THE SHAREHOLDER RIGHTS AND ACTIVISM REVIEW

FOURTH EDITION

Editor
Francis J Aquila

THE LAWREVIEWS

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PREFACE

In the years since the last financial crisis, shareholder activism has been on the rise around the world. Institutional shareholders are taking a broad range of actions to leverage their ownership position to influence public company behaviour. Activist investors often advocate for changes to the company, such as its corporate governance practices, financial decisions and strategic direction. Shareholder activism comes in many forms, from privately engaging in a dialogue with a company on certain issues, to waging a contest to replace members of a company's board of directors, to publicly agitating for a company to undergo a fundamental transaction.

Although the types of activists and forms of activism may vary, there is no question that shareholder activism is a prominent, and likely permanent, feature of the corporate landscape. Boards of directors, management and the markets are now more attuned to and prepared for shareholder activism, and engaging with investors is a priority for boards and management as a hallmark of basic good governance.

Shareholder activism is a global phenomenon that is effecting change to the corporate landscape and grabbing headlines not only in North America but also in Europe, Australia and Asia. Although shareholder activism is still most prevalent in North America, and particularly in the United States, almost half of the publicly announced activism campaigns in 2018 targeted non-US companies. This movement is being driven by, among other things, a search by hedge funds for new investment opportunities and a cultural shift toward increased shareholder engagement in Europe, Australia and Asia.

As both shareholder activists and the companies they target have become more geographically diverse, it is increasingly important for legal and corporate practitioners to understand the legal framework and emerging trends of shareholder activism in the various international jurisdictions facing activism. *The Shareholder Rights and Activism Review* is designed as a primer on these aspects of shareholder activism in such jurisdictions.

My sincere thanks to all of the authors who contributed their expertise, time and labour to this fourth edition of *The Shareholder Rights and Activism Review*. As shareholder activism continues to diversify and increase its global footprint, this review will continue to serve as an invaluable resource for legal and corporate practitioners worldwide.

Francis J Aquila
Sullivan & Cromwell LLP
New York
August 2019

Chapter 2

AUSTRIA

Sarah Wared[1]

I OVERVIEW

Globally, last year was record-breaking and saw a significantly increased number of investors employing activism as a tactic. Over 30 per cent of campaigns launched in 2018 by activist shareholders were merger and acquisition (M&A)-driven, with pushing for a sale being the most common objective.[2]

In Austria, a long and stable tradition of shareholder activism does not exist yet and shareholder activism campaigns can be categorised into many different types. A significant number of listed Austrian companies are controlled by one shareholder or a group of shareholders, which is one of the main reasons why shareholder activism has played a less pronounced role in Austria as compared with shareholder activism on a global level. However, in recent years, the number of activist campaigns has increased in Austria and activist shareholders of listed companies have actively sought to directly or indirectly generate profit for themselves or other shareholders by focusing mainly on the profitability and valuation of public companies.

Generally, activist shareholders concentrate on corporate structure and strategy, and restructuring measures: takeover bids, composition of management and supervisory boards; return of value to shareholders (e.g., share buy-backs and additional dividend payments); and acquisitions, merger proposals and opposition to delistings.

Activist shareholders take advantage of the possibilities provided to them by law, such as requesting the convocation of a shareholders' meeting or inclusion of items on the agendas of shareholders' meetings, the possibility of contesting shareholder resolutions and having the share exchange ratio in a corporate restructuring examined by a court.

It is likely that public companies will be required to deal with activist campaigns when they:

a have many free-float shares;
b are facing a disappointing share price;
c have non-active institutional shareholders;
d experience low shareholder attendance at shareholders meetings;
e encounter takeovers; or
f have proposed restructuring measures.

1 Sarah Wared is a partner at Wolf Theiss.
2 *2018 Review of Shareholder Activism*, Lazard.

In line with the global market trend, it can be expected that Austria will see more activism in the future. In particular, the EU Shareholder Rights Directive II (2017/828) (SRD II), amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement, aims to improve the participation of shareholders and may foster shareholder activism in the future. Additionally, shareholders of public companies are increasingly influenced by proxy advisers who support the campaigns of activist shareholders. Activist campaigns may result in changes to the strategy and structuring of public companies when dealing with essential corporate transactions.

II LEGAL AND REGULATORY FRAMEWORK

In past years, the main jurisdiction for shareholder activism has been and remains the United States, where activist shareholders employ the receptive legal frameworks available to them to reach their goals. In Austria, there are various legislative and regulatory frameworks with respect to shareholder rights, shareholder activism and shareholder engagement. The principal sources of law in this regard are found in the Stock Corporation Act, the Stock Exchange Act and the Takeover Act.

i Shareholder rights

Apart from basic shareholders rights, such as the entitlement to dividends and disposal of their participation in a company, shareholders are entitled to other essential rights that foster shareholder activism and provide an environment for activists.

Irrespective of their percentage of shareholdings in a company, the rights of shareholders include entitlement to participate and speak at shareholders' meetings as well as ask questions and receive answers with respect to the items on the agenda; exercise their voting rights; and challenge a resolution of the shareholders in court.

Rights of minority shareholders holding at least 1 per cent of a company's share capital include the entitlement to submit motions with respect to the items on the agenda of shareholders' meetings; and request a review by the Takeover Commission of the amount of the offer price with respect to mandatory tender offers and voluntary tender offers within three months of the publication of the results of a takeover offer.

Rights of minority shareholders holding at least 5 per cent of a company's share capital include the entitlement to request the following:

a convocation of a shareholders' meeting;
b inclusion of items on the agendas of shareholders' meetings;
c audit of the annual accounts by a different auditor for good cause; and
d convocation of a shareholders' meeting by shareholders of an acquiring company in the course of a simplified merger.

Rights of minority shareholders holding at least 10 per cent of a company's share capital include the entitlement to request dismissal of a member of the supervisory board for good cause; and that a claim be made against shareholders, the management board, supervisory board or third party to the extent the claim is not obviously unfounded.

Rights of shareholders holding at least 20 per cent of a company's share capital include the entitlement to object to the waiver or settlement of claims against founding shareholders, the management or supervisory board members.

Shareholders holding more than 25 per cent of a company's share capital present at a shareholders' meeting may object to amendments of the articles of the company (including capital measures); and measures excluding shareholder subscription rights.

Shareholders holding at least 30 per cent of a company's share capital have the right to elect an additional supervisory board member, if three or more members of the supervisory board are elected in one shareholders' meeting and one candidate got at least one-third of the votes in all prior elections without being successfully elected. In that case, the unsuccessful candidate having received the one-third vote in prior elections will be declared as elected without any further votes.

ii Shareholder obligations

Though shareholder rights under the Austrian legal and regulatory framework are far-reaching, the obligations of shareholders are limited.

Generally, shareholder attacks are considered legal in an activist campaign to the extent shareholders comply with the required disclosure and compliance obligations and avoid including incorrect or inaccurate information in their disclosures.

Certain Austrian fiduciary duties applying to shareholders of public companies may be relevant in some activist campaign situations. Although fiduciary duties are most clearly recognised with respect to partnerships, they are also applicable to a certain extent in the case of stock corporations and limited liability companies. With respect to stock corporations, there is a fiduciary duty to avoid the abusive exercise of voting rights and fiduciary duties of this sort are binding regarding all shareholders; namely, they are applicable to the controlling shareholders to the same extent as to the minority shareholders. Fiduciary duties need to be carefully considered in the context of specific situations such as the decisions of the shareholders in the course of shareholders' meetings and the potentially excessive use of discretionary powers.

iii Corporate constitution

Public companies may have a one or two-tier management system depending on the legal form of the entity: a stock corporation is required to have a two-tier management system consisting of the management board and the supervisory board, whereas a *Societas Europaea* can have either a one or two-tier management system.

The responsibility of the management board is to manage the company in the best interest of the company considering the interest of the shareholders, employees of the company and the interests of the public. From a pure legal perspective, the management board of a stock corporation is not required to follow instructions of the shareholders or the supervisory board.

The management board members of a stock corporation are appointed by the supervisory board for a maximum term of five years and can be reappointed after the expiry of their term. The supervisory board may revoke the appointment of a member of the management board for a good cause prior to the expiry of the member's term. In particular, an inability to manage the company properly and rescission of confidence by the shareholders' meeting based on objective reasons will constitute good cause.

The supervisory board of a stock corporation consists of at least three members. The articles of association may stipulate a higher number of supervisory board members. The

supervisory board members of a stock corporation are appointed by a resolution of the shareholders' meeting for a specified term. The appointment may be revoked without cause by a resolution of the shareholders' meeting with a three-quarters majority of the votes cast.

With respect to takeover scenarios, the management and supervisory boards of public companies are subject to the neutrality rule: they are required to not take any measures that could impair the opportunity of shareholders to make a free and informed decision with respect to the takeover offer unless the board measures are based on a pre-takeover obligation or a shareholders' meeting resolution passed following the intention of the offeror to make a takeover offer. The management and supervisory boards are required to obtain the consent of the shareholders' meeting for any measure (save for obtaining alternative offers) that could adversely affect the takeover offer (e.g., issuance of securities that could impede the bidder from acquiring control, sale of material assets of the company or acquisition of other companies).

iv Disclosure requirements

Activist shareholders, like all shareholders, are required to comply with the prescribed disclosure system when building a stake: a shareholder of a listed company is required to publicly disclose its shareholdings to the Austrian Financial Market Authority, the stock exchange and the issuer, if it – directly, indirectly or through financial instruments or derivatives – reaches, exceeds or falls below 4, 5, 10, 15, 20, 25, 30, 35, 40, 45, 50, 75 or 90 per cent of the voting rights. The articles of association may contain an additional disclosure threshold at 3 per cent, which will need to be published on the website of the issuer and, additionally, the Austrian Financial Market Authority will need to be informed. A shareholder is required to disclose immediately, and in any event within two trading days, each time a relevant threshold is triggered.

If a shareholder does not comply with the mentioned disclosure obligations, voting rights attached to the shares not disclosed will be automatically suspended. The articles of association of the company may also extend the suspension of voting rights to all voting rights of the shareholder breaching the required disclosure obligation.

Activist shareholders wishing to build up stock and deal in shares must also consider restrictions on dealing on the basis of inside information.

v Acting in concert

Pursuant to Section 1(6) of the Takeover Act, parties acting in concert are as follows:

> *natural or legal persons who, on the basis of an arrangement, cooperate with the bidder in an attempt to obtain control of or exercise control over the target company, especially by coordinating the way in which they exercise their voting rights, or natural or legal persons who cooperate with the target company, on the basis of an arrangement, to frustrate the successful outcome of a takeover offer.*

Parties acting in concert are required to launch a mandatory tender offer. Generally, under Austrian law, control is presumed by a shareholding representing, directly or indirectly, at least 30 per cent of the voting rights, although the control concept with respect to acting in concert pursuant to Section 1(6) of the Takeover Act is not subject to such a formal definition. The Takeover Commission considers a range of factors indicating an aim to control when determining whether shareholders are acting in concert.

Acting in concert 'arrangements' can involve legally enforceable and binding arrangements as well as unenforceable and non-binding long-term and individual arrangements. Therefore, the term arrangement can even encompass non-binding, non-written communication on the basis of which it can be assumed that the parties will act in accordance with their communications.

Shareholders of public companies may give advice to each other and consult with respect to company matters without being deemed to be acting in concert, but such communications may conflict with takeover regulations in certain cases. From a practical perspective, a challenge encountered with the acting in concert concept is to prove that the parties in fact acted in concert at a shareholders' meeting by exercising their voting rights. One indicator is when shareholders belong to the same group of companies or participate in arrangements regarding the election of supervisory board members. Generally, an arrangement can be assumed when shareholders vote the same way regarding all shareholder decisions relating to control. In this context, proxy advisers may play a relevant role (e.g., regarding the appointment and removal of supervisory board members) because interactions with the same proxy adviser by different shareholders may be scrutinised by the Takeover Commission as an indication of acting in concert.

The Takeover Commission has found that activist shareholders were acting in concert with another shareholder and violated their mandatory offer obligation because they were seeking the implementation of a transaction that would fundamentally change the corporate culture of the company.

A mandatory tender offer can also be triggered by way of 'creeping in'; namely when a person who has a controlling interest, which is not more than 50 per cent, acquires at least another 2 per cent of the voting rights within 12 months.

vi Structural defences

Preventative defensive measures available to public companies outside Austria should also be considered in Austria, in particular measures that have been effective in other jurisdictions. In particular, the business model, shareholder structure and voting system as well as the critical shareholders of a target company should be considered and analysed in the context of potential activist attacks. The articles of association may, for example, be amended to lower the statutory threshold disclosure mentioned above to 3 per cent, giving the company more advance warning of an activist's posturing. Public companies may introduce a takeover offer requirement of less than 30 per cent, and introduce higher voting thresholds or additional voting requirements than required by law to implement activist objectives.

Best practices would include the advance preparation of manuals setting out in detail any relevant internal (e.g., nomination of specific team members responsible for the determination of a response strategy) and external (e.g., communication regarding media and instruction of advisers) steps to be taken in response to a shareholder campaign.

III KEY TRENDS IN SHAREHOLDER ACTIVISM

Globally, shareholder activism has seen a substantial increase in recent years and has long been a feature of the US market. Strategies and objectives of activist campaigns follow different approaches, and specific categories of activist shareholders have not yet fully established

themselves in Austria. In certain cases, activist shareholders aim for short-term profit, whereas other activists take medium to long-term perspectives by trying to create value and change the management of a company.

i Activism driven by specific transactions

As outlined above, shareholder activism in the Austrian market has no developed tradition, and activists do not, for example, mainly focus on the performance and remuneration of the management board as is the case in some other jurisdictions where executive remuneration as an inappropriate cost factor is often raised by activists in the course of campaigns. Different types and objectives exist with respect to activist campaigns. A noteworthy number of activist campaigns have been driven by specific situations such as proposed public or private M&A and other corporate transactions. Some activists aim to push the management board to run the business in a more efficient way so as to increase the valuation and share price of the company.

Generally, activist campaigns have been seen in connection with corporate measures that are subject to an offer of adequate compensation such as mergers, squeeze-outs or other reorganisations. Activist shareholders try to gain more benefit from such transactions by challenging the compensation offered to the shareholders. In contrast with other claimants, activist shareholders are usually not aiming to hold up or block corporate transactions by using their shareholder rights in shareholders' meetings. Activist shareholders request an examination of the share exchange ratio with respect to a merger with the aim of becoming entitled to further compensation without blocking the implementation of the corporate transaction as such. The majorities required to implement particular corporate transactions provide the basis for shareholder campaigns. Activist shareholders buy and sell shareholdings in line with the type of corporate transaction they want to influence.

An activist shareholder may also aim to put pressure on the management board to undertake an acquisition or otherwise distribute value to its shareholders.

ii Litigation as part of the strategy

Activist shareholders may use litigation as part of their strategy. They use the right at a shareholders' meeting to request the appointment of special auditors to examine the management of the company. If the shareholders' meeting opposes this request, a special audit can be requested by application to a court by a shareholder holding 10 per cent of the share capital. The applicant is required to have held its shares for at least three months prior to the shareholders' meeting and continue to hold them until a decision with respect to the special audit has been made by the court. A shareholder holding at least 5 per cent of the share capital is entitled to request that a claim be made by the company against shareholders, the management or supervisory board, or a third party based on a report of the special auditor. To the extent petitioned claims are not obviously unfounded, a shareholder holding at least 10 per cent of the share capital is entitled to request to claim against shareholders, the management board, the supervisory board or a third party.

Activist shareholders may challenge resolutions of the shareholders to put the management board of the company under pressure to the extent the effectiveness of the resolved matter is subject to registration in the Commercial Register (e.g., an amendment of the articles of associations or capital increases). This approach may impede the implementation of the resolved matter as the Commercial Register may suspend the proceedings in certain cases.

iii Support by proxy advisers

As part of the strategy of activist shareholders, an interaction with proxy advisers may be relevant to a certain extent. For example, activist shareholders were supported by proxy advisers at the shareholders' meeting of conwert Immobilien Invest SE with respect to the management board candidates of the major shareholders. Considering that proxy advisory services have entered the Austrian market, activist campaigns can be expected to often turn to them as they seek majorities at shareholders meetings.

iv Use of media

A practice that has become more common among activist shareholders in Austria is the use of informal measures and strategies, which are common in other jurisdictions, to increase their influence beyond their proportionate shareholding and put pressure on the management and supervisory board of public companies; for example, submitting open letters to the management board and using the media to disclose publicly their dissatisfaction with the management board. Well-advised activist shareholders will carefully review the legal basis of such measures before the information is disclosed. By using the media, activist campaigns may have an impact on the share price and help to win other shareholders of the company to support the campaign or parts of the campaign.

IV RECENT SHAREHOLDER ACTIVISM CAMPAIGNS

In recent years, the number of campaigns run by activist shareholders has increased slightly. The following campaigns may be of particular interest.

i Petrus Advisers, Immofinanz AG and CA Immobilien

Petrus Advisers tried to put pressure on the management board of Immofinanz AG by publicly voicing its dissatisfaction with the management's strategy by issuing an open letter dated 14 March 2017 to the board. In the letter, Petrus Advisers in particular requested the sale of a Russian business and non-core assets, a share-buy-back and the submission of a cash offer to the shareholders of CA Immobilien.

Furthermore, Petrus Advisers expressed its dissatisfaction with the performance of the company and the development of the share price of Immofinanz AG, stating that the trading share price should be more than doubled.

Immofinanz AG responded that it was also dissatisfied with the performance of the company and that the requests of Petrus Advisers had either been partially or completely fulfilled.

ii Merger of CA Immobilien and Immofinanz AG

In 2018, the real estate companies Immofinanz AG and CA Immobilien again came under the attack of the activist shareholder Petrus Advisers with respect to the merger of the companies.

Immofinanz AG and CA Immobilien planned to merge, but the plan fell through following pressure by Petrus Advisers, which expressed its dissatisfaction in an open letter on 27 November 2017 and requested the termination of any further discussions with respect to the merger. The activist shareholder stated that if a 75 per cent majority with respect to the

merger could not be achieved, any further use of funds in connection with the merger would be unacceptable and claims for damages would be asserted. Following this pressure by the activist shareholder, the two companies terminated their merger plans.

iii Opposition to BWT AG's delisting

The manufacturer of water treatment systems BWT AG was criticised by activist shareholders opposing its delisting. They claimed that the structure of an envisaged merger of BWT AG into a newly established company and subsequent delisting was not legally permitted.

The activist shareholders stated that the structuring chosen by the core shareholder of BWT AG 'solely serves for the purpose to enforce the legally not permitted delisting from the stock exchange against the will of the remaining shareholders' and that in any case a review proceeding should be initiated.

In 2017, the Austrian Supreme Court decided that a merger for the purposes of delisting is abusive.

The envisaged merger was preceded by a voluntary takeover offer. The core shareholder published a voluntary takeover offer for all BWT AG shares, which resulted in only limited take-up and was insufficient to initiate a squeeze-out that would leave him as the company's sole shareholder.

In August 2018, the annual general meeting of BWT AG resolved upon the request of the majority shareholder to squeeze out the minority shareholders against payment of cash compensation. The envisaged merger has not been implemented.

V REGULATORY DEVELOPMENTS

The following recent development may have an impact on campaigns of activist shareholders.

The SRD II, which is intended to improve shareholder participation in listed companies, needs to be implemented into national law. The directive addresses the identification of shareholders and the role of intermediaries (e.g., proxy advisers); the remuneration of the management board members (say on pay); and related party transactions. In particular, the improved transparency with respect to management remuneration may foster shareholder activism.

Existing regulations already provide for certain rules with respect to the compensation of the management board. The supervisory board is required to ensure that the compensation of the members of the management board reasonably corresponds to their duties and benefits, and a company's position and overall remuneration levels. Compensation is required to provide for long-term incentives in line with the sustainable development of the company.

The SRD II and the ministerial draft supplement existing regulations without any substantive requirements with respect to remuneration. All that is introduced is a general concept of shareholders' participation in the remuneration of board members. It contemplates a shareholder vote on the general remuneration policy at least every four years and an annual vote on the current remuneration report.

The ministerial draft does not intend to change the existing governance structures of a stock corporation and the supervisory board remains the responsible body for the remuneration of the management board. Shareholders will have an advisory, incontestable vote with respect to the remuneration policy and the remuneration report. The supervisory board will set up a remuneration policy pursuant to the new rules. The remuneration policy is detailed compared with the guidelines currently provided under Austrian law, and needs to

consider and explain the company's strategy and its long-term development as well as contain a description of the fixed and variable components of the remuneration to be granted to the members of the management board.

The remuneration of the members of the supervisory board will also be subject to the new requirements.

Generally, the remuneration policy is subject to the recommending vote of the shareholders at least every four years or upon the occurrence of an essential change. Notwithstanding the vote being of a recommending and unappealable nature, the vote on the remuneration policy will have an essential practical impact considering that the supervisory board members are appointed by the shareholders.

Additionally, the management and supervisory boards are required to prepare an annual remuneration report with respect to the remuneration in the previous year, which needs to be submitted to the annual general meeting for a vote.

The mentioned voting rights of the shareholders in connection with the remuneration may increase the influence of activist shareholders on public companies to a limited extent.

VI OUTLOOK

First, because of the envisaged implementation of SRD II into national law, shareholder activism may play a greater role in the future. Notwithstanding the non-binding character of the votes, the shareholder votes may have an impact on the composition of management remuneration considering that the supervisory board is the competent body with respect to remuneration and thereby increase the influence of activist shareholders on public companies. Consequently, activist shareholders will most likely take advantage of the possibilities based on the mentioned new law in addition to the possibilities currently provided to them by corporate law (e.g., contesting shareholder resolutions and requesting shareholder meetings).

Second, shareholders of listed companies make more and more active use of their rights resulting in, among other things, a higher number of opposing votes in the elections of supervisory board members. Increasingly, proxy advisers are instructed to advise with respect to the strategies of shareholders. Such proxy advisers increasingly support the campaigns of activist shareholders.

Besides recent developments in the Austrian market, some companies are considering the implementation of preventative defensive measures, in particular measures that are effective in other jurisdictions are often considered.

In the long term, shareholder activism may have a positive impact on transparency and efficiency of public companies from a shareholder perspective considering that the majority of campaigns run by activist shareholders are value-driven. However, for a number of structural market reasons, it is unlikely that shareholder activism will reach the level currently seen in, for example, the United States.

Appendix 1

ABOUT THE AUTHORS

SARAH WARED

Wolf Theiss

Sarah Wared is a partner in the corporate/M&A team based in Vienna, Austria. She specialises in cross-border transactions in the fields of M&A, corporate and private foundation law. Sarah has expertise in a wide range of industry sectors, including private equity and venture capital, financial institutions, and technology, media and telecom.

Before joining Wolf Theiss, she worked for other major law firms in Vienna and also gained international experience in the United States, Singapore and Germany. Sarah is admitted to the Bar in both Austria and Germany. Sarah is the author of various publications on selected issues of Austrian corporate law.

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