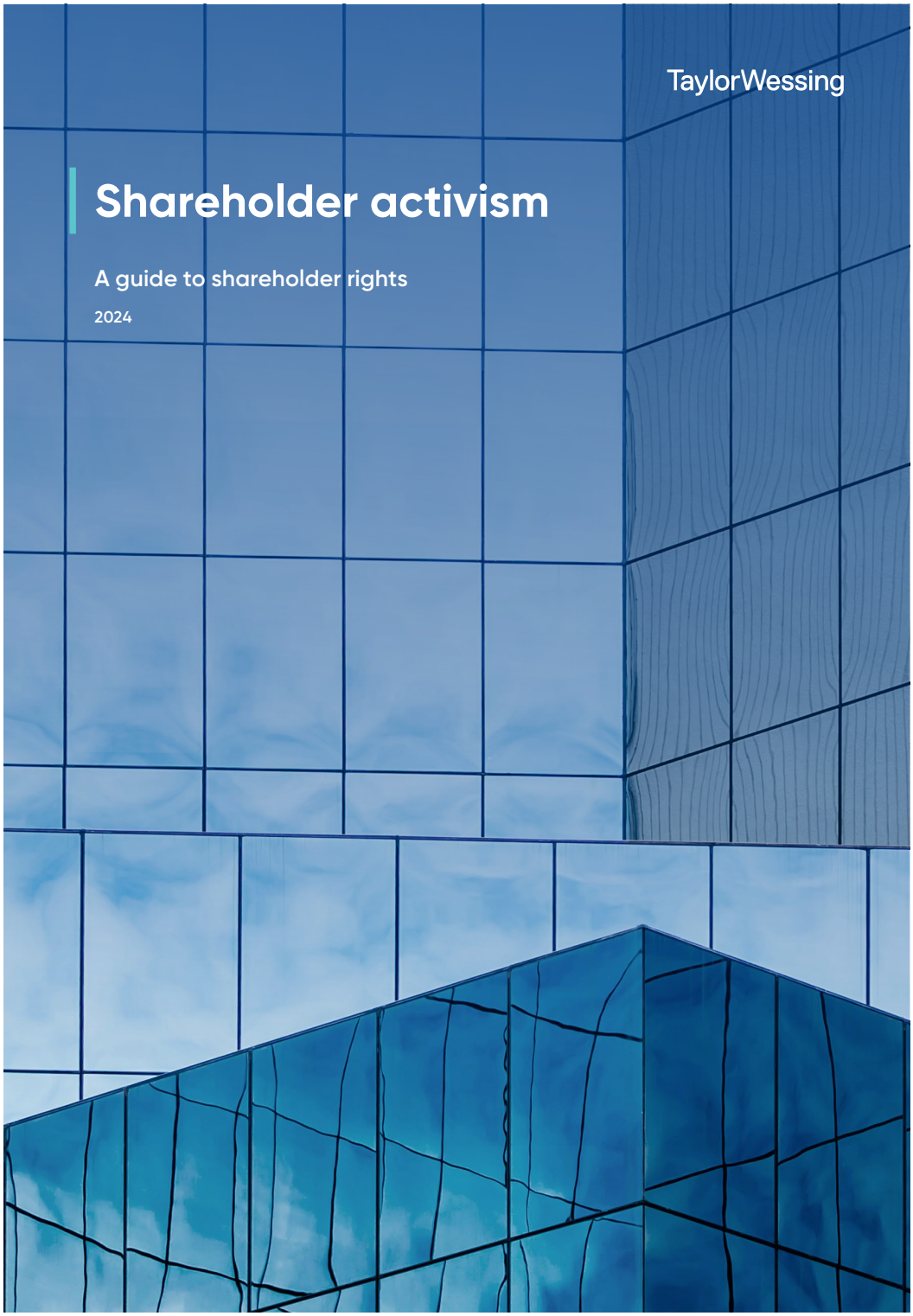
TaylorWessing

# Shareholder activism

## A guide to shareholder rights

2024



# Contents

# Shareholder activism is a broad concept with many forms.

**There are a wide variety of actions and behaviours that could justifiably fall under shareholder activism. However, no matter which form is chosen, the objective is to effect change, whether in management, the capital and asset structure, or the strategic direction of a company.**

# Introduction

**Whether economies are strong or weak, the trend for shareholders in publicly listed companies to make their views known continues to gather momentum. In some cases, shareholder views can be asserted by direct action. This shareholder action has been encouraged by changes in UK corporate laws, which assist shareholders and tip the balance between management and shareholders firmly in favour of shareholders.**

Activist shareholders want to put pressure on the management of a company to implement different initiatives or adopt alternative strategies. Their actions can go much further than simply voting against a resolution put forward by the board.

An important weapon in an activist's arsenal is a readiness to use the public domain which can be used to force change. Public relations can be a persuasive factor even where shareholders have no real power to make a board shift the company's direction.

The general public's awareness of issues that will affect them, like climate change, can help to persuade boards to do the right thing. Social media and 24-hour news have introduced new avenues for garnering widespread support which can drive change.

This guide focuses on the more active engagement undertaken by some shareholders.

Public relations can cut both ways. The role of professional advisers and a well-organised public relations strategy can prove to be extremely valuable when considering these issues, not only to the activist shareholder, but also to a company's board.

Before going public, the activist needs to understand the regulatory framework in which they are operating. Anyone adopting such an approach must take great care to ensure that they comply with regulatory regimes, particularly the market abuse and insider dealing regimes.

As stated, an activist shareholder will use their equity stake in a company not merely to express disapproval but to actively influence management by taking more extreme action. This guide considers some of the tools available to such a proactive and agenda-driven investor who is trying to effect change.

**To help you understand shareholder activism, this guide:**

- provides an overview of shareholder activism and how it may influence a company's behaviour
- identifies what options are available for shareholders wishing to pursue an activist agenda
- considers the legal framework in which UK public companies must operate when faced with shareholder activism.

This guide does not cover the considerations applicable to non-UK companies.

# Purpose of shareholder activism

**Management knows if the performance of the business isn't good enough for internal stakeholders, it isn't good enough for shareholders either. In the same way, if management believes a business is performing exceptionally, it's likely that shareholders will agree. Shareholders show support by leaving management to do what it does best. Poor performance over time is the starting gun for activism.**

The activist has many weapons in its arsenal and management has many countermeasures. But whatever the battleground and tactics used, the most persuasive party is likely to be the winner.

Large-scale defeat may be avoided by offering small concessions at the outset. Management should not react to the first sign of activism with a defiant and uncompromising response. Dialogue should be the first strategy not only to help management ensure it has fully understood the issues being raised, but to see if there's a simple solution.

Once faced with activist opposition, management would be well advised to assess its behaviour critically and from an outsider's perspective to understand what's driving the activists and whether there's scope for compromise. The activists' wish list may have some merit and should not just be dismissed out of hand.

Open and constructive communication at an early stage (subject to restraints around confidentiality and insider information) may head off far greater threats in the longer term.

**The following are some key reasons that shareholders may wish to pursue an activist agenda:**

- To procure a return of capital.
- To ensure the pursuit of a different corporate strategy to achieve improved performance and profitability, eg seeking to realise value by demerging businesses.
- To effect changes to a company's board.
- To effect changes to the remuneration of the board.
- In pursuit of a special interest, ie groups aligned with environmental, social or ethical strategies.
- To increase company efficiency by procuring the disposal of underperforming assets.
- To influence the outcome of a takeover or other M&A activity.

# Historical development of shareholder activism

**Traditionally, shareholders have expressed their views when they disapprove by selling their shares. This unloading has sometimes provided the opening for a takeover approach. Activism may present management with an opportunity to avoid a takeover offer being made.**

Criticism of management used to take place behind closed doors. In the past, large institutional investors in particular have tried to restrain themselves from criticising a company's board in the public domain. Increasingly, however, shareholders are prepared to speak publicly when criticism doesn't achieve the outcome they're looking for.

Criticism may be specific (eg to oppose a specific acquisition proposal put forward by management) or general (eg shareholders increasingly want their companies to pursue ESG agendas).

The concept of shareholder activism is not new, but it's now more common than ever before. Today's investors feel empowered and entitled to intervene in the management of public companies, both in the UK and abroad.

Motivating factors may be financial or non-financial and often include a desire to improve company performance or pursue a particular objective, such as seeking to hold the company to account for its response to ESG matters, including climate change and sustainability.

**Some high-profile examples of shareholder activism include:**

**Whitbread plc's** disposal of Costa Coffee following pressure from shareholders to demerge in 2018.

**Glencore** facing shareholder rebellions on more than one occasion, including over its environmental policy and more recently coming under pressure to move its primary listing from London to Sydney.

Board changes driven by shareholders at **Unilever** and **GlaxoSmithKline** (2022/23).

**Capricorn Energy** withdrawing from a merger with its rival, Tullow Oil, in 2022, because significant shareholders could see no clear strategic rationale and were concerned it was undervaluing Capricorn.

The takeover of **Spire Healthcare** by Ramsay Healthcare, which had been agreed by Spire's management but was rejected by shareholders in 2021.

Activism does not respect market size, and smaller companies have been targeted in recent years. In some instances, the targets have been the company directors personally.

Furthermore, in some market conditions eg where private equity groups may not be so ready to finance takeover offers, for the larger companies, activism might represent the only way of escalating external pressure to create change.

# Tools available to activist shareholders

**Activists have a number of tools available to them.**

## Statutory powers

**The Companies Act 2006 (the 2006 Act) sets out the legal framework which enables shareholders with an activist agenda to pursue their rights.**

Shareholders in public companies have various rights which they can exercise to achieve their objectives, as set out below – some are applicable to all public companies, others just to listed companies.

In addition, some of these powers can be exercised by the beneficial owners of the shares in certain circumstances **(see page 20)**. References to sections are to sections of the 2006 Act.

### Requisitioning a general meeting (sections 303-305) - all companies

**This gives members the means to convene the necessary forum to propose their desired resolution.**

Members with fully paid-up shareholdings representing at least 5% of a company's total voting rights can require the directors to call a general meeting of the company. The request must detail the nature of the business to be dealt with at the meeting and may specify wording for a proposed resolution to be tabled at the meeting.

Under the 2006 Act, all UK public companies can convene general meetings (other than AGMs) on 14 clear days' notice (provided their articles do not require a longer period). This includes companies listed on the Official List, provided that:

- their shareholders pass a special resolution every year, normally at the AGM, approving the 14 clear days' notice period, and
- the company 'offers the facility for shareholders to vote by electronic means accessible to all shareholders'.

However, listed companies also need to bear in mind the views and expectations of institutional investor bodies. For example, one such investor body, ISS, requests in its proxy voting guidelines that listed companies give as much notice as is practicable when calling a general meeting.

It suggests that such companies only use the additional flexibility afforded by this authority in limited and time-sensitive circumstances, where it would clearly advantage the shareholders as a whole. It also requests that companies provide assurance that they will only use the shorter notice period when merited. An appropriate use of this authority would be in circumstances where time is of the essence.

A proposed resolution (whether at a requisitioned meeting or proposed for an AGM) will not be permitted if it:

- would be ineffective as a result of it being inconsistent with the company's articles of association
- is defamatory
- is vexatious or frivolous.

An example timeline for requisitioning a general meeting is set out on **pages 36** and **37**.

### Requisitioning the circulation of a statement (sections 314-317) - all companies

**Sections 314-317 allows shareholders to require the circulation of a statement to be considered at a general meeting of a company.**

Members of a company representing at least 5% of the total voting rights of the company, or members (with a relevant right to vote) who are at least 100 in number and whose shares are paid up by an amount averaging at least £100 per member, can require the company to circulate a statement (of up to 1,000 words) to shareholders regarding a proposed resolution to be dealt with at a general meeting or other business to be dealt with at that meeting.

The company must receive the statement at least one week before the meeting. If the relevant meeting

is an AGM and the request is received prior to the end of the financial year preceding the AGM, the company is required to bear the costs of circulating the statement – if not, the members requiring the statement to be circulated will have to bear the costs, unless the company resolves otherwise.

The shareholders may be required to deposit sufficient funds with the company in advance to cover these costs.

Beneficial owners of shares can count towards the shareholder threshold required to trigger this request – **see page 20**.

### Proposing a resolution for an AGM (sections 338 and 340) - public companies

**Members of a public company can require a resolution to be proposed at the company's AGM.**

Members of a public company representing at least 5% of the total voting rights, or members (with a relevant right to vote) who are at least 100 in number and whose shares are paid up by an amount averaging at least £100 per member, can require a resolution to be proposed at the AGM.

Shareholders with small holdings need not be deterred by these thresholds, as the 2006 Act does not prevent a shareholder from dividing its holding into 100 nominee holdings each with an average paid up capital of £100.

Any request for a resolution to be proposed must identify the resolution and be received by the company before the end of the financial year preceding the relevant AGM, or within six weeks of the meeting (or, if later, when the company gives notice of the meeting). The exact timing of the request is important, as it will affect whether the expenses of circulation of the resolution are borne by the company or the members requisitioning the resolution.

Beneficial owners of shares can count towards the shareholder threshold required to trigger this request – **see page 20**.

### Removing a director from office (section 168) - all companies

**One of the ultimate shareholder sanctions, from a director's perspective, is removal from office.**

A company may remove a director from office, notwithstanding anything in any agreement between the company and the director, by passing an ordinary resolution (ie a simple majority of those voting in person or by proxy at the general meeting). Special notice of 28 days must be given to the company of the intention to propose a resolution for the removal or replacement of a director. The company's articles must be considered as they may include an alternative removal process.

This may be used by shareholders of public companies in conjunction with their power to propose a resolution at an AGM under section 338.

### Viewing the company's shareholder register (section 116) - all companies

**Any person can view or request a copy of a company's register of members.**

This right is particularly useful for activist shareholders who may benefit from identifying who the company's shareholders are. However, a request to view a company's register of members may only be made for a 'proper purpose', which would preclude an intention to intimidate or cause harm to any shareholders of the company. Canvassing support for a proposed resolution should constitute a proper purpose.

### Additional rights for shareholders in certain listed companies (not AIM) - quoted companies/traded companies

**Further rights are available to members of quoted companies representing at least 5% of the total voting rights, or members (with a relevant right to vote) who are at least 100 in number and whose shares are paid up by an amount averaging at least £100 per member, namely:**

- The right to require the directors to obtain an independent report on any poll taken or to be taken at a general meeting (section 342). The request must be received by the company no later than a week after the date of the poll, but would be most effective if received before the meeting.
- The right to require the company to publish on a website a statement

setting out any matter relating to the audit of the company's accounts that are to be laid at the next meeting or any circumstances connected with the auditors ceasing to hold office (section 527).

- In addition to the right to requisition a resolution at an AGM which is available to members of public companies under section 338 (described above), members of **traded companies**, who satisfy the qualifying shareholding requirements, have rights to require the company to include in the business to be dealt with at the AGM 'any matter' that may be properly included in such business (section 338A) and to have such matters circulated to members. If the request is timed correctly the circulation is done at the expense of the company (sections 340A and 340B).

Beneficial owners of shares can count towards the shareholder threshold required for these rights – **see page 20**.

### Quoted companies

Quoted companies are companies which have equity shares which are:

- listed in the FCA's Official List and are admitted to trading on a UK regulated market for listed securities
- officially listed in the EEA; or
- admitted to dealing on the New York Stock Exchange or NASDAQ.

AIM companies are not quoted companies.

### Traded companies

For this purpose, traded companies are companies any shares of which:

- carry rights to vote at general meetings, and
- are admitted to trading on a UK regulated market or an EU regulated market.

AIM is a multilateral trading facility and not a UK regulated market, so AIM companies are not traded companies.

| **Thresholds for shareholder rights** | |
|---|---|
| 5% of total voting rights **or** 100 members with voting rights and holding of shares paid up at least £100 on average* | Power to require circulation of a statement<br><br>Power to propose a resolution for the AGM<br><br>Power to require an independent report on a poll **(quoted companies only)**<br><br>Power to require website publication of audit concerns **(quoted companies only)**<br><br>Power to require inclusion of a matter to be considered in the business of an AGM **(traded companies only)** |
| 5% of total voting rights | Power to require a general meeting to be held |
| +50% (of those present at meeting and entitled to vote) | Requisite majority to pass an ordinary resolution |
| 75% (of those present at meeting and entitled to vote) | Requisite majority to pass a special resolution |

* Beneficial owners of shares can count towards the shareholder threshold required for these rights.

# Use of proxies and corporate representatives

## Proxies

**Proxies can often play an essential part in an activist's campaign.**

- Every member of a company has an absolute right to appoint a proxy to attend, speak and vote at meetings on their behalf (section 324).
- Proxies can vote on a poll and on a show of hands.
- Proxies have similar voting powers as members – on a show of hands, one vote, and on a poll, one vote for each share held. Companies cannot arrange for proxies to have fewer votes on a show of hands than the member would have if present in person.
- A member may appoint more than one proxy in relation to a meeting, provided that each proxy is appointed to exercise the rights attaching to different shares held by the member. Where a member appoints more than one proxy, each proxy has one vote on a show of hands.

Companies are permitted to grant more extensive rights regarding proxies than the statutory minimum and so the articles of association of the company should be considered carefully.

Each proxy has one vote on a show of hands except where the proxy is appointed by multiple members who instruct the proxy to vote in different ways (section 285).

Traded companies must comply with certain additional formalities regarding the appointment of proxies and the termination of such appointments.

## Corporate representatives

**Activist shareholders that are companies (or are individuals who hold their shares through nominee companies) may prefer to cast votes by way of a corporate representative rather than by proxy.**

This offers the shareholder greater flexibility, for example, where the proxy deadline is missed or where the shareholder wants to attend the meeting at short notice without formally changing the proxy's instructions.

Corporate shareholders can appoint one or more corporate representatives to act as their representative at a meeting by board resolution. A single corporate representative has full powers to exercise all of the rights of the shareholder at general meetings, as does any one of a shareholder's multiple representatives.

On a show of hands, each corporate representative has the same voting rights as the company itself would be entitled to if it were voting on its own account. This means that **each** corporate representative is entitled to one vote. On a poll the same shares cannot be voted in different ways (deliberately or accidentally).

If each corporate representative is appointed in respect of different blocks of shares this does not present a problem. If more than one representative is appointed in respect of the same shares, their votes will only count if they vote the same way. If they vote the same block of shares in different ways, none of the votes in respect of those shares will be counted.

It's essential that a corporate representative's paperwork is in order as a registrar/issuer will need to satisfy itself that the representative has been validly appointed. It will also need to ensure that where a corporate member has appointed more than one representative, each representative has been appointed in respect of a different block of shares.

An original or certified copy of the appropriate board resolution appointing the representative is required, although The Chartered Governance Institute (CGI) has issued guidance that companies may also accept an original letter on the letterhead of the registered shareholder and signed by an authorised signatory confirming the appointment, accompanied by evidence of the signatory's authority.

# Exercise of shareholder rights by indirect investors

### Information rights

Registered members of companies listed on the Official List can nominate the beneficial holder of the shares to enjoy 'information rights', that is, receive company documents and information (for example, shareholder notices, circulars and the annual report and accounts) that are sent to members by the company. These provisions do not apply to AIM companies.

Website publication is the default method of communication, but the nominated recipient may (before the nomination is made) request hard copies, through the person making the nomination and providing a postal address to which the documents may be sent.

Nominated persons cannot enforce the rights conferred by nomination against the company, although the member may do so.

### Members' requests

Under section 153, beneficial owners of shares can count towards the shareholder threshold required to trigger members' requests for:

- the proposal of a resolution for the AGM (public companies)
- the circulation of a statement (all companies)
- the inclusion of matters in business to be dealt with at the AGM (traded companies)
- an independent report on a poll (quoted companies)
- website publication of audit concerns (quoted companies).

This is subject to certain conditions intended to ensure that only genuine indirect investors are allowed to count towards the threshold, that the same shares cannot be used twice and that the indirect investor's contractual arrangements with the member allow the indirect investor to give voting instructions to the member.

# Shareholder transparency

**The UK regulatory regime aims to promote transparency of company ownership by requiring disclosure of substantial shareholdings and interests in shares in LSE Main Market, AIM and Aquis Stock Exchange (AQSE) companies. This will assist an activist shareholder in identifying other shareholders and their holdings or positions.**

### Disclosure Guidance and Transparency Rules

The disclosure requirements are set out in chapter 5 of the FCA's Disclosure Guidance and Transparency Rules (the **DTRs**).

Under DTR 5, where a person holds shares in a UK issuer:

- as a shareholder (including indirect interests with access to voting rights); or
- through their direct or indirect holdings of financial instruments which entitle the holder to acquire shares with voting rights attached (such as swaps, forward rate agreements, options, futures and other derivative products where voting rights are acquired); or
- which are referenced to the shares of a UK issuer and have similar economic effects to such financial instruments (including gross long contracts for difference positions)

that person must notify the company of the percentage of voting rights they hold if the percentage held reaches, exceeds or falls below 3% or any whole percentage figure above 3%.

For UK companies, the notification under DTR 5 must be made by shareholders as soon as possible but within two trading days (and, if the company is on the Official List, must be made using the prescribed FCA form TR-1). The company must then

make an announcement as soon as possible on receipt of a notification and by no later than the end of the following trading day (for UK issuers on the Official List) and by no later than the end of the third trading day for companies on AIM. Note, however, that for AIM companies, this third day requirement is subject also to the requirement to make the announcement 'without delay'.

Issuers must update the market, at the end of each calendar month during which an increase or decrease has occurred, on the total number of voting rights and capital for each class of share which it issues and the total number of voting rights attaching to shares held in treasury.

Additional reporting or disclosure requirements may apply to net short positions in shares and under the Takeover Code. The types of interest or financial product affected are varied and it's important that detailed advice is obtained on an investor's reporting or

**Companies Act 2006**

Section 793 enables a public company to require disclosure from any party it believes has or has had an interest in its shares at any time during the previous three years. The company must keep a register of all such disclosures. Section 811 enables any person to request a copy of the company's register of interests disclosed, subject to the request being for a 'proper purpose'.

# Derivative actions

**Sections 260-264 of the 2006 Act set the parameters of a statutory derivative action, giving shareholders the ability to bring a civil action on behalf of the company against a director (or against a third party) in respect of the director's conduct. The ability to bring a derivative action is dependent on the company itself having a claim.**

These types of action should usually be considered as an action of last resort.

There is a two-stage procedure for the shareholder seeking to bring the derivative action. First, the applicant will be required to make a prima facie case for permission to continue a derivative action. Secondly, but before the substantive action begins, the court may require evidence to be provided by the company.

### What type of claim may be brought as a derivative action?

The statutory position is a lot wider than under the common law. A claim may be brought in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director. This could include an alleged breach of any of the general statutory duties of directors, including the duty to exercise reasonable care, skill and diligence or the duty to promote the success of the company. 'Director' for this purpose can include a former or shadow director.

### Factors for consideration by the court

These factors include whether the member bringing the claim is acting in good faith, the importance that a director fulfilling the directors' statutory duty to promote the success of the company would attach to bringing this particular claim, the likelihood of authorisation or ratification and whether the company itself has decided to bring the claim.

The court is also likely to consider whether the case could be brought by the member personally (in which case the shareholder would usually be expected to bring their own action rather than bring a derivative action) and, most importantly, the views of independent members of the company, ie members with no personal interest, direct or indirect, in the matter.

In 2023, ClientEarth issued a derivative action against the board of directors of Shell alleging that the board was not doing enough to prepare for the net zero energy transition and was failing to manage climate change risks. The court refused permission for the claim to proceed.

Among other things, the judge cited the well-established principle that in fulfilling their statutory duties, it is for the directors to decide (acting in good faith) how best to promote the success of the company and the courts will be reluctant to intervene unless there is a very clear case. This case reinforces the high hurdle that shareholder claimants have to overcome in order to bring a derivative claim against a company and its directors.

| Advantages of derivative actions | Disadvantages of derivative actions |
|---|---|
| The scope is relatively wide – claims can be brought for negligence, default, breach of duty or breach of trust. If the claim is successful, the shareholder will have managed to achieve an outcome that the directors had refused. | A derivative claim involves a lengthy process. Even if permission to proceed is granted by the courts, it's likely that the entire process will take many months to reach a conclusion. |
| It is immaterial whether the person bringing the action became a shareholder after the cause of action arose. | Courts have strong powers and discretion to refuse permission for frivolous claims. |
| There is no requirement that a specific minimum number of shares (or a particular percentage of shares) in the company have to be held by the shareholder. | Any remedies awarded for a director's breach of duty will be for the company's benefit, rather than the shareholder itself. |
| There is no time period for which the shareholder must have held their shares before they can bring an action. | |
| The claim can be brought, not only in respect of past acts or omissions, but also in respect of proposed acts or omissions. | |

# Unfair prejudice

**Shareholders also have a statutory right to apply to court for relief where the company's affairs have been carried out in a way which has been unfairly prejudicial to the interests of its shareholders. In general, these actions also involve a lengthy process and are likely to take as long, if not longer, than a derivative action.**

**These actions are also rare in the context of listed companies, as the most natural remedy is for the investor to sell its holding in the market.**

**In general, as long as a company has acted within the confines of its constitution, it's often considered difficult to succeed with unfair prejudice petitions.**

# Acting in concert

**An activist shareholder is likely to seek support from fellow shareholders in pursuit of their agenda. Unless the shareholder in question has a sufficiently substantial shareholding to achieve their goals, there are obvious benefits to acting in concert with their fellow shareholders (although this will not always be the case).**

There are many ways in which shareholders can support each other in furthering their objectives. The shareholder driving the agenda may simply request that other shareholders agree to sign a request for a general meeting or agree to sign a more exhaustive letter outlining the proposals.

Other options for support include entering into a legal undertaking as to how the shareholders will vote, or simply asking for permission to use the shareholders' names in discussions with management. Although there may be obvious synergies between the goals which a number of shareholders seek to achieve, the implications of acting in concert must also be considered.

Co-operation among shareholders can take many forms, ranging from simple and informal discussions to the adoption of a more thorough and formal agreement as to how to pursue an activist agenda together.

### Disclosure Guidance and Transparency Rules

A person is viewed by the DTRs as an indirect holder of shares if they have concluded an agreement with a holder of shares "which obliges them to adopt, by concerted exercise of the voting rights they hold, a lasting common policy towards…… management". Shareholders acting together, therefore, need to consider whether they have indirect interests in each other's shares, or whether contractual arrangements constitute a financial instrument, and if so, whether disclosure is required if any of the disclosure thresholds have been reached **(see page 22)**.

### Takeover Code

Detailed legal advice should be obtained and the Takeover Panel should be consulted in advance as inherent risks exist within the Takeover Code for shareholders pursuing an activist agenda.

The provisions relating to mandatory bids are particularly relevant for shareholders 'acting in concert'. As the percentage of the aggregate shareholding of the shareholders acting in concert increases, so the need to take strategic care increases too.

This is especially true if the aggregate shareholding is approaching 30% of the company's voting rights (being the threshold at which a mandatory bid for the company will be required under Rule 9 of the Takeover Code).

The Takeover Panel does not normally regard the action of shareholders voting together on a particular resolution as action which of itself indicates that they are acting in concert. However, if shareholders threaten to requisition the consideration of a 'board control-seeking' proposal at a company's meeting, the Takeover Panel generally presumes them to be acting in concert, along with the proposed directors and any other shareholders who have supported them to this end.

Those parties will be presumed to have come into concert once an agreement or understanding is reached between them in respect of a board control-seeking proposal, with the result that subsequent acquisitions of interests in shares by any member of the group could trigger a mandatory offer obligation.

It's important that the size of the parties' aggregate shareholding is clearly identified and that any necessary standstill arrangements are implemented. A concerted shareholder arrangement won't necessarily cease once a general meeting has been requisitioned, especially if such a requisition is merely one part of a larger activist strategy.

### Companies Act 2006

A party is treated as 'interested in shares' where it has the right to call for the delivery of the shares or if there is an agreement to acquire interests in a particular company. Such interests must be disclosed if a public company serves notice requiring disclosure in respect of any interest in its shares during the previous three years (under section 793).

# Market abuse and insider dealing considerations

**Before any proposed action is taken, activist shareholders should be aware of the possible implications their action may have under the market abuse and insider dealing regimes.**

In circumstances in which the activist shareholder has engaged in communication with the company's board, it will be possible that inside information has been divulged, which would restrict the shareholder from being able to deal.

Moreover, in some instances it's possible that the actual strategy being pursued by the activist shareholder is itself inside information, thus requiring disclosure to the market as a whole. The FCA's general approach is not to view this conduct as abusive of the market if the participant will merely carry out acquisitions on the basis of its own knowledge and strategy, simply taking advantage of its own analysis of otherwise publicly available information – but clearly, great care must be taken in these situations.

The FCA has warned that other activist activities could constitute market abuse, for example, where a shareholder acquires shares on the basis of another participant's strategy or if dealings were undertaken on the basis of their knowledge of another participant's intentions and strategy, regardless of how such information was obtained.

Furthermore, shareholders are expected to take reasonable care to ensure that any comments made don't give rise to false rumours or deceptive indications as to their future strategic intentions.

An activist shareholder must also consider whether their actions may constitute the criminal offence of insider dealing, in breach of the Criminal Justice Act 1993. A breach will be committed, not only if an insider discloses inside information or deals in price-affected securities when in possession of such information, but also if the insider encourages others to deal in such a way.


Market abuse and insider dealing considerations

# Ten practical tips for an activist shareholder

1. Prior to engaging in any activist behaviour, clearly identify specific aims and what you want to achieve. Have a clear understanding of the strategy you plan to pursue from the outset.

2. Identify who your fellow shareholders are and carry out a detailed analysis of the shareholder register and support you may have.

3. Consider both the positive and negative implications of any subsequent shareholder activism being made public for both the company's board and the shareholders.

4. Remain in regular communication with fellow shareholders to monitor the level of support for the activist proposals. Use a broker if necessary to co-ordinate communications with investors.

5. Avoid requisitioning resolutions that may be considered vexatious or frivolous. Equally, ensure that any resolutions to be requisitioned will be effective and ultimately bind the company in accordance with its constitution if they are passed.

**6.** If a proxy battle is anticipated, ensure proxy forms are submitted on time in accordance with the company's constitution and that any paperwork appointing corporate representatives is in order.

**7.** Seek professional advice on the implications of requirements of the Takeover Code with regards to concert parties and discuss any issues with the Takeover Panel early in the process.

**8.** If you are an activist looking to build a greater stake in a company, consider and take advice on the implications of insider dealing and market abuse, in particular, where discussions with the board may have taken place.

**9.** Consider litigious actions, in particular derivative actions and unfair prejudice petitions, as a last resort. They are unlikely to have an immediate effect (compared to requisitioning a meeting or a resolution at an upcoming AGM) and can be costly.

**10.** Ensure that you engage experienced professional advisers and have a well-organised public relations strategy in place early in the process. Be aware of defamation laws when making criticisms and seek expert advice on minimising the risk of being derailed by a libel claim.

# Example timeline for requisitioning a general meeting

**The exact timing requirements will vary from company to company and will also depend on what action is proposed by shareholders, but the basic requirements and parameters are usually as follows.**

| Date | Action |
|---|---|
| **6-8 weeks prior to Date A** | ■ Request to view the company's shareholder register. The company must comply within five working days of a valid request, unless it applies to court for an order that the request is for an 'improper purpose'.<br>■ Prepare the resolutions which are intended to be moved at the general meeting. Co-ordinate support among other shareholders.<br>■ Check the company's articles for any particular requirements that must be complied with – for example, provision of information on new directors proposed by shareholders. |
| **Date A** | ■ The company receives the request for a general meeting from shareholders representing at least 5% of the voting rights of the company.<br>■ Note that if it is proposed to remove a director, 28 days' special notice needs to be given to the company. |
| **A+21 (Date B)** | ■ Date by which the directors must call a general meeting (within 21 days from the date of receipt by the company of the request). |
| **B+18** | ■ Earliest likely date on which the general meeting can be held (assuming that (i) the directors wait the full 21 days before calling the meeting (ii) the notices are posted and the company's articles provide for deemed delivery two days after posting (iii) the articles provide for 14 'clear' days' notice for general meetings and (iv) the company can take advantage of the 14 days' notice under section 307A. |
| **B+28** | ■ Date by which the general meeting must be held (not more than 28 days after the date of the notice convening the meeting). |

## Once a date is set for the general meeting

| Date | Action |
|---|---|
| **M-16** | ■ Last date on which notice of the meeting may be given to shareholders (14 clear days). Note that the company will have to despatch notices earlier than this date to comply with deemed notice provisions in the articles. |
| **Any time up to M** | ■ Prepare and execute documents appointing corporate representatives (if any). |
| **M-48 hours** | ■ Date and time by which proxies must be lodged with the registrars (need to check the articles as to whether '48 hours' excludes or includes working days but note that where the company has shares held in CREST, when calculating the 48-hour period no account can be taken of any part of a day that is not a working day). |
| **M** | ■ Date on which the general meeting is to be held. |
| **Prior to M and up to M+7 days** | ■ Right for members (representing at least 5% of the total voting rights, or members (with a relevant right to vote) who are at least 100 in number and whose shares are paid up by an amount averaging at least £100 per member), to require the directors to obtain an independent report on any poll taken or to be taken at the general meeting. |

# Our Corporate Finance team

**Tandeep Minhas**
Partner, Corporate Finance,
FS Regulatory and Competition
+44 207 300 4244
t.minhas@taylorwessing.com

**Will Belcher**
Partner, Corporate Finance,
FS Regulatory and Competition
+44 207 300 4221
w.belcher@taylorwessing.com

**James Homan**
Partner, Corporate Finance,
FS Regulatory and Competition
+44 207 300 4124
j.homan@taylorwessing.com

**2000+ people 1200+ lawyers 300+ partners 28 offices 17 jurisdictions**

| | | | |
|---|---|---|---|
| **Argentina*** | Buenos Aires | **Mexico*** | Mexico City |
| **Austria** | Klagenfurt \| Vienna | **Netherlands** | Amsterdam \| Eindhoven |
| **Belgium** | Brussels | **Nicaragua*** | Managua |
| **Brazil*** | Belo Horizonte \| Brasilia \| Rio de Janeiro \| São Paulo | **Panama*** | Panama City |
| **Chile*** | Santiago de Chile | **Poland** | Warsaw |
| **China** | Beijing \| Hong Kong \| Shanghai | **Portugal*** | Braga \| Lisbon \| Porto |
| **Colombia*** | Bogotá \| Bogotá, main office | **Puerto Rico*** | San Juan |
| **Costa Rica*** | Guanacaste \| San José | **Republic of Ireland** | Dublin |
| **Czech Republic** | Brno \| Prague | **Slovakia** | Bratislava |
| **Dominican Republic*** | Santo Domingo | **South Korea**** | Seoul |
| **Ecuador*** | Cuenca \| Guayaquil \| Manta \| Quito | **Spain*** | Barcelona \| Canary Islands \| Madrid \| Pamplona \| Seville \| Valencia \| Vitoria \| Zaragoza |
| **El Salvador*** | San Salvador | **UAE** | Dubai |
| **France** | Paris | **Ukraine** | Kyiv |
| **Germany** | Berlin \| Düsseldorf \| Frankfurt \| Hamburg \| Munich | **United Kingdom** | Cambridge \| Liverpool \| London |
| **Guatemala*** | Guatemala | **Uruguay*** | Montevideo |
| **Honduras*** | San Pedro Sula \| Tegucigalpa | **USA** | New York \| San Francisco |
| **Hungary** | Budapest | | |

* Powered by our strategic alliance with leading law firm ECIJA
** In association with DR & AJU LLC



TaylorWessing