

LEADERSHIP IN THE SPOTLIGHT

An interview with Tom Matthews, White & Case's global head of shareholder activism, Guy Potel, partner at White & Case and Sonica Tolani, associate at White & Case.



**Tom
Matthews**



Guy Potel



Sonica Tolani

WHAT SHOULD ACTIVISTS KNOW ABOUT THEIR LEGAL RIGHTS IN THE U.K.?

The regulatory framework in the U.K. is pro-shareholder. Shareholders enjoy numerous rights at low levels of shareholding, such as the right of any shareholder to request and inspect copies of the shareholder register and the rights at a 5% shareholding to requisition general meetings and propose resolutions at annual general meetings. At present, dual-class share structures are not permitted for companies listed on the “premium” section of the market, but this may change later this year.

HOW DO LOCAL INVESTORS VIEW SHAREHOLDER ACTIVISM?

The U.K. is the most mature and active market in Europe for shareholder activism, with over a quarter of all activist targets across Europe in 2020. The merits of active engagement are broadly accepted by local investors, with passive and active fund managers, as well as other types of shareholder, becoming more willing to adopt activist strategies in recent months. In turn, the approach taken by activists has shifted toward being more collaborative, with an expectation now that activists will look to “meaningfully engage” with management.

HOW ARE SHORT SELLERS VIEWED IN THIS MARKET?

Despite recent scrutiny, the U.K. market is reasonably accepting of short selling. Indeed, the U.K.'s Financial Conduct Authority has publicly supported short selling as providing a “critical underpinning of liquidity provision.”

Recent high-profile examples, such as NMC Health, underline this position, demonstrating the important role that short selling can play in price discovery, exposure of fraud, and the proper functioning of the market. We expect short selling will

continue to feature in the U.K. market, with the significant recent in-flows of capital into ESG and special purpose acquisition companies (SPACs) in particular creating conditions that will be attractive to short sellers.

SHOULD U.K. COMPANIES EXPECT TO SEE MORE ACTIVISM FROM U.S. FUNDS?

Interest from U.S.-based activists has been steadily increasing over the past two to three years, with no U.K. public company too large to be targeted, and we expect this trend to continue. In particular, despite some recent share price strength, U.K. companies appear to be trading at a discount to their U.S. peers, representing value opportunities for U.S.-based investors. More generally, we expect that U.S.-based activists will continue to be attracted to major strategic or M&A campaigns, with the significant pools of capital waiting to be deployed by SPACs and private equity providing ready counterparties for any M&A proposal, as well as event-driven value opportunities such as public M&A “bumpitriage” campaigns.

DO YOU EXPECT ESG TO IMPACT THE MARKET IN 2021?

Values-based activism has been a feature of the U.K. market for decades, and we expect this will continue, with more “say on climate” resolutions being proposed, in particular at natural resources companies and multi-national banks. At the other end of the spectrum, value-focused activists recognise the wave of capital that is currently chasing ESG-friendly investments. Companies that are underperforming their peers on E&S metrics represent opportunities to achieve a rerating, thereby becoming more investible and as a result increasing the share price. In the middle, we're seeing a growing number of “hybrid” activists, who believe better ESG performance leads to better returns. In parallel, the major passive and active fund managers are placing much greater prominence on E&S issues as they review their portfolios.

Together, these factors suggest that we will start to see a greater number of campaigns whose primary focus is on environmental, social, or sustainability issues. Historically, ESG has often been a “wedge” issue, used by activists to gain traction for their underlying campaign theses. The momentum now exists for these issues to move into the mainstream, and it will be interesting to see whether 2021 is the year in which these really take hold. [iQ](#)

ACTIVISM EN MARCHÉ

An interview with Saam Golshani, Diane Lamarche, partners at White & Case, and Simon Martin-Gousset, associate at White & Case.



**Saam
Golshani**



**Diane
Lamarche**



**Simon Martin-
Gousset**

WHAT SHOULD ACTIVISTS KNOW ABOUT THEIR LEGAL RIGHTS IN FRANCE?

The rights of minority shareholders under French law depend on their level of shareholding.

The holding of a single share of a French listed company gives any shareholder basic rights such as participating at the general meeting, submitting written questions to the board ahead of a general meeting, and submitting resolutions during general meetings in order to dismiss and/or to appoint directors to the board.

Shareholders holding a minimum threshold ranging from 0.5% to 5% of the stock, depending on the share capital of the company, are entitled to submit a resolution or an item for the agenda of the general meeting and requisition the convening of a general meeting (if in line with the wider corporate interest of the company), among other things.

WHAT LEGAL CHANGES HAVE AFFECTED SHAREHOLDER ACTIVISM IN FRANCE IN THE PAST YEAR?

In the spring of 2020, the Autorité des marchés financiers (AMF), the French stock market regulator, issued a communication setting out proposals on potential improvements to the regulatory framework and market practices regarding shareholder activism. The report does not call for major changes to the current legal framework but recommends targeted amendments toward greater transparency on stake building (e.g. lowering of the initial disclosure threshold from 5% to 3%), enhanced shareholder dialogue (e.g. immediate disclosure to the issuer of material information sent to other shareholders), and wider powers of the AMF (e.g. power to issue injunctions to shareholders to correct mistakes). After consulting its advisory commissions,

the AMF approved several changes to its policy on March 17, 2021, including some of the improvements discussed in its past communication.

In addition, in May 2019, the French Parliament enacted the “PACTE” law which represented a significant ESG milestone in France. The PACTE law introduced the concepts of corporate purpose (raison d’être) and benefit corporation (société à mission) into French corporate law. A considerable number of listed companies embraced these new tools in 2020 – which promise to be a key feature of shareholder activism in the coming years.

HOW DO LOCAL INVESTORS VIEW SHAREHOLDER ACTIVISM TODAY?

The early hostility against activists and their tactics has largely declined in France. While short sellers are still unpopular, shareholder activism is now accepted as a mainstream market phenomenon. For example, the AMF explicitly stressed the overall benefits of shareholder activism in its Spring 2020 report. It is not unusual now to see activist investors pairing with traditional players (e.g. Amber Capital and Vivendi in Lagardère).

COULD SOME ELEMENTS OF SHAREHOLDER ACTIVISM BECOME AN ELECTION ISSUE?

Political involvement within the French economy is an aspect that activists must always consider, especially in 2022 which is a presidential election year. The recent opposition to the projected merger between Alimentation Couche Tard and Carrefour (even though food distribution has never been considered to be a strategic sector), and the strengthening of foreign investment controls, are significant examples of increasing political involvement.

That said, there will be many campaigns (including high profile situations, such as Danone, Pernod Ricard, etc.) where the French government is unable to use the foreign investment controls to intervene because either the target company is not in a sensitive sector or the activist’s position is not large enough to trigger the thresholds for review (i.e. 25% of the share capital or voting rights for investors outside EEA, lowered to 10% as a COVID-19 temporary measure for sensitive listed companies). [iQ](#)

WELCOME TO GERMANY

An interview with Dr. Murad Daghles and Dr. Thyl Hassler, partners at White & Case.



**Dr. Murad
Daghles**



**Dr. Thyl
Hassler**

WHAT SHOULD ACTIVISTS KNOW ABOUT THEIR LEGAL RIGHTS IN GERMANY?

German law provides for a variety of minority shareholder rights, including the right to requisition a general meeting and to request the inclusion of a resolution at a general meeting.

Shareholder rights in listed German companies are largely regulated by statute and can be modified by the articles of association only if and to the extent permitted by statute. Certain core shareholder rights cannot be limited or waived.

WHAT RECENT LEGAL CHANGES HAVE AFFECTED SHAREHOLDER ACTIVISM IN GERMANY?

In December 2019, an EU Directive aiming at enhancing shareholder participation in listed companies was implemented into German law. The new law makes it easier for companies to identify their shareholders and obtain information for shareholders, with the aim of improving transparency among institutional investors, asset managers, and proxy advisers. It also included provisions on disclosure of related party transactions.

One particular area of focus was the (limited) involvement of shareholders on board remuneration (“say on pay”), with the new law giving shareholders the chance to vote on executive compensation at least every four years. The vote is not binding but, if shareholders do object, the supervisory board must review the proposals and will likely adjust them (although they are not required to do so). The revised German Corporate Governance Code has also implemented further recommendations on executive remuneration, as well as recommendations on the independence of members of the supervisory board and on ongoing self-evaluations of the supervisory board.

HOW DO LOCAL INVESTORS VIEW SHAREHOLDER ACTIVISM?

Public perception of activists has recently been improving, and other shareholders now have an increasingly favourable stance toward activists. A recent survey by Boston Consulting Group showed that, of the investors surveyed, half welcomed the entry of activists, 70% thought that the impact of activists on corporate strategy and cost structure would increase value, and around 40% expected a better return as a result in the medium- to long-term.

HOW ARE SHORT SELLERS VIEWED IN THIS MARKET?

The recent and very public fallout from Wirecard (which had been subject to significant targeting by short sellers) has highlighted the important role that short sellers can play, by exposing overvaluations and fraud. In the case of Wirecard, BaFin issued a (unique) ruling prohibiting short selling in Wirecard stock for two months.

However, there is still a perception that short selling can pose a threat, not only to the target company but also to the market as a whole. In 2018 and 2020, short seller Viceroy Research attacked ProSiebenSat.1 and financial services provider Grenke. In both cases, the share price subsequently fell heavily, but the allegations raised by the short sellers have not yet materialised.

HOW IS ESG INVESTING DEVELOPING IN GERMANY?

In 2017, the German legislature introduced mandatory sustainability reporting for large corporations on ecological, social, and societal aspects. The market share of sustainable funds and mandates in Germany exceeded 5% for the first time in 2019 and the market for sustainable investments in Germany increased by a factor of more than 10 between 2009 and 2019.

The pandemic has brought ESG issues further into focus. Because of the developments in favor of ESG investment strategies, companies that are lagging behind in ESG ratings risk lowering their valuations, and as such have become prime targets for activists. As a result, ESG issues will increasingly drive activists' investment campaigns. [iQ](#)