option);
- 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
- engaging in dedicated dialogue with the company's major shareholders and significant proxy advisory firms (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 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.

Defences

19 What 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 and the mandatory tender obligation (at 33.3 per cent) pursuant to the Financial Market Infrastructure Act 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 owing 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 revised Code of Obligations (the Revised CO), criticism with respect to the instruments of super voting rights and opting-out has been voiced in a recent battle for control over Swiss listed company Sika.

Proxy votes

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

It is not entirely clear whether the company itself is entitled to request to receive and review proxy forms returned to the independent proxy before the shareholders' meeting. However, the independent proxy holder tends to get in contact with the company (if the company has not itself reached out to the independent proxy) to discuss the status and trends of the proxy votes he or she has collected. Under the Revised CO, the independent proxy must treat the instructions of the individual shareholders confidentially until the shareholders' meeting. He or she may provide the company with general information on the instructions received not earlier than three working days before the shareholders' meeting and must explain at the shareholders' meeting what information he or she has provided to the company.

In addition, the dialogue with proxy advisers (ISS, Glass Lewis and Ethos) gives the company a rough indication of how some of the votes might be cast at the shareholders' meeting. A regular dialogue with proxy advisers is advisable to ensure proxy advisers understand the company's reasoning, in particular, if it deviates from proxy advisers' policy guidelines.

Settlements

21 Is it common for companies in your jurisdiction to enter into a private settlement with activists? If so, what types of arrangements are typically agreed?

The entering into settlements with activists is rare in Switzerland. One example was the settlement of the board of directors of gategroup Holding AG with RBR Capital Advisors during a proxy fight where the parties agreed on the composition of the board of directors.

SHAREHOLDER COMMUNICATION AND ENGAGEMENT

Shareholder engagement

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

Public companies are increasingly reaching out to shareholders in a systematic manner to gain a deeper understanding of shareholder thinking and priorities. Larger companies will retain specialized firms to assist them with such engagement.

On the shareholder side, the joining of forces by shareholders with regard to an activist campaign is rather uncommon. In two recent cases, RBR Capital Advisors and the London-based hedge fund Cologny Advisors formed a shareholder group that controlled more than 10 per cent of the Swiss public company gategroup Holding AG and Veraison and Cobas formed a group in the 2020 Aryzta campaign and jointly held 17.8 per cent in Swiss public company Aryzta.

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 Financial Market Infrastructure Act (disclosure only needs to be made by one member of the group), provisions to avoid triggering the mandatory bid obligation, 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 preceded by confidential discussions). The levels of success of these approaches depend on the specific characteristics of the target, including the industry it belongs to.

23 Are directors commonly involved in shareholder engagement efforts?

Chairpersons occasionally engage with shareholders when it comes to board matters such as corporate governance (eg, on a governance roadshow).

Regarding the engagement with activist shareholders, board members are regularly involved. 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 in the further approach (eg, relating to a supported board representation). It is common for activists to approach not only the chair of the company's board but also those board members they already know or to whom they have been introduced through their networks.

Disclosure

24 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 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. If, 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 website of the company and any interested party requesting to be included in the electronic distribution list.

Communication with shareholders

25 What are the primary rules relating to communications to obtain support from other shareholders? How do companies solicit votes from shareholders? Are there systems enabling the company to identify or facilitating direct communication with its 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).

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 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.

The board will also engage with proxy advisers 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.

Access to the share register

26 Must companies, generally or at a shareholder's request, provide a list of registered shareholders or a list of beneficial ownership, or submit to their shareholders information prepared by a requesting shareholder? 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. In addition, Swiss companies are not obliged to distribute information prepared by a requesting shareholder to the other shareholders.

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, that 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 them in the company's proxy materials.

UPDATE AND TRENDS

Recent activist campaigns

27 Discuss any noteworthy recent, high-profile shareholder activist campaigns in your jurisdiction. What are the current hot topics in shareholder activism and engagement?

Activist engagement has become an established element of the Swiss capital market and is unlikely to disappear in the foreseeable future. After a few years of increased shareholder activism, many Swiss companies are aware of the related challenges and prepare for them, for example, by having their advisers lined up. Not all activist approaches are publicly known, and not all published campaigns culminate in a proxy fight.

Some activists try to differentiate themselves from their competitors by stressing that they have a less short-term approach or that they wish to engage privately with the board of directors rather than in public campaigns. Swiss media are often divided in their assessment of the activists' requests, and so is public opinion.

A new expected trend in shareholder activism are campaigns on environmental, social and governance topics where environmental and social matters will become more present next to governance topics that have been part of the activist playbook for a long time.

28 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The Swiss government has set up a programme for emergency loans as well as rules on leases to ease the financial impact of shutdowns on certain affected businesses.

In addition, emergency legislation allows for virtual annual general meetings and meetings run via the proxy system only (ie, without the physical presence of shareholders). Both the 2020 and 2021 AGM seasons have been conducted in this manner.

Mariel Hoch
mariel.hoch@baerkarrer.ch

Brandschenkestrasse 90
8002 Zurich
Switzerland
Tel: +41 58 261 50 00
Fax: +41 58 261 50 01
www.baerkarrer.ch

Other titles available in this series

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Art Law
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Business & Human Rights
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Corporate Reorganisations
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Defence & Security Procurement
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
Drone Regulation
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Compliance
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gaming
Gas Regulation
Government Investigations
Government Relations
Healthcare Enforcement & Litigation
Healthcare M&A
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Litigation Funding
Loans & Secured Financing
Luxury & Fashion
M&A Litigation
Mediation
Merger Control
Mining
Oil Regulation
Partnerships
Patents
Pensions & Retirement Plans
Pharma & Medical Device Regulation
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public M&A
Public Procurement
Public-Private Partnerships
Rail Transport
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
Sovereign Immunity
Sports Law
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Technology M&A
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

lexology.com/gtdt

an LBR business

ISBN 978-1-83862-717-1