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ACTIVISM: 10 KEY DIFFERENCES BETWEEN THE US AND THE UK

Shareholder activism is well-established in the US. Activists in the US are extremely familiar with the tactics they can deploy and the relevant regulatory issues. By contrast, shareholder activism is less pronounced in Europe – but it is widely expected to become an increasingly important investment strategy in Europe and, in particular, the UK. There are, though, some important differences between the US and the UK.

1. REGULATION

Perhaps surprisingly, the regulatory regime is stricter – and therefore less friendly to the activist – in the UK than in the US. Any activist will find issues such as disclosure obligations (which, for a UK company, are triggered by shareholdings above 3 per cent and each 1 per cent threshold thereafter) and insider dealing more challenging and restrictive.

2. LITIGATION

A large proportion of activist situations in the US involve litigation or the threat of litigation. We don't expect litigation to play such a prominent part in any activism in the UK. The principal types of litigation available to disgruntled shareholders in the UK are unfair prejudice claims and derivative actions. Even if an activist were to bring a successful unfair prejudice claim, the remedy is unlikely to match the activist's strategic objectives. There are considerable barriers to pursuing derivative actions which will limit their attractiveness to activists.

3. DEAL FLOWS

In recent years the US markets, particularly the M&A and IPO markets, have seen higher levels of activity than the UK markets. In addition, notwithstanding the sophistication and scale of the UK financing market, it is not as deep or liquid as the US financing market. There are two implications of this. Firstly, although activists have been known to play important roles in a few landmark UK deals, there is less scope for "deal activism" in the UK. Secondly, it will not be as easy to assume a ready exit market for any assets that an activist considers non-strategic.

4. CULTURAL DIFFERENCES

Notwithstanding the new "say on pay" rights given to shareholders (see point 8), the question is whether institutional investors would side with any activist that wanted to vote down a remuneration policy. Cultural differences mean that UK institutions (as long-term shareholders) are likely to be reluctant to side publicly against management. Activists who are aware of such "softer" issues are more likely to adopt successful strategies than those who do not give proper consideration to them.

5. PROXY ADVISERS

Proxy advisers are extremely powerful in the US. ISS is commonly thought to be capable of influencing 20 - 30 per cent of the vote in a proxy contest, with Glass Lewis able to influence 10 per cent or more of the vote. Whilst both ISS and Glass Lewis (together with PIRC) are increasingly important in the UK, they are far less influential than in the US. Activists will therefore need to take a different approach in the UK to winning shareholder support for their proposals. A successful activist strategy in the UK will require a willingness to engage patiently with the broader shareholder base (as often as not behind closed doors) to persuade other shareholders of the merits of the activist's position and thereby increase the pressure on management to engage with the activist.

6. POISON PILLS

Poison pills are an established part of the defence package available to US corporates and can even be adopted after the activist builds its stake, as was seen in the 2014 *Allergan vs. Valeant and Pershing Square* battle. There are no poison pills in the UK and this will be attractive to US activists.

7. SHAREHOLDER RIGHTS

Shareholders in the UK have significant rights available to them which are generally unavailable to shareholders in the US. For example, with just a 5 per cent stake, shareholders can compel UK companies to convene a shareholder meeting to debate and vote on any valid resolution proposed by the relevant shareholder(s). These statutory shareholder rights are extremely powerful weapons in the activist's arsenal.

8. SAY ON PAY

The recent introduction of a binding vote on the remuneration policies adopted by UK companies – in addition to the previously existing advisory vote on their remuneration reports – means that activists in the UK now have another lever to pull if they want to apply pressure to boards. Given the highly personal relevance of say on pay shareholder votes to boards of directors, this is an area that has attracted considerable attention in the UK and has already played a role in some UK activist situations.

9. INVESTOR FORUM

The Investor Forum was officially launched in October 2014. The Forum has been created as a result of the review of UK equity markets undertaken by the economist Professor John Kay in 2011/12 at the request of the UK Government. The Forum's stated purpose is to facilitate better engagement between companies and long-term investors. Whilst it is still early days, it is possible that the role to be played by the Forum will make it less likely that the traditional UK institutional shareholders will back activist campaigns – whether publicly or behind the scenes – because of the alternative avenue for engagement that the Forum provides.

10. STEWARDSHIP CODE

Similarly, the Stewardship Code – which was first published in July 2010 – aims to enhance the quality of engagement between asset managers and companies to help improve long-term risk-adjusted returns to shareholders. As such, there is already considerable pressure on the traditional UK institutional shareholders actively to engage with companies.

We advise frequently on issues related to activism and are extensively involved in leading on technical innovation and thought leadership on all aspects of this developing area.

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