

# Turning a Slippery Slope into a Fair Game



**Gisèle Rosselle**

Partner  
gisèle.rosselle@strelia.com



**Cédéric Devroey**

Associate  
cederic.devroey@strelia.com



**Samantha Kabeya**

Associate  
samantha.kabeya@strelia.com

Shareholder activism in Belgium has been on the rise in recent years. You may have heard about the Nyrstar case in which minority shareholders question the transactions between the company and its shareholder Trafigura, or the case about investment fund CIAM's written demand this February to Telenet's board for a EUR 970 million dividend. In tandem with this behavioral pattern in Belgium, the Act of 28 April 2020 implementing the second EU directive on shareholders' rights (the SRD II, EU 2017/828) has also been enacted. SRD II aims to encourage long-term shareholder engagement and transparency in listed companies.

In this Strelia M&A Series, we will briefly discuss the concept and origin of shareholder activism, the levers that are addressed by activist shareholders in Belgium, the set of tools available to both sides and the prospects.

## *A US Phenomenon*

Shareholder activism started mainly as a US phenomenon, dating back to the 1940s when the SEC Rule 14a-8 allowing shareholders to include shareholder proposals at listed companies was introduced. *The Economist* estimates that, since the end of 2009, 15% of the members of the S&P 500 index have faced an activist campaign, and around 50% of S&P companies have had an activist on their share register. Shareholder activism consists of campaigns launched by activist investors, who are typically hedge fund managers or private-equity investors, but essentially it can be any shareholder who tries to actively influence management to unlock substantial value potential.

This pattern of shareholder behavior is set to grow in Europe. Lazard's Quarterly Review of Shareholder Activism (Q1 2020) showed that Europe witnessed a historic number of campaigns in the beginning of 2020. The activist report by Alvarez & Marsal in December 2019 highlighted that ESG (environmental, social, governance) factors will play an increasing role in shareholder rebellion, as ESG issues are becoming increasingly important for activist investors. However, in Belgium, activist investors have not yet "started" to campaign against environmental and social issues, or their focus is more so on governance.

## *Typical levers addressed by activist investors in Belgium*

The activist investors targeting issuers listed on Euronext Brussels tend to address these issues the most: corporate restructuring and related-party transactions (RPT), stock price performance, corporate governance, and directors' remuneration. Let us illustrate some recent cases in which these levers are at play. The Nyrstar case concerned an RPT: the minority shareholders question the lock-up agreement whereby Nyrstar's assets were transferred to a British Newco in which Trafigura holds a majority. The minority shareholders argued that the restructuring was not transparent, and that Nyrstar had been emptied by Trafigura. They also questioned the role of the auditor as is being done in the Wirecard case. In another case, in February this year, investment fund CIAM (1.26%) publicly questioned Telenet's underperformance (as Telenet's share price fell by 16.4%, compared to its December 2018 price) and demanded an exceptional dividend of EUR 970 million to be paid out. A month later, the general meeting decided to pay a dividend of EUR 143 million only. This illustrates that the campaign failed. Another case is a group of minority shareholders in ASIT Biotech who joined forces to successfully have the CEO and other directors removed and have two independent directors appointed.

## *Tools available to both sides*

There are existing and new tools under Belgian company law and related legislation that can help activist shareholders achieve the resolution they are fighting for. The existing tools are embedded in the Belgian Code of Companies and Associations (the BCCA): shareholders have, amongst other, the right to (i) include items on the agenda and propose resolutions in relation to these items (if they have at least 3% shareholding), (ii) ask questions to the directors and the auditor at the general meeting or in advance if those are submitted in writing (no threshold), (iii) convene a general meeting (if they have at least 10% shareholding), and (iv) vote at the general meeting. We are now seeing that activist shareholders tend to submit very lengthy and detailed questions to the board. Besides these methods, more and more activist shareholders resort to making public statements and going to court.

There are also new tools under the Act of 28 April 2020 implementing the SRD II that are available to issuers and shareholders: (i) the right for issuers to obtain the identity of its shareholders across the chain of intermediaries; (ii) enhanced transparency obligations for institutional investors, asset managers and proxy advisors towards the issuers, and this entails that they will have to develop shareholder engagement policies, codes of conduct, and report on conflict of interests; and (iii) shareholders get a say on key subject matters: the shareholders get to vote on a detailed remuneration policy (ex-ante, binding) and vote on a remuneration report (ex post, non-binding), and the rules for RPTs are strengthened. Besides these, the BCCA allows issuers to create a loyalty voting right in the company's articles of association: a shareholder gets a double voting right if the shares are held for an uninterrupted period for at least two years. Based on the preceding, issuers can now analyze their investor base, identify allies, and communicate with them and install a loyalty voting right to engage long term shareholding. Besides good financial performance and corporate governance, communication is a key tool to deal with activist shareholders.

## *Looking ahead*

Could shareholder activism in Belgium eventually evolve into a pattern like what has been developed in the United States? No one can predict the future, but Belgium and Europe will likely develop their own shareholder activism pattern. US companies have a different corporate culture and mindset. The relationship between the board and the shareholders has historically been more combative in the US, whilst in Europe the gap between the board and the shareholders has arguably not been so wide, as the European lawmakers have used various initiatives to try to narrow this gap. Furthermore, in the aftermath of the Nyrstar and Wirecard cases, we may consider the necessity to strengthen the role of the auditor.

In sum, it can be said that the SRD II and other initiatives do try to turn the slippery slope of shareholder activism into a fair game.