

# The Global Expansion of Shareholder Activism

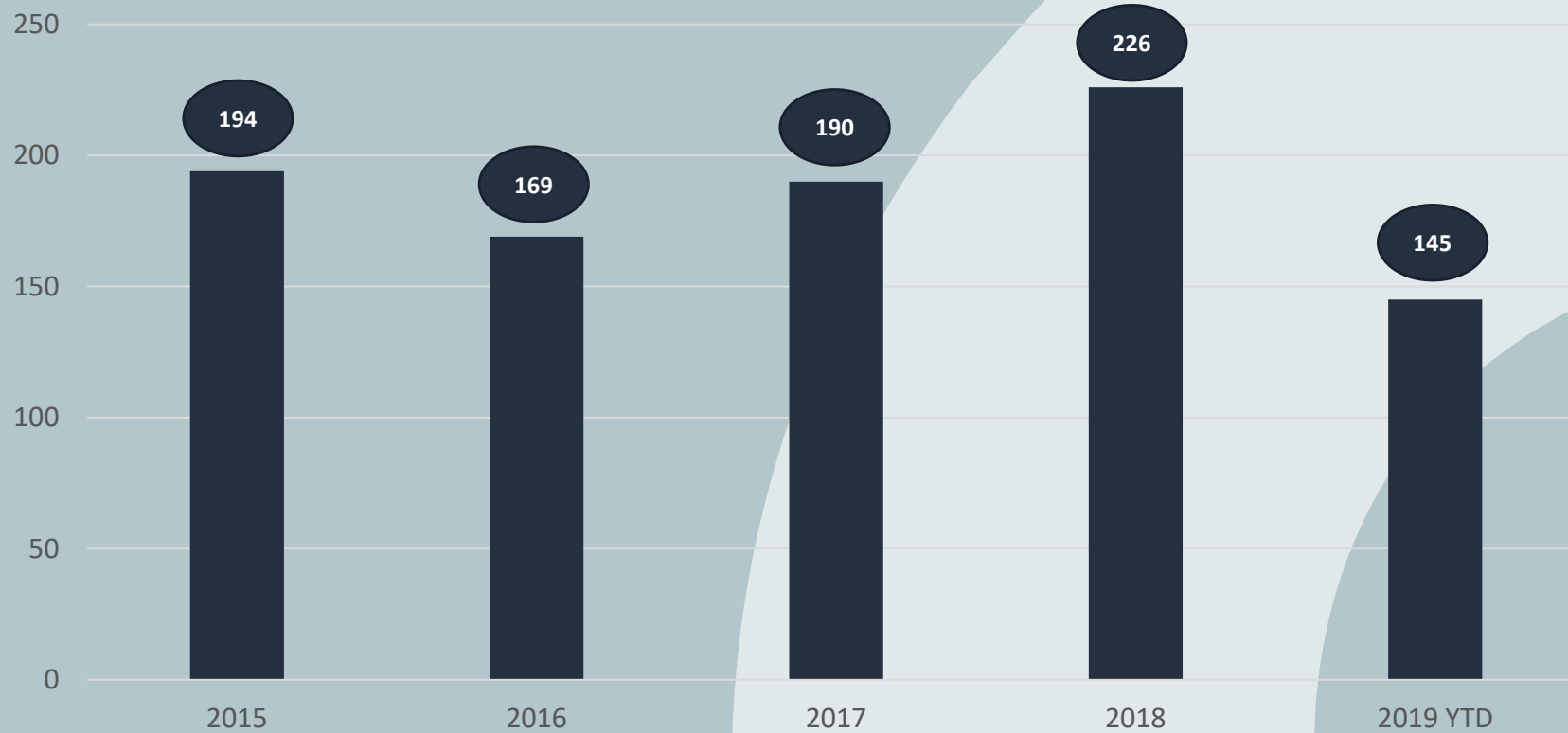
- **David Silk, Wachtell, Lipton, Rosen & Katz, New York**
- **Carl-Olof Bouveng, Cirio, Stockholm**
- **Gaku Ishiwata, Mori, Hamada & Matsumoto, Tokyo**
- **Arthur Mitchell, White & Case, Tokyo**
- **Andreas Mayr, Dorda, Vienna**
- **Jianwei Zhang, JunHe, Beijing**
- **Hernán Pacheco, EY Law, San José, Costa Rica**

- **Introduction to Shareholder Activism**
- **Overview of the activism environment in the respective country**
- **Panel discussion**

# Campaign Activity and Capital Deployed

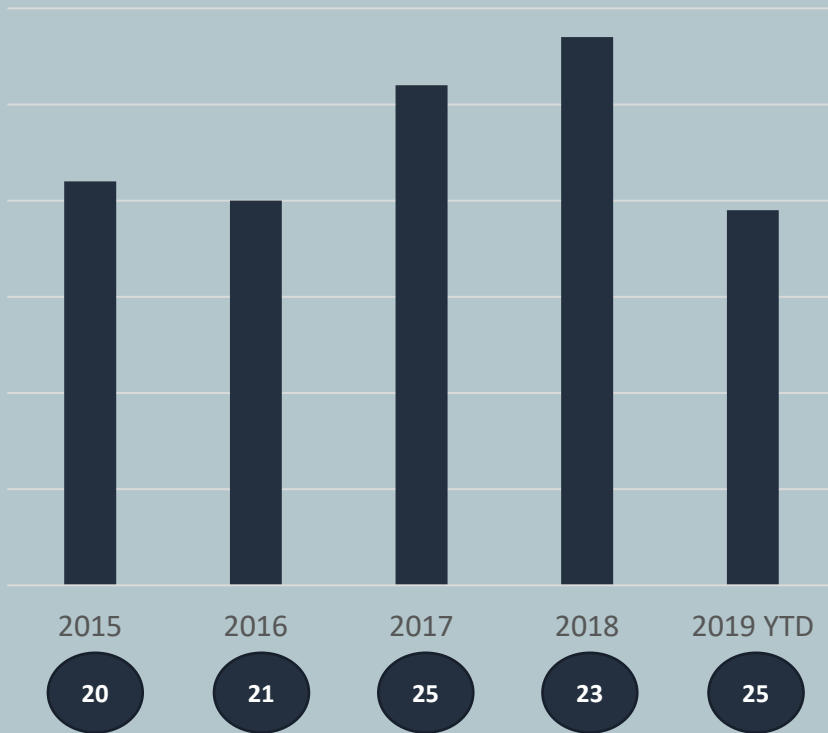
## Annual Campaign Activity (Q3)

(\$ in billions)

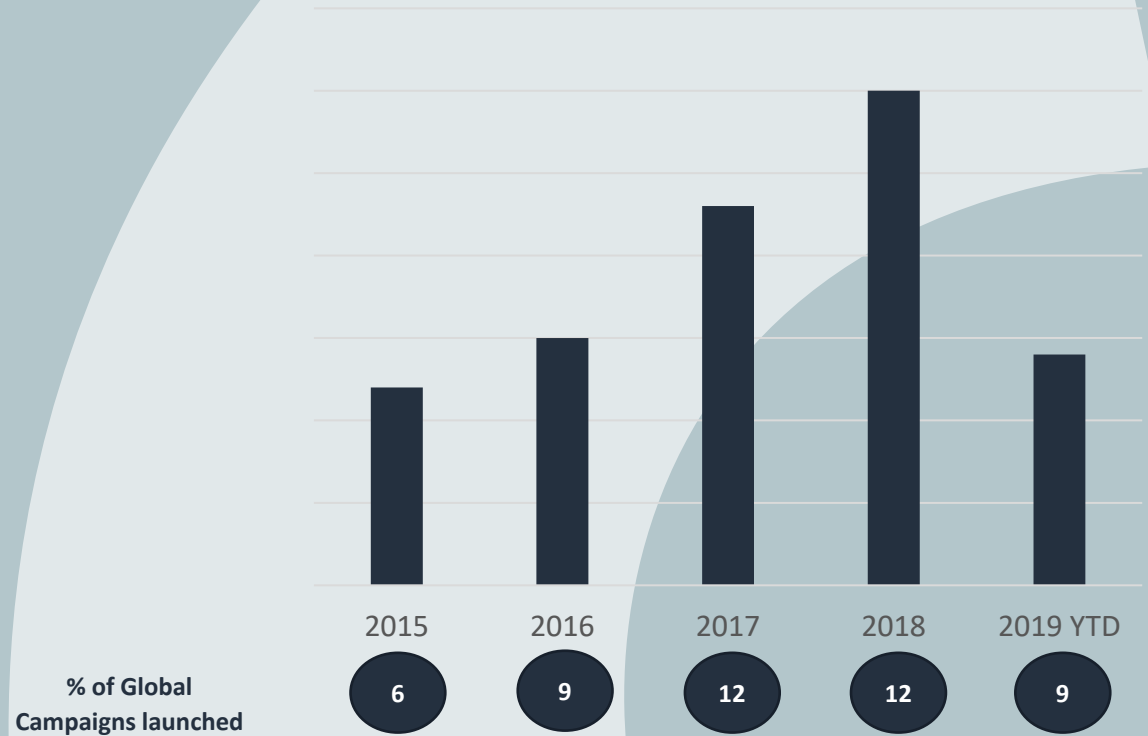


# Shareholder Activism – Europe and APAC

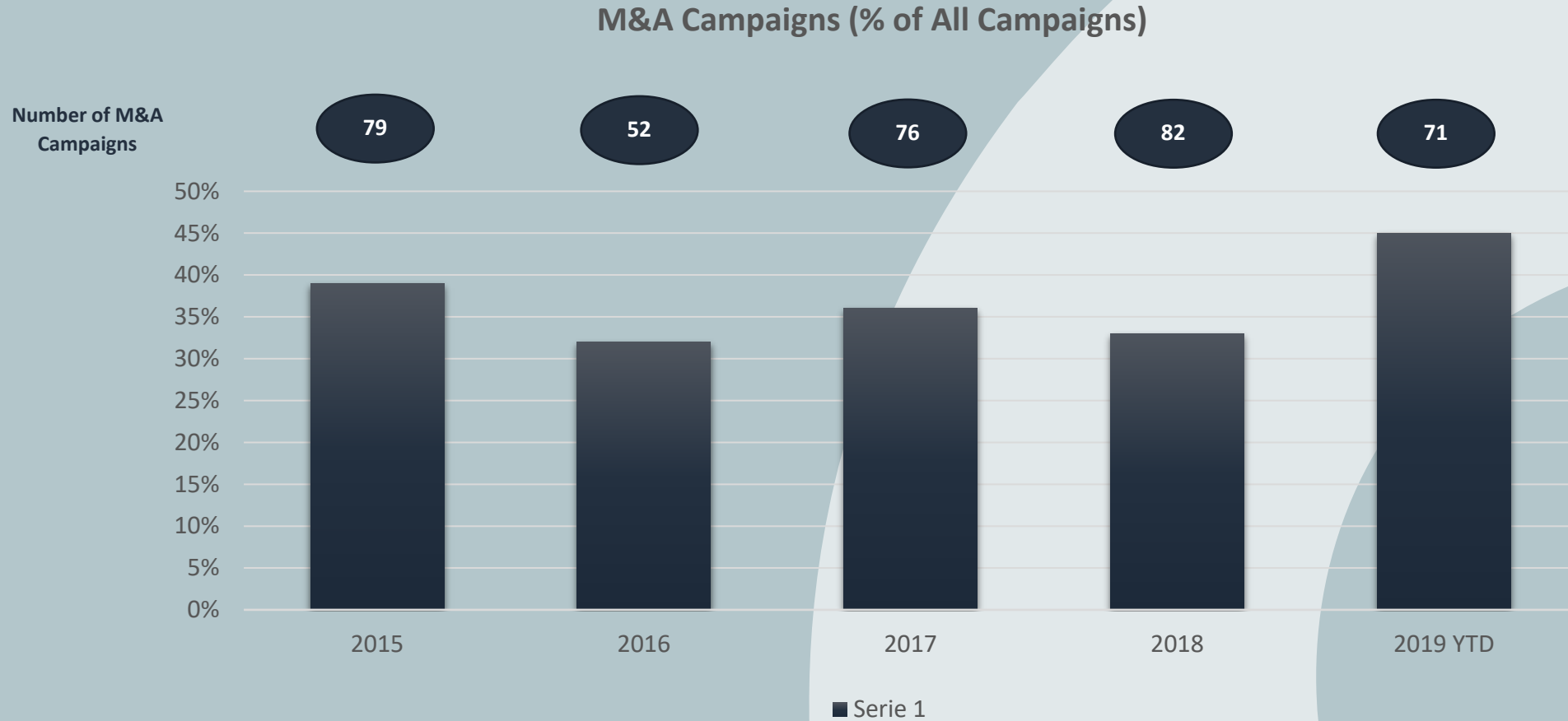
## Activism Against European Companies

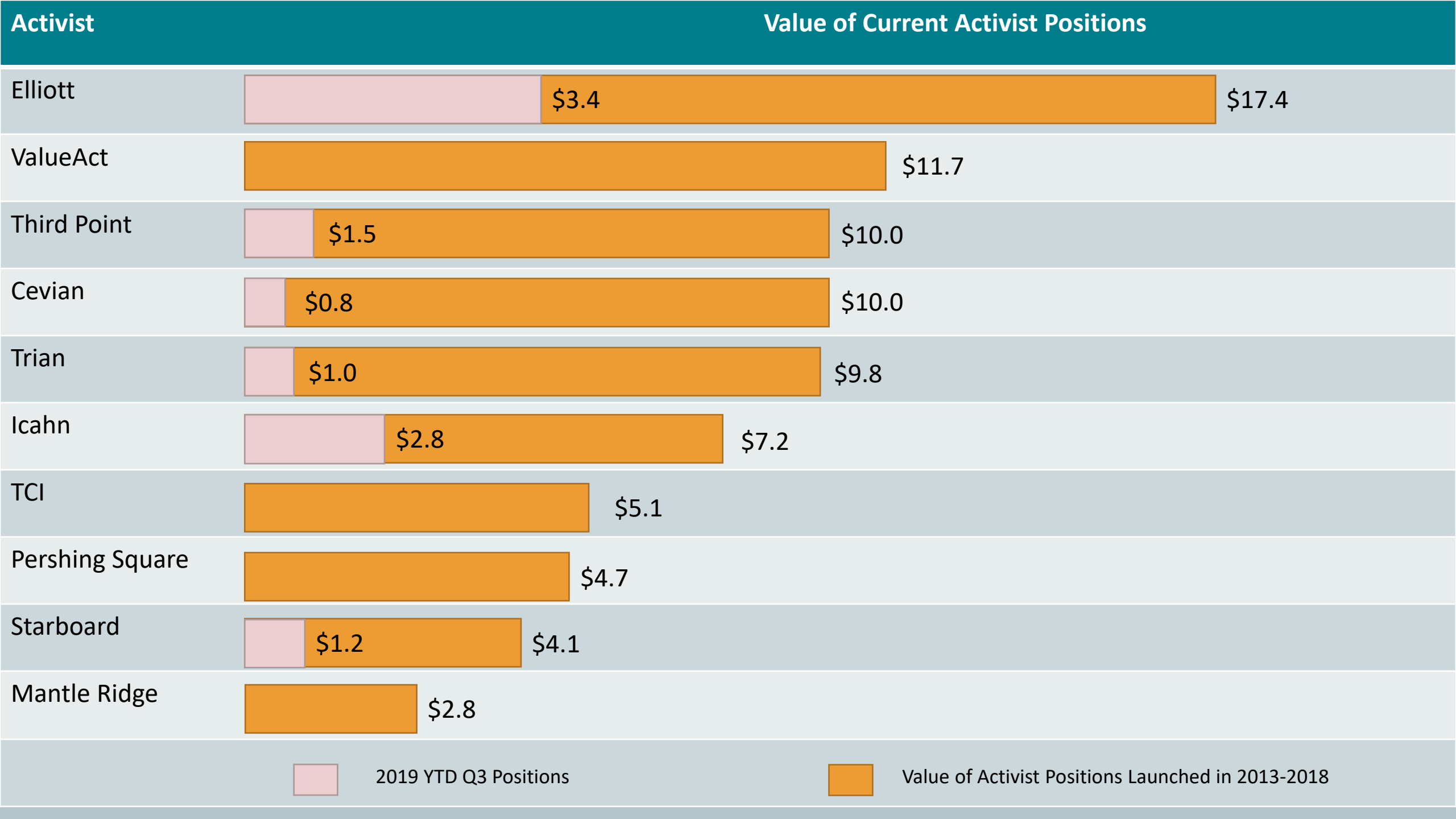


## Activism Against APAC Companies

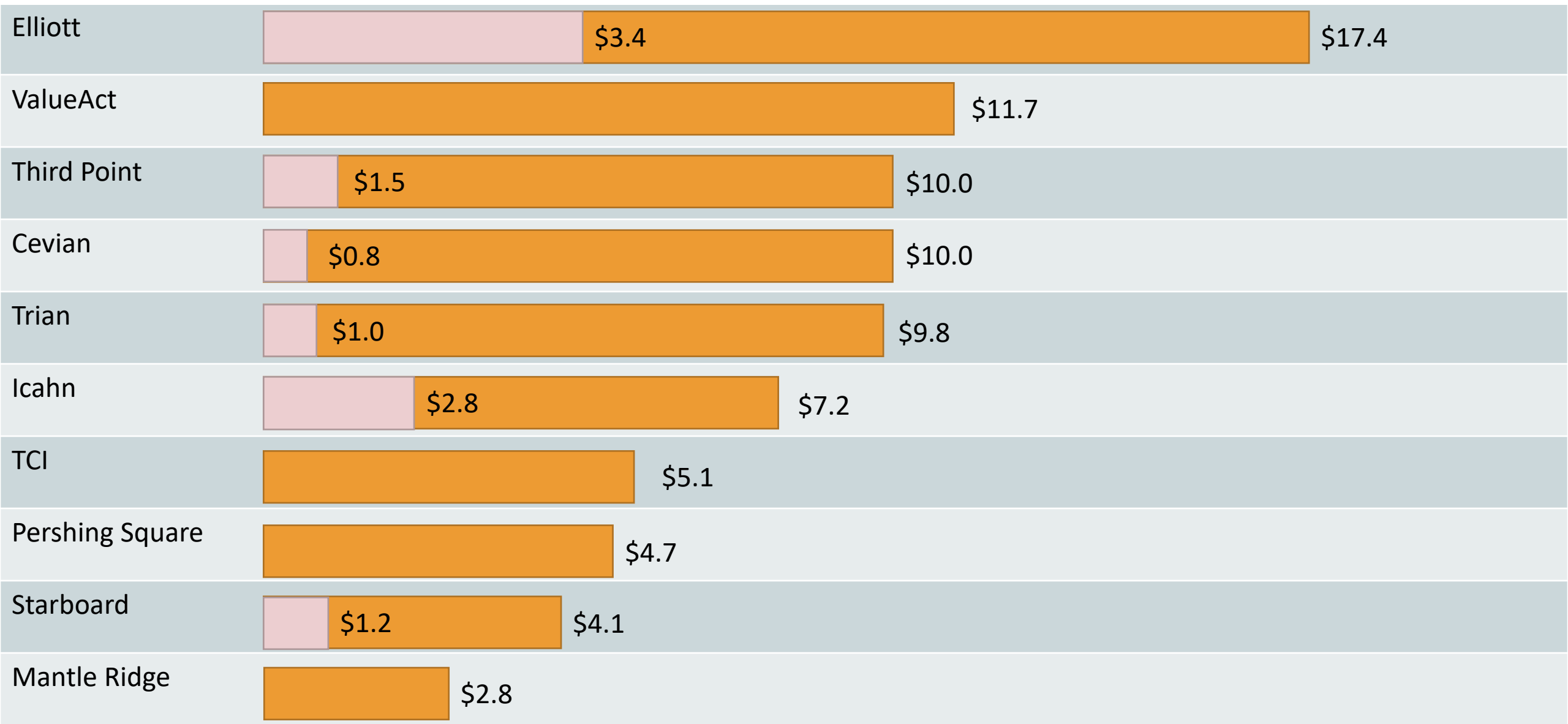


# M&A-related Campaigns





# Activist Value of Current Activist Positions



2019 YTD Q3 Positions
  Value of Activist Positions Launched in 2013-2018

## ● Recent Developments in Shareholder Activism Environment in Japan

### ➤ Corporate Governance Reforms

#### ◇ Stewardship Code of Japan (2014)

- Influenced the voting attitudes of institutional shareholders
- More than 55% of all shareholders of listed companies are institutional shareholders and non-Japanese shareholders

#### ◇ Corporate Governance Code (2015)

- Ratio of listed companies on the Tokyo Stock Exchange (1st) with independent outside director(s) increased from 46.7% (2013) to 99.7% (2019)
- Decrease in cross-shareholdings
- Decrease in defense plans (8.8% of all Japanese listed companies)

### ➤ Increase in Shareholder Activists

- ◇ 28% of Nikkei 225 companies have at least one shareholder activist among their shareholder base (2019)
- ◇ Number of shareholder activists active in Japan has increased from 9 (2014) to 27 (2018).
- ◇ Of those 27, 16 are US or European activists (such as Elliott, Third Point, TCI Fund, Value Act Capital and Greenlight), 5 are Asian activists (such as Effissimo and Oasis) and 6 are local activists (such as Murakami group)

## ● Recent Cases of Shareholder Activism In Japan

### ➤ Panasonic Case

- ◇ In 2016, Panasonic initiated a share exchange to acquire a 100% stake in its listed subsidiary PanaHome.
- ◇ Oasis started to acquire up to 9% shares in Panasonic Homes and launched a campaign to the effect that the consideration for such transaction was insufficient.
- ◇ Panasonic and PanaHome subsequently changed the transaction structure from a share exchange to a cash tender offer and increased the offer price to successfully close the transaction.
- ◇ Oasis exercised its appraisal rights.

### ➤ Toshiba Plant Systems Case

- ◇ a listed subsidiary of Toshiba deposited approximately US\$ 800 million with Toshiba as part of its Cash Management System
- ◇ Oasis brought a lawsuit against the directors of Toshiba Plant to enjoin such deposit claiming that it was a breach of their fiduciary duties.
- ◇ Toshiba Plant voluntarily terminated such deposit.

### ➤ Increase in Shareholder Proposals

- ◇ 56 companies facing shareholder proposals
- ◇ Number of successful proposals is still small - 2 (2017) and 3 (2018)
- ◇ Ratios of votes in favor of shareholder proposals (particularly for proposals to strengthen corporate governance and shareholder return) are increasing
- ◇ Olympus and “K” LINE gave board seats to directors appointed by shareholder activists (2019)



# Presentation

Shareholder Activism in Germany and Austria

by

**Dr Andreas Mayr, LL.M (Columbia)**

**Attorney at Law (New York)**

**D O R D A**

WE DELIVER CLARITY.

## Environment for Shareholder Activism in Germany

- Dramatic increase of activism during the last few years. Lately also attractive country for globally active activist funds (e.g. Elliot)
- Slowly developing public recognition of activists as also beneficial players
- Boards of large companies tend to be more often prepared to enter into a dialogue with activist shareholders which are following a moderate and constructive approach or who are expected to receive support from other (long-term, institutional) shareholders
- More activist campaigns commenced in connection with (pending) (M&A) transactions (transaction-oriented activism)
- Balanced legal environment in Germany encourages activism, while still protecting companies from purely predatory activists

## Environment for Shareholder Activism in Austria

- Activism is becoming more and more a debated topic in Austria (after not having played a significant role over the past decades)
- Recent changes in the "typical" shareholder structure of Austrian listed companies (reduction of number of core shareholders holding a large/majority/controlling stake) enhanced and will, in the future, continue to enhance an increase of activism
- Currently few but very active activists. Mainly hedge funds and special situations funds with focus on Austria
- Developing proxy practice; increased awareness of long term oriented (institutional) shareholders to exercise shareholder rights
- More often activist campaigns in connection with M&A-transactions
- Increasingly significant role/importance of proxy advisors

## Legal Environment for Shareholder Activism in Germany and Austria

- Extensive minority shareholder rights, depending finally on number of shares actually held, including:
  - Calling, attending, speaking and voting at the shareholders meetings
  - Request of special audit
  - Blocking minority rights
  - Contesting of shareholder resolutions in connection with (planned) transactions
  
- Corporate Governance Code (voluntary rules for good corporate governance based on a "comply or explain" principle):
  - Includes the requirement for listed companies to have one or more independent members of the supervisory board
  
- Mandatory bid requirements when purchasing a certain percentage of shares of a company or when shareholders acting in concert jointly hold such percentage
  
- Notification requirements when holding shares and reaching certain thresholds in a company

## Adjusted Strategies of Shareholder Activists in Germany and Austria


- Exercise of statutory rights as shareholder
- More often usage of media campaigns and other informal measures such as public letters, special audits, etc
- Exploitation of transactions and takeover situations (M&A/transaction based activism)
- Modified hidden stake building (being, however, aligned with legal requirements)

## Strategies of Attacked Companies

- Companies often have in the past not been sufficiently prepared for activist campaigns. Recent shift in awareness and willingness to implement preemptive measures, such as:
  - Analyzing company structure to identify weak points and other warning signs
  - Setting up teams able to respond quickly to measures of activists
  - Preparing board members and management for activist campaigns

## Outlook for the Future

- Shareholder activism is likely to further increase in both Germany and Austria. More exposure to globally active funds
- Increased transaction related activism
- Companies more aware and better prepared to respond to activist campaigns (in particular in connection with (planned) transactions)
- Role of media and public perception is becoming more important; more hostile public discourse and litigation


- 
- **What is the legal regime around activism?**
  - **How does an activist typically go about an attack?**
  - **How does a target company typically go about a defense?**
  - **How does activism impact M&A transactions in your country?**
  - **What is the role of proxy advisory firms, if any?**
  - **How do companies prepare in advance?**



- **What is the legal regime around activism?**

- Legal restrictions on offensive tactics by an activist (disclosure requirements around share purchases, mandatory bid requirements, regulatory restrictions, etc.)
- Defensive tactics by a target company (ability to implement classified board, poison pill, ability to restrict shareholders from calling a meeting, etc.)?

- **How does an activist typically go about an attack**
  - Buy stake, coordinate with existing investors, pressure the target company privately/publicly, proxy contests?
- **How does a target company typically go about a defense**
  - Takeover defenses, shareholder relations, etc.?

- 
- **What is the legal regime around activism?**
  - **How does an activist typically go about an attack?**
  - **How does a target company typically go about a defense?**
  - **How does activism impact M&A transactions in your country?**
  - **What is the role of proxy advisory firms, if any?**
  - **How do companies prepare in advance?**

Thank you!

**CIRIO**

