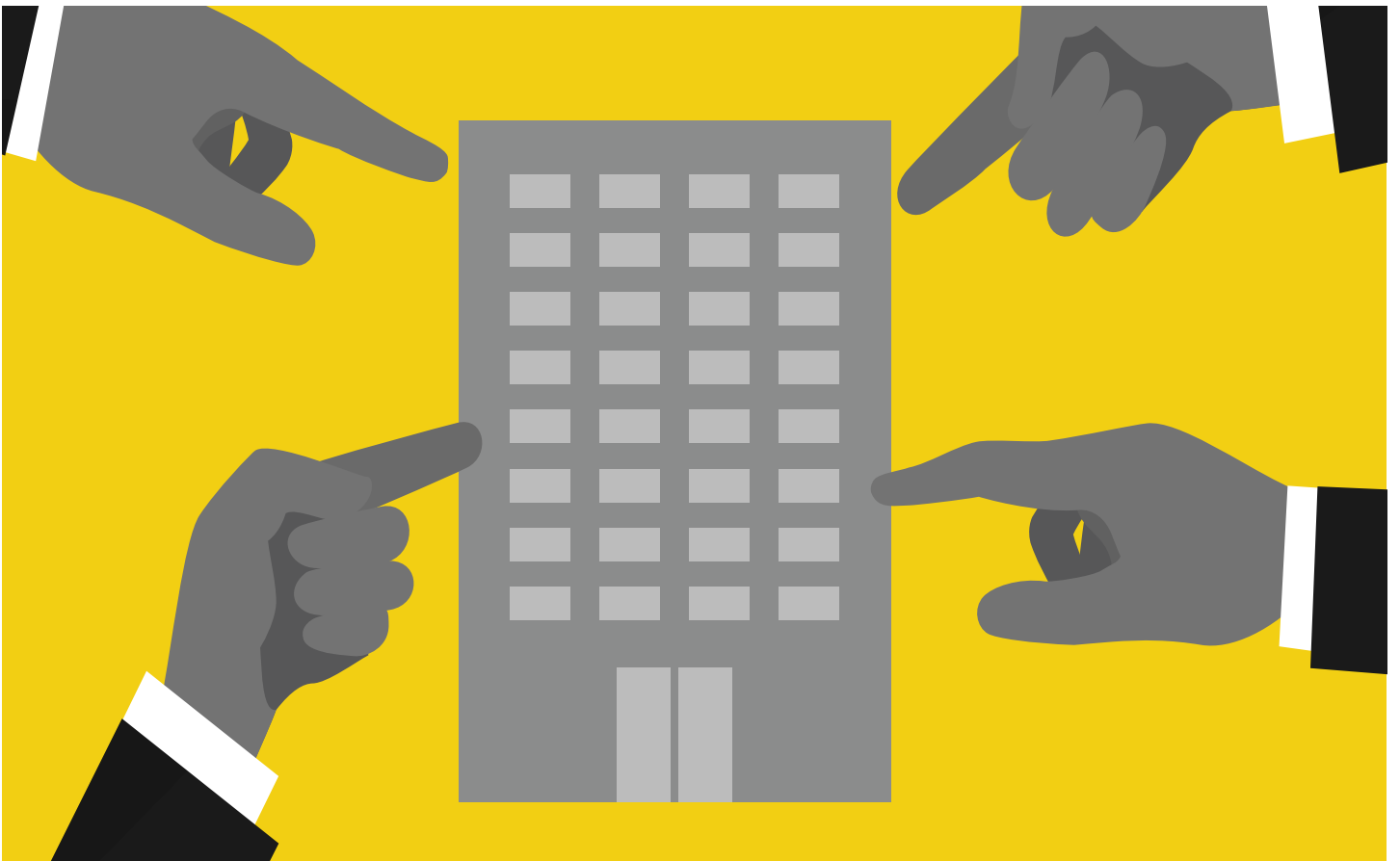




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# SHAREHOLDER ACTIVISM & ENGAGEMENT

Financier Worldwide canvasses the opinions of leading professionals around the world on the latest trends in shareholder activism and engagement.



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Will Pearce is a partner and head of the Europe practice at Davis Polk. He advises corporates, private equity and investment banking clients on domestic and cross-border private and public M&A transactions, takeovers and mergers, and securities offerings and listings, as well as on corporate governance, shareholder activism and restructuring matters. With over 25 years' experience of advising on the UK's Takeover Code and Listing Rules, he has been recognised as a leading lawyer for both corporate & M&A, and equity capital markets.

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**Q. Could you provide an overview of recent trends in shareholder activism in the UK? What factors and influential topics are driving activists to target companies?**

**A.** The UK remains the focus of activist campaigns in Europe, no doubt because of the large number of publicly traded companies in the UK relative to other European countries, and the relatively broad shareholder consents that such companies must seek on an annual basis and in connection with corporate actions. Key areas of focus for activists in the UK include board composition, executive remuneration, corporate strategy, which is often accompanied by a request for board representation, and M&A strategy, often with a demand to break up a group and return value to shareholders. In addition, ‘live’ M&A transactions remain a key area for activists, where the focus is on blocking a transaction in favour of a standalone strategy or alternative transaction, or on driving an improvement in the transaction terms. More recently, we have also seen a focus on environmental, social and governance (ESG) matters. While activist campaigns were historically

led by a small number of core players, often based in the US, traditional UK asset managers have become increasingly visible in campaigns and now take a far less passive approach to exercising their shareholder rights.

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**Q. What types of shareholder activism campaigns are you seeing? What strategies are being deployed to force companies to effect change?**

**A.** Activist tactics in the UK tend to be more cooperative than in the US. Save where circumstances leave no alternative, such as in a ‘live’ M&A situation, public engagement is usually a last resort, largely because it involves considerably more expense and risk, both in execution and reputation. Typically, an activist pursues its objectives through private engagement with a public company’s board. While there is a multiplicity of private engagement strategies, an activist will often not involve other shareholders in the first instance to reduce the risk of leaks and divergent views on solutions and objectives. If not satisfied that its objectives will be met through private engagement, an activist may use public

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announcements, open letters, website campaigns and social media to voice its concerns and seek to obtain support for its proposals from other shareholders and other interested market participants. The next steps in a campaign will then largely depend on the level of an activist's shareholding, the size of holding it can acquire in the market or the level of support it can garner from other shareholders. A 5 percent holding allows an activist to convene a general meeting to consider its proposal or to put a resolution to the vote at an annual general meeting, 10 percent can frustrate a bidder from acquiring 100 percent ownership in a takeover offer, and, in practice, 15 percent has proven sufficient to frustrate the shareholder vote required to implement a takeover by scheme of arrangement.

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**Q. Could you highlight any examples of shareholder activism which resulted in strategy changes at high-profile companies in the UK?**

**A.** The principle of shareholder engagement is a key feature of the UK's corporate governance regime. Following changes to the UK Corporate Governance

Code, the introduction and broad adoption of the UK Stewardship Code by asset managers and the creation of the Investor Forum to facilitate discussions between UK publicly traded companies and investors, there have been and continue to be plenty of examples of constructive engagement, rather than activism per se, that have led to strategic change at high profile UK public companies, including greater public disclosure, changes to the board, focus on succession planning, capital allocation and environmental strategy. In the context of recent M&A transactions, a high-profile example of an intervention by an activist that changed the strategic direction of a UK public company is that of Palliser Capital's intervention in Capricorn's proposed mergers with Tullow Oil and NewMed Energy.

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**Q. Have any recent legal or regulatory developments in the UK helped to facilitate activism and make campaigns more likely to succeed?**

**A.** Over the last five years, changes to the UK Corporate Governance Code and the UK Companies Act have forced additional disclosure by UK publicly traded

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companies of their corporate purpose, values and strategy, and required directors to report on how stakeholder interests have been considered when making board decisions. These additional disclosures, coupled with mandatory climate-related disclosures, have provided an additional route for environmental activists to seek to pursue claims against high-profile companies including Shell. More recently, the Financial Conduct Authority (FCA) provided guidance in Primary Market Bulletin 46 for market participants on whether the UK's market abuse regime, that makes it an offence to unlawfully disclose inside information, which could include an investor's voting intentions, prevented shareholder engagement, cooperation and activism, particularly in light of recent FCA enforcement activity. The FCA confirmed it had not changed its approach and the regime should not prevent engagement between companies and their investors. In the context of investors cooperating to influence a company's approach to ESG issues, the FCA noted there may be merit in investors making public their ESG stewardship plans to reduce the chance that these plans are viewed as containing inside

information and to simplify collective action.

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**Q. What advice would you offer to companies on priming their defences against potential activist attacks? What steps should they take to monitor and anticipate an activist campaign?**

**A.** A company will invariably be less vulnerable to challenge from an activist if it engages regularly with its major shareholders. Parties should also take additional proactive steps to protect themselves from being challenged by activists. They may, for example, conduct regular strategic reviews to identify potential areas of challenge, including, if appropriate, through a 'fire-drill' exercise, where the executive team is put through mock campaign scenarios. They should also carefully monitor unusual trading which may indicate that the company is being targeted by activists. Directors of public companies are very focused on this area and commonly prepare for shareholder activism in the same way they would prepare to defend a hostile takeover.



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**Q. How important is it for companies to proactively engage with key stakeholders, including activists, on a regular basis? What shareholder engagement methods should be considered?**

**A.** The principle of shareholder engagement is a key feature of the UK's corporate governance regime, and organised shareholder engagement is now the norm. It is commonplace for investor relations teams to meet on a regular basis with representatives of their large institutional shareholders and representatives of the ESG teams from such shareholders.

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**Q. What are your predictions for shareholder activism in the months ahead? In your opinion, will continuing activist activity demand ongoing corporate engagement?**

**A.** ESG-related activism to one side, transaction-related activism has been less prevalent in 2023 because of the slower M&A market in Europe. If M&A volumes pick up in 2024, examples of M&A-related activism will surely follow, not least as it remains challenging to properly



*If M&A volumes pick up in 2024, examples of M&A-related activism will surely follow, not least as it remains challenging to properly price a transaction given the broader deal environment.*

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price a transaction given the broader deal environment. Over the next year we may see opportunistic M&A transactions with buyers taking advantage of depressed valuations, distressed transactions and carve-outs and break-ups. There will be plenty of opportunities for activists to make their voices heard. That said, and notwithstanding changes in the UK corporate governance regime to encourage additional corporate disclosure and engagement with stakeholders, proxy fights and US-style legal threats remain relatively uncommon in the UK. Rather, investors typically prefer to engage with companies on an informal and amicable basis and, by all accounts, have done so successfully. It is hard to see that changing. □

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