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Shareholder activism

2023

Contents

Shareholder activism

Activist shareholders are becoming more active. The number of activist campaigns grew in 2022 after several years of decline.

Recent months have seen even more headlines about activists building stakes in well-known companies. But attitudes to activists can be complex.

— Some directors believe a moderate degree of activism can bring fresh perspectives, as well as helping to keep the company up to the mark on issues like governance. But more complain that activists encourage short-termism, second-guess the board and may not act in the interests of most investors.

— While some shareholders distrust activists, others are happy to see more scrutiny of the companies in which they invest. And some major investors have started taking activist-like steps themselves, often to avoid falling behind the ESG curve.

— Influential proxy advisers now frequently question the voting guidance issued by boards, and are increasingly prepared to recommend support for activists at general meetings.

Listed companies need to remain alert to the evolution of the shareholder relations landscape and to trends in activism, and to monitor aspects of their business that may draw the attention of activists. Getting on the front foot is always the most effective strategy for achieving good shareholder relations and dealing with activist campaigns.

In the following pages, we look at the activities of activists in more detail and consider how companies can prepare for them and respond to them.

Who are we talking about?

This document reflects rules that generally apply to companies listed in the UK.

We would be happy to explain how these rules affect your own situation. In particular, there are important differences between the regulation of UK and non-UK companies with a premium main market LSE listing, companies with a standard main market LSE listing, and companies listed on other markets, such as AIM or AQSE.

There may also be factors relevant to your company that are not mentioned in this broad overview.

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Who are the activists?

Activism has always been about pushing for change. But familiar patterns of activism are evolving as new players adopt an activist approach.

Activist shareholders traditionally fall into two broad groups:

— Those seeking to increase the value of their investments, sometimes by arguing for e.g. deals, buybacks, higher dividends or economies.

— Those pushing for the company to change its behaviour, often on ESG issues.

These have been described as 'value activism' and 'values activism' respectively, and have often been presented as opposites. But while they sometimes conflict, in a growing number of cases they overlap. Developments in ESG regulation and ethical investment mean that companies with a strong 'values' position increasingly tend to offer more 'value' to shareholders.

The boundaries between activists and other shareholders are also blurring. For some, activism is a raison d'être, but others are activists almost by accident – they have a long-term holding in a business that they come to believe needs to make changes. Some reject the term 'activist', preferring simply to see themselves as engaged investors.

Activist campaigns have also benefited from the growing influence of proxy advisers. The likes of Glass Lewis, PIRC and ISS increasingly have the ear of major investors on issues such as ESG, diversity and remuneration.

Even pension funds may be activist shareholders. And in some cases institutional shareholders, while not themselves activists, are not unhappy to see activists exert pressure on boards over issues such as sustainability or governance. In particular, tracker funds and others who can't easily sell up may be inclined to back an activist who has plans for shaking up an underperforming stock.

How much activism is there?

A report from Lazard says activists launched 235 campaigns in 2022 – a big rise on the previous year, and a definite reversal on the previous decline in activism.

Lazard's definition of a campaign is fairly tight and other market monitors report more activity. Looking forward, Alvarez & Marsal has identified nearly 150 European companies it considers to be at heightened risk of public shareholder activism over the next 18 months, with at least 96 activist funds currently targeting European (including UK) companies.

Bloomberg has an even larger number. Its review of global activism in 2022 says that 631 new activist campaigns were launched in the year, over half of them in the US. Bloomberg's data also excludes certain categories, so the actual number of campaigns may be even higher.

Insightia, which does not restrict its data-gathering by market cap, says that 967 companies were publicly subjected to activist demands in 2022, with 42 of them in the UK and a total of 139 across Europe.

Our focus in this document is on activists motivated by a wish to release or increase value, to change a company's governance or strategy, or to promote an ESG agenda. We have not considered campaigns by e.g. short sellers, or investors who hold debt rather than equity, but we would be glad to discuss such campaigns if they are relevant to you.

The activist playbook

Activists in UK companies are increasingly following the lead of US activists, using a variety of avenues to force change, both in public and in private. In the UK, an activist with even a single share has certain rights they can use to promote their cause.

Shareholder engagement

In the past, boards sometimes felt confident about simply ignoring activists. But this has changed – not only because activists now have many more options for leverage and publicity, but also because corporate obligations to be more open in and about shareholder engagement have increased.

For example, a company's section 172(1) statement (see page 12) is likely to include, in the words of the FRC, "the main methods the directors have used to engage with stakeholders and understand the issues to which they must have regard".

The idea of engagement has grown further through initiatives such as the UK Corporate Governance Code, which introduced (for companies with a premium LSE listing) an increased focus on the relationships between companies, shareholders and stakeholders, emphasising the need for alignment between corporate culture, purpose, values and business strategy, as well as promoting integrity and diversity.

This focus has also encouraged some shareholders to think more radically about the influence they should seek to exert over boards.

How does activism play out?

Some shareholder activists will kick off a campaign with a website, open letters and media interviews. At the other extreme are those who operate below the radar, building a stake and then seeking to open a private dialogue with management.

But however it begins, a shareholder campaign usually involves **negotiations** with the board and/or actions at **general meetings**. In a few cases, it can also involve **litigation**.

Limitations on activists

An activist is, of course, subject to the same rules as any other shareholder. They need to be mindful of the risk that they may be judged to be 'acting in concert' with other shareholders, thus potentially incurring significant obligations under the City Code on Takeovers and Mergers.

The UK Stewardship Code too deals with the question of how shareholders may co-operate to influence companies.

Other rules which may constrain the activities of activists include the need to observe FCA disclosure thresholds, and the market abuse regime covering issues such as inside information, insider dealing and market manipulation.

Negotiations

Companies should usually be prepared to talk to activists – and to listen. Activists taking a stake in a company now frequently say (at least initially) that they'd prefer to work constructively with existing management to realise their goals.

But directors also need to be careful.

— Directors should not let activists control the agenda of discussions. It is better for the board to lead the way, typically with an initial focus on exploring and clarifying the activists' concerns.

— Directors should not lose sight of the fact that the activists probably represent only a minority of the shareholder base, and do not necessarily represent the views of shareholders as a whole.

— Directors should be wary of making statements or expressing aspirations that could be construed as intentions or even promises.

— Directors must take great care not to disclose price-sensitive information to particular groups of investors. In some cases, even the fact of the discussion may constitute inside information which should be disclosed to the market.

Many companies would prefer not to have to negotiate with activists. Those who hold that boards are already heavily regulated, and should be allowed to exercise their discretion in setting and executing corporate strategy without additional shareholder interventions on policies or compliance, are never going to be keen on the potential compromise that negotiation implies.

However, negotiations only arise once an activist has a stake and is potentially in a position of influence. Unless the board is confident it can defeat the activist in what could be a long campaign, preliminary negotiations – if only to sound the activist out and understand their position more fully – are often the least worst option.

Even while they seek dialogue with the board, some activists may also push their arguments on social media, engage with the press and seek to influence other shareholders. Boards may wish to make negotiations conditional on the suspension of such activities.

For more on negotiations, see **Dealing with activists.**

AGMs and other general meetings

Annual general meetings are the public stage for many activist dramas. So are other general meetings – but in practice many activists are better positioned to avail themselves of the opportunities an AGM affords.

While activists can sometimes take advantage of a general meeting that the company has called to approve a particular action (typically as required by the law or the company's own articles of association), they cannot requisition such meetings themselves unless – broadly – they control at least 5% of the company's share capital.

If the timing of a forthcoming AGM works, therefore, activists will probably try to use it as a forum for highlighting their message, asking questions, advancing a hostile resolution or following their playbook in other ways.

One tactic that is increasingly common is for shareholders to target resolutions to approve the company's remuneration report and policy (sometimes referred to as 'say-on-pay' resolutions – see box below) as a way of indicating their dissatisfaction with executive pay.

The same goes for resolutions for the re-election of directors, in particular if shareholders believe a director is 'over-boarded' (i.e. holding a number of positions on multiple boards).

Until recently, such tactics often garnered plenty of publicity and sometimes attracted significant numbers of opposition votes at AGMs, but typically came nowhere close to achieving the 50% of the votes cast required to defeat the resolutions. However, that threshold is now being met at an increasing number of AGMs, with remuneration and re-election both obvious lightning rods for shareholder discontent.

Every respondent in a 2022 study on the influence of the UK Stewardship Code 2020 had been involved in some form of engagement and escalation, with engagement being intensified when target companies repeatedly ignored investors' concerns. Nearly 90% of the asset managers in the survey had voted against company management recommendations and increasingly voted against director re-election as a method of escalation.

In June 2022, Informa's AGM saw one of the largest recent shareholder rebellions when, following recommendations from ISS and Glass Lewis, there was a 71% vote against the company's pay report.

For more detailed information on activism in AGMs and other general meetings, see the section on **AGMs and activists**.

Say-on-pay

So-called say-on-pay voting is merely advisory in the case of votes against remuneration reports. A company losing such a vote can take note of what has happened and later provide an update explaining what (if anything) it is doing to remedy the situation. But shareholders must also vote once every three years (or more frequently in certain situations) on the company's remuneration policy. This is a binding vote and, if it is lost, the company must operate according to the last remuneration policy to have been approved by shareholders, until it is able to win a vote on an alternative.

Litigation

Most shareholder activism entails negotiations with the board or other shareholders, or actions at general meetings. In theory, activist shareholders may also take legal action, through a derivative claim or an unfair prejudice petition.

— In a **derivative claim**, a court grants a shareholder permission to bring a claim on behalf of the company against one or more of its directors on the grounds of negligence, default, breach of duty or breach of trust (usually after the board has refused to take action itself).

  - Any damages awarded under such a claim go to the company rather than the shareholder, making this an unappealing strategy for many activists.
  - The courts may also be reluctant to permit a claim that appears to be made principally as a means to an activist's ends rather than in the company's interests.

— A minority shareholder may petition the court for relief on **unfair prejudice** grounds if it believes the company's affairs have been conducted in a manner that is unfairly prejudicial to the interests of shareholders generally, or to a section of them.

  - The remedy for a successful claim is usually an order that the company should buy the petitioner's shares at a fair value.
  - As the activist shareholder would thus cease to be a shareholder, and might not achieve a better price than by selling on the market, such a claim is likely to be something of a last resort.

In practice – given the difficulty of maintaining and proving sustainable claims as a matter of law, and the likely inadequacy of the available remedies – litigation is rarely used strategically by shareholder activists in the UK (in contrast to e.g. those in the US and Germany).

One notable exception, however, is the growing number of instances in which activists have taken legal action over a company's approach to ESG issues.

In 2022, activist shareholder ClientEarth notified the board of Shell of its intention to launch legal action over the company's climate transition plan, claiming that the board are failing in their duty under the Companies Act 2006 to promote the success of the company and to act with reasonable care, skill and diligence by refusing to commit to lower absolute emissions in line with the Paris Agreement.

It was reported in February 2023 that ClientEarth had formally launched proceedings against Shell's directors in the High Court – the first derivative claim against a board on climate grounds.

Share ownership can allow ESG activists to challenge a company in other ways too. For example, greenwashing might leave a company vulnerable to litigation under the Financial Services and Markets Act 2000, which allows shareholders to sue the company for loss suffered as a result of any untrue or misleading statements.

However, the cost of such litigation and the requirement to demonstrate financial loss mean it is more likely to come from large investors and asset managers, especially those who are keen to protect their own environmental credentials, rather than from dedicated ESG activists.

Takeovers

Some activist campaigns seek to persuade the company to put itself up for sale. (Activists have even been known to use their own networks to help facilitate transactions.) But a growing number of campaigns are being conducted *against* a proposed sale – often with the aim of achieving better terms in a renegotiation or a better price for the business via an alternative deal.

Activists engaging in such 'bumpitrage' attempt to persuade a prospective acquirer to 'bump up' their offer for the company, usually with the threat that the deal will otherwise be blocked.

Typical tactics include arguing that the directors of the target are failing in their duty by not negotiating the best possible price, and suggesting publicly that shareholders should not accept the offer.

The flipside of bumpitrage is the arbitrage in which activists engage when they invest in an acquiring company whose stock price has fallen after a merger announcement, and then seek to kill the deal – thus driving the price up again.

Investing on principle: ESG activism

Investor activism on issues that are now termed 'ESG issues' has been around for many years. But as general awareness of ESG issues has grown – particularly in relation to climate change – ESG shareholder activism has become much more common.

Burgeoning disclosure requirements for climate-related data and progress on net zero commitments are making the performance of many companies, in areas such as sustainability and environmental impact, a matter of public record.

The information disclosed is increasingly informing third party voting advice to shareholders. It also gives environmental activists more data than ever as they decide which companies to target – just as other evolving disclosure regimes (such as the FCA's requirements on reporting diversity and inclusion) can aid ESG activists.

Climate activism

Although activism around other issues is becoming more common, environmental and climate-based activism remains at the forefront of ESG campaigns.

— Companies are under continued and constant pressure to implement their climate change objectives and policies and to publish meaningful reports on their actions.

— There is increased pressure to ensure that corporate objectives are consistent with Paris Agreement targets.

— Increasingly investors – many of whom have climate-related targets of their own – want companies to demonstrate what they have done to implement their climate commitments.

Some companies – particularly in sectors such as fossil fuels – have been the focus of campaigns by activists whose modus operandi is to cause disruption in order to publicise their cause.

But while the activity of extremists still colours the picture of activists presented in the media, many ESG activists have a much more sophisticated approach.

Value and values

As already noted, there is an increasing overlap between 'value activism' and 'values activism'.

Some ESG-focused investors are adopting activist tactics while also explicitly targeting value creation. Examples include Engine No 1, which – despite holding just 0.02% of the company's stock – succeeded in getting three of its nominees onto the board of ExxonMobil after arguing that Exxon's approach to decarbonisation and its financial under-performance were connected.

— Engine No 1 says it aims to "shift the trajectory of companies to create more value for employees, customers, communities, and the environment. By doing so, we can create more long-term value for shareholders."

— A year after Engine No. 1's intervention, Exxon's share price was up by over 50% and the board recommended the re-election of all three directors originally nominated by Engine No. 1.

ESG issues are also driving major institutional shareholders to take steps that a few years go would have been associated with activists. Norges Bank Investment Management, with some USD 1.2tn in worldwide assets, says it will vote against board members if it sees "material failures in disclosing, managing or overseeing climate risk" and may propose its own climate-related resolutions where companies do not meet its expectations.

Climate change resolutions

A common tactic used by climate activists is to requisition a climate-focused resolution at a company's AGM. But the wording of a resolution can make a big difference to the attitude of other shareholders. Broadly, the more prescriptive a resolution, the less likely it is to garner support.

— Shareholders are more likely to support a resolution requiring a set outcome than one that directs the board to take a specific action or approach.

— Blackrock Investment Stewardship is not untypical when it says it is "not likely to support … [resolutions] intended to micromanage companies. This includes those that are unduly prescriptive and constraining on the decision-making of the board or management".

— Where a shareholder-requisitioned resolution has gone up against a broader advisory resolution tabled by the board, typically it is the board resolution that wins out, as was seen in the cases of both BP and Royal Dutch Shell during the 2022 AGM season.

For many activists, though, the act of requisitioning the resolution itself is a sufficient achievement. Recent examples of such activist success include the engagement of HSBC and Rio Tinto with their shareholders to develop what were in effect negotiated climate resolutions, both of which were then tabled and passed at their respective AGMs.

For more on this topic, see **Discouraging ESG activism**.

A Say on Climate?

The 2022 AGM season saw several boards present 'Say on Climate' resolutions (essentially, putting a climate action transition plan to a shareholder vote, or establishing the framework for the adoption of an annual vote on climate change matters). Activist shareholders also sometimes requisition such resolutions. But 'Say on Climate' resolutions are not universally popular among ESG advocates, and proxy advisers typically recommend assessing Say on Climate proposals on a case-by-case basis.

— In the case of shareholder resolutions, proxy adviser Glass Lewis makes the point that allowing shareholders to "weigh in" on a company's climate strategy may effectively mean abdicating some of the board's responsibility for setting the strategy of the business.

— Glass Lewis adds that "shareholders are being asked to make informed voting decisions associated with the setting of companies' long-term business strategy – as is the case with the establishment of net zero emissions goals to 2050 – with potentially incomplete information relating to operational changes and related costs."

— Where the board puts forward a Say on Climate resolution, concerns have been expressed that this could lead to the rubber-stamping of strategies that are, in fact, not aligned with net zero, particularly where shareholders lack the expert knowledge to analyse such strategies in detail.

Minimising the risk of activism

Any listed company is a potential target for activists. But some are much more vulnerable than others. Companies can take a variety of steps to minimise and mitigate the risk.

Track and evaluate factors that may attract the attention of activists.

These will include issues such as:

— Visibly weak or problematic governance.

— A poor stock market performance relative to the company's peers'.

— Negative coverage from analysts.

— Sustained negative media coverage.

— A stockpile of cash.

— An ongoing activist campaign – it is not uncommon for one activist to attract others.

Assess the company's situation regularly to identify vulnerabilities.

Scheduled strategic reviews can also evaluate the potential of corporate strategy to attract unwelcome attention from activists. External advisers can be asked to audit the company's position.

Monitor the shareholder register and trading in the company's shares.

Causes for concern may include:

— Stake-building by known activists or their proxies.

— Any unusual activity, including unusual levels of stock lending and borrowing.

— Multiple small holdings appearing on the register, especially as the AGM approaches.

Stake-building
Investors must disclose their holding of shares or financial instruments once it reaches 3% (and in 1% increments thereafter), within two trading days.

— If the company goes into an offer period, a shareholder has to disclose their interest and dealings when their interests exceed 1%.

— When considering thresholds, persons acting together need to consider whether they have an indirect interest in each other's shares, or relevant contractual arrangements.

The company may send a section 793 notice to persons it knows or reasonably believes has or has had interests in its shares in the previous three years, requiring disclosure of their interests and of agreements or arrangements relating to the shares. It may also require disclosure of certain other information about the recipient's own interests in the previous three years and their knowledge of others' interests.

A person who fails to comply with a s793 notice or knowingly or recklessly provides materially false information is liable to a fine and/or imprisonment.

— The company can also apply for a court order to remove all voting rights or rights to payment attaching to the shares, to make any transfer of the shares void, and to ban participation in further share issues.

— In addition, companies typically have articles that permit shares to be disenfranchised without a court order if the person does not supply the requested information or provides a false or inadequate answer.

Reporting on engagement
The Companies (Miscellaneous Reporting) Regulations 2018 require certain large companies to report on various matters in the strategic report section of their annual accounts, including a statement describing how the directors have had regard to the matters in section 172(1)(a) to (f) of the Companies Act 2006.

Also, the directors' report section must summarise how the directors have had regard to the need to foster the company's business relationships with suppliers, customers and others, and the effect of that regard, including on the principal decisions taken by the company during the financial year.

Monitor activist activity in other companies.

Be aware of trending issues for activists and conduct due diligence to evaluate the company's vulnerability on these points.

External advisers may be retained on a watching brief.

Ensure the Investor Relations team has good (and proactive) relationships with major shareholders.

The IR team should be addressing the concerns of major shareholders quickly and effectively while communicating the company's message on key issues such as strategy, growth and shareholder value.

— This should be ongoing. Major shareholders are likely to be unimpressed if they only hear from the company when activists are at the door.

— Some large shareholders have limited time and bandwidth for engaging with individual portfolio companies – not least because UK listed companies are a smaller proportion of many portfolios than they were in the past. IR teams should make engagement as easy as possible.

— Major shareholders typically prefer to hear about key developments from the company itself before they read about them in the media (although the company must of course comply strictly with the rules on the treatment of inside information).

Make sure the IR team's relationships with international shareholders are as strong as its relationships with domestic ones. (More UK listed shares, by value, are held overseas than are held in the UK.) If, for example, a UK company with big US shareholders is targeted by a US-based activist investor, it will want to neutralise any potential disadvantage from national identity, connections or geography.

Companies should monitor the effectiveness of their IR teams (e.g. major shareholders can be surveyed for feedback). A weak IR function can be a catalyst for activism.

Identify and target the shareholders the company would like to have.

A core of large holdings in the hands of institutional investors who are generally sympathetic to the board's approach can be a very strong defence against unwelcome activism. A company should know which investors it would like to have on its shareholder register, and should make strong efforts to persuade them of its investment case.

Maintain good relationships with analysts and key journalists.

Roadshows continue to be an important way of getting a company's message to the investment community. The ability to run online roadshows, common after Covid, has made it possible for companies to increase the number of these events, and to be more active in running them for an international audience.

Being accessible to journalists is important. This can often be achieved through things as simple as making it easy for them to pull key information from a company's website (journalists rarely have time to read through an annual report), and making sure they have a reliably responsive point of contact in the company.

Engage regularly with smaller shareholders.

This type of engagement is inevitably more retail in nature, but can still have a strong positive effect on shareholder sentiment. The growth of social media has seen an increase in the number of comments being posted in chat rooms by small shareholders which are then picked up in the media, and by larger shareholders and the market more generally.

Companies should consider "re-using" their interactions with larger shareholders and analysts by e.g. making material from investor relations days and capital markets days available on their websites.

Take shareholder opposition to resolutions at general meetings seriously.

If a significant number of votes go against a board-backed resolution, that is always a matter for concern.

— Under the UK Corporate Governance Code, if 20% or more of votes are cast against the board recommendation for a resolution, the company should say how it will consult shareholders on the issue, and withing six months publish the views received from shareholders and actions taken.

Even a negative vote below 20% can be a sign of trouble, especially if it includes a major or influential shareholder.

— The Investment Association runs a public register that shows when companies in the UK FTSE All Share receive significant opposition by shareholders to a board-backed resolution, as well as where resolutions are withdrawn before a shareholder vote.

Have a 'fresh pair of eyes' (or several).

Professionals and experts from outside the business can help you keep everything about the company – from compensation and corporate governance to cost structures – under regular review.

In addition to highlighting opportunities, as well as areas of risk that might attract activists, this can give the company ready access to credible third-party analysis and opinions with which to respond to activist campaigns.

Have an action plan for responding to activism.

Companies may go as far as running exercises to stress-test their action plans (and to give their team experience), with external advisers or consultants taking the role of the activist.

A good plan will facilitate a rapid response to any activist who breaks cover, potentially helping the company get its message across to key shareholders and media outlets first.

Any plan should reflect the fact that, for example, dealing with an ESG activist may require a significantly different strategy from handling a disgruntled institutional investor or a professional activist seeking seats on the board.

Discouraging ESG activism

Observing the various recommendations for best practice that now cover ESG issues will do much to reduce a company's chance of being targeted by ESG activists. A company's actions might include:

— Collecting and correctly reporting relevant data about its performance.

  - This is important, but may have a negative impact if the company performs below expectations. In that event, prompt acknowledgement of underperformance in combination with a credible plan for future improvement is often the best way to pre-empt action from activists.

— Monitoring ESG performance even in areas where it is not obliged to report and chooses not to do so or is unable to do so.

  - Some companies have found themselves under attack by ESG activists because of e.g. the activity of joint ventures or poor ESG practices in their supply chain. Having a heads-up on such potential issues can be very valuable.

— Ensuring effective board oversight.

— Properly assessing and managing exposure to ESG risks.

— Working to embed ESG principles in its corporate culture.

— Monitoring the ESG positioning of its peers/ competitors, to ensure it is not an outlier.

— Familiarising itself with the ESG positions of major shareholders.

  - As shareholder expectations and policies can change, the company should regularly ensure its information is up to date.

— Publicising its ESG achievements, without resorting to greenwashing.

There are certain sectors where even observing these principles may not be enough. Any company whose business looks set to decarbonise slowly or incompletely – whether for economic, operational or technical reasons – is at heightened risk of activist intervention.

Dealing with activists

There is little companies can do to prevent shareholder activism from a legal perspective. At its core, shareholder activism is the exercise by one or more shareholders of their rights in respect of their shares. But there are preventative and reactive measures companies can take in response to shareholder activists.

Companies will want to think carefully about calibrating their response to activism.

A one-size-fits-all reaction from the company may simply encourage activists to double down, and might even cause disquiet among other shareholders.

— It usually makes sense to treat ESG activists who are keen to engage differently from those whose main aim is to protest and disrupt.

— An activist investor seeking a constructive discussion on strategy will expect (and should probably get) a different reception from one who comes in aiming to sack the board.

Campaigns

Faced with an activist campaign, what should a company be doing? Each campaign is different, but typical options include the following.

Understand what the activist is doing, and why, and analyse how much of a threat they really are.

Remember, too, that simply highlighting the flaws, discrepancies or contradictions in an activist's argument will not always be enough to win a battle against them.

— If the activist has previously targeted other companies, a review of their tactics may prove useful.

— It will also be helpful to examine the activist's record of success: where activists have previously failed to create value or achieve their goals, it will sometimes be in the company's interest to highlight that.

Engage with activists and be seen to engage with them.

You can also use publicity and the media to talk more widely about the issue that concerns the activist – but try to avoid negotiating with the activist through the media or in public.

Engage promptly and openly with other major shareholders to put forward your arguments.

Where possible, take the initiative – don't give the activist a free hand to make the running or determine the agenda.

It is sometimes appropriate to take pre-emptive action to address the activist's concerns.

A major attraction of doing this is that it not only takes the wind out of the activist's sails but also allows you to deal with those concerns on your own terms.

When activists table a resolution, the company should make its own position clear and engage with shareholders as fully as possible.

— Companies sometimes use proxy solicitation agents in this situation, to maximise their reach among shareholders.

— It is increasingly common for major shareholders to indicate, in public and in advance, how they will vote in meetings. Depending on the position they support, this can significantly help – or hinder – the board.

Prepare thoroughly for any general meeting, including AGMs.

See the supplement on AGMs and activists at the end of this document for more information.

Monitor activity and check compliance.

Like the company, activist shareholders are subject to rules – some triggered by the size of their shareholding, for example, or requiring them to follow specific procedures – and the company should pay close attention to what the activist is doing.

— If any of the activist's actions may constitute regulatory breaches (e.g. of insider dealing rules), the company may wish to report this to the regulator.

— However, regulators do not like to be seen to be used as a negotiating tool and take a dim view of attempts to leverage a threatened regulatory breach for commercial benefit.

Know when to compromise.

If you think an activist will prevail in the long term, then the company's own long-term interest may be to embrace them and the change they want to see. Many directors have concluded that it is better to work with activists than to be put out of work by them. It is not uncommon for companies to enter into formal relationship agreements with activists – sometimes giving the activist or its nominee a seat (or seats) on the board, and making commitments around strategy and governance.

— Such agreements may also include, for example, clauses to stop either side disparaging the other, or to prevent the activist increasing its stake in the company or pursuing its campaign any further.

— Even without a formal agreement, a seat on the board is sometimes enough to bring the activist onside. Directors owe their duties to the company and must take collective responsibility for board decisions. It is a breach of duty for a director to seek to undermine the board by publicly dissociating themselves from board policy without permission.

A company may attract attention from more than one activist. (At the time of writing, for example, no fewer than three large and well-known activists have independently taken stakes in US software giant Salesforce.) This may complicate the situation, especially if the activists have different aims. But it may also offer the company a choice of activists to work with, allowing it to develop a relationship with the one whose approach it prefers.

Communications

A company targeted by activists will want to involve external advisers (probably including brokers, lawyers and PR advisers) when considering and drafting its communications, as there may be risks around e.g. defamation or disclosure.

A company's initial instinct may be to counterattack immediately by discrediting the activist: e.g. by drawing attention to litigation in which the activist is involved, or negative publicity it has received in the past. But such steps on the part of the company should only be taken in the context of a broader – and carefully planned – publicity campaign or communications strategy.

When developing a communications strategy, a company should consider a number of factors:

Aim for a clear and, ideally, simple strategy to get its message across to the broad majority of shareholders.

Clarity and simplicity are not just for the benefit of shareholders. Everyone on your team – especially if the team is large or dispersed – needs to understand your strategy completely.

It will also be helpful if your message itself is clear and simple (however much detail may be required in any associated documents).

Decide how far it will acknowledge any validity in the activist's arguments.

If the company accepts that even some of what the activist says is justified, it needs to present a credible plan for dealing with the issue (unless it can show that e.g. doing so would have too great an opportunity cost).

If the company believes the activist has no case, it needs to explain why. That explanation should be compelling and evidence-based, as the activist will usually have taken considerable pains to make their argument at least superficially persuasive. Simply dismissing the activist's view without presenting a convincing alternative is unlikely to win shareholders over.

Evaluate and respond to the activist's own communication strategy.

If the activist's argument is getting into the national press, for example, the company's should too.

Agree which individual(s) will speak on behalf of the company.

It is important to ensure that the company's message is consistent and well-presented – especially if events are unfolding rapidly.

Agree on the appropriate tone for its messaging.

Appearing defensive is probably not a good idea – but nor is it always best to fight fire with fire. Input from seasoned veterans of activist campaigns will help the company get it right.

Don't…

Don't underestimate activists

Many are well funded, committed and ready for the long haul – in some cases, prepared to pursue a campaign over several years.

Activists are also usually well informed, and often come armed with deep bespoke research on their targets.

Research suggests that fund managers who are socially connected to activists are significantly more likely to support them. Companies should not assume that their connections with their shareholders are automatically better than those of activists.

Don't ignore activists

Particularly in the early days of a campaign or stake-building, the company may be tempted to do nothing, rather than spend management time on establishing or reviewing its defences. It might hope that the activist will have minimal demands or will soon sell their stake again. Experience suggests that such hopes are usually ill-founded.

Don't dismiss activists

When activists are not investment professionals but are from ESG or other pressure groups, some companies may be inclined not to take their arguments or their campaigns seriously. But patronising or dismissive comments about activists often play badly in the media, and increasingly with other shareholders.

Especially if activists are from a minority or community that feels it has been treated poorly by the company, displaying an apparently dismissive attitude can be a major own goal.

Don't automatically attack activists

Many shareholders today have a somewhat positive view of activists, in many cases hoping that they might be able to shake up the business and add or return value.

It is usually more effective to counter the activist's argument – e.g. explaining why they will not achieve value – rather than attacking the activist themselves.

Don't attempt to deny activists a platform

The law gives all shareholders certain rights at meetings and in other situations – for major shareholders, many other situations.

In an age of social media, trying to deny even the smallest shareholder a platform is likely to be unsuccessful and probably counterproductive.

It will also almost certainly be counterproductive to argue that it is 'for the good of the company/other shareholders' not to let the activist make its case.

Don't panic

Activist shareholders usually start off in the minority – they need to win the support of other shareholders.

A chaotic or uncoordinated response to the appearance of an activist – or an unduly aggressive or defensive response – typically plays into the activist's hands.

If you have a stress-tested plan for dealing with activists, good shareholder relationships and good corporate governance, you are in a strong position to counter an activist campaign. Even if you fall short in one or more of those areas – or others, like share price or the delivery of value to investors – you will almost certainly have a number of viable options.

Many activist campaigns ultimately fail, or are resolved by compromise. Proceeding carefully, reasonably and rationally is the company's best route to achieving one of those outcomes.

Supplement: AGMs and activists

The AGM is often where the conflict of an activist campaign plays out – though sometimes the forum may be a general meeting that has been called by the company or requisitioned by an activist.

In either case, the principal attraction for many activists is the possibility of securing a substantial vote against the board on a resolution. For other activists, a meeting may principally be an opportunity to question the company, or to embarrass it, or to gain publicity for a cause.

Whatever an activist's motives, the rules governing meetings (which may include additional rules in a company's articles) offer multiple opportunities for both the activist and the company to shape events.

Preparing for a meeting

As the FRC notes in its Good Practice Guidance for Company Meetings, after notice of an AGM is published, "companies may wish to offer a separate shareholder event to discuss matters pertinent to making decisions on voting at the AGM, to enable shareholders to discuss matters related to the company and receive up-to-date information about the business prior to formal voting by proxy or at the AGM."

Companies may wish to have discussions with key shareholders, potentially encouraging them to indicate how they intend to vote on certain resolutions.

The company should monitor closely any media coverage of the upcoming meeting and respond to it where appropriate.

— If media coverage of the meeting itself is expected, the company may wish to offer pre-meeting briefings to journalists.

— Companies do not have to admit journalists to AGMs, but most do. Any planning to deny journalists access (especially where it has previously been available) should bear in mind that this may become a story in itself.

Additional preparations should be made for the conduct of the meeting. For example, the board should be armed with a comprehensive Q&A, anticipating questions that might be asked at the meeting and providing suitable answers. This should be prepared with input from the company's advisers.

— It may be helpful on some questions to provide a summary of answers offered at previous meetings or on other occasions, and it can save time to be able to refer to material already on the company's website.

— It is generally a good idea for directors to be present at AGMs. The FRC recommends that "so far as practicable, board members attend the meeting (virtually or physically) to respond to questions." The absence of directors can help activists develop the narrative of a board that is Awol or is trying to avoid scrutiny.

Disruption and security

It is important for the directors to remember that shareholder meetings are for the shareholders' benefit and that the role of the chair is to run an orderly forum for proper and fair debate and decision-making.

— The chair (who may be the chair of the board, but need not be) will wish to prepare with particular thoroughness if a meeting looks set to feature negative shareholder interventions.

— They may, on the day, have to strike a balance between allowing shareholders to express their views and maintaining order in the meeting. (They could, for example, invite a large group of activists to select a single spokesperson, to facilitate a more orderly and productive debate.)

— The chair needs to know what options are available to them if they have to deal with disruption, and to understand clearly what rights any shareholder has – as well as the limits of those rights.

— It may be useful for the chair to have a legal briefing ahead of the meeting or for a lawyer to be present in the meeting.

If the meeting is expected to be lively, plan the configuration of the room so that directors have close access to advisers and those managing audio-visual equipment, and so that they do not have to pass through the audience in order to leave the room.

— Instead of using a roving microphone, consider using a podium at the front of the room and inviting speakers to address the room from there rather than from a camp of vocal supporters.

Contingency planning for disruption is increasingly important.

— Activists chanting or gluing themselves to the furniture can derail an AGM – but dealing with them can, if not done professionally, be even more disruptive.

— The FRC's Good Practice Guidance for Company Meetings suggests companies "make it clear that unacceptable behaviour will not be tolerated at the meeting and that it will be dealt with appropriately by the chair."

— The company should carefully consider reputational factors when it engages in contingency planning.

In some cases it may be wise to put additional security measures in place at a meeting.

— Some shareholders will object to the imposition of security measures they find intrusive. But if a company has grounds to believe that activists are planning to disrupt a meeting, it will want to consider steps such as issuing special access passes, searching attendees (if permitted by the articles of association) and even refusing entry at the directors' discretion (again, if the company's articles of association provide for this).

— In addition to the usual criteria for selecting a venue, companies that anticipate disruption by activists will want to find a location where their security teams will be able to contain disruption effectively.

Activists and hybrid meetings

Some activists believe that 'hybrid' AGMs – that is, AGMs which permit shareholders to attend online as well as physically – are beneficial for shareholders. Activist charity ShareAction has suggested that a hybrid AGM can be the 'best of both worlds', allowing contributions from a wider range of shareholders "while simultaneously supporting the deeper dialogue that in-person meetings allow."

The FRC's Good Practice Guidance for Company Meetings also recognises the advantages for shareholders, recommending that companies should "where appropriate, take advantage of the use of technology to increase participation and engagement."

— Some companies now provide webcasts or audiocasts of even physical-only meetings, to increase overall shareholder engagement.

— Only a few companies have held wholly virtual meetings. The high degree of legal uncertainty that exists about virtual meetings may be the main reason the number is so low.

Leading Counsel has advised that hybrid meetings are feasible even if the company's articles of association do not expressly permit such meetings – as long as the articles do not expressly prohibit them. In practice, it is much easier to run a hybrid meeting if the articles expressly facilitate them by including provisions such as what to do if there is an outage.

Running hybrid meetings

Hybrid meetings cost more than traditional meetings and are more challenging to organise.

— Contingency planning needs to be in place to cover any tech problems, wifi failure etc.

— Directors and other company officers need to be properly conversant with the technology being used (as do registrars and any other service providers involved).

— Appropriate online security will be needed to prevent unauthorised access, disruption or the hacking of votes.

— Companies expecting a large online attendance should give proper consideration to providing a temporary technical support function/helpline for shareholders.

In the words of the FRC's guidance: "As far as the technology allows, shareholders should have the same rights of participation in hybrid (and, if the legal position is clarified, virtual) meetings as in physical meetings." This stance should be reflected in both the planning of meetings and their conduct, in which the chair should ensure that, as far as possible, shareholders attending online are not disadvantaged.

The technology available for hybrid meetings is developing rapidly. In 2022, renewable electricity giant Iberdrola became the first Spanish company – and possibly the first major company anywhere – to run a hybrid shareholder meeting in the Metaverse, with attendees able to access it either with virtual reality glasses or from any computer or mobile phone.

Questions at hybrid meetings

Some companies allow remote participants to send questions for a meeting in advance – potentially emailing them up to the morning of the meeting – but not to ask questions remotely.

Managing questions asked online during a meeting is certainly more challenging (as is handling follow-up questions). But shareholders are more likely to view scripted answers to pre-screened questions as a 'fix', and advocates for shareholder rights argue strongly that companies ought to enable questions to be asked remotely in real time.

— Without real-time questioning, shareholders who ask questions remotely can't respond to the company's answer – only those physically present in the meeting can ask follow-up questions. Nor can shareholders who attend remotely ask questions about what is presented or said at the meeting.

— If remote questions are enabled, shareholders should be clearly told how to ask such questions, and how questions will be selected/moderated.

Voting at hybrid meetings

Hybrid and virtual meetings potentially offer more access to shareholders, but mean that remote voting has to be enabled, with shareholders given clear instructions in advance (probably in the notice of meeting) on how to log in, vote and ask questions online.

— Proxy voting remains an option for shareholders, as it does for purely traditional meetings.

Requisitioning shareholder meetings

The directors of a company must call a general meeting if asked to by the holder(s) of at least 5% of the company's paid-up voting share capital. Such a meeting will usually be to consider a resolution or resolutions from those shareholders.

— This will often be a resolution calling for the removal of one or more of the directors, which may be accompanied by others calling for the appointment of directors preferred by the activists.

— In certain situations, a shareholder who requisitions or threaten to requisition a general meeting to consider a 'board control seeking proposal' could trigger a mandatory bid for the company under Rule 9 of the Takeover Code. However, other conditions would have to be met: most obviously, the shareholder and any others with whom it was deemed to be acting in concert would need to hold 30% or more of the voting rights in the company.

When requisitioning a meeting, the shareholders must set out the business to be dealt with at the meeting, which may include the precise text of any proposed resolutions.

— There are some restrictions on what resolutions can be proposed. Any resolution must not be incapable of taking effect – for example, because it would be inconsistent with the company's constitution – and must not be defamatory, frivolous or vexatious.

— A requisitioned general meeting is likely to generate considerable press coverage and provide activists with a public platform to promote their campaign. Activists will often tailor their resolutions to attract such coverage.

Broadly, when a meeting is correctly requisitioned by shareholders, the directors must call it within 21 days. The meeting must be held no later than 28 days after it is called. (Shareholders need to give the company at least 28 clear days' notice of an intention to move resolutions for the removal of directors.)

Companies tend to resent requisitioned meetings. They inevitably eat up management time, can be expensive and often attract unwelcome media attention. But directors who appear to be reluctant participants, or who drag their feet over process, will do their cause no favours. The best approach is usually to grasp the meeting as an opportunity definitively to resolve the issue that prompted the activist to requisition it.

Proposing resolutions at an AGM

A shareholder or shareholders holding at least 5% of the total voting rights in a UK company (excluding rights attaching to treasury shares) can require a resolution or resolutions to be proposed at an AGM.

— One hundred or more shareholders (if they have shares on which an average of at least £100 per shareholder is paid up) can also require a resolution or resolutions to be proposed.

  • In practice, this makes it easy for activists of any size to get resolutions onto the agenda. A shareholder with less than 5% could split its shareholding, transferring shares to 99 other affiliates/nominees to meet the 100 member threshold.

— Shareholders proposing a resolution are also permitted to request a copy of the share register from the company. A company can only refuse such a request if it can show that it was not made for a proper purpose (for example, in order to intimidate other shareholders).

  • An activist can gather information about other shareholders from the register. But an effective campaign will need to go beyond this (e.g. the activist may want to put its case to the beneficial owners of shares, where these are not the same as the legal owners identified in the register). Activists often enlist professionals such as proxy solicitation agents to help them at this stage.

In some cases, a period of negotiation will see resolutions that are initially requisitioned by shareholders evolve into board resolutions.

— This can be a win-win process, with the activist getting (some or most of) what they want and the board avoiding the time-consuming headache of countering a full-blown activist campaign.

— In other cases the resolution may go to the meeting but the board may also table its own compromise resolution on the same topic, in an effort to head off any shareholder revolt.

Making statements

Shareholders who are able to require that a resolution be put to an AGM are also able to put forward a statement of up to 1,000 words on any matter to be dealt with at the AGM, which the company must circulate to all shareholders, at the same time and in the same manner as it gives notice of the AGM or as soon as reasonably practicable afterwards.

— Statements do not always come in tandem with requisitioned resolutions. Engaged shareholders sometimes publish and circulate their own statements on resolutions they oppose.

— The company can sometimes avoid circulating a statement if the shareholders fail to fulfil certain conditions.

Such shareholders can also require the company to publish on its website a statement setting out their concerns about audit matters – in particular, about the audit of the company's annual accounts or an auditor ceasing to hold office.

Posing questions at meetings

All shareholders are entitled to speak at shareholder meetings, where they can ask questions of the board. The right can be exercised via a proxy or corporate representative.

Broadly, the Companies Act obliges the board to answer, assuming a question relates to the business being dealt with at the meeting.

— The board can refuse to answer in certain circumstances, for example where a response would involve the disclosure of confidential information or would not be in the interests of the company.

— A board may take the view that it is better to engage with a shareholder in private, rather than entering into a public debate at the general meeting.

In practice, the right to ask questions in a meeting may be of limited benefit to activists unless the meeting is high-profile enough to attract media attention.

Voting on resolutions

The thresholds for shareholders to requisition resolutions or a general meeting are relatively low. But the thresholds for passing resolutions are much higher.

The default position is that an ordinary resolution can be passed with a simple majority of the votes cast. This includes a resolution to appoint or remove a director.

— There are some limited exceptions (e.g. where a listed company has one or more controlling shareholders, the election or re-election of any independent director by shareholders must be approved by a majority of the independent shareholders as well as an overall majority).

— The right of shareholders to remove a director by ordinary resolution (50%+1 of those shareholders attending and voting) cannot be excluded and overrides any contractual provisions.

To pass a special resolution 75% of the votes cast for or against must be in favour.

— Special resolutions include those amending articles, reducing capital, and disapplying pre-emption rights.

— A company's own articles of association may specify additional situations in which a special resolution is needed.

While in practice this means that a shareholding bloc of 30% may be sufficient to pass or reject a resolution (given that shareholder turnout at meetings is said typically to be between 50% and 70%), this is still far more than the number needed to put a resolution to the meeting.

Furthermore, most companies have articles of association that say the company need only take instructions from shareholders if the resolution is passed by 75% of the votes cast for or against.

Leveraging votes

Voting thresholds can make it difficult for activists to achieve certain changes to a company. But they can also make it easier for activists to block change in certain cases – potentially offering activists a valuable negotiating chip.

— In particular, activists with 25%+1 of the votes at a meeting can block a special resolution proposed by the directors or any attempt to achieve a takeover by scheme of arrangement.

— Even smaller numbers can block some other steps: notably, only 10% are needed to prevent a post-takeover squeeze-out of minority holdings.

— Some other situations also offer activist shareholders potential opportunities to leverage their position through a vote – for example, premium listed companies need shareholder approval for Class 1 transactions.

The least useful right available to activist shareholders may be the right to request an independent report on a poll taken on a vote at a general meeting, which has the same 5% / 100 member threshold as the right to requisition a resolution. Any vote of a listed company will probably have been conducted through a poll supervised by an independent registrar. An activist's intervention would almost certainly just confirm the validity of the poll, while appearing excessive and unnecessary to other shareholders.

Will resolutions pass?

Although activists are enjoying increasing success in AGM votes, a resolution backed by the board will still usually be approved, just as activist-requisitioned resolutions tend to fall short. But any significant vote against it is a 'shot across the bows' for the board.

Directors who don't subsequently try to address and resolve such opposition are likely to find that it spreads. Most companies now acknowledge this when announcing their voting results, usually with a statement outlining their plans to identify and/or address the issue.

If the vote against a board-backed resolution is 20% or more, the UK Corporate Governance Code says that "the company should explain, when announcing voting results, what actions it intends to take to consult shareholders in order to understand the reasons behind the result. An update on the views received from shareholders and actions taken should be published no later than six months after the shareholder meeting. The board should then provide a final summary in the annual report and, if applicable, in the explanatory notes to resolutions at the next shareholder meeting, on what impact the feedback has had on the decisions the board has taken and any actions or resolutions now proposed."

The most successful shareholder resolutions are often the less ambitious, more specific ones – it is usually easier to attract support for the removal of a particular director with a poor record than it is to force strategic change on a company.