The Shareholder Rights and Activism Review

Sixth Edition

Editor

Francis J Aquila

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THE SHAREHOLDER RIGHTS AND ACTIVISM REVIEW

SIXTH EDITION

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PREFACE

In the years since the last financial crisis, shareholder activism has been on the rise around the world. Institutional shareholders are taking a broad range of actions to leverage their ownership position to influence public company behaviour. Activist investors often advocate for changes to the company, such as its corporate governance practices, financial decisions and strategic direction. Shareholder activism comes in many forms, from privately engaging in a dialogue with a company on certain issues, to waging a contest to replace members of a company's board of directors, to publicly agitating for a company to undergo a fundamental transaction.

Although the types of activists and forms of activism may vary, there is no question that shareholder activism is a prominent, and likely permanent, feature of the corporate landscape. Boards of directors, management and the markets are now more attuned to and prepared for shareholder activism, and engaging with investors is a priority for boards and management as a hallmark of basic good governance.

Shareholder activism is a global phenomenon that is effecting change to the corporate landscape and grabbing headlines not only in North America but also in Europe, Australia and Asia. Although shareholder activism is still most prevalent in North America, and particularly in the United States, activism campaigns directed at non-US companies now represent approximately half of global activism activity. This movement is being driven by, among other things, a search by hedge funds for diversified investment opportunities and a cultural shift towards increased shareholder engagement in Europe, Australia and Asia.

The covid-19 pandemic and other political and cultural events of 2020 have further heightened focus on corporate governance as well as environmental, social and political (ESP) considerations impacting public companies. Although the global crisis decreased activist campaign activity in the short-term, activism activity has since returned with full force as predicted. Moreover, practitioners generally expect to see activists further incorporate corporate governance and ESP themes into their activism campaigns.

As both shareholder activists and the companies they target have become more geographically diverse, it is increasingly important for legal and corporate practitioners to understand the legal framework and emerging trends of shareholder activism in the various international jurisdictions facing activism. *The Shareholder Rights and Activism Review* is designed as a primer on these aspects of shareholder activism in such jurisdictions.

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My sincere thanks to all of the authors who contributed their expertise, time and labour to this sixth edition of *The Shareholder Rights and Activism Review*. As shareholder activism continues to diversify and increase its global footprint, this review will continue to serve as an invaluable resource for legal and corporate practitioners worldwide.

Francis J Aquila
Sullivan & Cromwell LLP
New York
August 2021

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Chapter 16

UNITED KINGDOM

Filippo de Falco, Claire Jackson and Christian Boney[1]

I OVERVIEW

Shareholder activism in the UK has developed significantly in recent years to become a more prominent feature of listed company life. Originally seen as something of an import from the United States, activism within the UK has developed along a slightly different path to that in the US, not least due to the differences in legal framework between the two countries. The Companies Act 2006 (and its predecessors) contain numerous ways in which a shareholder can utilise even a relatively small shareholding to ensure that its voice is heard; as such, compared to the US (where there is a stronger deference to board decision-making, for example), the UK legal and regulatory framework provides a fairly benign environment within which activism can flourish. One of the dominant themes in the area of activism more recently has been the change in perception as to what constitutes activism or what renders someone an activist. Many of those who are termed activists by the media or the companies targeted would instead argue that they are engaged investors, providing the type of oversight and engagement that is actively encouraged by the new Stewardship Code. Others consider themselves as indistinguishable from private equity funds or other institutional investors. While we use the terms 'activist' and 'activism' for the purpose of this chapter, it is notable how the traditional, somewhat pugilistic vocabulary of 'campaigns', 'defence' and 'defeat' are gradually giving way to terminology more reflective of a constructive dialogue intended to yield positive results.

Another aspect of the improvement in reputation of the activist is that, whilst undoubtedly many activists are pursuing an agenda of value-release through some sort of corporate event, increasingly there are instances of activist shareholders championing environmental social and governance (ESG) causes and longer-term issues of sustainability. This can increase the activist's chances of winning the support of major institutional shareholders – who may be seeking similar outcomes themselves or might use the activist campaign as the impetus to reiterate broader concerns with management.

After a period of subdued shareholder activism in the first half of 2020, no doubt motivated by the uncertainty following the onset of the covid-19 pandemic and activists' reputational fears that their campaigns might be branded opportunistic, activism in the latter part of 2020 and beginning of 2021 has rebounded. A continuation of depressed and volatile share prices as the country emerges from covid-19 into the post-Brexit world, the impact

1 Filippo de Falco, Claire Jackson and Christian Boney are partners at Slaughter and May. Special thanks go to Gillian Fairfield for her valuable assistance in preparing this chapter.

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of actions taken by companies in response to the crisis and private equity funds looking to deploy capital accumulated during the pandemic, are likely to create fertile conditions for activism to continue to flourish.

II LEGAL AND REGULATORY FRAMEWORK

The paths along which activism has developed in the UK have reflected the fact that the UK's legislative framework, particularly as compared with the one that exists in the US for example, provides numerous statutory and common law devices for shareholders to express their views and garner the attention of both directors and other shareholders. The Companies Act 2006 (the Companies Act or the Act) provides numerous tools that empower shareholders to make their views known and to drive particular courses of action. Such methods are rarely used in isolation, but are very often combined with other, non-legal options of engagement, such as engaging with the board (whether privately or through public channels), conducting a press campaign and eliciting the views of other shareholders. However, while these non-legal options frequently do, in practical terms, pile often enormous amounts of pressure on the company to act and respond, they do not oblige it to do so. As such, the various shareholder rights enshrined in English company law are often combined with these non-legal, 'softer' options to act as a whip in case the company does not engage of its own volition.

i The Companies Act – shareholder rights

Almost without exception, activists will buy shares in the object of their attention. The intention may be to build a stake significant enough that it can be used to affect the outcome of voting on matters at general meetings, hopefully yielding a future profit, should the activist's intervention achieve the desired increase in share price. Whatever the size of stake that is built, holding shares will furnish the activist with various rights. Perhaps the most relevant shareholder rights under the Companies Act within the activist's toolkit, and the ones that have been most commonly used of late, are those that relate to general meetings. Any shareholder can attend a company's general meetings and may use the opportunity to pose questions to the board of directors and its chair (non-shareholders such as journalists, advisers and lobbyists may be granted entry at the chair's discretion, which is not always forthcoming). Section 319A of the Companies Act provides that a traded company must cause to be answered its members' questions relating to the business being dealt with at the meeting. There is some scope to push back on this, including if answering would involve disclosing confidential information or if the question has already been answered (i.e., this provides some protection against haranguing or time-wasting). Members holding 5 per cent of paid up share capital may, pursuant to Sections 303–306 of the Act, requisition a general meeting and suggest the text of a proposed resolution. Under Sections 338–340 of the Act, members of public companies who hold 5 per cent (or at least 100 members who have a right to vote and hold shares on which an average of at least £100 per member is paid up) can require resolutions to be put before an annual general meeting. These tools are being used more frequently in practice, with resolutions ranging from the appointment of a new, activist-nominated director, to resolutions to phase out activities that are not in alignment with the Paris Climate Agreement.

Those shareholders can also, under Sections 314–317 of the Act, require the circulation of a statement of up to 1,000 words regarding a matter to be dealt with at a general meeting and can, under Section 527 of the Act, require the company to publish a statement on its

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website about audit matters. At shareholdings above a certain level, activists may have the power to block certain resolutions or corporate activity, for example, those holding more than 10 per cent can, under Section 979 of the Act, block the squeeze-out of minority holdings following a takeover offer and those holding more than 25 per cent can block a special resolution in a general meeting, as well as being able to block an attempted takeover by way of scheme of arrangement.

ii Unfair prejudice

Section 994 of the Companies Act provides for a shareholder of a company to petition for relief against unfair prejudice, where the affairs of the company are being conducted in a manner that is unfairly prejudicial to the interests of members generally (or a subsection of them). Successful petitions are comparatively rare (although by no means unknown) and tend to be mainly confined to private companies, where relationships between the shareholders have soured and one faction is unhappy at the direction the company is taking. The most common order made by the court where it is satisfied that an unfair prejudice petition is with merit is to order the shares of the petitioner to be bought out.

iii Shareholder derivative actions

In extremis, a shareholder may also bring a derivative claim against the directors of a company under Section 260 of the Companies Act. This is a means by which the court may use its discretion to permit a member of the company to bring a claim – on behalf of the company itself – for certain wrongs committed by the directors. Claims may be brought for directors' breach of fiduciary duty, without any need for the director in question to have benefited from the alleged breach. However, the fact that any relief granted is for the benefit of the company, rather than the shareholder bringing the derivative claim, means that this is clearly not a route through which an activist may pursue his or her own personal agenda or grievances (and indeed if the court felt this was the case, they would generally refuse to permit the claim to proceed). As such, derivative claims may often be threatened but are rarely pursued.

iv Shareholder group action

Recently, however, there has been an increase in the number of shareholder group actions, particularly in relation to aggrieved investors who feel that they have suffered losses, due to a listed company falling short of its obligations to provide accurate and timely disclosure of matters relating to its securities. Two key weapons in relation to such claims are available to investors. One is Section 90 of the Financial Services and Markets Act 2000 (FSMA), which grants shareholders who have suffered loss because of untrue or misleading statements or omissions in a prospectus a right to be compensated, regardless of the shareholder's ability to show reliance on the prospectus in question (this is the closest UK law comes to the 'fraud on the market' theory that underpins US securities law class actions). The second is Section 90A FSMA, which creates a similar, but less claimant-friendly, regime for other market announcements (requiring the claimant to be able to show reliance). Importantly, under both sections, compensation is paid directly to the claimant-shareholder (and not to the company, as would be the case in a derivative action). Owing to the costs that litigation under either of these sections entails, litigation is likely to be affordable only where undertaken collectively by a large group of claimants. Institutional investors are increasingly showing willingness to lead the way, such as in the recent litigation brought under Section 90A FSMA against Tesco plc in respect of a 2014 market announcement of income and trading profits.

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Another example was the claim brought by thousands of institutional and retail investors against RBS under Section 90 FSMA, alleging that the prospectus from its 2008 rights issue did not properly and fairly present the bank's financial position and omitted relevant information (the claims were settled in 2017 before the matter got to trial).

v AGMs

The annual general meeting of a listed company inevitably becomes a central arena for the activist shareholder, not only because of the Companies Act rights the activist may have by virtue of their shareholding, but also because of various governance elements, which the activist can deploy to good effect. The AGM will include as part of its business the election or re-election of the company's directors (the UK Corporate Governance Code requires that listed company directors should be re-elected annually). This provides a powerful outlet for shareholder discontent. In addition, the Investment Association's launching of a public register of FTSE All-Share companies, to show where those companies have had significant (i.e., 20 per cent or more) votes against any of their AGM resolutions, has increased public and media scrutiny of these instances of shareholder dissent. The register stemmed from the Department for Business, Energy & Industrial Strategy's green paper on corporate governance, which focused on ways of strengthening the stakeholder voice in the boardroom. Any company that has a significant vote against any of its AGM resolutions is required by the UK Corporate Governance Code to explain, at the time of announcing the voting results, what consultation it will undertake with shareholders to understand the reasons behind the vote against, and will need to publish an update statement six months after that to describe what actions it has taken. Since its inception, the most commonly featured resolutions on the register have related to executive remuneration, with those relating to director re-election featuring a close second. Dissent on the subject of remuneration has intensified with the covid-19 crisis, as economic hardship and loss of workers' livelihoods have increased the scrutiny on whether executives are being too lavishly remunerated; where 'say on pay' resolutions to approve remuneration policies are opposed, this generally leads to agitation to vote against the re-election of the chair of the remuneration committee and in some instances against the chair of the board.

vi Disclosure of holding

Both activists building a stake and the companies in whom they are stakebuilding will be observing disclosure thresholds set by The Financial Conduct Authority (FCA) in its Disclosure and Transparency Rules (DTR). Under DTR 5.1.2, shareholders must disclose their percentage of the voting rights in a UK incorporated listed company if the percentage of those voting rights reaches, exceeds or falls below 3 per cent (and every 1 per cent thereafter) as a result of an acquisition or disposal in shares of that company. Such disclosure is often the first indication that a target company has an activist shareholder on its register. The continued disclosure requirement ensures that the target company receives updates as and when the activist changes its position. An important point to note here is that there is an exception to the 3 per cent threshold contained in DTR 5.1.5. This exception provides that where the shareholder is an investment manager (e.g., the investment management arm of the activist investing the assets of the activist investment fund), disclosure is only required where the percentage of voting rights reaches, exceeds or falls below 5 per cent and 10 per cent and above.

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Activists will often hold their interest in a target company through a combination of shares and other derivate financial instruments. In the run-up to a general meeting, an activist may need to convert its holding to shares in order to exercise votes at the meeting. The relevant TR-1 disclosure forms do distinguish between voting rights held through shares and through financial instruments, however they are comparatively light on detail and it is often difficult to ascertain what types of financial instruments are being used (in contrast to the US regime that prescribes more detailed disclosures).

vii Disclosure – market abuse and insider dealing

On broader disclosure issues, activists will be subject to the restrictions contained under the Market Abuse Regime relating to insider dealing, control of inside information and other offences such as market manipulation (although many listed issuers that are the subject of a public spat with an activist will be acutely aware of the feeling that the listed issuer's every statement is carefully verified and vetted whereas certain activists may be less scrupulously accurate and, assuming they are not falling foul of the Market Abuse Regime or committing any offences under the Criminal Justice Act of 1993, may appear to have a much greater freedom as to what they can say).

viii The Stewardship Code and the Takeover Code

Care is clearly also required when communicating one's own investment decisions with other investors. Some activists will themselves be signatories to the Financial Reporting Council's new Stewardship Code, applicable from the beginning of 2020; in any event, many activists will be aware of the Code's tenets as they affect the other institutional investors, with which the activist may engage. The type of activities that the new Stewardship Code envisages include not only engaging issuers and holding them to account on material issues but also working with others to influence issuers.

Here, inside information restrictions become relevant as well. Although a safe harbour is available to the extent that the only information that is in a stakebuilder's possession is knowledge of its own intentions, activists in possession of other information will need to assess it carefully to determine if they are in a position to carry on dealing.

Activists will also wish to assess whether they may be 'acting in concert' with other shareholders, for the purposes of determining whether any obligations under the City Code on Takeovers and Mergers are triggered. To this end, the Takeover Panel's Practice Statement No. 26 clarifies that when a group of shareholders requisition (or threaten to requisition) a 'board control-seeking' proposal, a concert party may come into existence.

III KEY TRENDS IN SHAREHOLDER ACTIVISM

Activist activity continues to be strong, even if activity recorded as activism in 2020 showed a decline from the amount of activism seen in 2019.[2] The blurring of lines as to who counts as an activist means that a record number of those considered to be new to activism launched campaigns in the past year, with institutional and occasional activists now accounting for roughly half of all campaigns.[3] The size of companies being targeted continues to be on

2 Lazard's 2020 Review of Shareholder Activism.

3 Lazard's 2020 Review of Shareholder Activism.

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the rise. Campaigns targeting companies with a market capitalisation greater than US$500 million now account for a greater proportion of the total number of campaigns initiated than previously (173 out of 182 campaigns).[4] Activists themselves seem more prepared than ever to diversify the markets they target, as they seek out hitherto untapped opportunities. The more traditional paths for activists are still well trodden, with US funds such as ValueAct and Elliott Management continuing to be active in Europe as well as in their 'home markets'. As fund names become more established, so the reaction to them changes because their previous track record in their campaigns (whether their 'success' involved securing a particular transactional outcome, or gaining a board seat, or being seen to drive an uptick in the share price) means that they may find themselves dismissed less readily, with boards of directors showing a greater willingness to hear them out and, if appropriate, accommodate their suggestions.

i Transactional/event-driven activism

Transformative transactions, such as M&A, takeovers of the company concerned, demergers of particular business units, or even something that requires a secondary equity raise, continue to provide fertile breeding grounds for activism as the activist investor has ample opportunity to lobby for a particular outcome and to seek to influence their fellow shareholders as to their voting on the matter in question. A classic example of this is what has become known as 'bumpitrage', which refers to the long-established practice where an activist takes a stake in a target company then agitates publicly that the consideration being offered by the bidder undervalues that target and should be increased. This will typically involve the activist both agitating with the target board that it has not adequately discharged its duties and is 'rolling over' too easily on price and urging them to negotiate for a better deal, while at the same time publicly announcing their view that the offer is inadequate and often indicating that they themselves would not accept it.

A recent example of this includes Catalyst Partners' intervention in Countrywide's proposed deal with Alchemy Partners. Pursuant to this, Alchemy Partners would acquire a stake in the company in return for a cash injection at a valuation that the board of Countrywide endorsed at the time. As a result of Catalyst's agitation that the share price was too low, Alchemy increased its offer, but ultimately could not compete with the public bid tabled by Connells. In a related strategy, there have been instances of activists (publicly) encouraging a public company to seek a take-private transaction, such as ValueAct's open letter to Merlin Entertainment's chair, following a series of earnings downgrades, which is widely seen as having acted as the catalyst to the agreed bid from KIRKBI and Blackstone Core Equity Partners; or to seek a merger partner, such as US hedge fund Cat Rock's stance towards Just Eat, even going so far as to set up a website under the name 'Justeatmustdeliver.com', which sets out its views on what needed to be done. The highly public stances taken in these examples also echo another key trend in shareholder activism, namely, an increase in public engagement with boards and public airing of views, rather than the more technical (and more time-consuming and expensive) engagement in proxy battles waged in respect of general meetings.

4 Lazard's 2020 Review of Shareholder Activism.

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ii A focus on longer-term sustainability issues rather than simply short-term gain

The traditional complaint that activists are simply peddling a short-term agenda to profit at the cost of the overall good of the company no longer holds true in all cases. An increased investor interest in ESG and long-term sustainability (in all its myriad forms, from climate change to discussions about corporate purpose and social licence to operate) means that activists are picking up the refrain. There has been a sense that covid-19 (including the resulting economic fall-out) has presented a crisis of such magnitude that it has pushed other more fundamental questions to the forefront of collective business consciousness and has meant that a pure shareholder primacy model has ceded to a more pluralistic consideration of wider stakeholders. Notably, as investors turn their attention to the 'S' in ESG in the wake of the pandemic, executive pay comes more sharply under scrutiny. 2021 has seen companies integrating ESG factors into executive remuneration in an attempt to avoid shareholder rebellions over underwhelming ESG targets or remuneration policies perceived as out-of-touch with the policies shaping the future of business.

Furthermore, these developments coincide with some significant governance developments arising from various government green papers and consultations on governance, which preceded the 2018 version of the Corporate Governance Code. For example, for the first time, this Code required a company to articulate its purpose, values and strategy, and ensure its culture and behaviour were aligned. In addition, the Companies (Miscellaneous Reporting) Regulations 2018 required directors to report on how stakeholder interests had been taken into account in board decision-making. This reporting may well act as a catalyst for more investor attention on perceived good and bad behaviours.

The courts may now also provide a route for activists to push for long-term sustainability goals. On 26 May 2021, the Hague District Court ordered Shell to curb its carbon emissions by 45 per cent by 2030, much faster than it had planned. The ruling echoes shareholders' previous demands that Shell set more ambitious ESG targets. Also in May, the US witnessed activists secure ESG victories in the petroleum industry. Chevron's shareholders approved a measure for the company to set stringent targets on the emissions from the products it sells, contrary to management's recommendations, while hedge fund Engine No.1 led a successful public campaign focused on revamping Exxon Mobil's approach to climate change and secured three seats on the company's board of directors. It, therefore, seems likely that shareholders will continue to use the platforms available to them (whether this be bringing formal legal proceedings or more conventional avenues) to champion long-term sustainable goals.

iii The activist as a welcome presence (from the point of view of other shareholders)

While target boards may lament the drain on time that activism can entail, shareholders and the market may welcome the presence of a sophisticated activist on the register of an underperforming company – with the expectation that the activist will scrutinise company performance and agitate for a strategic turnaround or other value creating event.

If an activist is also seen by the wider market as achieving results, that activist is more likely to attract followers. The volatility in the markets over recent years has meant that activists have been able to use depressed share prices to establish attractive entry points in the market – their success, combined with the fact that other investors often view them as a predictor of corporate activity of some sort, means that they bring followers with them. This

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can lead to an element of churn on the target company's shareholder register, which can cause unease among management and makes it harder to track who is in which camp, and what messages will resonate with them.

iv An increased focus on the mechanics of how activists structure their holdings

The rhetoric of an activist being a longer-term investor whose interests are aligned with other shareholders only holds true if the activist investor's exposure to share price performance is consistent with that of other shareholders. There have been instances recently where the leverage, stock-borrowing and hedging structures used by activists have been the focus of attention and adverse commentary, particularly to the extent that these mean that the activist's time-horizon and economic exposure is not aligned with the majority of institutional long-term holders. This was particularly the case in Sherborne Investors' campaign against Barclays (see below).

v Interactions with boards: nominee directors, 'settlement agreements' and governance

A further development over the past few years is that a number of instances of activism have resulted in the target company agreeing a relationship agreement (sometimes referred to by its US name as a settlement agreement) with the activist in situations where that relationship agreement is not mandated by the Listing Rules, but is a way of establishing the terms between activist and target in a way that avoids the negative effects of a protracted proxy battle or public campaign. Such relationship agreements may include provisions determining the rights of the activist to appoint a nominee director to the target board, a standstill agreement in respect of the activist's purchasing of shares in the target and potentially non-disparagement clauses. Examples of the relationship agreement route being used in practice include ValueAct's relationship agreement with Rolls-Royce and Oasis Management's relationship agreement with Premier Foods. Getting a director onto the board is seen by many activists as a key step to evidencing the 'success' of their campaigns. Julian Dunkerton, the original founder of Superdry, succeeded in being reappointed as its CEO, also Browning West's Usman Nabi was successful in being appointed to Domino's Pizza Group; by contrast, Edward Bramson's attempt to be appointed to Barclays' board was conclusively voted down, and similarly, Coast Capital failed to have its nominees appointed to First Group's board. In some cases, applying pressure on the boards of underperforming companies means that activists may obtain their desired result even if the campaign does not result in a board seat. An example of this is Cevian increasing its stake in Pearson in an effort to secure a board seat and oversee the replacement of the company's CEO. Although Pearson did not offer the activist a seat on the board, it appointed a CEO that Cevian endorsed.

vi Shareholders discussing their voting intentions in advance

The Financial Reporting Council's new Stewardship Code, applicable from the beginning of 2020, establishes a number of yardsticks as to what stewardship activities its signatories should be undertaking. The type of activities that the new Stewardship Code envisages include not only engaging issuers and holding them to account on material issues but also working with others to influence issuers. By way of example, Norges Bank Investment Management already publishes its voting intentions for certain 'fundamental issues that [they] emphasise in

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particular'[5] ahead of the general meeting in question and announced[6] at a seminar recently on activism that it was their intention from 2022 onwards to announce their voting intentions approximately five days in advance of each general meeting, to inform others as to those intentions. Signatories to the new Stewardship Code may well follow this approach, meaning that institutional discussion on the 'hot topics' of the day could become the norm rather than the exception.

vii Proxy advisers: influence and regulation

Recent years have shown a marked increase in the influence wielded by proxy advisers (such as Institutional Shareholder Services and Glass Lewis) through the way they guide major shareholders as to how to respond and vote on the key issues of the moment. This has meant that market participants have increasingly called attention to how the proxy advisers are regulated and have queried whether there is adequate transparency as regards the methodology used by such firms in preparing their reports. Critics have said that there is insufficient transparency around how proxy advisers make their recommendations, while supporters commend their analysis of corporate governance issues and their role in streamlining shareholder voting decisions. In the UK, the impact of the Shareholder Rights Directive II is that asset managers will have to disclose their use of proxy advisers annually, with proxy advisers being required to disclose (among other things) information regarding their processes and codes of conduct.

IV RECENT SHAREHOLDER ACTIVISM CAMPAIGNS

i Prudential

Third Point's call for Prudential to separate Jackson, its US life insurance business, from its Asian operations is a recent example of an M&A-motivated campaign launched in a sector which has previously been relatively shielded from activism. In February 2020, New York-based hedge fund Third Point publicly challenged Prudential's strategy and current structure, consisting of distinct units in the US and Asia operated from a London head office. It further claimed that Prudential's Asian business was materially undervalued by investors as a result of its association with Jackson. On 25 January 2021, Prudential announced that it had decided to demerge Jackson directly to shareholders, while retaining a 20 per cent stake.

ii EasyJet

The ongoing campaign of opposition to EasyJet's board being waged by EasyJet's founder, Stelios Haji-Ioannou, is a live example of a company founder-turned-activist. The dynamic between the company and its founder is to a large extent dominated by Mr Haji-Ioannou's sizeable shareholding in EasyJet plc.

Mr Haji-Ioannou publicly stated his opposition to the board's plan to acquire £4.5 billion worth of aircraft from Airbus, on the grounds that it was inappropriate at a time when the airline had grounded all of its planes as a result of covid-19 restrictions and when the company has had to secure a £600 million loan from the Bank of England's emergency coronavirus fund. On 8 April 2020, Mr Haji-Ioannou requisitioned a general meeting,

5 Norges Bank Investment Management website - https://www.nbim.no/en/the-fund/responsible-investment/our-voting-records/voting-intentions-published-ahead-of-general-meetings/.

6 ActivistMonitor seminar, Wednesday 9 October 2019.

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proposing the removal of its Chairman John Barton, CEO Johan Lundgren, CFO Andrew Findlay and non-executive director Andreas Bierwirth. Subsequently, Mr Haji-Ioannou published an open letter to all shareholders giving his rationale for the removal of the four directors, claiming that this 'is the only method a shareholder has to require the remaining seven directors to serve notice of termination to Airbus for the order for 107 additional completely unnecessary aircraft', which in his view would provide EasyJet with its 'best chance of avoiding bankruptcy'.

On 22 May 2020, EasyJet held the general meeting and rejected Mr Haji-Ioannou's resolutions, with more than 57 per cent of votes cast as against it. However, Andrew Findlay has since announced his resignation as CFO, effective in May 2021. Mr Haji-Ioannou has also since made a public offer of financial rewards to employees and related parties willing to give 'whistleblowing' inside information that would lead to the cancellation of the Airbus order.

iii Superdry

In contrast, the Superdry co-founder achieved the end result he sought (albeit only by a narrow margin). Superdry co-founder Julian Dunkerton stepped down from the board in March 2018 following a disagreement with the board on how to run the company. Mr Dunkerton did not agree with the board's strategy on diversifying its range into children's wear and other products, and away from the company's core product range. On 1 March 2019, Mr Dunkerton along with co-founder James Holder requisitioned a general meeting requesting that Dunkerton be re-appointed as a non-executive director. At the general meeting on 2 April 2019, Mr Dunkerton received a simple majority of 51.15 per cent in favour of his re-appointment, and just hours afterwards the Chairman Peter Bamford and CEO Euan Sutherland resigned. Mr Dunkerton was subsequently appointed as CEO.

iv Barclays

Sherborne's Barclays campaign provides an interesting example not only of an activist seeking a board seat and advocating structural changes, but also of the method in which activists hedge and structure their holding in the target coming under scrutiny. In April 2018, Sherborne Investors partner, Edward Bramson, made public calls for a restructuring of Barclays' investment banking business and urged Barclays' shareholders to support his attempt to secure a board seat. Mr Bramson had built up an approximately 5.5 per cent position through a 'funded equity collar'. This arrangement involved Bank of America borrowing the Barclays shares and selling them to Mr Bramson while also providing him with financing in the form of the loan. As part of the arrangement, Mr Bramson took out a series of 'put' and 'call' options that protected him from losses if the shares were to fall below a certain level while also limiting his upside. The arrangement garnered criticism (from both Barclays itself and institutional shareholders) on the grounds that Mr Bramson had structured his holding in such a way that his interests could no longer be seen as aligned with those of other shareholders. The shareholder advisory group Glass Lewis advised investors to vote against Mr Bramson, in part due to his 'questionable ownership framework'.[7] After Mr Bramson made several informal attempts to have himself appointed to the board, on 5 February 2019,

7 'Shareholder adviser ISS backs Barclays in Bramson battle', David Crow and Owen Walker, 19 April 2019.

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Sherborne Investors submitted a resolution to appoint him as a board member at the 2019 AGM. However, at its AGM on 2 May 2019, the resolution was defeated with more than 87 per cent of shareholders voting against it.

Sherborne briefly paused its campaign to unseat chief executive Jes Staley during the initial onset of the covid-19 pandemic, only to relaunch public efforts in August by increasing its stake. This approach reflects another trend in activism during the covid-19 pandemic, namely, the softening of activists' public stances in a time of unprecedented crisis for many companies. Throughout 2020, however, Mr Bramson had continued to informally apply pressure on the board to begin a formal search for Staley's successor. In May 2021, Sherborne sold its entire stake of just over 6 per cent in Barclays, accepting defeat in its campaigning efforts.

v Rolls-Royce

ValueAct's investment in Rolls-Royce is noteworthy as being an example of an active investor entering into a US-style 'settlement agreement' or relationship agreement with its target. ValueAct Capital spent several months building its stake in Rolls-Royce, becoming its largest shareholder with a stake of 10 per cent in November 2015. On 2 March 2016, Rolls-Royce appointed Bradley Singer of ValueAct as non-executive director to its board. Notably, the two parties entered into a relationship agreement, which provided inter alia that Mr Singer's appointment was subject to ValueAct continuing to hold a 10 per cent stake in the company. In addition, during a 'standstill period', ValueAct agreed to certain provisions, namely, that it would not acquire a stake in the company in excess of 12.5 per cent, that it would be bound by certain corporate governance provisions and that it would vote in favour of all commonly proposed resolutions recommended by the board at the company's 2016 and 2017 AGMs. The relationship agreement expired in 2018 and ValueAct retained its board seat until 2019.

vi Domino's Pizza Group

A more recent example of the relationship agreement is Browning West with Domino's Pizza Group. On 23 October 2019, the US fund announced that it had acquired a 5.3 per cent stake in Domino's. On the 12 November 2019, the company announced the appointment of Usman Nabi of Browning West as a non-executive director. The parties also entered into a relationship agreement, which included terms with respect to corporate actions, non-disparagement, share dealings and other corporate governance matters.

vii AB InBev/SABMiller

AB InBev's £71 billion takeover of SABMiller involved an example of M&A based activism, often colloquially referred to as 'bumpitrage', whereby an activist takes a stake in a live takeover situation and agitates for greater value to be offered to the target shareholders. In November 2015, AB InBev announced a £71 billion offer for SABMiller, comprising cash consideration and an alternative of share consideration in a new holding company of AB InBev (with SABMiller's two largest shareholders opting for the share consideration). The Brexit referendum of 2016 significantly impacted the value of sterling, which, combined with AB InBev's Euro-denominated revenues, meant that in effect the cash consideration on offer was less attractive than the alternative share offer. The share offer had been structured in such a way that the shares in question would not trade publicly for five years, meaning that many shareholders felt that to switch from accepting cash to accepting shares was not a tenable alternative. In July 2016, Elliott Management acquired an interest in SABMiller. It

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was then widely reported in the media, among growing unease as to the disparity between the cash offer and the share offer, that Elliott had written a private letter to the SABMiller board to voice its concerns. The outcome of Elliott Management's campaign was that AB InBev increased its cash offer by 100 pence per share to 4,500 pence per share, which valued SABMiller at £79 billion.

viii Merlin Entertainments

A more recent example of an activist deploying the tactic of M&A 'bumpitrage' is ValueAct Capital's campaign in relation to Merlin Entertainments plc. ValueAct had increased its stake to 9.3 per cent on 23 May 2019, and on the same day, publicly issued an open letter to the board of Merlin, urging it to find a buyer to take the company private, asserting that the public markets could not value Merlin's business accurately enough and citing concerns around the focus on short-term metrics, which a public listing inevitably entailed. Subsequently on 28 June 2019, Merlin announced a recommended £5.9 billion enterprise value offer from a consortium of Kirkbi (the Lego family), Blackstone and CPPIB (a Canadian pension fund).

V REGULATORY DEVELOPMENTS

Many of the most significant recent regulatory developments and corporate governance reforms affecting activism have already been mentioned above. Of particular note in terms of recent developments are the following. The new Stewardship Code's focus on engaging issuers and holding them to account on material issues, as well as working with others to influence issuers, will see more disclosure from the Code's signatories (likely generating more debate about whether those signatories are doing enough to hold companies to account, as well as focusing media and shareholder attention on what are seen by the investment community as the 'burning platforms' of the day). Moreover, the Stewardship Code's focus on working with others to influence issuers will deepen a trend that is already in evidence, of activists working in close coordination with other institutional shareholders of a company. This gradual shifting of more 'mainstream' asset managers into the field of activism is also likely to be heightened by the Shareholder Rights Directive II, which asset managers have been required to comply with in the UK since 10 June 2019, with its focus on engagement activities and voting decisions.

The increasing importance of proxy advisers in this ecosystem has already been noted: given institutional investors' widespread use of their services and their need to continue doing so (due to a combination of cost, ever-increasing amounts of disclosure and the need to compare and analyse disclosures across a multiplicity of companies, sectors and geographies), their importance will not likely diminish and calls may be renewed for greater transparency as to their operation. The Market Abuse Regulation will continue to be a key facet in the regulation of activism; the UK's departure from the European Union may affect this, although most market participants expect no significant divergence from the existing regime. In the post-covid-19 environment, a company's social licence to operate and its statement of purpose, which has only recently been required by the Corporate Governance Code, will continue to be the subject of scrutiny, while in parallel ESG focus is likely to intensify, which may prompt more active shareholders to requisition resolutions focusing on these areas. Climate change will clearly form a huge part of this, with the European Parliament

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recently adopting new legislation on sustainable investments,[8] aimed at creating a common classification against which businesses and investors can determine whether economic activity can be labelled as environmentally sustainable based on whether it contributes to certain objectives. The Task Force on Climate-related Financial Disclosures (TCFD)'s work continues, with the FCA recently issuing proposals requiring premium-listed companies to make climate-related disclosures in line with the approach set out by the TCFD or to explain why not. As regards board diversity, ethnic diversity is clearly still a significant issue for boards of directors to address, as the 2020 update from the Parker Review Committee indicates.

VI OUTLOOK

The direction of travel of the above regulatory developments suggests that the UK market will see a record year in activism, including from many who hitherto would not have termed themselves 'activists'. Factors such as the economic fall-out of the covid-19 crisis, the impact of Brexit, and the ensuing volatility in share prices all have the potential to create a turbulence in which many more opportunities for activism will present themselves. The increased focus on stewardship and engagement on key issues means that constructive activism will be encouraged rather than discouraged, but may also provide a helpful yardstick for what is considered 'constructive engagement' as opposed to 'short-term opportunism'. Finally, it is likely that ESG concerns will continue to be a prominent feature of activist campaigns. As we have already noted, covid-19 (including the resulting economic fall-out) has presented a crisis of such magnitude that it has pushed other more fundamental questions to the forefront of collective business consciousness and has meant that the balance that companies must strike between incentivising their management who have had to demonstrate significant leadership during the pandemic and the interests of employees and other stakeholders, has become even more delicate. Certain mainstream institutional investors have publicly stated that they will examine how companies have responded to the crisis with, for example, Legal & General Investment Management flagging that they will scrutinise the actions that companies take during the covid-19 crisis and will 'hold companies to account for their stakeholder responsibilities'.[9] This trend will likely see activists agitating on a platform of ESG reform, combining with more mainstream institutional shareholders to achieve their goals; it will also bolster activists' ability to present themselves as a force for good in the market rather than as a predatory force, motivated by short-term profits.

8 Regulation of the European Parliament and of the Council on the establishment of a framework to facilitate sustainable investment, 5639/2/20.

9 Sacha Sadan, Legal & General Investment Management, quoted in *The Guardian*, 'Legal & General warns firms to act fairly during coronavirus', Mark Sweney, 22 April 2020.

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Appendix 1

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