UNDERSTANDING AND DEALING WITH HEDGE FUNDS AND SHAREHOLDER ACTIVISM ACROSS EUROPE: THE IMPACT OF THE FINANCIAL CRISIS

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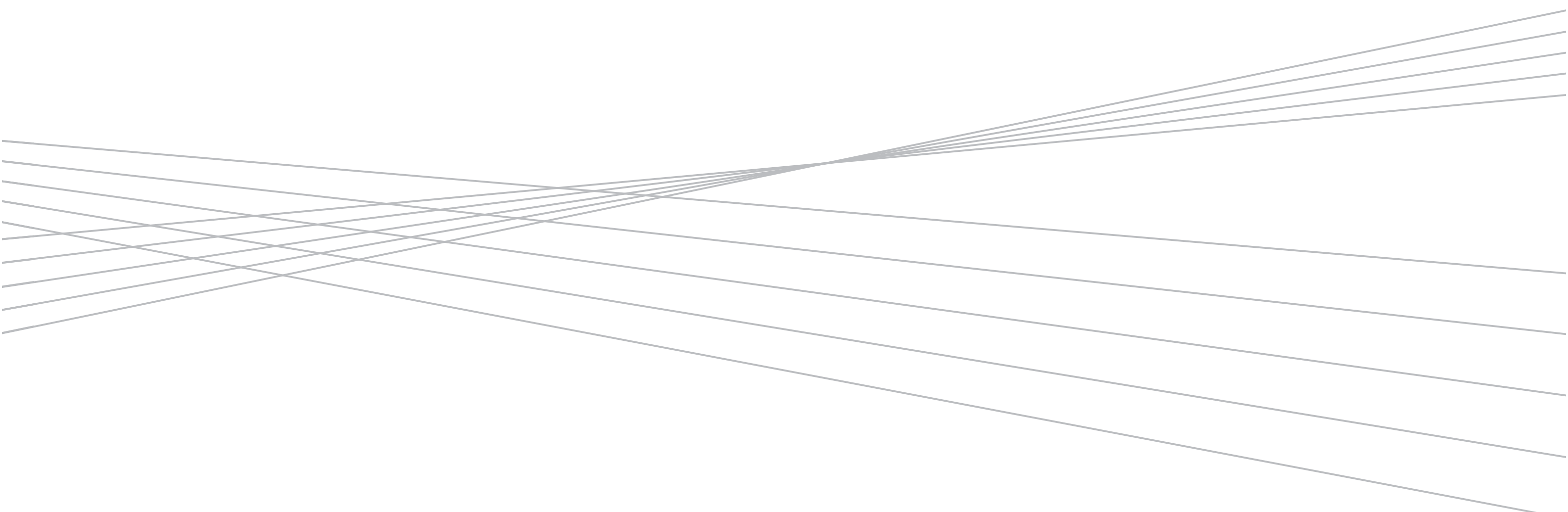

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Important Note

This guide is intended to provide a summary overview of certain important aspects of the law and regulation in the jurisdictions which it covers. The information contained in this guide is not intended to be used and must not be used as legal or taxation advice, either on general questions or on questions relating to any specific transaction or situation.

The firms listed above would be pleased to provide advice upon request for general queries, as well as advice on specific transactions or situations.

The information contained in this guide is given as at 31 December 2011.

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Understanding and dealing with hedge funds and shareholder activism across Europe: the impact of the financial crisis

Introduction

Hedge funds and the financial crisis

Since the 2008 credit crunch, hedge funds and their managers have occupied a prominent position in the minds of commentators, regulators, politicians and, increasingly, the general populaces of Europe. They have consistently been first in line when criticism is handed out on grounds of short-termism, lack of transparency or a lack of connection with the "real economy". At critical moments and especially during the 2008 financial crisis, their behaviour and trading strategies (short-selling, in particular) have been held up as exacerbating volatility and as contributing to, if not causing, systemic risk. At the same time, hedge funds have faced more challenging conditions in terms of fund-raising, investor support and performance.

These conditions, together with various regulatory initiatives launched in or following the peak of the 2008 financial crisis – principally, increased disclosure requirements and the much debated and lobbied Alternative Investment Fund Managers Directive (AIFMD) – have impacted the strategies and operations of hedge funds along with their profile.

Needless to say, economic conditions since 2008 have also produced a markedly different environment for other sorts of investor as well as, obviously, for the companies in which they invest.

Impact on shareholder activism

The various aspects of this changed economic environment have not dramatically shifted the overall incidence of shareholder activism, but they have undoubtedly changed the backdrop against which activist situations play out. Specifically, the lower profile of hedge fund activism through and since the financial crisis of 2008 seems to have coincided with an increase in activism from outside the hedge fund community – both from institutional investors with a longer term investment horizon as well as from other, sometimes non-institutional, investors with a strategic agenda.

Perhaps inevitably, "creditor activism" also seems to be on the rise as the financial crisis and economic conditions produce an increasing number of distressed situations.

Pan-European trends and developments

This guide takes a pan-European look at trends and developments through the 2008 financial crisis and in the period since, focusing on:

- the position of hedge funds: their behaviour, performance and strategies in that period, as well as the changed regulatory landscape they now face
- activist behaviour by both hedge funds and other investors during that period.

Dealing with hedge funds and other shareholder activists

The theme of this guide is that the key to dealing with hedge fund managers and other shareholder activists is to understand them and their differing motivations and objectives. A proactive and coherent ongoing strategy can then be formed and integrated into a corporate's normal investor relations practice. The same considerations are also likely to inform a corporate's response in the more acute situation that arises once an activist has arrived on the scene and taken positive action, whether private or public.

The guide concludes with a series of appendices looking country-by-country (the UK, France, Germany, Italy, the Netherlands, Portugal and Spain) at some of the main issues relevant to hedge funds and shareholder activist behaviour in those jurisdictions and covering:

- themes and developments in the activity of hedge funds and shareholder activists
- case studies giving examples of hedge fund activity
- key legal and regulatory issues
- rights of minority shareholders
- stakebuilding disclosure requirements (in particular when using derivatives).

1. Hedge funds: an overview

1.1 "Hedge fund" is not a term capable of exact definition. Most hedge funds are a form of collective investment vehicle, but this embraces many variants of both regulatory and legal structure. Perhaps the predominant common features are the use of leverage to create investing capacity and the use of derivative contracts with prime brokers as the preferred form of investment, with limited, if any, legal ownership of investments through a custodian.

1.2 Hedge fund managers are principally located in New York (approximately three-quarters) and London, although UK taxation and the increasing regulatory burden have led to a growing number having additional presences in readily accessible European low- or no-tax locations such as Geneva, Monaco, Zug, Montreux and the Channel Islands. At the same time, global economic shifts have seen offices open up in emerging market regions as growth prospects accessible from established markets have diminished.

1.3 Most hedge funds, as distinct from their managers, are located in low-tax off-shore jurisdictions such as the Cayman Islands and British Virgin Islands. More recently, jurisdictions such as Ireland, Luxembourg and Malta have introduced local legal and regulatory regimes designed to give similar financial benefits within an EU domicile, leading some European investors to require, for essentially political reasons, that their funds be invested only in EU-domiciled funds.

1.4 Hedge funds are significant players in terms of the absolute size of assets under their management. Approximately $2 trillion of assets are estimated to be managed by hedge fund managers worldwide (excluding fund of funds assets). Perhaps more significantly, and this is particularly important in times of crisis, they punch above their weight in terms of trading frequency – thus increasing their day-to-day impact on markets and prices. It has been estimated that hedge fund managers routinely account for more than 30 per cent. of daily trading activity on the New York Stock Exchange and more than half of trading on the London Stock Exchange.

1.5 Hedge funds can also be analysed in terms of investment strategies or objectives, with a fund manager typically seeking to out-perform (measured as "alpha") a benchmark for a fund's disclosed strategy (called "beta"). However, this is not to exclude the traditional (and, with interest rates low, once again popular) "absolute return" fund – a fund that seeks to deliver a steady increase in net asset value (NAV) regardless of the returns available from direct investment in the main securities markets. It was, after all, the capacity to deliver a return greater than the interest available on a bank deposit that led to the first hedging strategies being developed on Wall Street in the early 1940s.

1.6 Any particular hedge fund may be very hard to pigeon-hole or categorise specifically by reference to its investment strategy. That said, in broad terms, the following are the principal or traditional passive and activist hedge fund strategies:

- Market-neutral: a strategy designed to eliminate the market risk associated with investing in shares, concentrating the risk on the relative performance of the companies in which the fund manager wishes to invest. The fund manager will achieve this by buying exposure to company equity and short-selling an equivalent exposure to other companies in the same sector. Even if the market falls, the fund will make money provided the first company outperforms the others in the sector.

- Long/short equity: similar to a market-neutral strategy but without hedging the entirety of the market risk (and thus leading to a higher risk but greater potential returns).

- Convertible/fixed income arbitrage: a technique that seeks to take advantage of price differences between convertible securities and the underlying shares.
- Event-driven – merger arbitrage: taking a position in a company's securities with the expectation of profiting from a company-specific event – typically a takeover.
- Event-driven – distressed debt: taking a position in the debt of a company that is in financial difficulties with the expectation of making a profit as the company restructures and survives.

1.7 The large proportion of hedge funds adopt non-activist short-term trading strategies. Outside of event-driven funds focused on merger arbitrage or distressed debt situations, only a small minority of hedge fund managers are set up with explicit activist mandates: activism involves considerable expense, the prospect of reputational issues, and the risk of becoming an "insider" (when freedom to deal will be constrained by market abuse and insider dealing regimes). Any benefits gained will also have to be shared with other shareholders. However, event-driven investment strategies or tactics, even when not activist as such, can have a significant impact on corporates in the M&A world – in particular by arbitrage in takeover situations, where the success of the bid or an increase in the offer price is integral to the hedge fund generating a profit over its, typically recent, entry price. Hedge fund activism or event-driven strategies can be equally keenly felt in distressed debt situations as the profile of the debt-holders shifts away from long-term holders towards investors with a shorter-term perspective and potentially narrower objectives.

2. The hedge fund sector during and after the 2008 financial crisis

2.1 The aftermath of the 2008 financial crisis saw a "dash to cash", with many hedge fund managers experiencing significant falls in assets under management and redemption requests at unprecedented levels. The liquidity crisis highlighted disparities between investor redemption rights and portfolio marketability, with many hedge funds forced to reorganise or reconstruct after imposing gates (to limit redemptions) or introducing side-pockets (for illiquid assets, with investors entitled only to the net proceeds if and when a sale becomes possible). By June 2009, the sharp falls in worldwide stock markets coupled with net redemptions over the preceding nine months had resulted in assets under management in hedge funds falling significantly from the 2007 peak – some estimates suggested by at least 30 per cent. As a result, some hedge funds were restructured as described above, while many other hedge fund managers, in particular smaller hedge fund managers, were absorbed by larger competitors or simply ceased to operate and closed down.

2.2 The continuing low level of interest rates and the lack of return from low-risk investments following the summer of 2009 meant that investment in hedge funds began to climb in the second half of 2009 and by summer 2011 assets under management were estimated to exceed the early 2008 high of approximately $1.9 trillion. Industry surveys in summer 2011 suggested institutional investors had earmarked further investment in the sector in the next 12 months. Those statistics illustrate a clear regaining of scale prior to the sovereign debt crisis of summer/autumn 2011, but beneath them is an interesting trend in terms of the changed shape of the hedge fund industry post-crisis.

2.3 Put simply, the trend is towards operations of scale. Just as the loss of scale during 2009's market collapse and redemption wave primarily affected smaller hedge funds, so the principal beneficiaries of the scale regained in the period to summer 2011 were

the larger hedge funds. Growth in assets under management over the year to July 2011 at Europe's twenty largest hedge fund managers was estimated to have accounted for over 80 per cent. of the total growth in the sector in Europe. So whilst good relative performance was a primary indicator of growth of assets under management through investor in-flows across the sector (indeed, some might perceive an element of "performance chasing", not always successfully, by investors), the combination of continuing risk-averse investor sentiment, increasing regulatory uncertainties and administrative costs seem to have accounted for that growth being concentrated disproportionately amongst the big, liquid and systemic brand names.

2.4 In terms of investment performance, hedge fund returns averaged 19 per cent. in 2009, the highest for a decade, and 11 per cent. in 2010. This came just one year after hedge funds posted their worst annual loss in the wake of falls in equity markets, short-selling bans and pressure to liquidate positions to meet margin and redemption calls. With market conditions improving, equity markets recovering and debt remaining extremely cheap, hedge funds saw positive performance across most strategies through and after 2010 until the sudden downturn in global markets began in August 2011. This called a halt to growth with some large losses – and, once again, considerable uncertainty as to future performance, both immediately and in the longer term.

2.5 So, whilst by summer 2011 total assets under management were beginning to exceed previous highs and there had been some performance upsides, the question remains: will the sovereign debt crisis that began in 2011 trigger a new wave of redemptions and a precipitous fall in asset allocation to hedge funds over the coming months? Since the summer of 2011 there has been increased concern over global macro-economic uncertainties, especially slowing economic growth and the differing political responses to United States and eurozone sovereign debt concerns. This has heralded a return of extreme uncertainty and a lack of confidence which has now fairly clearly precipitated a widespread return to risk-averse attitudes amongst investors. Nevertheless, some contrarians have argued that a repeat of 2009's squeeze on hedge funds is unlikely. First, the sector is now more institutionalised and concentrated, meaning that a wave of redemptions is less likely, particularly so soon after indications of an intent to increase hedge fund exposure. Secondly, with interest rates very low and likely to remain so, and the price of safe haven assets regularly hitting all-time highs, the alternatives to hedge fund allocation are not so obviously attractive in comparison.

2.6 Even leaving to one side the investment environment and the increased regulatory burden (discussed in section 3 below), hedge funds and their managers faced an additional significant challenge through the period from 2008: negative publicity and regulatory, political and popular criticism. Since the early stages of the credit crunch in 2008, hedge funds have continued to face considerable negative media coverage with hedge fund managers being subject to frequent characterisation as investors who make large sums for their clients and themselves without any contribution to society or benefit to the real economy. At critical points in the crisis, their behaviour and trading strategies – particularly short-selling (see sections 3.6 to 3.9 below) – have been held up as actions which make returns at the cost of exacerbating volatility and which contribute to, if not cause, systemic risk.

2.7 In addition, as private, lightly regulated entities, hedge fund managers are not obliged to make extensive public disclosures and some hedge funds have very limited transparency, even to their own investors. This has contributed to a reputation for secrecy which has in itself also attracted continuing negative commentary, particularly against the background

of calls from politicians and regulators, in numerous contexts, for increased transparency. As public pension funds increasingly allocate assets to hedge fund investment, concerns have also been raised as to the indirect risks or consequences of such investment for workers – particularly in the context of hedge funds being seen as having influenced or driven M&A situations that have ultimately resulted in retrenchments. In those cases, labour unions, works councils and politicians have been increasingly frequent and vocal critics of hedge fund activity, characterising hedge funds as having bought into the company at a late stage on short-term considerations and with no interest in the company or its business beyond an arbitrage strategy for the transaction – though often using more colourful language to do so.

3. Regulatory developments: hedge funds, short-selling and AIFMD

3.1 Until the 2008 credit crunch, capital flowed steadily into the hedge fund industry and there were few stresses to test the strength of the industry's practices and controls. That changed significantly as the financial crisis widened and the existence and extent of those controls came under more focus.

3.2 Generally, the funds themselves are established in low-tax, off-shore jurisdictions and, as such, tend to be largely unregulated. Hedge fund managers, however, tend to be based in global financial centres and their operations are subject to more extensive regulation and supervision in those jurisdictions. It is estimated that approximately 70 per cent. of hedge fund assets within Europe are managed by UK-based managers. These managers are subject to the prudential, conduct of business and disclosure requirements imposed by the UK's Financial Services Authority (FSA) on all FSA-regulated fund managers. In addition, the 35 largest hedge fund managers in London are supervised by a specialist supervision team within the FSA. Trading techniques used by hedge fund managers throughout Europe are also subject to general legislation that, for example, prohibits abusive market practices and requires public disclosure of exposures to listed shares (for example under the Market Abuse Directive and the Transparency Directive).

3.3 However, prior to the credit crunch, hedge funds and their managers in the UK were not required or expected to make any more specific strategic information available to the market or to those issuers whose securities they acquired. Unless hedge fund managers disclosed such information voluntarily, it was not generally possible for an issuer to know, or to investigate, the current investment strategy or objectives of the hedge fund manager holding its shares or the identity of the ultimate investors in that hedge fund.

3.4 The hedge fund industry was encouraged to adopt voluntary standards which addressed some areas of concern to regulators, investors and issuers, including in particular:

- structural and contractual transparency (including the disclosure of side letter arrangements granting preferential terms to favoured investors)
- the need for managers to adopt robust and transparent valuation methodologies
- safeguards against potentially abusive practices, in particular focusing on the use of information obtained in the context of event-driven activist strategies and through dealings in the secondary debt markets.

3.5 Various principles, standards and guidance for the hedge fund sector on these and other issues have since been produced by the Alternative Investment Management Association (AIMA) (the global trade association for alternative investment managers), the International Organisation of Securities Commissions, and the Financial Stability

Forum. The FSA provides input to each of these organisations. In January 2008, the Hedge Funds Working Group (HFWB), a group formed by 14 of the major hedge funds in the UK, published a set of best practice standards intended to address the key concerns identified above. These have since been adopted by most of the hedge fund managers based in London. In August 2010, HFWB went further and adopted best practice policies on issues such as disclosure, valuation, governance and activism – as well as policies on more specific issues such as the "empty voting" of borrowed stock.

3.6 The involvement of hedge funds in "short-selling" also afforded critics an opportunity to lay some of the blame for the turmoil in the world's financial markets at the door of hedge funds. "Short-selling" involves selling borrowed shares in the expectation that prices will fall, so enabling the short-seller to make a profit when it reacquires the shares at a lower price. The practice of short-selling is of course not restricted to hedge funds, but hedge funds have often used it as an investment strategy, and the association of the technique with hedge funds is now firmly established in the minds of commentators, regulators and politicians.

3.7 The practice of short-selling has attracted considerable criticism from many commentators, who believe that it de-stabilises financial markets and artificially drives down the share price of companies whose shares are sold short. At the height of financial institutions' instability in 2008, particular criticism was reserved for certain hedge fund managers who were said to have explained to large audiences that they were short-selling securities issued by certain banks and insurance companies while raising questions about the businesses or accounting practices of those banks and insurance companies – the suggestion being that these activities triggered a self-perpetuating fall in the price of those securities.

3.8 Other commentators have taken a different view, maintaining that short-selling is a legitimate investment technique which brings useful scepticism to company valuations, increases liquidity and aids the functioning of the markets. Some support for this view is to be found in the various investigations into the effects and effectiveness of the short-selling bans imposed by the US, the UK, Germany and France in September 2008 in respect of shares in financial institutions. These have generally concluded that, however eye-catching they were at the time, such bans did not ultimately have the intended long-term effect of reducing market volatility – though whether supporters of the bans ever thought they would have such a panacea effect must be doubted. Equally, other analysis has concluded that the steps taken were a valid measure to quell some of the market instability, but did not solve the structural problems in the sector.

3.9 Nevertheless, when faced with acute situations, European regulators have generally decided that, whatever the legitimacy of short-selling in normal market conditions, the spectre of global financial meltdown supports the introduction of restrictions on short-selling with a view to their playing their part in increasing the stability of financial markets. Short-selling prohibitions and/or disclosure requirements in relation to financial stocks were introduced on a widespread basis in September 2008 as moves designed to protect the fundamental integrity and quality of markets as well as to guard against further instability in the financial sector – and they have been re-introduced in various forms at various times since, including most notably during the more recent sovereign debt crisis. That said, the divergence of views concerning the efficacy of short-selling restrictions did become apparent again in August 2011, when some European regulators moved to ban short-selling of financial stocks with a view to stabilising markets in the face of sovereign and eurozone debt concerns. The FSA and the US Securities and Exchange

Commission (SEC), on the other hand, did not consider this an appropriate response second time round.

3.10 Another central theme of the period since 2008 is increased scrutiny of hedge funds by EU and US regulators, who have sought to curb practices seen as disruptive to global securities markets, as well as to impose greater regulation and portfolio transparency. In Europe this process has been marked by the introduction of the Alternative Investment Fund Managers Directive (AIFMD). The impetus for the Directive came from the G20 summit in London in April 2009 where it was agreed that hedge fund managers should be regulated by, and systemically report relevant data to, regulators in EU Member States. As such the AIFMD initially proposed a very strict regime for managers of hedge (and other non-UCITS) funds in Europe, combined with a potentially even more restrictive regime for funds or managers based outside Europe wishing to distribute non-UCITS funds (Alternative Investment Funds or AIFs) to investors within Europe.

3.11 While the industry, led by AIMA, was generally supportive of the broad regulatory goals, concerns were expressed about various aspects of the AIFMD, including the so-called "third country" marketing provisions which would have restricted the ability of non-EU funds and managers to access the EU market and thus the ability of EU investors to invest efficiently or with relative ease outside the EU.

3.12 After intense lobbying by the hedge fund industry and other asset managers affected by the proposed regime (in particular managers of private equity and property funds), as well as by many European pension funds and institutional investors, the provisions of the AIFMD were substantially redrawn prior to its formal adoption in July 2011. Part of the lobbying involved a campaign, at least partly successful, to nullify the initial conclusion of some regulators that hedge funds themselves represented a systemic risk. The other key argument was one of European competitiveness; it was argued that the AIFMD would effectively exclude European investors from potential returns from strategies that would have become available only to their overseas competitors.

3.13 The AIFMD was formally adopted (level 1 of the EU legal process) in July 2011 and is to be implemented in each EU Member State by July 2013. The Paris-based European Securities and Markets Association (ESMA) conducted public consultations during the summer of 2011 and published its final advice (ESMA/2011/379) to the European Commission on the detailed rules underlying the AIFMD on 16 November 2011. ESMA's advice extends to approximately 500 pages and covers four broad areas: (i) general provisions for managers, authorisation and operating conditions; (ii) governance of AIFs' depositaries; (iii) transparency requirements and leverage; and (iv) third countries. Inevitably, the detail of ESMA's advice will take time to digest and develop. However, in a speech on 1 November 2011, Sheila Nicoll of the FSA discussed the FSA's involvement in the consultation process, noting that ESMA had taken the consultation seriously and suggested that there would be changes to ESMA's initial proposals before they were finally adopted. The Commission will now prepare implementing measures (level 2 of the EU legal process) on the basis of ESMA's advice.

3.14 There remain a number of areas of uncertainty as to the detailed measures by which the AIFMD will be implemented, as well as to the cost implications for the asset management industry in Europe – in particular in London, where the vast majority of European hedge fund managers are located. While ESMA's final advice provides some indication of the shape of the new regime, until the Commission prepares the implementing measures such indications will remain just that.

3.15 With AIFMD casting a cloud over the future of the traditional off-shore hedge fund, some hedge fund managers are actively investigating moves outside Europe with a view to abandoning European regulation and distribution. Others are concentrating on strategies that can be undertaken within the UCITS III Directive, such as using the so called "NewCITS" structure, which allows retail customers to invest in products that pursue strategies that are more common in the alternative investment fund sector – in particular, the hedge fund sector – while remaining within the UCITS regime. UCITS funds fall outside the scope of the AIFMD and so are particularly attractive at a time when the impact of AIFMD remains unclear. Their two principal disadvantages, however, are the material costs, perhaps 2 to 3 per cent. per annum for a $100 million fund, and the fact not all strategies can be incorporated within the UCITS regulations.

4. Recent trends in the strategies and actions of shareholder activists – hedge funds and other investors

4.1 While the M&A slowdown has meant that the small numbers of shareholder activist hedge funds focused on transactional strategies or merger arbitrage have been generally quiet, shareholder activism by institutional investors with a longer term investment horizon and other investors with a more strategic agenda has, in contrast, seen an increase. In the case of institutional investors, this has taken place with a level of encouragement from governments and regulators. This reflects an increasingly widely-held view – and one expressed more than occasionally by politicians floating future disclosure rules or regulations for the investor community – that the active involvement of the longer term investor (in particular pension funds and their advisers) in the affairs of the corporates in which they invest, as well as being an end in itself, might also help to address a series of perceived problems in the fields of governance, corporate strategy, risk management, diversity and executive remuneration at a time of public austerity. Institutionalising or formalising the active involvement of investors with a longer-term perspective is also seen by some as a valuable and necessary counterbalance to the activities of other investors, including hedge funds, who are perceived as seeking to profit from changes to management and strategy that provide short term profits at the expense of longer term objectives or wider political or social goals – in particular the local or national retention of industry and employment.

4.2 The theme of increased participation or engagement from institutional shareholders has found some expression in the UK in the form of the Stewardship Code issued in July 2010 by the Financial Reporting Council (FRC) which, on a "comply or explain" basis, places certain requirements on institutional investors. The Code acknowledges that it will be legitimate for some institutions to choose not to engage or intervene, including if such behaviour does not form part of their investment strategy. It also acknowledges that not all parts of the Code will be proportionate for all investors. Institutions will, though, be expected to explain the extent of and reasons for any non-compliance. In the activism context, the more significant requirements of the Code for investors are:

- to publicly disclose their policy on discharging their stewardship responsibilities, including a strategy on intervention
- to establish clear guidelines on when and how they will escalate their activities as a method of protecting and enhancing shareholder value, including when and how they will move from private conversations with a corporate's board, management and advisers to more public intervention and joint action with other institutions

- to be willing to act collectively with other investors where appropriate, against the background of a disclosed policy on collective engagement
- to have a policy on voting and disclosure of voting activity.

4.3 Whilst it is fairly clear that the incidence of activist or interventionist behaviour from more traditional institutional investors has increased through and since the financial crisis, when it comes to considering the subject matter of activist situations in Europe since 2008, it is largely a case of *plus ça change, plus c'est la même chose*. With that in mind, it is worth considering the activism landscape from two perspectives:

- the strategies and objectives of the activists
- the tactics deployed and actions taken by activists in pursuit of their strategies and objectives.

In both cases, perhaps the most significant point is that relatively little has moved on.

4.4 The strategies and objectives of activists have, as in prior periods, generally focussed on:

- seeking management changes, either as an end in itself or in support of other strategies. For example, *Elliott Advisers/National Express* and *Sherborne/F&C* in Part 2 of the UK Appendix; *Wyser-Pratte/Lagardère* in Part 2 of the France Appendix; *Infineon/Hermes* in Part 2 of the Germany Appendix; and *Hermes and Fursa/ASMI* in Part 2 of the Netherlands Appendix
- other broader governance themes: board and governance structures, independent representation, information access, financial discipline, and perceived governance or communication failures. For example, *Wyser-Pratte/Lagardère* in Part 2 of the France Appendix; *Algebris/Generali* and *Amber Capital/Banca Popolare di Milano* in Part 2 of the Italy Appendix; as well as several of the examples above where management changes were proposed
- shareholder payout or returns. For example, *EasyJet* in Part 2 of the UK Appendix and *Deutsche Börse/TCI and Atticus Capital* in Part 2 of the Germany Appendix
- strategy, including responses to transactional situations and major fund-raising. For example, *Atticus Capital and TCI/Deutsche Börse/LSE*, *G4S/ISS* and *EasyJet* in Part 2 of the UK Appendix; *Apax/GFI Informatique* and *Wyser/Pratte/Lagardère* in Part 2 of the France Appendix; *Knight Vinke/ENI* in Part 2 of the Italy Appendix; and *TCI/ABN AMRO* in Part 2 of the Netherlands Appendix
- control- or influence-seeking objectives. For example, *Piedmont/Mitchells & Butler* in Part 2 of the UK Appendix; *Hermès/LVMH* in Part 2 of the France Appendix; and *Centaurus and Paulson/Stork* in Part 2 of the Netherlands Appendix
- takeover agitation, whether pushing for a transaction to happen, taking steps to encourage a higher price from a bidder or pursing merger arbitrage strategies. For example, *Kraft/Cadbury* in Part 2 of the UK Appendix; *Apax/GFI/Fujitsu* and *Elliott Management/Macquarie/APRR* in Part 2 of the France Appendix; and *Hermes & Orbis/Canon-Océ* in Part 2 of the Netherlands Appendix.

4.5 The tactics used in pursuance of those strategies and objectives have, again mirroring prior periods, principally comprised:

- private discussions and engagement with management: talking to the chairman or non-executive directors to bring about a change of executive management or strategy or to seek concessions from the board. Many of the examples of more

public action began with private discussions with board members, whether directly or through brokers or retained advisers. The dynamics and development of these private discussions can be critical for the outcome of any situation, and section 5 below looks at when it will be appropriate for corporates to engage in discussions with hedge funds and the duties of directors when doing so

- engagement or connection with other shareholders, privately or publicly, with a view to achieving a critical mass or broader range of support or pressure
- stakebuilding, whether through shares, CFDs or even stock loans to acquire additional "empty" voting power. Recent activist situations featuring significant stakebuilding exercises include: *Piedmont/Mitchells & Butler* and *Sherborne/F&C* (see Part 2 of UK Appendix), and *LVMH/Hermès* (see Part 2 of the France Appendix). Equally, however, it is clear that activists are also prepared to operate from the base of a relatively insignificant percentage holding, e.g. *Wyser-Pratte/Lagardère* (see Part 2 of the France Appendix), *Hermes/Infineon* (see Part 2 of the Germany Appendix), and *Knight Vinke/ENI* (see Part 2 of the Italy Appendix)
- publicising private engagement or other public action or intervention: agitation through press releases, briefing journalists, writing open letters to the board and trying to galvanize major shareholders as a follow-up
- use of minority shareholder rights and other public action beyond mere agitation: requisitioning meetings or resolutions to replace board members and make new appointments or to force a change in strategy or encourage or block a transaction. As is clear from the examples in the country-by-country appendices, the use of these rights is a core and frequently deployed activist tactic once a situation begins to play out publicly
- engaging in court action or litigation or encouraging intervention by regulators. Court and regulatory action are more of a feature in some jurisdictions than others, and it is here that the differing national legal regimes of individual European states come into play. Recent prominent examples include: *Centaurus/Pardus/Atos Origin*, *Elliott/APRR*, *Wendel/Saint Gobain* and *Hermès/LVMH* (see Part 2 of the France Appendix); various litigious and regulatory steps in relation to *Porsche/VW* and *CeWe Color/MarCap/K Capital* (see part 2 of the Germany Appendix); and various Enterprise Chamber actions in Netherlands, including *ABN AMRO*, *Centaurus/Paulson/Stork*, *Hermes/Fursa/ASMI* and *Hermes/Orbis/Canon-Océ*.

4.6 The fact that the picture on activists' strategies, objectives and tactics has remained recognisable, if not constant, is perhaps unsurprisingly. Equally unsurprisingly, moving away from shareholder activism, creditor activism has emerged as an increasing theme during the financial crisis. The recessionary environment, as well as in some cases the financial crisis itself, has inevitably left some corporates in distressed situations. Equally inevitably, in some of those situations and as the interests of the corporate and the value in it has begun to shift from equity-to debt-holders, creditor activism has emerged as the response to the deteriorating position. Such activism takes various forms, including: debt-holders pushing for a debt-for-equity swap; investors buying into both the equity and the debt (often multiple layers of the debt) of the distressed corporate with a view to applying activist pressure on both sides; and subordinated debt investors seeking to limit the haircut applied to their tranche of debt as part of a restructuring.

5. How corporates can prepare for and respond to an activist situation

5.1 In the same way that activist strategies, tactics and actions have not undergone fundamental change through the challenging environment of the last few years, nor has the range of possible responses available to corporates faced with an activist situation. One thing that has moved on, however, is the background against which activist situations play out:

- the performance of corporates is more challenged and the outlook more often uncertain
- constrained cashflow and investment returns to shareholders generally have put pressure on those corporates in the fortunate position of having strong cash positions and cash flow to return that cash to shareholders rather than retaining it on the balance sheet or deploying it for transactions or other business development
- there is a fresh focus on governance and the role of non-executive directors and supervisory boards, partly fuelled by a sense in some quarters that governance failures were faultlines beneath some of the financial difficulties faced by corporates through the crisis
- as noted above, there is increased engagement and activism from more traditional institutional investors – a trend that looks likely to continue
- regulators across the piece feel more empowered and emboldened than perhaps they did before the 2008 financial crisis.

5.2 Each of those factors can potentially increase the general pressure on a corporate and will certainly play into the dynamic of any activist situation that might arise. Beyond that, the change in background is significant for two principal reasons:

- the increasing engagement from constituencies of shareholders who, in happier economic times, were much less inclined towards activist behaviour and the increased opportunities for the non-institutional shareholder with a specific strategic agenda both increase the value to a corporate of advance analysis and generic preparation. This will be particularly the case in the investor relations area where the objective of advance analysis and preparation is to provide an early warning of upcoming or developing investor issues
- the generally challenged and volatile nature of the economic environment underlines the importance of boards and executive management keeping strategic issues under review, including to some degree from the perspective of potential activist investor challenge.

5.3 Reconnaissance and advance analysis and preparation – both within the company and externally with investors and analysts – have therefore become perhaps even more important than previously. The sections below suggest in general terms some themes for possible advance work in the areas of investor relations and board preparedness. They also set out a set of more specific legal and investor relations tools that can be considered and maybe utilised, whether on a general ongoing basis or once a "live" activist situation has arisen – albeit that once an activist situation begins, the content and means of any response will of course be highly situation-dependent and focused on the specific challenge faced.

5.4 **Investor relations**

- Reviewing the company's dividend policy, cash position, analyst and investor presentations to consider hedge fund or other activist angles.
- Monitoring research analysts' notes (including drafts), proxy advisers, governance rating agents, activist institutions and media reports for opinions or facts which may attract the attention of activists. Being alert to the messages passed on from research analysts.
- Managing news flow to the market to support a coherent view of the company and its strategy, to build management credibility and to restrict the opportunity for hedge funds or other activists to build a stake in the company on the cheap.
- Ensuring that consistency with the company's basic strategic message is maintained. Being proactive in addressing reasons for shortfalls against peer company benchmarks. Anticipating key questions and challenges which may come from analysts and activists and being prepared with answers to show why the company's strategy is correct and the activists' analysis is flawed.
- Monitoring changes in institutional shareholdings regularly. Understanding the shareholder base, including the relationships amongst the shareholders if possible. Stock watch programmes may alert the company to new large shareholders and unusual dealing patterns.
- Maintaining regular contact with institutional investors and, where appropriate, being prepared to engage on specific issues. Considering their concerns and educating them about the company's strategy and the reasons for its success.
- Maintaining up-to-date plans for contact with the media, regulatory agencies and other bodies.
- Monitoring securities trading – both the company's activity and peer activity.

5.5 **Preparing the board to deal with activist situations**

- Ensuring that board consensus is maintained on key strategic issues. Activist strategies often involve or rely on raising doubts or questions about strategy and management performance to drive a wedge between the executive and non-executive board teams.
- Reviewing strategy and evaluating the group's businesses and capital structure with the board, in light of possible arguments which may be raised by activists in favour of transaction-led strategic change or changes to capital structure, e.g. spin-offs, buy-backs, special dividends, takeover of the company, and migration or other structural changes.
- Anticipating and researching alternative strategic initiatives so that pressure to adopt a new direction (e.g. a suggestion in an analyst's note) can be closed off at an early stage before the story or suggestion gets broader traction.
- Scheduling periodic presentations by lawyers, brokers, investment bankers and other advisers to familiarise directors and executive management with the current activist environment.
- Being aware of psychological and perception factors as well as legal and financial factors in becoming a target of activists.

5.6 Legal tools

- Directors of companies are fortified by the fact that their duties take account of the interests of legal shareholders but typically not of those holding merely derivative or CFD interests.
- Ensuring proper procedures, systems and controls are in place to demonstrate that the directors have undertaken an appropriate exercise of their duties in order to provide good defences to challenges on governance as well as to legal actions by shareholders (e.g. derivative claims).
- Monitoring compliance with corporate governance best practice, listing obligations and general law to avoid challenge by activists on general grounds becoming part of the debate on narrower questions.
- Making use of rights to require disclosure from parties which have an interest in the company's shares, in order to investigate a company's shareholder base – e.g. in the UK, s.793 (of the UK Companies Act 2006) notices – or, where available, to seek an explanation of a particular shareholder's intentions after it has acquired certain stakes (see Part 5 of the Appendices).
- Monitoring hedge funds' and other investors' behaviour and shareholdings closely to see whether relevant holdings thresholds are crossed and analysing the consequences this may bring (such as making a particular disclosure or having to make a mandatory bid – see Part 5 of the Appendices). In particular, two or more hedge funds pursuing a common strategy may be "acting in concert": if this is the case, their shares may be aggregated for the purposes of disclosure requirements, mandatory bid thresholds and other purposes (see Part 3 of the Appendices).
- Monitoring hedge funds' and other investors' behaviour for legal or regulatory slips and breaches. Disclosure requirements are not always met and, in the case of shareholders who appear to act together but are not disclosing their interests on an aggregated basis, regulatory intervention can be considered to force aggregated disclosure and public admission of the joint action. Certain types of activist behaviour can also cross the line into market abuse. Companies should be alert to the possibility that hedge fund activity may constitute abusive conduct and consider using it as a defence tool. Companies should gain a sense of the activist strategy and be ready to respond promptly.

5.7 Responding to the activist approach

- Preparing a dedicated team to deal with activism, made up of a small group of key managers and advisers (financial, legal and investor relations). The team should be familiar with hedge funds and other investors that have made activist approaches and their strategies and tactics.
- Private communications with investors: there is no duty to enter into private discussions or negotiations with activist hedge funds or other investors – each situation should be treated on its merits. However, companies should not be afraid to engage and, if they do, should give clear answers in support of the company's stated strategy. Responses should be carefully structured and prepared by a dedicated team and recorded internally in writing afterwards. Board members should be kept updated as appropriate.
- Public communications: assembling the team, informing the directors, calling an emergency board meeting to discuss and consider the communication. Determining

what the board's response should be and whether to meet, or otherwise engage directly or indirectly, with the activist. Avoiding mixed messages and being ready to defend attacks proactively and vigorously.

6. Conclusion

It is clear that shareholder activism is here to stay. The increased encouragement of investor and stakeholder engagement – through regulation, voluntary codes and other softer pressure – seems likely to make it even more mainstream behaviour over time.

Activist shareholders, whether hedge funds or classic long-term institutional shareholders, are just another part of the corporate landscape and corporates will need to keep taking account of that.

Armed with the knowledge of the activists' likely angles, strategies and the tools available to them, corporates can develop their own coherent approaches for responding to the challenges that may be faced. For the most part, these can be integrated into a company's regular corporate and investor relations programmes and they will also ensure that the company is fully equipped to respond vigorously to activists, both welcome and unwelcome.

Appendix 1 – UK

Part 1: Themes and developments in the activity of hedge funds and shareholder activists in the UK

The themes and developments in terms of hedge funds and shareholder activism in the UK through the recent period of financial crisis mirror those described in the opening section of this guide.

Simply by reason of the concentration of European hedge funds managers in London, the UK has seen the greatest number of hedge fund closures, the greatest weight of fund redemptions, and the largest falls in assets under management. The underlying conditions have also bought increased consolidation of the UK hedge fund industry into a small number of larger hedge funds.

As regards shareholder activism, much has, of course, remained entirely the same. Shareholder-led proposals for management or governance changes, for instance, have occured in much the same way and at much the same frequency as they have for some time. The changed economic environment has, though, inevitably resulted in an increased number of distressed or pressured situations. These have inevitably been fertile ground for increased shareholder engagement in activism as some of the advantages and defences that management possessed in more benign times have become conspicuous by their absence. There has also certainly been increased evidence of creditor activism.

The greatest single change has been that, outside takeover or merger arbitrage situations, hedge funds seem to have been supplanted as the poster children of activism by longer-term institutional investors. The apparent behavioural and attitudinal shift of institutional investors has its genesis in a number of factors: increased disclosure requirements, soft pressure and encouragement (some would say the promise or threat of further regulation) from politicians and regulators, and an increased sense that active involvement of longer-term investors has a role to play, including in relation to recommendation practices. These factors have found expression in the Stewardship Code issued by the Financial Reporting Council and various pending developments for listed corporates' remuneration policy and practices. The increased activism and engagement from institutional investors has been seen in a range of contexts:

- ordinary course investor relations
- pressure on cash-generative businesses to increase cash returns to shareholders
- transactional or major fundraising situations, including most recently in the reaction of G4S's shareholders to the proposed acquisition of ISS.

In regulatory terms, there has been increased scrutiny from the FSA and other EU regulators who have sought to put hedge funds on the same footing as traditional asset management businesses. Hedge funds have also made moves to take themselves in that direction, with the Hedge Funds Working Group (a group formed by 14 major UK-based hedge funds) publishing best practice guidelines on issues such as disclosure, valuation, governance and activism as well as policies on specific issues such as the "empty voting" of borrowed stock.

The Takeover Panel has, to some extent, sought to address market short-termism by examining the role of hedge funds and other investors in takeover situations – albeit that the reforms ultimately introduced stopped short of some of the reforms floated in the early stages of consultation such as the disenfranchisement of shares acquired by investors (presumably typically for short-term or arbitrage reasons) during an offer period or an increased two-thirds approval/acceptance level for public takeovers. There has also been an increased focus on

internal governance (for example, the UK's Walker Review) and, with the FRC's publication of its Stewardship Code, more formal procedures have been introduced on a "comply or explain" basis to regulate the relationship between shareholders and corporates.

While the hedge fund industry clearly faces continued uncertainty, it is clear that that will not result in a lower incidence of shareholder activism. The various themes described above and in the opening section of this guide make it clear that corporates should continue to be prepared for activist situations – and perhaps in particular for the implications of increased engagement and focus from longer-term institutional investors.

Part 2: Examples of hedge fund activity and shareholder activism in the UK	
Atticus Capital and The Children's Investment Fund/Deutsche Börse/London Stock Exchange **(4 years to March 2009)**	• Atticus sold the majority of its stake in Deutsche Börse in March 2009. Up to this point both Atticus and TCI had been involved in attacks on Deutsche Börse which had ousted one chief executive and two chairmen. Additionally, the two funds were seen as instrumental in blocking the Börse's attempts to take over the London Stock Exchange. • The sale in March 2009 signalled a failure on the part of the two funds, which had been working together, to break up the Börse or to force it to cash in on what they perceived as hidden value within its clearing division.
Kraft/ Cadbury: role of Berkshire Hathaway and hedge funds buying into Cadbury **(September 2009 to February 2010)**	• Kraft announced a possible cash/stock offer for Cadbury, valuing the company at 745 pence per share. Kraft subsequently announced a firm intention to make an offer at a value of 717 pence per share, and then posted an offer document and a prospectus in which the shares were valued at 713 pence each. • Cadbury defended the offer vigorously. At the same time, Berkshire Hathaway announced an intention to vote against Kraft's proposed issue of shares – effectively forcing Kraft to restructure its offer so as not to require shareholder approval. • During the bid process an increasing number of short-term investors bought up Cadbury's shares. Hedge fund share ownership grew to about 30 per cent., with the concomitant change in overall value expectations that increased hedge fund ownership entails, i.e. focus on rapidly achieved but short-term value, compared to 'traditional' long-term investors. • Ultimately, the board recommended Kraft's offer of 840 pence per share. The deal prompted a revision of certain aspects of the regulation of takeover bids in the UK (see Part 3 below).

Piedmont and Mitchells & Butler: board changes followed by attempted takeover **(October 2008 to October 2011)**	Through his investment vehicle, Piedmont, Joe Lewis bought a stake in Mitchells & Butler ("**M&B**") (the pub operator) in October 2008. In September 2011, Piedmont made a nil premium offer for the company, which followed a period of activism by Piedmont during the course of 2009 and 2010. In July 2009, Piedmont owned a 23 per cent. stake in M&B. Another large stake of approximately 17 per cent. was controlled by the investment vehicle Elpida, controlled by J.P. McManus and John Magnier. M&B granted Piedmont the right to appoint a non-executive director at each of the shareholding levels of 16 per cent. and 22 per cent. In November 2009, M&B asked the Takeover Panel to investigate whether Piedmont and Elpida had formed a concert party. M&B suspected that its major shareholders were attempting to take control of the company. Following the departure of the two Piedmont nominated non-executive directors, Piedmont proposed four non-executive directors for election at the company's AGM. Prior to the AGM in January 2010, the Panel ruled that no concert party had formed and that all shareholders were free to vote their shares independently at the AGM. All four of the Piedmont nominees were elected at the January AGM, with such appointments being supported by Elpida. From January 2010 onwards, board composition shifted regularly with a sequence of CEO resignations. In September 2011, Piedmont made a takeover approach for M&B at 230p per share. The offer, which was rejected, did not provide M&B's shareholders with any premium. In October 2011, Piedmont withdrew its offer for M&B. Piedmont cited market volatility, the general economic climate and the most recent M&B trading statement as reasons for the withdrawal. There is some speculation as to whether Piedmont will renew its attempts to acquire M&B following the mandatory 6 month "pens down" period following a withdrawn takeover offer.

EasyJet and Sir Stelios Haji-Ioannou: activist stance from principal shareholder **(May 2010 to present)**	• Sir Stelios Haji-Ioannou, the founder of EasyJet and holder of a 38 per cent. stake, has taken an activist stance against the directors of EasyJet and has used several different tools available to the activist shareholder. • In May 2010, Sir Stelios resigned from the board of EasyJet having become unhappy with the company's strategy and plans for expansion arguing that expansion at a time of rising oil prices would be unwise and also seeking the payment of a special dividend from the company's large cash balance. At the time of his resignation, Sir Stelios stated that it appeared easier to influence the company as an activist shareholder than as a member of the board. • During the course of summer 2011, Sir Stelios increased his use of activist tactics. In May, Sir Stelios publicly called for the payment of a special dividend. In July, Sir Stelios alleged via a letter to the directors that the company's decision to expand the fleet was subject to the Listing Rules and therefore required shareholder approval and a general meeting. In August, he called an EGM to remove the deputy chairman and in September he called an EGM to remove a non-executive director. • These tactics yielded some results. In September, EasyJet agreed to commence paying dividends (although not of the size originally requested) and the deputy chairman resigned prior to the EGM. Sir Stelios dropped the requests for the other EGMs. Over the summer, more traditional investors were publicly (but anonymously) commenting that the activism was destabilising the company and that management should be given time and space. • In late September, Sir Stelios announced he was establishing a new airline, although it is not yet clear if this will be a direct competitor with EasyJet. • In mid-November 2011, EasyJet announced it would pay a special dividend of £150 million which, when combined with the ordinary dividend brought the total pay-out to an estimated £195 million.

Elliott Advisors/ National Express: hedge fund forces motion onto AGM **(March 2011 to present)**	• Elliott, which held a 17.5 per cent. stake in National Express, wrote to National Express shareholders seeking to remove one and elect three new non-executive directors at its AGM in May 2011. It was thought that Elliott wanted National Express to sell part of the group, merge with a competitor or expand into the US. National Express responded by commencing a recruitment process for new directors and criticising Elliott for trying to appoint new directors in breach of corporate governance procedures. • National Express claimed to have the unanimous consent of the board, including the Cosmen family, who control a 17 per cent. stake. Elliott was also claiming to have the family's support. The family declined to comment on either of these suggestions. • Elliott and National Express ultimately came to a deal whereby Elliott's proposals would not be put to the AGM. Legal & General and M&G, both significant shareholders in National Express, came out in support of the board. Following this intervention, it seems concessions were made by both sides. As is noted below, Elliott seemed keen to avoid a high profile failure. The agreement resulted in Elliott agreeing a one year confidentiality order in return for the addition of Chris Muntwyler and two other international non-executives joining the board. Elliott had originally put forward three names, one of which was Mr Muntwyler. • There was some feeling that Elliott's concessions in relation to National Express and the softening of its demands were partly a function of its contemporaneous activism in relation to Actelion, a Swiss biotech company. Elliott had lost a shareholder vote at Actelion's AGM and there was commentary that it might have been keen to avoid the risk of a similar outcome at National Express.
Ontario Teachers' Pension Plan/ Vodafone **(2010)**	• OTTP held 0.42 per cent. of Vodafone when, in July 2010, it attempted to put pressure on the Vodafone board over what it described as "strategic weaknesses". In terms of profile, OTTP is generally thought to have more in common with traditional long-only institutional investors than with hedge funds. • OTTP stated that it would vote against the re-election of Sir John Bond, the chairman, and John Buchanan, the deputy chairman, at the Vodafone AGM. • OTTP lost the vote and the chairman and deputy chairman were re-elected. Sir John Bond subsequently resigned from the board of Vodafone in July 2011. Vodafone stated that it was always Sir John's plan to have a 6 year term at Vodafone and therefore his resignation was not connected to the shareholder activism seen last year.

F&C Asset Management/ Sherborne: activist forces change in chairman **(December 2010 to February 2011)**	• Sherborne, the investment vehicle of American activist investor and turnaround specialist Edward Bramson, used its 17.6 per cent. stake in F&C to press for a change at board level. Bramson had accused F&C of a lack of financial discipline which resulted in it cutting its dividend. Bramson also criticised F&C's acquisition record, suggesting that the acquisitions of Thames River Capital and Reit Asset Management had not been in shareholders' interests. • Bramson was elected chairman at an EGM in February, ousting then chairman Nick MacAndrew. 82 per cent. of the F&C shareholders voted on the replacement, of which 65 per cent. chose to remove MacAndrew and 70 per cent. supported Bramson's installation.
G4S/ISSL: approval withheld for acquisition **(October/ November 2011)**	• On 17 October 2011, G4S announced that it had agreed to acquire ISS for an enterprise value of approximately £5.2 billion. Due to the respective sizes of G4S and ISS, the acquisition was a reverse takeover requiring shareholder approval. G4S proposed to partly fund the acquisition by raising approximately £1.9 billion in a rights issue, also requiring G4S shareholder approval. A G4S shareholder meeting was convened for 2 November 2011. G4S's share price dropped by more than 22 per cent. in reaction to the deal, with commentators noting shareholder scepticism as to the scale of the rights issue and to whether G4S could integrate the two companies. • On 19 October 2011, Parvus Asset Management, a hedge fund, became G4S's fifth largest shareholder after it took ownership of a 3.7 per cent. stake in the company by swapping out of a CFD position. Parvus had been building its position since 15 April 2010. On the following day, Parvus made an unsolicited telephone call to Reuters communicating that it intended to vote against the acquisition. Over the following days, it was reported that Artemis and Schroders, which owned 2 per cent. and 1.35 per cent. stakes in G4S respectively, were set to vote against the acquisition. Harris Associates, another hedge fund and G4S's third largest shareholder (with a 4.9 per cent. stake), then announced on 31 October 2011 that it too intended to vote against the acquisition. • On 1 November 2011, G4S announced that it had agreed with ISS to terminate the acquisition and the shareholder meeting was called off.

Part 3: Key UK legal issues affecting hedge fund and other shareholder activism		Source
Short-selling	• On 15 September 2010 the European Commission published a formal proposal for regulation on short-selling and certain aspects of credit default swaps. On 17 May 2011, the Council of the European Union announced that it had agreed a general approach on the proposed regulation. On 18 October 2011 the European Parliament announced that it had reached agreement with the Presidency of the Council on the proposed regulation. • On 15 November 2011, the European Parliament adopted, with certain amendments, the Commission's proposals. The new regulation must be formally approved by the European Council and will enter into force in November 2012. • The proposal aims to increase transparency on short positions held by investors; confer emergency powers on Member States to restrict short-selling; encourage cooperation between Member States and the European Securities and Markets Authority ("**ESMA**"); and to reduce risks associated with uncovered short-selling. • The proposal covers all financial instruments admitted to a trading venue in the EU (and derivatives relating to such financial instruments) as well as EEA sovereign debt instruments (and derivatives relating to such debt instruments). The terms of the proposal will apply to both natural and legal persons across all market sectors. • Net short positions of 0.2 per cent. of the share capital or above must be disclosed to the regulator, whilst those of 0.5 per cent. and above must be disclosed to the market. • In relation to naked short sales, the regulation requires the transfer to locate and have a "reasonable expectation" of being able to borrow the shares from the located party. • Exceptions apply in the following circumstances: (a) where the principal market for the shares is outside the European Union; (b) where the market making activities play a crucial role in providing liquidity to European markets (although this does not include proprietary trading); and (c) where primary market operations are performed by dealers assisting issuers of sovereign debt.	Short-Selling Regulation

	• Where there is a serious threat to financial stability or market confidence, competent authorities will be granted temporary powers to require further transparency and to limit persons from entering into derivative transactions. Such powers should normally only last up to three months. • The issue of a ban on naked credit default swaps (CDSs) has proved divisive. The Parliament has been in favour of such a ban whereas Commissioner Barnier has been opposed to both a ban and to allowing Member States the discretion whether to ban them. The text adopted by the Parliament would ban naked CDS trading in all but very limited circumstances.	
The Alternative Investment Fund Managers Directive	• The Alternative Investment Fund Managers Directive ("**AIFMD**") was adopted in response to a perceived need for greater regulation, on an EU-wide basis, of alternative investment funds ("**AIFs**") (as defined in the AIFMD) and their managers ("**AIFMs**"). The AIFMD was published in the Official Journal of the EU on 1 July 2011. Member States are required to implement the Directive by 22 July 2013. • The AIFMD will generally apply to AIFMs established in the EU which manage one or more AIFs irrespective of whether the AIFs are located in the EU (EU AIFs) or outside the EU (non-EU AIFs), whether or not they are listed, and regardless of the legal form the AIF takes. The AIFMD will also apply to AIFMs established outside the EU (non-EU AIFMs) which manage one or more EU AIFs or which market one or more EU AIFs or non-EU AIFs within the EU. Hedge funds and their managers will therefore fall clearly within the scope of the AIFMD. • Under the AIFMD, AIFMs will face greater disclosure and transparency requirements, including obligations to establish and disclose maximum levels of leverage; to produce detailed annual reports; and to make information available to investors before they invest in an AIF. Additionally, AIFMs will have reporting obligations to competent authorities. • AIFMs will be required to make various disclosures to both listed and non-listed companies in which AIFs that they manage acquire interests, including: disclosure of shareholdings at specified thresholds; disclosure of acquisition of "control" (defined as 50 per cent. of voting rights); and disclosure of their intentions as regards the future business of the company and the likely impact on employees.	AIFMD

- The AIFMD will require AIFMs to arrange for an annual independent valuation of the AIF's assets, and for the net asset value calculation to be disclosed to investors. A depositary will need to be appointed to take custody of the AIF's assets.

- AIFMs will be obliged to establish remuneration policies for senior managers and risk takers, and to ensure that all reasonable steps are taken to identify potential conflicts of interest.

- AIFMs will also be required to maintain specified minimum levels of capital.

- The AIFMD will also introduce a passporting regime whereby an AIFM registered in one Member State will be able to market and/or manage AIFs in all Member States. The AIFM may provide the services either from its Home Member State, or by establishing a branch in the Member State where the AIF is domiciled.

- EU AIFMs managing EU AIFs will be able to take advantage of the passporting regime from the date of implementation of the AIFMD. The passporting regime will be available to EU AIFMs managing non-EU AIFs and non-EU AIFMs from June 2015 at the earliest, and then only if ESMA agrees that the regime should be extended to them. It will, however, be possible for EU AIFMs managing non-EU AIFs and non-EU AIFMs to continue to make use of national private placement regimes (insofar as they exist) until at least 2018.

- Note that the marketing provisions in the AIFMD apply only in respect of marketing to professional investors. Marketing to retail investors will continue to be regulated by individual Member States.

- Following public consultations during the summer of 2011, on 16 November ESMA published its final advice to the European Commission on the detailed rules underlying the AIFMD. ESMA's advice covers four broad areas: (i) general provisions for managers, authorisation and operating conditions; (ii) governance of AIFs' depositaries; (iii) transparency requirements and leverage; and (iv) third countries. The Commission will now prepare implementing measures on the basis of ESMA's advice.

Stakebuilding and use of CFDs and other derivatives	• Building a stake in a listed company to exercise influence on its management: often this is done through CFDs or other derivatives. However, where the relevant instrument includes a right to acquire the underlying share or represents a "long" economic interest, the holder will be subject to the disclosure obligations contained in the DTRs (see Part 5: UK stakebuilding: key thresholds and disclosure requirements). • The Takeover Code requires opening position disclosures to be made shortly after the commencement of an offer period by all 1%-plus investors. Such a disclosure requires persons subject to the Code's disclosure regime to disclose details of their interests or short positions in, or rights to subscribe for, any relevant securities (including CFDs) of a party to the offer if the person concerned has such a position. Disclosures are not required to be made in respect of positions in relevant securities of a cash bidder. • During the offer period, a dealing disclosure is required after the person concerned deals in relevant securities of any party to the offer. If a party to the offer, or any of its concert parties, deals in relevant securities of any party to the offer, it must make a dealing disclosure by no later than 12 noon on the business day following the date of the relevant dealing. Any person who is interested (directly or indirectly) in 1 per cent. or more of any class of relevant securities of any party to the offer (other than a cash bidder) must make a public dealing disclosure if he deals in any relevant securities of any party to the offer (other than a cash bidder) during an offer period. • The Takeover Panel requires irrevocable undertakings (to accept a takeover offer) to be announced even where they are given by holders of CFDs referenced to the underlying shares.	DTR 5.1.2 – 5.3 Takeover Code (Rule 8) Takeover Code (Rule 8) Takeover Code (Rule 2.11)
Shareholder rights	• See Part 4 below.	Companies Act 2006 ("**CA 2006**")

Duties of directors	• A director's principal duty is to promote the success of the company for the benefit of its shareholders as a whole. • Since October 2007, directors' duties have been codified with a view to building "enlightened shareholder value". S.172 CA 2006 lists a series of factors which must be taken into account by directors when considering that principal duty, including employees' interests, impact on the community and the environment, and the desirability of a reputation for higher standards of business conduct. Initially, the view of certain commentators was that a combination of these factors, the business review requirements for annual report and accounts and the new derivative claims procedure (see below) could lead to activists challenging the exercise of duties by directors with the benefit of hindsight. A few years on, those fears remain unrealised as no significant such claims have been brought. • The UK Takeover Code has been amended to clarify that it does not require the offer price to be the determining factor in the board's consideration of an offer and that the Code does not prevent a board taking other factors into account. The board will assess a takeover proposal based on value and deliverability: it is thus legitimate to withstand any pressure to give a recommendation in favour of a bid or allow access for due diligence. Furthermore, the legal duties only require that the interests of shareholders are taken into account, not those of holders of derivatives. However, during a bid it becomes hard in practice not to treat CFD holders as being current shareholders, as CFD holders can put significant pressure on the board and may have a right to call or borrow stock and requisition a general meeting.	CA 2006 Takeover Code (Rule 25.2)
Litigation	• A new statutory derivative action was introduced in October 2007 for breach of directors' duties, allowing a shareholder to compel the company to take action against directors. Only a single share needs to be held and this can be acquired after the event in question. • Shareholders may also petition for a remedy where their interests are "unfairly prejudiced". • Group Litigation Orders allow the courts to deal with multiple similar claims together and in a more cost-efficient manner.	CA 2006 Civil Procedure Rules 19.10 – 19.15

Market abuse	• Prohibition on dealings on the basis of non-public, price-sensitive information – a particular risk of this arises when activists have private conversations with the board. The FSA has commented that it believes "some hedge funds are testing the boundaries of acceptable practice concerning insider trading and market manipulation", for example where a party trades on the basis of another investor's strategy. • Prohibition on dissemination of misleading information with the intention of profiting from an expected fall in a company's share price ("trash & cash").	Criminal Justice Act 1993; FSMA S.118
Concert parties	• When parties act in concert, their shares are aggregated for the purposes of disclosure requirements and other requirements are triggered when certain holdings are reached / crossed (see Part 4). • Two or more parties "act in concert" where they cooperate to obtain control of a target company. Note that the Takeover Panel assumes that persons requisitioning a "board control-seeking proposal" are acting in concert.	DTR 5.2.1; Notes to Rule 9 of the Takeover Code
Corporate governance	• The UK Walker Review sets out a number of recommendations on how the UK banking industry might improve its corporate governance standards. • In particular, the review stresses that non-executive directors should have appropriate experience and training and should be aware of the time commitment expected of them. It proposes that the Chairman (if not all board members) should stand for re-election on an annual basis. • In relation to institutional shareholders, there is strong emphasis on compliance with the UK Stewardship Code (see below). Voting preferences should be disclosed on websites or in another publicly accessible manner. • The report also stresses the importance of having a risk committee (whose findings should be included in the annual report and accounts) and a remuneration committee, and encourages the use of external consultants to review board policies in these areas.	UK Walker Review; UK Corporate Governance Code

	• The UK Corporate Governance Code, which replaced the 2008 Combined Code on Corporate Governance, sets out standards of good practice in relation to board leadership and effectiveness, remuneration, accountability, and relations with shareholders. All companies with a Premium Listing of equity shares are required under the Listing Rules to set out in their annual report and accounts how they have applied the Code, on a "comply or explain" basis. The new edition of the Code applies to financial years beginning on or after 29 June 2010. • The main changes introduced by the Code include a requirement for a clear statement of the board's responsibilities relating to risk, greater emphasis on the importance of board diversity and a recommendation that all directors of FTSE 350 companies be put up for re-election every year. When the Code was published in May 2010 it included in Schedule C some engagement principles for institutional investors. This Schedule has now been superseded by the UK Stewardship Code (see below).	
Corporate-shareholder relations	• Published in July 2010 by the Financial Reporting Council, the UK Stewardship Code aims to enhance the quality of engagement between companies and institutional investors. The Code applies to institutional investors on a "comply or explain" basis. • The main principles of the Code stipulate that institutional investors should publicly disclose how they intend to discharge their stewardship responsibilities; manage conflicts of interest in relation to stewardship; and monitor their investee companies. • Institutional investors are also expected to establish clear guidelines on when and how they will escalate their activities as a method of protecting and enhancing shareholder value, and to have a clear policy on voting and disclosure of voting activity. They must be willing to act collectively with other investors where appropriate.	UK Stewardship Code

Financial stability information requirements	• The Financial Stability and Market Confidence Sourcebook (FINMAR) came into force on 6 August 2010 and is part of the FSA Handbook. • Chapter One contains material on the FSA's use of its financial stability information-gathering powers (which derive from the Financial Services Act 2010). These powers enable the FSA to request information from certain categories of persons if the FSA considers that that information would be relevant to the financial stability of an individual financial institution or to one or more aspects of the UK financial system. If certain criteria are met, these powers would, for example, allow the FSA to request information about a hedge fund from an investor in or the manager of that hedge fund. • Chapter Two deals with short-selling. This chapter applies to all persons who engage, or are intending to engage, in short-selling in relation to relevant financial instruments (which includes instruments admitted to trading on a regulated or a prescribed EEA market), and to persons who have engaged in short-selling where the resulting short position is still open. The rules are not permanent, and will be replaced by the introduction of the European short-selling disclosure regime (see above). • The Sourcebook provides for disclosure of short positions during a rights issue period, and also for ongoing disclosure by persons with a disclosable short position in a UK financial sector company. For the purposes of the Sourcebook, a disclosable short position is a net short position which represents an economic interest of one quarter of 1 per cent. or more of the issued capital of a company, excluding any interest held in the capacity of market maker.	Financial Stability and Market Confidence Sourcebook
Corporate governance and activism	• Report by Hedge Funds Working Group ("**HFWG**") addresses best practice on issues such as disclosure, valuation of assets, corporate governance and activism, recommending, for example, that managers should not borrow stock in order to vote and should have a proxy policy which allows investors to evaluate their strategic approach (see www.hfsb.org). Hedge fund managers can voluntarily agree to observe the standards on a "comply or explain" basis. • Following a consultation process, the original standards from January 2008 have been amended in respect of certain provisions relating to redemption, administration and safekeeping.	HFWG: Final Report on Hedge Funds Standards, August 2010

Takeovers: Regulatory reform	• The Code Committee of the Takeover Panel ("**Panel**") has been reviewing the rules regulating takeover bids. A consultation paper was published in June 2010, and in October 2010 the Panel produced a review of the responses received, along with proposals for changes to the UK Takeover Code ("**Code**"). Another consultation paper followed in March 2011. The response statement, issued on 21 July 2011, set out the results of the Panel's review and the changes that will be made to the Code. The rule changes came into force on 19 September 2011. • The aim of the review was to address the perceived vulnerability of UK companies to hostile offerors which, the Panel believed, was to the detriment of shareholders. The stimulus for the review was the hostile takeover of Cadbury plc by Kraft Foods, Inc. Important changes made to the Code include those outlined below. • The existing "put up or shut up" regime has been extensively modified. Any publicly named possible bidder must, within a fixed period of 28 days, and in the absence of an extension to that period, either announce a firm intention to make an offer or announce it will not make an offer. When making an announcement that starts an offer period, target companies will have to identify all possible bidders from whom they have received an approach and set out the appropriate announcement deadline. Extensions to these deadlines can be requested but will only be granted shortly before the expiry of the 28 day deadline and effectively only with target company consent. • The Panel has also brought in a general prohibition against inducement fees, implementation agreements and other "offer-related" arrangements. The Panel's view is that such deal protection measures have historically deterred competing bidders or led to competing bidders making offers on less favourable terms. Going forward, only break fees agreed with white knights or put in place as part of a "formal sale process" will be permitted as an exception to the general prohibition.	UK Takeover Code

<table>
<tr><td></td><td>• The Panel has also made amendments which aim to increase transparency in takeover offers. As such, bidder and target companies will have to include their advisers' and financing fees in public documents. Additionally, bidder and target companies will be required to publish in a greater level of detail financial information on themselves. Finally, bidders will also have to disclose additional detail concerning their financing arrangements.

• The Panel has made changes aimed at providing greater recognition of employee interests. For example, bidders will be "held to" statements they make that relate to strategic plans regarding employees of either party to an offer. Additionally, the point in time when the bidder and target must notify their employees that an offer is being made has been brought forward. Target companies will also have to inform employee representatives that they have a right to include a statement in the target board's circular or on the offer website setting out their views.

• The Panel intend to review the practical impact of the amendments to the Code not less than 12 months following their implementation.</td><td></td></tr>
<tr><td>Takeover Code and shareholder activism</td><td>• In September 2009, the Takeover Panel published Practice Statement 26 on how it interprets and applies certain provisions of the Takeover Code in relation to shareholder activism.

• One of the key concerns of activists is whether they trigger the Rule 9 obligation to make a mandatory offer for the entire share capital of a company if the 30 per cent. threshold is exceeded. As a result activists generally seek to avoid being found in a concert party when looking to influence the strategy or direction of the company in which they invest.

• The Panel's view is that a mandatory offer would only be triggered by activist shareholders if (i) the shareholders requisition a general meeting to consider board control seeking resolutions or threaten to do so; and (ii) after an agreement or understanding is reached between the activists to propose or threaten a board control seeking resolution, those shareholders acquire interests that take them through 30 per cent. of the voting rights in the company (or consolidate a controlling position above 30 per cent.).</td><td>Takeover Panel Practice Statement 26, September 2009</td></tr>
</table>

- A board control seeking resolution would include seeking to replace existing directors with directors with a significant relationship with the requisitioning shareholders so that those shareholders could control the board. Additional non-executive directors or independent directors will not be considered board control seeking.
- The practice statement highlights factors that the Panel will regard as indicative of shareholders having moved beyond having a shared goal to acting concertedly.

Part 4: Rights of minority shareholders under English law		
Required shareholding (voting shares)	**Description of Right**	**Statutory Provision (CA 2006 unless stated otherwise)**
Single share	• Attend, speak and vote at general meetings.	Company's constitution
	• Receive notice of a general meeting.	s. 310
	• Appoint a proxy to attend, speak and vote on the member's behalf.	s. 324
	• Commence litigation, principally: (i) a shareholder can bring a derivative action on the company's behalf against the company's directors for breach of their duties even if the share held has been acquired after the alleged breach of duty; and (ii) unfair prejudice provisions allow a shareholder to bring a petition to court and seek a remedy where the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of the members, generally or some or them (including at least himself). This remedy is not widely used in the listed company context.	ss.260-269 and s.994
	• Following a takeover offer for the company, to be bought out by a bidder who has already acquired not less than 90 per cent. of the share capital and voting rights ("sell-out" rights).	s. 983
	• Inspect and request a copy of the register of members. The company can also require any shareholder to declare his interest in its shares, and this information must be available for inspection.	ss. 116, 793 and 809
5 per cent. of paid up share capital	• Requisition a general meeting and suggest the text of any proposed resolution.	ss. 303-306
5 per cent. or not less than 50 members	• Apply to court to set aside a resolution by a public company to re-register as a private company.	s. 98

5 per cent. or at least 100 members who have a right to vote and hold shares on which an average of at least £100 per member is paid up	• Requisition a resolution to be proposed at a public company's AGM.	ss.338-340
	• Require the circulation of a statement of up to 1,000 words regarding a matter to be dealt with at a general meeting.	ss.314-317
	• Require the company to publish a statement on its website about audit matters.	s.527
	• Requisition independent scrutiny of a poll vote held at a general meeting.	s.342
10 per cent.	• Require the company to send out a s.793 notice and investigate its shareholder base.	s.803
10 per cent. or not less than 200 members	• Apply to the Secretary of State to investigate the affairs or the membership of a company.	ss.431 and 442 Companies Act 1985
>10 per cent.	• Block the squeeze-out of minority holdings following a takeover offer.	s. 979
>25 per cent.	• Block a special resolution in a general meeting.	s.283
	• Ability to block an attempted takeover by way of scheme of arrangement (approval required from a majority in number of the shareholders at the meeting and representing 75% of the shares voted at the meeting).	s. 899

Part 5: UK stakebuilding: key thresholds and disclosure requirements (in particular for CFDs)		
SOURCE	**WHEN DOES IT APPLY?**	**REQUIREMENT** **Note: this also applies to persons "acting in concert"**
Disclosure and Transparency Rules ("DTRs")	Any time	• A person must notify the company where in aggregate he reaches, exceeds or falls below 3 per cent. and each 1 per cent. threshold above that of voting rights in that company, as a result of an acquisition or disposal of shares or "financial instruments" in that company (DTR 5.1.2). • "Financial instruments" include transferable securities, options, futures, swaps, forward rate agreements and other derivative contracts (e.g. CFDs) but only if they entitle the holder to acquire the underlying shares (DTR 5.3.1). Most CFDs do not generally incorporate a legal right to call for underlying shares (except if entered into as part of pre-takeover stakebuilding where the call right can be helpful to establish "facilitation" defences to insider dealing and market abuse challenge). • The FSA's Disclosure and Transparency Rules (Disclosure of Contracts for Differences) Instrument 2009, in effect from 1 June 2009, extended disclosure obligations in respect of interests in a company's shares to include all "long" CFDs referenced to those shares whether or not the CFD investor has a legal right to call for the underlying shares.
CA 2006 (s.793)	Any time	• A company may give notice to a person to disclose interests held in the previous three years in instruments relating to its voting shares but, in the case of CFDs, only if they entitle the holder to acquire the underlying shares. • The notice may require the recipient to disclose so far as lies within his knowledge: (a) the identity of any persons interested (in the previous three years) in the same shares; and (b) where the interest is a past interest, the identity of the person to whom the shares were transferred as well as to give particulars of any interests currently or previously held.

DTR 3	Any time	• Persons discharging managerial responsibilities ("**PDMRs**") – essentially directors and very senior executives of company (together with certain "connected persons") – must disclose transactions on their own account in the company's shares, including CFDs, derivatives or any other financial instruments relating to those shares (DTR 3.1.2). • A company must announce information which has been notified to it under DTR 3.1.2R and s.793 CA 2006 (DTR 3.1.4).
Takeover Code	Stakebuilding of any amount during an offer period	Any offer must be in cash or accompanied by a cash alternative (Rule 11).
	Stakebuilding of 1%	Obligation to disclose dealings during an offer period and to disclose initial interests at start of offer period in an opening position disclosure (Rule 8).
	Stakebuilding at any time during an offer period or in the three months beforehand	Acquisitions of any shares (or other interests) in this period set a floor price for a subsequent offer (Rule 6).
	Stakebuilding at any time during an offer period or in a 3/12 month look-back period	If shares (or other interests) of 10 per cent. or more are purchased for cash in the 12 months prior to offer period (or if any shares or other interests are purchased during the offer period itself), any offer must be in cash or accompanied by a cash alternative (Rule 11.1). Similarly, if shares (or other interests) are purchased in exchange for bidder securities during the offer period or in excess of 10% during a three-month look-back period, those bidder securities must also be made available under the offer (Rule 11.2).
	Upon reaching 30%	Acquisition may be prohibited (Rule 5) or result in a requirement for a cash offer to be made for the target (Rule 9) if it takes aggregate holding to 30 per cent. or more if additional to existing 30 per cent. holding.

Appendix 2 – France

Part 1: Themes and developments in the activity of hedge funds and shareholder activists in France

Hedge funds: a global overview

The hedge fund environment has radically evolved in the past two years due to the impact of the financial crisis and the subsequent global overhaul of the financial system.

There have been noticeable changes within the hedge fund industry itself – such as the growing concerns of investors about transparency and governance and the industry's focus on high growth industries and emerging economies, with some hedge funds establishing operations in new locations (such as Hong Kong, Singapore, Sao Paulo, and Miami) to access those opportunities. All these developments have led hedge funds to focus their investment on new assets and to use less liquid strategies.

Although only 5 per cent. of European hedge funds are headquartered in France, France remains an attractive location for hedge funds' investments. For instance, Pardus, an American hedge fund, announced at the beginning of 2011 its intention to raise $2 billion with the aim of acquiring minority stakes in European companies, including French ones.

The situation of French hedge funds

Even if some offshore hedge funds are moving into more regulated structures to comply with investors' new demands, the hedge fund industry remains attractive.

The hedge fund industry is so appealing that the French government, usually reserved on such matters, has sought to develop the attractiveness of France for alternative investment. Indeed, the Haut Comité de Place (a think-tank dedicated to improving the appeal of France as a financial centre), chaired by the then-French Finance Minister, Christine Lagarde, approved, amongst other proposals, recommendations set out in a commissioned report on alternative asset management by the consulting firm, Reinhold & Partners.

The report by Reinhold & Partners highlighted the fact that the French hedge fund industry, despite its renowned human and technical expertise, is not competitive due to cultural opposition to hedge funds and the absence of a domestic market. In addition, even though the French legal system makes provisions for specific vehicles dedicated to alternative investment, there are barriers to exporting the funds set up in that way. As a result, the returns posted by French hedge funds can be lower than those posted by American or English funds.

The report made several recommendations on measures which would make the French alternative investment market more attractive. These include the use of better marketing strategies, the adaptation of rules (laws, regulations, etc.) whenever possible and the integration of the requirements of French and foreign investors.

Shareholder activism in France

In the past 20 years, French shareholder activism mainly took the form of minority shareholders disputing (individually or collectively) the decisions taken by the management or by the majority shareholders in order to protect their minority rights. Accordingly, traditional shareholder activism in France could be characterised as "protectionist activism".

In France, such activism is seen as an alternative mechanism to compel the management and the majority shareholders to follow enhanced standards of corporate governance. For instance, PhiTrust Active Investors, a French asset management company which develops shareholder

engagement strategies in order to promote good corporate governance practices, filed resolutions prior to the general meetings of various French listed companies, including Sanofi-Aventis, Total and Société Générale, seeking to limit executive compensation and to separate the roles of Chairman and CEO.

This "protectionist activism" approach encouraged the development of several minority shareholders associations during the 90's and the 00's, such as the "*Association des actionnaires minoritaires*" ("ADAM") and the "*Association des petits porteurs actifs*" ("APPA"). These associations sought to ensure the protection of minority shareholders' rights against detrimental actions taken by management or majority shareholders by using any means necessary, from media activity to judicial proceedings. For example, when the French financial market authority ("AMF") granted the family shareholders in Hermès an exemption from having to buy out minority investors in the context of the reorganization of their shareholding and the creation of a holding company with a controlling stake (as part of a defence strategy against a potential takeover by LVMH), the ADAM attacked the exemption and lodged a complaint with the court of appeal in Paris.

In addition, the environmental and social impact of corporate activity has become a rising concern for French shareholders. As a consequence, some shareholders are pushing management to improve companies' environmental or social policies.

Whilst the involvement of minority shareholders associations is seen in the majority of significant French operations or transactions, there is also an increasing trend of hedge fund activism in French companies. Indeed, an increasing number of hedge funds are developing a "proactive" approach to shareholder activism in order to put pressure on management with the aim of aligning a company's strategy with their own financial interests or to take advantage of a potential restructuring situation.

One of the more striking examples of this new trend involves the hedge fund, Pardus, and the French listed company, Atos Origin. Pardus and Centaurus, another hedge fund, (after accumulating 21 per cent. of Atos Origin) unsuccessfully tried to convince the management of Atos to dismantle the company and then also pushed to have their own directors nominated.

More recently, attention has been drawn to the French listed company, Lagardère. Guy Wyser-Pratte, the manager of an American hedge fund holding a 0.53 per cent. stake in Lagardère, announced his intention to be nominated to the supervisory board and to change the corporate structure of the company.

Regulatory changes

Although post-crisis regulation has imposed certain disclosure obligations on shareholders involved in securities lending and borrowing, it has also (as the reform to proxy fight regulation shows) accepted shareholder activism as a reality that requires more specific regulation in certain contexts.

For a description of the AIFM Directive, please refer to the EU-wide summary.

Part 2: Examples of hedge fund activity and shareholder activism in France	
Pardus/Valeo: pushing for strategic restructuring **(January 2007 to June 2008)**	• Commencing in 2006, Pardus Capital Management, a hedge fund, built a 20 per cent. stake in the capital of the French company, Valeo. Pardus pushed for Valeo to buy a stake in the U.S. company, Visteon, in which Pardus also held a stake. • In May 2007, at Valeo's general meeting, Pardus argued in favour of a strategic renewal of the management of the company and, as the main shareholder (it held 14.2 per cent. of the share capital at the time), requested eight seats on the board. All nominations proposed by Pardus were rejected. • In the first half of 2008, Pardus suffered from the market volatility of its investments and eventually settled with Valeo's management in June 2008 to get one seat on the board, with Pardus undertaking to support management and not to increase its holding in the capital of Valeo above 20 per cent.
Centaurus/ Pardus and Atos Origin: pushing for strategic renewal of the board **(October 2006 to September 2008)**	• In 2006, Centaurus and Pardus jointly accumulated a 21 per cent. stake in the French company Atos Origin and requested a seat on the supervisory board of the company. With a view to curbing this attempt, Atos management publicly announced its fears that the hedge funds intended to take over the company. • Following the cancellation of a first notice to convene a shareholders meeting, the hedge funds put pressure on the management to convene a new meeting in order to nominate new supervisory board members and threatened litigation if the meeting was not convened. • The hedge funds used a specific conciliation procedure before the commercial court (in the context of the application for an early shareholders meeting). The parties reached a court-approved agreement. The meeting was held in May 2008, during which the chairman of Atos' supervisory board resigned and each hedge fund managed to secure a seat at the board, with the support of the minority shareholders association, the Association des Actionnaires Minoritaires ("**ADAM**"). • In June 2008, PAI Partners, a private equity fund (and the former majority shareholder of Atos until 2004), surprisingly acquired a stake of 17.9 per cent. in Atos and obtained two seats at the supervisory board (out of 11). • In September 2008, Centaurus sold three million shares in Atos Origin (presumably to PAI Partners) causing its stake in Atos Origin to drop to 6.66 per cent. At the same time PAI partners' stake increased to 22.61 per cent. PAI Partners subsequently announced its intention to ask for the appointment of a third supervisory board member.

Apax/GFI: creating alliances **(March to August 2007)**	• At the 2007 shareholders meeting, the management of GFI Informatique proposed a share capital increase in order to issue shares to Apax Partners. Minority shareholders, including the hedge fund Boussard & Gavaudan, contested the price of the share issue offered for each. • Against this background, Fujitsu Services launched a hostile tender offer for GFI (May 2007). The offer was rejected by the management and employees (holding 13 per cent. of GFI's share capital) and by Apax Partners (holding 15 per cent. of GFI's share capital). Boussard & Gavaudan, which had tendered its 10.6 per cent. stake in favour the offer, eventually aligned its position with that of Apax and the management of GFI and increased its stake to 17.47 per cent. of the share capital of the company.
Elliott Management/ APRR: blocking squeeze out **(January to April 2006)**	• Following its successful tender offer for APRR, the Macquarie/ Eiffage consortium failed to delist APRR because Elliott Management Corporation was able to block the squeeze-out procedure thanks to its 10 per cent. stake in APRR. Elliott Management Corporation sold its stake in APRR to the Macquarie/ Eiffage consortium in June 2010. As of the date of publication of this guide the delisting of APRR is suspended due to litigation initiated by a public entity (*Conseil Général de Saône-et-Loire*) which owns a 0.025 per cent. stake in APRR.
Wyser-Pratte/ Lagardère: pushing for governance reform and strategic change **(March – April 2010)**	• Guy Wyser-Pratte announced in the media on 25 March 2010 that he owned (personally and along with other investment funds) 0.53 per cent. of the share capital of Lagardère (a limited partnership with shares) and would submit two resolutions to the general meeting of the shareholders to be held on 27 April 2010. The subject matter of the resolutions, according to his declaration, would be to appoint him as a member of the supervisory board and to transform Lagardère's "*anti-democratic and medieval*" corporate structure from a limited partnership to a corporation. Wyser-Pratte publicly criticised the managing partners' strategy and the corporate structure of the company. • Lagardère's stock price increased by 10 per cent. in the two weeks following that announcement. The managing partner of Lagardère, Arnaud Lagardère, countered in the media that Wyser-Pratte's intention was to sell back his shares right after the general meeting for a profit and that the real purpose of the resolutions was not to change the corporate structure of the company. Lagardère therefore objected to the AMF that the market was not properly informed by Wyser-Pratte of his true intention towards the company. • Wyser-Pratte's insistence on his right to legally propose that two resolutions be added to the meeting's agenda (for him and on behalf of the various funds he pretended to represent) gave rise to numerous exchanges between him and Lagardère.

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• Fearing that his resolutions would not be taken into account, Wyser-Pratte initiated legal proceedings. Eventually, Lagardère decided to include the resolutions on the agenda. The two resolutions were for:

(i) the appointment of Wyser-Pratte to the supervisory board; and

(ii) the removal of the "preliminary" nature of the general partners' agreement as set out in the by-laws for all decisions made by the shareholders meeting (but not to change the corporate structure).

• On the day of the general meeting, Lagardère's shareholders voted against both resolutions by more than 75 per cent.

• Following the general meeting, Wyser-Pratte claimed, in particular to the SEC and the AMF, that a large amount of the votes by correspondence had not been taken into account during the general meeting. Such claims were strongly denied by Lagardère.
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<td>Wendel / Saint Gobain: stakebuilding and market information failure

(autumn 2007 – 2010)</td>
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• Wendel's stakebuilding in Saint Gobain during the fall of 2007 through the use of CFDs caused the AMF to investigate. The AMF then initiated sanction proceedings in order to determine whether or not Wendel complied with the applicable disclosure requirements when building its stake.

• On December 13 2010, the Enforcement Committee of the AMF (Commission des sanctions) imposed a €1.5 million fine on each of Wendel and Mr Lafonta – the chairman of Wendel's supervisory board at the time – for failing to disclose inside information to the market in respect of Wendel's stakebuilding. Both of them appealed against the Enforcement Committee decision.
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<td>Hermès / LVMH: Stakebuilding through the use of CFDs

(October 2010 – current)</td>
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• The recent stakebuilding of LVMH in Hermès International (October 2010) through the use of CFDs generated quite a stir in France. LVMH entered into cash-settled equity swap contracts in 2008 and in October 2010 amended their terms so that the underlying shares would be delivered and the termination dates moved forward.

• LVMH then disclosed that on 21 October 2010 it had crossed the 5 per cent. threshold for holdings of shares and voting rights and the 10 per cent. threshold for holdings of shares and, on 24 October 2010, the 10 per cent. threshold for holdings of voting rights and the 15 per cent. threshold for holdings of shares.

• In December 2010 LVMH crossed (through on-market and off-market purchases) the 20 per cent. threshold for holdings of shares in Hermès, announcing that it held 20.21 per cent. of the share capital and 12.73 per cent. of the voting rights in Hermès. The AMF is currently investigating LVMH's stakebuilding.
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Part 3: Key French legal issues affecting hedge fund and other shareholder activism		Source
Short selling	*Prohibition of naked short selling* • The French Monetary and Financial Code ("**FMFC**") has prohibited "naked" short sales since the Law Relating to Banking and Financial Regulation was passed on 22 October 2010. Short selling of financial instruments admitted to trading on a regulated market is prohibited if the seller: (i) does not own the financial instruments to be sold; or (ii) has not taken the necessary steps to obtain reasonable assurance from a third party on his ability to deliver such financial instruments on the settlement date at the latest. Exemptions can be adopted by Decree after consultation of the board (*collège*) of the AMF. *Regulation of 'covered' short selling* • The ban on short selling of securities of French financial companies (banks, insurance etc) was renewed in November 2011 for a three-month period. • In addition, a disclosure regime has been in effect since 1 February 2011. • These provisions only relate to certain companies admitted to trading on a regulated market (Euronext) or an organised multilateral trading facility (Alternext) and listed by the AMF on its website. • The disclosure regime requires daily private disclosure to the AMF of any net short position which reaches, exceeds or falls below 0.2, 0.3 or 0.4 per cent. of the share capital of one of the above mentioned companies at close of business within one trading day. Similar disclosure requirements apply and are made public by the AMF on its website for any net short position which reaches, exceeds or falls below 0.5 per cent. and every subsequent 0.1 per cent.	Art. L. 211-17-1 of the FMFC Art. 223-37 of the AMF General Regulation and Implementing Instruction n°2010-08

	• The reporting requirement does not apply to credit institutions, investment firms, and members of a regulated market that deal on their own account in one of the following cases, provided they submit a prior application to the AMF, which accepts it: (i) posting of firm, simultaneous quotations of competitive bid and offer prices for comparable quantities so as to provide the market with regular liquidity, and (ii) as part of their usual business, executing client orders and responding to clients' requests to trade. • The new regime anticipates the adoption of the EC's draft short selling regulation.	
The Alternative Investment Fund Managers Directive	• See the summary of the AIFMD's disclosure and minimum capital requirements contained in Part 3 of the UK Appendix.	AIFMD
Stakebuilding and use of CFDs and other derivatives	• Building a stake in a listed company to exercise influence – this can be done through financial instruments referenced to shares or arrangements which provide temporary ownership of the shares (see below).	
	• Already issued shares owned or which can be acquired by a person at his sole discretion, immediately or in the future, pursuant to a contract or a financial instrument (giving voting rights therein), as well as situations where a person is deemed to be the legal owner of the shares or voting rights, are aggregated for disclosure requirement purposes. Instruments giving a purely economic exposure to the shares (such as CFDs) are not aggregated for calculating the threshold for such disclosure. See further Part 5 below.	Art. L. 233-7 and L. 233-9 of the FCC and Art. 223-11 et seq. of the AMF General Regulation
	• An offeror may sometimes wish to increase the likelihood of a successful takeover bid by building a stake in the target through off-market and on-market purchases before the commencement of the offer period or the pre-offer period (if any). This stakebuilding is possible but there are a number of applicable restrictions to insider dealing and market manipulation (and also disclosure obligations), and such purchases may also have an impact on the pricing of the eventual offer.	Art. 231-38 et seq. of the AMF General Regulation

	• Although amendments to the disclosure regulation have been made since the Wendel/ Saint-Gobain case (*see Part 2*), the AMF's decision and the stir caused by the LVMH/Hermès International case (*see Part 2*) could lead to further changes in the regulation applicable to the disclosure of CFDs and other derivatives.	
Temporary transfer of shares / stock lending	• Allows borrowers of shares to exercise voting and shareholder rights without incurring long-term economic exposure. All owners of a company's shares at the record date (12 pm three days before a shareholders meeting) are entitled to vote, even though their shares might have been sold between the record date and the meeting. • The implementation of the Transparency Directive (Directive 2004/109/EC) has not restricted the ability of hedge funds or other activists to use temporary transfers of shares but such devices are subject to disclosure requirements (see Part 5 below).	Art. L. 225-126 and R. 225-85 et seq. of the French commercial code ("**FCC**")
Duties of directors	• Directors owe their duties to the company as an entity, not to the shareholders – they must act "in the best interest of the company". However, directors may be liable to shareholders for their actions (see "Litigation" below). Although the board of directors does not represent the shareholders, in practice their interests are often taken into account, especially during a takeover offer. Interests of the holders of instruments giving a purely economic exposure to the shares (such as CFDs) are not usually taken into account, although they may be in practice when their influence is particularly strong.	
Litigation	• Among other claims that can be brought against them, members of the board of directors and/ or the CEO may be liable (individually or jointly and severally) to the company for breaches of applicable laws, breach of the terms of the company's by-laws or for negligence ("*fautes commises dans la gestion*"). Any shareholder may bring a shareholder derivative action against the board and/or the CEO on behalf of the company or an individual action for damages suffered personally by such shareholder (distinct from that of the company).	

	• In addition, action can be taken against directors and/or *de jure* and *de facto* managers (which may include majority shareholders) for appropriating the company's assets or using its funds for their own personal interests or applying them in a way which is not in the company's best interests.	Art. L. 225-251 et seq. of the FCC Art. L. 242-6 of the FCC
Market abuse	• France has adopted the Market Abuse Directive (Directive 2003/6/EC). The General Regulation of the AMF prohibits insider dealing and market manipulation (price manipulation and dissemination of misleading information). These regulations limit the investment techniques which hedge funds and other activists may use.	General regulation of the AMF
Concert parties	• Parties are regarded as acting in concert when they enter into agreements relating to: (i) the acquisition or transfer of shares or voting rights; or (ii) the exercise of their voting rights, in order to adopt a common policy or stance towards a listed company or to gain control of that company. • During a takeover offer, the bidder and the persons supporting it are deemed to be acting in concert, as are the target and the persons supporting the target. • Although evidence of a written agreement is not strictly required to show that parties are acting in concert, in practice the AMF has never found that parallel behavior between investors is in itself sufficient for finding the existence of a concert party (although a 2008 case – Sacyr/Eiffage – shows that it can be a material factor). • When parties act in concert, their shares and voting rights are aggregated for purposes of disclosure requirements and mandatory bid requirements.	Art. L. 233-10 of the FCC Art. L. 233-10-1 of the FCC
Proxy fight	• Proxy solicitation has been subject to regulation since 1 January 2011.	Art. L. 225-106-1 and seq. of the FCC

• Any person actively soliciting proxies for general meetings of companies admitted to trading on a regulated market or an organised multilateral trading facility must publish on its website a document describing its voting policy and how such person intends to vote on resolutions for which no specific indication has been given by a shareholder.	Art. R. 225-82-3 of the FCC
• Persons soliciting proxies can be subject to further specific disclosure requirements (e.g. if such person controls the company or is a member of the board or of management, etc.). When, during the validity period of the proxy, certain listed facts occur, the proxy becomes void unless expressly confirmed by the shareholder.	Art. L. 225-106-1 of the FCC
• A shareholder can bring a claim against a proxy firm so as to deprive such firm from its right to participate at any general meeting of such company for up to three years in case of non-compliance with its disclosure requirements or its voting policy. The company can also bring a claim if the proxy firm did not comply with its disclosure requirements.	Art. L. 225-106-3 of the FCC
• Direct proxy solicitation is difficult as bearer securities may account for a large part of the share capital of a company. Only the company itself can request disclosure of the identity of holders of bearer shares carrying voting rights (for a fee) by the central custodian administering those shares (as long as this power is included in the company's by-laws). The company may not pass on the information thus obtained. Accordingly, any solicitation by activist shareholders must be done through public announcements (for example in the press or via a website).	Art. L. 228-2 of the FCC
• Blank proxies ("*pouvoirs en blanc*") may be given without naming a proxy: in such case, the relevant shareholder is deemed to vote in favour of resolutions recommended by the board and against resolutions opposed by the board. A blank proxy is not an abstention vote.	Art. L. 225-106 of the FCC

	• The AMF issued a Recommendation for proxy advisory firms regarding: (i) establishing and issuing voting policy; (ii) establishing and submitting voting recommendations to investors; (iii) communicating with listed companies; and (iv) preventing conflicts of interests. This recommendation must be implemented as soon as possible and in any event in time for the 2012 general meeting season.	AMF Recommendation n°2011-06
Shareholder rights	• See below.	

Part 4: Rights of minority shareholders under French law		
Required shareholding	**Description of Right** **For French "*sociétés anonymes*" (companies limited by shares)**	**Statutory Provision**
Single share	• Attend, speak and vote at shareholders meetings. A shareholder can also choose to be represented by any person, an individual or a legal entity, of his choice.	Art. L. 225-106 and L. 225-122 of the FCC
	• Oppose decisions increasing the commitments (*engagements*) of the shareholders.	Art. L. 225-96 of the FCC
	• Demand that written questions sent to the management prior to a general meeting be answered at the meeting (questions must be sent no later than four business days prior to the meeting).	Art. L. 225-108 and R-225-84 of the FCC
	• Commence litigation against the directors by means, among other possible claims, of (i) individual action for damages suffered personally by the shareholder; or (ii) derivative action on behalf of the company (even if the shares have been acquired after the alleged breach of duty).	Art. L. 225-252 of the FCC
	• Note that, regardless of the items on the agenda, a shareholder can propose a resolution for the removal and replacement of all or part of the members of the board of directors at any time during a shareholders meeting.	Art. L. 225-105 of the FCC

5 per cent. (alone or jointly)	• Ask questions to the management concerning its acts or ask the court to appoint an expert to review the acts of management.	Art. L. 225-231 of the FCC
	• Ask questions to the management twice a year concerning any fact that could compromise the continuity of the company's business.	Art. L. 225-232 of the FCC
	• Apply to court to remove the statutory auditors (for just cause).	Art. L. 823-6 of the FCCArt.
	• Apply to court to appoint a representative to convene a shareholders meeting (and set the agenda), where such meeting should have been duly convened but the management has failed to do so.	L. 225-103 of the FCC
	• Propose that a topic be debated during a shareholders meeting (no later than the 25th day prior to the shareholders meeting).	Art. L. 225-105 of the FCC
	• Propose a resolution (no later than the 25th day prior to the shareholders meeting). A short statement may be attached to the text of the proposed resolution.	Art. L. 225-105 of the FCC
	• All the above listed rights can be exercised by a "shareholders' association". In order to qualify, each one of its members must have been holding its shares in the company for at least 2 years and together the members must represent at least 5 per cent. of the company's voting rights.	Art. L. 225-103, L. 225-105, L. 225-231, L. 225-232 and L. 225-120 of the FCC
	Note that, for the last three points above, the minimum requisite percentage of share capital holding decreases when the amount of the company's capital increases.	Art. R. 225-71 and L. 225-120 of the FCC
5 per cent. of the share capital or the voting rights	• Ability to block a squeeze-out following a tender offer.	Art. L. 433-4 II of the FMFC
>33$^{1/3}$ per cent.	• Ability to block a special resolution in a shareholders extraordinary meeting (this may include a resolution to increase or decrease the share capital, to approve a merger or de-merger, or proposing any amendments to the company's by-laws).	Art. L. 225-96 of the FCC

Part 5: French stakebuilding: key thresholds and disclosure requirements (in particular for CFDs)		
Source	**When does it apply?**	**Requirement** **Note: These requirements also apply to persons "acting in concert".**
Art. L. 233-7 et seq. of the FCC and Art. 223-11 et seq. of AMF's General Regulation **Art. L. 433-3 of the FMFC and Art. 234-1 et seq. of the General Regulation of the AMF**	Any time	• A person must notify a company and the AMF when his holding reaches or exceeds 5, 10, 15, 20, 25, 30, 33.3, 50, 66.6, 90 and 95 per cent. of the shares or voting rights of that company (within four trading days). The AMF will announce this information to the market. The company's by-laws may impose an additional reporting obligation relating to the holding of fractions of the capital or voting rights below 5 per cent. (with a minimum of 0.5 per cent.). • Where a person's holding of shares or voting rights in a company exceeds the 10, 15, 20 and 25 per cent. thresholds, such person must announce to the issuer and the AMF, within 5 business days, what actions it intends to take in the following 6 months over certain matters (including whether he will continue to purchase shares or propose to be appointed as a member of the board of directors or the supervisory board). • Note that in some cases a person may be legally deemed to be the owner of the relevant shares and/or voting rights for the purpose of the disclosure requirements (loans of securities, proxies with no voting instructions, etc.). • Note that since the Law Relating to Banking and Financial Regulation was passed on 22 October 2010, all the shares and/or voting rights taken into consideration for calculating the ownership triggering disclosure requirements are also taken into consideration for mandatory tender offer purposes. The threshold for mandatory tender offer purposes has been lowered from 33.3 to 30 per cent. of the shares or voting rights. A person who already holds between 30 and 50 per cent. of the shares or voting rights and who acquires a further 2 per cent. or more of the shares or voting rights in the target within a period of less than 12 consecutive months is also required to make a mandatory bid.

Art. of L. 225-126 I of the FCC **Art. 223-38 of the General Regulation of the AMF**	Prior to general meetings	• A person must notify a company and the AMF when he temporarily owns a number of shares (e.g. under any temporary assignment of shares, or any transaction under which he can or must sell or transfer back such shares to the seller) representing more than 0.5 per cent. of that company's voting rights. • Such disclosure must be made at least three days prior to a general meeting and if such agreement is still in force at the date of such general meeting include the number of shares held, the identity of the transferor, the date and termination date of the underlying agreement and the voting agreement if any. • The information is then made public by the company with the company publishing such information on its website as soon as possible and, at the latest, one business day after the receipt of such information.
Art. L. 233-11 of the FCC	Any time	• Any significant agreement (relating to more than 0.5 per cent. of the share capital or voting rights of the issuer) must be disclosed to the issuer and the AMF within five trading days from the execution date of such agreement. This does not include CFDs.
Art. 223-22 of the AMF's General Regulation	Any time	• Persons discharging managerial responsibilities (essentially directors and very senior executives of a company, together with persons connected to them) must disclose to the AMF transactions on their own account in securities of the company or in any other financial instruments related thereto within five trading days from completion.
Art. 223-32 et seq. of the AMF's General Regulation	Any time	• The AMF may require disclosure of an intention to make a bid (within a specific deadline) where there are reasonable grounds to believe that persons are preparing a takeover bid, either alone or in concert (particularly in the event of discussions between the companies concerned or the appointment of advisers with a view to preparing a takeover offer). • If the persons indicate that they do not intend to make an offer, they may not file a draft offer for a period of six months unless they provide evidence of major changes in the environment, situation or shareholding structure of the persons concerned, including the issuer itself.

Art. 231-40 of the AMF's General Regulation	During a takeover "offer period"	• Any dealings in the securities of the target company by the target company itself and persons acting in concert with it are prohibited. • The same obligation applies during the pre-offer period.

Appendix 3 – Germany

Part 1: Themes and developments in the activity of hedge funds and shareholder activists in Germany

The financial crisis had a serious impact on hedge funds in Germany. The number of hedge funds established and registered under the German Investment Act (*Investmentgesetz – InvG*) fell from 31 in 2009 to 20 as of September 2011 according to figures published by the German Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht – BaFin*).

Trends in legislative activity affecting hedge funds

German regulation of hedge funds and their activities has increased enormously since the financial crisis, with German regulation often going beyond European law requirements or standards.

For example, Germany rushed ahead in May 2008 when the BaFin temporarily banned short sales in several financial sector companies. Additional BaFin decrees in May 2010 included a ban on naked short sales of debt securities issued by eurozone countries and traded on German stock exchanges in the regulated market, as well as a ban on credit default swaps (CDS) where the reference debt is from a eurozone country and which do not serve to hedge against default risk (naked CDS). In July 2010 both BaFin decrees were codified into statutory law under the Act on the Prevention of Improper Securities and Derivatives Transactions (*Gesetz zur Vorbeugung gegen missbräuchliche Wertpapier- und Derivatgeschäfte*).

In March 2010, the BaFin introduced a new transparency regime governing net short-selling positions in shares of certain financial sector issuers, based on the proposal of the Committee of European Securities Regulators (CESR) for a pan-European short-selling regime. This regime was extended to 25 March 2012 shortly before its expiry on 31 January 2011. The BaFin's transparency regime has since been expanded and codified into statutory law under the Act on the Prevention of Improper Securities and Derivatives Transactions (*Gesetz zur Vorbeugung gegen missbräuchliche Wertpapier- und Derivategeschäfte*), with such rules becoming effective on 26 March 2012.

Disclosure rules on stakebuilding were widened under the German Risk Limitation Act (*Risikobegrenzungsgesetz*) which became effective in 2009. In order to increase transparency and to prevent creeping acquisitions or stakebuilding, disclosure rules will be extended further to apply to financial instruments (e.g. cash-settled equity swaps and other instruments that factually or economically enable their holders to acquire shares with their inherent voting rights). The new disclosure rules are part of the Act on Strengthening Investor Protection and Improving the Functionality of the Capital Markets (*Anlegerschutz- und Funktionsverbesserungsgesetz – AnsFuG*) which was enacted April 2011. These rules became effective as of 1 February 2012.

As a consequence of all these legislative activities, experts expect a decrease in hedge fund activity in Germany or at least a refocusing of hedge fund activity on other classes of assets or investments such as foreign currencies and non-regulated financial instruments.

Behavioural trends and activism

Generally, hedge funds have not been visibly involved in large scale transactions or in investments in large German companies. A recent exception, however, was the takeover bid of Spanish ACS for the German construction company Hochtief AG, in which hedge funds

acquired around 15 per cent. of the shares and played an active role in supporting and rejecting the bid.

Over the last few years there has been an ongoing trend for hedge funds to invest in mid-cap companies. In 2009 several hedge funds invested in German MDAX-companies, e.g. Rheinmetall AG (Greenlight Capital), HeidelbergCement AG (Paulson & Co), Gerresheimer AG (Sageview Capital, Pennant Capital, Eton Park and Brett Barakett). Through such investment, the hedge funds have tried to influence corporate strategy and restructurings. However, existing shareholding structures in mid-cap companies, which often have majority shareholders, have made it difficult for the hedge funds to achieve their goals.

Other longstanding hedge fund strategies remain unchanged, e.g. seeking changes in the composition of management or supervisory boards.

The most recent trend to emerge from restructuring scenarios is for hedge funds which have a stake in a company's equity also to become lenders to that company by acquiring credit claims or bank loans, and to then push for restructuring of the company. In February 2011, hedge funds with interests in German Conergy AG pushed for a shareholder resolution on a capital increase allowing for a debt-for-equity swap of their loan claims – a step which was without precedent for a publicly listed company in the German market (see Part 2 below for details).

So far hedge funds have not been very active in bringing actions in German courts against German companies or their directors. The first ever public action was the recently jointly filed damages claim of several investors (including hedge funds) before the local court of Braunschweig against Porsche Automobil Holding SE and Volkswagen AG alleging market manipulation during the course of Porsche's attempt to takeover Volkswagen in 2008/09. Other investors followed by filing separate actions. Further, some hedge funds have sued German companies and their board members in other jurisdictions. The most prominent example is the multi-billion dollar damages claim of Elliott Associates and about 30 other hedge funds in the US against Porsche Automobil Holding SE and its former management board members, which was rejected at first instance due to lack of jurisdiction.

German public opinion on hedge funds is still influenced by a statement made by Franz Müntefering (a German politician) in 2005 that likened hedge funds to "swarms of locusts". However, the statistics do not provide support for such prejudice. According to some studies, hedge funds have only managed to force through their demands for special dividends or special fund distributions in only one of every four cases.[1]

Generally, hedge funds in Germany seem to continue to act in the background and most of their activities are not publicly visible. According to some studies, only about ten per cent. of all hedge fund activities in the German market become public (e.g. through press releases or interviews).[2]

1 Böhm, Grote: Hedgefonds-Aktivismus in Deutschland. In: BAI Newsletter 04/09 p. 16.

2 Böhm, Grote: Hedgefonds-Aktivismus in Deutschland. In: BAI Newsletter 04/09 p. 16.

Part 2: Examples of hedge fund activity and shareholder activism in Germany	
Deutsche Börse/TCI/ Atticus **(2004 to 2005) (2008 to 2009)**	• Deutsche Börse and Euronext were competing in a takeover battle for the London Stock Exchange (LSE). • After Deutsche Börse announced a tender offer for LSE (December 2004), TCI increased its stake in Deutsche Börse to 8.5 per cent. and together with other hedge funds (including Atticus) claimed that the premium offered by Deutsche Börse for LSE was too high and pushed instead for a $500m (£350m) return of value to shareholders. • In March 2005, Deutsche Börse withdrew its bid and started a share buy-back program. The hedge funds demanded an additional share buy-back programme and sought to replace the CEO and the chairman of the supervisory board. TCI requested an EGM and filed a proposal to amend the agenda of the AGM to remove the chairman of the supervisory board. This proposal was withdrawn (in May 2005) after the company's CEO stepped down and three supervisory board members announced their resignation. In autumn 2005, the chairman of the supervisory board also resigned. • The BaFin scrutinized the actions of TCI and other hedge funds, but concluded that there was not enough evidence to prove that they were acting in concert. • In September 2008, TCI and Atticus acting in concert (together owning 19 per cent.) demanded urgent action by Deutsche Börse to improve shareholder value. In a joint statement, they said they would explore all options. Shortly thereafter they pushed to replace the chairman of the supervisory board and TCI requested an EGM to remove the chairman. In October 2008, the chairman announced his resignation from the supervisory board with effect from December 2008. • On 31 March 2009, TCI and Atticus announced the immediate termination of their concert party in a press release. Two weeks earlier a German newspaper had reported that both funds had used financial instruments such as cash-settled equity swaps to exit Deutsche Börse without having to meet disclosure requirements.

CeWe Color/ MarCap Investors/ K Capital Partners **(2005 to 2007)**	• In 2005, MarCap Investors and K Capital Partners, together with other hedge funds and investors (including Guy Wyser-Pratte) built a stake of approximately 39 per cent. in CeWe Color, a German photo service company. • In early 2007, the hedge funds requested an EGM to vote out the management and the supervisory board members. They also pressed for a change in the company's strategy and for the payment of a super dividend. • In a turbulent annual general meeting, the management of CeWe Color, supported by the company's largest shareholder (who held a 27 per cent. stake), needed the support of minority shareholders to achieve the 50 per cent. majority required to pass resolutions proposed by management, in particular regarding dividend and supervisory board election. The hedge funds filed actions challenging the resolutions, but these were dismissed. Shortly before the annual general meeting the hedge funds also filed a criminal complaint accusing the management of market manipulation.
Infineon/ Hermes **(2010 to 2011)**	• Hermes owns less than 3 per cent. of Infineon AG. • In January 2010, Hermes nominated an opposing candidate to run against the candidate of the company, Mr Peter Wucherer, in the election of the designated chairman of the supervisory board. Mr Wucherer eventually won the election after promising to act as an interim chairman for only one year. • After rumours that Mr Wucherer had not taken serious action to ensure that a succession occurred within the promised time period, Hermes requested, in October 2010, that he present a timeframe for his succession within two weeks. Furthermore, Hermes, together with the UK pension fund VIP, urged the company to increase the amount of compensation for the supervisory board chairman in order to attract top-class candidates to the position. Shortly thereafter, in November 2010, Mr Wucherer announced his resignation, leaving the supervisory board at the general shareholders meeting in February 2011.
Kuka/ Wyser-Pratte **(2009 to 2010)**	• Guy Wyser-Pratte has been a shareholder of the mid-cap automotive supplier Kuka AG since 2003. In August 2009, Mr Wyser-Pratte publicly demanded to be elected onto the supervisory board and supported the majority shareholder Grenzebach in his attempt to change Kuka's management. One month later, Mr Wyser-Pratte was appointed by the competent local court as the successor to a resigning Board member. • Although he had participated in an increase in capital in June 2010, Mr Wyser-Pratte decreased his interest in Kuka from 7.75 per cent. to 4.74 per cent. in late September 2010.

Conergy/York Capital, Sothic Capital, et al. **(2010 to 2011)**	• In the third quarter of 2010, several creditors of the heavily indebted solar company Conergy sold their debt positions to hedge funds (including York Capital and Sothic Capital) which eventually held about 35 per cent. of the company's debt. The company was reported to be close to insolvency. • The hedge funds pushed heavily for a debt-for-equity swap. In December 2010, management called an extraordinary shareholders meeting. Conergy agreed with its creditors on a refinancing plan. At the shareholders meeting, which took place at the end of February 2011, the shareholders approved an equity reconstruction with a debt-for-equity element: share capital was reduced from €398 million to one eighth of that amount, and then increased to €188 million by issuing new shares against cash or loan claims as a contribution in kind. With the proceeds from the capital increase, Conergy's debt burden was reduced. Under the resolution, shareholders had rights to subscribe for new shares against cash to avoid dilution. To the extent such subscription rights were not exercised by the shareholders, creditors were allowed (and also had previously committed themselves) to contribute their loan claims as contributions in kind. The loan claims were valued at 60 per cent. of the nominal value of the claims. Under the capital increase, Conergy received €13 million in cash proceeds, and loan claims to an amount of €175 million were contributed. With that contribution, the lenders waived 40 per cent. of the nominal claim and the company's debt was reduced to €135 million. The lenders now hold 61 per cent. of the share capital. York Capital, a hedge fund, is the largest shareholder with 20 per cent. • Following the debt-for-equity swap, hedge funds and Deutsche Bank placed their representatives on Conergy's supervisory board to reflect the new ownership structure.

Part 3: Key German legal issues affecting hedge fund and other shareholder activism		Source
Stakebuilding using contracts for difference (CFD) and other derivatives or stock lending	• Building a stake in a listed company to exercise influence on the management is often effected through financial instruments such as options or derivatives. Cash-settled equity total return swaps are also common – particularly in takeover scenarios – although they typically do not give the holder an entitlement to the underlying share. • Traditional stock-lending agreements or sale and repurchase agreements ('repos') are also common arrangements used to acquire a stake in a particular issuer. • Different disclosure requirements and mandatory offer rules apply to the various instruments and agreements (see Part 5 below).	§§ 21 – 28 WpHG (Securities Trading Act)
Short selling	• Naked short selling of shares issued by German companies and admitted to trading on the regulated market of a stock exchange in Germany, shares of foreign companies which are only admitted to trading on a regulated market of a stock exchange in Germany and debt securities issued by eurozone countries which are admitted to trading on a regulated market of a stock exchange in Germany is prohibited by the Act on the Prevention of Improper Securities and Derivatives Transactions (*Gesetz zur Vorbeugung gegen missbräuchliche Wertpapier- und Derivategeschäfte*) which, in this respect, entered into force on 27 July 2010. • Economic net short positions in shares of ten specified German financial sector issuers must be disclosed pursuant to a transparency regime introduced by BaFin in March 2010 based on the CESR proposals for a pan-European short selling regime. • From 26 March 2012, disclosure requirements will generally apply to net short positions in companies with shares admitted to trading on a regulated market of a stock exchange in Germany.	§§ 30 h, 30 i WpHG (Securities Trading Act), BaFin General Decree dated 4 March 2010 and extended on 31 January 2011

Insider trading rules	• Prohibition on dealings on the basis of non-public, price sensitive information relating to the company, including information obtained in private conversations with the management board. • A hedge fund's plan to build a stake in a company or to pursue a particular investment strategy does not in itself constitute inside information for the hedge fund (and such intention may in certain circumstances even be disclosed to third parties). However, where this information becomes price-sensitive, third parties to whom such information has been disclosed may not trade on the basis of such information or disclose it to other third parties. • If a hedge fund fails to comply with the disclosure requirements (see Part 5 below), any additional purchases of shares made thereafter by the hedge fund may amount to insider trading.	§§ 12-14 WpHG (Securities Trading Act)
Market manipulation rules	• Prohibition on making false or misleading statements (including concealing facts which may have an impact on the price of financial instruments, including securities). • Trades or orders for shares or financial instruments which may give a false or misleading impression to the market as to the price, demand or supply of shares or financial instruments are also prohibited. This includes wash trades, pre-arranged trades, circular trading or scalping. • The offence of market manipulation does not require proof of intention.	§ 20a WpHG (Securities Trading Act)

Disclosure requirements	• Details on disclosure requirements in connection with stakebuilding are found in Part 5 of the WpHG (Securities Trading Act). Disclosure requirements currently apply to voting shares (§ 21 WpHG) as well as to financial instruments which give the right to acquire voting shares (§ 25 WpHG), e.g. call options providing for physical delivery of the underlying shares. • Disclosure requirements were broadened in the course of 2011 under the Act on Strengthening Investor Protection and Improving the Functionality of the Capital Markets (*Anlegerschutz- und Funktionsverbesserungsgesetz – AnsFuG*), which took effect from 1 February 2012. From that date, disclosure requirements have also applied to any instrument (including instruments not qualifying as a financial instrument) that grants a right to, or factually or economically enables, the holder of such instrument or any third party to acquire shares with voting rights. Furthermore, disclosure requirements will apply to cash-settled equity total return swaps and similar instruments. • Failure to comply with disclosure requirements relating to voting rights may lead to the loss of certain shareholder rights, including (under certain provisions) the right to dividends. Furthermore, the maximum fine for failure to comply with disclosure requirements has been raised from €200,000 to €1,000,000 from 8 April 2011.	§§ 21, 22, 25, 25a WpHG (Securities Trading Act)
Acting in concert	• Acting in concert requires "coordinated behaviour" towards the target. It is defined as "joint conduct" (in the form of an agreement or by other means) by two or more shareholders (i) in respect of the exercise of their voting rights at shareholders meetings, or (ii) with the objective of permanently and substantially changing the company's business direction. Thus, coordination between two parties aimed at causing a fundamental change in a company's business model or a divestiture of a material business unit will generally qualify as "acting in concert", whereas cooperation to preserve the status quo of the company's business ("standstill") will not.	§ 30(2) WpÜG (Securities Takeover Act) § 22(2) WpHG (Securities Trading Act)

	• Coordinated behaviour in discrete areas is generally exempt: the "acting in concert" test will therefore generally not be met by coordinated action in respect of individual shareholder resolutions on various topics, or a repeated resolution on one specific topic, or with respect to the nomination of a candidate for the supervisory board. Even coordination among supervisory board members will not be regarded as "acting in concert". • Coordinated action in the form of the simultaneous purchase of a company's shares is likewise outside the scope of "acting in concert". • Where parties are acting in concert, their voting rights are aggregated. This may (i) trigger an obligation to make a mandatory bid if the 30 per cent. threshold is crossed or (ii) trigger a disclosure obligation (see Part 5 below). Non-compliance results in, *inter alia*, the loss of shareholder rights, including (under certain requirements) the right to dividends.
Shareholder rights	• See Part 4 below for a detailed description. • Although in principle the exercise of all shareholder rights is limited by shareholders fiduciary duties and the prohibition on misuse or arbitrary use of rights, these restrictions have not so far been of practical importance.
Empty voting	• Under German law, voting rights cannot be separated from the shares to which they are attached. However, "empty voting" could be achieved by (i) acquiring/borrowing the shares before the record date of a general meeting (the 21st day before the meeting), registering for the general meeting and then selling the shares (record-date-capture); (ii) obtaining a proxy from other shareholders (this may trigger a disclosure obligation – see Part 5 below); or (iii) neutralising the economic exposure from a shareholding with derivatives, short-sale instruments, etc. • German law does not prohibit empty voting in itself. However, as with any kind of voting, it may constitute breach of fiduciary duty or the misuse or abuse of shareholder rights.

Regulatory Issues	• The establishment of a hedge fund in Germany generally requires a license under the Investment Act (*InvG*). German Single-hedge funds are limited to a broad catalogue of eligible assets under the InvG (including, in particular, securities and all forms of derivatives). Their constitutional documents must provide for short sales and/ or the use of leverage but they are basically otherwise only subject to few statutory investment limitations. German Single-hedge funds are not allowed to invest in real estate and non-securitized loan receivables. Furthermore, a Single-hedge fund may invest only 30 per cent. of its capital in companies not listed on a stock exchange or a regulated market. • Only "funds of hedge funds" can be distributed to the public, but they are not entitled to use leverage or short sales. • German hedge funds have not gained significant importance since the introduction of the regulatory framework which provides for their establishment under German law in 2004. In particular, German hedge funds do not play a significant role as activist shareholders in or outside of Germany. • The future development of German hedge fund regulation will in particular be influenced by the European Directive on Alternative Investment Funds Managers (AIFM) which is expected to be implemented by the beginning of 2013.	§§ 112 et seq. InvG (Investment Act)

Part 4: Rights of minority shareholders under German corporate law		
Required shareholding	**Shareholder Right**	**Statutory Provision of the German Stock Corporation Act**
Single share	• Attend, speak and vote at general meetings.	§§ 126, 127
	• File countermotions before and at a general meeting.	§§ 246, 249
	• Commence litigation by means of a "challenge action" (*Anfechtungsklage*) or a "nullity action" (*Nichtigkeitsklagen*) against shareholder resolutions.	
	• Request information at a general meeting and, if the information is not provided, bring an action to obtain such information by means of court information proceedings.	§§ 131, 132
	• If the company is part of a *de facto* group (*faktischer Konzern*), a shareholder may bring damages claims (including on behalf of the company) against the majority shareholder or the management and supervisory boards of the majority shareholder or of the company for actions taken to the detriment of the company for which no compensation was provided to the company.	§§ 317, 318, 309
At least 1 per cent. or holding of €100,000 normal capital	• Request a special audit of the management of the company by a court appointed auditor.	§§ 142(2), 315
	• Request permission of the court to pursue liability claims on behalf of the company against the management or supervisory boards.	§ 148
At least 5 per cent. or holding of €500,000 nominal capital	• Requisition a general meeting and/or an amendment to the agenda of a general meeting (including the addition of resolutions to remove a supervisory board member, to propose a vote of no confidence in respect of a management board member, to change the articles of association, or to pursue liability claims against the management or supervisory board members).	§ 122
5 per cent. plus 1 share	• Ability to block squeeze-out of minority shareholders by the majority shareholder (even where the consideration is fair cash compensation).	§ 327a

At least 10 per cent. or holding of €1,000,000 normal capital	• Request a court-appointed representative to pursue liability claims against management or supervisory board members. • Requisition an individual vote on the dismissal of each individual management or supervisory board member.	§ 147 § 120(1)
25 per cent. plus 1 share of the shares represented in general meeting	• Ability to block certain shareholder resolutions – for example those relating to the company's capital (e.g. capital increases, the creation of authorised or contingent share capital), corporate agreements (*Unternehmensverträge*), changes to the articles of association, or the transfer of substantially all of the company's assets.	§§ 179(2), 179a(1), 182(1), 293(1)

Part 5: German stakebuilding: key thresholds and disclosure requirements (particularly CFDs). Note: these also apply to persons acting in concert	
SOURCE	**REQUIREMENT**
§§ 21, 22 WpHG (Securities Trading Act)	• A person must notify the company and the BaFin when he reaches, exceeds or falls below 3, 5, 10, 15, 20, 25, 30, 50 or 75 per cent. of the voting rights (as distinct from share capital) of a company as a result of an acquisition, disposal or any other event (including changes in the total number of voting shares). In calculating this threshold a person must include, *inter alia,* voting rights from (i) shares owned by a subsidiary, (ii) shares owned by a third party but held for his financial account, (iii) shares that he has the power to unilaterally acquire (*dingliche Option*), (iv) shares for which he has obtained proxies from other shareholders, unless he has received specific instructions how to exercise voting rights, and (v) shares held by or attributed to others with whom he is acting in concert. • Pursuant to the BaFin Issuer Guidelines (*Emittentenleitfaden*), the disclosure requirements in respect of stock lending agreements depend on the particular features of the agreement. The current owner of the shares is always subject to a disclosure requirement, provided a relevant threshold is reached. The lender remains subject to a disclosure requirement if he can influence the exercise of the voting rights by the borrower.
§ 25 WpHG (Securities Trading Act)	• A person must notify a company and the BaFin when he directly or indirectly holds financial instruments which entitle him under a binding agreement to acquire shares in a company so that he would reach, exceed or fall below 5, 10, 15, 20, 25, 30, 50 or 75 per cent. of the company's shares. "Financial instruments" include transferable securities, options, futures, swaps, forward rate agreements and other derivative contracts (e.g. CFDs), but only if the holder is entitled to acquire the underlying shares. • From 1 February 2012, these disclosure rules will also apply to so called "other instruments" which do not qualify as financial instruments, but which do give the right to acquire shares along with the attached voting rights. These include, *inter alia,* claims of the lender under a stock loan and the claims of the initial seller under a repo. • Pursuant to the prevailing opinions (which is shared by BaFin), the above disclosure rules generally do not apply to cash-settled total return swaps provided the holder of such instruments is not entitled to acquire the underlying shares. • Voting rights from shares are added to financial instruments or other instruments for the purposes of determining whether a relevant threshold under § 25 WpHG has been reached or exceeded.

§ 25a WpHG (Securities Trading Act)	• From 1 February 2012, disclosure requirements will also apply to financial instruments or other instruments which enable the holder or any third party to acquire shares. A person must notify a company and the BaFin when he directly or indirectly holds such instruments which enable him to acquire shares in the company so that he would reach, exceed or fall below 5, 10, 15, 20, 25, 30, 50 or 75 per cent. of the company's shares. It will be irrelevant whether an underlying agreement provides for cash settlement instead of share settlement. • These requirements will apply in particular to CFDs, swaps (including cash-settled return swaps) and call options with cash settlement. They will also apply to financial instruments that refer to a basket or an index as well as to irrevocable undertakings. Using a trustee or a proxy will not exempt a holder of such instruments from the disclosure requirements. • For the purpose of determining whether a relevant threshold has been reached or exceeded, shares and all other financial instruments will be aggregated.
§ 27a WpHG (Securities Trading Act)	• A person who acquires shares in a company, such that his holding reaches or exceeds 10 per cent. or more of the voting rights in that company, must inform the company of his intentions in making the acquisition (including whether he has any strategic goals or aims to realise profits from his holding) and whether he intends to (i) acquire additional voting rights within a period of 12 months, (ii) influence the composition of the management or supervisory boards of the company, or (iii) propose changes to the capital structure, including the company's dividend policy. • Regarding the origin of the funds used for such acquisition, the notifying party must specify whether such funds are from its own resources or are funds which the notifying party has borrowed in order to finance the acquisition of the voting rights. The above notification requirement does not apply if the threshold has been reached or exceeded by way of a tender or mandatory offer under the Securities Acquisition and Takeover Act.
§ 21-28 WpHG (Securities Trading Act)	• Non-compliance with disclosure requirements may result in the shareholder being prevented from exercising its rights until disclosure is made (or for a further 6 months where such non-compliance is the result of wilfully or grossly negligent conduct). Rights to dividends are only lost in the case of wilfully or grossly negligent conduct. • Furthermore, the maximum fine for non-compliance with disclosure requirements has been raised from €200,000 to €1,000,000 from 8 April 2011.

BaFin-General-Decree and § 30i WpHG (Securities Trading Act)	• With effect from 25 March 2010, the BaFin introduced a new mandatory transparency regime under which market participants must notify BaFin of net short-selling positions in shares of selected financial sector issuers when such positions reach a threshold of 0.2 per cent. of the issued share capital. Any subsequent change in the net short-selling position of 0.1 per cent. or more must also be notified. Net short-selling positions equal to or exceeding 0.5 per cent. of the issued share capital are published in anonymous form on the BaFin website. This regime corresponds with the Committee of European Securities Regulators (CESR) consultation from May 2010. The Decree was initially valid until 31 January 2011 and has now been extended until 25 March 2012. • The BaFin's transparency regime has since been adopted and expanded by the WpHG pursuant to the Act on the Prevention of Improper Securities and Derivatives Transactions (*Gesetz zur Gesetz zur Vorbeugung gegen missbräuchliche Wertpapier- und Derivategeschäfte*) to apply to shares of all companies admitted to trading in the regulated market of a German stock exchange. The expanded transparency regime will be effective from 26 March 2012 (providing for a seamless transition from the BaFin's transparency regime to statutory law). Contrary to the current BaFin system and the proposal of the EU Commission, disclosure under the new law will not be anonymous.
§ 67 AktG (Stock Corporation Act)	• Shareholders of nominal shares (*Namensaktien*) must provide the company with certain information (including the number of shares held and, if the company so requests, the identity of the person for whom the shares are held). Non-compliance with this requirement results in the loss of voting rights.
Mandatory bid obligation under takeover rules	• A mandatory bid requirement is triggered where a party holds (directly or indirectly) 30 per cent. or more of the voting rights in a listed company. This does not apply to CFDs referenced to shares. The same rules apply as for disclosure requirements of voting rights (but not of financial instruments).
§ 23 WpÜG (Securities Takeover Act)	• After announcing its intention to launch a bid, a bidder must announce on a regular basis the number of target shares and voting rights held by or attributed to him and specifically the number of shares tendered into the bid (and the corresponding voting rights). • From 1 February 2012, such announcement must include voting rights resulting from financial instruments and other instruments which are subject to disclosure requirements.

Recent Reform **(Anlegerschutz- und Funktionsverbes- serungsgesetz – AnsFuG)**	• The German legislature enacted the Act on Strengthening Investor Protection and Improving the Functionality of the Capital Markets (*Anlegerschutz- und Funktionsverbesserungsgesetz – AnsFuG*) in April 2011. The new Act extends disclosure requirements by including any instrument or arrangement that grants the holder a right to, or *de facto* or economically enables, the holder to acquire voting shares. Disclosure requirements may therefore also apply even if the underlying agreement only provides for a cash settlement. The new requirements also cover CFDs, cash-settled swaps and cash-settled options. The extension of the disclosure requirements under the new Act will become effective on 1 February 2012. • During the legislative process it was proposed that the mandatory takeover rules under the Securities Takeover Act be extended to cover the situation where additional purchases are made after a mandatory tender offer has been made but where the offeror does not hold the majority of voting rights. Such proposals were expressly rejected. • In a non-public expert hearing in November 2011 in the finance committee of the German Bundestag, experts discussed potential measures to strengthen the international competitiveness of German takeover laws and how to avoid potential disadvantages for German companies under German takeover laws.

Appendix 4 – Italy

Part 1: Themes and developments in the activity of hedge funds and shareholder activists in Italy

Business trends

Before the credit crunch, the Italian hedge fund industry had grown significantly, in terms of the number of hedge funds and hedge fund managers as well as in terms of assets under management. Nevertheless, the scale of the sector remained small when compared to other EU countries and particularly the UK. In 2008, Assogestioni – the Italian association of mutual and hedge funds – reported about 30 Italian and foreign hedge fund managers and 268 hedge funds operating in Italy. The financial and economic crisis has since had an impact on the Italian hedge fund industry: in 2009, Assogestioni reported 223 Italian and foreign hedge funds operating in Italy, and for the first time the number of liquidated funds exceeded the number of new funds. Today, the main Italian economic newspaper regularly tracks the performance of about 190 hedge funds managed by about 35 Italian or foreign fund managers.

There has also been a significant decrease in the value of assets under management: the assets under management of hedge funds operating in Italy decreased from a pre-crisis €21.3 billion to €16.1 billion at the end of 2009 and, finally, to €13.8 billion in mid-2010.

Investment and performance trends

Collected published data on hedge fund performance in Italy focuses on: single manager funds using the long/short equity strategy; funds of funds investing in both hedge and mutual funds; multi-strategy funds (characterised by low/medium volatility or high volatility); and specialised funds (for example, funds that only invest in equity). In 2008, the financial and economic crisis hit all sectors badly, with losses ranging from 15.5 per cent. to 19.95 per cent. From the beginning of 2009, hedge funds operating in Italy began to deliver positive returns again – almost in line with pre-crisis performance. Single manager funds specialising in the long/short equity strategy posted the best results. This was attributable to good stock picking and more prudent initiatives (in particular, in terms of maintaining liquidity). Hedge funds using arbitrage techniques also posted positive results[1].

Behavioural trends

From 2010 to 2011, some new hedge fund activism has been seen in Italy (see further Part 2 below). Nevertheless, hedge funds investing in Italy have mostly sought to operate other than publicly, not engaging in many board-changing proposals and generally acquiring only small holdings. Indeed, an analysis of the forms recently filed at Consob for the purposes of disclosing significant shareholdings (under Italian law, disclosure obligations are triggered whenever a person's holding exceeds or falls below the 2 per cent. threshold – see Part 5 below) shows that very few hedge funds hold material stakes in any of the 30 major Italian issuers. Moreover, even in the instances where the 2 per cent. threshold has been exceeded, the disclosed shareholdings are generally only slightly above 2 per cent.

Hedge funds that operate in Italy typically engage in a few forms of activism. An example of such activity is the submission of slates for the appointment of directors or statutory auditors – that said, hedge funds have taken such action much less frequently than other institutional investors. Indeed, the last relevant examples of such action taken by hedge funds are those relating to Parmalat (in both 2008 and 2011) and ENI (2010) – see Part 2 below. In

[1] Andreotti, *Strategie e classificazione degli hedge funds*, available at http://www.mondohedge.com/uploads/estratto_andreotti.pdf and UBS Wealth Management, UBS global outlook, December 2009, p. 22.

contrast, during the period from 2008 to 2011, other institutional investors (e.g. mutual funds) submitted minority shareholders' slates for the appointment of directors or statutory auditors in relation to many issuers of the FTSE Mib index (e.g. Enel S.p.A, Eni S.p.A., Finmeccanica S.p.A., Pirelli&C. S.p.A., Intesa Sanpaolo S.p.A.). Traditionally, mutual funds and pension funds have also submitted slates for the appointment of minority directors and statutory auditors (see Part 3 and Part 4 below) but their relations with management have not been as confrontational as those seen in hedge fund situations involving activists.

Part 2: Examples of hedge fund activity and shareholder activism in Italy	
Algebris/ Generali **(October 2007 to Summer 2008)**	• Algebris sent (and subsequently pubished) a letter to the Board of Generali strongly criticising the company's management, its chairman, its governance structure and the executives' remuneration. No response was made by Generali. • Algebris then sought to appoint the chairman of the board of statutory auditors at Generali's 2008 AGM. Algebris disputed (in the courts and with Consob) the eligibility of the candidate proposed by another shareholder (Edizione Holding), on the ground that the candidate was "linked" to Generali and Generali's principal shareholder (Mediobanca) and thus was not entitled to exercise minority rights. Consob ruled in favour of Algebris and the court case was settled following Edizione Holding's decision to withdraw its candidate. Algebris eventually failed to appoint its candidate at the AGM. • In Summer 2008, Algebris filed an application for the board of statutory auditors of Generali to investigate certain transactions carried out by the company and whether they had been fairly accounted for in the company's balance sheet.
Hermes/Ital-mobiliare **(March to May 2008)**	• Hermes exercised its right to submit a proposal at the AGM to pass a resolution to convert Italmobiliare's non-voting shares into ordinary shares. Hermes's proposal was not approved by the shareholders. • At the same AGM, Hermes sought to appoint candidates as an independent director and the chairman of the statutory auditors. Hermes mounted a challenge regarding the eligibility of the candidates submitted by the company's second largest shareholder (Serfis), on the ground that Serfis was "linked" to the company's main shareholders who appointed the majority of the board's members and was thus not entitled to exercise minority rights. The issue caused some public debate. Hermes did not ultimately succeed in appointing its own representatives to the board of directors and the board of statutory auditors, but Consob did publish a consultation paper that proposed changes to the rules governing the exercise of these minority rights.

Amber Capital/ Banca Popolare di Milano **(2008)**	• Amber raised criticism of the governance rules and the management of Banca Popolare di Milano, an Italian cooperative bank. • The board of directors initially refused to register the funds managed by Amber (at that time owner of a 2 per cent. stake in BPM) in the shareholders register of the company (which would have allowed Amber to exercise non-economic rights) on the ground that the company's rules governing admission to voting rights of new shareholders prevented registration of funds incorporated in the Cayman Islands. • Amber set up an "association" of shareholders with other institutional investors to increase pressure on the company's board and to force changes in the governance of the company. • Amber finally succeeded in its efforts to be entered on the shareholders register and the board was forced to change its rules governing admission of shareholders.
Knight Vinke/ ENI **(2009 – 2010)**	• In 2009, Knight Vinke (a New York based hedge fund which held approximately 1 per cent. of ENI's share capital) published letters in which it expressed concerns regarding the business structure of ENI, the Italian oil company. In particular, according to Knight Vinke, more value could be unlocked by separating ENI's upstream and downstream businesses. According to the hedge fund, ENI was undervalued by over €50 billion and a restructuring was needed. • ENI's management reacted by addressing a letter to the hedge fund: the management of the company avoided an open confrontation with Knight Vinke, although it did not agree to pursue its proposals. In November 2009, Knight Vinke replied to the managing director of ENI, and published a detailed letter in which it explained more thoroughly the reasons why ENI was undervalued and described the transactions that the company could carry out in order to unlock more value. • At the beginning of 2010, the managing director of ENI gave an interview in which he envisaged the possibility of a separation of the Gas & Power business and the Exploration & Production business of ENI. These statements were favourably greeted by Knight Vinke in a letter published some days after the publication of the interview. To date, no such transaction has been undertaken by ENI.

Parmalat **(2008 and 2011)**	• In 2008 some hedge funds asked for a general meeting to be convened in order to amend the company's by-laws, which set a limit on dividend distribution of 50 per cent. of profits. The hedge funds were seeking an increased limit with a view to achieving distribution of the cash built up following settlements with banks and auditors following the Parmalat financial collapse. This initiative yielded no results, since the convened general meeting was inquorate. • In 2008 a new board was appointed: the new directors were appointed from a slate submitted by hedge funds and institutional investors. • In 2011, the French company Lactalis pursued a takeover of Parmalat and, to this purpose, used derivative instruments in the manner described below: (i) first, Lactalis purchased shares representing 7.3% of Parmalat's share capital and entered into an equity swap that gave Lactalis the right to acquire further shares representing 4.1% of Parmalat's share capital; (ii) then, Lactalis submitted a slate for the appointment of new directors at the 2011 AGM; (iii) Lactalis' shareholding was further increased to 8.6% of the share capital and the equity swap was amended so as to grant Lactalis the right to acquire shares representing 5.1% of Parmalat's share capital; (iv) Lactalis then entered into an agreement with three hedge funds, which had previously submitted a slate for the appointment of new directors in Parmalat's board. In particular, under this agreement: (a) shares held by the hedge funds and representing 5.4% of Parmalat share capital were purchased by Lactalis; and (b) the remaining Parmalat shares held by the same hedge funds and representing 9.9% of the share capital were acquired by two banks with which Lactalis entered into further equity swaps; (v) Lactalis exercised the rights to acquire Parmalat shares provided by the various equity swaps, therefore purchasing further shares representing about 15% of Parmalat share capital and consequently increasing its shareholding to 28.7%; and (vi) finally, Lactalis launched a successful tender offer for the remaining shares in Parmalat.

Part 3: Key Italian legal issues affecting hedge fund and other shareholder activism		Source
Short selling	• During the credit crunch and the market turmoil in the summer of 2011, the Italian regulatory authority on capital markets put in place temporary restrictions on short selling. Most of these restrictions have now expired. The only obligations and restrictions which remain as permanent provisions are: (i) disclosure obligations with respect to relevant short positions (in particular, disclosure to Consob is required whenever a short position corresponds to 0.2 per cent. of an issuer's share capital and (subsequently) whenever there is a variation of such position equal to or exceeding 0.1 per cent. of the issuer's share capital); and (ii) a ban on naked short selling (i.e. where the underlying financial instruments are not owned at the time the order is placed).	Consob resolutions
The Alternative Investment Fund Managers Directive	• See the summary of the AIFMD's disclosure and minimum capital requirements contained in Part 3 of the UK Appendix.	AIFMD
Stakebuilding and use of CFDs and other derivatives	• Building a stake in a listed company to exercise influence on management is often done through CFDs or other derivatives.	
	• Disclosure obligations are triggered when an individual or an entity: (i) holds financial instruments or enters into a binding agreement that grants the right to acquire shares, on the holder's own initiative and by physical settlement; (ii) holds financial instruments or enters into an agreement which gives rise to an economic interest of the holder that is positively related to the trend of the underlying shares, irrespective of whether the agreement provides for cash or physical settlement (e.g. in the case of the party holding a long position in a CFD) – see also Part 5 below.	Consolidated Financial Act of 1998 ("**CFA**") Art. 120 and Consob Regulation 11971/1999 ("**CFA Rules**") Art. 116-*terdecies* CFA Rules Art. 41
	• During a tender offer, the offeror and any other "interested" party (including parties acting in concert) must disclose on a daily basis any CFDs or similar arrangements which give them a right to purchase the target's shares.	

Shareholder rights	• Minority shareholders have the right to appoint at least one member of the board of directors and the chairman of the board of statutory auditors (a position somewhat similar to the chairman of the audit committee, but with greater powers and duties) – see also Part 4 below. Such rights can allow minority shareholders (and hedge funds in particular) to exercise significant influence over the company's management (and gain insight into its affairs).	CFA Art. 147-*ter* and Art. 148
Duties of directors	• Directors must comply with the duties imposed on them by law and the company's by-laws. Directors are liable to the company for breach of their fiduciary duties and to the company's creditors for breach of their duty to preserve the company's equity. Directors may also be liable to shareholders individually in tort (e.g. prospectus liability or unfair exchange ratio on mergers). • Directors must pursue the interests of the company and thus of its shareholders as a whole – no duties are owed to holders of CFDs. Hostile takeovers in the Italian market are rare – as a result, the precise scope of the board's duties during a takeover bid has not been examined by courts. However, it is generally accepted that – in the context of a bid – the directors' general duty to pursue the company's interests means that they must maximise shareholder value.	Civil Code ("**CC**")
Litigation	• A company may file an action against a director pursuant to either (i) a shareholders' resolution or (ii) a supermajority decision of the board of statutory auditors. • Shareholders holding (individually or in aggregate) at least 2.5 per cent. of a company's share capital (or any lower percentage provided by its by-laws) may file derivative actions on behalf of the company. • Shareholders may bring a court action to challenge the fairness of a merger or of other statutory transactions to be entered into by the company (and may seek an injunction to stay execution of the transaction until the court has ruled on the merits of the claim).	CC

Market abuse	• Prohibition on dealings on the basis of non-public, price-sensitive information. For activist investors, a particular risk arises where they are engaged in private discussions with the company. • Prohibition on the dissemination of misleading information with the intention of making a profit from the expected fall in share price ("trash & cash").	CFA
Concert parties	• Persons acting in concert are those cooperating on the basis of an agreement (written or oral, valid or void), the purpose of which is to acquire, strengthen or maintain control over an issuer or to oppose a tender offer. • Shareholders' agreements (e.g. agreements concerning the exercise of voting rights at GMs) must be disclosed to the public. • The CFA Rules also list: (i) additional situations in which such "action in concert" is presumed (although rebuttal is possible), e.g. trading activity in the issuer's shares carried out by a financial adviser of the offeror; and (ii) specific cases that do not amount to "action in concert", e.g. the submission of minority shareholders' slates for the appointment of one or more (but not the majority) of directors. • The joint exercise of minority rights by two or more shareholders (e.g. two hedge funds jointly submitting and voting on a proposal for the appointment of the "minority" directors and statutory auditors) is not deemed to be a shareholders' agreement which must be disclosed, unless the joint exercise of such rights is the result of a prior commitment to do so. • Shares held by parties to a shareholders' agreement or, in any case, by persons acting in concert are aggregated for the purposes of disclosure requirements and mandatory bid rules.	CFA Artt. 101-*bis*, 109 and 122 CFA Rules Art. 44-quater

Part 4: Rights of minority shareholders under Italian law		
Required shareholding (voting shares – held individually or jointly)	**Description of Right**	**Statutory Provision**
Single share	• Attend, speak and vote at general meetings.	CC Artt. 2370, 2377, 2379, 2379-ter, 2408 and 2422
	• Claim damages suffered as a result of shareholder resolutions passed in violation of the law or of the company's by-laws (e.g. unfair exchange ratio in a merger).	CFA Artt. 148 and 157
	• Challenge a "void" shareholder resolution (e.g. in the case of approval of a transaction in breach of mandatory provisions of law) within 3 years from its registration (though note that resolutions approving a merger, capital increase or other transaction affecting the company's capital cannot be challenged after their registration).	CFA Rules Artt. 144-quinquies ff.
	• Challenge the annual accounts (to the extent that the auditors have not issued a "clean" opinion).	
	• Submit a slate for the appointment of statutory auditors (unless the by-laws set a higher qualifying shareholding threshold). As described in Part 3 above, the chairman of the board of statutory auditors shall be appointed from a slate submitted by minority shareholders, i.e. shareholders not "linked" to the principal or controlling shareholder or to those shareholders who have submitted or voted for the slate from which the majority of the board's members are taken.	
	• Report irregularities to the board of statutory auditors.	
	• Access the share register.	
	• Submit questions to the board on the matters included in the agenda for a shareholder meeting, including ahead of the meeting.	

>0.001 per cent.	• Challenge the validity and obtain cancellation by the court of shareholders' resolutions taken in violation of procedural rules or the company's by-laws (a 90-day expiry from the resolution or its registration applies).	CC Art. 2377
Between >0.5 per cent. and >2.5 per cent (depending on the company's market cap)	• Submit a slate for the appointment of directors. As described in Part 3 above, at least one member of the board of directors must be appointed from a slate submitted by minority shareholders, i.e. shareholders not "linked" to the principal or controlling shareholder or to those shareholders who submitted or voted for the slate from which the majority of the board's members are taken.	CFA Art. 147-*ter* CFA Rules Art. 144-*quarter*
>2 per cent.	• Submit a request to the board of statutory auditors to investigate without delay specific company matters and to report its findings to the AGM.	CC Art. 2408
>2.5 per cent.	• Add matters to the agenda of a shareholders meeting that has already been called by the board. • Bring a derivative action against the directors (for breach of their fiduciary duties) or against the statutory auditors.	CFA Art. 126-*bis* CC Art. 2393-*bis* and 2407
>5 per cent.	• Apply to the court to request an investigation into the company's affairs. • Challenge the annual accounts even if the auditors have issued a "clean" opinion. • Request the board or the court to call a shareholders meeting.	CC Art. 2409 CFA Art. 157 CC Art. 2367
>33.34 per cent.	• Block a resolution proposed at an extraordinary shareholders meeting (e.g. mergers or capital increases).	CC Art. 2368

Part 5: Italian stakebuilding: key thresholds and disclosure requirements (in particular for CFDs)		
SOURCE	**WHEN DOES IT APPLY?**	**REQUIREMENT** **Note: this also applies to concert parties**
CFA **CFA Rules**	Any time	• A person must notify the company and Consob whenever in aggregate his holding reaches, exceeds or falls below the following thresholds: 2, 5, 10, 15, 20, 25, 30, 35, 40, 45, 50, 66,6, 75, 90 and 95 per cent. of voting rights in the company. • A holder of financial instruments, or a party to a binding agreement which gives the right to acquire voting shares (on the holder's own initiative and through physical settlement), must disclose to the company and Consob whenever such "potential" holding reaches, exceeds or falls below the following thresholds: 5, 10, 15, 20, 25, 30, 50, 75 per cent. If the acquisition of shares is conditional upon the exercise of conversion rights or warrants, such shares are included in the "potential" holding only if the purchase could take place within 60 days. • A person or entity must disclose to the company and to Consob whenever the sum of: (i) the voting shares it holds; (ii) its "potential" holding (as described above); and (iii) the shares underlying derivative instruments (such as CFDs) in which said person or entity has a long position (see also Part 2 above) reaches, exceeds or falls below the following thresholds: 10, 20, 30 and 50 per cent. This provision was inserted to extend the scope of the disclosure provisions to cash-settled derivative instruments, which may be a vehicle for empty voting.
CFA **CFA Rules**	Any time	• Directors, senior management, controlling shareholders and all holders of more than 10 per cent. of a listed company's voting rights (together with their spouses, children and certain other relatives) must disclose transactions on their own account in shares of the company, including CFDs, derivatives or any other financial instrument relating to those shares.

CFA **CFA Rules**	During a tender offer period, until the settlement date and during the six months following the settlement date	• An "interested person" (i.e. the offeror, its group, directors or concert parties) must disclose any sale or purchase of the financial instruments for which the offer is made, as well as of any related derivative instruments (including cash-settled derivative instruments), on a daily basis until the settlement date. The same disclosure obligation applies – on a monthly basis – to the offeror and those acting in concert with him during the six-month period following the settlement date.
CFA	Anytime	• Whenever, as a consequence of one or more purchases, a person's holding reaches or exceeds the 30 per cent. threshold, a mandatory bid must be made. The same obligation arises whenever a person's holding already corresponds to 30 per cent. or more (but without having the majority of votes in the general meeting) and he increases his holding by more than 5 per cent. in a 12-month period. • For the purposes of calculating the 30 and 5 per cent. thresholds triggering mandatory bid obligations, all derivative instruments (whether cash-settled or physically-settled) giving a long position on voting shares shall be taken into consideration, although some exceptions apply (e.g. financial instruments traded on a regulated market). Such derivative instruments should also be taken into consideration when calculating the offer price.

Appendix 5 – The Netherlands

Part 1: Themes and developments in the activity of hedge funds and shareholder activists in the Netherlands

General

The Netherlands has a well-developed funds and alternative investment market, which benefits from a solid and increasingly favourable tax, legal and regulatory framework and an extensive tax treaty network. From an investor perspective, the Netherlands has a mature pension fund industry which has increasingly taken up the role of activist investors. As is the case for all the EU member states, an increasing proportion of the Dutch legal framework finds its origin in EU legislation, the latest example of which is the AIFMD. The AIFMD is expected to have a significant impact on the Dutch fund industry because currently investment funds which are only available to institutional investors or are only accessible by investors investing €100,000 or more are exempt from the supervisory regime of the Dutch Financial Markets Supervision Act (FMSA *Wet op het financieel toezicht or 'Wft'*).

The Dutch government, recognising the importance of the financial services industry, supports and promotes the Netherlands as a prime location for setting up funds. The Netherlands has great potential for accommodating hedge fund start-ups, and commentators expect the Dutch hedge fund market to grow given the quality of the investment climate, the investor-friendly tax position and the amount of capital available to Dutch pension funds. There are several initiatives being carried out by the government to support new alternative investment management activities in the Netherlands generally and specifically within the Holland Financial Centre – a public/private partnership consisting of banks, brokers, pension funds and asset managers, as well as consultants, accountancy and law firms, the Dutch central government, and the two supervisory authorities for the financial industry (*De Nederlandsche Bank* (DNB) and the Dutch Authority for the Financial Markets (*Autoriteit Financiële Markten* – AFM)). Private parties are also playing their part. For instance, IMQubator (a fund of funds established by ABP, a pension fund, and others) provides seed capital to entrepreneurial alternative investment managers on the basis that the seed funds are aligned with the long term interests of investors.

Hedge funds

Several hedge funds are based in the Netherlands. Although low in number, the assets under management of Dutch hedge funds significantly exceeded €2.5 billion at the end of 2009.[1] These hedge funds are predominantly (60 per cent.) invested in other hedge funds. Key players in the market are (amongst others) Transtrend, Pelargos Japan Fund, Saemor Europe Alpha Fund, Pelargos Asia Fund and Kempen Absolute Return Credit Fund. Few hedge funds situated in the Netherlands pursue an activist investment approach. More commonly, they make use of technically advanced methods such as automated trading strategies. That said, since 2004 hedge funds have played a visible activist role in the affairs of Dutch listed companies on several occasions. However, the number of cases in which such hedge funds played a role is too low to deduce any key trends. Where hedge funds have taken concrete action, the impact has ranged from the sale or break-up of a company (ABN AMRO, Stork) to changes to the governance structure of a company (ASMI).

[1] De Nederlandsche Bank, Statistisch Bulletin June 2010, p. 9.

The Netherlands pension fund industry

The Netherlands has one of the most mature pension industries in the European Union and ranks highly in global terms with regard to investments in absolute and relative terms, with commentators generally seeing Amsterdam as the only real eurozone fund management counterweight to London simply by virtue of the size and reach of the Dutch pension funds. A fair share of the cash put into these pension funds is in turn invested in hedge funds both within and outside the Netherlands, subject to certain restrictions set by the Dutch regulating authorities. Dutch pension funds have increasingly taken up the role of activist investors calling for more openness and more transparency about corporate behaviour, as well as positive action around human rights abuses and the environment. One of the more high profile examples of this is the strong involvement of the two biggest Dutch pension funds, PGGM and ABP, in Eumedion (a non-profit organization set up by ABP and PGGM) which has evolved into one of the main advocates and protagonists of shareholders rights and investor activism.

Part 2: Examples of hedge fund activity and shareholder activism in the Netherlands	
TCI/ABN AMRO **(February 2007 to October 2007)**	• On 20 February 2007 TCI, which held 1 per cent. of ABN AMRO, sent a public letter to ABN AMRO criticising its strategy and performance and suggesting that it should actively pursue a break up. To this end TCI sought to add certain items to the agenda of ABN AMRO's general meeting of shareholders. • ABN AMRO did not immediately respond to TCI's demands, but on 19 March 2007 it announced that it had entered into exclusive preliminary discussions with Barclays to consider a merger. In response to this announcement, on 12 April 2007, a consortium of RBS, Santander and Fortis expressed their strong interest in putting forward a joint offer for ABN AMRO. • On 23 April ABN AMRO announced its €67 billion merger agreement with Barclays and the sale of its subsidiary LaSalle Bank to Bank of America for $20 billion. The sale was seen by minority shareholders as a move to frustrate a competitive bid by the consortium. Nonetheless, shortly thereafter, the consortium made an indicative offer for ABN AMRO of approximately €72 billion. • On 26 April 2007 ABN AMRO shareholders approved a non-binding motion by TCI resolving that ABN AMRO should be split up to maximize shareholder value. On the same date, shareholder group VEB filed a suit at the Dutch Enterprise Chamber, including seeking an interim injunction to suspend the sale of LaSalle. • The minority shareholders succeeded in obtaining the interim injunction suspending the sale of LaSalle, and therewith the Barclays merger. The Dutch Supreme Court overruled the Enterprise Chamber decision on 13 July 2007 and dismissed the injunction to suspend the sale of LaSalle. • Shortly after the Supreme Court decision, the consortium confirmed its intention to proceed with the offer for ABN AMRO and ABN AMRO was eventually acquired by the consortium in October 2007.
Centaurus and Paulson/Stork **(December 2005 to January 2008)**	• In December 2005, Centaurus and Paulson informed Stork, a Dutch listed industrial conglomerate, that they believed that Stork shares were trading at a discount because of Stork's conglomerate structure and proposed certain strategic measures including a public-to-private transaction (which was rejected by the company). • Centaurus and Paulson assembled holdings of about 35 percent of Stork's shares and called a general meeting of shareholders to vote on their proposed alternative strategies (which were approved at the general meeting of shareholders on a relatively low turn-out). After a further refusal by the company, Centaurus and Paulson called a new general meeting of shareholders to dismiss the board. • Defensive measures (including the issue of special preference shares to an SPV) were taken by the company which led to litigation by Centaurus and Paulson before the Enterprise Chamber.

	• The Enterprise Chamber issued a staying order for a vote on the dismissal of the supervisory board but also appointed three temporary members of the supervisory board with decisive powers to supervise talks with the hedge funds and other interested parties. • Eventually Stork was sold to Candover and delisted. Its food division was sold to Marel, an Icelandic company.
Hermes & Fursa/ASMI **(March 2008 – July 2010)**	• From 2005 onwards Fursa and Hermes had been pressing for a change in strategy and regime of the Dutch listed company ASMI. As the discussions were fruitless, Fursa and Hermes put on the agenda of the 2008 general meeting a proposal to replace the CEO and most supervisory directors with persons supported by Fursa and Hermes. • In reaction to these proposals, ASMI's protective foundation (a body that is formally independent but related to ASMI) prevented approval of these proposals by exercising a call option for special preference shares that gave it a controlling vote prior to the general meeting. • Hermes then started proceedings at the Enterprise Chamber to seek annulment of the issue of the special preference shares and a corporate inquiry into ASMI's policy and conduct of business. The Enterprise Chamber ordered the parties to hold discussions and attempt to reach a settlement and prohibited the foundation from taking part in any decision-making. • The parties engaged in talks (which were temporarily derailed when a strategic party expressed interest in buying a major part of ASMI) and appeared to be on the verge of a settlement in early 2009, but at the latest possible moment, the talks once again broke down. • As the parties failed to reach an agreement, in August 2009, the Enterprise Chamber rendered its second decision, ordering an inquiry into the policy and affairs of ASMI. • On 9 July 2010, the Supreme Court reversed the order of the Enterprise Chamber to hold a corporate inquiry into ASMI's policy and conduct of business.
Hermes & Orbis/Canon – Océ **November 2009 – May 2010**	• Hermes and Orbis held substantial stakes (5 per cent. and 13 per cent.) in the Dutch listed printing company Océ. • Canon made a recommended offer for Océ. • Hermes and Orbis publicly opposed the offer, stating that the offer price was too low. • Hermes filed a request with the Enterprise Chamber for an investigation into the negotiations between Canon and Océ about the offer. • On 3 March 2010, the Dutch Enterprise Chamber dismissed the requests by Hermes. The following day Canon declared its offer for Océ unconditional.

- Hermes finally tendered its shares, whilst Orbis refused to sell to Canon.
- As a result of Orbis's refusal to tender its shares to Canon, it was not possible for Canon to acquire the minimum of 95 per cent. of the shares in Océ required to initiate a squeeze out to acquire 100 per cent. of Océ.

Part 3: Key Dutch legal issues affecting hedge fund and other shareholder activism		Source
Short selling	• The current provisions with respect to short selling measures in the Netherlands are set out in the Temporary Regulations Concerning Notification of Short Positions (effective as of 1 June 2009) issued by the Dutch Authority for the Financial Markets – the AFM. These provisions only relate to certain Dutch financial institutions. • The former ban on short selling has been lifted and currently only a disclosure regime is effective, which allows the AFM to supervise the relevant financial markets by possibly linking short positions to manipulative strategies. Although it was initially intended that these measures would lapse on 1 January 2010, the Temporary Regulations have been amended to prolong the measures indefinitely. • The disclosure regime requires daily disclosure to the AFM of any net short position which reaches, exceeds or falls below the thresholds of 0.25 per cent. and every subsequent 0.10 per cent. at the close of business. • The Temporary Regulations are subject to change in the future as a result of the EC's draft short selling regulation.	Temporary Regulations Concerning Notification of Short Positions of the AFM
Stakebuilding and use of CFDs and other derivatives	• Hedge funds and other activists often build a substantial stake (>1 per cent.) in a listed company to exercise influence on the management of such company or a (potential) bidder for such company (also see Part 2). • Public disclosure is required for all acquisitions of shares, depositary receipts, options or (other) transferable derivative contracts which allow the holder to acquire the underlying shares exceeding certain thresholds (see "Regulatory Reform" and Part 4 of this Appendix below). • Through the use of CFDs or other derivatives that do not give the holder a right to acquire the underlying shares, hedge funds can gain economic exposure to a listed company without a disclosure obligation arising.	Articles 5:33, 5:38 & 5:45 Dutch Supervision of Financial Markets Act ("**Wft**")

Stock lending	• Stock lending is allowed under Dutch law. However, the person borrowing the shares in principle needs to publicly disclose its holdings (and potential holdings) if certain thresholds are exceeded (see above and Part 5 below).	Articles 5:38 and 5:45 Wft
Shareholder rights	• Minority shareholders have the right to put items on the agenda of shareholders meetings and to call extraordinary meetings, as well as to request court ordered inquiries into the policy and affairs of the company (see Part 4 below).	
Duties of directors	• Members of the management board must act in the interests of the company, its business and all its stakeholders (not just the shareholders). In practice, the interests of shareholders will have a high priority particularly in (potential) takeover situations. No duties are owed to holders of CFDs. • On the basis of the standard indicated above, it is legitimate for members of the board to withstand activist pressure and (for example) to deny due diligence access or pursue other strategic opportunities. In its July 2010 ruling on the ASMI case, the Dutch Supreme Court determined that the strategy that is to be pursued by a company is to be determined by the management board and it is up to the management board, under supervision of the supervisory board, to determine whether and to what extent it is desirable to engage in dialogue with shareholders in this respect. The management board is accountable to the shareholders with respect to the strategy pursued by the management board, but, in principle, the management board is under no obligation to consult the shareholders meeting up front on issues which are within the scope of the management board's authority. • This ruling has strengthened the management board's position in discussions with hedge funds and other activists and in withstanding pressure exerted by them.	Article 2:9 and 2:140 Dutch Civil Code

Litigation / inquiries into affairs of the company	• Depending on the number of shares held (see also Part 4), activist shareholders may apply to the Enterprise Chamber of the Amsterdam Court of Appeal to request an investigation into the policy of the company and certain events within it. • Such an inquiry is generally considered a very powerful tool, as it opens the door to far-reaching temporary injunctions which may be issued by the Enterprise Chamber. This may include staying decisions of the board, suspending members of the board, appointing temporary members of the board with special executive or supervising powers and suspending the use of protective devices. • In addition, the powers of the Enterprise Chamber also extend to imposing restrictions on shareholders (including hedge funds and other shareholders), for example suspending their voting rights.	Articles 2:345 – 2:359 Dutch Civil Code
Market abuse (EU Market Abuse Directive)	• Dealings on the basis of non-public, price-sensitive information are prohibited. • "Tipping" is also prohibited but certain exceptions apply. • Disseminating misleading information or executing manipulative transactions in relation to listed companies or listed instruments is also prohibited.	Articles 5:56 and 5:53 FMSA Article 5:57 FMSA Article 5:58 FMSA
Acting in concert	• For the purposes of disclosure obligations, "acting in concert" is defined as acting jointly on the basis of an agreement (which may be informal and need not be in written form) providing for a long-term joint policy on exercising voting rights.	Articles 1:1 and 5:45 FMSA
Regulatory reform	• The Dutch government has announced the introduction of a Bill to lower the initial threshold for disclosure of (potential) holdings in a listed company from 5 to 3 per cent. • Furthermore, new rules will be introduced to enable companies to identify all their shareholders (including those with an interest below 3 per cent.).	Bill pending

Part 4: Rights of minority shareholders under Dutch law		
Required shareholding (voting shares)	**Description of Right**	**Statutory Provision(s) of the Dutch Civil Code**
Single share (EU Shareholder Rights Directive)	• Attend, speak and vote at general meetings. • Inspect the annual financial statements and report and the annual accounts of the company. • Ability to challenge shareholder and/or board resolutions if the Dutch Civil Code, the articles of association of the company, or a test of 'reasonableness and fairness' are not observed.	Articles 2:117 and 2:118 Articles 2:101 and 2:102 Articles 2:14 and 2:15
≥ 3 percent or ≥ €50,000,000 – market value	• Right to put an item on the agenda for a general meeting.	Article 2:114a
≥ 10 percent (joint) ownership	• Right to request the court to call a general meeting.	Article 2:110
≥ 10 percent ownership or ≥ €225,000 in nominal value	• Right to request an inquiry into the company's policy or affairs, or other orders (including the suspension of certain decisions, the suspension of directors and the appointment of temporary directors with special powers) at the Enterprise Chamber.	Article 2:346
Proposals for reform	• The Dutch government has announced the introduction of a Bill to increase the threshold for shareholders to place items on the agenda for the general meeting from 1 to 3 percent and to abolish the supplementary right to put items on the agenda for holders of shares representing a value of at least €50 million.	

Part 5: Dutch stakebuilding: key thresholds and disclosure requirements (in particular for CFDs)		
SOURCE	**WHEN DOES IT APPLY?**	**REQUIREMENT** **Note: this also applies to persons "acting in concert"**
Disclosure obligation and thresholds **Articles 5:33, 5:38 & 5:45 FMSA (EU Transparency Directive)**	Any time	• A person who, through the acquisition or transfer of shares, depositary receipts, options or (other) transferable derivative contracts which allow the holder to acquire the underlying shares or depositary receipts, either reaches, exceeds or falls below 5, 10, 15, 20, 25, 30, 40, 50, 60, 75 or 95 per cent. of a listed company's issued share capital or (potential) voting rights, must notify this forthwith to the AFM. • A person is deemed to control shares, depositary receipts, options, or (other) transferable derivative contracts allowing for the acquisition of the underlying shares or (potential) voting rights if such person holds them directly or indirectly through a subsidiary or a third party over which he exercises control. • A person is deemed to have effective control over voting rights or potential voting rights, if such person either directly or indirectly – through a subsidiary or a third person – holds the shares or derivatives or (i) has an agreement with another share holder which provides for a common policy in exercising the voting rights or (ii) has an agreement with another shareholder which provides for the temporary transfer of voting rights or (iii) has obtained a proxy to exercise certain voting rights at his own discretion.
Disclosure obligation for members of the boards **Article 5:48 FMSA**	Any time	• Members of a listed company's management and supervisory board must notify the AFM of all holdings of shares, certificates, options or (other) transferable derivative contracts which provide for the acquisition of the underlying shares or depositary receipts in their company, as well as any (potential) voting rights attached.

Mandatory Offer **Articles 1:1, 5:70 and 5:71 FMSA (EU Takeover Directive)**	Upon triggering the relevant shareholding threshold	• Any person who directly or indirectly has or gains effective control over 30 per cent. or more of the total voting rights in a listed company (with its corporate seat in the Netherlands) must make a public bid for all of the company's shares and depositary receipts. Certain exemptions exist to this rule. • "Acting in concert" for the purpose of the mandatory offer regime is defined as acting jointly on the basis of an agreement with the purpose of (i) gaining effective control over a listed company; or (ii) when acting in concert with the listed company, blocking a public bid for a listed company.
Article 5 Dutch Decree on Public Offers (Public Takeover Bids Decree) (EU Takeover Directive)	During a takeover "offer period"	• After a public offer has been announced and until the offer has been completed or withdrawn, the bidder and the target company, both with respect to their own transactions, as well as their directors (and certain other persons), must publicly notify any transaction in shares (or other securities) that are subject to the offer or any shares (or other securities) that are offered in exchange (except in so far as these transactions concern regular transactions on the markets for financial instruments).
Proposals for reform		• The Dutch government has announced the introduction of a Bill requiring shareholders holding at least 3 per cent. of a company to disclose their intentions regarding the company after which any change to their intentions must be reported. • Also see "Regulatory reform" in Part 3.

Appendix 6 – Portugal

Part 1: Themes and developments in the activity of hedge funds and shareholder activists in Portugal

The financial crisis affected the financial sector globally and Portugal was no exception. Therefore, it comes as no surprise that, as part of that, hedge funds have had to adjust to the new reality.

Hedge funds were the object of criticism and targeted by many politicians and commentators for a number of reasons. First, a lack of transparency in their management and the hands-off or light touch approach to their regulation were seen by the public as one of the main themes – or even causes – of the severe crisis that affected the financial sector and the economy as a whole. Furthermore, the drying up of liquidity in the markets caused strain for some hedge funds which then found it difficult to meet the terms agreed with investors. This in turn contributed to increased criticism of alternative investment schemes.

Furthermore, the activities of hedge funds also came under pressure from the public and from regulators, who took the view that hedge funds' activities had contributed significantly to asset price inflation and the growth of structured credit markets. Consequently, some of the investment strategies and financial instruments principally associated with hedge funds (such as short-selling and credit derivatives) were severely attacked and constrained and, in an effort to control risks of a systemic nature, the regulators have since intervened extensively in these areas. In 2008, at the peak of the crisis, the Portuguese Securities Commission (the "*Comissão do Mercado de Valores Mobiliários*" or "*CMVM*") responded by introducing prohibitions on the short-selling of financial institution shares as well as disclosure requirements. More recently, the CMVM further intervened by extending shareholding disclosure obligations applicable to the holding of long positions in financial derivatives, including CFDs, cash-settled swaps, futures and options. This change potentially has a significant impact on hedge fund activity.

Likewise, at the European level, increased regulation came to the fore in talks between the representatives of different EU Member States. There was, for instance, an increase in the number of voices advocating the control of the development of derivative-related positions through, *inter alia*, limitations on OTC trading and the establishment of stricter liquidity and capital requirements. This has marked a clear tendency in European circles to introduce more constraints on the activities of hedge funds. In this context, it is impossible not to mention the Alternative Investment Fund Managers Directive, which will affect managers of all funds not already harmonised under the UCITS directives.

Currently, there are no national funds established in Portugal which can really be characterised as hedge funds, nor are there any foreign hedge funds which are registered for investment by the public in Portugal. Of course, this does not mean that hedge fund activity is not seen in Portugal or does not play its part in transactions involving Portuguese companies – as the examples of hedge fund activity set out below illustrate. In addition, there is a recognised category of funds – the Special Investment Funds ("FEI" or "*Fundos Especiais de Investimento*") – which have some common characteristics with hedge funds.

That said, hedge funds do not generally play a very active role in the conduct and affairs of the companies in which they have an interest in the Portuguese market. In many cases, their exposure to companies is obtained by means of synthetic positions which do not provide them with voting rights or any other possibilities of influencing the course of their businesses. But even when they do possess these rights, their position tends to be of a strictly financial nature and they do not, as a general rule, intervene in the outcome of deals or in the definition of corporate strategy. Whether that changes as the effects of the financial crisis continue to be felt remains to be seen.

Part 2: Examples of hedge fund activity and shareholder activism in Portugal	
The arrival of hedge funds in the Portuguese market is a relatively recent phenomenon. Their activity has focused on taking positions in Portuguese listed public companies, often those subject to takeovers in the expectation that they can influence and benefit from an increased take-out price.	
Paulson & Co. stake in PT	• The U.S. hedge fund Paulson & Co. built a qualified shareholding (more than 2 per cent.) of the voting rights in Portugal Telecom, SGPS, S.A. in the context of the takeover bid launched by Sonaecom, SGPS, S.A. and Sonaecom, B.V.
Bonds exchangeable into ordinary shares of Portugal Telecom, SGPS, S.A.	• The €750,000,000 4.125 per cent. exchangeable bonds due 2014 exchangeable for new and/or existing fully paid ordinary shares of Portugal Telecom, SGPS, S.A., issued by Portugal Telecom International Finance B.V., were largely subscribed by hedge fund investors.
Bonds exchangeable into ordinary shares of EDP-Energias de Portugal, S.A.	• The €572,800,000 2.69 per cent. exchangeable bonds due 2010 exchangeable into ordinary shares of EDP-Energias de Portugal, S.A., issued by Parpública – Participações Públicas (SGPS), S.A., were largely subscribed by hedge fund investors.
TPG-Axon Capital Management, LP stake in PT	• The hedge fund sponsor TPG-Axon Capital Management, LP acquired in June 2010 a qualified shareholding of more than 5 per cent. of the voting rights of Portugal Telecom, SGPS, S.A., in the context of the sale of the 50 per cent. shareholding held by Portugal Telecom, SGPS, S.A. in Brasilcel N.V. During the following 12 months, TPG-Axon Capital Management, LP progressively sold its shareholding in Portugal Telecom.
AQR Capital Management, LLC stake in EDP Renováveis Portugal, S.A.	• The English hedge fund AQR Capital Management, LLC acquired a significant short position of 0.25 per cent. in the share capital of EDP Renováveis Portugal, S.A.
Banco Comercial Português, S.A. and Banco Espírito Santo, S.A.	• Various hedge funds have built significant short positions ranging from 0.256 per cent. to 0.633 per cent. of the share capital of Banco Comercial Português, S.A. and from 0.210 per cent. to 0.871 per cent. of the share capital of Banco Espírito Santo, S.A.

Part 3: Key Portuguese legal Issues affecting hedge fund and other shareholder activism		Source
Short selling	• Naked short selling of shares in certain financial institutions is prohibited. The members of the markets managed by Euronext Lisbon and PEX may not accept or execute orders to sell on-market the shares issued by certain specified financial institutions (or other securities that give acquisition, subscription or conversion rights into such shares) in circumstances where the person issuing the order or the market member acting on its own behalf does not respectively ensure the availability or makes available the relevant securities at the time of transmission or execution of the order.	CMVM Instruction No. 2/2008
	• Entities holding or managing, either directly or indirectly, an economic interest (arising from a future delivery obligation or an instrument with a similar financial result) which is equal to or greater than 0.20 per cent. of the share capital of a company issuing shares listed on a regulated market or multilateral trading facility located or operating in Portugal will, irrespective of the nature of the interests, be deemed to be holding or managing a "significant short interest", and therefore be subject to certain disclosure duties.	CMVM Regulation No. 4/2010
	• For the purposes of this Regulation, a "significant short interest" may *inter alia* result from the following situations: (i) disposal of shares that the seller does not hold, or where the seller's title is the result of a stock loan or similar agreement; (ii) trading of units in passively managed funds that replicate indices or baskets of shares; or (iii) derivative financial instruments traded on or off market or off-market, including swaps, options and futures, even if covering indices or baskets. The significant short interest is calculated on a net basis and long positions therefore cancel out short positions.	

	• Entities holding or managing a "significant short interest" in shares admitted to trading on a regulated market or multilateral trading system located or operating in Portugal are bound to communicate to the CMVM: (i) the creation of the significant short interest; (ii) increases and decreases of such interests by more than 0.1 per cent. of the issuer's share capital; and (iii) the termination of any "significant short interest". These reporting obligations must be fulfilled within one trading day from occurrence of the relevant event. • Once the "significant short interest" is equal to or greater than 0.5 per cent. of the share capital of an issuer which has its shares admitted to trading on a regulated market or multilateral trading system located or operating in Portugal, the entities holding or managing the "significant short interest" are bound to communicate not only to the CMVM (as in the paragraphs above) but also to the issuer: (i) the creation or termination of such a short position for subsequent disclosure to the market by the issuer; and (ii) increases and decreases of 0.1 per cent. relative to the issuer's share capital that affect the "significant short interest". The issuer is then under the duty to disclose any such fact to the market. These reporting obligations must be fulfilled within one trading day from occurrence of the relevant event.	
The Alternative Investment Fund Managers Directive	• See the summary of the AIFMD's disclosure and minimum capital requirements contained in Part 3 of the UK Appendix.	AIFMD
Stakebuilding and use of CFDs and other derivatives	• Building a stake in a listed company to exercise influence on management: often this is done through CFDs or other derivatives. • A disclosure requirement arises if the instrument: (i) transfers the economic risk of the investment in the underlying shares onto the CFD/derivative holder; or (ii) gives the CFD/derivative holder the right to acquire, dispose of, direct, influence or control the exercise of the voting rights attached to the underlying shares, in which case the relevant voting rights will be attributed to the holder under article 20 of the PSC (see Part 4 for further detail).	Art. 20 of the Portuguese Securities Code ("**PSC**")

	• There is also a duty to disclose long economic positions in shares, to the extent that CFDs or derivatives do not automatically give rise to the attribution of voting rights under article 20 of the PSC (see Part 5 for further detail).	
Stock lending	• A borrower of shares is allowed to exercise voting and shareholder rights without a long-term economic exposure to the value of the shares. • Stock loans are, in effect, an acquisition of shares and generally count toward disclosure thresholds under article 20 of PSC for both the borrower and the lender. • In respect of the companies which have shares admitted to trading on a regulated market, a right to participate, speak and vote at general meetings is attributed to shareholders on the register on the record date (corresponding to 0 hours (GMT) of the fifth trading day prior to the general meeting). A borrower under a stock loan will therefore, as a formal matter, generally hold voting rights.	Art. 20 and Art. 23-C/1/3/7 PSC
Shareholders rights	• See Part 4 below.	
Duties of directors	• Directors have to comply with (i) duties of care; and (ii) duties of loyalty, to act in the best interests of the company, serving the long term interests of shareholders and taking into account the interests of other relevant parties such as employees, clients and creditors in ensuring the sustainability of the company. • Directors are liable to (i) the company, for any damage caused by breach of their legal or contractual duties, unless they are able to prove that they have acted without fault; (ii) the company's creditors, where their wilful disregard of legal or other requirements in the articles of association has the effect of dissipating the company's assets; and (iii) shareholders and third parties for damages resulting directly from the failure to discharge their duties.	Art. 64 of the Portuguese Companies' Code ("**PCC**") Art. 72/1 Art. 78/1 Art. 79/1 all of PCC

	• No duties are owed to holders of CFDs from a corporate law point of view, although this may not make much of a difference in many situations in practice, particularly when holders of CFDs have the possibility of settling the CFDs physically or use settlement proceeds to acquire the equivalent amount of shares. • Within eight days of receipt of the draft prospectus and launch announcement of a takeover bid and five days of disclosure of any addenda to the offer documents, the board of directors of the target company shall send to the bidder and the CMVM and disclose to the public a report on the opportunity and terms of the offer. • From the moment it acknowledges a takeover bid for more than one third of the relevant securities, and until the assessment of the offer or its prior termination, the board of directors of the target company may not perform acts that materially affect the net equity of the target company and which may significantly affect the objectives announced by the bidder, apart from in the normal day-to-day management of the company.	Art. 181/1 and 182/1 PSC
Litigation against directors brought by the company	• A company may take action against the directors where the majority of its shareholders resolve that it should do so at a general meeting and such action must be brought no later than six months following said resolution. • Resolutions to take action against directors and to remove directors may be taken at annual general meetings, and may be voted on even where they are not included in the notice of meeting. The directors who are the subject of such resolutions cannot be reappointed while such action is ongoing.	Art. 75 PCC
Litigation against directors brought by shareholders	• Where the general meeting has not resolved to bring an action, shareholders holding, solely or jointly, 5 per cent. or more of a company's share capital (or 2 per cent. in the case of a listed company) may bring a claim for damages against the directors due to damage caused to the company, regardless of whether or not such a shareholder has brought a claim for damages it has individually suffered.	Art. 77/1 PCC

Litigation challenging corporate resolutions	• Shareholder resolutions may be challenged on the grounds that they are (a) null and void (for example where they were adopted at a general meeting which was not duly convened, except where all shareholders were present or represented); or (b) voidable (for example where they damage the company's or the shareholders' interests in favour of a particular shareholder or a third party). Directors' resolutions may also be challenged on the grounds that they are (a) null and void (for example where they were adopted at a general meeting which was not duly convened, except where all directors were present or represented); or (b) voidable (where they breach legal or statutory provisions). • The supervisory board of a company must announce whether a resolution is "null and void" to the shareholders in the general meeting, with a view to permitting renewed discussions (where possible) or the annulment of its effect by the courts. • Any shareholder who did not vote in favour of a resolution (or subsequently approved it) may seek its annulment on the grounds that it is voidable (within the prescribed time period). • A shareholder may also request that an invalid board resolution be challenged within one year of becoming aware of the defect in the resolution, provided that less than three years have elapsed since the resolution was approved.	Art. 56 to 59 Art. 411 and 412 all of PCC
	• If a company adopts resolutions which are deemed to be against the law, the articles of association or any agreements, any shareholder may seek provisional suspension of the resolution being challenged.	Art. 396 Civil Procedural Code
Market abuse	• Prohibition against dealings on the basis of inside information ("*informação privilegiada*") and market manipulation.	Art. 378 and 379 PSC

Concert parties		
Concert parties	• When parties act in concert, their shares are aggregated for the purposes of disclosure obligations and other requirements triggered when certain holdings are reached or crossed.	Art. 20 PSC
	• Any agreement on the transferability of shares in a public company (as defined in the PSC) is presumed to be an agreement to exercise a concerted influence over such company. However, this presumption could be rebutted before the CMVM if there is evidence that the existing relationship between the parties is independent of any potential or effective exercise of influence over the company.	Art. 19 PSC

Part 4. Rights of minority shareholders under Portuguese law		
Required shareholding (voting shares)	**Description of Right**	**Source**
Single Share	• Attend, speak and vote in general meetings (unless otherwise provided in the articles of association). Whenever the articles of association require holding of a certain number of shares to confer voting rights, shareholders not holding the minimum number of shares can pool their shares in order to achieve the required number and be represented by one of the members of the group.	Art. 379/1/5 PCC
	• Receive a pro-rata share in profits (unless otherwise provided by law or the articles of association).	Art. 21/a) and 22/1 PCC
	• Obtain information on the company, as set out by law and in the articles of association; shareholders are also awarded the corresponding right of action ("*inquérito judicial*") in case of breach.	Art. 290/1 and 292 PCC
	• Be bought-out in certain events provided by law (e.g. change of the company's registered office to a foreign country).	Art. 3/5 PCC
	• Challenge corporate resolutions and initiate liability actions.	Art. 417/1 PCC
	• Apply to court to appoint supervisory board members / sole auditor, if the general shareholders meeting has failed to do so.	
	• Right to compulsory sale of its shares, where the squeeze-out requirements under either the PCC or the PSC are fulfilled.	Art. 490/5 PCC Art. 196 PSC
≥ 0.5 per cent.	• Only applicable to public companies ("*sociedades abertas*"): seeking provisional suspension of the resolution being challenged.	Art. 24 PSC

≥ 1 per cent.	• Consult, on reasonable grounds, the following documentation at the company's registered office, provided that justified grounds are alleged: (i) the annual report and financial statements relating to the previous three financial years; (ii) the convening notices, minutes and attendance lists of general and special meetings of shareholders and meetings of bondholders for the previous three years; (iii) the total amount of remuneration paid to members of the corporate bodies in each of the three previous years; (iv) the total amount paid in each of the three previous years to the 10 or 5 employees of the company who received the highest remuneration; and (v) the share register.	Art. 288/1 PCC
	• Receive by courier, upon request, preparatory information for the general meeting.	Art. 289/3 PCC
	• Shareholders are also given the corresponding right of action ("*inquérito judicial*") in case of breach.	Art. 292 PCC
≥ 2 per cent.	• Only applicable to companies having shares admitted to trading in a regulated market: to request the calling of a general meeting, to add items to the agenda and to propose resolutions.	Art. 23-A/B PSC
≥ 5 or 2 per cent.	• Where the general meeting has not resolved to bring an action, shareholders holding, solely or jointly, 5 per cent. or more of a company's share capital (or 2 per cent. in the case of a listed company) may bring a claim for damages against the directors due to damage caused to the company, regardless of whether or not any such shareholder has brought a claim for damages individually suffered.	Art. 77/1 PCC
≥ 5 per cent.	• Request the court that a different representative for the company be appointed where the company has resolved to exercise its right to be indemnified by a director.	Art. 76/1 PCC
	• Request the calling of a general meeting and addition of items to the agenda.	Art. 375 and 378 PCC
	• Requisition of a general meeting to vote on a proposed merger within 15 days of the publication of a merger plan which has not been approved by the shareholders in a general meeting.	Art. 116/3 PCC

≥ 10 per cent. to 20 per cent.	• Draw up a list of candidates who may be appointed as directors or members of the general and supervisory councils (up to a certain limit, provided that this is authorised by the company's articles).	Art. 392/1 and 435/3 PCC
≥ 10 per cent.	• Oppose a decision by the company to settle or waive an action for indemnification.	Art. 74/2 PCC
	• Request information relating to corporate matters to be provided in writing and to sue the directors ("*inquérito judicial*") in case of breach.	Art. 291/292 PCC
	• Appoint at least one director to the board (where the articles allow this) if a majority which excludes this 10 per cent. has voted in favour of other candidates.	Art. 392/6 PCC
	• Request that the court dismiss any director for just cause ("*justa causa*") provided that a general shareholders meeting has not been called for this purpose.	Art. 403/3 PCC
	• Ability to block squeeze-out rights (including after a takeover bid).	Art. 490 PCC Art. 194 PSC
	• Within 30 days of the general meeting at which the members of the board of directors and the supervisory board are appointed, request that the court appoints one further permanent member and one further deputy member to the supervisory board, provided that the petitioning shareholders voted against the winning motions and their votes were recorded in the minutes.	Art. 418 PCC
≥ 20 per cent.	• Block a decision to dismiss a director without just cause elected under the special 392 provision of the PCC.	Art. 403/2 PCC
≥ 33.3 per cent.	• Block special resolutions in a general shareholders meeting (e.g., capital increase/reduction, transformation, merger, de-merger, amendments to the articles of association or any other issue for which the law requires a qualified majority).	Art. 383/2 and 386/3 PCC

Part 5: Portuguese stakebuilding: key thresholds and disclosure requirements (in particular for CFDs)		
SOURCE	**WHEN DOES IT APPLY?**	**REQUIREMENT**
Art. 16 and 20 PSC	Any time	• Any person whose holding in a company reaches, exceeds or falls below any of the following thresholds must notify the company and the CMVM: (a) 10, 20, 33.3, 50, 66.6, and 90 per cent. of the voting rights in a public company subject to the Portuguese personal law; (b) 5, 15 and 25 per cent. of the voting rights corresponding to the share capital of: (i) a public company which is subject to the Portuguese personal law, and is an issuer of shares or other securities giving subscription or acquisition rights (where such securities are admitted to trading on a regulated market located or operating in a EU Member State); (ii) a company which has its statutory office in a Member State other than Portugal and is an issuer of shares or other securities giving subscription or acquisition rights (where such securities are exclusively admitted to trading on a regulated market located or operating in Portugal); (iii) a company which has its statutory office outside of the European Union and is an issuer of shares or other securities giving subscription or acquisition rights (where such securities are admitted to trading on a regulated market located or operating in Portugal, in respect of which the CMVM is the competent authority); and (c) 2 per cent. of the voting rights corresponding to the share capital of a public company which is subject to the Portuguese personal law and is an issuer of shares or other securities giving subscription or acquisition rights (where such securities are admitted to trading on a regulated market located or operating in a Member State) ("**Qualified Shareholding**"). • Derivative contracts (e.g. CFDs) and financial instruments which transfer to its holder the economic risk of the investment in the underlying shares or the right to acquire, dispose of, direct, influence or control the exercise of the voting rights attached to the underlying shares: those voting rights may be attributed to the holder under article 20 of the PSC and require disclosure to be made if the relevant thresholds are crossed.

CMVM Regulation No. 5/2010	Any time	• Whenever a long economic position relative to 2, 5, 10, 15, 20, 25, 33.33, 40, 45, 50, 55, 60, 66.66, 70, 75, 80, 85 and 90 per cent. of the share capital of a company which is subject to Portuguese law and has its shares admitted to trading on a regulated market located or operating in Portugal, is achieved, or a position exceeds or falls through any of the above-mentioned thresholds, this must be communicated to the CMVM and to the relevant issuer for disclosure to the market by the latter, within four trading days from the occurrence of the relevant event. • Any of the following may constitute a long economic position: (i) shares (where voting rights are attributed to its holder under the terms of article 20 of the PSC); or (ii) agreements or financial instruments with an effect similar to holding shares which do not autonomously give rise to the attribution of voting rights, held directly or by third parties who are in one of the situations provided for in no. 1 of article 20 of the PSC, namely: CFDs, swaps with financial settlement, options with financial settlement and futures and forward contracts with financial settlement.
Art. 447/1 **PCC**	Any time	• The members of the board of directors and of the supervisory board of a limited company ("*sociedade anónima*") – together with certain "connected persons" – must inform the company of the number of company shares and bonds they hold and of any acquisition, encumbrances or transfers of ownership of shares and bonds of the company and other companies within the group.
Art. 448/1 **PCC**	Any time	• Shareholders who own non-registered bearer shares representing at least one-tenth, one-third or half of a company's share capital must disclose to the company the number of bearer shares they hold.

Art. 248-B PSC **CMVM Regulation No. 5/2008**	Any time	• Persons discharging managerial responsibilities (essentially directors, members of the supervisory board and very senior executives of the company) together with their "connected persons" must disclose to the CMVM and the company any transactions of an amount equal to or higher than €5,000 involving shares in the company, including CFDs and any other derivatives or financial instruments that have shares in the company as the underlying security.
Art. 19 PSC	Any time	• Shareholders' agreements aimed at acquiring, maintaining or increasing a Qualified Shareholding in a public company or at influencing the success of a takeover bid must be notified to the CMVM by any of the contracting parties within three days of its execution of such agreement.
Art. 180 PSC	During a takeover "offer period"	• In the context of a takeover bid, from the date of publication of the preliminary announcement until assessment of the offer results, the bidder and any related parties (as set out in article 20 of PSC): (i) may not negotiate off-market purchases of securities of the same class as those that are the subject of the bid or part of the consideration, unless previously authorised by the CMVM and the target company; and (ii) are required to inform the CMVM on a daily basis of any transactions effected in securities issued by the target company or which form part of the consideration. • Securities acquired in the manner described at (i) above after publication of the preliminary announcement are taken into account in the calculation of the minimum amount the bidder intends to acquire under the offer. Upon occurrence of any such acquisition: (i) in the context of voluntary takeover bids, the CMVM may determine the consideration to be reviewed if, as result of such acquisition(s), the consideration is not deemed equitable; or (ii) in the context of mandatory takeover bids, the bidder must increase the consideration to a price at least equal to the highest price paid for securities so acquired.

Appendix 7 – Spain

Part 1: Themes and developments in the activity of hedge funds and shareholder activists in Spain

Merger arbitrage as the principal hedge fund strategy pre-crisis

Hedge fund activity in Spain, or at least observable hedge fund activity, has traditionally been focused on classic event-driven strategies such as merger arbitrage and taking positions in companies subject to takeover proposals in the expectation that the successful takeover will be at a higher offer price.

Whilst it is safe to assume that any announcement or press speculation of public M&A in Spain would attract the attention of hedge funds, their influence on M&A transactions generally remains private.

Strategies coming into fashion with the financial crisis

The financial crisis, however, has significantly changed the scene. On the one hand, public M&A activity has dropped noticeably, providing investors with fewer transactions where price differences between targets and bidders can be exploited through arbitrage. On the other hand, the crisis has brought new opportunities for other strategies to develop.

As in most other securities markets, short selling of shares in financial companies became subject to strict disclosure rules in September 2008 amidst the agitated market movements that threatened many financial institutions. Far from proving to be temporary, short selling disclosure rules were amended in May 2010 and in Spain have since been extended to cover all listed shares. Whilst comparing pre-crisis and current short selling activity is difficult due to the lack of public disclosures before 2008, it seems safe to assume that short selling as a strategy has significantly increased in Spain. That, in turn, has brought hedge fund activity directly under the spotlight. In any event, it is clear that the short-selling trend seems to be far from over. In August 2011, widespread concerns about sovereign debt affecting financial institutions caused the CNMV (the Spanish securities regulator) to ban all short selling of financial institutions. This new ban was initially temporary but has since been extended indefinitely.

The financial crisis has also provided increased opportunities for hedge funds and other investors to deploy "distressed-for-control" strategies. There have been frequent reports of funds considering the acquisition of debt of companies believed to be in financial difficulties with a view to bringing about a restructuring and a debt-for-equity swap.

Shareholder activism

Shareholder activism continues to be the clear missing hedge fund strategy in the Spanish capital markets. Whilst it may well be the case that activist strategies are pursued privately, the fact that no significant case has become public is a good indicator that, to date, it has been a rare strategy in Spain.

Whilst the main reason for the lack of shareholder activism on the part of hedge funds is probably that no suitable "targets" for the strategy have been identified by them, the concentration of ownership in many listed companies is an important part of the story. Certainly, the fact that the management of many listed Spanish companies is supported by significant or majority shareholders who view their investment as strategic or long-term makes it more difficult for a hedge fund or other activist to seek to influence the management of the company armed only with a minority stake in the company.

As a matter of fact, the activist's toolkit, and the defences normally raised by their targets, have been most frequently seen in Spain in the context of battles for control or influence between industrial investors rather than as part of an outsider's activist strategy.

Part 2: Examples of hedge fund activity and shareholder activism in Spain	
Hedge fund activities in Spain have been focused on event-driven strategies such as merger arbitrage and, more recently, short selling. The following are some examples of merger arbitrage seen in Spain.	
Endesa takeover **(2006-2007)**	• Several hedge funds acquired stock in Endesa during the hostile tender offer by Gas Natural for Endesa and the subsequent competitive tender offers by E.On, and, thereafter, Enel and Acciona. Enel and Acciona eventually succeeded in acquiring 92.06 per cent. of the share capital of Endesa.
Telepizza takeover **(2006-2007)**	• Following the launch of a tender offer by Foodco Pastries Spain, several hedge funds acquired securities of Telepizza. Subsequently, Foodco Pastries Spain launched an exclusion tender offer, obtaining in aggregate more than 90 per cent. of Telepizza's share capital and approximately 37 per cent. of its convertible securities.
OHL exclusion takeover **(2006)**	• The hedge fund Amber Master acquired a stake in OHL, in the expectation that a mandatory exclusion tender offer by Cartera Villar Mir for OHL would succeed. The tender offer from Cartera Villar Mir was unsuccessful as the price offered was below the market price.
Colonial takeover **(2006)**	• Following CNMV authorisation in respect of the tender offer launched by Inmocaral over Colonial, Amber Master acquired a stake in Colonial which was sold (at a profit) in the tender offer.
Recoletos takeover **(2005)**	• Centaurus acquired a stake in Recoletos in expectation of a tender offer by Retos Cartera for the company. This tender offer was successfully made so that Retos Cartera acquired 98 per cent. of Recoletos' share capital. The shares of Recoletos were subsequently de-listed.

Part 3: Key Spanish legal issues affecting hedge fund and other shareholder activism		Source
Short selling	• Naked short selling is forbidden. • Any short position on any share or *cuota participativa* admitted to trading in Spanish regulated markets exceeding 0.2 per cent. of the issued shares (or *cuotas*) admitted to trading must be communicated to the CNMV. • Communication of the reduction of previously communicated positions below the 0.2 per cent. threshold. • Update of communicated short positions when there are modifications in the short position which cause the position to exceed or fall below any multiple of 0.1 per cent. of the issued capital of the relevant issuer. • All communications must be made no later than 19:00 CET on the day after the event giving rise to an obligation to communicate. • Short positions not exceeding 0.5 per cent. are disclosed in aggregate by the CNMV at least on a bi-weekly basis.	2010 CNMV Short Selling Regulation
Time limit for disclosure of short positions	• Short positions exceeding 0.5 per cent. of the issued capital are made public by the CNMV (including the identity of the holder).	
Stakebuilding and use of CFDs and other derivatives	• Building a stake in a listed company to exercise influence on management: CFDs or other derivatives often considered and used (at least for quickly establishing a toehold with limited disclosure requirements). • CFDs and other derivatives, including total return equity swaps, do not normally require disclosure unless the relevant instrument grants the holder the right to acquire the underlying shares or some influence on voting. • Disclosure requirements do apply to the acquisition of shares or voting rights (over applicable thresholds, generally 3 per cent.). • See Part 5 for further detail on disclosure requirements.	Royal Decree 1362/2007 on Transparency "**DTR**"), Arts. 23 and 28

The Alternative Investment Fund Managers Directive	• See the summary of the AIFMD's disclosure and minimum capital requirements contained in Part 3 of the UK Appendix.	AIFMD
Time limit for disclosure of significant shareholdings	• Stakebuilders normally have four trading days to disclose that they have exceeded one of the disclosure thresholds.	DTR, Art. 35
Stock lending	• Allows a borrower of shares to exercise voting and shareholder rights without long-term economic exposure to the value of the shares. • It is in effect an acquisition of shares and generally counts towards disclosure thresholds under DTR for both the borrower and the lender. • A borrower of shares on the record date (D-5) for a shareholders meeting should hold the shares on the date of the shareholders meeting to avoid any challenge to its exercise of voting rights.	DTR, Arts. 23 and 28 Companies Act 2010 ("**CA**"), Art. 179
Shareholders rights	• See Part 4 below.	
Duties of Directors	• Directors have to act in the best interests of the company, which is generally understood as the interests of the shareholders as a whole. • No duties are owed to holders of CFDs from a corporate law point of view, although this may not make much of a difference in many situations from a practical point of view – particularly when holders of CFDs have the possibility of settling the CFDs and using the proceeds to acquire the equivalent amount of shares. • Directors are liable to the company, its shareholders and its creditors for any damage caused through acts contrary to the law or the articles of association or in breach of their duties as directors. • Once a takeover offer is announced, directors have a duty to be neutral and must normally share, with good faith potential bidders, information made available to previous bidders. Before announcement of a proposal, directors have a wider discretion when a suitor approaches them, particularly in terms of denying access to information.	CA, Art. 226 CA, Art. 236.1 Royal Decree 1066/2007 on Takeovers ("**Takeovers Regulation**"), Arts. 28 and 46.

Litigation against Directors	• A company may take court action against its directors for breach of their duties if the general shareholders meeting so decides. Shareholders can pass such a resolution at any point in a shareholders meeting regardless of whether it was set out in the agenda. Passing of such resolutions automatically entails the removal from office of the directors against whom the action is approved.	CA, Art. 238.1
	• If the general meeting resolves against the initiation of such action against directors, shareholders holding 5 per cent. or more of the share capital can initiate the action against the directors for the benefit of the whole company.	CA, Art. 239
	• The company may at any time settle or waive the action unless shareholders holding 5 per cent. or more of the share capital oppose the settlement or waiver.	CA, Art. 238.2
	• Individual shareholders can bring a claim for damages resulting from directors' breaches which directly harm their interests, but have to prove the separate and individual damage they have suffered.	CA, Art. 241
Litigation challenging corporate resolutions	• Shareholders meetings or board resolutions may be challenged when they (i) are contrary to the law or the company's articles of association; or (ii) damage the company's interests in favour of specific shareholders or of third parties.	CA, Art. 204.1 CA, Arts. 205 and 206 CA, Art. 251 Civil Procedural Act, Art. 727.10
	• Shareholder resolutions can be challenged: (a) if the resolutions are contrary to the law, by shareholders and directors but also by any third party (such as a creditor) who shows a legitimate interest, in all cases within a period of one year following the date of the resolution; and (b) if the resolutions are contrary to the company's articles of association or damage the company's interest as indicated in (ii) above, by directors and by shareholders who had their opposition to the challenged resolution recorded in the minutes of the relevant shareholders meeting or were not present at such meeting, in all cases within a period of forty days from the date of the resolution.	

	• Board resolutions can be challenged by (i) directors, within forty days of the date of the resolution; and (ii) shareholders representing 5 per cent. or more of the share capital within the shorter of the following periods: (a) thirty days following the date on which they had knowledge of the resolution; and (b) one year from the date of the resolution. • If a resolution is challenged by shareholders representing 1 per cent. or more of the share capital, they may also seek provisional suspension of the resolution being challenged.	
Market abuse	• Prohibition against market manipulation and insider trading.	Securities Act, Arts. 81, 83. 83 ter and Royal Decree 1333/2005 on Market Abuse
Concert Parties	• Parties acting in concert are considered as a single person for certain purposes including disclosure of interests and takeover rules. Circumstances which constitute concerted action for purposes of disclosure of interests may not constitute concerted action for purposes of the takeover regulation. • There is a broad requirement to disclose any agreements between investors: (i) as to how they will exercise their voting rights in shareholders meetings of a listed company or shareholders meetings of an entity controlling a listed company; or (ii) limiting the transferability of their shares (or convertible bonds) in a listed company or in an entity controlling a listed company. Shareholder agreements falling under these disclosure requirements are, in certain circumstances, presumed by law to create a concert party relationship between the relevant parties.	Securities Act Takeover regulation DTR

Part 4: Rights of minority shareholders under Spanish law		
Required shareholding (voting shares)	**Description of Right**	**Statutory Provision**
Single share	• Apply to court to request the calling of an annual general shareholders meeting ("AGM") where this has not been called within the prescribed time period.	CA, Art. 169
	• Request information or question the directors on matters on the agenda of an AGM or an extraordinary general shareholders meeting ("EGM"), or on any information made public by the company through the CNMV since the last shareholders meeting. Where disclosure of such information would, in the Chairman's opinion, be contrary to the company's interests, the directors are not obliged to disclose it. However, if the information request is supported by shareholders representing 25 per cent. or more, the directors are required to deliver the information regardless of the Chairman's opinion.	CA, Art. 197 CA, Art. 527
	• Challenge AGM and EGM resolutions if they are contrary to the law, or provided that the shareholder (i) had its opposition to the challenged resolution recorded in the minutes of the relevant shareholders meeting; or (ii) was not present at such meeting, if the resolutions are contrary to the company's articles of association or damage the company's interest in favour of specific shareholders or third parties.	CA, Art. 204-206
	• Bring a claim against directors for breach of duty where the breaches have directly harmed the shareholder's interests (but the shareholder has to prove the separate and individual damage suffered).	CA, Art. 241
≥ 1 per cent.	• Seek the interim suspension of corporate resolutions being challenged.	Civil Procedural Act, Art. 727.10
	• Request the presence of a public notary at the general shareholder meeting (only if the directors have not done so on their own initiative).	CA, Art. 203

≥ 5 per cent.	• Force the directors to call an EGM and force the inclusion of new items on the agenda.	CA, Arts. 168 and 172
	• Challenge board resolutions within the shorter of the following periods: (a) thirty days following the date on which they had knowledge of the resolution; and (b) one year following the date of the resolution.	CA, Art. 251
	• Sue directors for breach of their duties for the benefit of the whole company (even if the shareholders meeting has voted against initiating such action).	CA, Art. 239
	• Oppose a decision to settle or abandon a company action against its directors.	CA, Art. 238.2
	• Seek in court the removal and replacement of auditors (where there are justified reasons for doing so).	CA, 266 CA
> 10 per cent.	• Ability to block squeeze-out following a takeover bid.	Takeover Regulation, Art. 47
≥ 25 per cent.	• Ability to override the Chairman as to the appropriateness of any information request in the context of an AGM / EGM (see rights of any shareholder above).	CA, Art. 197.4
Depending on percentage of total share capital owned	• Proportional appointment of directors. Depending on the number of directors, minority shareholders can pool their holdings in order to be able to appoint one or several members of the board. This allows for the appointment of directors by minority shareholders.	CA, Art. 243
	• This right has been overridden in some high profile cases by the right of the AGM / EGM to remove directors who have interests in conflict with those of the company due to the application of a broad construction of a rule allowing the AGM / EGM to remove any director holding office in a competitor.	CA, Art. 224.2

Part 5: Spanish stakebuilding: key thresholds and disclosure requirements (in particular for CFDs)		
SOURCE	**WHEN DOES IT APPLY?**	**REQUIREMENT** **Note: this also applies to persons "acting in concert"**
Disclosure and transparency rules ("DTR")	Any time	• A person must notify the company and the CNMV when his holding of voting rights, or his holding of financial instruments over voting rights, reaches, exceeds or falls below any of the following thresholds: 3, 5, 10, 15, 20, 25, 30, 35, 40, 45, 50, 60, 70, 75, 80 and 90 per cent. of the total voting rights in a company. If a person is resident in a tax haven or a territory which does not effectively share tax information with Spain, any holding over 1 per cent. (and each 1 per cent. thereafter) must be notified. • Financial instruments (including transferable securities, options, futures, swaps and other derivative contracts (e.g., CFDs)) generally only have to be disclosed in this context if they allow the holder to acquire the underlying shares. As a result, total return equity swaps generally fall outside the disclosure regime.
DTR	Any time	• Persons discharging managerial responsibilities (essentially directors and very senior executives of the company) together with their "connected persons" must disclose to the CNMV and the company any transaction involving shares in the company, including CFDs, and any other derivatives or financial instruments with shares in the company as the underlying security.

Securities Act CA	Any time	• The execution, amendment or extension of any agreements between investors (i) as to how they will exercise their voting rights in shareholders meetings of a listed company or shareholders meetings of an entity controlling a listed company; or (ii) limiting the transferability of their shares (or convertible bonds) in a listed company or in an entity controlling a listed company must be immediately disclosed to the issuer, the CNMV and the market and registered with the Spanish Commercial Registry. • Since October 2011 financial intermediaries appointed as proxy holders must provide a list to the company disclosing the identity of each client from which they have received a proxy, the number of shares that the intermediary is voting on the client's behalf and any instructions issued by the appointing shareholder within the seven days preceding an AGM or EGM. This obligation represents a significant departure from previous rules and its application raises a number of doubts, including the potential effect on proxies received by financial intermediaries within the seven days preceding an AGM or EGM and the interpretation of what institutions fall under the definition of "financial intermediary" in this context.
Takeover regulations	During a takeover	• A bidder (or a person acting in concert with him) must disclose to the CNMV any purchase of target shares made outside the tender offer, and may not dispose of shares in the target until the offer is settled. • Shareholders of the target company must notify the CNMV of any acquisition which results in their holding reaching or exceeding 1 per cent. of voting rights in the target, and shareholders with 3 per cent. or more of the target's voting rights must disclose any changes to their holdings.

URÍA MENÉNDEZ

BONELLI EREDE PAPPALARDO

BREDIN PRAT

DE BRAUW BLACKSTONE WESTBROEK

HENGELER MUELLER

SLAUGHTER AND MAY