



# Shareholder Activism in Germany

## Recent trends and cases in Germany

February 2020

## Recent cases and trends in German Shareholder Activism - Overview

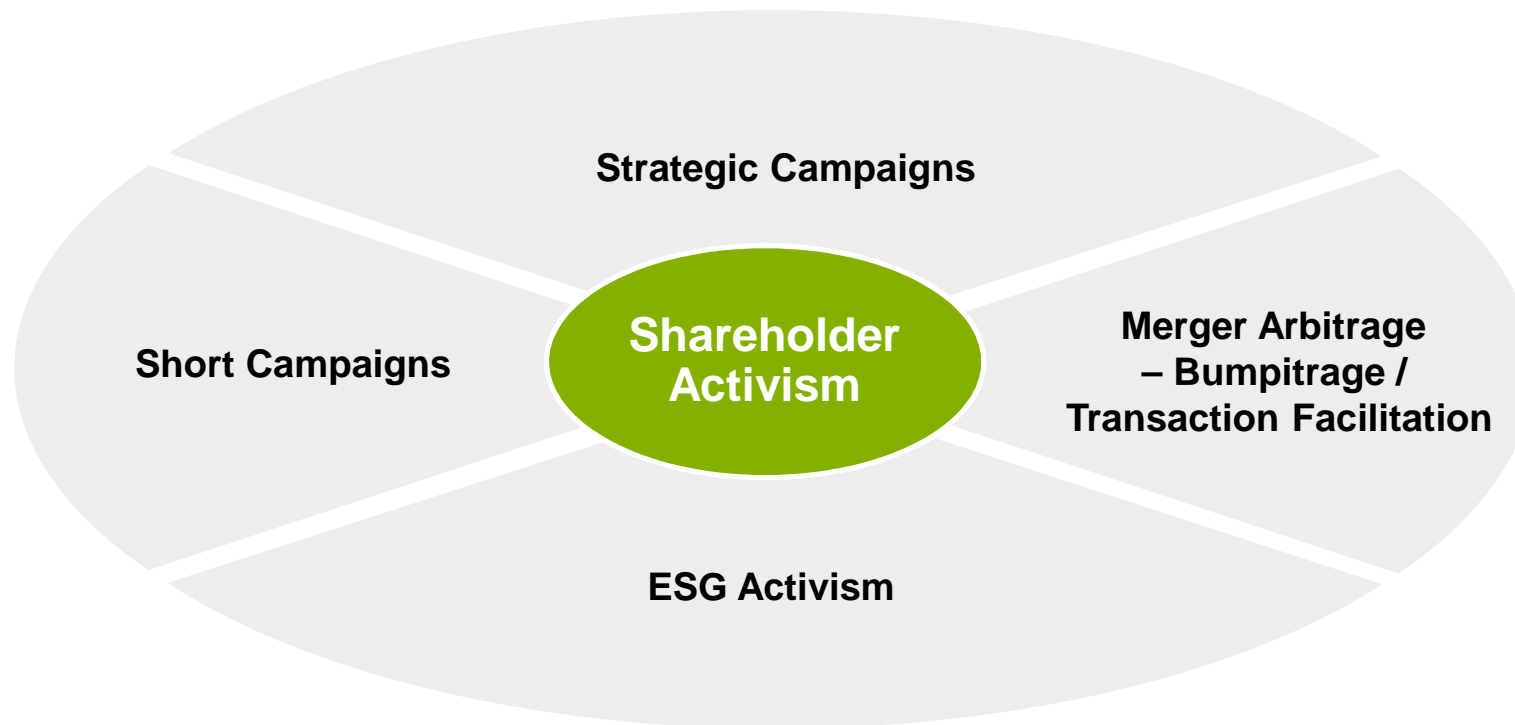
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### ■ Development of German Shareholder Activism over the last years

- Generally Strategic Campaigns, Merger Arbitrage – Bumpitriage / Facilitation and Short Campaigns
- Substantial increase in Shareholder Activism in Germany
- Supervisory board and management board members are often replaced via informal negotiations (so-called “collaborative activism”); proxy fights are less common and often only launched when negotiations have not been successful
- Instead of influencing the management board in the long-term, shareholders are often less focused on gaining control of the company but on achieving or maximizing returns in the short-term
- For this purpose, shareholders invest in specific event-driven situations
- Often accompanied by comprehensive PR campaigns („spin doctors“)
- Increase in ESG Investing and related activism

## Recent cases and trends in German Shareholder Activism - Overview

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## Recent cases and trends in German Shareholder Activism – Strategic Campaigns

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- Aimed at an increase in the enterprise value or an improvement of company's performance by means of strategic or operational measures, such as
  - Changes in formation of management board and/or supervisory board, rarely via proxy fights (*ThyssenKrupp/Cevian 2019; Elumeo/Ottoman Strategy Holdings 2019; Bilfinger/Cevian 2018; Gea/Elliott 2018; STADA/Investor Active Ownership Capital 2016*)
  - Pushing the company to divest certain assets (*Aareal Bank AG/Teleios Capital Partners 2019; Scout24/Elliott 2019; ABB AG/Cevian 2018; Bilfinger/Cevian 2018; ThyssenKrupp/Cevian 2018; VW/The Children's Investment Fund 2016; STADA/Investor Active Ownership Capital 2016*)
  - Request an EGM or amendments of the AGM agenda (*Biofrontera/Deutsche Balaton 2018/2019; STADA/Investor Active Ownership Capital 2016; Kabel Deutschland/Elliott 2015*)
  - Small stakes in large caps with big impact (e.g., recent Elliott investments in Bayer & SAP)
  - Implementation of a revised shareholder pay-out policy via increased dividends and/or share buy backs

## Recent cases and trends in German Shareholder Activism – Merger Arbitrage – Bumpitrag / Transaction Facilitation

- Aimed at higher offer- or squeeze-out-price by means of
  - the exploitation of loopholes and structural peculiarities existing under German law of public takeovers and the subsequent integration of the target and/or
  - by building up substantial stakes in takeover situations which could either block further corporate measures or facilitate a smoother and quicker integration of the target into the bidder organisation (*Comdirect/Petrus Advisers 2019; Uniper/Elliott 2017; Uniper/Knight Vinke 2016; Celesio/Elliott 2014*) or
  - by making a competitive offer (*Biofrontera/Deutsche Balaton 2019*)
- Aimed at higher cash compensation via PLDTA or Squeeze-Out (*Osram/AMS 2019; Stada/Elliott 2018; Kabel Deutschland/Elliott 2014 ongoing*)

## Recent cases and trends in German Shareholder Activism – Short Campaigns

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- Aimed at short-term realization of profits

*(Aurelius/Ontake 2020 ongoing; Corestate/Muddy Waters 2019; Wirecard 2019 ongoing; Aurelius/Gotham City Research 2017; Ströer/Muddy Waters Capital 2016; Wirecard/Zatarra Research&Investigations 2016; Steinhoff/Zatarra Research&Investigations 2016)*

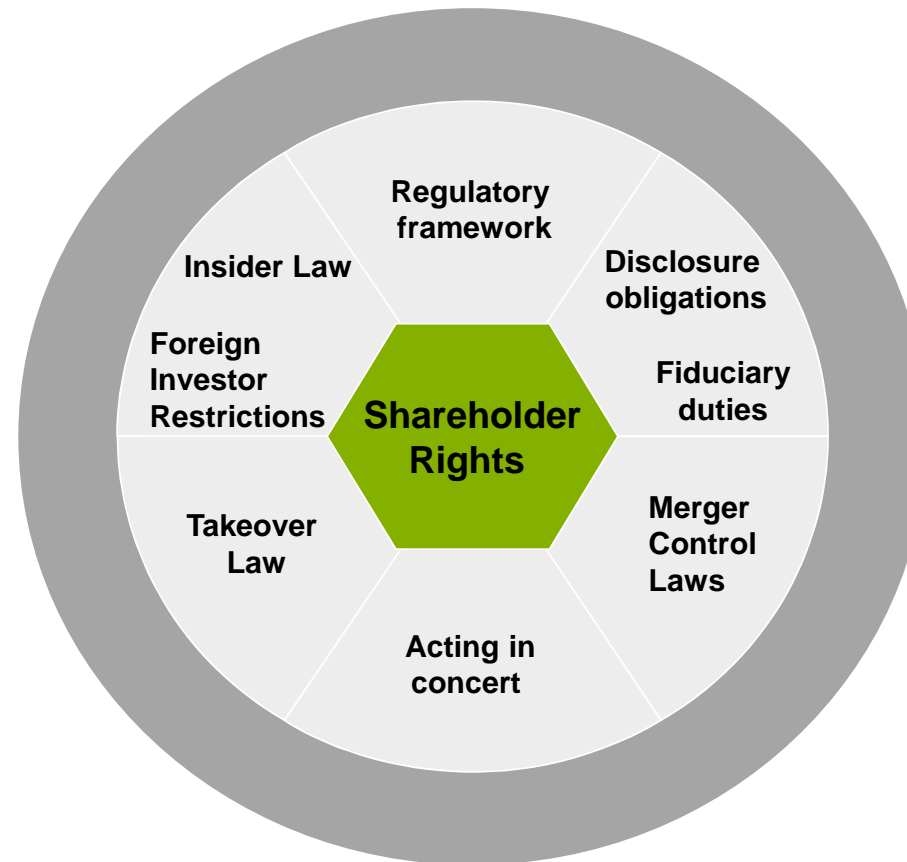
## Recent cases and trends in German Shareholder Activism – ESG Activism

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- Aimed at pushing ESG objectives  
*(Siemens: Rail signalling for coal mine railway; Infineon: appointment of lawyers)*

## Shareholder Activism – Regulatory Framework

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## Recent cases and trends in German Shareholder Activism – The German Legislator’s reaction

### Wirecard Shortselling Ban

### Amendment of Sec. 26 of the German Takeover Act („WpÜG“)

### ARUG II

#### Legislative developments affecting Shareholder Activism

- General Administration Act issued by the German Federal Financial Supervisory Authority on 18 February 2019 and valid until 18 April 2019
- Based on Article 20 of EU Regulation No. 236/2012 (EU Shortselling Regulation)
- Provided the prohibition of the establishment or increase in existing net short positions of Wirecard
- Reaction to second takeover offer made by AMS with respect to Osram by circumventing 1-year-cooling-off period using another subsidiary as bidder company
- Scope of cooling-off-period extended to persons acting in concert with the bidder and underlying entities
- Law for the implementation of the Second Shareholders’ Right Directive
- Aimed at improving shareholder participation / attendance rates at AGMs, the transparency of shareholder identity or the accountability and transparency of proxy advisor activities
- e.g. new regulation of shareholder communication between listed companies and intermediaries and intermediaries and shareholders; shareholder’s right to resolve maximum compensation of management board members resolved by supervisory board

## Listed companies in Germany

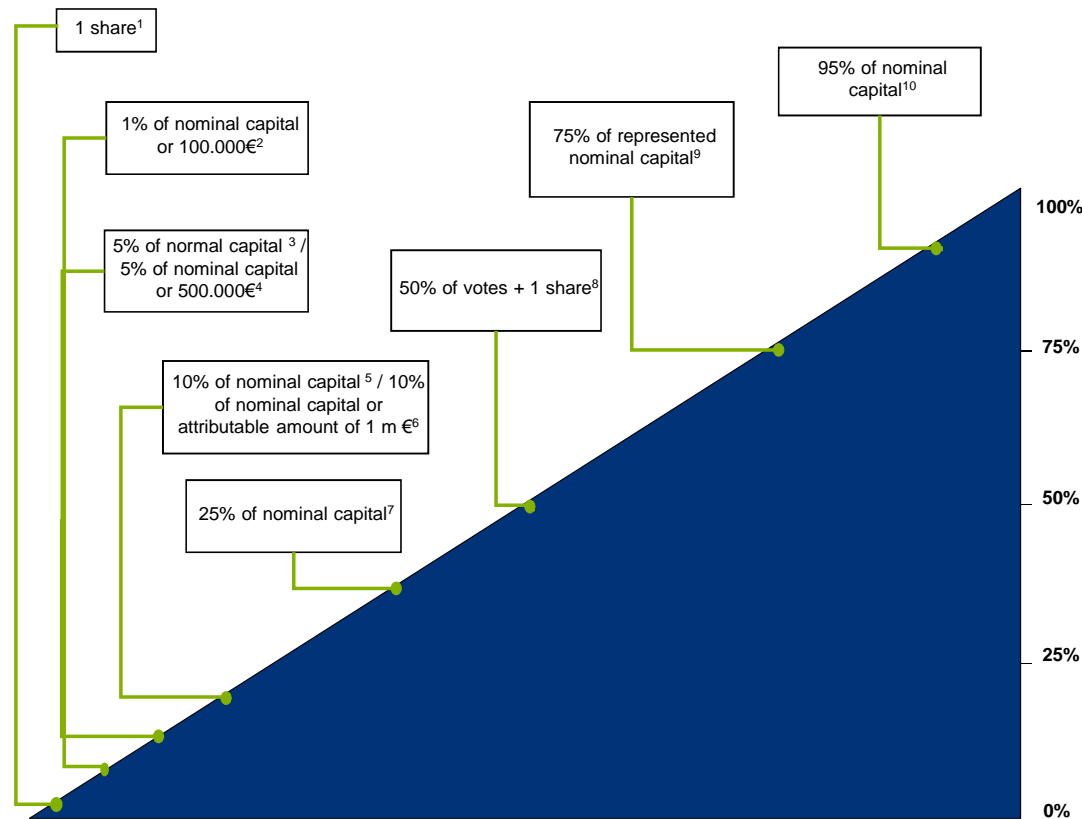
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- ~ 450 companies listed in the Regulated and Open Market on the Frankfurt Stock Exchange
- Substantial decrease of listed companies due to increase of delistings and fewer IPOs over the last couple of years
- The majority of these listed companies is controlled or at least dominated by majority or larger shareholders
- Attendance in AGMs of listed companies with high freefloat traditionally low



## Key Shareholder Rights and German Takeover Law

## Key Shareholder Rights in Germany - Overview



(Examples)

- 1 - File legal action, Sec. 245, 249 AktG  
- Right to information, Sec. 131 AktG  
- Attend AGM  
- Nominations and motions (e.g. nomination of supervisory board members, Sec. 127 AktG, or supplementary motions relating to items of AGM agenda, Sec. 124 para. 4 AktG)
- 2 - Approval procedure claims (*Klagezulassungsverfahren*) for compensation claims, Sec. 148, 147 AktG  
- Request court appointment for special audit, Sec. 142 para. 2 AktG
- 3 - Request an EGM, Sec. 122 para. 1 AktG  
- Block Squeeze out under stock corporation law (Sec. 327a AktG) or under takeover law (Sec. 39a WpÜG)
- 4 - Amendments to the AGM agenda, Sec. 122 para. 2 AktG, e.g. request reduction of maximum remuneration of management board members, Sec. 87 para. 4 AktG (shareholders resolution required, Sec. 133 para. 1 AktG → simple majority is sufficient)
- 5 - Priority to nominations of supervisory board members, Sec. 137 AktG  
- Objection to waiver of compensation rights, Sec. 50 AktG  
- Block Squeeze out under merger law (Sec. 62 para. 5 UmwG)
- 6 - Exchange of representative who claims compensation, Sec. 147 para. 2 AktG  
- Request that shareholders decide upon discharge of management board and supervisory board on an individual basis, Sec. 120 para. 1 AktG  
- Application for dismissal of a supervisory board member, Sec. 103 para. 3 AktG
- 7 - Block changes to articles of association, Sec. 179 para. 2 AktG  
- Block capital increases/decreases, Sec. 182, 192, 202, 207 AktG
- 8 - Factual control  
- Elect supervisory board members, Sec. 101 para. 1 AktG  
- Enforcement of compensation claims, Sec. 147 para. 1 AktG
- 9 - Integration  
- Change articles of association, Sec. 179 para. 2 AktG  
- Dismissal of supervisory board members, Sec. 103 para. 1 AktG  
- Domination/profit-and-loss transfer agreement, Sec. 293 para. 1 AktG  
- Change of legal form in KG or in other corporation, Sec. 233 UmwG
- 10 - Squeeze out of minorities (shareholders resolution required, Sec. 133 para. 1 AktG → simple majority is sufficient, and main shareholder may participate)

## German Takeover Law - Overview

		Offer	Takeover Offer	Mandatory Offer
<b>Definition</b>		Public offers that are not aimed at obtaining control (< 30% of the voting shares / rights)	Offers aimed at obtaining control in a target company (30% - 100% of voting rights)	If number of voting rights exceed 30% without having made a Takeover Offer, German takeover law requires a mandatory offer for all target shares to be launched
<b>Conditions</b>		Partial offer possible	Conditioning possible	No conditioning
<b>Special Requirements</b>	<b>Information Requirements</b>	Publication of decision to launch an offer to the stock exchange, government authorities and issuer without undue delay	Publication of decision to launch an offer without undue delay	The publication to launch a Mandatory Offer must be made without undue delay and in any case within seven calendar days of the acquisition of control
	<b>Consideration</b>	Not Regulated	Minimum consideration: <ul style="list-style-type: none"> <li>Any offer must be at a price equivalent to at least the highest consideration paid or agreed to be paid by the bidder during a period of six-months prior to the launch of the offer</li> <li>At least equal to the weighted average stock exchange price of the relevant target shares during a three-months period prior to the launch of the offer</li> </ul> <ul style="list-style-type: none"> <li>Consideration must be in cash or liquid shares admitted to trading on a regulated market. The bidder must make a cash offer to target shareholders if it acquired 5% of the shares or voting rights in the target for cash during the six-months period prior to the announcement of the offer until the end of the offer period</li> <li>Obligation to pay additional compensation if offeror acquires shares in the target company outside the stock exchange within one year from the end of the offer period and if - in terms of value - a higher consideration than under the Offer is granted</li> </ul>	
	<b>Financing Confirmation</b>	Cash confirmation for the offer limited to targeted threshold in shares	Cash confirmation for all target shares required	



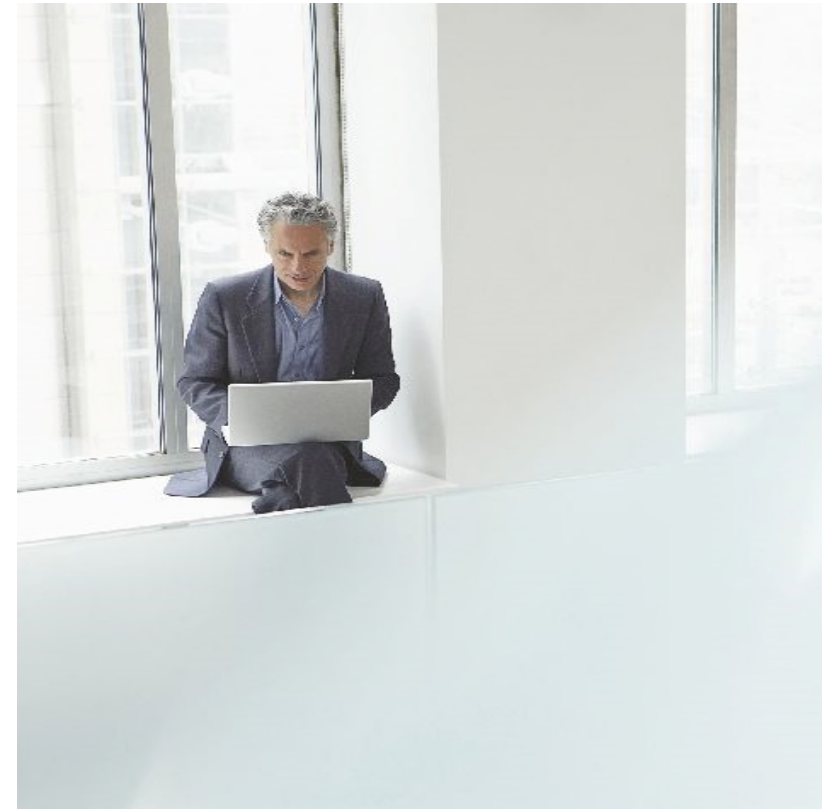
# Heuking Kühn Lüer Wojtek Overview

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- With about 400 lawyers, tax advisors and notaries we offer comprehensive German law legal advice in all business law areas.
- On an international level, we cooperate with leading independent law firms and operate various international desks:  
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- We currently operate eight offices in Germany and one office in Zurich.



Klaus Tiedke - plainpicture

## Our locations





## Michael Neises

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Michael Neises is a partner in the Frankfurt office of Heuking Kühn Lüer Wojtek and advises on finance and capital markets law matters, including public take-over transactions and shareholder activism.

Prior to joining Heuking Kühn Lüer Wojtek, Michael Neises was the head of the Corporate-Finance-Team of a German boutique law firm. Since 2004, Michael worked at international law firm Dewey & LeBoeuf primarily on cross border corporate finance and capital markets transactions. He was head of the German Desk in the London office of Dewey & LeBoeuf from 2008 to 2010.

Michael Neises started his career in the banking and capital markets group of Clifford Chance in 2001 and is dual qualified as a German *Rechtsanwalt* and as an English solicitor.

Prior to becoming a lawyer, Michael Neises trained with Deutsche Bank and gained work experience in the corporate finance teams of the Hannover, Magdeburg and Osaka branches of Deutsche Bank AG.

Thank you very much for your attention!

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