

### **Under Attack**

Preparing and Communicating for a Successful Defense



### Today's presenters



**Dr Lutz Golsch**Senior Managing Director
FTI Consulting Frankfurt

- Head of the Strategic Communications Practice in Germany
- Joined FTI Consulting in 2001 and was appointed Senior Managing Director in 2013
- Has been advising corporations and institutions on strategic communications for more than 18 years
- Focus on major issues in financial and corporate communications.
   In a world of complex and dynamic stakeholder relationships, Lutz
   Golsch helps clients navigate critical communications challenges,
   protect their reputation and enhance their enterprise value
- Particularly strong track record in special situations such as M&A transactions, IPOs, crisis situations and restructurings, having advised on numerous high-profile transactions and situations in the German market and across borders
- Advised on M&A transactions with a combined value of more than €50 billion over the past decade
- Considerable expertise across several industries, e.g. in technology, media and telecoms, financial services, health care, and private equity



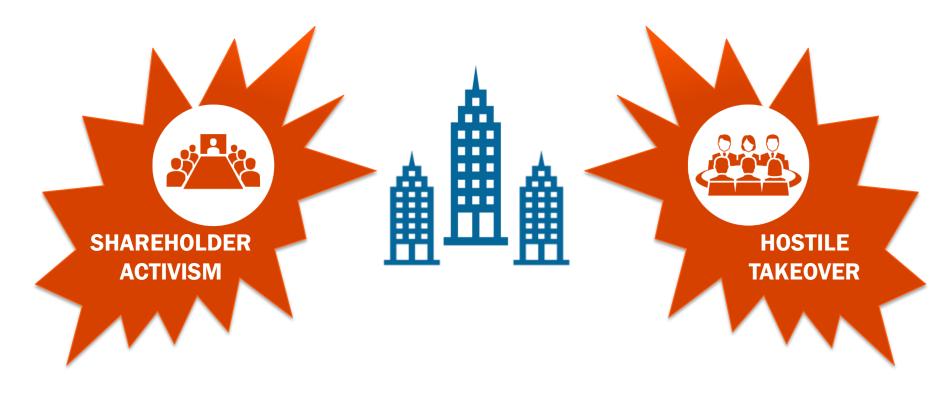
**Steven Balet** 

Managing Director FTI Consulting New York

- Head of Corporate Governance and Activist Engagement
- Part of the Financial Communications and Capital Markets practices
- Joined FTI Consulting in April 2013. Prior experience included 15 years at MacKenzie Partners, including three years as head of their London Office
- Has advised public companies and hedge funds of all sizes on mergers & acquisitions, contested proxy campaigns and corporate governance issues for the past 19 years
- Experience includes providing strategic advice in cross-border and global proxy solicitations, corporate proxy defense strategy, dissident investor campaigns, proxy fights and M&A transactions
- Extensive experience working with issuers to develop the most effective
  message for delivering the vote; routinely counsels issuers on how to engage
  third party advisory groups such as ISS as well as providing background
  information on various activist stockholders and the techniques they employ
- Has been involved in some of the largest contested situations in the past decade; most recently advised Allergan in its defense against Pershing Square Capital Management and Valeant Pharmaceuticals' unsuccessful hostile takeover attempt, as well as Perrigo Company in its landmark defense against Mylan's N.V.'s \$26 billion hostile bid



### Companies under attack by activist investors or unsolicited takeover bids











### Shareholder activism is spreading

#### **Activist investing is growing**

#### 355 campaigns announced in 2015

→ More than 62% increase from 5 years ago

#### 2015 saw 105 proxy fights, the most since 2009

Of the 105 proxy fights announced in 2015, 46 resulted in board seats for the corresponding activist

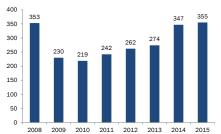
### Board representation campaigns have more than doubled since 2005

- Between 2013 and 2015, activists sought 43 board seats, up from 23 between 2010 and 2012
- At the end of 2015, 118 companies had instituted proxy access bylaws and dozens more filed bylaw updates

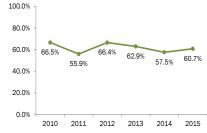
#### Activist funds with ca. \$170bn in capital in 2015

- In addition, an increasing number of funds that have not historically been activist are engaging in activist activity
- Institutional investors and the marketplace in general have increasingly sided with activists, which has provided a boost to activists' success rate

### Total Number of Activist Campaigns 2008 – 2015



### Activist Investor Success Rate 2010 – 2015





Source: FactSet

### Shareholder activism is becoming more sophisticated and more nuanced

#### Universe of potential targets is growing

- Size is no longer a deterrent activists no longer need to take large positions in order to win proxy fights and are not afraid of engaging with mega cap companies
- Activists have sought far more board seats at companies with greater than \$10 billion in market cap in the last few years than in previous years
- Institutional shareholders and pension funds are increasingly accepting of activist activities

#### Activists' approaches are becoming more business like

- Activists are more sophisticated seeking structural changes and longer-term involvement with targets
- Activists are investing in more professional campaigns, hiring banking and PR professionals, producing extensive and detailed white papers as well as engaging in social media campaigns
- The media has become increasingly sympathetic to activists often cheering the fall of iconic CEOs and covering activist campaigns as they would political elections



Source: FactSet

### Characteristics that contribute to a company being a possible target





### Increasing number of institutional investors support activists

# How institutional investors viewed the growth of shareholder activism over the last few years







Favorable 76%

Neutral 13%

Unfavorable **10**%

# The majority of institutional investors believes activism adds value to a target company







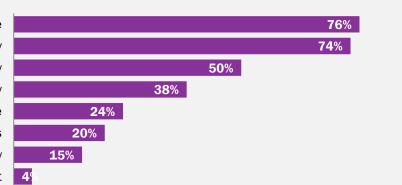
Adds Value 84%

No Impact 9%

Reduced Value 7%

#### **Factors Contributing to Shareholder Support of Activism**

Failure of management to improve financial performance
Failure of management to execute strategy
Unclear company capital allocation strategy
Unclear company growth strategy
Mismanagement by company of talent/culture
Failure of the company to effectively engage with shareholders
Unclear expectations set by company
Unwillingness of the company to negotiate a settlement with an activist





### German companies are becoming more and more attractive for activists



Stada gerät unter Druck von aktivistischen Investoren



Investoren fordern
Milliarden-Entschädigung
– Jetzt kommt's für
Volkswagen richtig dick

### Frankfurter Allgemeine

Balda Hängepartie: Aktionäre stimmen Verkauf zu

### FINANCE Das Magazin Für Franzechets

Kauf von Atmel durch Dialog Semiconductor droht zu kippen: Dialog Investoren feiern das wahrscheinliche Ende des gewagten Deals

### FINANCE

SKW: Finanzinvestor MCGM erhöht den Druck



Aktivisten treiben Vorstände vor sich her

### Handelsblatt

Italiener steigen ein: Der Bieterkampf um Balda geht weiter

#### RHEIN-NECKAR-ZEITUNG

Chaosjahre bei Bilfinger: Aktionäre üben scharfe Kritik

### manager magazin

Aktivistische Investoren: Ein Angriff auf Adidas wäre nur logisch



### Activists come in many forms and with varied interests

- High focus on "excess returns"
- Short-term investment orientation
- Trend to build groups like "wolf packs", increasingly with institutional investors

**Shareholder** Activists -**Arbitrageurs** 

Individual

- Long-term investments in companies with potential for value increases
- Deep industry expertise and company insights due to own research
- Often targeting board representation
- Multi-stakeholder approach

Activists -"Notorious Severance payments – Consent against granting financial advantages opponents"

- Creation of "nuisance value" for critical decisions/claims
- Rare: Strategic agenda linked with the build-up of bigger long-term positions

**Shareholder** 

Activists -**Change Agents** 

- Typical long-only investors
- Increasingly building alliances with activist investors
- Corporate Governance & remuneration as typical points of action - own Corporate Governance teams



### Thresholds of escalation and communications options

	Scenario A: Dialogue with options of escalation			Scenario B: Attack
Preparation	Dialogue	Media pressure build-up	Campaigning	Attack upfront
<ul> <li>4-6 months preparation time</li> <li>Research, interviews &amp; hires, exploration</li> <li>Building up equity positions</li> <li>Avoidance of crossing regulatory thresholds</li> </ul>	<ul> <li>Establish an informal contact / letter</li> <li>Contact with other investors</li> <li>Constructive or controversial dialogue</li> </ul>	<ul> <li>Crossing reporting threshold / communication</li> <li>First official comments, attacks</li> <li>Leak "White Paper"</li> <li>Dialogue still partly possible</li> </ul>	<ul> <li>Public "Full Blow"</li> <li>Exercising shareholder rights – AGM intervention – targeting Board representation</li> <li>Questioning the strategy</li> <li>Proxy fight</li> <li>Almost no opportunity for constructive dialogue</li> </ul>	<ul> <li>Often in M&amp;A situations: Attack from individual activists without a previous dialogue</li> <li>Activist often acts as "leader of the pack", backed up by following or simultaneous attacks of individual shareholders</li> <li>Constructive dialogue impossible</li> </ul>
	cenes approach" f top management		" – Tweets, website, public lett on stage at AGM/-request, ac	



### The use of media by activists in an attack scenario – example Carl Icahn





### Preparation: "self-assess, prepare, engage"

#### **Situation Analysis**

#### Internal vulnerability analysis from the activist's perspective

- Benchmarking of strategy and company figures, competitor evaluations
- Monitoring of the activist's world, media, analyst's reports and proxy advisors (directives and voting behaviour)
- Shareholder structure and perception → "listen & understand"
- Identification of allies among investors and other stakeholders
- Activist-Response-Team (company, IR, Comms, Legal, Finance)

#### **Planning**

- Corporate Narrative and Capital Markets Story with a long-term focus
- Development of a defense & communication strategy, specifically for major investors
- Implementation planning
- Ongoing monitoring of event triggers
- Extend the dialogue with proxy advisers (ISS, GlassLewis...)
- Logistics (War Room, manual, check lists ...), dry runs
- Create an internal and external team of "A" players
- Track the stock performance of companies where the activist has been involved

#### **Program**

- Ongoing intensive dialogue in the regular communication as well as in special cases
- Regular management based contacts with institutional investors, Proxy Advisors, analysts etc.
- Inclusion of stakeholders beyond the investors and analysts - media, social media, politicians, employees
- Active media strategy ("limit the gap for an activist")
- Regular monitoring and if necessary readjusting of the defense strategy
- Analyze shareholder voting trends, relationships with proxy advisory firms, and proxy decision making process

Team has been built Situation has been understood

Strategy has been fixed, sensors have been activated, ready to go Program ready to go, constant optimization



### Activist mapping: "reading the adversary"

#### What does the activist intend?

- Motivation (financial and /or strategic)
- Time of entry
- Investment strategy

#### Which criticism does he usually express?

- Bad Performance
- Conglomerate discount
- Corporate Governance

#### How does he act normally?

- "Behind the scenes" approach ...
- ... and / or official attack / Media campaign
- In-depth analysis of former targets

#### What is his track record?

- Number of successful interventions
- Track record of his investments / returns
- Bad actions by portfolio companies
- Public perception and reputation

#### When does he have a problem?

- When the company does not act
- High participation interests with high entry prices
- Danger of failing M&A offers

#### Who are his allies?

- "Friend" Investors
- Every one, who wins
- Contacts to politics, media ...



#### Defense: "maintain control under attack"

#### **Maintain control**

#### Activist- Response-Team (Corporate, Legal, Financial, Comms) ad hoc available

- Analysis of the activist, the perception of shareholders, shareholder ID, followers and opponents
- Analysis of attack points in the perspective of the activist
- Define own positioning > long-term definition!
- Response strategy and tactic > Consistence for all stakeholders
- Identify allies
- Prevent leaks

#### **Rapid Response**

- Start dialogue with activist, if possible "behind the scenes" – gain time
- Powerful response, especially for the capital market – intensive dialogue
- If necessary, tactical media work, ensure the leadership of opinion, incl. social media
- Mobilize followers, isolate opponents
- Adopt a clear position against "destructive activism"
- Insist on having all the data you need at hand to execute your responses
- Focus on proper messaging
- Create strong shareholder engagement

#### **Campaigning**

- Ensuring confidence, continuing the dialogue with the activists, investors and analysts as well as with other large stakeholders
- Strengthening followers, isolating opponents
- Strengthening attractive long-term prospects
- Quick responsiveness
- Leverage the traditional media and use digital assets
- Create digital content and website to facilitate various stakeholder communications
- Intensive monitoring and updating, acting not reacting

Attack has been understood Preparation of strong responses

Give powerful and convincing response, lead the dialogue and mobilize followers

Ensure the opinion leadership, achieve majority







### Case study: activism defense / Allergan

#### Our research and background investigations



Identified that Valeant's "double-digit" sales growth came from excluding discontinued products and those with declining sales from its calculation





Found Valeant likely reorganized its reporting segments for three consecutive years to conceal that key products had declining sales volumes and that its 1,400+ development products did not produce meaningful revenue



Found that Valeant used **inflated metrics** to support claims of
successful acquisition history,
when facts indicated otherwise



Found that Valeant's unsustainable price increases – not growing unit sales volume – were the revenue driver of key products



Identified that Valeant senior management contradicted itself in public disclosures on the profitability calculation associated with one of its top-selling products



#### Nine critical success factors for activism defense

1

Understand why you are a target and what this means for your defense, especially leading up to any proxy contest. Use messaging that directly addresses the activists' assertions – avoiding them gives investors the impression that they are correct.

**Engagement with shareholders** needs to include the proxy-voting decision makers, which may not be the portfolio manager or analyst.

4

**Shareholder research** – understand voting guidelines, preferred engagement processes and identify voting decision makers.

5

Drive messaging that resonates with investors first and the media second.

Know your opponent and their slate including: history of success, history of companies where their nominees serve and background of nominees, institutions they have engaged with and which have supported them in the past.

Leverage the traditional media and use digital assets (website and social media) to get the message out quickly – use social media to reinvigorate the messaging as traditional media may tire of a story.

8

Monitor and keep track of all key influencers, e.g. within your shareholder base, sell-side analysts and bloggers.

Have a plan for Proxy Advisory Firms.
The ISS/Glass Lewis strategy should not be the sole strategy for institutional support.
Some arguments will not influence ISS/Glass Lewis, but may influence other institutions.





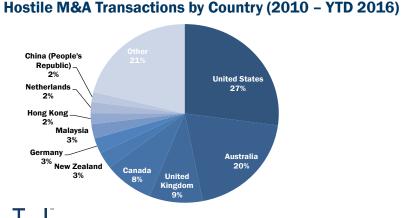




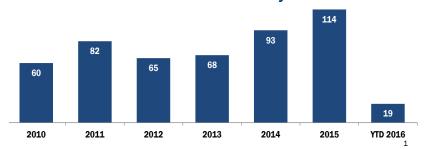
### Hostile M&A is increasingly common across the globe

Between 2010 and May 20, 2016, there have been **501 hostile M&A situations globally** including both private equity and strategic buyers.

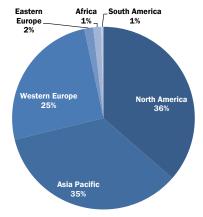
Of these transactions, about 50% were cancelled before close, however, about **30% were completed**.



#### **Number of Hostile M&A Transactions by Year**



#### **Hostile M&A Transactions by Region (2010 - YTD 2016)**



Source: FactSet; Data as of May 20, 2016

### Growing number of hostile takeovers in Germany

### Handelsblatt

K+S-Übernahme- 'Es gibt keine Killerverteidigung'

### Franffurter Allgemeine zeitung für deutschland

Fosuns feindlicher Angriff

### Wirtschafts Woche

Potash bereitet offenbar feindliche Übernahme vor

#### Börsen-Zeitung

Fosun legt feindliche Offerte für die BHF-Bank vor

#### DIE WELT

Deutsche Wohnen wehrt sich verzweifelt gegen Vonovia

### Börsen-Zeitung

Chinesen greifen nach BHF Kleinwort Benson und fordern Lenny Fischer heraus

### Saarbrücker Zeitung

Bericht über feindliches Übernahmeangebot beflügelt K+S-Aktie

### Handelsblatt

Feindliche Übernahme von R. Stahl geplatzt

#### Aachener Nachrichten

Pleite für Vonovia: Feindliche Übernahme ist abgeblasen



### Unequal conditions, unequal chances

#### THE (HOSTILE) BIDDER

**150**Days

**1** Day

#### THE TARGET

A bidder prepares it takeover approach on average for **4-6 months** before approaching a target or making an offer.

- Selection of target
- Analysis of valuation figures and outline of bid
- Limitation of potential issues
- Initial consideration of antitrust situation and potential undertakings
- Strategy to convince own and target investors
- Preparation of multi-stakeholder communications strategy
- Scenario plans (white knights etc.)

The target company often only has **24 to 48 hours** to prepare before an unsolicited offer approach becomes public.

- Activation of defense team
- Evaluation of offer and its chances
- Limitation of potential issues
- Assessment of likely investor reactions
- Development of an ad hoc response, short-term defense strategy and messages
- Activation of investor support
- Organization of logistics

Proper corporate governance requires a thorough and timely preparation process



### Effective preparation for defense situations

#### **Analysis**

#### Review existing shareholdervalue approach

- Identify potential bidders and their likely approaches
- Status quo & vulnerability assessment
- Stakeholder analysis
   (employees, shareholders,
   supervisory board, media,
   political environment,
   analysts, potential bidders /
   investors)
- Scenario analysis

Company and initial situation understood. Possible scenarios evaluated

#### **Planning**

- Team setup (legal, banking, communications)
- Develop defense strategy (stand-alone vs. price maximization)
- Define roles and relations of key players in defense team
- Positioning of top management
- Scenario planning
- Logistics (war room, hand book, checklists ...)

#### **Defense Program**

- Develop and continually update defense guidelines
- Monitor potential bidders
- Shareholder intelligence
- Preventive communication
- Dry runs

# Immediate Defense Case

- Joint team consists of Company, financial advisor, legal advisor and FTI Consulting
- Adapt defense program to fit defense strategy
- Tactical media relation outreach, maintain and widen opinion leadership
- Ensure consistent communications with all stakeholders
- Monitoring

Team in place.

Approach coordinated.

Strategy defined

Program developed.

Management & team prepared.

Program all set

Defense program goes "live"



### Core arguments of bidders are predictable

Premium	"Attractive premium – reflects u	um – reflects upside valuation potential"	
Strategy	"Excellent strategic fit"  "Matching business philosophy"  "Creating a market leader of a new dimension"		
Portfolio	Complementary: "Acquiring additional performance potential"	(Partial) Overlap: "Creating size and additional efficiencies"	
Synergies	"Realizing significant synergies" "Improving key figures"		
Investors	"Improving stock liquidity"  "Acceptance into share index membership and increased international recognition"  "Moving ahead of immediate peer group"		
Financing	"Significantly improved capital markets access – both for debt and equity"		



### "Valuation plus x": Typical areas of hostile takeover defense

Valuation	<ul> <li>Attack the underlying valuation of the bid</li> <li>Depending on cash vs. share, attack the currency of the price paid</li> </ul>	
Strategy	<ul> <li>Contest the strategic fit of the companies</li> <li>Highlight dilution of successful strategy, mobilize customers</li> </ul>	
Synergies	<ul> <li>Highlight problems in realizing synergies and related issues for stakeholders</li> <li>Point-out dissynergies (e.g. customer conflicts or overlaps)</li> </ul>	
Antitrust & Politics	<ul> <li>Emphasize regulatory issues and damages from likely undertakings</li> <li>Mobilize political concerns and resistance, in connection with jobs / sites</li> </ul>	
Employees & jobs	<ul> <li>Raise concerns about job cuts and site closures</li> <li>Create strong coalition with workforce and workers councils to protect jobs</li> </ul>	



### 360° approach of stakeholders in defense situations

#### **Defense Strategy**

#### **Defense Program** Adapt defense program according to defense strategy Tactical analysis and implementation of response scenarios Tactical update of core messages. O&As etc. Analysts / **Customers** / Political decision-Media **Private investors Employees** Institutionals **Business partners** makers Management Roadshow support Online newsletter Sales briefing plus Initiating contacts Active media contact Active contact and Call center hotline Individual talks/ information speaker notes and Q&As management Guidelines for personal briefings Intranet Press conferences. feedback management Letters to shareholders Speaker notes and Newsletters interviews. for investors and appeals Events Backgrounders analysts Speaker notes and Q&As for regional Internal hotline Press releases and Guidelines for bank O&As for regional and local management follow-up and local management Draft letters/ emails communication Ongoing media Draft letters/emails Intense contact with monitoring advocates Communication with hedge funds. arbitrageurs Active agenda setting and Defense website Online / Social Media facebook You Tube twitter **StockTwits** Online newsletter dialogue

Real-time social media monitoring



#### Success factors of defense communications

- 1 Make sure the market recognizes and rewards the potential value of the company.
- Identify potential bidder, monitor them diligently and know their (communication) strengths and weaknesses.
- Define your goal: Stand-alone vs. best-possible buyer and price maximization. A "just say no" strategy is rarely successful.
- Define roles and relations of key players: Who is the face of defense? Who coordinates the process? Where are key supporters for endorsements?
- Create unity among management, board and works council and include all employees, business partners, customers as well as local, regional and national politicians.
- Ensure quick response times, protect company as well as management reputation and shape media coverage by means of agenda setting.
- Always attack bidder on price, valuation and currency (cash vs. share). But keep in mind that other factors may well win the defense in the end.



### Thank you for your attention!







### Critical Thinking at the Critical Time ™

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