The Shareholder Rights and Activism Review

Editor
Francis J Aquila

Law Business Research

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Editor
Francis J Aquila

Law Business Research Ltd

PUBLISHER
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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-910813-09-6

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

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ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

BAKER & MCKENZIE – CIS, LIMITED

BOWMANS

DE BRAUW BLACKSTONE WESTBROEK NV

HERBERT SMITH FREEHILLS LLP

MANNHEIMER SWARTLING

MARVAL, O'FARRELL & MAIRAL

MORGAN LEWIS STAMFORD LLC

MORI HAMADA & MATSUMOTO

SULLIVAN & CROMWELL LLP

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EDITOR'S PREFACE

Over the years since the financial crisis, shareholder activism has been on the rise around the world. Increasingly institutional shareholders are taking a range of actions to leverage their ownership position to influence public company behaviour. Activist investors often advocate for changes to the company, such as its corporate governance practices, financial decisions and strategic direction. Shareholder activism comes in many forms, from privately engaging in a dialogue with a company on certain issues, to waging a contest to replace members of a company's board of directors, to publicly agitating for a company to undergo a fundamental transaction.

Although the types of activists and forms of activism may vary, there is no question that shareholder activism has become a more prominent, and likely permanent, feature of the corporate landscape. Boards of directors, managements and the markets have increasingly become more attuned to shareholder activism, and engaging with investors has become a priority for boards and managements as a hallmark of basic good governance.

Shareholder activism has become a global phenomenon that is effecting change to the corporate landscape not only in North America but also in Europe, Australia and Asia. While shareholder activism is still most prevalent in North America, and particularly in the United States, shareholder activism is expanding its reach across the globe. This movement is being driven by, among other things, a search by hedge funds for new investment opportunities and a cultural shift toward increased shareholder engagement in Europe, Australia and Asia.

As both shareholder activists, and the companies they target, become more geographically diverse, it is important for legal and corporate practitioners to understand the legal framework and emerging trends of shareholder activism in the various international jurisdictions facing activism. This inaugural edition of *The Shareholder Rights and Activism Review* is designed as a primer on these aspects of shareholder activism in such jurisdictions.

My sincere thanks to all of the authors who contributed their expertise, time and labour to this first edition of *The Shareholder Rights and Activism Review*. As shareholder activism continues to increase its global footprint, I am confident that this review will serve as an invaluable resource for legal and corporate practitioners worldwide.

Francis J Aquila
Sullivan & Cromwell LLP
New York
October 2016

Chapter 8

UNITED KINGDOM

Gavin Davies and Mark Bardell[1]

I OVERVIEW

Shareholder activism continues to grow in prevalence and significance in the UK, in common with global trends. While shareholder activism is not a new concept in the UK market, the type of investors undertaking activism, the companies that they are targeting and the outcomes that they are seeking to achieve have continued to evolve over recent years, influenced in large part by the development of such activity in the US.

'Shareholder activism' is a generic term that is usually used to describe an approach by a shareholder or shareholder group to a company's board, and if necessary to its fellow shareholders, seeking to effect change within a company. While shareholder activism in the UK has historically been focused on obtaining board representation, activist investors have begun to utilise the legal and regulatory tools available to them to achieve a more diverse range of outcomes, short of a full control transaction.

Shareholder activism campaigns in the UK can be categorised in many different ways. One simple approach is to distinguish between: (1) event-driven activism, where an activist shareholder will seek to assert its influence on a company's then-current corporate activity, particularly in relation to a takeover or other M&A situation; and (2) strategic or operational activism, where outside of a company's then-current corporate activity, a shareholder activist seeks to address operational performance, balance sheet or other strategic issues, or some other longer-term concern at a company, such as governance or remuneration. While strategic or operational activism is often associated with management or leadership changes, achieving control in the strict company law sense is not usually an objective and paying a control premium is something activists will seek to avoid.

Just as the type of shareholder activism can vary broadly, there is no one type of shareholder activist in the UK, and the term can cover a wide range of investors. Some activists are specific investment funds with activism as their business model, and it is these

1 Gavin Davies and Mark Bardell are partners at Herbert Smith Freehills LLP.

investors that are generally classed as 'activist' shareholders. Equally, existing shareholders may become 'active' shareholders, for example, where they consider that the company is underperforming or they disagree with the decisions being made by the company's board. Traditionally, institutional investors in the UK have refrained from voicing their concerns or criticisms of management in the public domain and the vocal activist community has historically been composed of hedge funds, specific investment funds and other alternative investors. Increasingly, however, institutional investors and other shareholders are becoming more prepared to air their concerns in the open, or to lend their support (publicly or privately) to those who are more willing or able to do so, when they feel that their concerns are not being registered by management. 'Activist' shareholders are sometimes described as performing a 'lightning rod' role for such dissent in the public market; they can sometimes provide a useful channel for such dissatisfaction felt by a wider group of shareholders.

The specific shareholder activist funds operating in the UK are generally well researched, tactically astute and determined, and come armed with the funds needed to support their campaigns. Such activists will be prepared for a hostile response (and will not shy away from public disagreement) but may prefer to reach a consensual agreement with a board if they can. They are persistent (some with multi-year time horizons on their investment) and relatively resistant in the face of an initial knockback (with a number of examples of activists willingly reiterating arguments and returning to shareholders for a second shareholder vote).

This chapter considers: (1) the legal and regulatory framework relating to shareholder activism campaigns in the UK; (2) the key trends in shareholder activism in the UK that have emerged in recent years; (3) examples of recent shareholder activist campaigns in the UK; and (4) future regulatory developments that may affect shareholder activism in the UK.

II LEGAL AND REGULATORY FRAMEWORK

The global focal point of shareholder activism over the past decade has been and remains the US market, where activist investors have been ready and willing to employ the legal means available to them to achieve their objectives. In the UK, corporate law has always provided a strong basis of shareholder rights from which to challenge management. This, together with concerted efforts over many years by UK regulators and policy-makers to encourage more active shareholder engagement (particularly following the failures identified in the global financial crisis), has resulted in a legal and regulatory framework in the UK that is arguably the most benign framework for possible activist activities in Europe. This state of affairs is likely to increase in a post hard-Brexit environment.

The most important legal tools available to an activist shareholder are enshrined in English company law (the Companies Act 2006), which provide an activist shareholder with the means of amplifying its influence beyond the size of its shareholding (which in some cases may be quite small) and becoming the 'lightning rod' for the shareholder voice of change referred to above. The most powerful tool in an activist shareholder's toolkit is the ability to call for a general meeting of a company. Provided that a shareholder holds at least 5 per cent of a company's issued share capital, it may requisition a general meeting of its fellow shareholders and propose one or more resolutions to be considered at that meeting (Section 303). Alternatively, shareholders holding at least 5 per cent, or a group numbering at least 100 shareholders, may requisition specific resolutions to be considered at a company's annual general meeting (Section 338).

It is this ability to introduce a resolution, taken with the ability of a simple majority of those voting at the relevant meeting to remove or appoint a new director, that gives the shareholder its most potent threat. Accordingly, in strategic and operational as well as governance and pay situations, the requisition will be to remove existing directors from the board or appoint new directors nominated by the activist investor, to ensure new voices on the board to help achieve the desired outcome. However, provided that it relates to a matter that is not defamatory or vexatious and, if passed, would be effective (noting that merely 'directive' resolutions by shareholders to the board are not generally regarded as such), there is no limit to the type or wording of a resolution that an activist may propose.

Ordinary resolutions of a company may be passed by a simple majority (50 per cent plus one share), whereas special resolutions require a majority of 75 per cent. This means that a group of shareholders holding 50 per cent of the shares voted at a meeting have the power to pass ordinary resolutions, or conversely, a minority bloc of 25 per cent may block special resolutions. These thresholds refer to percentages of shareholders present and voting at the meeting, so in fact a much smaller overall bloc of shareholders may be able to pass or block resolutions, depending on turnout. The National Association of Pension Funds 2015 AGM Report cited average voting turnout across FTSE 350 AGMs that year at 72.5 per cent.

It should also be noted that for a UK listed company, in particular, one with a premium listing, certain significant corporate transactions will require shareholder approval (for example, a class 1 major transaction under the UK Listing Rules or where non-pre-emptive issuances of consideration shares are required). Therefore, significant corporate activity will often present a voting opportunity for a shareholder to intervene (and likewise on a takeover, by exercising votes on a scheme of arrangement, or accepting or not a contractual takeover offer).

The Companies Act 2006 contains a number of other ancillary rights that may also assist a shareholder in conducting its activist campaign. Under Section 116, Section 809 and Section 811, shareholders have the right to inspect and copy a company's register of members and any register of beneficial interests, which can allow other shareholders to be identified and subsequently communicated with, or (in circumstances where the directors of a company have failed to comply with a shareholder's requisition) allow the activist shareholder to call the general meeting itself at the company's expense (Section 305).

In addition, any shareholder has the right to attend and speak at a general meeting of a company (whether that meeting has been requisitioned or is being held in the ordinary course of business), giving that shareholder the opportunity to state a view or ask difficult questions to the directors. This right may be exercised by a representative of the shareholder or via a proxy.

Listed companies in the UK are required to hold an annual general meeting each year, which will include re-election of directors by rotation and, in the case of FTSE 350 companies, will typically propose resolutions to re-appoint each of their directors in order to comply with the UK Corporate Governance Code. This can provide shareholders with an annual opportunity to effect change. Another common means of activist shareholders voicing their discontent with how a company is run has been to vote against the annual directors' remuneration report, the subject of an annual advisory vote at each AGM (high-profile examples being Burberry in 2014, and Smith & Nephew in 2016). The introduction in 2013 of a binding AGM vote every three years on the directors' remuneration policy provides another more significant opportunity for shareholder 'say-on-pay' intervention.

In extreme cases, an activist shareholder may decide to exercise its right under the Companies Act 2006 to take legal action in the form of a derivative claim against a company's directors (which is a claim on behalf of the company) (Section 260) or an unfair prejudice petition (Section 994). Such shareholder litigation is very rare in the UK in relation to listed companies.

While the legal and regulatory framework in the UK is generally favourable to activist shareholders, the UK has tended to see a higher level of cooperation between activists and boards of directors when compared to the US. In a substantial majority of cases, a disgruntled investor in a UK company will begin by reaching out to the board of that company and attempt to persuade the directors round to its view, or to take certain actions, through informal engagement in the first instance. A host of other soft or 'non-legal' options are open to activists, including private discussions with other shareholders and public press or social media campaigns. The shareholder activist will gauge support for certain resolutions which a group of investors may come together to require the board to propose at a general meeting (as discussed above), or to cooperate in opposing certain resolutions proposed by the board.

While shareholders are generally free, and indeed encouraged by policy (such as the Stewardship Code) to talk to one another, it is important to take account of all of the regulatory contexts for any such discussions. As further discussed below, investors will need to be careful that they do not unlawfully disclose any inside information (as defined in the EU Market Abuse Directive EU, or MAR) in relation to their intentions, or (if they have such information) the company, which could amount to market abuse under MAR.

A strategy often employed by activist funds, acting individually, is to build up a stake in a company to increase its leverage to call for change. Such stake building exercises require particular care. Under the City Code on Takeovers and Mergers (the Code), a person will be required to make an offer for all of the remaining shares of a company subject to the Code for a price not less than the price paid for any shares by the potential controller during the previous 12 months in the event that he or she (together with any persons 'acting in concert' with him or her) becomes interested in shares carrying 30 per cent or more of voting rights. Although shareholders will not generally be deemed to be acting in concert as a result of agreeing to vote on resolutions in a certain way, the Code states that where a group of shareholders requisition a 'board control seeking' resolution (or threaten to do so), and subsequently acquires shares taking the aggregate interest of the group above 30 per cent, a mandatory offer will be required (Note 2 to Rule 9.1; see also Practice Statement 26 for further guidance).

Activist investors building a stake will, in the usual way, need to consider their disclosure obligations under the FCA's Transparency Rules. Where a shareholder's interests in shares in a listed UK issuer reach or fall below 3 per cent, and every 1 per cent increment thereafter, such person must notify the issuer, who is then required to announce to the market. For these purposes, indirect and derivative interests will both be counted as well as direct holdings. This prevents an activist from building up a significant stake in secret. Limited exemptions may apply (for example, investment firms will only be required to disclose from 5 per cent). The disclosure thresholds are less onerous for companies that are listed in the UK but incorporated in a third country.

The activist wishing to deal in shares will also need to be well advised on the restriction contained in MAR on dealing on the basis of inside information, and the criminal offence of insider dealing under the Criminal Justice Act 1993. If the only inside information in a stakebuilder's possession is its own intentions, a safe harbour is available under MAR (and

the FCA's Market Watch 20 publication has also generally been regarded as clear that this will not amount to market abuse). However, care needs to be taken where information is obtained from the target or from other shareholders.

Institutional investors in UK listed companies should have regard to the Stewardship Code, which sets out good practice for their duties to engage as shareholders, and is applied on a 'comply or explain' basis. It recommends that institutional investors establish clear guidelines on when and how they will escalate stewardship activities. It says engagement is likely to begin with confidential discussions but may be escalated where a company does not respond constructively. The Stewardship Code recognises the role that activism may play in improving corporate governance.

The board of a company facing an approach from activist shareholders is unlikely to sit idly by, but may select from various strategies to defend its position. Some of these are 'legal' defences. For example, a company may refuse to allow a resolution to be requisitioned on the grounds that it is 'frivolous or vexatious' or defamatory, or it may challenge a requisitioned resolution on technical grounds. In the long run, such an approach is generally unlikely to be effective, since the impression given is one of a board unwilling to openly engage with shareholder concerns. An engagement on the substantive issues of concern and a demonstration that directors are open to measured and thoughtful challenge is generally regarded as an approach more likely to defuse activist pressure.

III KEY TRENDS IN SHAREHOLDER ACTIVISM

Globally, shareholder activism has seen a substantial increase over the past five years. In 2015, the number of activist campaigns launched by shareholders reached a recorded high of 507, a 73.6 per cent increase from 2014 and a 28 per cent increase from the prior all-time high in 2012.[2] The UK market has followed this global trend. Between 2010 and 2015, the number of shareholder activist campaigns in Europe (including the UK) increased by 126 per cent,[3] with 24 shareholder activist actions being launched in the UK between June 2015 and June 2016.[4]

Both historically, and reinforced by the introduction of 'say-on-pay' legislation, shareholder intervention in the UK has been focused on board-related matters such as executive remuneration and requests for board representation. In H1 2016, requests for board representation and issues with executive remuneration or other corporate governance matters accounted for 65.1 per cent of all shareholder activism activities in Europe (including the UK).[5] The number of activist matters relating to company M&A and other corporate activities is, however, also on the increase (as outlined in further detail below).

i Event-driven activism

As outlined above, shareholder activism in the UK market has been traditionally focused on the performance and remuneration of executive directors and requests for board representation by activists. Over the past decade, however, the type and objectives of shareholder activist have

2 Thomson Reuters – Global Shareholder Activism Scorecard 2015.

3 Forbes – 'Europe sees 126% rise in activist investor action in five years', 15 November 2015.

4 *Activist Insight Monthly*, Volume 5 Issue 6, July 2016.

5 *Activist Insight Monthly*, Volume 5 Issue 6, July 2016.

evolved and an increasing number of activist campaigns have been event driven, involving company M&A (both private and public) or other corporate activity (including the return of value to shareholders via dividends or share buybacks). In H1 2016, 28.3 per cent of activist campaigns launched in Europe (including the UK) were related to company M&A or other company balance sheet concerns.[6]

Whenever a company is required to obtain prior shareholder approval to acquire or dispose of a company or business (for example, if the transaction is a class 1 or related party transaction for the purposes of the UK Listing Rules), shareholders are given the ability to reject a deal after it has been conditionally agreed by the company's board. In M&A situations that are dependent on shareholder approval, activists may seek to influence a particular outcome through public criticism, proxy solicitation, lobbying of institutional investors or proposing alternative transactions.

Activists may also seek to instigate or put pressure on a company to undertake an acquisition or disposal or otherwise return value to its shareholders, particularly if a company is perceived to be sitting on too much cash, or shareholders would prefer a return of cash to it being spent on a transaction that they do not support.

In public takeover situations, where the ultimate decision as to whether to proceed with the transaction rests with the shareholders of the target company (by shareholder vote on a takeover by scheme, or acceptance of the offer on a takeover by contractual offer), activist investors can wield a significant influence. This is the case even at the early stages of a potential bid, by encouraging a target board to negotiate with the bidder or, on the other hand, indicating that they will not accept an offer below a certain minimum level to attempt to encourage an increase in the bidder's offer price.

ii Activism as a more acceptable activity and name-calling

Shareholder activism has historically had pejorative connotations in the UK with activists being stereotypically cast as opportunistic and aggressive 'corporate raiders' concerned with realising short-term returns at the expense of long-term shareholder interests.

Both the rise of an activism advisory community in the UK, and the terminology being used suggest that, as in the US, in the UK there is increasing acceptance of activism as a valid and indeed desirable public market business model, as evidenced by the more neutral language used.

In the UK, in addition to the traditional broker role for the company, financial advisers have been establishing specialist teams to advise listed companies on activist situations. Specialist proxy solicitation agents have moved across from the US to support the hunt for votes on both sides. The big four accountancy firms have built up teams to support their listed clients, and, like the financial advisers, the PR consultancies are increasingly seeing activism as a specialist area of advice. Interestingly the terminology has changed; a few years ago terms such as 'corporate defence' were prevalent among this type of advisory work. Now 'corporate preparedness', 'shareholder engagement' and 'valuation solutions' are the sort of terms in widespread use.

Similarly in the US, a new nomenclature shows a change in attitudes. 'White hat' has been introduced in recent years to identify a less contentious form of 'constructive activism'

6 *Activist Insight Monthly*, Volume 5 Issue 6, July 2016.

with a focus on medium to long-term value creation. 'White-hat' activists are characterised as typically favouring more collaborative measures conducted in private (usually on a consensual basis) and as only instigating a public activist campaign as a last resort.

iii US style tactics and developments – the adoption of the settlement agreement

The global focal point of shareholder activism over the past decade has been and remains the US market, with activist investors such as Carl Icahn, Pershing Square Capital Management, ValueAct Capital Partners and Elliott Management playing prominent and well-publicised roles in the US activist community.

While some of the tactics and approaches developed by US activist investors have been adopted in the UK market, regulatory and legal limitations on the types of influences activists can have on UK boardrooms has meant that many of the bolder forms of US activism have not translated across the Atlantic. However, one US trend that is beginning to be implemented in the UK is the use of settlement agreements or 'activist relationship agreements'.

Settlement agreements have been in use in the US over the past decade and provide a means of settling a potential contest between an activist investor and a company, while avoiding the significant drain on resources that a protracted proxy battle may entail. US-style settlement agreements typically include the following basic components:

a an agreed set of actions to be taken by the company, which may include the appointment of board representatives for the activist investor;

b a standstill agreement on activist's share ownership in the company;

c a standstill agreement in relation to certain corporate governance matters (e.g., a restriction on the activist from taking certain actions designed to gain additional board representation); and

d other material provisions, which may include non-disparagement clauses, remedy provisions and the term of the agreement.

A recent example of a US-style settlement agreement with an activist investor being adopted by a UK company was announced by Rolls-Royce in March 2016, considered further below, even though the company labelled it a 'relationship agreement', which is more familiar and more neutral sounding to a UK audience familiar with such agreements. These agreements are required under the UK Listing Rules for shareholders with interests of 30 per cent or more of voting rights, a level of shareholding ValueAct had not reached. Another example includes the terms reached between Elliott Management and the board of Alliance Trust in April 2015, also further described below.

iv Use of dedicated websites and microsites

A practice that has become more common among activist shareholders in the UK is the use of dedicated websites or microsites as a platform to promote their message more widely. Such sites provide activists with the means of collating their arguments (generally from RNS press releases, shareholder circulars, etc.) with other supporting data and third-party resources in a public forum that is easily accessible for other shareholders, journalists and the public in general.

Well-advised activist shareholders will carefully evaluate the legal and regulatory basis on which such information is made available. They will consider financial services and market abuse law and regulation, as well as defamation issues, just as they would with any public

release or circular. They will also consider the full range of legal challenges as they would for contents of any website or microsite before it is launched to avoid breaching any copyright, third-party confidentiality or data protection laws.

v Board diversity

A topic that is not yet widely raised in relation to activist campaigns, but may become more important is the role of gender diversity on the boards of listed companies.

According to a study conducted by Bloomberg, in the past five years the five biggest US activist funds have only nominated women for a board seat in seven out of 174 occasions.[7] In the UK, the charge of 'male, pale and stale' has been levelled in the context of a proposed board slate. With increasing focus being given to the diversity of company boards by regulators, policy-makers and investors, the question of diversity, both of existing boards and whether nominees of activist shareholders improve or worsen that position, may be raised more often.

IV RECENT SHAREHOLDER ACTIVISM CAMPAIGNS

i Rolls-Royce

ValueAct Capital Partner's investment into Rolls-Royce Holdings Plc provides a recent example of white-hat activism and the adoption of a US-style settlement agreement.

Following several months of stake-building, in July 2015 ValueAct became Rolls-Royce's largest shareholder with a shareholding of 5.4 per cent. ValueAct positioned itself as an 'engaged investor' not an 'activist' and began to exert pressure on Rolls-Royce privately. Following an initial rejection of board representation in November 2015, on 2 March 2016, Rolls-Royce announced that it had entered into a 'bespoke relationship agreement' with ValueAct, which contained the following key terms:

a ValueAct to be granted one representative on the Rolls-Royce board, subject to certain conditions relating to ValueAct's shareholding;

b a standstill on ValueAct's share ownership (ValueAct cannot acquire more than a 12.5 per cent shareholding);

c a standstill on certain corporate governance matters, including restrictions on ValueAct requisitioning general meetings, soliciting proxies, proposing mergers or other change of control transactions, proposing changes to Rolls-Royce's strategy or publicly criticising or disparaging Rolls-Royce; and

d a commitment for ValueAct to vote in accordance with the board's recommendation on 'customary resolutions' at general meetings.

ValueAct now holds a 10.8 per cent shareholding and has one seat on the board.

7 Bloomberg – 'Icahn, Loeb and other Activists Overlook Women for Board Seats' – 8 March 2016.

ii Electra Private Equity

Sherborne Investors' activist campaign in relation to Electra Private Equity Plc is a high-profile example of a contentious proxy battle for board representation, in furtherance of a call for an operational turnaround.

Following a period of stake-building and a public rebuttal of its request for board representation, in October 2014 Sherborne requisitioned a general meeting for shareholders to vote for the appointment of two Sherborne nominee directors to the board of Electra and the removal of one existing director. Sherborne's campaign was centred on the belief that it had identified significant value in the Electra portfolio that the existing board had failed to realise and that could be unlocked by certain changes to the company's strategy. The proposals were defeated at the general meeting and Electra's board subsequently announced its own strategic review.

Following the release by the company of its strategic review and a further period of stakebuilding in Electra, Sherborne requisitioned a second general meeting in November 2015. At that meeting, Electra shareholders voted in favour of the appointment of two Sherborne nominee directors to the board of the company.

iii Alliance Trust

Elliott Management's public campaign against Alliance Trust Plc in 2015 is an example of an activist using its right to requisition resolutions at a company's AGM.

Arguing that Alliance Trust had underperformed its peers, Elliott sought to appoint three new non-executives to the board at the company's AGM to improve governance and focus the directors on raising returns. Elliott and Alliance Trust came to an agreement prior to the AGM in which Alliance Trust undertook to appoint two new non-executive directors (as nominated by Elliott) in return for Elliott supporting the board on all other resolutions. Elliott also agreed not to agitate against the company, its board or management publicly until after the company's 2016 AGM.

iv Poundland

Elliott Management's involvement in the £600 million takeover of Poundland by South African retailer Steinhoff is a recent example of an event-driven activist intervention.

In July 2016, Steinhoff announced a recommend takeover bid for Poundland priced at 220p per share (plus a 2p dividend) valuing the business at £597 million. Shortly after the announcement of the takeover offer, Elliott (an existing shareholder in Poundland) announced that it had increased its stake to 17.6 per cent. As the takeover offer required the vote of 75 per cent of shareholders to proceed (excluding Steinhoff's 23.6 per cent holding), Elliott's increased stake would have been enough to block the takeover. Although Elliott did not make its intentions regarding Poundland public, following the announcement of Elliott's increased stake, Steinhoff increased its offer by 5p to 225p per share (plus a 2p dividend).

V REGULATORY DEVELOPMENTS

Perhaps the most significant recent change in the regulatory landscape as far as shareholder activism is concerned was the coming into force of MAR on 3 July 2016. MAR, as an EU Regulation, has direct effect in each Member State without the need for any implementing measures by national legislatures. It aims to impose a more uniform market abuse regime across

the European Union than that possible under its predecessor, the Market Abuse Directive, and is also broader in scope. It governs, among other things, market abuse and the obligation on issuers to disclose inside information regarding themselves or their financial instruments to the market. There are some detailed changes with potential relevance to shareholder activism, in particular, the introduction of formal provisions regarding market sounding.

A market sounding is defined for the purposes of MAR as the communication of information (whether or not inside information) prior to the announcement of a transaction in order to gauge the interest of one or more potential investors in the transaction or by a bidder to sound out target shareholders on a takeover. Detailed requirements apply to all persons who disclose information in a market sounding. These include requirements for an assessment of whether the information is inside information, the use of scripts, recorded telephone lines (if available), sounding lists, cleansing and recorded keeping. While the market sounding regime will be most relevant to a company being targeted by an activist, it will be important for all parties to an activist campaign to ensure continued compliance with MAR.

The aspects of the regime which are most important to shareholder activism (i.e., market abuse and disclosure of inside information by issuers) have not been altered materially by MAR from the previous regime applicable in the UK (and indeed much of the case law is likely to remain informative for interpretation). However there are areas that active shareholders, and companies targeted by them will focus on. These include questions of inside information (including inside information of the shareholder itself), and the applicability of the new investment recommendation regime to shareholder activist situations.

A further development still in the pipeline is the proposed amendment to the Shareholder Rights Directive (2007/36/EC). The Shareholder Rights Directive is the source of many of the shareholder rights discussed above which have been given effect in English company law through amendments to the Companies Act (including shareholders' rights to requisition meetings and resolutions). A proposal for the planned amendments was published by the EU Commission on 9 April 2014, including provisions which would introduce new rules for proxy advisers, but has not yet been adopted. The question of the timing for the adoption of the Directive and its implementation into UK national law may mean the relevance of these potential changes becomes a question of the UK's Brexit timetable.

VI OUTLOOK

The legal and regulatory framework in the UK relating to shareholder rights and engagement has continued to evolve to encourage active shareholder engagement, and will continue to provide a benign environment for shareholder activists. The market will continue to develop, as activists increasingly seek to distinguish themselves, and as institutional shareholders, listed companies, advisers, commentators and the investment community more widely become more accepting of this activity and seeks to understand the nuances between its various protagonists.

For a number of market structural reasons, shareholder activism in the UK market is unlikely to reach the prevalence currently seen in the US. But the UK remains a fertile ground for activists to continue to seek targets for strategic campaigns, as well as companies with a range of corporate events in which they will choose to intervene. While the extent of the change to the UK's legal and regulatory framework resulting from a hard Brexit is impossible to judge at this stage, it will certainly provide activists with new opportunities as listed company boards seek to address their own business strategies in an economically turbulent post-hard-Brexit environment.

Appendix 1

ABOUT THE AUTHORS

GAVIN DAVIES

Herbert Smith Freehills LLP

Gavin is a corporate partner with 22 years of experience in public and private equity M&A.

He acts on cross-border M&A, JVs, VC and other investments, as well as governance, across Europe and Africa. Gavin represents financial investors, corporates and government agencies. His matters regularly involve complex or novel structures, contentious situations or distressed situations.

Gavin has particularly strong experience in shareholder activism situations in the UK, having acted on a number of the most significant campaigns in the UK in the last 10 years.

Gavin is cited as a leading M&A lawyer in *The Legal 500* and is identified in *Who's Who Legal* as a leading practitioner in the field of international M&A.

MARK BARDELL

Herbert Smith Freehills LLP

Mark is a corporate partner with considerable experience across a wide variety of advisory and transactional work, comprising domestic and cross-border, corporate finance and M&A, including public takeovers, private M&A, joint ventures and corporate governance.

He has a particular focus on advising companies listed on the main market in the UK or traded on AIM and is frequently involved in advising on significant challenges that face boards including board or governance disputes, regulatory investigations and corporate transactions.

Mark is recommended in *The Legal 500* for M&A premium deals and noted for his public takeover expertise. In September 2011, he completed a two-year secondment as Secretary to the UK's Takeover Panel.

HERBERT SMITH FREEHILLS LLP
Exchange House
Primrose Street
London EC2A 2EG
United Kingdom
Tel: +44 207 374 8000
Fax: +44 207 374 8888
gavin.davies@hsf.com
mark.bardell@hsf.com
www.hsf.com