

# German and East Asian Perspectives on Corporate and Capital Market Law: Investors versus Companies

Edited by  
HOLGER FLEISCHER, HIDEKI KANDA,  
KON SIK KIM and PETER MÜLBERT

*Max-Planck-Institut  
für ausländisches und internationales  
Privatrecht*

*Beiträge zum ausländischen  
und internationalen Privatrecht*

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**Mohr Siebeck**

Beiträge zum ausländischen und internationalen Privatrecht

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## Preface

This volume is based on presentations delivered at a symposium held in 2017 at Seoul National University. It follows two earlier conferences in Hamburg and Tokyo. A fourth conference has subsequently taken place in Beijing in 2018. These four symposia have not only given enormous pleasure to all participants but also stimulated comparative legal exchange between company law academics in Germany, China, Japan and South Korea and put it on a new footing.

We would like to express our gratitude to our South Korean hosts for unforgettable days in Seoul. Furthermore, we would like to thank all speakers for their valuable and much appreciated contributions. Janina Jentz and Yannick Chatard took care of the editing process and their help is gratefully acknowledged. Last, but not least, our sincere thanks go to Michael Friedman and Jane Yager for providing valuable language editing.

Hamburg, Tokyo, Seoul and Mainz  
October 2019

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*Peter Mülbert*



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## Abbreviations

AEA	Act on External Audit of Joint Stock Corporations
AGM	Annual General Meeting
aka	also known as
AktG	Stock Corporation Act (Aktiengesetz von 1965)
Art.	Article
BGH	Germany's Federal Court of Justice (Bundesgerichtshof)
BGHZ	Decisions of the German Supreme Court in civil matters E (entscheidungen des Bundesgerichtshofs in Zivilsachen)
BaFin	Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht)
BAG	Federal Labor Act (Bundesarbeitsgesetz)
CALS	Centre for Asian Legal Studies of NUS Law
CEO	Chief Executive Officer
CEPS	Centre for European Policy Studies
CFD	Contracts for Difference
C.F.R.	Code of Federal Regulations
CMA	Korean Capital Market Law
Co.	Company
Co. Ltd.	Company Limited by shares
CSD	Central Securities Depository
CSRC	China Securities Regulatory Commission
Del. Ch.	Delaware Court of Chancery
ECFR	European Company and Financial Law Review
ECGI	European Corporate Governance Institute
ECJ	European Court of Justice
ed.	Edition
EDC	Economy Democratization Committee
EEA	European Economic Area
e.g.	for example
ESMA	European Securities and Markets Authority
et al.	et alii/aliae/alia
etc.	et cetera
EU	European Union
FATF	Financial Action Task Force
FinfraG	Financial Market Infrastructure Act (Finanzmarktinfrastrukturgesetz)
FSC	Financial Services Commission
FSCMA	Financial Investment Services and Capital Markets Act

FSS	Financial Supervisory Service
Fund Corporation	China Securities Investor Protection Fund Corporation
GDP	Gross Domestic Product
GmbH	Private limited company (Gesellschaft mit beschränkter Haftung)
GMS	General Meeting of Shareholders
GWG	Money Laundering Act (Geldwäschegesetz)
HC	Halla Construction
HGB	Commercial code (Handelsgesetzbuch)
i.e.	id est
id.	idem
IMF	International Monetary Fund
Inc.	Incorporation
IPC	Institution of Public Character
ISMR	Information Session for Major Restructuring
JASDAQ	Japan Association of Securities Dealers Automated Quotations
KCC	Korean Commercial Code
KCML	Korean Capital Market Law
KFTC	Korea Fair Trading Committee
KOSDAQ	Korea Securities Dealers Association Automated Quotations
KOSPI	Korea Composite Stock Price Index
KRX	Korea Exchange
KWG	Banking Act (Gesetz über das Kreditwesen, Kreditwesengesetz)
LLC	Limited Liability Company
LLP	Limited Liability Partnership
LSE	London Stock Exchange
M&A	mergers and acquisitions
MAD	Directive on Market Abuse
MAR	Market Abuse Regulation
MBR	Mandatory Bid Rule
MSI	Medium and Small Investors
MSI Center	China Securities Investor Services Center
NASDAQ	National Association of Securities Dealers Automated Quotations
NBS	Nippon Broadcasting System
no.	Number
NPA	National Pension Act
NPCSC	Standing Committee of the National People's Congress
NPS	National Pension Service
NSWLR	New South Western Law Review
NUS Law	National University of Singapore, Faculty of Law
NY	New York
NZG	New Journal for Corporate Law (Neue Zeitschrift für Gesellschaftsrecht)

OLG	Higher Regional Court (Oberlandesgericht)
OTC	Over the Counter
para.	Paragraph
PBR	Price Book Value Ratio
PC	Personal Computer
PRP	Pre-warning rights plan
PSPD	People's Solidarity for Participatory Democracy
PTS	Proprietary Trading System
R&D	Research and Development
ROA	Return on assets
S&P 1500	Standard & Poor's Composite 1500 Index
SA	Société Anonyme
SCA	Stock Corporation Act (Aktiengesetz, AktG)
Sc.L.R.	Scottish Law Review
SEC	US Securities and Exchange Commission
sec.	Section
SIAS	Securities Investor Association in Singapore
SISI	Special Information Session for Investors
SMP	Standard Market Price
SOE	State-owned Enterprise
STA	Securities Transaction Act
TD	Transparency Directive
TOD	EU Takeover Directive
ToSTNeT	Tokyo Stock Exchange Trading NeTwork
TRS	Total Return Swap
UK	United Kingdom
US	United States of America
WpHG or STA	Securities Trading Act (Gesetz über den Wertpapierhandel, Wertpapierhandelsgesetz)
WpPG	Securities Prospectus Act (Wertpapierprospektgesetz)
WpÜG	Securities Acquisition and Takeover Act (Wertpapiererwerbs- und Übernahmegesetz)



## I. Shareholder Activism



# Shareholder Activism in Germany

*Andreas Engert*

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## I. Introduction

Shareholder activism has become a lasting force in corporate governance around the globe.<sup>1</sup> Hailed by some as a cure for shareholder apathy,<sup>2</sup> others perceive it as a threat to the long-term thriving of corporations and their stakeholders.<sup>3</sup> In Germany, shareholder activism arrived most visibly with the campaign of several UK and US hedge funds, led by The Children's Investment Fund (TCI), against the attempted takeover of London Stock Exchange by Deutsche Börse in 2005.<sup>4</sup> The clash between Deutsche Börse's manage-

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<sup>1</sup> See M. BECHT/J. FRANKS/J. GRANT/H. WAGNER, Returns to Hedge Fund Activism: An International Study, *The Review of Financial Studies* 30 (2017) 2933, 2953 (documenting the rise in numbers of activist campaigns in a broad international sample 2000–2010).

<sup>2</sup> Vocal proponents in U.S. literature include: R. GILSON/J. GORDON, The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights, *Columbia Law Review* 113 (2013) 863, 896–902 (characterizing activists as filling the gap left by more diversified institutional investors); L. BEBCHUK/A. COHEN/S. HIRST, The Agency Problems of Institutional Investors, *Journal of Economic Perspectives* 31 (2017) 89, 104–107 (likewise).

<sup>3</sup> See L. STRINE, Who Bleeds When the Wolves Bite?, *Yale Law Journal* 126 (2017) 1870; J. COFFEE, The Agency Costs of Activism: Information Leakage, Thwarted Majorities, and the Public Morality, ECGI Law Working Paper 373, 2017.



ment and the activists culminated in the crushing defeat and ouster of the company's CEO Werner Seifert. This very prominent occurrence has been preceded and – even more so – followed by many activist campaigns,<sup>5</sup> prompting many contributions in legal literature, especially by legal advisers of potential target corporations.<sup>6</sup>

Without giving away too much, shareholder activism is now a firmly established part of the corporate governance landscape of German stock corporations.<sup>7</sup> As understood in this essay, it reflects a coherent and specific investment strategy. Briefly put, activism consists of taking significant minority positions in publicly traded firms, effecting changes in corporate management, and selling at a profit. While this is a straightforward description, it fails to cover behaviors that occasionally are also referred to as “activism.” Sometimes any sustained exercise of voice by shareholders in the corporation is referred to as “activist.” The assertive and short-run campaigns considered in this essay could then be characterized – based on their typical promoters – as “hedge fund activism” to distinguish them from the continuous and more temperate engagement of mutual funds, pension funds, and other traditional institutional investors with corporate management.<sup>8</sup> Hedge funds are also targeting corporations with short selling positions to benefit from alleged – and often real – managerial misbehavior, especially relating to questionable accounting.<sup>9</sup> Likely because of

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<sup>4</sup> BECHT/FRANKS/GRANT/WAGNER, *supra* note 1, 2941–2944 (providing a sketch of the incident); one of the first contributions to the legal debate in Germany was motivated by the Deutsche Börse case, see A. ENGERT, *Hedgefonds als aktivistische Aktionäre*, *Zeitschrift für Wirtschaftsrecht* 2006, 2105.

<sup>5</sup> See the studies cited in note 41 *infra*.

<sup>6</sup> See, e.g., M. SCHOCKENHOFF, *Vorstände im Visier aktivistischer Aktionäre. Auswechslung und Vergütungsreduzierung auf Verlangen von Aktionären und Investoren?*, *Zeitschrift für Wirtschaftsrecht* 2017, 1785; M. SCHOCKENHOFF/J. CULMANN, *Shareholder Activism in Deutschland*, *Zeitschrift für Wirtschaftsrecht* 2015, 297 (citing three cases, including the 1990s “Girmes” case); B. GRASSL/T. NIKOLEYCZIK, *Shareholder Activism and Investor Activism*, *Die Aktiengesellschaft* 2017, 49; M. SCHIESSL, *Empfehlungen an Publikumsgesellschaften für den Umgang mit Hedgefonds*, *Zeitschrift für Wirtschaftsrecht* 2009, 689, 690–691 (recounting prominent cases and citing Hermann Krages as a German shareholder activist of the 1950s).

<sup>7</sup> See the illuminating comparison between activism in the U.S. and in Germany by K. LANGENBUCHER, *Hedge Fund Activism in Germany and the US – on Convergence, Differences and Normative Reasoning*, in: Siekmann (ed.), *Festschrift für Theodor Baums* (Tübingen 2017) 743.

<sup>8</sup> See, e.g., M. DENES/J. KARPOFF/V. MCWILLIAMS, *Thirty years of shareholder activism: A survey of empirical research*, *Journal of Corporate Finance* 44 (2017) 405, 407–408 (distinguishing hedge fund activism from other types).

<sup>9</sup> For examples from Germany, see M. SCHOCKENHOFF/J. CULMANN, *Rechtsschutz gegen Leerverkäufer*, *Die Aktiengesellschaft* 2016, 517, 518–519; see also J. WENTZ, *Shortseller-Attacken – ökonomische und juristische Bewertung eines ambivalenten Geschäftsmodelles*,

their public attacks on firms, these hedge funds are also often labeled as “activist.”<sup>10</sup> But short sellers only seek to persuade the market of the perceived wrongdoing and to gain from the resulting fall in the stock price. Their strategy does not involve active intervention in the management of the corporation.

The following Section II casts more light on German-style shareholder activism using the recent example of the successful campaign against the incumbent management of Stada AG. It also reviews the empirical evidence on the scope and effects of activism, putting the focus on Germany. Sections III and IV then consider in more depth the issues raised by shareholder activism under German law, separately for the two stages of building a shareholding in the target corporation and then of using the resulting power to influence management. Section V briefly concludes.

## II. Shareholder Activism in Germany: State of Play

In this essay, activism is seen as an investment strategy aiming at returns from accomplishing major changes in the management of individual corporations. Dedicated activists specialize in this strategy. Rather than holding a broad portfolio of shares and earning the market return, plus perhaps a minor extra reward for stock picking, activists seek to identify target firms where they believe that implementing far-reaching changes – such as replacing existing leadership or a sale of the business – would substantially increase the market value of the corporate stock. Having found a suitable target, they make concentrated investments at the current price and use the acquired shareholding to pressure for the desired measures. If the campaign succeeds, they liquidate their stake and realize the resulting price increase. The returns of activists reflect mostly their ability to discover worthwhile targets and to pressure their management; the general market return from holding risky stock is only an accidental complement. In the jargon of financial investment, the expected returns consist of much “alpha” (asset manager ability) and only little “beta” (market risk premium). This return composition makes activism the natural domain of hedge funds.<sup>11</sup>

### *1. Activism as an Investment Strategy: The Case of Stada Arzneimittel AG*

The recent activist campaign targeted at the German drug maker Stada Arzneimittel AG (“Stada”) serves to illustrate the three steps of buying low, intervening, and selling high. Founded in 1895 as an association of German pharmacists, Stada became a stock corporation in 1970 and went public in

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Zeitschrift für Wirtschafts- und Bankrecht 2019, 196. For the U.S., see I. APPEL/J. BULKA/V. FOS, Active Short Selling by Hedge Funds, ECGI Finance Working Paper 609/2019.

<sup>10</sup> See, e.g., WENTZ, *supra* note 9, 196 (“Shortseller-Attacken”).

<sup>11</sup> See *infra* note 40.

1997/1998.<sup>12</sup> Since 1993, the dominant figure in the firm's management had been Hartmut Retzlaff as chairman of the executive board (*Vorstand*). Mr. Retzlaff in 2014 boasted an annual compensation of seven million Euros, a rather large paycheck for a firm with both sales and a market capitalization of around two billion Euros.<sup>13</sup> There were also allegations of Mr. Retzlaff improperly promoting the career of his son within Stada.<sup>14</sup> Perhaps more importantly, the generic pharmaceutical industry had seen much consolidation in previous years. Stada was seen as a potential takeover candidate,<sup>15</sup> except for the fact that the transferability of its shares was restricted, meaning that acquiring them required approval by the executive board.<sup>16</sup>

On 1 April 2016, the investment fund Active Ownership Capital, based in Luxembourg and managed in Frankfurt by two finance professionals,<sup>17</sup> reported having acquired a 5.05% shareholding in Stada.<sup>18</sup> Only as late as 28 June 2016, already deep into the battle, the U.S.-based activist investor Guy Wyser-Pratt announced that he had also acquired slightly less than 3% of the voting rights.<sup>19</sup>

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<sup>12</sup> Until 1997, share ownership had been restricted to pharmacists and physicians. See STADA ARZNEIMITTEL AG, *Eine Zeitreise: Die Geschichte von STADA 1895–2015*, available at <<https://www.stada.de/konzern/unternehmensgeschichte.html>> (last visited 1 November 2018); Hoppenstedt Aktienführer 1976–2015, database available at <<https://digi.bib.uni-mannheim.de/aktienf%C3%BChrer/data/index.php>> (last visited 1 November 2018).

<sup>13</sup> See Stada, Annual Report 2014, pp. 2, 96. In fairness, Mr. Retzlaff in the same year agreed to forego 17 million Euros of his previous 35 million Euros net worth of pension benefits, see Stada, Annual Report 2013, p. 97. Mr. Retzlaff's compensation for 2015, his last full year in office, halved to 3.6 million Euros, Stada, Annual Report 2015, 108.

<sup>14</sup> P. HOLLSTEIN, System Retzlaff: Family Business, apotheke adhoc, available at <<https://www.apotheke-adhoc.de/nachrichten/detail/markt/stada-family-business-generika-apotheke-retzlaff/>> (last visited 1 November 2018).

<sup>15</sup> See E. HENNING, Activist Investor to Pressure Stada AG to Explore Potential Sale, *Wall Street Journal*, 3 May 2016, available at <<https://www.wsj.com>> (last visited 2 November 2018); E. HENNING, Stada Arzneimittel Holds Buyout Talks With CVC Capital, *Wall Street Journal*, 25 May 2016, available at <<https://www.wsj.com>> (last visited 2 November 2018) (pointing to estimates of a potential takeover valuation of 60 Euros per share).

<sup>16</sup> § 8 of Stada's articles of incorporation as of 2015, accessible at <<https://www.unternehmensregister.de>> (last visited 1 November 2018); Stada, Annual Report 2015, 142. Since 1990, stock exchanges no longer require that listed firms commit to granting approval, see W. BAYER, in: *Münchener Kommentar zum AktG* (4<sup>th</sup> ed., Munich 2016) § 68 AktG paras. 78–80.

<sup>17</sup> See <<http://activeownershipcapital.com>> (last visited 19 March 2019). One of the founders, Klaus Röhrig, formerly worked for Elliott, the famous U.S.-based activist hedge fund manager.

<sup>18</sup> Major shareholding disclosures by Stada, accessible at <<https://www.unternehmensregister.de>> (last visited 19 March 2019). In addition to the shares, Active Ownership Management also acquired call and put options, each for .96% of Stada's shares.

<sup>19</sup> See S. IWERSEN/M. TEIGHEDER, Activist Investor Buys Stake in Stada, 28 June 2016, available at <<https://www.handelsblatt.com/>> (last visited 19 March 2019).

Other than these two investors, no further changes in Stada's ownership structure became publicly observable.<sup>20</sup> Active Ownership Capital seems to have reached out to other activists as potential allies but without tangible results.<sup>21</sup> Nonetheless, the fund proved capable of launching an ultimately successful campaign against the incumbent management. From the beginning, it appears that Active Ownership sought not so much to mend Stada's strategy or corporate governance but rather to accomplish a sale of the company.<sup>22</sup> Stada's management at one point agreed to nominate five directors suggested by the fund for election to the supervisory board but then reneged on its promise and postponed the general meeting.<sup>23</sup> Mr. Retzlaff appears to have held talks with CVC Capital Partners, a private equity fund manager, as a potential friendly acquirer.<sup>24</sup> When the attempt failed, Mr. Retzlaff cited health reasons for taking an indefinite leave of absence on 5 June 2016.<sup>25</sup>

The shareholders meeting was finally held on 26 August 2016 and turned into a showdown between management and the activist fund. Interestingly, the two leading proxy advisors were split in their support for either camp.<sup>26</sup> Active Ownership Capital received support from Deutsche Bank's DWS fund family and other shareholders.<sup>27</sup> After heated debates, not all of the activist's candidates for the supervisory board were elected, but it succeeded in replacing Martin Abend, the long-time chairman, along with all but one shareholder representative on the supervisory board. Importantly, the shareholders meeting also voted to remove the restriction on share transferability from the articles.<sup>28</sup> Half a

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<sup>20</sup> A shareholding disclosure by BNY Mellon Service Kapitalanlage-Gesellschaft dated 25 February 2016, accessible at <<https://www.unternehmensregister.de>> (last visited 19 March 2019) likely served the stake-building effort of Active Ownership Capital as indicated by the congruence of the derivative positions.

<sup>21</sup> See HENNING, *supra* note 15, 3 May 2016 (reporting that large hedge funds in London and New York had shown skepticism about the potential for a sale of the firm). But see *Börsen-Zeitung*, BaFin nimmt sich Stada-Investor vor, 29 July 2016 (referring to an investigation by the market supervisor BaFin into a possible failure to disclose shareholdings based on coordination with other investors).

<sup>22</sup> See references in note 15. But see IWERSEN/TEIGHEDER, *supra* note 19) (citing Active Ownership Capital's criticism of the supervisory board's failure "to embrace reform"); HENNING, *supra* note 15, 25 May 2016 (citing a claim by the fund's managers that they were interested in improving performance). See also S. WADEWITZ, *Stada-Aktionäre machen ihrem Ärger Luft*, *Börsen-Zeitung*, 27 August 2016, 7 (reporting divergent characterizations of the fund's goals).

<sup>23</sup> HENNING, *supra* note 15, 25 May 2016.

<sup>24</sup> HENNING, *supra* note 15, 25 May 2016.

<sup>25</sup> IWERSEN/TEIGHEDER, *supra* note 19).

<sup>26</sup> S. WADEWITZ, *Rückendeckung für Stada Aufsichtsrat*, *Börsen-Zeitung*, 13 August 2016, 1; S. WADEWITZ, *Stada schafft klare Verhältnisse*, *Börsen-Zeitung*, 16 August 2016, 9.

<sup>27</sup> On DWS' early support, see HENNING, *supra* note 15, 25 May 2016.

<sup>28</sup> S. WADEWITZ, *Stada droht juristisches Nachspiel*, *Börsen-Zeitung*, 30 August 2016, 7.

year after the shareholders meeting, the executive board of Stada disclosed that it was considering overtures from three competing private equity firms.<sup>29</sup> After what it described as a “structured bidding process”, the board on 10 April 2017 announced its support of a takeover bid by the private equity investors Bain Capital and Cinven, which had increased their offer from 58 to about 65 Euros at the last minute.<sup>30</sup>

But it went even better for the shareholders of Stada: In their first attempt, Bain and Cinven failed to reach their acceptance threshold of 67.5%.<sup>31</sup> A second, slightly improved bid with a lower acceptance threshold of 63% finally succeeded on 17 August 2017.<sup>32</sup> Yet in the meantime, another activist arrived on the scene: Paul Singer and his Elliott fund group notified a first stake of 8.7% in early July 2017 and by the end of August expanded it to 15.2%.<sup>33</sup> The new advance belongs to another activist strategy with a peculiar German flavor: interventions in ongoing acquisitions with the goal of squeezing a more attractive price from the acquirer. Elliott, in fact, has pioneered this approach that relies on at least three levers offered by the German institutional environment:<sup>34</sup> accumulating a share block in the takeover phase to prevent the acceptance threshold from being met, preventing in the same manner the acquirer’s ability to conclude a domination agreement after the takeover, or – failing this – challenging the compensation offered in the domination agreement. In acquisitions of German stock corporations, domination agreements – a special institution under the German *Konzernrecht* (group law) –

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<sup>29</sup> Inside information disclosures by Stada of 12, 13, 16, and 23 February 2017, accessible at <<https://www.unternehmensregister.de>> (last visited 19 March 2019) (naming only Advent International and Cinven).

<sup>30</sup> Inside information disclosure by Stada of 10 April 2017, accessible at <<https://www.unternehmensregister.de>> (last visited 19 March 2019). L. BURGER/A. HÜBNER, Bain, Cinven pay up to win backing for Stada deal, Reuters, 10 April 2017, available at <<https://uk.reuters.com/article/uk-stada-m-a-idUKKBN17COCT>> (last visited 19 March 2019).

<sup>31</sup> Inside information disclosure by Stada of 26 June 2017, accessible at <<https://www.unternehmensregister.de>> (last visited 19 March 2019) (noting that the threshold had already been lowered from 75%).

<sup>32</sup> S. CLAUSEN, Bain and Cinven gelingt Kauf von Stada – Aktie steigt stark, Manager-Magazin, 18 August 2017, available at <<http://www.manager-magazin.de/unternehmen/artikel/stada-bain-capital-und-cinven-gelingt-kauf-a-1163470.html>> (last visited 19 March 2019). See also inside information disclosure by Stada of 10 July 2017, accessible at <<https://www.unternehmensregister.de>> (last visited 19 March 2019) (disclosing Stada’s consent to exemption from one-year exclusion period for renewed public takeover bid).

<sup>33</sup> Major shareholding disclosures by Stada of 12 July 2017 and 31 August 2017, accessible at <https://www.unternehmensregister.de> (last visited 19 March 2019).

<sup>34</sup> See the opinion piece by two Elliott managers S. WAXLEY/F. TUIL, Rechte für alle – Kampf um Wella als Blick in die Zukunft, *Börsen-Zeitung*, 2 April 2005, B12 (characterizing Elliott’s intervention in Procter & Gamble’s acquisition of Wella AG as a model); B. GRASSL/T. NIKOLEYCZIK, Shareholder Activism und Investor Activism, *Die Aktiengesellschaft* 2017, 49, 51 (describing a more recent intervention by Elliott).

are the necessary condition for an acquirer to avail itself of the target's assets to pay for the acquisition price.<sup>35</sup> Concluding a domination agreement requires a 75% qualified majority in the shareholders meeting, giving activists a realistic prospect of snatching up a veto position. As many transactions rely on the target's assets for funding, blocking the domination agreement gives activists a strong bargaining position at a point in time when the acquirer can no longer back out of the transaction. Even if the agreement goes through without additional concessions, the activist can still challenge the terms of the pay-out offer in appraisal proceedings. In the case of Stada, Elliott seems to have reached an understanding with Bain and Cinven: The profit transfer and domination agreement was approved by a 99% majority of the shareholders on 2 February 2018. It contained a pay-out offer at 74.40 Euros, a sizable premium on the takeover price, which nonetheless virtually no outside shareholder accepted.<sup>36</sup> The last step consisted of another offer by Bain and Cinven in October 2018, as a precondition for delisting the stock, to purchase all outstanding shares at 81.73 Euros, bringing their shareholding eventually to 93.6%.<sup>37</sup> This offer was finally too sweet to reject for Elliott.<sup>38</sup> Active Ownership Capital had sold out already in June 2017 at a stock price of around 65 Euros. Compared to the stock price of 30–35 Euros upon acquiring its stake, it had doubled its investment within a year.

The stock price chart on the following page (*Figure 1*) presents the timeline of events.

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<sup>35</sup> For an overview of the German law of corporate groups, see K. LANGENBUCHER, Do We Need a Law of Corporate Groups?, in: Fleischer/Kanda/Kim/Mülbert (eds.), *German and Asian Perspectives on Company Law* (Tübingen 2016) 353, 359 ff.; A. SCHEUCH, *Konzernrecht: An Overview of the German Regulation of Corporate Groups and Resulting Liability Issues*, *European Company Law* 13 (2016) 191; T. TRÖGER, *Corporate Groups*, in: Fleischer/Hansen/Ringe (eds.), *German and Nordic Perspectives on Company Law and Capital Markets Law* (Tübingen 2015) 157, 162 ff.

<sup>36</sup> Major shareholding disclosure by Stada of 22 October 2018, accessible at <<https://www.unternehmensregister.de>> (last visited 19 March 2019) (showing Cinven and Bain shareholding of 65.3% and an additional derivative position of 7% in October 2018).

<sup>37</sup> Stada, Annual Report 2018, 12.

<sup>38</sup> Major shareholding disclosure by Stada of 4 December 2018, accessible at <<https://www.unternehmensregister.de>> (last visited 19 March 2019) (reporting complete disposal of Elliott's stake).

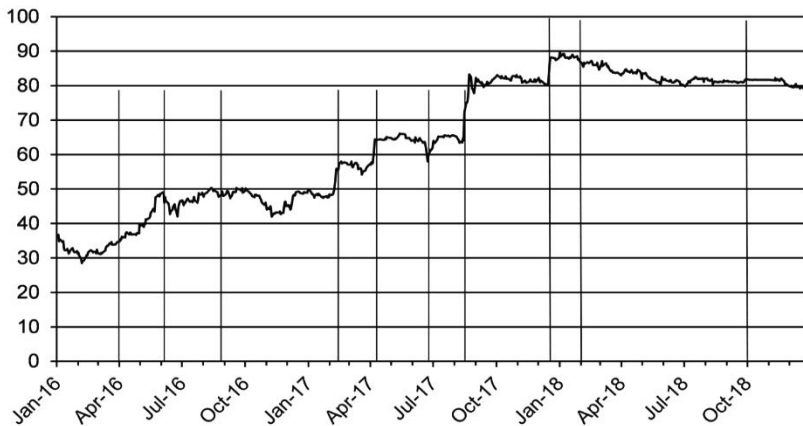


Figure 1: Stock price of Stada AG<sup>39</sup> and timeline of events. From left to right: disclosure of acquisition of 5% stake by Active Ownership Capital (1 April 2016); chairman of executive board Hartmut Retzlaff takes indefinite leave of absence (5 June 2016); chairman of supervisory board Martin Abend dismissed in shareholders meeting (26 August 2016); competing indications of interest from three competing bidders acknowledged (12–23 February); offer of 65 Euro from Bain and Cinven approved by executive board (10 April 2017); first takeover bid fails (16 June 2017); second bid succeeds (17 August 2017); conclusion of domination agreement (19 December 2017); approval of domination agreement by shareholders meeting (2 February 2018); announcement of acquisition offer in preparation of delisting (1 October 2018).

## 2. The Larger Picture

The Stada case encapsulates the main features of shareholder activism: Instead of broadly investing in a diversified portfolio and perhaps attempting to overweight undervalued securities, activists take concentrated positions in the stock of firms that they believe have a large potential for appreciation.<sup>40</sup> They then cajole and often pressure management and their fellow shareholders to

<sup>39</sup> The data was downloaded from the Stada website.

<sup>40</sup> Put differently, the business model of an activist investor is to reap returns from the asset manager's superior investment skills ("alpha", "arbitrage profits") rather than from taking market risk and earning a risk premium ("beta"). This explains why hedge funds are the epitomic activist investors, see BEBCHUK/COHEN/HIRST, *supra* note 2, 104–106; J.P.Morgan, *The activist revolution*, 2015, <[https://www.jpmorgan.com/directdoc/JPMorgan\\_Corporate\\_FinanceAdvisory\\_MA\\_TheActivistRevolution.pdf](https://www.jpmorgan.com/directdoc/JPMorgan_Corporate_FinanceAdvisory_MA_TheActivistRevolution.pdf)> 3–4. On the nature of hedge funds, see A. ENGERT, *Transnational Hedge Fund Regulation*, *European Business Organization Law Review* 11 (2010) 329, 333–335.