# The Shareholder Rights and Activism Review

Seventh Edition

**Editor**
Francis J Aquila

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# THE SHAREHOLDER RIGHTS AND ACTIVISM REVIEW

SEVENTH EDITION

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# CONTENTS

PREFACE.......... v
*Francis J Aquila*

Chapter 1 AUSTRIA.......... 1
*Sarah Wared*

Chapter 2 BRAZIL.......... 10
*Lior Pinsky, Levi Santos and Victor Meneguelli*

Chapter 3 CANADA.......... 19
*Alex Moore and Jennifer Crawford*

Chapter 4 GERMANY.......... 31
*Michael J Ulmer*

Chapter 5 GREECE.......... 43
*Pavlos Masouros and Antonis Nikolaidis*

Chapter 6 INDIA.......... 51
*Nikhil Narayanan*

Chapter 7 ITALY.......... 61
*Maurizio Delfino and Anna Laura Pettoello*

Chapter 8 JAPAN.......... 71
*Akira Matsushita*

Chapter 9 LUXEMBOURG.......... 82
*Margaretha Wilkenhuysen and David Al Mari*

Chapter 10 NETHERLANDS.......... 97
*Paul Cronheim, Willem Bijveld and Frank Hamming*



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Chapter 11 SINGAPORE.......119

*Bernard Lui, Suet-Fern Lee and Chrystle Kuek*

Chapter 12 SOUTH AFRICA.......129

*Ezra Davids and Ryan Kitcat*

Chapter 13 SOUTH KOREA.......144

*Hyeon Deog Cho, Joon B Kim, Eun-Young Lee and Gun Woo Kim*

Chapter 14 SWITZERLAND.......158

*David Oser and Karin Mattle*

Chapter 15 UNITED KINGDOM.......170

*Filippo de Falco, Claire Jackson and Christian Boney*

Chapter 16 UNITED STATES.......182

*Francis J Aquila and Lauren S Boehmke*

Appendix 1 ABOUT THE AUTHORS.......193

Appendix 2 CONTRIBUTORS' CONTACT DETAILS.......205




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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 around the world. 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 almost 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.

Since the fourth quarter of 2021, global activism activity has been at higher levels than the market has seen for a number of years. Looking forward, activism activity is generally expected to remain strong, although events such as the war in Ukraine are having an impact on activity levels in certain jurisdictions. Moreover, shareholder activists are expected to remain focused on environmental, social and political (ESP) considerations and corporate governance.

As shareholder activists and the companies they target continue to be more geographically diverse, it is 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 seventh 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 2022



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Chapter 15

# 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 that is potentially more conducive to activism. 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 UK's 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, while undoubtedly many activists are pursuing an agenda of short-term 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 – often branding themselves as 'constructivists'. 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 following the onset of the covid-19 pandemic in the first half of 2020, activity rebounded to pre-pandemic levels during 2021 and the beginning of 2022. However, the market volatility and inflationary environment triggered by the crisis in Ukraine has caused the number of campaigns in Europe to tail off.

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



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A large proportion of European activism takes place in the UK and focuses on M&A, a longstanding point of interest for investors, but also now on ESG, a relatively new direction of travel that has increasingly brought larger market capitalisation companies into the activists' purview.

## 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 get 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 strategies 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 threat 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 targeted company. 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 equip 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 any shareholders' 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 put forward 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. When a resolution is tabled by the members, investor guidance requires the company to provide a comprehensive outline of its position and be available to engage with shareholders.[2] This demonstrates that investors' expectations

2 2022 Stewardship and Voting Guidelines published by the Pensions and Lifetime Savings Association.



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go beyond what is required by the Act. These tools are being used more frequently in practice, with resolutions ranging from the appointment of a new, activist-nominated director, to targeted strategic change. In a recent example, Tesco has committed to increasing its sales of healthier food and drink as a response to a shareholder resolution requisitioned by a coalition of over 100 retail and institutional investors led by ShareAction in advance of the 2022 annual general meeting. In 2021, HSBC put forward a plan to change its fossil fuel financing following demands made in a resolution tabled by a shareholder coalition.

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 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 o f the c ompany a re b eing c onducted i n 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 its aim 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. For example, this year, ClientEarth used derivative action as the basis for threatening legal proceedings against the directors of Shell. This would be the first ever legal action against directors for failing to deliver on climate-related goals.

### iv Shareholder group action

Shareholder group action is an avenue to seek remedy for 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



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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. This is a developing area in practice and a space to watch. After the settlements secured by shareholders of Tesco in 2020 and RBS in 2017, Section 90A FSMA was considered at full trial for the first time this year, when several companies of the Hewlett-Packard group succeeded in their claim against the British software firm Autonomy.

### v AGMs

The annual general meeting of a listed company often 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 as a result of the covid-19 crisis and the current inflationary environment, which 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)



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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.

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 shareholder meeting or vote, an activist may need to convert its holding to shares in order to exercise votes. 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 companies that are the subject of a public spat with an activist will be acutely aware of the feeling that the listed company'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 Stewardship Code, which applied 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 Stewardship Code envisages include not only engaging companies and holding them to account on material issues but also working with other shareholders to influence companies.

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.



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## III KEY TRENDS IN SHAREHOLDER ACTIVISM

In Europe, shareholder activism saw 16 new campaigns in the last quarter of 2021, with the momentum continuing at a similar pace at the start of 2022. However, market volatility triggered by the Ukraine crisis caused the level of activity to drop by 38 per cent between February and March 2022, which is in stark contrast with the US, where there was 50 per cent growth in the same period.[3] The UK has been an exceptionally active market, with 40 per cent of all European campaigns in 2021 having UK targets – more than three times the activity seen in the next most targeted jurisdiction in Europe.[4]

Over the past two years, there has been consistency in some of the key demands being made by activists, but with signs that new areas of focus are emerging. In particular, M&A continues to be the primary demand, featuring in 45 per cent of activist campaigns globally in 2021. Opposition to M&A deals has become more prevalent, accounting for 19 per cent of all activist campaigns globally, although most often the ultimate aim was to achieve better transaction terms rather than to abandon the deal.[5] A parallel can be drawn between the US, where litigation in the form of class actions is the prevailing mechanism to secure a better price and almost always a reality to be prepared for when carrying out an M&A deal, compared to the UK, where shareholders have a bigger say, using their voting rights when the deal is in the making.

An emerging trend that has shifted the activism landscape in recent years is the expansion of ESG campaigns beyond the usual small activist organisations that have sustainability as their core mission and into the sphere of more traditional activists and institutional investors. ESG goals, from climate and health-related shareholder resolutions to governance reforms, have provided a platform for activists to make demands, although these are still usually ultimately value driven. Notably, the past two years have seen several high-profile campaigns against companies with very large market capitalisation, like Shell and Glencore, signalling a shift away from mid-market companies that had traditionally been the activists' 'sweet spot'.

The profile of the activist shareholder has also evolved. While some trends continue, such as the influence of large players like Elliott (which accounted for 18 per cent of total European campaigns in 2021),[6] asset managers are starting to be more publicly active, particularly on ESG campaigns. For example, Royal London Asset Management targeted Glencore in 2021, successfully securing a net zero commitment. This is consistent with the shift away from the traditional model of an 'established' or 'professional' activist agitating for short-term gains and moving on, towards a new style of activism prioritising a longer-term outlook, which is being adopted by the 'active managers' and institutions.

### 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 a platform 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',

3 Lazard's Q1 2022 Review of Shareholder Activism.
4 Lazard's 2021 Review of Shareholder Activism.
5 Lazard's 2021 Review of Shareholder Activism.
6 Lazard's 2021 Review of Shareholder Activism.



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which refers to the long-established practice where an activist takes a stake in a company subject to a takeover offer 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.

An 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 (which remains rare in the UK).

### ii A focus on sustainability as an impetus for change

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, coupled with the current cost of living crisis, executive pay comes more sharply under scrutiny. The years 2021 and 2022 have 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



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had been taken into account in board decision-making. This reporting, as well as the new mandatory climate disclosure regime discussed below, 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, which have gained traction after the ruling as discussed in the case study below. Also in May 2021, 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 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



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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 Stewardship Code, which has applied since the beginning of 2020, sets out a number of yardsticks as to what stewardship activities its signatories should be undertaking. The type of activities that the Stewardship Code envisages include not only engaging companies and holding them to account on material issues but also working with other shareholders to influence companies. In 2022, investors such as Schroders and Legal & General Investment Management have pre-declared their voting intentions, particularly on ESG-related resolutions, in advance of the annual general meetings of large companies like Sainsbury, BP and Shell. This approach is endorsed by the UN Principles for Responsible Investment and, more recently, by ShareAction in its 2022 Voting Expectations of Asset Managers as it can serve as a platform to generate momentum among shareholders and draw the public's attention to the issue.

### 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 now 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.



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## IV RECENT SHAREHOLDER ACTIVISM CAMPAIGNS

### i GSK

Recently, companies with large market capitalisation have been increasingly targeted by activist shareholders, which shows that sheer size is no longer a shelter from activism. An example is the recent campaign targeting GSK, a top 10 FTSE company with a market capitalisation of over £90 billion. In early 2021, Elliott published a letter demanding management changes aimed at boosting biopharma experience in the leadership team after the planned demerger of GSK's consumer healthcare business. GSK stood behind its executive team, and other shareholders like M&G Investments and Royal London Asset Management have backed this approach. GSK is not the sole example; in the past two years, high-profile campaigns have been launched against other large-cap companies such as Shell, Unilever, Aviva and Glencore.

### ii 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 had 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.

### iii Shell

The ongoing campaign launched by Third Point against Shell demonstrates the increasing tendency of shareholders to pursue their agenda by arguing that what is good for the climate also generates better returns for investors. On 27 October 2021, Third Point wrote a letter to investors protesting against two decades of poor investor returns and arguing that Shell has the potential to 'accelerate decarbonisation while simultaneously improving returns for its long-suffering shareholders'. Third Point demanded a break-up of Shell into standalone businesses, including a legacy oil and gas business focused on greater returns for shareholders and a renewables business with smaller cash returns but more investment in carbon-reducing technologies.

The proposal has been criticised by Follow This, an activist group with a small stake in Shell that has the mission of committing oil companies to the Paris Climate Agreement. Their view is that a break-up would have little environmental benefit and that a better approach is to invest the cash generated by fossil fuel in renewables. This difference in opinion highlights that, in some cases, although activist investors push for ESG-related change, the key driver of the campaign often remains value creation, and the ESG angle is used as a catalyst for support.

### iv Merlin Entertainments

An example of an activist deploying the tactic of M&A bumpitrage is ValueAct Capital's campaign in relation to Merlin Entertainments. ValueAct 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



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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 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, 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 2020 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 REGULATORY DEVELOPMENTS

The Stewardship Code's focus on engaging companies and holding them to account on material issues, as well as working with other shareholders to influence companies, will likely continue to prompt disclosure from the Code's signatories on their stances and voting intentions. The adoption of the Stewardship Code has been very successful recently. By the end of October 2021, the Financial Reporting Council received significantly more applications than expected from organisations wishing to join the list of signatories to the Stewardship Code. There were 74 successful applicants in the last application window, bringing the total number of signatories to 199.

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



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Climate change has been a key concern in recent years, and the government responded to this in April 2022 with new regulations requiring mandatory climate-related financial disclosures by large public and private companies and LLPs.[8] This regulatory development is likely to contribute to the increased focus on ESG, which is a key point of interest for activist shareholders, and potentially more scrutiny of corporate reporting and performance against climate-related goals.

As regards board diversity, ethnic and gender diversity is clearly still a significant issue for boards of directors to address, and the Financial Conduct Authority has recently introduced new requirements for listed companies to make disclosures related to gender and ethnic diversity at board and executive level against prescribed targets.[9]

## VI OUTLOOK

Factors such as the economic fall-out of the covid-19 crisis and the ongoing market volatility and inflationary environment prompted by the crisis in Ukraine have the potential to create a turbulence in which opportunities for activism can present themselves. It is likely that ESG concerns will continue to be a prominent feature of activist campaigns given the new mandatory climate disclosure regime as well as the public sentiment on the environment and wider social purpose, which provides activists ultimately seeking value creation with a potential platform for challenging the leadership for not doing enough. We also expect institutional investors and asset managers to continue to be more publicly active in holding companies and boards to account on ESG in areas such as climate and nature goals, remuneration and diversity and inclusion. These trends will likely see activists continuing to leverage ESG as a platform, combining with more mainstream institutional shareholders to achieve their goals (which may ultimately be value-driven); 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 Companies (Strategic Report) (Climate-related Financial Disclosure) Regulations 2022 and Limited Liability Partnerships (Climate-related Financial Disclosure) Regulations 2022.

9 Policy Statement PS22/3.



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Appendix 1

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