

TRAFIGURA REACH FOR THE (NYR)STAR

“A decade on from one of the worst environmental disasters of the 21st century...Trafigura has rebranded itself, claiming it is a transparent, responsible company. This corporate giant...must not be allowed to completely wash its hands of this disaster.”

– *Lucy Graham, researcher at Amnesty International*

Case overview

On 19 August 2006, Trafigura Group Pte. Ltd. (Trafigura), the world’s largest private metals trader and second largest oil trader, found itself at the centre of a toxic waste scandal in Ivory Coast. Over 100,000 people needed medical assistance and several lives were lost. Consequently, the former Chief Executive Officer (CEO) landed in an Ivorian jail for five months.

Controversies involving the company did not end there. In its 26-year history of trading, the company has been implicated in several high-profile environmental, corruption and market manipulation scandals, such as the Iraq oil-for-food scandal, the 2007 chemical explosion in Norway, a price-fixing controversy in Malta, toxic diesel trading in Africa, as well as the recent Brazilian car wash scandal that shook the world. Trafigura was also accused by the minority shareholders of its then Belgian associate Nyrstar N.V. of throttling the latter with lopsided deals that led to its collapse.

The objective of this case study is to facilitate a discussion of issues such as corporate governance of large unlisted companies; fiduciary duties of directors in insolvency situations; corporate restructuring; interlocking directorships and management teams; minority shareholder rights and activism; and the growing importance of environmental, social and governance (ESG) factors.

The Trafigura journey

In March 1993, Trafigura Beheer B.V. was born. Alongside the late Claude Dauphin – the legendary commodity trader and former Chairman and CEO of Trafigura – its founding partners were made up of a large swathe of the top brass from Marc Rich & Co, a pioneering oil-trading firm in Switzerland.² Trafigura Group Pte. Ltd., the Group’s headquarters in Singapore, was later established in March 1996.³

This case was prepared by Daphne Ng Yun Ying, Hu Shuyi, Low Jun Yang Leroy, Megan Tam Yee Kwun, Tan Yi Jie and Whitney Phua Yiyu, and edited by Tan Yi Jie under the supervision of Professor Mak Yuen Teen. The case was developed from published sources solely for class discussion and is not intended to serve as illustrations of effective or ineffective management or governance. The interpretations and perspectives in this case are not necessarily those of the organizations named in the case, or any of their directors or employees.

A recent book⁴ explained how the rebound of oil prices near the end of the last century and the continuing oil boom propelled international commodity trading houses such as Cargill, Vitol, Trafigura and Glencore to “extraordinary financial wealth and political power”.⁵

A highly qualified founding team and a few defining events in 2001 placed Trafigura on a path of accelerated growth, starting with the collapse of Enron which signalled the advent of heightened volatility in the commodities market. A low-price environment caused miners to go bust, Big Oil to transform their business models, while traders profited from managing inventories and balancing supply and demand.⁶

An acceleration in demand for energy and industrial raw materials in emerging economies led by China also called for trading houses like Trafigura.⁷ The company had the ultimate secret formula to succeed in the metals market. Dauphin hired a number of individuals with new skill sets, including financial and derivatives specialist, Jeremy Weir. As Trafigura’s CEO, Weir restructured the company’s non-ferrous books and established an investment subsidiary, Galena Asset Management, to provide third-party investors with a platform to invest in commodity derivatives markets alongside Trafigura.⁸

Today, Trafigura is one of the largest physical commodities trading groups in the world.⁹ Its core business is the physical trading and transportation of oil and petroleum products and metals and minerals.¹⁰ Group revenues have since risen from less than US\$10 billion in 2001 to US\$147 billion in 2020.^{11,12} Net profit was US\$1.6 billion, up from US\$0.9 billion in 2018 and 2019.¹³

Trafigura is exclusively owned by its management and active employees across 88 offices in 48 countries.¹⁴ In 2012, the company shifted its main trading hub to Singapore to benefit from the city-state’s low tax-regime and proximity to China.¹⁵

A (Figura)tive recipe for success?

Trafigura is an association of key partners – the management, together with about 850 senior employees out of the 8,000 total employees, are shareholders in the business.¹⁶ It believes that this structure is the best system for alignment between management and shareholders as it would encourage employees to focus “on the long-term success of the business, promoting management depth and stability, and encouraging prudent risk management”.^{17,18}

One important aspect of the capital structure of commodity trading firms is the ownership of equity.¹⁹ The increasing asset intensity of commodity trading firms has demanded an evaluation of ownership structure. Although Trafigura transitioned from a pure trading model to a relatively more fixed asset intensive model, the company decided to remain private. It has invoked the incentive benefits of private ownership to explain its choice, stating that “we believe an employee-owned private company is the best ownership model for our core trading business.”²⁰

Trafigura's current CEO, Weir, explained that many industry outsiders do not have a clear picture of the gearing of a trading company and for those in the know, "it doesn't often fit into the normal financial metrics of equity analysts for industrial companies. And they don't understand the risk profile around it."²¹ His ideology is very much aligned to that of the late Trafigura founder, Dauphin. While Trafigura's competitors were dealing with the restructuring problems brought about by public listings, Trafigura continued its expansion of market share around the world by staying private.²²

The ethics of commodity trading houses like Trafigura has been questioned over the years. As one book puts it: "Within these companies there is an extraordinary cast of characters: manically hard-working, fiercely smart, disarmingly personable, and singularly focused on making money. One thing there is not much of in the commodity trading industry is women. The commodity trading companies make Wall Street banks look progressive on gender diversity."²³ It adds: "Some of the traders we've interviewed have been remarkably blunt about the trading industry's reputation for bribery and corruption."²⁴ It quotes Torbjörn Törnqvist, the co-founder and CEO of oil trader Gunvor as saying: "Unfortunately this is something that has plagued the commodity industry... There's a lot of skeletons and many of them, most of them, will never be surfaced".²⁵

Seven wonders of Trafigura

In 2015, Trafigura underwent a restructuring from the previous two-tier board structure – which comprised the supervisory board and the board of directors – to a unitary board structure in accordance with Singapore law.²⁶ The current board of directors consists of two sub-committees – the Audit Committee (AC) and the Nomination and Remuneration Committee (NRC). The Management Committee (MC), sitting below the board of directors, is separately responsible for the execution of Trafigura's business strategy. According to Trafigura, the MC is supported by the following corporate functions and committees: Finance Committee, Accounting Steering Committee, IT Steering Committee, Market Risk Management Committee, Compliance Committee, HSEC Steering Committee, Human Resources Committee, AC and NRC.²⁷

Trafigura claims to have short reporting lines, flat structures, clear delineation and segregation of responsibilities, and personal accountability.²⁸

As of FY2020, Trafigura's board consists of seven members. Three of them also hold key positions in the MC – Weir (Executive Chairman and CEO), Mike Wainwright (executive director and Chief Operating Officer) and Jose Maria Larocca (executive director and co-head of oil trading).²⁹

One of the other four directors, Pierre Lorinet, a non-executive director (NED), used to be the Group's former Chief Financial Officer (CFO).³⁰ Andrew Vickerman, another NED, chairs the NRC. Concurrently, he co-chairs the HSEC Steering Committee which is one of the corporate functions under the MC.³¹ Vickerman has a background in economics and spent almost 20 years with Rio Tinto Group, one of the world's largest mining companies, with the last 10 years as a member of the executive committee with responsibility for global communications and external relations.³²

The third NED, Sipko Schat, also holds director roles in various other companies. He is an independent member of the supervisory board and Chairman of the Risk Committee for Rothschild & Co, Chairman of the supervisory board of Vion N.V., and senior independent director of OCI N.V.³³ The last NED on the board, Mark Irwin, is a U.K. qualified chartered accountant who joined Trafigura as financial controller in 1994, and was appointed as a director in 2004 "to provide support for Trafigura's corporate and IT structure".³⁴

Shooting (Nyr)star

Nyrstar, incorporated in Belgium with its corporate office in Netherlands,³⁵ is a global multi-metal organisation³⁶ and market leader in the production of high quality zinc, lead and other base and precious metals³⁷ in Europe, the U.S. and Australia.³⁸ It is listed on the Euronext Brussels N.V., a European bourse.³⁹ After going public in October 2007, Nyrstar became the world's biggest producer of zinc metal and alloys.⁴⁰ Nyrstar was an associate company of Trafigura⁴¹ until the restructuring of the Belgian firm, after which Trafigura became the "majority owner of the operating business of Nyrstar".⁴²

From the end of 2009,⁴³ Nyrstar took on debt to finance its zinc mine acquisitions that subsequently underperformed. Thus, Nyrstar either had to write down its value or sell it at a loss.⁴⁴ By 2018, Nyrstar's debt had accumulated as a result of failed acquisitions, leading to liquidity issues.^{45,46} Nyrstar attributed its liquidity issues to overall unfavourable market conditions that affected zinc prices and treatment charges^{47,48} and its obligation to refinance its bonds for €350 million.⁴⁹

While Nyrstar blamed lower zinc prices in 2018 for its liquidity issues,⁵⁰ the average zinc price was reported to be higher in 2018 than in 2017.⁵¹ Nyrstar claimed that the zinc prices "completely took us [Nyrstar] by surprise".⁵² However, short seller, Iceberg Research, argued that any ordinary smelter would have hedged its exposure to commodity prices to mitigate its metal price exposure.⁵³ In fact, Nyrstar has consistently monitored its "Metal at Risk" on a continuous basis and hedged its metal price exposure.⁵⁴ "Metal at Risk" refers to the metal held by Nyrstar, either as work-in-progress or finished good inventory, that has been "priced-in but not priced out".⁵⁵ Hence, such metal is at risk of being "priced out" as it is exposed to fluctuations in underlying metal prices.⁵⁶ Nyrstar had also previously hedged 70% of its total "free metal" produced at the zinc smelters and North American mines in the first half of 2018 and 50% in the second half of 2018.⁵⁷

Nyrstar further blamed low spot treatment charges for its liquidity issues.⁵⁸ According to the company, 49% of its gross profits come from treatment charges, a compensation from miners to smelters that would be deducted from the price the smelter has to pay for the zinc concentrate, which is crucial to the profitability of Nyrstar.⁵⁹ While spot treatment charges were very low in the first half of 2018,⁶⁰ Iceberg Research suggested that “no smelter would rely only on spot treatment charges as smelters are capital intensive industrial firms that need visibility on price”.⁶¹ Iceberg Research’s argument was supported by a business model presentation by Nyrstar in 2017, where Nyrstar declared that spot treatment charges only constitute a maximum of 10% of Nyrstar’s typical mix of zinc treatment charge terms⁶² and that Nyrstar targets its treatment charges to correspond to the benchmark treatment charges in the market as it negotiates for its long-term contracts.⁶³ Interestingly, in 2018, Trafigura paid Nyrstar an average treatment charge of US\$37.20 per tonne for a contracted volume of 500,000 tonnes of zinc concentrates. This was much lower than the US\$147 per tonne agreed by Nyrstar and other smelters with miners as an annual benchmark for that year.⁶⁴

Let Trafigura be your (Nyr)star

“We are not all friends. We come to board meetings, we act independently of each other. The board, when it is making decisions, it makes them on an informed basis and the board normally gets all the information it can get and then makes the decision.”

– *Martyn Konig, Executive Chairman of Nyrstar*⁶⁵

On 12 October 2019, Reuters reported that minority shareholders of Nyrstar were seeking €1.48 billion in damages from Trafigura over the restructuring of the Belgian firm.⁶⁶

The Nyrstar minority shareholders claimed that Trafigura had influenced Nyrstar’s board⁶⁷ to act against its legal duties and committed fraud.⁶⁸ The lawsuit sought to void the decision of Nyrstar’s board in accepting the restructuring terms in April 2019.⁶⁹ Nyrstar was entering insolvency⁷⁰ before Trafigura stepped in to bail it out of its debt with a restructuring plan.^{71,72}

Following the restructuring, Trafigura’s stake in Nyrstar increased from 24.4% to 98%,⁷³ giving only a two percent stake to minority shareholders of Nyrstar.⁷⁴ While Nyrstar argued that the restructuring is the best outcome for all stakeholders, including its shareholders, the minority shareholders believed that the beginning of the problems lies with Trafigura’s de facto control over Nyrstar.⁷⁵

Trafigura had been Nyrstar’s largest shareholder even before the restructuring exercise.⁷⁶ On 9 November 2015, Nyrstar had entered into a relationship agreement which provided a framework for its dealings with Trafigura⁷⁷ to ensure that all transactions were made at arm’s length, as long as Trafigura held between 20% and 50% of Nyrstar’s shares.⁷⁸ Under this agreement, both parties entered into supplier and offtake contracts and Trafigura was given some governance rights such as nominating directors constituting the minority of the Nyrstar board.⁷⁹ Trafigura said that it would not purchase more than 49% of Nyrstar’s shares under the relationship agreement.⁸⁰

However, Nyrstar signed a trade finance framework agreement (TFFA) amounting to US\$650 million with Trafigura on 6 December 2018⁸¹ as it was decided that such financing was urgently required to mitigate the possibility of insolvency. Nyrstar said that the TFFA was in the interest of the company, as assessed by Nyrstar's directors Martyn Konig, Carole Cable and Anny Fahy.⁸² Nyrstar was also assisted by external experts such as Grant Thornton, Wilkie Farr & Gallagher and Argo Law in its assessment of the necessity for the TFFA.⁸³

Minority shareholders of Nyrstar, however, argued that the liquidity issue could have been dealt with if Nyrstar used its available credit facilities instead of entering into the TFFA with Trafigura, which allowed Trafigura the opportunity to seize Nyrstar on non-market terms.⁸⁴ Nyrstar rebutted this, saying that given the approaching maturity for some of its debts, it was impossible to obtain new credit lines at reasonable interest rates. The TFFA was said to be necessary to avoid an insolvency, as advised by Grant Thornton and other external advisors.⁸⁵ Bloomberg subsequently reported that Trafigura had made an alleged threat to withhold from Nyrstar a US\$250 million credit facility, which Grant Thornton considered as "a factor in the rapid deterioration of available liquidity" of Nyrstar which contributed to the risk of insolvency.⁸⁶

According to Belgian Corporate Law, the decision for the restructuring lies with the board of directors, which has to take into account the interests of all stakeholders, including shareholders.⁸⁷

Trafigura stated that restructuring was the only available option to Nyrstar and that Nyrstar would not be able to survive otherwise.⁸⁸ The Chairman of Trafigura also stated that given its long business relationship with Nyrstar, it should support Nyrstar under such circumstances.⁸⁹

Nyrstar said that funding from others who were not already familiar with its business was impossible because of the urgent need for funds, the various restrictions placed on its existing credit facilities regarding potential terms of new funding, and the impracticality of getting waivers from its existing creditors given the tight time constraints.⁹⁰ It added that Trafigura had the requisite expertise in Nyrstar's business, and the capacity to invest a large amount of funds within a short period of time.⁹¹

However, Iceberg Research challenged Nyrstar's argument, pointing out that obtaining such waivers from its existing creditors was only a formality which could be settled quickly – as long as the request was reasonable – as creditors would want to avoid a liquidity crisis and instead opt to give the company more time to repay its debts.⁹² Iceberg Research also argued that Nyrstar, being a publicly-listed company, is "not exactly a secretive business" and that if Nyrstar were to choose to sell its assets to raise funding, it would have been able to repay its debtors.⁹³

Other events also raised further suspicions about Nyrstar's actions. Nyrstar's statutory auditor, Deloitte Bedrijfsrevisoren (Deloitte), issued a qualified opinion for FY2018 on the basis that it was unable to obtain sufficient appropriate audit evidence to ascertain the completeness in disclosures of related party transactions and the company's relationship with Trafigura.⁹⁴

On 29 May 2020, the Financial Services and Markets Authority of Belgium (FSMA) announced an expansion of scope in its year-long investigation into Nyrstar, regarding the lack of crucial information relating to the restructuring exercise. The expansion in scope was to include information about the profitability of the Port Pirie smelter in Australia and Nyrstar's solvency and liquidity position at the end of 2018.⁹⁵ This investigation was previously initiated based on whistleblower information from the former head of internal audit services of Nyrstar, Gilbert Guinikoukou. He alleged malpractices between Nyrstar and Trafigura and filed two complaints with the FSMA.⁹⁶ It was later reported that Trafigura got the Swiss court to stop the whistleblower from discussing the matter with Belgian and Swiss authorities on the basis that he had "violated his obligations to corporate confidentiality and risked causing damage to the company that would be difficult to undo".⁹⁷ It has been alleged that Trafigura has a record of taking action against any adverse reporting of the company.⁹⁸

Shoot down those (Nyr)stars

On 30 October 2020, minority shareholders received some further good news when the President of the Corporate Court in Belgium approved their request to nominate a panel of experts to further investigate possible wrongdoing in the restructuring of Nyrstar.⁹⁹ Some of the minority shareholders' key arguments were: (a) violation of Belgian corporate governance rules and corporate law; (b) placement of Trafigura loyalists in Nyrstar's board and management positions to gain effective control of Nyrstar; (c) approval of excessive discounts to Trafigura despite the relationship agreement to transact at arm's length; (d) disposal of mining assets at below market prices; (e) causing Nyrstar to be in a liquidity crisis which was avoidable if Nyrstar had made use of the credit facilities available to it; and (f) taking the lead in a restructuring effort where minority shareholders were effectively excluded.^{100,101}

In its responses, Nyrstar claimed that its auditor, Deloitte, and external experts such as KPMG and Stonehouse Consulting had confirmed that the transactions with Trafigura were conducted on an arm's length basis.¹⁰² Furthermore, Nyrstar rebutted the argument that it disposed of its mining assets at below market prices in 2016 and asserted that such transactions were done through normal sales processes with appropriate selling prices, as supported by managing consulting firm FTI Consulting.¹⁰³ Additionally, Nyrstar argued that the restructuring was not only on market terms, but also the most optimal option for all stakeholders, according to analyses by third party experts such as Morgan Stanley, Grant Thornton and Duff & Phelps. Furthermore, Nyrstar said that the minority shareholders would have received "zero euros" in an insolvency scenario.¹⁰⁴

It was not an easy journey for minority shareholders of Nyrstar to obtain a favourable court decision. They faced multiple challenges throughout the restructuring process and their legal proceedings against Nyrstar's board. The legal system in Belgium has been described as one with "built-in impediments for swift and effective preventive action by minority shareholders when their interests are violated".¹⁰⁵

Specifically, minority shareholders often lack access to established advisory and expert firms, as well as key information to present their case.¹⁰⁶ In fact, the minority shareholders of Nyrstar largely relied on public information or information published by Nyrstar to further their case, which lacked credibility in their view.¹⁰⁷ Additionally, minority shareholders usually have to bear their own legal costs, while the defendants can depend on the huge financial resources of an organisation. These circumstances thus dissuade many minority shareholders in Belgium from making claims against the majority. Nyrstar's minority shareholders therefore relied on regulatory authorities to help their claims against Trafigura, during and after the successful restructuring of Nyrstar.¹⁰⁸

Nyrstar's minority shareholders previously claimed that the restructuring of Nyrstar occurred "without any information [given] to the shareholders" and that the shareholders had no say in the process, as Trafigura already had de facto control over Nyrstar.¹⁰⁹ Nyrstar subsequently responded in a frequently asked questions publication that the Belgium Corporate Law vests the restructuring decision with the board of directors, and shareholders are not required to vote on such decisions.¹¹⁰

On 3 June 2019, two shareholders requested Nyrstar to provide more information regarding Deloitte's report of non-disclosure by Nyrstar.¹¹¹ Nyrstar rejected the request, claiming that it had already provided sufficient information for shareholders to approve its annual accounts. The shareholders then turned to FSMA, which asked the Nyrstar board to postpone the vote on the approval of the annual accounts by five weeks.¹¹² However, Nyrstar's subsequent reply to the warning issued by FSMA to postpone the vote did not satisfy the shareholders. This prompted the two shareholders to submit a unilateral petition to the President of the Corporate Court in Belgium on 21 June 2019, just four days before the approval of the annual accounts was scheduled to be voted on during the Annual General Meeting (AGM).¹¹³

On 22 June 2019, Nyrstar agreed to delete the resolutions pertaining to the annual accounts from the agenda until the audit report is available, but announced that the AGM would still take place on 25 June 2019. Nyrstar's announcement came two days before the court granted the two shareholders' request in full.¹¹⁴

After Deloitte had issued the audit report on 27 September 2019, Nyrstar's board convened a new AGM on 5 November 2019, with the approval of the annual accounts for FY2018 and the discharge of the directors on the agenda.¹¹⁵ The annual accounts were approved, albeit by "a majority against a minority".¹¹⁶ Minority shareholders alleged that the meeting was organised inappropriately, given the lack of paper documents, food or drink, and the absence of interpreters after 7pm, even though the meeting ended at 8.45pm.¹¹⁷

A fortuitous absence

The attendance quorum necessary for the amendment of the articles of association was not met on 5 November 2019.¹¹⁸ Nyrstar then called for an Extraordinary General Meeting (EGM) on 9 December 2019 to vote on the resolution of the board of directors in accordance with the alarm bell procedure of Section 633 of the Belgian Companies Code, which required a decision on the dissolution of Nyrstar.¹¹⁹ The surprise absence of Trafigura from this EGM allowed the minority shareholders, representing only 2.83% of the total shareholders, to successfully reject the proposed continuation of activities of Nyrstar.¹²⁰ This meant the effective dissolution of Nyrstar.

The minority shareholders could not have achieved this result in the presence of Trafigura. Their rejection was a “protest vote against the restructuring”, as they wanted to avoid a mischaracterisation that voting in favour of the continuation of the activities would have implied approval of the restructuring.¹²¹

Heading to the court

After the vote to continue the operations of Nyrstar was rejected on 9 December 2019, the board proposed to “deliberate and resolve upon the voluntary dissolution and liquidation” of Nyrstar as one of the agendas in the upcoming shareholders’ meetings on 25 March 2020, in accordance with Section 633 of the Belgian Companies Code.¹²² This agenda was scheduled under the second of the two consecutive EGMs to be held on 25 March 2020. A third general meeting was also scheduled to be held on the same day. However, the three meetings – one general meeting and two consecutive EGMs – were then postponed until 2 June 2020, due to the COVID-19 pandemic.¹²³

On 27 April 2020, the minority shareholders brought a writ of summons before the President of the Antwerp Commercial Court, Antwerp Division. They sought to appoint a panel of company law experts to “gather evidence in order to be able to initiate an informed procedure to remedy an impairment of the company’s interest, either to have it repaired or to recover the resulting damage to the company”.¹²⁴

Given the lack of physical attendance at the three meetings on 2 June 2020 due to the pandemic, as well as the pending court decision as to whether a panel of experts should be appointed, a group of minority shareholders informed Nyrstar of their intent to make additions and amendments to the original agendas and proposed resolutions for the meetings on 2 June 2020.¹²⁵

The changes to the agendas included the postponement of the 2 June 2020 general meeting. It was suggested that the said general meeting should be included as part of the 2020 AGM, which “should be held on the last Tuesday of June” (30 June 2020).¹²⁶

Another requested amendment related to the proposed resolution for the second agenda of the 2 June 2020 general meeting. The second agenda involved the liability claim made against

both the former and current directors of Nyrstar for the errors committed in the FY2019 and FY2020.¹²⁷

The minority shareholders also requested to postpone the second EGM scheduled for 2 June 2020.¹²⁸ They alleged that the board abused the “Corona measures to prohibit physical presence” to make “any discussion on the dissolution or restructuring of the company among the shareholders and between the shareholders and the board of directors impossible”.¹²⁹ In addition, the second EGM should be postponed due to the ongoing summary proceedings brought before the Antwerp Commercial Court regarding the appointment of the panel of experts.¹³⁰

At the same time, the minority shareholders wanted to postpone the decision on dissolution until the following conditions are met:¹³¹

- i) Physical attendance at the general meeting is possible and/or an actual discussion can be organised at the general meeting;
- ii) The consolidated annual financial statements audited by the statutory auditor have been approved until the date of closing of the restructuring on 31 July 2019; and
- iii) A final decision with the authority of res judicata on the appointment of a company law expert is available.

On 18 May 2020, the newly proposed items to the agenda were added to the three meetings originally scheduled for 2 June 2020.¹³²

Finally, on 2 June 2020, Nyrstar held the general meeting and two consecutive EGMs, where the various requests made by the minority shareholders regarding the changes to the agenda and proposed resolutions were put to a vote. In yet another setback for the minority shareholders, the proposed resolutions regarding the postponement of the general shareholders’ meeting and the liability claim against the directors and former directors of the company were rejected¹³³ by 76.26% of the votes.¹³⁴ Additionally, the attendance quorum for the two EGMs were not met,¹³⁵ hence the request to postpone the EGMs was not approved and was adjourned to 30 June 2020.¹³⁶

The conclusions arising from the various meetings on 2 June 2020 prompted the FSMA to publish a press release on the same day, as it voiced support for the postponement of the decision on the dissolution of Nyrstar “until at least three months after the court decision” has been made regarding the appointment of a panel of experts. Nyrstar continued discussions with FSMA subsequent to the press release.¹³⁷

While discussions were still ongoing, the minority shareholders served another summons in preliminary relief proceedings on Nyrstar, before the President of the Antwerp Corporate Court, Antwerp Division. This was aimed to prohibit Nyrstar from holding the shareholders’ meetings on 30 June 2020 with the dissolution of Nyrstar on the agenda of the second EGM.¹³⁸

The minority shareholders wanted the court to order that the decision on dissolution must be postponed “until three months after a final report will have been issued by a body of experts whose appointment is requested in separate proceedings before the court, or, alternatively until three months after a final decision will have been rendered in the aforementioned proceedings regarding the appointment of a body of experts”.¹³⁹ Four days before the planned EGM on 30 June 2020, the Antwerp Corporate Court dismissed the former request but accepted the latter claim for a postponement.¹⁴⁰

To comply with the court order, Nyrstar decided on 26 June 2020 to postpone the second EGM planned for 30 June 2020, which had the resolutions regarding the proposal for dissolution of the company on the agenda. The other meetings – the AGM and the first EGM – which were scheduled for 30 June 2020 did eventually occur.¹⁴¹ All items on the agendas of the AGM and EGM were approved, with the exception of the second item on the agenda of the EGM relating to a change of the company name from Nyrstar N.V. to NYR Holding.¹⁴²

Changing (Nyr)stars

Prior to the restructuring and legal challenges, there were significant changes in the Nyrstar board and management team which raised some eyebrows among observers and analysts.¹⁴³

Since 2015, the Nyrstar board has between six and eight directors, with NEDs making up the majority of the board and the CEO usually being the only executive director. After Nyrstar entered into the relationship agreement with Trafigura in November 2015, through the latter’s wholly-owned subsidiary Urion Holdings (Malta) Ltd, Trafigura was able to nominate a predetermined number of directors to Nyrstar’s board without constituting a majority of the board.¹⁴⁴ This agreement was struck during the period when Trafigura’s shareholding in Nyrstar had steadily increased from 15.30% in 2014,¹⁴⁵ to 20.02% in 2015¹⁴⁶ and 24.64% in 2016.¹⁴⁷

In 2014, when Trafigura increased its shareholding in Nyrstar to 15.30%, the incumbent CEO, Roland Junck, resigned.¹⁴⁸ Subsequently, before Trafigura increased its shareholding to 20.02% in September 2015,¹⁴⁹ Trafigura proposed to nominate two new directors – Martyn Konig and Christopher Cox – to Nyrstar’s board in April 2015.¹⁵⁰ Bloomberg reported that shareholders of Nyrstar claimed that the proposal was “unsolicited” and that the nomination was submitted too late for the AGM on 29 April 2015.¹⁵¹ Trafigura disagreed with these claims, stating that it had given Nyrstar “ample time to interview and assess the candidates”.¹⁵² Eventually, at the AGM, shareholders approved the appointment of the two new board members.¹⁵³

The nomination of Konig and Cox to Nyrstar’s board also raised suspicions. Philip Ngotho, an analyst at ABN Amro Holding N.V., predicted that the nomination was a step for Trafigura to “gain more control over Nyrstar and ... it will fuel further speculation of a potential takeover.”¹⁵⁴ He reasoned that the nomination would make a takeover by Trafigura “smoother and less hostile if Nyrstar’s board of directors [had] a friendlier stance”.¹⁵⁵ The takeover indeed became a reality.

Are the stars aligned?

There were doubts about the independence of the two new directors. König has been a consultant advisor, and previously Chief Investment Officer,¹⁵⁶ to T Wealth Management SA (T Wealth) before his appointment to Nyrstar in 2015.¹⁵⁷ T Wealth had only separated from Galena Asset Management, a Trafigura affiliate and the private investment arm of Trafigura Group, in June 2015.¹⁵⁸

However, at an AGM on 25 June 2019, König clarified that he has no other relationship with Trafigura, apart from receiving an annual salary and bonus – which depended on the performance of the fund – from T Wealth, while T Wealth is “completely independent from Trafigura”.¹⁵⁹ Yet, T Wealth is known to be the asset management fund for most of the senior management of Trafigura. Coming under severe scrutiny, König once again reiterated his independence, stating that joining Nyrstar’s board was “the worst decision” he has made in his life.¹⁶⁰

There have been several changes to König’s role on Nyrstar’s board since his nomination in 2015. During the AGM on 27 April 2016, König was elected as the Non-Executive Independent Chairman, one year after he had joined the board.¹⁶¹ He held the position until 18 January 2019, when he took up the role of Executive Chairman. As the Executive Chairman, König represented Nyrstar “during negotiations with stakeholders in the capital structure review process”,¹⁶² which ultimately led to the takeover by Trafigura. After the completion of the capital restructuring process, König was reappointed as Non-Executive Chairman on 5 November 2019, which remains his current role today.¹⁶³

Apart from König’s relationship with T Wealth, his position as an NED on the board of Euromax Resources Ltd. (Euromax) since August 2012¹⁶⁴ also resulted in further complications. Euromax is a publicly-listed Canadian company involved in the “building and operating the Illova-Shtuka copper project in Macedonia”.¹⁶⁵ In April 2018, Galena Resource Equities Limited (Galena), a Trafigura affiliate, became a shareholder of Euromax, before increasing its shareholding to 53.1% in March 2019.¹⁶⁶ Private placement funding was also conducted between Galena and Euromax in 2019.¹⁶⁷ The transactions between Galena and Euromax have thus led to a perceived lack of independence of König among shareholders. During the AGM held on 5 November 2019, several shareholders questioned if König could truly be independent if he holds a position in Euromax and contested the claim that König is independent.¹⁶⁸ In reply, König asserted that he is “fiercely independent”, declaring that “all board decisions” on Euromax had been made independently in Nyrstar.¹⁶⁹

Another board member who had pre-existing relations with Trafigura was Cox. At the time of his appointment to Nyrstar’s board, he was serving on the Trafigura Supervisory Committee and was also formerly the head of the non-ferrous and bulk trading division at Trafigura. Between March and December 2011, Cox was also a member of Trafigura management board, and he was a member of the Trafigura board of directors from October 2013 to September 2014. Cox is also no stranger to the industry, having worked at Gold Fields of South Africa previously.¹⁷⁰ As part of the relationship agreement, Cox was considered as one of the “Trafigura Directors” who was non-independent and nominated by Trafigura in 2015.¹⁷¹

Cox held his role until 31 December 2018, when his mandate was terminated after the general shareholders' meeting for FY2018. His reappointment was not proposed at the general shareholders' meeting following the termination.¹⁷²

Come on board!

Konig and Cox became members of the NRC of Nyrstar after joining the company's board in 2015. One of the roles of the NRC is to "make recommendations to the board of directors with regard to the appointment of directors".¹⁷³

While Konig and Cox were members of the NRC, Jesús Fernandez was appointed as an NED on Nyrstar's board on 27 April 2016. Fernandez was the head of merger and acquisition (M&A) and sat on the board of the mining division of Trafigura Group at the time of his appointment. Fernandez also concurrently served as a board member of numerous companies, including Atalaya Mining PLC, Bowie Resource Partners, Mawson West Ltd. and various subsidiaries of Trafigura.¹⁷⁴ He was also a principal of the Galena Private Equity Resources Fund. Nyrstar disclosed in its 2016 annual report that Trafigura is a related party to both Cox and Fernandez, although it was stated that their various roles do not "entail a direct personal conflict of interest".¹⁷⁵

After Fernandez's appointment to the Nyrstar's board, he became a member of the Health, Safety, Environment and Community Committee (HSECC), AC and NRC.¹⁷⁶ He remained in these committees until 2018, before his departure from Nyrstar on 25 February 2019.^{177,178}

It was reported that Fernandez left Nyrstar to assist Trafigura in the negotiations regarding Nyrstar's capital structuring process and his resignation would ensure clarity and avoid any potential conflict of interest.¹⁷⁹ He re-joined Trafigura in 2019 and continues to be the head of M&A for Trafigura today.¹⁸⁰

In 2016, in order to "further bolster performance" and "execute the current strategy" of Nyrstar, there was a shake-up of the senior management structure in Nyrstar.¹⁸¹ On 13 December 2016, Hilmar Rode was appointed as an executive director on Nyrstar's board, after taking on the role of CEO in the same month.¹⁸² This was the same year when Konig became Chairman of the board. Rode has vast experience in the metals industry, specifically in relation to the smelting business. He previously held senior management roles in other mining companies, such as BHP Billiton and Glencore. Rode also led a restructuring and business optimisation project at Glencore's Kazinc operation in Kazakhstan, prior to joining BHP Billiton.¹⁸³

Following the completion of Nyrstar's restructuring exercise on 31 July 2019, Rode's three-year stint at Nyrstar came to an end on 30 September 2019. Thereafter, he re-joined Glencore and subsequently Sibelco Group as CEO.¹⁸⁴

Ties that bind

Apart from the close relationships between members of Nyrstar's board and Trafigura, there were also connections between members of the management team in both companies.

In 2015, Christopher Eger was appointed as CFO of Nyrstar. Prior to joining Nyrstar, Eger was a senior member of the M&A team at Trafigura. He also worked with metals and mining companies on debt and equity financing and M&A at the investment banking arm of Bank of America Merrill Lynch.¹⁸⁵

Eger's appointment to the management team of Nyrstar came under the spotlight due to his ties to Trafigura. It was alleged that Nyrstar approached Trafigura to look for someone to fill the CFO position.¹⁸⁶ Late 2015 was also a crucial period for Nyrstar, as it was suffering from the "biggest commodity rout since the financial crisis".¹⁸⁷ Concurrently, Nyrstar was preparing to launch its third equity offering since 2011 to raise up to €275 million to meet a looming debt repayment. Ultimately, Trafigura agreed to underwrite part of this fundraising.¹⁸⁸

Eger's appointment also caught the attention of regulators in Brussels, as they were assessing if Trafigura had taken de facto control of Nyrstar. With an impending prepayment deal between the two parties involving up to €170 million forming part of Nyrstar's refinancing package, as well as the commencement of a deal which would result in Trafigura supplying Nyrstar zinc concentrate from January 2016, there were growing suspicions about the close relationship between the two parties.¹⁸⁹ Eger subsequently stepped down as CFO to "pursue other opportunities" on 3 May 2018.¹⁹⁰

Star awards for (Nyr)star performers

Apart from an AC, a NRC, and a HSECC, Nyrstar's board set up a Special Committee to "assist the board in the day-to-day supervising and reviewing of strategic financing matters and any capital structure review" in October 2018.¹⁹¹

The Special Committee was made up of Mike Corner-Jones, who was the Chairman of the committee, Jane Moriarty, Konig, Cable and Fahy. The committee's role involves the supervision of the recapitalisation proposal, negotiation with various creditors and the conducting of a liquidity review, among other responsibilities. The Special Committee was said to have met frequently for the "efficient operation of the Special Committee and the board".¹⁹² In total, the committee held 70 meetings from 2018 to September 2019, a number far exceeding that of the AC (four in 2018 and 10 in 2019), NRC (three in 2018 and four in 2019) and the HSECC (three in 2018 and one in 2019).¹⁹³

It was further disclosed that in March 2019, Fahy, Cable and Moriarty each received additional remuneration of €10,000 for being members of the Special Committee. The Special Committee was dissolved on 31 July 2019 after the completion of the capital restructuring.¹⁹⁴

The restructuring of Nyrstar not only introduced a new Special Committee, but it also entailed changes to the company's remuneration structure. These changes were proposed by Nyrstar's NRC, which makes decisions on the remuneration structure by seeking independent advice from external professionals. The policies are framed and redesigned to "retain talented employees and meet shareholders expectations".¹⁹⁵

In 2016, the NRC was made up only of NEDs and a majority of IDs, as per the Belgium Companies Code.¹⁹⁶ The Committee was chaired by Konig, while the members were Cable, Fahy and Fernandez. Konig was previously a member of the NRC for one year in 2015 and was deemed to have satisfied the requirements of having the "the necessary expertise on remuneration policy" pursuant to the Belgium Companies Code,¹⁹⁷ while Fahy and Fernandez were only appointed as board members in 2016.¹⁹⁸

In the same year that Konig became Chairman of Nyrstar's board and Chairman of the NRC, the board submitted proposals to shareholders to make the following changes to the remuneration structure:¹⁹⁹

1. Increase the remuneration paid to the Chairman of the AC from €20,000 to €30,000 due to the amount of preparatory work involved compared to other committees;
2. Remunerate certain NEDs in whole or partly in deferred share units instead of cash;
3. Renew the powers of the board of directors to pay out entitlements to beneficiaries under the annual incentive plan (AIP) in the form of Shares instead of cash; and
4. Renew the long term incentive plan for a term of 10 years.

This review was done to ensure the remuneration policies were "in line with market practice".²⁰⁰

The abovementioned changes to the remuneration structure included paying NEDs in deferred share units instead of cash. These shares will not vest immediately but will "effectively vest and be delivered on the earlier of the end of the director's mandate of the eligible director, or a change of control" over Nyrstar.²⁰¹ This was done to enable the NEDs "to link their effective remuneration to the future performance of Nyrstar and to strengthen the alignment of their interest with the interest of the company's shareholders".²⁰²

Two of the directors who were eligible for the deferred share units plan were Konig and Cox. The full amounts – €70,000 each – of both Konig's and Cox's remuneration, which would otherwise have been paid in cash, qualified for this scheme.²⁰³ This change in remuneration structure was also in line with Article 556 of the Belgian Companies Code, which states that shares can be delivered upon the occurrence of a change of control over a company.²⁰⁴

The board of directors subsequently proposed to further revise the remuneration structure to remunerate certain NEDs in whole or partly in deferred share units instead of cash and to renew

the powers of the board to pay out entitlements to beneficiaries (including members of the MC and directors, where applicable) under the AIP in the form of shares instead of cash.²⁰⁵

Konig continued to remain as Chairman of the NRC, except during the period when he was appointed as Executive Chairman to oversee the capital restructuring process. Moriarty replaced him as NRC Chairman during this period.²⁰⁶

The special award goes to...

Before the restructuring was completed, Nyrstar's NRC, along with the board, provided for additional remuneration incentives in view of the capital structure review process in 2018, with the "appropriate conflict of interest procedures being applied".²⁰⁷

To retain talents after the capital restructuring, it was disclosed in both 2018 and 2019 annual reports that Nyrstar paid then CEO Rode an ex-gratia payment of €221,567 in 2019. Another ex gratia payment of approximately €1.1 million was also paid to him "as the retention condition of the CEO not having resigned, nor having been dismissed for cause under Swiss law, until the earlier of (a) 31 December 2019 or (b) the successful conclusion of the Restructuring" was met by the CEO on 31 July 2019 after the successful restructuring of Nyrstar.²⁰⁸

Separately, as Konig became Executive Chairman from 18 January 2019 to facilitate the capital structure review, he was paid €119,646 in the first quarter of 2019. He received yet another ex gratia payment of €677,994 as he fulfilled a retention condition similar to Rode's.²⁰⁹

Another three members of the MC were paid an aggregate amount of €487,465 in September 2019 as part of the board's strategy to "secure continuity during the capital restructure process".²¹⁰ This condition was met by the three members.²¹¹ However, it was not disclosed who the three members were.

Simultaneously, the interim CFO, Roman Matej, who was appointed in January 2019, was paid €206,969.^{212,213} This amount was disbursed in two payments – 50% in June 2019 and a further 50% in December 2019. These payments were only given after he satisfied the condition that he had remained in Nyrstar when the payments were due.²¹⁴

Under the ESG radar?

"It's really incredible to think that a company will use the legal and PR profession so coyly to end up making their name world famous for corporate irresponsibility. The irony is that three months ago no one outside their sector had actually heard of this firm."

– Brendan May, managing director of Planet 2050²¹⁵

As an unlisted company with no public investors, Trafigura does not face the demands that publicly-listed companies face from institutional investors regarding their ESG performance. However, the company has been under public scrutiny after several ESG-related scandals.

Dumping toxic waste

In 2005, Trafigura purchased a large consignment of coker naphtha, an unrefined gasoline. However, it had to figure out a way to reduce its sulphur content before selling it.²¹⁶ To do so, the coker naphtha underwent caustic washing, which was completed on board of a vessel, Probo Koala.²¹⁷ 500 tonnes of toxic sulphuric waste was produced.²¹⁸

Internal Trafigura emails revealed that the company knew even before the caustic washing commenced that there would be considerable challenges in disposing of the toxic waste.²¹⁹ Trafigura engaged Amsterdam Port Services (APS), a Dutch waste management company,²²⁰ to deal with the waste, calling it “harmless slops”.²²¹ However, when treatment began, APS found the waste to be much more polluted than it initially believed, such that sophisticated treatment was required to process it. With the greater complexity of treatment required, APS raised its asking price. Trafigura did not agree to the higher cost, and brought the waste back on board Probo Koala, which transported it from Europe to Ivory Coast in West Africa.²²²

In August 2006, Trafigura engaged a newly licensed company, Compagnie Tommy, to dispose of the waste.²²³ However, the contract did not specify any requirement to properly treat the waste before disposal.²²⁴ The foul smell coming from the waste led the local dumpsite to close. Hence, truck drivers proceeded to transport and dump the waste at 18 spots around Abidjan.²²⁵ This improper disposal of the waste allegedly led to thousands of Ivorians suffering from nausea, breathing difficulties, vomiting and diarrhoea. Furthermore, at least 10 lives were reportedly lost as a result of the improperly disposed waste.²²⁶ The health scare led to governmental precautionary measures, such as the suspension of school activity and fishing, destruction of vegetation and culling of livestock near dumping grounds.²²⁷

Trafigura denied responsibility for the disposal of untreated toxic waste. It blamed Compagnie Tommy, claiming that it had appointed the waste handlers in good faith, believing it would dispose of the waste safely and properly.²²⁸ Trafigura allegedly threatened to sue anyone who disagreed with its stance and sued the BBC for publishing material that Trafigura’s lawyers disagreed with.²²⁹

In 2007, Trafigura reached an out-of-court settlement with the Ivorian government to pay US\$198 million for the clean-up and to support victims.²³⁰ It paid a further US\$1,546 to each of the 31,000 claimants, under a lawsuit brought by Leigh Day & Co.,²³¹ which was far lower than the £6,000 (US\$9,764) that each victim originally asked for.²³²

Trafigura also allegedly attempted to conceal the severity of the pollution caused by its waste disposal. On 11 September 2009, Trafigura obtained an emergency super injunction to stop British newspaper The Guardian from releasing a report by Minton, Trehan and Davies Ltd, a consultancy company.²³³ This report, which was later published, concluded that the waste dumped was “capable of causing severe human health effects through inhalation and ingestion. These include breathing difficulties, nausea, eye irritation, skin ulceration, unconsciousness and death.”²³⁴ Trafigura alleged that the draft report was a general study not specific to Trafigura’s case.²³⁵ It also claimed that the waste could only at most cause temporary low-level flu symptoms.²³⁶

Trafigura received backlash as critics argued that it had transported toxic waste out of Europe, and passed it on to a company that was incapable of dealing with the high toxicity of the waste which would simply dispose of it in a city dump.²³⁷ Many argued that Trafigura should have known that extra diligence was required in the waste disposal, especially after APS found the waste to be greatly contaminated, requiring sophisticated treatment.²³⁸

Organisations such as Amnesty International and Greenpeace have called for transparency from Trafigura for the sake of the victims still suffering from the waste dumping 10 years on. They said that the Ivorian victims “live in fear and without basic answers about how the waste has affected their health”.²³⁹

In August 2012, Trafigura declined Amnesty International’s request for it to disclose the contents of the toxic waste, citing that the waste contents were disclosed in U.K. court proceedings. However, the court disclosures were based on tests conducted by a Dutch government agency well before the waste dumping.²⁴⁰ Additionally, Trafigura’s claims that the most severe effect of the waste on an individual’s health was low-level flu symptoms was based on evidence which was made confidential after a 2009 court settlement.²⁴¹

Lucy Graham, an Amnesty International researcher, pointed out that if Trafigura truly had nothing to hide, it would be transparent and disclose the full details to allow the victims to move on.²⁴²

Chemical explosion in Norway

Just nine months after the Ivory Coast waste disposal incident, Trafigura was involved in yet another scandal. On 24 May 2007, a tank containing waste from Trafigura exploded in Sløvåg Gulen, releasing sulphurous fumes that caused Norwegians nearby to suffer environmental and health effects,²⁴³ such as chemically red sore throats.²⁴⁴ This waste was identical to the waste that had been dumped in Ivory Coast²⁴⁵ and was being handled by Vest Tank, which was engaged by Trafigura for waste disposal.²⁴⁶

Norwegian authorities accused Vest Tank of not having the appropriate permits to perform the caustic washing for Trafigura. Vest Tank insisted it had permission while Trafigura insisted it complied with government regulations when dealing with Vest Tank.²⁴⁷ While Norwegian police decided not to prosecute Trafigura for the explosion, it requested multiple times to interview the Trafigura employees involved. However, Trafigura was not willing to consent to the interviews, and tried to set conditions before deciding if it would cooperate with the Norwegian police.²⁴⁸ Trafigura also declined to comment on the scandal to reporters.²⁴⁹

Trading of toxic diesel in Africa

In 2016, Public Eye published a “Dirty Diesel” report after three years of research, exposing Swiss commodities companies for taking advantage of lenient African standards to sell highly sulphurous fuels in Africa.²⁵⁰ These companies – including Trafigura – were found to be blending cheap but toxic petroleum products to create “African quality” fuel, which had high sulphuric content and other toxic substances, to be sold in Africa.²⁵¹ This blending technique deliberately reduced fuel quality and was done as it was cheaper and would thus increase profit margins.²⁵²

This “African quality” fuel, while compliant with Africa’s low fuel standards, would violate European standards as its sulphur content was “up to 378 times higher than levels permitted in Europe”, and contained harmful substances banned in Europe.²⁵³ When burned, this low-grade fuel would release sulphur into the atmosphere, resulting in environmental consequences, such as air pollution and health effects including respiratory diseases.²⁵⁴

Trafigura responded to the report, citing that the onus of setting fuel standards is on national governments and that Trafigura supplies fuels that meet national standards in all its markets.²⁵⁵ It also stated that it is doing its part to support human rights by being a member of the African Refiners Association (ARA) and supporting its efforts to improve fuel quality in Africa.²⁵⁶

Public Eye responded to Trafigura’s claims, accusing the company of “systematically exploit[ing]” Africa’s low fuel standards to increase profits.²⁵⁷ It further added that it saw no reason for Trafigura’s inability to deliver fuel that is of higher quality than the national standards and called for Trafigura to deliver European quality fuels to Africa.²⁵⁸

Operation Car Wash

Operation Car Wash started as an investigation on agents who used small businesses to launder money.²⁵⁹ However, it was soon discovered that these agents were working on behalf of an executive from *Petróleo Brasileiro S.A.* (Petrobras), a Brazilian state-owned oil and gas company,²⁶⁰ which eventually led to the uncovering of a vast and intricate web of corruption. The operation evolved into the biggest corruption scandal in Brazil’s history, involving some of the world’s biggest companies, political parties and billionaires.²⁶¹

Global Witness, a London-based anti-corruption and investigative group,²⁶² raised concerns about Trafigura engaging middlemen with links to the Car Wash scandal.²⁶³ This was mentioned in Global Witness’ report published in November 2018, which was based on previously unreported court materials. In the case of Trafigura, the report highlighted that according to Petrobras, Trafigura was under police investigation in Brazil, and two of the central figures in the Car Wash scandal exchanged messages²⁶⁴ about orchestrating bribes amounting to US\$20 million.²⁶⁵ Trafigura responded that the report was “a recycling of ambiguous commentary and conjecture, and beyond that, it provides no substantiated evidence of any wrongdoing by Trafigura”.²⁶⁶

In December 2018, it was reported that Trafigura was under investigation for bribes of US\$4.1 million to secure deals for trading petroleum products and rental of storage tanks.²⁶⁷ In connection to this, Brazilian prosecutors accused two former Trafigura executives, Mariano Marcondes Ferraz and Marcio Magalhaes, of the wrongdoing although they were not charged.²⁶⁸

According to prosecutors, one of the bribery schemes was allegedly masterminded by former Trafigura executives Ferraz and Magalhaes, as well as Carlos Herz – a middleman for giving bribes to Petrobras officials.²⁶⁹ Trafigura signed a contract hiring Herz as an agent for his “experience and networks” to “develop business opportunities”.²⁷⁰

Herz regularly invoiced Trafigura for “consultancy services” from mid-December 2012.²⁷¹ However, the document trails showed that Herz passed a portion of money to a Petrobras official. In one case, Herz emailed Ferraz saying he had paid out US\$200,000 to the Petrobras official, and needed to pay US\$235,000 more.²⁷² After receiving funds from Trafigura, Herz disguised these payments. He received invoices from purported Chinese companies which allegedly turned out to be money launderers, reflecting the rough amounts that he needed to pay Petrobras – US\$200,000 for “consulting services related to purchase and logistic procedures of stationery, hardware, sanitary toilets” on 4 January 2013, and US\$235,200 for purported sanitary services on 24 January 2013.²⁷³ These payments to Herz continued until 2014.²⁷⁴ Trafigura claimed there was nothing improper about approving the payment to Herz and the allegation that “Trafigura’s current management knew that payments to an intermediary would be used to make improper payments to employees of Petrobras is not correct”.²⁷⁵ Trafigura also added that it has a zero tolerance policy on bribery and corruption.²⁷⁶

The report by Global Witness also alleged links Trafigura had with Jorge Luz, who was known as the “Deacon of Bribes” in Brazil.²⁷⁷ Luz and his son were allegedly planning to benefit from Petrobras’s petroleum trade through an oil contract with Trafigura, getting bribes of US\$20 million.²⁷⁸ According to an insider, Trafigura would lend Petrobras funds under an oil-backed loan, to be repaid through a discount on future oil sales.²⁷⁹ Trafigura said that such contracts for pre-payments were not uncommon in the industry and admitted there was a contract offered to Petrobras. However, the proposal did not result in any agreement as Petrobras officials rejected it. Trafigura claimed that both Luz and his son were not retained by the commodity trader to lobby the proposal to Petrobras.²⁸⁰

In May 2020, Ferraz signed a cooperation agreement to share information with prosecutors in exchange for reduced penalties. He revealed that two of Trafigura’s directors, Larocca and Wainwright, approved bribes to obtain hundreds of oil fuel contracts. Ferraz also claimed that the heirs of Dauphin, the late founder of Trafigura, knew about the bribes and approved them.²⁸¹

In December 2020, based on Ferraz's information, Brazilian investigators began pursuing the criminal probe of Larocca and Wainwright. However, neither individual has been charged to date.²⁸² Brazilian prosecutors also filed a civil lawsuit relating to corruption allegations involving Petrobras to seek damages from Trafigura. It was alleged that Trafigura paid US\$1.5 million in bribes to former employees of Petrobras' commercial area to secure 31 irregular fuel oil purchases and sale transactions between May 2012 and October 2013.²⁸³ Trafigura profited from this and caused losses to Petrobras.²⁸⁴ The lawsuit sought more than US\$77 million from Trafigura.²⁸⁵ In addition, prosecutors used the information provided by Ferraz to request the freezing of US\$187.55 million in assets from individuals involved, including the heirs of Dauphin.²⁸⁶

In July 2021, it was reported that the commercial arm of Mexican state oil company, Petroleos Mexicanos (Pemex), has temporarily banned new business with Trafigura, due to investigations into the latter's conduct in several countries in Latin America.²⁸⁷

Trafigura finally figuring it out...or not?

"It is disingenuous for Trafigura to tout a superficial transparency record at a time when the victims of 2006 are left in fear for their health because of its opacity."

– Lucy Graham, researcher at Amnesty International²⁸⁸

Trafigura has made efforts to rebrand itself as a socially responsible leader in the commodities industry. In 2014, Trafigura was the first commodities company to join the Extractive Industries Transparency Initiative.²⁸⁹ This initiative implements the "global standard to promote the open and accountable management of oil, gas and mineral resources".²⁹⁰ Additionally in 2016, it held a forum on supporting responsible trade.²⁹¹ The timeline of rebranding attempts from 2014 to 2016 coincided with Public Eye's 2016 exposé on Trafigura regarding the alleged exploitation of Africa's low fuel standards to sell cheap, toxic fuel.

More recently, Trafigura has continued to take steps to rebrand and maintain its image in the industry. On 28 September 2020, Trafigura released a press statement that it had partnered with IFM Investors to form a joint venture, Nala Renewables Switzerland Sàrl (Nala Renewables), to invest in renewable energy projects in markets that Trafigura operates in.²⁹²

On 6 January 2021, it was announced that Nala Renewables would invest €30 million in a project to develop battery energy storage systems at Nyrstar's zinc smelting facility. In connection with this, Nyrstar's CEO Daniel Vanin announced that Nyrstar "collaborates with partners who help make the shift towards more green energy and climate actions".²⁹³

However, at around the same time, it was reported that Trafigura invested €1.5 billion for a 10% stake in Vostok Oil, a giant Arctic oil project backed by Russia's President Vladimir Putin, in a partnership with PJSC Rosneft Oil Company (Rosneft).²⁹⁴ Not only is the project highly controversial from an environmental point of view, Rosneft has a highly questionable reputation with very close links with President Putin through Rosneft's CEO, Igor Setchin. Both

Rosneft and Setchin are under U.S. sanctions.²⁹⁵ The investment in Vostok Oil was reportedly made through a Singapore-registered special purpose vehicle called CB Enterprises, which financed the deal with debt and equity. The Financial Times report said that corporate filings in Singapore showed the €5.755 billion syndicated loan facility for the project was organised by the Central Bank of Moscow, which also has ties to Rosneft and Setchin.²⁹⁶

Epilogue

Nearly two years after the restructuring of Nyrstar was completed, Belgian regulator FSMA still has not published the outcome of its ongoing investigations. This has left Nyrstar's minority shareholders, who are highly dependent on regulatory authorities to protect their rights, disappointed and frustrated. A recent report included a fresh allegation by minority shareholders that Nyrstar hid some profits in its corrected FY2017 accounts by combining a negative accounting correction of €51 million with almost €100 million of extra profit and presenting it as a positive effect of €46 million in the metals processing division.²⁹⁷ Who will prevail in the tussle between Trafigura and the minority shareholders of Nyrstar remains to be seen.

At the AGM held on 29 June 2021, several resolutions were proposed by the minority shareholders. The resolution to decide that the current directors cannot be considered independent was not approved. The proposed resolution to require the board to convene, within a period of 60 days, a special general meeting to consider the appointment of one or more independent directors, became a source of dispute between the company and the minority shareholders. According to the company, part of the resolution requires amendments to the articles of association, and quorum required for such a decision was not reached. The minority shareholders disagreed with this interpretation. The company proceeded to put to vote only the part of the resolution instructing the board to convene a general meeting within 60 days to consider the appointment of one or more independent items. This was passed. A further resolution to follow certain procedures proposed by minority shareholders for the nomination of independent director candidates was not approved.²⁹⁸

Minority shareholders decided to boycott the EGM to amend the articles of association on 23 August 2021, calling it "an unsolicited, shameless legal charade that is actually without object". They also said that Nyrstar and Trafigura have already indicated that they will not accept an independent director, therefore "making the general meeting meaningless".²⁹⁹

On 2 September 2021, the Court of Appeal in Antwerp decided to postpone the decision on the nomination of the panel of experts until 22 February 2022.

On the ESG front, it remains unclear how far Trafigura has progressed to align its ESG practices to globally accepted practices or whether it will operate on different ESG standards compared to its publicly-traded peers.

Discussion questions

1. Evaluate the ownership structure of Trafigura compared to publicly-traded commodity traders such as Glencore and how the difference in ownership structures may affect their respective corporate governance.
2. According to Nyrstar, what are the reasons which led to the restructuring plan with Trafigura? Critically evaluate the reasons offered by Nyrstar. In such a situation, what are the duties of Nyrstar's board of directors? Do you think the directors have adequately discharged them?
3. Evaluate the changes in the board composition of Nyrstar prior to the restructuring and whether these changes created issues from a corporate governance standpoint.
4. Evaluate the independence of the directors on Nyrstar's board. To what extent do you think the board of directors of Nyrstar is responsible for the downfall of Nyrstar?
5. Based on the case, what are some challenges faced by minority shareholders of Belgian listed companies such as Nyrstar? Should there be better protection for minority shareholders and if so, what measures would you recommend be introduced?
6. Consider Trafigura's ESG scandals described in the case. Discuss to what extent have the fiduciary duties of directors, in particular the duty of care, been fulfilled? Critically evaluate Trafigura's involvement in these scandals from an ethical standpoint. Do you think a company's actions can be considered ethical as long as its actions are legal? Explain.
7. Evaluate Trafigura's responses when reports about its ESG scandals were published, as well as the company's subsequent efforts to rebrand itself as a socially responsible corporation. Do you think these rebranding attempts are superficial methods used by Trafigura to recover from the scandals, or has it genuinely changed for the better?
8. Comment on the adequacy of the current regulations for large unlisted companies such as Trafigura from an ESG perspective. Should Trafigura be subjected to the same standards as a company like Glencore? Explain.
9. As a privately-held company, Trafigura is subjected to less regulation and oversight, and does not face scrutiny from institutional investors such as pension funds and asset managers. Does this give Trafigura a competitive advantage as compared to its publicly-listed peers? Which stakeholders do you think would be most able to influence the company's conduct? Do you think Trafigura will eventually align its practices with those of its publicly-listed peers or will it continue to play largely by its own rules? Explain.

Endnotes

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