



December 2016

Dear All,

Please find below a rundown of recent corporate governance news and developments that have taken place around the world:

Shareholder Activism

- > **Georgeson's Cas Sydorowitz** spoke at Mergermarket's M&A and Private Equity Forum in Zurich. Mergermarket have posted a **video interview with Cas Sydorowitz about activism in Europe** (registration required): <http://events.mergermarket.com/switzerland/cas-sydorowitz-activism-in-europe>.
- > Reuters reports that **Korea scandal shows risk of pension giant**: <http://www.reuters.com/article/us-southkorea-politics-pension-breakingv-idUSKBN14I0FI>. "The suspicion is that the pension service, the world's third-largest, was pressured into voting for a \$8 billion merger of two Samsung Group units, Cheil Industries and Samsung C&T, as part of backdoor dealings between the presidential office and the country's largest conglomerate. A special prosecution team has been looking into whether the order came from then-head of the Ministry of Health and Welfare, which runs the National Pension Service. That minister is now chairman of the institution. The deal effectively gave Samsung scion Jay Y. Lee stronger control over the group's crown jewel, the electronics business. But the plan involved valuing the target company, Samsung C&T, substantially lower than the acquirer, although the former was bigger. That didn't go down well with many Samsung C&T shareholders, including U.S. hedge fund Elliott Associates, which launched a proxy fight against the tie-up. The NPS' vote gave Samsung a narrow win in a fight it would have probably otherwise lost. Samsung C&T's stock has dropped more than 30 percent since shareholders approved the merger in July last year."
- > Law360 have published an article entitled **Think Twice Before Settling With An Activist**: <https://www.velaw.com/Insights/Think-Twice-Before-Settling-With-An-Activist/>. "The tide of shareholder activism keeps rising in the U.S. and elsewhere around the world. At the beginning of this era of shareholder activism, target companies fought back. For example, 15 years ago in 2001, more than 60 percent of the proxy contests in the U.S. went to a shareholder vote and only 20 percent settled prior to the shareholder meeting. Times have changed dramatically. In 2016 to date, only approximately 30 percent of the proxy fights in corporate America went the distance while 47 percent of them ended in settlements. And these numbers understate the prevalence of settlements because the vast majority of activist situations never reach the proxy contest phase. Many activist situations settle in private, confidential negotiations before any public agitation by the activist begins and long before the shareholder meeting. [...] Needless to say, there are often good reasons for boards to settle. Frequently, boards and activists find sufficient common ground during private negotiations. Proxy contests are time-consuming, distracting and costly, which motivates many boards to avoid them. However, in recent years, it has become clear that many settlements did not yield the desired results. This article examines why boards should think twice before they rush into a settlement with an activist." Also see here: <https://corpgov.law.harvard.edu/2016/12/22/think-twice-before-settling-with-an-activist/>.
- > Reuters reports that **CalPERS sues IAC over move to maintain Diller's voting power**: <http://www.reuters.com/article/us-iac-interactive-lawsuit-calpers-idUSKBN1412Q5>. "The California Public Employees' Retirement System said on Monday it had filed a lawsuit to block IAC/InterActiveCorp from issuing a new class of non-voting stock that it said was aimed at securing Barry Diller's control over the online media

company at the expense of other shareholders. Chairman Diller controls more than 44 percent of IAC's voting shares, while the billionaire owns less than 8 percent of the company's stock, CalPERS said in a statement."

- > DealBook reports that **As Avianca Weighs Bids, Hedge Fund Plays Unusual Role: Diplomat:** <http://www.nytimes.com/2016/12/05/business/dealbook/as-avianca-weighs-bids-hedge-fund-plays-unusual-role-diplomat.html>. "That has brought Elliott's executives to the negotiating table in recent months, meeting with Avianca's suitors, participating in board meetings and keeping an eye on their borrower. [...] If a deal comes together, Elliott would have helped broker one of the biggest deals in the airline industry this year. [...] Better known as a combatant than a diplomat, Elliott has emerged at Avianca as a result of a two-decade-long relationship with Mr. Efromovich that executives first disclosed to Avianca's board members this summer. Elliott has long specialized in taking positions in complicated loan arrangements, most notably its investment in defaulted Argentine debt, and over the years Elliott has helped to bankroll the expansion of Mr. Efromovich's Synergy Group."

Europe...

- > Investment & Pensions Europe reports that **EU negotiators reach agreement on revised Shareholder Rights Directive:** <https://www.ipe.com/news/esg/eu-negotiators-reach-agreement-on-revised-shareholder-rights-directive/10016620.article>. "Under the new rules, institutional investors will be required, on a "comply-or-explain basis", to develop and disclose a policy on how they intend to engage with investee companies. If they do not do so, they will have to explain why. Other requirements include the right for shareholders to vote on the remuneration policy for a company's directors. [...] The Commission had proposed that the vote on pay should be binding, but, in 2015, MEPs voted to let member states decide if shareholder votes on pay should be binding or advisory. According to the statement from the European Parliament, the next steps are for its Legal Affairs Committee to approve the negotiators' agreement in a vote in January, with a final plenary vote scheduled for March. The Council will also have to adopt the final text next year, and, after the directive is officially published, member states will have two years to transpose it."
- > The Financial Times reports that **UK chief executives earn much more than European peers:** <https://www.ft.com/content/585f41d4-c778-11e6-9043-7e34c07b46ef>. "Chief executives of big UK companies are part of a pay 'premier league', earning substantially more than their continental European peers. But unlike in football, where total spending on players is reflected in team performance, paying a UK chief executive more does not guarantee improved results, according to new comparative research by Vlerick Business School's Executive Remuneration Centre. Xavier Baeten, the centre's founder, said: 'People say "if you pay peanuts, you get monkeys". Our study doesn't show that you can pay peanuts, but it does show that you won't get the best chief executives by overpaying them.' The study of 701 companies also found that UK chief executives receive a higher proportion of their total remuneration as variable pay, relative to continental European business leaders. Such bonuses and long-term incentive plans are often tied to earnings per share and total shareholder return, which Prof Baeten warned could encourage short-termism and 'may even be dangerous'." See here for Vlerick Business School's **CEO Remuneration Study 2016:** <https://fd.nl/binaries/36/08/71/presentatie-bevindingen-ceo-remuneration-onderzoek-voor-nederland-als-pdf.pdf>.

...and beyond

- > The Wall Street Journal reports that the **CFA Institute Calls Out Use of Non-GAAP Metrics:** <http://blogs.wsj.com/cfo/2016/12/13/cfa-institute-calls-out-use-of-non-gaap-metrics/>. "Add another group to the list of those calling out companies for using adjusted earnings. Nearly 80% of firms in the S&P 500 and the FTSE 100 use financial measures outside of generally accepted accounting principles, and that could mislead investors, according to a study by the CFA Institute in London. Even though companies need to reconcile non-GAAP measures when they report results, their increasing use can lead to investors comparing apples with oranges, said Vincent Papa, acting head of financial reporting policy at the CFA Institute. 'The like-for-like premise is often times undermined,' he said, 'resulting in confusion on behalf of investors, especially retail investors.' Regulatory bodies like the Securities and Exchange Commission, the European

Securities and Markets Authority and the International Organization of Securities Commissions are stepping up their efforts to address these investor concerns.”

- > The Financial Times reports that **Big Four auditors face crackdown on global operations:** <https://www.ft.com/content/86e72a0a-c14f-11e6-9bca-2b93a6856354>. “The Big Four auditing firms routinely boast about their global footprint in more than 150 countries, promising clients joined up services around the world. But KPMG, Deloitte, PwC and EY are much less forthcoming about how audit quality can sometimes vary widely from one region of the world to another, critics say. Lapses in oversight by one of the Big Four were highlighted last week when the US accounting watchdog hit Deloitte’s Brazil business with a record-setting \$8m fine. The Public Company Accounting Oversight Board found accountants in Brazil falsified the audit of a local airline, altered documents and misled inspectors reviewing the audit. The case marked the first time that the PCAOB had taken action against an affiliate of a Big Four firm over an alleged fraud and cover up. That same day, PCAOB also announced a \$750,000 settlement with Deloitte Mexico after finding altered documents in its audit of US mining company Southern Copper.”

UK

- > The Financial Times reports that **BlackRock threatens tougher action on executive pay:** <https://www.ft.com/content/2ca8a554-bba6-11e6-8b45-b8b81dd5d080>. “BlackRock, the world’s largest investor, is threatening to vote against the re-election of board directors who fail to rein in outsized pay packages for their top executives. The fund manager will outline its tougher stance in a letter to the heads of remuneration committees of the UK’s biggest 350 companies. ‘We will be voting against [remuneration] committee chairmen if we think there is a disconnect between [executive] pay and performance,’ Amra Balic, head of BlackRock’s Emea Investment Stewardship team, told MPs at a hearing on Tuesday. [...] BlackRock was ‘preparing a paper and a letter to go out in coming weeks to 350 UK companies outlining some of the market level concerns we feel exist – pay rises year on year, pension contributions and benchmarking,’ she said. ‘And we will hold chairmen of remuneration committees directly accountable for what happens with pay if we feel it is not linked to performance by voting against [them].’”
- > ICSA reports that on **Boardroom diversity: More action is needed:** <https://www.icsa.org.uk/knowledge/governance-and-compliance/analysis/december-boardroom-bellwether-2016>. “Nearly half of the FTSE 350 company secretaries who responded to the survey said that their boards do not meet Lord Davies’ target of having a quarter female representation. This target was met in the FTSE 100 in 2015, but has since stagnated, with women on the largest 100 boards now making up just over 26%. Given that a target for the FTSE 250 has only recently been put in place, some outliers would be expected. But what is really surprising is that, of those who have not met the 25% target, more than a third have no plans in place to do so before January 2018. Meanwhile, over a third – 39% – have no plans to do so at all.”
- > Lombard reports that **in one respect Brexit has driven down executive pay:** <https://www.ft.com/content/00b63b40-b6f2-11e6-ba85-95d1533d9a62>. “The result for foreign executives working in the UK is that their earnings are now worth a lot less back home. For purely illustrative purposes, Lombard retrieved the headline annual pay figure for four chief executives who run big UK companies and calculated how much those earnings have fallen in the money used in their country of origin. The pay packet of Kingfisher’s poised French boss Véronique Laury has dropped €230,000 in value. Ross McEwan, RBS’s Kiwi CEO now has NZ\$1.1m less to spend on All Blacks home game tickets. Prudential’s head wrangler Mike Wells, who is American, has seen his cattle/hat ratio slip \$2.3m. Rakesh Kapoor of Reckitt Benckiser, who has dual British and Indian nationality, has seen his earnings tumble by Rs300m.”

France

- > Glass Lewis explains that **Amendment on Executive Pay Leaves French Boards in a Bind:** <http://www.glasslewis.com/amendment-executive-pay-leaves-french-boards-bind/>. “Embedded in an omnibus transparency and economic modernisation bill (known colloquially as ‘Sapin 2’), this amendment institutes two separate binding votes on remuneration: a forward looking vote on policy, and a backward looking vote on

variable and exceptional pay amounts. In terms of timing, the former vote will come into force in 2017, while the latter won't grace the AGM ballot card until 2018. More specifically, the new rules for 2017 include a forward looking, annual, binding shareholder vote on the 'principles and criteria of determination, distribution and allocation of fixed, variable and exceptional components of total compensation and benefits any kind', attributable to the chair, CEO, and Deputy CEO in a single board structure, or to the members of the executive board, the sole managing director, and the members of the supervisory board in a dual board structure. In case of failure of this forward looking vote, the previous principles and criteria will continue to apply or, if there was no previous policy, remuneration will be determined 'in accordance with the previous year's remuneration'. In 2018, the second binding vote will come into force: for any payment to occur, shareholders will be required to approve the payment of variable and exceptional pay amounts to the chair of the board of directors or the supervisory board, the CEO, deputy CEO, the members of the management board or a sole managing director. The amendment does not specify what recourse issuers may have in case of a failure of this second binding vote."

Germany

- > The BVI (the German Investment Funds Association) **have published their 2017 guidelines:** <https://www.bvi.de/regulierung/branchenstandards/analyse-leitlinien-fuer-hauptversammlungen-alhv/>. The new guidelines now state that: 1) companies should disclose the first appointment date of both the audit firm and the audit partner; 2) the remuneration system should be proposed for a shareholder vote at least every five years (even when there is no change); 3) the excess (or deductible) applied to the D&O insurance should be disclosed; 4) supervisory board members whose tenure exceeds 10 years will no longer be considered independent; 5) they clarify the overboarding guidelines applied to supervisory board members; 6) they specify that the supervisory board must include a financial or audit expert; 7) they underline that failure to disclose individual meeting attendance could result in a vote against a supervisory board member's re-election (and not just against the discharge); 8) long-term incentives will not be supported if they are exclusively linked to share price appreciation; 9) the extent to which the supervisory board can exercise discretion with regard to remuneration should be disclosed; and, 10) when considering capital increases all outstanding authorities from previous years will be included in the calculation of the potential maximum dilution. The changes are summarised in this presentation (German only): https://www.dirk.org/dirk_webseite/static/uploads/161004_MV_Evonik_Zschorn_Proxy-Solicitation.pdf. Additionally, the BVI have published a **review of compliance with their guidelines among the 160 DAX companies** (German only): <https://www.bvi.de/presse/aktuelles/artikel/news/analyse-leitlinien-des-bvi-konstant-hohe-defizite-in-der-unternehmensfuehrung/>.
- > Glass Lewis have published a study entitled **German Gender Quota and Targets:** <http://www.glasslewis.com/gl-blog-german-gender-quota-targets-study/>. "During the 2016 AGM season, two important milestones for female representation on the supervisory boards of DAX index companies were reached: women now account for in excess of 30% of non-executive positions and there are no longer any supervisory boards consisting solely of men. Interestingly though, improvement in female board representation across our sample was much more pronounced in companies that are not subject to the gender quota. While female representation in these companies has historically been lower, due in part to higher female representation among employee board representatives than those representing shareholders, the data suggest that the boards of companies not subject to the legislation are also keen to increase diversity."

Netherlands

- > The Dutch Corporate Governance Code Monitoring Committee have published their revised **Corporate Governance Code 2016:** <http://www.commissiecorporategovernance.nl/?page=3779>. The most significant changes to the code are the focus on long-term value creation and the introduction of organisational culture as a component of good governance. Other changes include: a recommendation to disclose diversity targets (and steps to be taken if targets are not met); the Code now recommends an independent majority on the supervisory board (as opposed to only one non-independent member); the Code's principle has been changed from appointment of supervisory board members for three four-year periods to appointment for two four-year

periods (reappointment after this is possible for a maximum of a further two two-year periods and must be justified in the report of the supervisory board); and, the Code now recommends transparency about the ratios between the remuneration of management board members and employees. Dutch listed companies are required to report in 2018 on compliance with the revised Code in the 2017 financial year. See here for an overview of the most important changes: <http://www.commissiecorporategovernance.nl/download/?id=3376> and here for the full Code: <http://www.commissiecorporategovernance.nl/download/?id=3367>.

Switzerland

- > The Ethos Foundation have published their **2017 Proxy Voting Guidelines and Corporate Governance Principles**: <https://www.ethosfund.ch/en/news/ethos-proxy-voting-guidelines-2017-new-good-governance-requirements>. "In particular, the 2017 edition foresees that members of the executive management will no longer be accepted as board members. In addition, the maximum duration of the external audit firm's mandate is set at 20 years in line with the practice adopted by the European Union. Regarding authorisations to issue capital for general purposes without pre-emptive rights, a single authority may not exceed 15% of issued capital down from 20% currently. Finally, the discharge will not be granted to the governing bodies, in particular when the company is in the situation of capital loss or over indebtedness." See here for the full document: https://www.ethosfund.ch/sites/default/files/2016-12/LDPCG_Ethos_2017_EN_FINAL2.pdf.

United States

- > Georgeson have published their **2016 Annual Corporate Governance Review**: <http://www.georgeson.com/us/resource/Pages/acgr.aspx>. "Georgeson's authoritative Annual Corporate Governance Review gives a critical look at the key trends for the annual meetings, shareholder initiatives and proxy contests of the 2016 proxy season. Moreover, this comprehensive document provides the definitive set of 2016 proxy data for your reference, and an analysis of the trends that may affect the 2017 proxy season. Georgeson explores the rise of shareholder activism and the increase of shareholder engagement between issuers and investors. Other key topics examined include: 1) The rise of proxy access; 2) Trends in shareholder engagement; 3) Increasing focus on board composition in director elections; 4) Say on pay and pay-for-performance disconnect; and, 5) Shareholder activism and contested solicitations." See here to download the report: http://www.georgeson.com/us/resource/Pages/acgr_online.aspx.
- > Bloomberg reports that **Wells Fargo Splits Chairman, CEO Roles After Account Scandal**: <https://www.bloomberg.com/news/articles/2016-12-01/wells-fargo-separates-chairman-and-chief-executive-officer-roles>. "Wells Fargo & Co. changed its bylaws to require a separate chairman and chief executive officer, breaking with most of its U.S. peers after years of sales abuses in its branches spiralled into a national scandal. That move is significant in an industry that has long fought off pressure from corporate governance activists and shareholders including pension managers, but it won't change Wells Fargo's current leadership. John Stumpf had held both roles at Wells Fargo until he stepped down in October under pressure from lawmakers. Tim Sloan was promoted that month to CEO, while Stephen Sanger became non-executive chairman."
- > The Wall Street Journal reports that **Exxon Faces Dilemma on Rex Tillerson's Pay**: <http://www.wsj.com/articles/exxon-faces-dilemma-on-rex-tillersons-pay-1481733021>. "Exxon Mobil Corp.'s board faces a difficult decision over how to make a financial break with Chief Executive Rex Tillerson, who will step down at year's end now that Donald Trump has chosen him as secretary of state. The oil giant, which announced Mr. Tillerson's departure Wednesday, is considering whether to grant him more than \$175 million in stock compensation that he is currently eligible for only upon hitting the retirement age of 65 in March. The board also has to decide whether to grant the shares immediately, instead of over years. Allowing Mr. Tillerson to retire early and cash out would be a break from company policy under which vesting occurs after a decade. It could also open Exxon to criticism it is giving Mr. Tillerson a gift as he heads to a government post in which he could have vast influence over Exxon's fortunes. However, if the cabinet nominee is able to fully divest his Exxon holdings, that would alleviate concerns over how he could personally benefit from State Department actions that help Exxon."

- › The Financial Times reports that **Zynga falls foul of tech investors' Faustian bargain:** <https://www.ft.com/content/e49dfa32-c5ca-11e6-8f29-9445cac8966f>. "Zynga has the hallmarks of a company that makes corporate governance campaigners delirious. These include shares with super-voting rights, quarterly reports that emphasise 'adjusted' earnings measures and a board of directors that has informal ties to one another. Other tech groups including Facebook and Tesla Motors have taken heat for similar measures. However, Zynga, unlike those two, has repeatedly issued disappointing financial results and now trades at less than a third of its IPO price. As such, it fell foul of the Faustian bargain that many tech investors have accepted: we will avert our eyes to governance shortcomings if the company hit its numbers. Violate this arrangement, though, and all bets are off. [...] Furthermore, shareholders are not sticklers out of principle but pragmatism; they appreciate not just rising stock prices but management aligned with ordinary investors. Zynga has become a legal battle because its shares crashed and it seems its close-knit bosses tried to dump the losses on everyone else."

Japan

- › Reuters reports that **Nissan's Ghosn poised for third salary after being confirmed as Mitsubishi chairman:** <http://uk.reuters.com/article/us-mitsubishimotors-pay-idUKKBN1430S6>. "Nissan Motor Co Ltd and Renault SA CEO Carlos Ghosn is set to receive a third salary after Nissan-controlled Mitsubishi Motors Corp on Wednesday approved the Frenchman as its chairman along with a tripling in compensation for board members. Shareholders voted in favor of raising the ceiling on combined annual compensation for Mitsubishi's 11 internal and external directors to 3 billion yen (\$26.06 million), including 2 billion yen in salary and 1 billion yen in stock options. Mitsubishi has revamped top management and appointed Ghosn to head its 11-member board after Nissan in October took a 34 percent controlling stake in Japan's sixth-largest automaker, which is struggling to recover from a mileage-cheating scandal. At a special shareholders meeting, some raised concerns about bumping up executive pay while Mitsubishi was on track to post an annual net loss after it overstated the fuel economy on many of its domestic models."
- › The Financial Times reports that **Shortcomings at SMC Corporation stick out because standards are rising in Japan:** <https://www.ft.com/content/1b29d2ee-c6a5-11e6-8f29-9445cac8966f>. "But there is a starkly alternative reading. SMC's corporate governance stands out precisely because standards are rising and the market is armed with a vocabulary for calling out the foot-draggers. Before Abenomics, says Zuhair Khan, equity analyst at Jefferies, SMC would not have been singled out because too many companies were in a similar position. Back then, neither brokers nor investors were in the business of using corporate governance as a rod to beat a company with decent growth. SMC's small tally of outside directors now sticks out because the average number per board across the Topix 500 has risen from 0.5 to three since 2012. It is true that the Japanese market has yet to devise a really juicy looking carrot to incentivise better corporate governance but the kerfuffle around SMC suggests there may be an improving supply of sticks."

If you have any comments or questions please do not hesitate to contact me.

Kind regards,

Daniele Vitale

Georgeson

Corporate Governance Manager > Corporate Advisory

daniele.vitale@georgeson.com

T +44 (0)20 7019 7034 **M** +44 (0)7747 697 136 **F** +44 (0)870 702 0158

Moor House, 120 London Wall, London EC2Y 5ET, United Kingdom

www.georgeson.com