

M&A Standpoint

Shareholder activists in Europe: Raiders or settlers?

Shareholder activists remain commonly viewed as short-term, opportunistic, foreign “corporate raiders”; seeking new targets in Europe after having already picked-off the easier targets on the other side of the Atlantic. However, like many raiders over the centuries before them, have shareholder activists now settled in Europe, permanently?

Arguing whether activism is on the rise, has peaked or is falling in Europe is to miss the point: shareholder activism is now here to stay in Europe and the question really is whether this is a good or bad development?

Shareholder activism has long been a feature of US markets but the large US activist funds increasingly look overseas for appropriate targets. This is in part due to the industry in the US itself maturing with a few very large funds emerging as the key protagonists, such as Carl Icahn’s eponymous fund, Nelson Peltz’s Trian and Paul Singer’s Elliott and the need for those funds to identify very large targets in order to generate and maintain the level of returns which their own investors have come to expect. In 2015, the number of companies subject to public activist campaigns was 673 globally of which 255 were outside of the US. In 2016, that number increased to 758 globally of which 302 were outside the US. Europe and in particular the UK were at the vanguard of this expansion in global shareholder activism: 27 campaigns in the UK in 2015 compared to 43 in 2016. In 2017, to date, while there has been a small

decline in volume in the numbers of public activist campaigns the targets have been among Europe’s largest companies and most recognised brands.

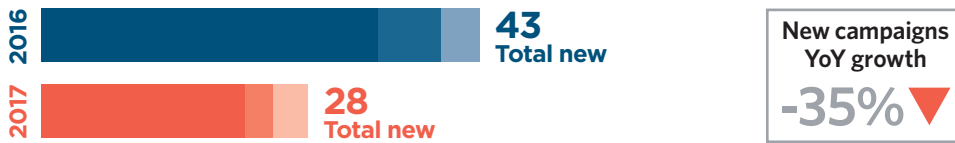
Take for example, Elliott’s recent campaign against the board of Dutch listed Akzo Nobel in respect of its stance on the proposed takeover approach from PPG, during which Elliott built a stake of approximately 9.5% in Akzo Nobel. The campaign resulted in Akzo Nobel agreeing in August 2017 to divest its specialty chemicals division (leaving it focussed on its core business of paints and coatings); appointing three new directors to the board; and declaring a special dividend to shareholders of US\$1.6 billion. Activism in Europe is increasingly event driven, where the activists seek to instigate or put pressure on the board to agree to a merger, or to pursue a disposal, or declare a return of value to shareholders.

Shareholder activism can also be sector focussed. Large multinational consumer companies currently face challenges around focus and efficiency, against slowing revenue growth and reduced margins. Take

Campaign activity H1 2017

■ 2016 ■ 2017

The volume overall of new campaigns launched in Europe decreased as local funds struggled with toppy valuations. Significantly, more midcaps were targeted in H1-17.



Total campaigns (live and potential) by market capitalisation



(Activistmonitor – Activism in Europe, First half review 2017, p. 2)

for example Nelson Peltz's recent successful campaign to be appointed to the board of P&G in the US and Third Point's recent campaign against the board of Nestlé (headquartered in Switzerland) which resulted in the board announcing a US\$21 billion share buyback. Arguably, at this stage of the cycle, the US activist funds have already forced change at the easier and more vulnerable targets in the US and are now looking for equivalent targets in Europe.

Seen in the broader context of global investment opportunities, in what is currently a global low interest and low yield environment, the large hedge funds with a proven track record present interesting opportunities for absolute returns, without limits on timing, without restrictions on permissible kinds of investment or sectors and without regular public financial reporting requirements - unlike other funds. One of the strengths of activist funds is that they can take a longer-term view compared to PE funds with fixed exit periods to deliver returns. In addition activist funds can also take a minority stake in a company and need not acquire control.


Accordingly, it is not surprising that it is not only US hedge funds which are pursuing an activist agenda. More and more, European investors are: seeking more active engagement with the companies in which they invest; using activist methods; allying themselves with, and even investing in, activist funds. The result is that traditional institutional shareholders make demands and become more activist in nature. For example, whereas traditionally in the UK institutional investors have refrained from voicing their concerns or criticisms of management publicly, the arrival of activist pressure or campaigns allows for the activist to become a "lightning rod" to channel previously private dissatisfaction felt by a wider group of

shareholders. The increase in votes against the directors' remuneration report at AGMs in the UK is an example of this, high profile examples include Babcock, Shire and Smith & Nephew. In short, activists can tap into general shareholder dissatisfaction and shareholders can encourage activists to step forward publicly in a way that traditional institutional investors are not willing to do.

The legal rights that activist shareholders seek to take advantage of will vary across company laws in the different jurisdictions they operate within. However, the key is the ability to call for a general meeting of the company's shareholders. In the UK, as well as in Germany, provided that a shareholder holds at least 5% of a company's issued share capital, it may requisition a general meeting of fellow shareholders and propose one or more resolutions to be considered at that meeting. In addition, activist shareholders in Germany often threaten to challenge resolutions in court - a powerful tool that does not require the holding of a significant stake. In France, minority shareholders holding at least 5% of the share capital cannot call directly for a general meeting of shareholders but they can ask the President of the Commercial Court to appoint an ad hoc agent whose role will be to convene the meeting if the board of directors refuses to convene a meeting following a specific request.

Activist investors do not only rely on their legal rights as shareholders. In addition, the successful activists are adept in using other means, such as a dialogue with the company or external PR or social media campaigns. For example in the UK, a board can seek to refuse to allow a resolution to be put at a meeting requisitioned by shareholders on the grounds that it is "frivolous or vexatious" or defamatory or on the technical grounds that it is a resolution

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without any legal effect (eg merely advisory). Winning this legal argument and having a resolution disallowed may at first look like a “win” against an activist but may in the long-run prove to be a tactical error because this can be presented in a media campaign as an overly defensive board unwilling to listen to shareholder concerns and concerned only with protecting their own jobs. In any event, the activist may then put a second resolution in such a way as to address the technical objection.

In fact, entering into a constructive dialogue with activist shareholders can always be presented positively to investors at large and can even be a good way for chief executives to initiate discussions about strategic decisions usually considered taboo, like divesting core assets. Therefore, regulators or policy makers can even encourage active shareholder engagement. It is apparent that corporate attitudes towards activists are changing as well.

Activism is no longer a foreign, US phenomenon, but is a permanent feature of European markets. This means that for all listed European corporates, being prepared to respond to an activist campaign is imperative. More than that, boards of European listed corporates will, in certain situations, want to consider a strategy of constructive dialogue with activists, recognising that this can be in the best interests of all shareholders and may in fact be welcomed by institutional shareholders.

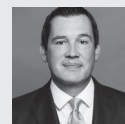
Activists have settled in Europe: they have become part of and have forever changed the communities around them.

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