

# Dealing with shareholder activism

Twenty things to do  
(and six things not to do)

# Contents



# Shareholder activism

Activist shareholders are getting more active. The number of activist campaigns is growing after several years of decline.

Recent months have seen a slew of 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, and helps 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.

## 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 some 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.

This document does not consider campaigns by e.g. short sellers, or investors who hold debt rather than equity.

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

# 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 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.

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.

There is little companies can do to prevent shareholder activism from a legal perspective. At its core, shareholder activism is the exercise by shareholders of their rights in respect of their shares. But there are still numerous preventative and reactive measures that companies can take, which we look at in more detail in the following pages.

## How much activism is there?

A report from Lazard says activists launched 235 campaigns in 2022 – a big rise on 2021. Lazard’s definition of a campaign is fairly tight and other market monitors suggest more activity. Alvarez & Marsal considers nearly 150 European companies to be at heightened risk of public shareholder activism over the next 18 months, with at least 96 activist funds targeting European (including UK) companies.

Bloomberg’s review of global activism says that 631 new activist campaigns were launched in 2022. Insightia calculates 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.



# The activist playbook

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

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 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 activists include FCA disclosure thresholds, and the market abuse regime covering issues such as inside information, insider dealing and market manipulation.

# Negotiating with activists

Companies should usually be prepared to talk to activists – and to listen. Many activists now say that they 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.
- 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 should be allowed to exercise their discretion in setting and executing corporate strategy without additional shareholder interventions on policies or compliance will never 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 – 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.



# AGMs and other general meetings

Annual general meetings are the public stage for many activist dramas, with activists often keen to highlight their message, ask questions, advance a hostile resolution or follow their playbook in other ways.

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

Activists often focus on AGMs as they cannot requisition general meetings themselves unless – broadly – they control at least 5% of the company's share capital.

One common tactic is for shareholders to target resolutions to approve the company's remuneration report and policy, or resolutions for the re-election of directors.

Until recently, such tactics sometimes attracted significant support but typically came nowhere close to achieving the 50% of votes cast required to defeat the resolutions. However, that threshold is now increasingly being met, with remuneration and re-election both the main lightning rods for registering shareholder discontent. Nearly 90% of asset managers in one recent survey had voted against company management recommendations, and increasingly voted against director re-election as a method of escalation.

## Getting the vote out

The threshold for shareholders to requisition resolutions is relatively low. Very broadly, a shareholder or shareholders with at least 5% of the total voting rights can require a resolution to be proposed. (One hundred or more shareholders with shares on which an average of at least £100 per shareholder is paid up can also requisition a resolution.) 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 – with limited exceptions – a resolution to appoint or remove a director.
- 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 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 average shareholder turnout of 50-70%), this is still far more than the number needed to put a resolution to the meeting.

Furthermore, most companies have provisions in their 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.

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* other changes – potentially offering them a valuable negotiating chip.

# Litigation

Activist shareholders may also take legal action, through a derivative claim or an unfair prejudice petition. In practice, however, costs and other practical concerns make litigation relatively uncommon.

## Derivative claim

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.

- 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 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.

## Unfair prejudice

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 would thus cease to be a shareholder, and might not achieve a better price than by selling on the market, such a claim is usually a last resort.

## Practical limitations

Given the difficulty of maintaining and proving sustainable claims, and the likely inadequacy of the available remedies, litigation is rarely used strategically by shareholder activists in the UK.

Increasingly, though, activists are taking legal action over a company's approach to ESG. Notably, ClientEarth has launched High Court proceedings against Shell's directors, arguing that they are failing in their duty to promote the success of the company and to act with reasonable care, skill and diligence by refusing to commit to lowering emissions in line with the Paris Agreement. This is the first derivative claim against a board on climate grounds.

Share ownership may enable other ESG challenges. Greenwashing can leave a company vulnerable under the Financial Services and Markets Act 2000, which allows shareholders to sue for loss suffered as a result of untrue or misleading statements. But the cost of such litigation and the requirement to demonstrate financial loss mean such litigation is more likely to come from large investors than from activists.



# Investing on principle: ESG activism

Activism around many ESG issues is also growing more common, but environmental and climate-based activism remains at the forefront of ESG campaigns.

Companies are under constant pressure to implement their climate change objectives and policies and to publish meaningful reports on their actions. There is also growing pressure to ensure that corporate objectives are consistent with Paris Agreement targets.

Increasingly, too, investors – many with their own climate-related targets – want companies to show what they have done to implement their climate commitments.

Some companies have been the focus of campaigns by activists whose main aim is to cause disruption in order to publicise their cause. But many ESG activists now have a much more sophisticated approach.

- As already noted, there is an increasing overlap between ‘value activism’ and ‘values activism’.
- Some ESG-focused investors adopt activist tactics while also explicitly targeting value creation.

ESG issues are also driving major institutional shareholders to take steps that a few years ago would have been associated with activists. Norges Bank Investment Management, for example, says it will vote against board members if it sees “material failures in disclosing, managing or overseeing climate risk” and may propose climate-related resolutions if 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 back a resolution requiring a set outcome than one that directs the board to take a specific action or approach.
- Where a shareholder-requisitioned resolution goes up against a broader advisory resolution from the board, the board resolution typically wins out.

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

## Discouraging ESG activism

Observing ESG best practice reduces a company’s chance of being targeted by ESG activists. This may include:

- Collecting and correctly reporting relevant data about its performance.
- Monitoring ESG performance in unreported areas, to watch for potential problems.
- Ensuring effective board oversight.
- Properly assessing and managing exposure to ESG risks.
- Working to embed ESG principles in its corporate culture.
- Monitoring its ESG position relative to its peers’.
- Familiarising itself with the ESG positions of major shareholders.
- Publicising its ESG achievements, without greenwashing.

# Minimising the risk of activism

Any listed company is a potential target for activist campaigns. But companies can take steps to minimise and mitigate the risk.

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

These may include factors such as:

- Visibly weak or problematic governance.
- Poor stock market performance.
- Negative coverage from analysts.
- Sustained negative media coverage.
- A stockpile of cash.

**2. Assess the company's situation regularly, to identify vulnerabilities.**

If appropriate, use external advisers to audit the company's position and/or maintain a watching brief over potential trigger points.

Certain situations may be particularly attractive to activists: e.g. they may campaign against a sale – often aiming to achieve better terms or a better price via an alternative deal – or invest in an acquirer whose stock price falls after a merger announcement, hoping to kill the deal and drive the price back up.

**3. Monitor activist activity in other companies.**

Track trending issues and evaluate your vulnerability on them. External advisers may be retained on a watching brief.

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

Causes for concern may include unusual activity (including unusual levels of stock lending and borrowing), stake-building by known activists or their proxies, and the appearance of multiple small holdings on the register.

**5. Ensure the Investor Relations team has good, proactive relationships with major shareholders.**

Address the concerns of key shareholders quickly and effectively, while delivering a strong message on issues such as strategy, growth and shareholder value.

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

A core of large holdings in the hands of sympathetic institutional investors is a strong defence against activism.

**7. Engage regularly with smaller shareholders.**

Such engagement tends to be with retail investors, but it can still have a positive effect on overall shareholder sentiment (and social media coverage).

**8. Maintain good relationships with analysts and journalists.**

Good practice includes running roadshows (including virtual ones), making information easy to access, and responding promptly to queries.

**9. Although board-proposed resolutions at general meetings are still usually approved (unlike shareholder resolutions), opposition to them should be taken seriously.**

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, then publish the views received and actions taken. But even a negative vote below 20% can be a sign of trouble.

The most successful shareholder resolutions are often the 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.

**10. Have an action plan for responding to activism, to facilitate a co-ordinated and rapid response to activist activity.**

Some companies run exercises to stress-test their plans (and to give their team experience), with external advisers playing the role of the activist.



# Responding to activism

When the risk of activism becomes a reality, what steps can a company take to deal with it quickly and effectively?

**11. Understand what the activist is doing (and why) and analyse how much of a threat they really are.**

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

Where activists have previously failed to create value or achieve their goals, it may be in the company's interest to highlight that.

**12. Calibrate your response carefully and strategically.**

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

**13. Develop your publicity campaign or communications strategy.**

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 counter-attack 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 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:

- Aim for a clear and, ideally, simple strategy to get its message across to the broad majority of shareholders.
- Decide how far it will acknowledge any validity in the activist's arguments. If it believes the activist has no case, it needs to explain why. Otherwise 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).
- Evaluate and respond to the activist's own communications strategy.
- Agree which individual(s) will speak on behalf of the company, in order to ensure a consistent and well-presented message.
- 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 veterans of activist campaigns will help the company get it right.

# Responding to activism

## 14. 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.

## 15. 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.

## 16. 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.

## 17. When activists table a resolution, the company should make its own position clear and engage with shareholders.

Companies sometimes use proxy solicitation agents 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. This can significantly help (or hinder) the board.

## 18. Prepare thoroughly for any general meeting, including AGMs.

For more detailed information on activism in AGMs and other general meetings, see our [longer guide to shareholder activism](#).

## 19. 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.

## 20. Know when to compromise.

If an activist is likely to prevail in the long term, then the company's own long-term interest may be to embrace them. It is not uncommon for companies to enter into formal relationship agreements with activists – sometimes involving a seat (or seats) on the board and commitments around strategy and governance.

- Such agreements may also include, for example, clauses to stop either side disparaging the other, or to stop the activist increasing its stake or pursuing its campaign.
- Even without a formal agreement, a seat on the board is sometimes enough to bring the activist onside. Directors owe 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.



# Responding to activism: don't...

## 1. Don't underestimate activists

Many are well funded, committed and ready for the long haul.

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

Companies should not assume that their connections with their shareholders are automatically better than those of activists.

## 2. 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 dealing with it – sometimes hoping that the activist will have minimal demands or will soon sell their stake again. Such hopes are usually ill-founded.

## 3. Don't dismiss activists

When activists are not investment professionals but are from pressure groups, some companies may be inclined not to take their arguments and 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.

## 4. Don't automatically attack activists

Many shareholders now have a somewhat positive view of activists, in many cases hoping that they might 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.

## 5. Don't try 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.

## 6. Don't panic

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

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

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