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October 2014

ACTIVIST INVESTING IN EUROPE

A SPECIAL REPORT

Activist Insight

The team

Skadden is a global leader among law firms involved in mergers and acquisitions and other corporate transactions, and a top adviser for clients on corporate governance, takeover preparedness, contests for corporate control, proxy fights and other forms of shareholder activism. We provide clients with an integrated team from different areas of law, including attorneys from our M&A, corporate governance and litigation practices. Our diversity of experience helps clients address the full spectrum of issues presented by activists and is key to helping our clients prepare for and respond to activist shareholders advocating strategic, financial or structural changes.

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Activist investing in US markets has increased in importance by almost any measure over recent years, with greater assets under management, more companies targeted, and bigger, more complex demands. In recent years, as US activists explore new jurisdictions, European corporations have increasingly been targeted and shown a growing interest in the objectives, stratagems and approaches of US activists.

Converging evidence, including public statements by several prominent investors, points to a rising number of activists crossing the Atlantic. Yet talk of increasing activity in Europe ignores the long history of activism in Europe, albeit in a distinct form. Many activists specializing in European jurisdictions have been in existence since the 1990s, but are less reported-on because they are typically publicity-adverse and less well-endowed than US activists. In addition, proxy fights and special meeting requisitions, which provide US activists with a public forum to articulate their views, are considerably less common in Europe. In contrast, European activists typically meet management early on in the process of building their stakes. Often, they will seek a consensus for change through private meetings with management and later involving other shareholders, rather than setting out their ideas in white papers, for example.

Nonetheless, the role of shareholders in managing corporations has come into focus since the global financial crisis and subsequent recessions in Europe. Sluggish growth has created opportunities for activist investors to denounce hidden value in underperforming companies. According to Activist Insight's database of public campaigns, more than a hundred companies in Europe have been targeted since 2010. And with activists suggesting less than one-third of their engagements become public, the real number is undoubtedly much higher.

Several activists have earned a degree of fame across the Continent, with Cevian Capital, The Children's Investment Fund and Knight Vinke Asset Management commanding assets comparable with big-name US activists, and active in large-cap companies. However, there is also a great deal of activism in European small- and mid-cap companies. One European activist with €450 million under management provided a breakdown of the 31 stocks it had targeted since 2009; six each in Germany and the Netherlands, four each in Norway and the UK, three in Denmark, two each in Belgium, Italy, and France, and one each in Finland and Portugal.

Several European activists gave interviews for this report. They believed European executives were more aggressive in order to protect their reputations in the face of activism. While all agreed that the UK was the most activist-friendly market in Europe, legal constraints were typically the least important deterrent for activists considering launching a campaign. Unfriendly management, a single powerful shareholder and a lack of legal levers were the most significant factors dissuading activists from launching campaigns, the activists said.

As the "invasion" of US activists continues, these funds are likely to find the European landscape different and challenging. Indeed, few demands by US activists have been fully adopted. Yet so long as opportunities present themselves, activists will continue to seek governance, strategy and capital allocation reforms. To assume otherwise would expose European issuers to the risk of being caught unprepared.

United Kingdom

Interest in a potential influx of US activists has propelled activism to public prominence in the UK this year, yet a discussion at a recent Investor Relations Society conference was notable for the large proportion of the audience which had already encountered an activist in some form. Indeed, the UK is considered the most activist-friendly jurisdiction in Europe, judged on its regulatory regime and the sentiment of institutional investors. This has led to a high number of activist campaigns and managers focused exclusively on the UK, including RWC Partners, Toscafund and GO Investment Partners. Cevian Capital, Elliott Associates and Sandell Asset Management have offices in London.

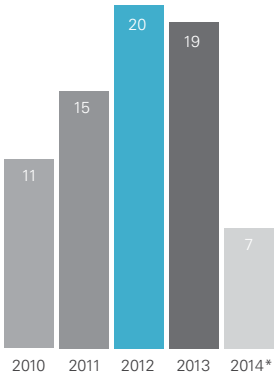
Activists with experience in the UK market say the ability to requisition a shareholder meeting with just 5% of the investor base is the most powerful of the tools at their disposal, and often encourages directors to give shareholders a private hearing first. FTSE 100 companies have not often seen activist-nominated candidates elected to their boards, although Elliott gained one board seat as part of a settlement with National Express in 2011, and SpringOwl joined the board of Bwin.party in 2014. However, the latter appointment was made through a right attached to the activist's shares, SpringOwl having dropped its alternative slate right before the meeting.

"Activism" by institutional investors, particularly in opposition to management on remuneration issues, has resurfaced in 2014 following 2012's "shareholder spring." However, while institutions are said to be supportive of activists in private, they are less likely to praise individual activists in public. Nonetheless, UK shareholders are under pressure to be more vocal, with political drives to increase shareholder engagement. Recent takeover battles have seen institutions arguing publicly over deals, a debate necessitated by changes to takeover rules, which may deny shareholders the opportunity to consider an offer if they don't force management to engage with the bidder.

Noteworthy Activist Campaigns

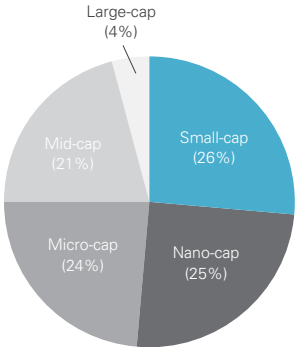
Date	Activist	Issuer
Feb 2014	SpringOwl Asset Mgmt.	Bwin.party
Dec 2013	Sandell Asset Mgmt.	FirstGroup
May 2012	Elliott Associates	National Express
April 2012	Cevian Capital	Cookson

Proxy fights are a rare occurrence in the UK, and when they have occurred the activist has tended to fall somewhat short. At National Express, Elliott Associates settled for a single seat on the board at the eleventh hour, when it had been seeking three. Similarly, SpringOwl Asset Management withdrew its nominations at Bwin.party this year, instead appointing a director using the rights obtained with its acquisition of shares in the company. Cevian Capital has been successful in this market recently, being offered a seat on the board of Cookson Group and aiding the strategic review that led to the division of the company. By contrast, Sandell Asset Management has so far seen little traction for its plans to divide FirstGroup.



Unique companies publicly targeted by activists per year

Activism in the UK increased steadily after the financial crisis, culminating in the shareholder spring of 2012. While 2013 saw slightly less activity, the most recent proxy season has seen an unusual number of high-profile companies targeted and there is an expectation that the numbers will continue to rise.



Size of companies publicly targeted by activists since 2010

Activism exists at almost all levels in the UK, with a number of funds focused on the small- and mid-cap space. As the above graph shows, activists are distributed relatively equally across market-caps, with even the large-cap sector seeing at least one activist campaign in each of the past three years.

** as of 16th September 2014*

Scott Hopkins & Lorenzo Corte

Shareholder Activism - recent developments in the UK

Within Europe, the UK has been the jurisdiction where shareholder activism has been most prevalent. As various activists and commentators have noted, although the continent may offer better pricing opportunities, the UK legal, regulatory and market structure provides a better environment for an activist campaign. In particular, the deeper and more liquid UK market allows an activist to gain meaningful economic exposure (before disclosing its position) so it can achieve upside if the campaign unlocks value. These conditions have contributed to US-based investors increasing their activities in the UK, a fact reflected in the general migration of UK share registers from domestic retail shareholders to foreign (mainly US) institutions.

> "The forecast is for levels of activism to continue to rise"

In recent years, there has been a significant upsurge in visible activist activity; and while it is a far cry from the (more US-style) landscape of agitators running public campaigns and seeking to replace entire boards, the level of public activity is expected to continue to rise. That would represent a real development, as shareholders in UK companies have typically been supportive of management and sought to engage in a private context, if at all, rather than airing grievances publicly.

From a legal and regulatory point of view, it has always been difficult for shareholders to sue directors of UK companies. As a result, activists have tended to employ less direct tools. Yet whilst the courts may not be an agent for change in this area, the current trend of increased activism coincides with a powerful political impetus in the UK to increase shareholder engagement. More generally, these concepts resonate within the UK's corporate governance system of 'enlightened shareholder value' which, whilst acknowledging that the interests of other stakeholders need to be considered, places the primary focus on running a company for the benefit of shareholders.

Calls for shareholders to be more engaged with portfolio companies, rather than simply exiting a stock if they are unhappy, originate from various quarters in the UK, including politicians, the press and regulators. Indeed, it is now the orthodox view that shareholder engagement must be improved, with a clear manifestation of this in the formation of a Collective Engagement Working Group by the main UK institutional shareholder representative bodies (the Association of British Insurers, the Investment Management Association, and the National Association of Pension Funds). The Working Group's primary aim is to identify how investors can work together in their engagement with listed companies to improve sustainable, long-term company performance and overall returns to shareholders.

To this end, the Working Group established the Investor Forum in July 2014. Participation in the Forum will be voluntary and open to all institutions seeking to engage more with UK-listed companies, including asset managers, asset owners and international investors. It remains to be seen whether activists will be able to leverage other actors - an increasingly important strategy for them - into articulating their views in a quest for improved long-term performance.

These developments have the potential to create a 'perfect storm' of shareholder activism in the UK. The forecast is for levels of activism to continue to rise; boards of UK companies should be aware and prepared to respond.

France

Although the level of activism in France is high by European standards, almost 40% of activists' demands are left unsatisfied, making it the least activist-friendly European jurisdiction covered by this report, except for Italy.

Management and employee protections, and the role of the state in a number of major companies, have not stopped the likes of Dan Loeb's Third Point Partners taking an interest in certain situations. Loeb failed to force Technicolor into a sale of its license operation, despite holding a 5% stake. Vincent Bolloré has been more successful, recently becoming Chairman of Vivendi after playing a leading role as a 4% shareholder in its reorganization. Bolloré is an example of the "homegrown activism" by individual investors that is a distinctive feature of the French market.

Of non-French activists, The Children's Investment Fund (TCI) has been particularly busy, calling for divestment of non-core businesses and reallocation of capital to investors at Safran and pushing for the sale of Airbus' stake in Dassault Aviation. Knight Vinke has also been active in the French market, including at electric goods retailer Darty and supermarket chain Carrefour.

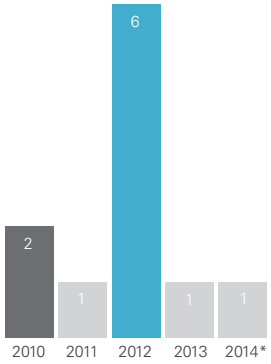
Recent legal reforms mandating the publication of institutional investors' voting records have led them to increase their attendance at shareholders' meetings and to sometimes collaborate with activists. Moreover, shareholder pressure can be as influential in executive accountability as elsewhere, with Accor CEO Denis Hennequin replaced by a transition team nominated by Colony Capital last year and Amber Capital forcing out Nexans CEO Frédéric Vincent in May 2014 with the support of three of the largest proxy advisers.

Emboldened by these successes as well as changes in the legal environment, shareholder activism is likely to become a permanent feature of the French market.

Noteworthy Activist Campaigns

Date	Activist	Issuer
Jun 2014	Vincent Bolloré	Vivendi
May 2014	Amber Capital	Nexans
Aug 2013	TCI	Airbus
Apr 2013	Colony Capital	Accor

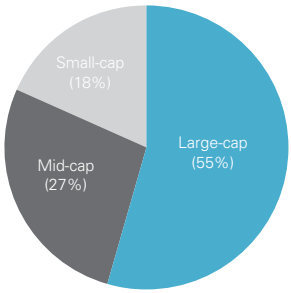
France has its very own financial magnate in Vincent Bolloré, who in 2014 became the Chairman of media conglomerate Vivendi, following heavy involvement in its strategic review and restructuring. Over the past four years, some of France's strongest brands have been the subject of activist campaigns, with former Colony Capital executive Sebastian Bazin taking over at Accor, Eric Knight overseeing a turnaround effort at Carrefour (where his fund initially recommended the supermarket chain separate its real estate assets before coming to the view that this was inadvisable) and Trian Fund Management pressing for additional savings and cash returns before acquisitions at Danone.



Unique companies publicly targeted by activists per year

2012 was a big year for activism in France, with the initiation of campaigns at Accor, Vivendi, Danone, Société Générale and Safran—all large caps—plus Technicolor. Since then, activist campaigns have been less vocal, but as the legal analysis opposite suggests, there is likely to be more to come.

** as of 16th September 2014*



Size of companies publicly targeted by activists since 2010

Perhaps because targets of activism in France tend to be well-known with plenty of international shareholders, large-caps have borne more of the brunt than other sectors since 2010, as indicated by the above chart.

Armand Grumberg & Pascal Bine

Florange Law: its potential impact on shareholder activism in France

Several provisions of the law of March 29, 2014 aimed at recapturing the real economy (known as the "Florange Law") are designed to empower French publicly traded companies with efficient tools to fend off hostile offers and creeping takeovers. In fact, they are likely to result in additional pressure from activists and further strengthen France's position as one of the most active European jurisdictions in terms of shareholder activism in recent years after the UK.

The automatic allocation of double voting rights for shares held in registered form for more than two years and the removal of the passivity rule (which required the board of a company targeted by a takeover bid to obtain prior shareholder approval before taking defensive measures other than the search for an alternative bid) are two of the key reforms introduced by the Florange Law. However, the shareholders of a French listed company remain free to reverse them by amending its articles of association. Activist investors could be tempted to pressure boards of French companies to present such amendments or even submit resolutions to this effect in advance of the 2015 annual shareholders' meeting. If they do so, it is likely that they will receive the support of proxy advisors who have long been hostile to double votes and board discretion regarding takeover defenses.

> "Double voting rights can prove a useful tool to activists"

But certain activist shareholders, in particular those already holding a stake, may have second thoughts about deactivating double voting rights, as these can actually prove a useful tool to increase their influence on the board and management without putting up additional capital. The sponsors of the Florange Law also assumed that only shareholders supportive of management were likely to be patient and overt enough to hold their shares in registered form for two years. But the reality is likely to be different, as suggested by some examples of companies who had voluntarily opted for double votes before the Florange Law (*e.g.* the Saint-Gobain/Wendel matter).

Absent a resolution to include the board passivity rule in the articles of association, its removal pursuant to the Florange Law could in particular have a crippling effect on the ability of the board of directors to receive extensive delegations to issue shares from its shareholders' meeting. Institutional investors were already reluctant to grant delegations for the issuance of shares without preferential subscription rights, and imposed strict conditions limiting the board's discretion. This trend could worsen with activist shareholders taking the lead in making sure that the board receives no delegation capable of being used as a tool to defend against a takeover bid.

Finally, the Florange Law also features measures that will render the takeover process for a French target more lengthy and uncertain. These include the obligation to consult with the works council and the introduction of an automatic lapsing threshold if the bidder fails to reach 50 percent of the target's share capital or voting rights. In practice, they will provide activist investors with greater opportunities to challenge and potentially derail friendly offers, in particular where the offer price is perceived as insufficiently attractive.

Germany

With its two-tier boards and stakeholder mentality, the German corporate landscape may demand different and possibly novel strategies from activist investors. Nonetheless, several activists interviewed for this report said they were seeking more opportunities there.

The structure of public companies, together with the relative power of German executives, suggests, however, that many engagements will remain private. An activist interviewed for this report told us that the supervisory board system meant there were "ways in," but that these differed from other markets.

Perhaps the biggest player in Germany in recent history has been Cevian Capital, which gained a seat on the supervisory board of Demag Cranes in 2010 and was instrumental in bidding up an offer from Terex Corp the following year. Audley Capital and Guy Wyser-Pratte have also joined company boards, while RWC Partners' European Focus Fund and Sterling Strategic Value co-sponsored a proposal for a special dividend at KHD Humboldt Wedag in 2013.

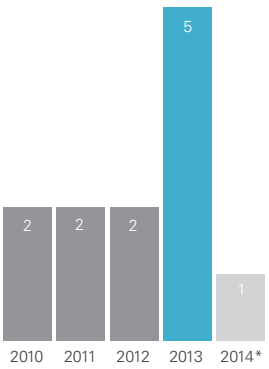
This activity is a far cry from the situation more than a decade ago, when in the words of one activist, German corporations "wouldn't want to talk to us." Since then, statutory change, a new Corporate Governance Code and more active conduct by investors has led to a material change in corporate culture.

A further feature of activism in Germany has been the emergence of arbitrage funds such as Elliott Associates, which has sought to bid up prospective bids at Celesio and Kabel Deutschland in the past twelve months. Germany's legal system allows minority shareholders to go to court arguing over the value of their shares in a takeover situation. As one activist described for this report, "In Germany, if you have good lawyers, you can get quite far [with these kinds of situations]."

Noteworthy Activist Campaigns

Date	Activist	Issuer
May 2014	Odey Asset Mgmt.	SkyDeutschland
Dec 2013	Cevian Capital	ThyssenKrupp
Sep 2013	Elliott Associates	Kabel Deutschland
Oct 2010	Cevian Capital	Demag Cranes

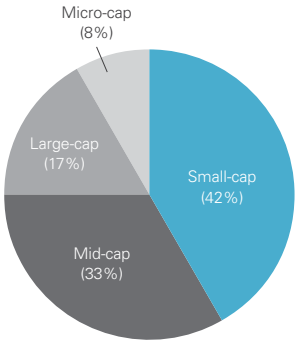
Germany is currently witnessing both the subtle and noisy variants of activism, with Cevian Capital quietly building a stake in steelmaker ThyssenKrupp and letting it be known that it wants a seat on the board, while Elliott Associates takes to the courts over its arbitrage position in Kabel Deutschland. It is worth noting that Cevian was also instrumental in wringing a sweetened offer out of Terex for Demag Cranes in 2011. The two activists are probably the most visible in Germany over the last few years, but New York-based Kerrisdale Capital has also been active in the past year.



Unique companies publicly targeted by activists per year

Last year saw a significant increase in activism in Germany, after three years of steady activity. While some of this was related to arbitrage funds such as Kerrisdale Capital and Elliott Associates, traditional players such as Cevian Capital were also active in 2013.

** as of 16th September 2014*



Size of companies publicly targeted by activists since 2010

In contrast to other European jurisdictions, large-caps have not come under the same scrutiny as other firms in Germany, perhaps due to uncertainty about how activism can best be practiced or the need to cultivate good relationships with stakeholders.

Lutz Zimmer

Recent changes in ThyssenKrupp make room for increased shareholder activism

One of the most remarkable recent examples of campaigns by shareholder activists in Germany is Cevian Capital at ThyssenKrupp, particularly given that the Alfried Krupp von Bohlen und Halbach Foundation (the "Foundation") until recently held a blocking minority in Thyssen and had had a major influence on the supervisory board.

Cevian started its campaign in September 2012. At this time, the Foundation held in excess of 25% of Thyssen´s share capital. Thus, it could, among other things, veto resolutions on amendments to the articles of association (Sec. 179 para. 2 German Stock Corporation Act ("AktG")), capital increases (Sec. 182 AktG) or mergers (Sec. 65 German Transformation Act), through a so-called blocking minority. Furthermore, it had the right to appoint up to three members of Thyssen's supervisory board (Sec. 9 para. 2 Articles), such right being envisaged by Sec. 101 Para. 2 AktG and requiring in the case of Thyssen a shareholding of no less than 25%. Thyssen regarded Cevian's investment as a sign of confidence and confirmation of Thyssen's strategy.

> "Legally, Cevian may not enforce a request for board representation"

Cevian has gradually increased its stake. In February 2014, Cevian announced that its voting rights in Thyssen exceeded 15%. This increase partly resulted from a €900m capital increase in December 2013. As a result, the Foundation's stake decreased to 23%.

In the wake of the increase, Cevian notified Thyssen that it sought representation on the supervisory board. Legally, Cevian may not enforce such representation, but only request that its candidate be voted on before other candidates, which may increase the chances of his/her election (Sec. 137 AktG).

Cevian also announced that it aims at neither material changes in Thyssen's capital structure nor at changes in the composition of its management board. As regards business strategy, Cevian supports Thyssen's focus on its technology business. It is not public to what extent Cevian influenced the decision on this strategy.

Cevian's efforts come against a backdrop of increasing investor activism in Germany over the last few years. Earlier this year, Elliott Associates decided to increase its stake in Celesio AG, a healthcare service provider, in order to oppose a contemplated $8.6 billion takeover of the company by McKesson. The activist succeeded in obtaining a higher price and eventually supported the bid. The activist fund had previously called for Celesio AG to consider a break-up, which resulted in the sales of its wholesale and pharmacy businesses.

In other noted examples, fund manager Hermes mounted a campaign to have Deutsche Bank's shareholders sanction the bank's supervisory board over executive pay and the handling of a change in leadership, and activist investor Octavian Advisors tried to replace three directors on the supervisory board of Balda AG, alleging conflicts of interests as well as the use of "deceptive tactics and inaccurate arguments in order to defend its questionable behavior and to mislead shareholders."

These and other recent examples of shareholder activism point to a probable increase of such a phenomenon in Germany in the years to come.

Italy

Italian firms are often referred to as "political" by activist investors - a feature of corporate life explained by the prevalence of controlling family shareholder blocks. At times, this has frustrated efforts by European activists to achieve their objectives, although there is a feeling that structural reforms currently being undertaken by the Renzi government may filter through to better corporate governance and shareholder-friendly managements.

Italy has also seen an upswing in public confrontations recently. Telecom Italia spent much of late 2013 and early 2014 fighting off a challenge from Marco Fossati's Findim Group, resulting in broad changes to its board membership.

The case highlighted some of the best and worst of Italian corporate governance, with the minority shareholder able to challenge management, but the controlling shareholder effectively ruling out wholesale changes. Although corporate governance questions appear to have been settled for now, several shareholders have subsequently weighed in on the future of the group's Brazilian subsidiaries.

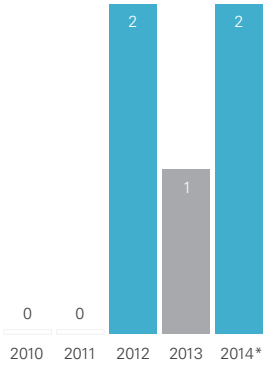
One activist reportedly involved in the Telecom Italia discussions - Amber Capital - recently used a shareholder meeting to call for white goods manufacturer Indesit to consider selling itself. The company subsequently announced that Whirlpool, a US rival, would be taking a majority stake.

However, by far the most prominent recent example of activism in an Italian corporation was Knight Vinke Asset Management's intervention in ENI. With the activist commanding a stake of less than 1%, it repeatedly called for the consolidation or divestment of several subsidiary companies and the full privatization of the oil and gas entity, but was frustrated at each turn. It sold its stake earlier in 2014, citing concern over the role of the state in the succession process for CEO Paolo Scaroni.

Noteworthy Activist Campaigns

Date	Activist	Issuer
May 2014	Amber Capital	Indesit
Apr 2014	Amber Capital	Interpump Group
Oct 2013	Findim Group	Telecom Italia
Jan 2012	Knight Vinke	ENI

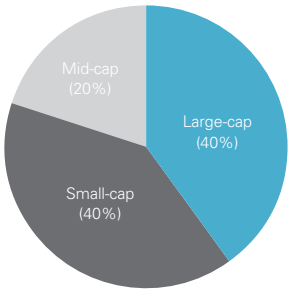
Amber Capital has recently developed a liking for activist situations in Italy, with the New York-based investment adviser launching a number of campaigns in the past year across the industrial, consumer goods and technology sectors. Knight Vinke's campaign at ENI is perhaps the best known activist campaign in Italy, with its decision to abandon its investment earlier this year an indictment of Italian corporate governance. However, it is Telecom Italia that has seen the most rancorous activism in the country, with arguments about the compositions of its board continuing into 2014, although the appointment of Giuseppe Recchi as Chairman now appears to have allayed the most immediate concerns.



Unique companies publicly targeted by activists per year

Activism in Italy was subdued as the country teetered on the brink of an economic collapse, but has since returned with a degree of regularity, as the above chart shows.

** as of 16th September 2014*



Size of companies publicly targeted by activists since 2010

Campaigns at oil company ENI and Telecom Italia in recent years account for the considerable amount of activism in large-cap Italian stocks. Amber Capital, a significant player in the space, prefers to focus on the small- and mid-cap, as evidenced by its public campaigns.

Switzerland

Activist investors typically describe Switzerland's corporate landscape as a tight-knit community, requiring local knowledge and connections. Moreover, there is general agreement that the majority of the country's larger firms are well run, limiting the number of undervalued or underperforming targets. However, this hasn't stopped activist investors from expressing an interest in the country, with several local and external investors making their presence felt in recent years.

Those that operate from offices within Switzerland itself include GoldenPeaks Capital and Worldview Capital Management, which do not typically publicize their activities. However, the country has also seen some of its global companies targeted, including by Trian Fund Management (Nestlé) and Carl Icahn (Transocean).

In the most notable recent campaign, Knight Vinke Asset Management questioned whether UBS should not separate its investment banking arm. The activist said it also considered investing in Credit Suisse but decided UBS possessed a "jewel in the crown," in its successful wealth management unit.

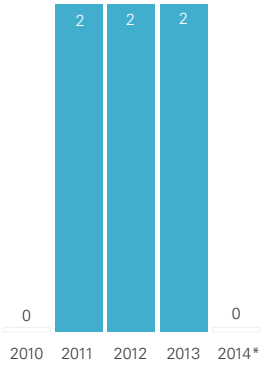
Such campaigns are beyond the capabilities of many activists, with few activists having the capital to build meaningful exposure to a company of UBS' size, or the greater resources required to explore the complexity of the banking sector. By contrast, the industrial sector has reportedly attracted interest from activist investors, although several pointed to an influx of capital from Russian investors limiting opportunities.

Additionally, according to one activist with experience of the country, boards of directors are more influential than management boards in Switzerland, emphasizing the influence of large shareholders and preventing smaller activist funds from gaining traction.

Noteworthy Activist Campaigns

Date	Activist	Issuer
Nov 2013	Carl Icahn	Transocean
May 2013	Knight Vinke	UBS
May 2012	Knight Vinke	Xstrata
Feb 2011	Elliott Associates	Actelion

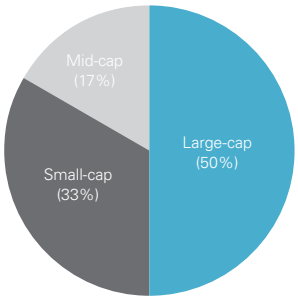
Many of Switzerland's most notable industries have been affected by shareholder activism over the last five years, ranging from banking (UBS), to mining (Xstrata), and pharmaceuticals (Actelion). Moreover, the flow of US inversion M&A deals opens the way for US-style shareholder activism in companies that have recently re-domiciled to Switzerland. In another notable case of activism, Carl Icahn gained two board seats at dual-listed Transocean in 2013. The company is based in Geneva.



Unique companies publicly targeted by activists per year

The level of activism in Switzerland has been kept relatively consistent by the success of the local economy and the presence of some home grown activists.

** as of 16th September 2014*



Size of companies publicly targeted by activists since 2010

The nature of Switzerland's industries and investing style of activists such as Knight Vinke have left large-caps more affected than any other sector, as the above chart makes clear.