

ESG IS THE WAY FORWARD

AN INTERVIEW WITH TOM MATTHEWS, GUY POTEL, PARTNERS AT WHITE & CASE, AND SONICA TOLANI, ASSOCIATE AT WHITE & CASE.

How are activists in the U.K. increasing their focus on E&S issues?

There is a growing consensus that improved E&S management is a bellwether of future financial performance. Both active and passive managers are giving greater attention to these issues, as record amounts of capital chase “ESG-friendly” companies. E&S issues have become hard for companies to ignore, with valuations impacted by greater numbers of investors shunning and screening out companies that fall short.

The energy, mining, and banking sectors, longtime key constituents of U.K. public markets, continue to come under the most scrutiny, with high-profile E&S campaigns launched at some of the largest companies in these industries. However, the scope for E&S activism is now far broader than this, with the pandemic accelerating awareness of human capital management and supply chain issues. Consequently, the consumer and retail sectors have come under increasing scrutiny. We expect E&S campaigns to be a key feature of activism campaigns in 2022.

How will activism in the U.K. impact M&A activity in 2022?

U.K. public markets remain depressed relative to international peers. Long-term undervaluation, coupled with relatively supportive fiscal policies, and a favorable U.S. dollar to U.K. pound exchange rate, will mean the U.K. continues to attract interest from foreign investors, and from the U.S. in particular. In the last 12 months, activists have zeroed in on conglomerates as ripe for M&A solutions ranging from spin-offs and take-privates to strategic acquisitions. We expect this trend to continue.

Despite the current geopolitical tensions and an inflationary environment introducing a potential slowdown in levels of M&A activity, in particular compared with 2021's record year, we expect activists to continue to promote and pursue M&A solutions in the U.K. Whilst valuations remain opaque and markets depressed, we also expect opposition toward M&A to continue.

Will special-purpose acquisition companies (SPACs) be a feature of activism in 2022?

Changes to the U.K. Listing Rules aimed at attracting SPACs to the U.K. saw the first U.K. SPAC listing in late November 2021,

and we expect more this year despite the slowdown in the U.S. In addition, a near-saturated U.S. market is turning to Europe and the U.K. for “de-SPAC” transaction targets. Conversely, activists pushing companies to sell off non-core assets will target this new source of capital for “de-SPAC” transactions.

SPACs looking at “bubble” sectors (such as ESG and technology) may risk overpaying to get a deal done and may become vulnerable to “SPAC-tivism” (both long and short) if “bad” deals emerge.

Other than ESG and M&A activism, what will be the biggest trend in activism in the U.K. in 2022?

We expect to see the rise of “retail activism” in 2022. Market participants in the U.K. have watched the successes of retail investors in the U.S. with interest. U.K. platforms are being set up to help retail investors engage meaningfully with companies. Institutional activists may be wary of the unpredictable nature of these investors, but it is also possible that they will become allies in campaigns, with the ability to help deliver demands to management teams rapidly and efficiently. We expect ESG concerns to feature prominently in these campaigns. ■



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FRANCE EMBRACES ACTIVISM

AN INTERVIEW WITH SAAM GOLSHANI, DIANE LAMARCHE, PARTNERS AT WHITE & CASE, AND SIMON MARTIN-GOUSSET, ASSOCIATE AT WHITE & CASE.

What are the outcomes of the main activist campaigns conducted in the past year?

The French market has witnessed a number of recent high-profile activist campaigns, with activists engaging both mid-cap and large-cap issuers. 2021 saw Amber Capital's landmark success in effecting major changes to Lagardère's corporate structure and Bluebell Capital successfully removing Danone's CEO, assisted by Artisan Partners.

The strategies employed by activists in France are particularly notable, ranging from confidential shareholder dialogues (as was the case at Pernod Ricard) to judicial battles (as seen at Lagardère). Although most campaigns remain confidential, this strategic breadth, along with an ever-increasing number of large-cap activist targets, demonstrates France's growing activist-friendly reputation. Recent campaigns have lacked the hostility of previous years. As a result, activism is no longer perceived as predatory but rather as a driver of performance and good governance.

How are activists in France increasing their focus on E&S issues?

Consistent with global trends, ESG activism continues to affect French companies already facing increased public and regulatory pressure (e.g. PACTE Act, Duty of Vigilance).

Alongside traditional corporate activists, a broad range of shareholders now closely scrutinize French issuers' ESG credentials, including specific ESG-focused funds, non-governmental organizations (NGOs), and institutional investors. These shareholders frequently work in tandem using "activist" methods, given that interests in ESG-themed campaigns often align. Demands are no longer limited to advisory shareholder resolutions on climate strategy and enhanced E&S disclosure: investors are pursuing binding E&S targets.

French issuers initially resisted ESG demands from activists. There appears to have been a sea-change in 2021. Several high-profile French companies (including TotalEnergies and Vinci) proactively submitted climate-related shareholder resolutions,



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possibly to stave off activist intervention. This trend is expected to continue into the 2022 proxy season.

How does French stock market regulator Autorités des Marchés Financiers (AMF) consider shareholder activism today?

Following largely pro-issuer reports from French industry bodies and think tanks, the AMF published an April 2020 report on activism, noting that the existing regulatory framework was "sufficiently flexible and robust".

In March 2021, the AMF adjusted its previous position. Most notably, it emphasized the importance of shareholder dialogue on key strategic topics, such as governance and ESG performance.

The AMF's light touch approach is perhaps unsurprising, given its prior comments on responsible activism's potential to improve price discovery, governance, and management structures.

Other than ESG, what will be the biggest trends in activism in France in 2022?

In the short-run at least, activists will continue to engage issuers with Russian exposure. As issuers enter a post-COVID world, the ongoing Russian conflict may also catalyze event-driven activism. Calculating fair company valuations is difficult enough in the current environment. Should the economic outlook worsen, insolvencies and restructurings could follow.

Coalitions (or wolf packs) of activists are also likely to become a key feature of French campaigns. Bluebell showed at Danone that small stake activists can garner wider shareholder support, from both fellow activists and institutional shareholders, to agitate for changes. ■

GERMAN ACTIVISTS TARGET CLIMATE LAGGARDS

AN INTERVIEW WITH DR. MURAD DAGHLES, PARTNER AT WHITE & CASE AND DR. THYL HASSLER, LOCAL PARTNER AT WHITE & CASE.

What are the outcomes of the main activist campaigns conducted in Germany in recent years?

The German activist landscape has seen recent high-profile campaigns at some of the country's largest blue-chip companies, with the activists succeeding at least partially in their goals.

Activist investors have sought and achieved two key outcomes: board representation and influence over strategic decision-making. Cerberus's public pressure at Commerzbank changed the company's board composition. Cevian's campaign at ThyssenKrupp led to the sale of its elevator unit. Approaches from Elliott led SAP to target increased efficiency and Bayer to revise its Monsanto litigation strategy. At MDAX listed digital company Scout24, two outcomes were realized: Elliott's demands resulted in the sale of key company assets and the company implementing an ambitious share buy-back, whilst Pelham's proposed candidate was appointed to the company's supervisory board at a shareholder meeting.

Activists have also exerted influence over takeover bids. Most recently, Advent and Centerbridge saw their offer for Aareal Bank fail following its public rejection by activists Petrus Advisers and Teleios. The activist pair continue to push for changes to the company's board composition.

Germany remains a level playing field for activist investors.

How are activists in Germany increasing their focus on ESG issues?

ESG campaigns typically target companies exposed to transition risks in ESG-sensitive segments like commodities, energy, chemicals, and heavy industry. Enkraft Capital's recent targeting of RWE AG, where they demanded that Germany's largest energy supplier split into "brown" and "green" units, is illustrative of this trend.

ESG aspects serve as a gateway for activists not only to demand changes in ESG strategy but also to achieve traditional activist goals. Public awareness of ESG's importance continues to rise, and ESG campaigns attract elevated levels of public interest. As an added benefit, ("silent") institutional investors are often much more likely to support such campaigns.

How does the German stock market regulator view shareholder activism today?

Unlike the European-wide regulator the European Securities and Markets Authority (ESMA), the German Federal Financial Supervisory Authority is yet to make an official statement.

Corporate Germany has traditionally harbored reservations over activism, often criticizing activists for short-term opportunism. More recently, this has started to change, as activist shareholders have been successful in supporting companies adapting to challenging environments. Activists have therefore enhanced their reputation as potential strategic partners, capable of helping companies transform their business models.

Other than ESG, what will be the biggest trend in activism in Germany in 2022?

We expect so-called "passive" institutional investors to play an increasingly active role. Such investors are, by far, the largest shareholder group in DAX-listed companies, and are yet to embrace engagement with activists or traditional private equity investors fully. It remains to be seen how far this will change.

Institutional investors like the Bavarian Pension Fund have explicitly changed their investment strategies to become more "active". Such plans are ambitious, given the sheer number of investments they hold. To implement such strategies in the future, institutional investors could well become more open to partnering with activists. As a minimum, they could steadily become more supportive of campaigns that align with their interests. It will be interesting to observe companies' reactions to any such developments. ■



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