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UK: Turbulent markets enhance scrutiny

An interview with Tom Matthews and Sonica Tolani, partners, and Alex Woodfield, counsel, White & Case.



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How is U.K. activism being impacted by current market conditions?

Sonica Tolani (ST): As with the wider global markets, the U.K. has recently been facing turbulent market conditions, with M&A activity and activism dampened by significant geopolitical uncertainty, rampant inflation, and interest rate rises.

Such dampening contrasts with the past few years, during which the U.K. has otherwise seen many activists seeking to increase value through M&A solutions. The viability and attractiveness of such transactions, and activists' appetite to push for them at the current time, are constrained by market conditions – particularly those requiring debt or equity financing.

U.K. companies suffering from depressed valuations may be considered as potential takeover targets. However, takeover offers, particularly those considered to be opportunistic, are expected to face increased scrutiny from shareholders, with potential for opposition and opportunities for bumpitrag.

What about U.K. activism more broadly?

Tom Matthews (TM): Whilst some of the most prominent recent campaigns have been undertaken by long-established activists, the universe of investors engaging in shareholder activism continues to expand. Existing activists are entering new markets, new activist funds are being established, and private equity, debt, and other investment funds are increasingly adopting activist techniques.

An increasing number of investors engaged in activism are also willing and able to consider pursuing and/or financing takeovers themselves, reflecting the broadening universe of activist investors, and activist fund structures becoming more flexible. Activists who are shareholders of U.K. companies with ongoing depressed valuations may have an incentive to consider a defensive bid, to avoid crystallising losses in the event of a sale to a third-party bidder.

How may current developments affect future shareholder voting?

Alex Woodfield (AW): Some of the largest institutional shareholders have been taking steps to pass through voting rights to underlying investors in some of their funds. Although this emerging trend towards “democratization” is currently in its early stages, we anticipate it is likely to become more widespread over time and may in the future impact proxy voting, particularly on topics such as board remuneration and ESG.

How do you expect the economic backdrop to impact investor views on remuneration for U.K.-listed companies?

ST: Whilst remuneration is a perennially sensitive topic for listed companies, we anticipate this year will see significant attention paid to executive remuneration in view of the cost-of-living concerns for companies' own workforce and customers. There is also expected to be particular scrutiny of remuneration arrangements which have been impacted by geopolitical factors and other considerations outside of management's control.

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AW: In some cases, remuneration arrangements may appear particularly generous due to using performance during the pandemic as a baseline, or as a result of companies profiting significantly from dramatic increases in energy prices resulting from the war in Ukraine. At the other end of the spectrum, many companies have received significant financial support from the government in respect of their energy bills.

How have recent developments been impacting investors' focus on ESG?

TM: With the war in Ukraine giving rise to public focus on unprecedented energy price rises and short-term energy security, some of the momentum behind environmental activism appears to have dampened, at least temporarily. However, sustainability remains a major focus for many investors and seems certain to reemerge as a key trend.

Through a combination of legal changes and voluntary guidelines, regulators and investors are seeking greater consistency from companies in their sustainability reporting, with a particular emphasis on clamping down on greenwashing. [iQ](#)

France: Embracing activism

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



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How is shareholder activism evolving in France?

Saam Golshani (SG): 2022 activist campaigns provided further evidence that activism is now firmly embedded within the French markets. Market participants are more accepting of activists and willing to engage. This is reflected in a number of campaigns being undertaken behind closed doors on a confidential basis, and dialogue between activists and issuers is becoming increasingly effective in overcoming issues or concerns.

Activists' tactics are also becoming more sophisticated from a legal perspective, with activists exercising their rights as minority shareholders to their advantage. As an example, activists who once sought to minimise contact with the French regulator, the Autorité des Marchés Financiers (AMF), are now, at times, actively seeking its support.

At TotalEnergies' 2022 annual meeting, climate-related resolutions proposed by a group of 11 investors were rejected by the company's board for attempting to dictate the strategy of the company in this area. The shareholders requested that the AMF intervene, which it declined to do.

Nonetheless, seeking to involve the AMF in the first place can be seen as a significant development when compared with past practice. This comes against the backdrop of public positions taken by the AMF in 2020 and 2021, which pointed to the potential benefits of shareholder activism as contributing to the proper functioning of markets and to an improvement in the corporate governance and management of issuers.

Did 2022 spur any notable developments regarding “say on climate” in France?

Diane Lamarche (DL): As was anticipated, the “say on climate” initiative gave rise to one of the most prominent campaigns of 2022, that of TotalEnergies. The focus on “say on climate” and corporate climate transition plans confirms the importance of ESG and strongly suggests that ESG (climate change in particular) will remain a central issue in investor engagements in 2023. Without existing legislation in place, influential market participants are lobbying issuers to include “say on climate” resolutions on a voluntary basis.

In response to the rise in such campaigns, the AMF published a statement on shareholder dialogue on environmental and climate issues. In its statement, AMF calls on companies to strengthen shareholder dialogue by presenting their climate strategy at

each general meeting and facilitating discussion. The strategy should be accompanied by precise targets with follow-ups arranged at regular intervals. The AMF also noted that it would be appropriate, in the future, for this information to be approved by shareholders, similar to the approval of annual financial statements.

Which debates and/or changes in the regulatory framework occurred in France in 2022?

Simon Martin-Gousset (SMG): France has not seen any substantive legislative developments directly impacting activism in 2022. However, a strong debate arose concerning the ability of shareholders to vote on certain corporate issues, in particular resolutions regarding the company's climate strategy.

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In the context of this debate, several prominent think-tanks and academics have expressed the view that legislative reform in this area is not necessary. In light of the AMF confirming that it is unable to rule on the allocation of powers between shareholders and their board of directors (i.e. how shareholders should be able to influence company strategy), it is anticipated that investors whose proposed resolutions are excluded from annual meeting agendas will instead seek to challenge such exclusions in the commercial courts.

In addition, we note a strong trend in Europe of introducing environmental- and social-related requirements into company law and we would anticipate that investors will push for French companies to comply with such requirements and/or use new legislation as tools in future campaigns. [ia](#)

Germany: Primed for an ESG revolution

An interview with Dr Murad M. Daghles and Dr Thyl Haßler, partners, White & Case.



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What demands were made of German companies by activists in 2022 and early 2023?

Dr Murad Daghles (MD): In 2022, there were a number of high-profile campaigns mainly targeting blue-chip companies. Demands ranged from calls for a change in leadership to urging companies to split and/or divest business units to maximize shareholder value.

Bayer faced demands from large investors calling for the CEO to be replaced and for a vote of no confidence in the managing board's 2021 performance by refusing to ratify the conduct of the board. These demands were not ultimately successful at the drug manufacturer's 2022 annual meeting.

In January 2023, Inclusive Capital Partners and Bluebell Capital Partners continued to call for a change in Bayer's leadership and for a separation of the company's pharmaceutical and agricultural businesses. This ongoing market pressure ultimately led to Bayer's CEO being replaced.

Another campaign of note is Primestone Capital's public call for market leading chemical distributor Brenntag to end takeover talks with its U.S. rival Univar Solutions, citing financial and operational risks and antitrust concerns. Activist investor Engine Capital joined the campaign in early 2023 and requested a seat on Brenntag's supervisory board and a split of Brenntag. In March 2023, Brenntag announced a share buy-back of up to €750 million (\$808 million) and a 37% increase to its 2022 dividend. In April 2023, PrimeStone Capital claimed a seat on Brenntag's supervisory board and a split of the group.

Did 2022 bring forth any notable developments in ESG-related activism in Germany?

Dr Thyl Haßler (TH): Two landmark campaigns are noteworthy for their ties to ESG. Enkraft Capital's engagement with energy company RWE involved an ESG-related demand which was unprecedented for a German shareholder meeting. Enkraft (with a shareholding of 0.03%) demanded a vote to accelerate the spin-off of RWE's brown coal business; the company's most emissions-intensive unit. Enkraft argued that the move would realise around €16 billion (\$17.2 billion) in value and turn RWE into a "greener" company.

Ultimately, this motion and Enkraft's demand for a seat on the supervisory board both failed but demonstrate the ESG-driven pressures traditional industry players can expect to face in the future.

Similarly, at Volkswagen, various Scandinavian pension funds and the Church of England Pension Board challenged the lack of transparency around Volkswagen's lobbying on climate rules. Volkswagen refused to include on its 2022 proxy ballot a proposal to enhance the board's reporting obligations in relation to lobbying.

The investors have since taken legal action against the company to test whether it has the right to refuse to include an item on the annual meeting agenda. This is one of the first high-profile examples in Europe of shareholders pursuing litigation regarding a climate-related matter.

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Did the Russian invasion in Ukraine impact investor campaigns in Germany?

MD: Many large German companies reacted with official statements reporting a withdrawal from business activities with Russia or Russian entities which helped avoid activist campaigns that used ties to Russia as a tool to push for demands. At the 2022 shareholder meetings of several large blue-chip companies, investors challenged exposure to Russia: Henkel sold its Russian business after DSW (among others) claimed reputational harm and Beiersdorf shareholders criticized its ties to Russia (although Beiersdorf already ceased certain parts of its business activities in Russia).

Notwithstanding the landmark developments described above, the current geopolitical landscape appears to have temporarily diverted investor attention away from environmental and social concerns to a certain extent. However, with the war in Ukraine being described as a "historic turning point" in how European countries source their energy, it is anticipated that ESG-focused campaigns will take center stage in coming years. [iQ](#)

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Insightia's 2022 Advisor Awards

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