Activist Investing in Europe

2024

Mergermarket

Skadden

Contents

Foreword

Evolving activist behaviours raise new challenges for boards

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Head of Skadden's European M&A practice

Activism remains a steady – and, in 2023, increasing – trend in the landscape of European listed companies. Activists seem eager to insist wherever their recipes have proven to be successful and/or made an impact. For example, they tend to favour playing fields to which they are accustomed. In terms of geography, this is reflected by their appetite for "mature markets" such as the UK and, to a lesser extent, France, which is mature on certain aspects, such as environmental, social & governance (ESG) issues. Activists, including new entrants, can also be opportunistic, as demonstrated by the number of public campaigns launched in Germany in 2023.

Activists play to their strengths, but do not hesitate to adapt and evolve when confronted with specific constraints. Their growing appetite, confirmed again in 2023, for ESG matters is another illustration. Although ESG issues have been assimilated at board level, they are and will remain a key focus for activists, but certain parties may change their perception of ESG. Last year, all activists seemed aligned to defend and promote ESG (or at least appear to do so). Now, a line has been drawn between two camps: certain activists defend, in the public eye, ESG matters and request always stiffer undertakings from the companies; meanwhile other activists, perhaps due to the overall economic situation, prefer to slow down or even downplay ESG matters to maximise their return on investment.

Such changes in the behaviour and habits of activists could be due to the number of new entrants. Whether these players are here to stay is yet to be confirmed.

All of this being said, the issuers will have to remain prepared to adapt their responses to such new actors. As always, but even more so when facing unknown activist counterparts, boards of directors should have their set of defences ready, from the collaborative/co-operative dialogue option to more robust/contentious tools, to the extent necessary.

Vigilance is boards' greatest virtue in this era of polycrisis

An extraordinary confluence of risk factors is weighing on corporate boards. Regardless of the macro conditions, underwhelming returns will be a spur to shareholder activism.

This is the fourth successive year in which Skadden, with the assistance of Activistmonitor, has published in-depth research into shareholder activism in Europe. For the fourth successive year, companies as well as activists themselves report heightened levels of activity.

There are good reasons that explain this. Many European companies face significant, indeed unprecedented, disruptions – due to an uncertain macroeconomic landscape, mounting geopolitical tensions, and paradigm-shifting trends such as digital transformation. In addition, the pressure from multiple stakeholders to lower carbon emissions and pursue sustainable growth is soaring.

All of these aspects are the perfect nutrients of a fertile breeding ground for shareholder activism. Arguments over the direction that boards should be taking on key issues are common. Management teams' decision-making is under more scrutiny than ever before. Stock market volatility only adds to the sense of insecurity.

Boards must at all times remain vigilant. Every company wants to maintain good relations with its shareholders, but the need to work closely with investors, sharing views and relevant information transparently, has never been greater. Neglecting shareholder relations leaves the door open for attacks from activists that may ultimately find broad support.

Equally, in a number of cases, a confrontational mindset is best avoided. Many companies in this report say they have been able to work with shareholder activists, often without a campaign becoming hostile or public, to address key concerns. Interactions with activist investors need not escalate and deteriorate into a full-blown conflict – and the danger of such disputes is that they occupy leadership time which would be better spent running the company.

The onus is therefore on boards and management teams to understand the exact nature of the threat, and to mitigate the risk of a public and contentious dispute. This may not always be possible, but observant and prepared companies will clearly be in a much better position to deal with activist shareholders.

Our key findings include:

1. More than half of corporate respondents forecast either a moderate (37%) or significant (23%) increase in shareholder activism over the next 12 months. Two-thirds of activists (67%) expect their organisation to be involved in at least three campaigns in the next 12 months.

2. Almost all survey respondents believe activists in Europe will increasingly use a strategy of visible, public activism – as opposed to "quiet", confidential activism – over the next 12 months. Overall, 98% of respondents agree, including 46% who strongly agree.

98%

3. Respondents believe companies in Europe should mainly be concerned about becoming targets from activists based in continental Europe (98%) and/or in the UK (96%) over the next 12 months.

4. By far the largest share of respondents (42%) expect companies in the technology, media & telecoms (TMT) sector to be targeted the most frequently by activists over the next 12 months. Energy, mining & utilities (EMU, 22% of first-choice ballots), financial services (16%) and consumer & retail industries (12%) are also seen as likely targets.

42%

5. Respondents see activists in Europe as most likely to focus on ESG issues (28%), a significant shift from last year's survey. Respondents also expect activists to demand governance structure changes (26%) and changes to the board or senior management (20%).

6. More than two-thirds of respondents (68%) agree that activists have recently become more prescriptive in their ESG-related demands and that they are less likely to find broader shareholder approval for these demands than they were 12 months ago. Activists are more likely than corporate respondents to agree (80% and 63%, respectively).

68%

7. The single most effective step for companies seeking to mitigate the chances of activist campaigns is to maintain transparent disclosure practices with shareholders and investors (cited by 26%). Where a campaign goes public, the most effective defensive tactic that companies can employ is regarded as communication with the activist (38%).

Methodology

In Q4 2023, Activistmonitor surveyed 35 corporate executives from listed companies and 15 activist investors from the UK, France, Germany, Italy and Switzerland to gain insights into key trends in Europe's activist investing space. All responses are anonymous, and results are presented in aggregate.

Part 1: 2023 Review Hardships on the home front

Companies are being proactive in resolving issues that activists could exploit. And yet, first-time activists are increasingly coming forward. For boards, a new challenge is always just around the corner.

The number of public shareholder activist campaigns in Europe soared in 2023, with activists launching 89 new public campaigns against companies in the region, 68% higher than the equivalent figure for 2022. All told, the number of open, live campaigns in Europe reached 380 as of Q4 2023, up by more than 30% from end-2022, according to Activistmonitor data.

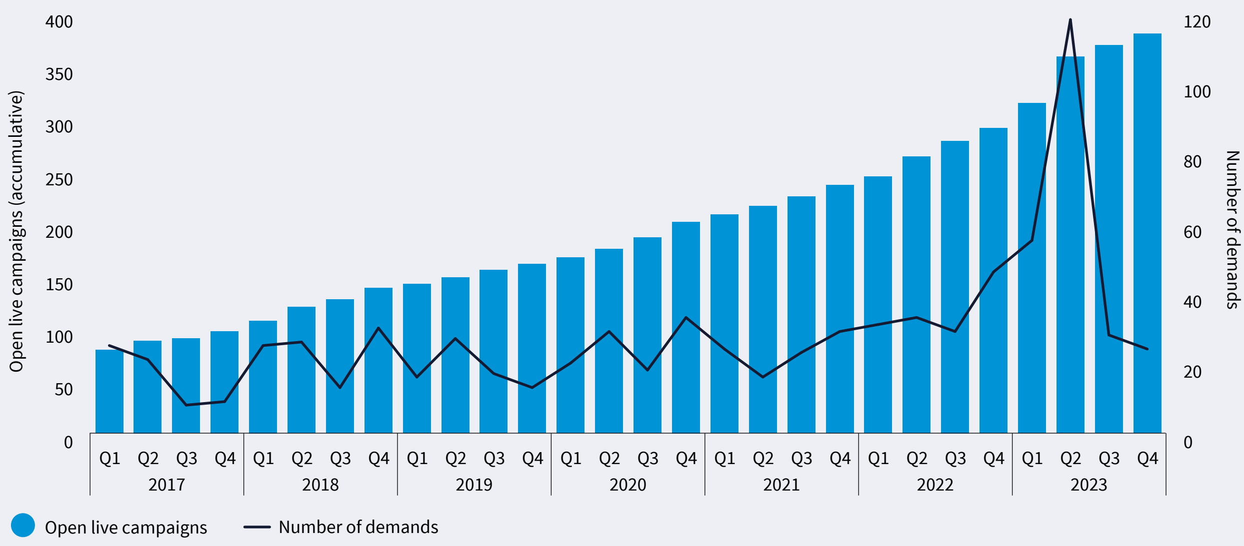
Of the 89 public campaigns launched in 2023, companies in the UK were targeted in 30 of them, up marginally from the equivalent figure in 2022 (27). However, more remarkable, and more emblematic of the upturn in public campaigns in Europe, is the number of occasions on which German companies were targeted in 2023 – 26, almost a threefold increase from the nine reported in last year's edition of this report, and just two in the 2021-22 edition.

Activists exerted the most pressure on larger companies – those with a market capitalisation over US$2bn were targeted in 53 new campaigns in 2023, almost twice as often as in 2022 (27). The number of campaigns

Total campaigns by market capitalisation (live & potential)

Market cap	2022	2023	Growth
<US$1bn	20	32	60%
US$1bn-US$2bn	6	4	-33%
>US$2bn	27	53	96%
Total	**53**	**89**	**68%**

Live campaigns in Europe



against companies with a market cap between US$1bn-US$2bn declined marginally year on year, from six to four, while smaller companies (with market cap under US$1bn) were targeted in 32 campaigns, up 60% from the year before (20).

The rise in the number of new public campaigns naturally triggered a corresponding increase in the number of demands issued, up by 62% year on year from 139 in 2022. Per Activistmonitor's metrics, the single most common type of demand in 2023 was for structural governance changes, with 47 such demands issued, a more than threefold increase from 2022 (14).

The next most common demand was for changes to the composition of the board/management, with 38, up by 27% from 2022's 30, when it was the most popular type of demand overall. Relatedly, there were 21 demands in 2023 for board member appointments, up 50% from 2022's 14. Taken together, these 59 board-related demands illustrate that control over management remains activists' priority. Finally, demands for cost reductions/operational improvements, also made up a large share of all demands, with 33 over the course of 2023 (a 94% increase year on year).

Concerning the identity of key players in 2023, the single most prolific shareholder activist was Union Investment, the investment arm of German financial services group DZ Bank. Union Investment took seven campaigns public, all against German companies. The next busiest activists also hailed from Germany, those being shareholder association DSW and investment adviser Deka Investment, with each taking four campaigns public, also all against German companies.

Overall, German activists took 20 campaigns public in Europe in 2023, outgunned only by their peers in the US (23) and the UK (25). Even just a couple of years ago this would have seemed improbable, but shareholder activism seems undeniably to have become a fixture of German corporate life over the last 12 months.

Demands made in open live campaigns

	2021	2022	2023	Y-o-Y 2023
Discussions		3	2	-33%
Special meeting			2	NA
Cost reductions/operational improvements	5	17	33	94%
Share buy-back/dividend/return of capital	6	8	12	50%
Acquisition/merger agreement	3	5	2	-60%
Oppose acquisition/merger agreement	6	20	13	-35%
Bolt-on/divestiture/spin-off	12	14	18	29%
Oppose bolt-on/divestiture/spin-off	3		7	NA
Strategic alternatives	6	11	14	27%
Capital allocation/structure changes	3	3	9	200%
Governance changes	15	14	47	236%
Management/board changes	16	30	38	27%
Board member(s) appointment	16	14	21	50%
Environmental/social changes	1		7	NA
Total	**92**	**139**	**225**	**62%**

German corporates are suffering from supply-chain issues, as well as decoupling and derisking. These and other factors have brought to light needs for reorganisation, spin-offs, M&A and other corporate transactions. Activists are seeing these needs and have increasingly used them for their campaigns.

Matthias Horbach and Holger Hofmeister, Partners in Skadden's Frankfurt office

New activists enter the fray
Among the corporate respondents surveyed for this study, two-thirds (66%) were approached by activists on one or two occasions over the last 12 months, with a further 8% reporting three or four approaches. Around a quarter (26%) say they had no contact at all from activists. Considering the broad year-on-year uptick in public campaigns detailed earlier in this chapter, it seems as though that subset of respondents should count themselves lucky.

In last year's report we noted a marked rise in international shareholder activism. Businesses and boards increasingly found themselves targeted by activists based in other jurisdictions around the world – but this trend appears to have eased.

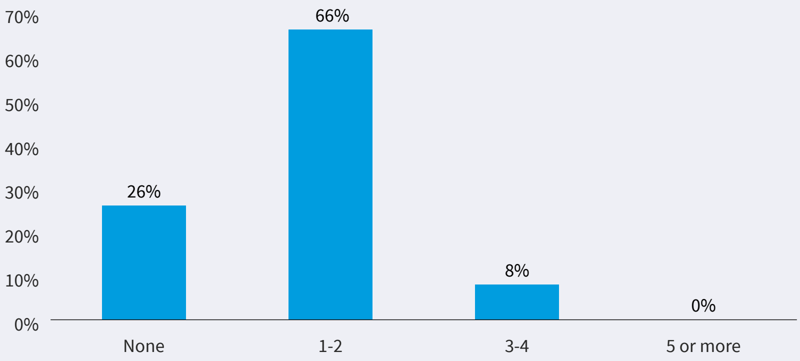
In this year's survey almost three-quarters of corporate respondents (71%) approached by activist investors say the activist was based locally. No corporate respondents say they were approached only or mainly by non-local activists over the last 12 months, whereas in last year's study almost a third of respondents (31%) had experienced this.

Figures from Activistmonitor confirm this. Of the 89 new public campaigns launched against European companies in 2023, 68.5% were led by an activist from within the region, indeed more often than not from within the same country the company calls home.

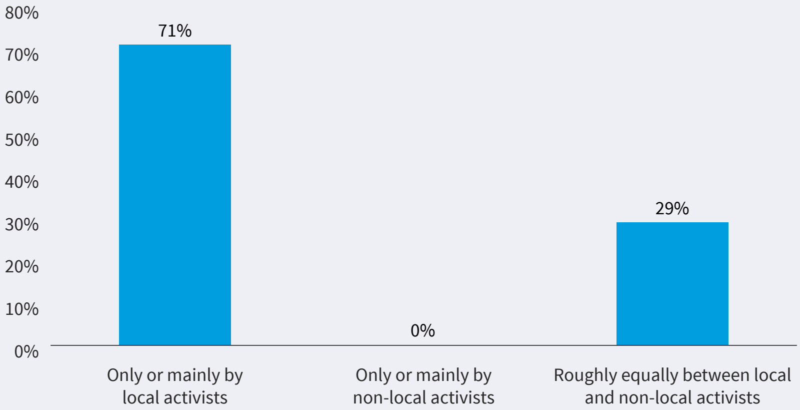
Nevertheless, boards continue to receive approaches from a range of different types of activists, and new players are entering the fray. Indeed, 60% of corporates say they have seen first-time activists become much more active over the past 12 months, and a further 37% say first-timers have been somewhat more active. Hedge funds and private equity (PE) investors have likewise been on the move, with 66% and 46% of corporates describing these two groups, respectively, as much or somewhat more active.

Corporate respondents also say institutional investors account for a growing number of activist interventions, with 77% reporting more contact from this group of

Over the last 12 months, how often has your board or top management been approached (privately or publicly) by activists? (Select one)



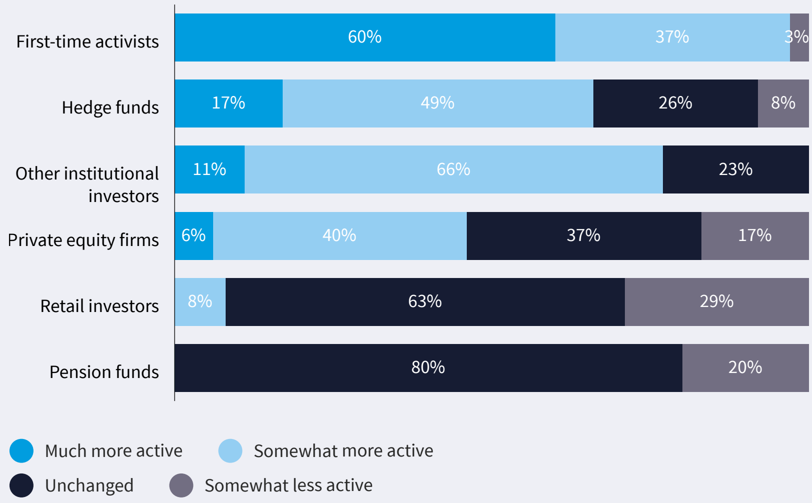
Over the last 12 months, have you been approached mainly by local or non-local activists? (Select one)



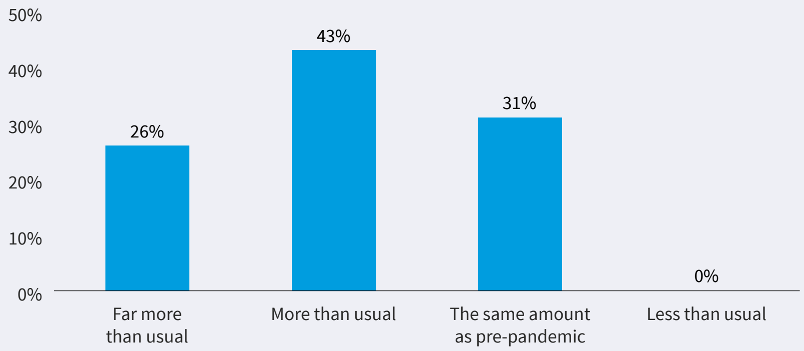
> Given the significant gap that persists between public and private market valuations – and the resulting temptation for activists to pressure corporates to divest non-core assets to realise short-term value – it is unsurprising that more financial sponsors are looking at this space.

Katja Butler, Partner in Skadden's London office

Over the last 12 months, how much more or less active/vocal have the following types of activists been compared to the preceding 12 months? (Select one option for each activist type in the chart below)



Over the last 12 months, how often has your board proactively discussed the threat of activist campaigns? (Select one)



shareholders. However, this cohort excludes pension funds, from which many corporates report more modest or largely unchanged levels of activity during 2023. Similarly, retail investors appear no more inclined than usual to involve themselves directly in activist campaigns.

Recognising one's weaknesses

While this study suggests the number of threats from activist investors that converted into formal approaches fell slightly during 2023, boards remain – and should remain – on high alert. This makes sense, as each of the past two years has seen very significant levels of activism across Europe.

More than two-thirds of corporates (69%) say their board has discussed the possibility of being targeted by an activist campaign more often than usual over the last 12 months, including 26% who say these discussions had taken place far more frequently than in the past.

These figures mark a continuing shift up the boardroom agenda for shareholder activism; in last year's report, 63% of corporates said this issue has been under consideration more frequently, and 6% said they had discussed the threat less than usual, whereas not one respondent reports the same this year.

One explanation for this increasing level of debate is that many companies are conscious of potential weaknesses that activist investors may target. And the number and range of these weaknesses continues to increase – 66% of corporates say they identified new areas of concern over the past 12 months that they have felt compelled to discuss with shareholders. A further 3% are conscious of potential weaknesses about which they haven't yet held talks with shareholders.

Inevitably, during a period of high inflation, weak growth and heightened geopolitical tension, many of those issues are related to the external environment. "There have been financial pressures in the past year, and we've had to take some important strategic decisions," reflects a board member at a French company. "We explored financial restructuring prospects due to the changes in our financial position. To avoid activist-related problems, we decided to be very transparent about our decision-making and the reasons that led to this restructuring."

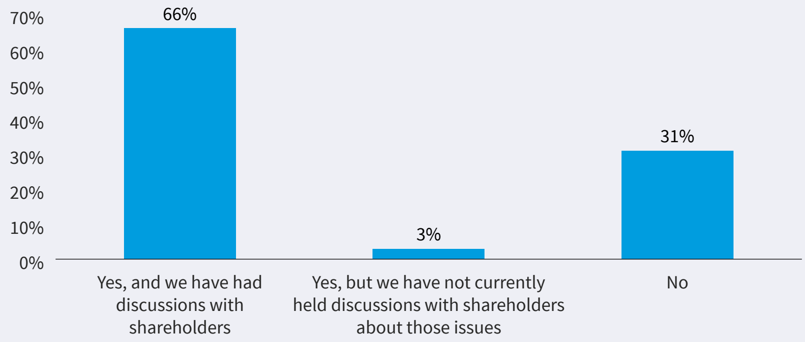
The growing debate over ESG issues is also giving some boards pause for thought. "We are still struggling with the process of making our organisation more sustainable," concedes a board member of an Italian corporate of its decision to engage with shareholders. "Rather than let any rumour about our capabilities affect activist perception, we wanted to come forward with our strategy to drive more sustainability within our processes."

Similarly, many companies continue to focus on how to defend themselves against activist threats. Notably, 40% of corporates say they have already adopted poison-pill-type mechanisms to provide protection, up from only 3% that had taken this step a year ago. A further 20% are planning to make this move in the near future.

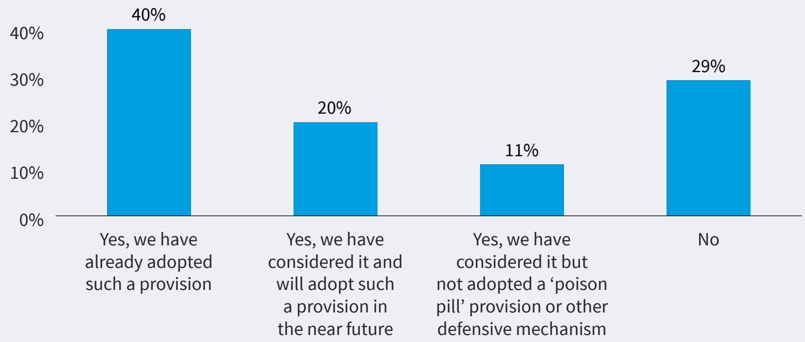
Poison-pill tactics can vary greatly. Boards may simply ask shareholders to approve rules that prevent any single activist from amassing sufficient numbers of shares to pose a credible threat to the company. In more extreme situations, they may even seek to suspend trading in their shares while investors debate proposals such as the launch of a shareholder rights plan that might subsequently rebuff an activist.

Such strategies always come with pros and cons. A board member at a French corporate recalls: "The decision to suspend the listing of financial holdings was not our first choice, but it was important to protect the interests of the company and give us more time to become financially stable." As the managing director of a corporate in the UK says: "We adopted a poison-pill provision to mitigate against immediate risks – there was less support from shareholders during this period, and we had to take some additional steps to preserve our reputation and drive better financial outcomes.

Over the last 12 months, have you identified any new weaknesses that could be raised by activists in potential campaigns? (Select one)



Over the last 12 months, has your board considered adopting a 'poison pill'-type provision or other defence mechanisms? (Select one)



While lawmakers are pretty busy with a lot of topics, new laws that are targeted at governing activist campaigns are not, and likely will not be at least short term, atop their priority lists. Nonetheless, given the publicity and steady increase of campaigning activity, lawmakers and policy makers should be expected to monitor the developments and take note of potential areas of action – they will likely not hesitate to act should dysfunctions become apparent.

Bruce Embley, Partner in Skadden's London office

Part 2: 2024 Outlook Public activism prevails in stricken Europe

Respondents agree that campaigns will increasingly be fought in the public eye. Some activists may overplay their hand, especially on ESG, but the pressure on boards remains remarkably high.

As Europe encounters pressing economic challenges and geopolitical tensions, the stage is set for continuing shareholder activism. The increased focus on ESG issues, and the battle against climate change in particular, will only strengthen this trend.

Those taking part in this study certainly share this view. Both corporate respondents and activist investors themselves expect a very busy year of disruptive campaigns.

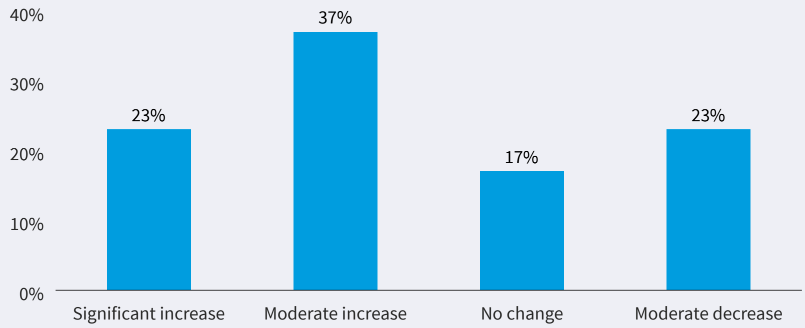
1 The activist agenda

More than half the corporates in this study expect shareholder activism in Europe to increase in frequency over the next 12 months, either by a significant amount (23%) or more moderately (37%).

While those numbers are down a little from last year's study, when 71% of respondents predicted an increase in activism, they nonetheless show that boards will remain alert for the coming year and be prepared for challenging conversations with investors.

Similarly, 57% of corporates expect the volume of unsolicited or hostile takeover bids to increase over the next 12 months, including 11% who expect a significant rise in the number of such bids. Again, this suggests still-heightened levels of activity ahead, even if the figures are lower than in last year's report, when around two-thirds of corporates expected to see more hostile deals.

What type of evolution in activity are you anticipating in shareholder activism over the next 12 months? (Select one)



"The continuing market headwinds and unpredictable macro environment are likely to increase pressure on corporates experiencing periods of underperformance or a challenge to the execution of their business strategy. Activists will continue to be on the hunt for these opportunities in Europe in 2024."

Simon Toms, Partner in Skadden's London office

The expectations of corporates are broadly in line with those of activist investors. More than half of the latter (60%) expect to be involved in three or four campaigns over the coming year, with a further 7% anticipating they will pursue at least five companies.

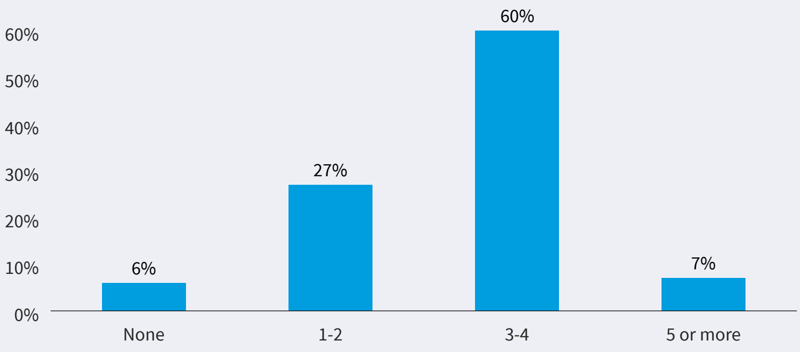
That said, a small minority of activists seem set to hold fire, with 7% saying they will not get involved in any campaigns at all over the next year. In last year's report, not one activist investor felt this was likely.

Two countries in particular stand out as likely hotspots for shareholder activism in 2024: 40% of activist respondents single out the UK as offering the best opportunities for campaigns, while 27% cite France. These two countries, which also topped predictions last year, are significantly ahead of any others, though Italy and Switzerland both received 13% of votes.

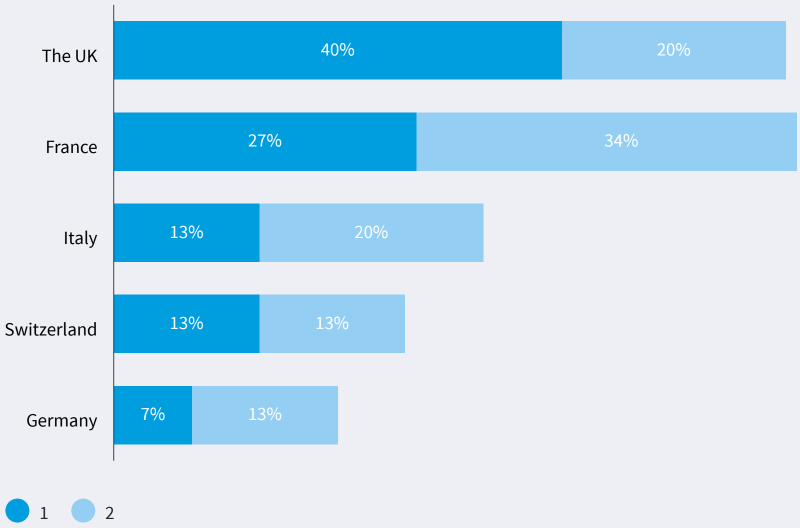
Why those countries? The president of a Swiss activist investor says shareholders in the UK tend to be more engaged. "When the support is better, we can lead or be involved in successful campaigns," the executive adds. Meanwhile, the portfolio manager at a UK activist investor argues that heightened levels of ESG awareness in the country are also supportive of activist campaigns. "We can reason with management to make effective changes," the manager says. "We want people to take more accountability for decisions."

In France, meanwhile, the president of an activist investor based in the country says the wide range of opportunities explains why activists are looking at French businesses. "There are companies with good potential that have underperformed because of the lack of preparation by management teams," according to the investor. "These campaigns can drive better value over time."

How many activist campaigns do you expect your organisation to be involved in over the next 12 months? (Select one)



Which European markets do you expect to offer the best opportunities for activist campaigns over the next 12 months? (Select top two and rank 1-2, Activist investor only)



Displays of confidence

As for where the threat of campaigns will come from, corporates would be wise to look close to home, this study suggests. Almost all respondents say that boards should be concerned by the prospect of activists from the UK or mainland Europe targeting their companies. At least half of respondents think boards should be very concerned about the prospect of campaigns from investors in these markets.

"UK investors are capable of organising public campaigns," says the CEO of one French corporate. "We've noticed recent developments in activity in the UK, with investors becoming quite threatening. They are demanding changes to the core operations, and to sale and purchase decisions."

The CEO of a Swiss corporate adds that activists in the region are already making their presence felt. "Activists from mainland Europe have started influencing board decisions. There is greater interference from activists in the region, mainly from Germany and France," the executive says. "Activists here are targeting small and medium-sized companies for more results. There is definitely greater confidence being displayed."

Still, activists from further afield are expected to flex their muscles, too, over the year ahead. Notably, almost a fifth of respondents (18%) warn corporates to be very concerned about being targeted by North American activists, with a further 50% feeling somewhat anxious about the threat from these investors. And more than a third (36%) of respondents point to the likelihood of campaigns from investors based in the Asia-Pacific region.

Respondents also expect most activist activity to be confined to a handful of industry sectors. Significantly, 42% see technology, media & telecoms (TMT) companies as most likely to attract activist attention. The sector has come under increasing scrutiny, with stock market valuations of many technology companies falling back over the past 18-24 months.

The energy, mining & utilities (EMU) sector is also seen as a likely potential target, along with financial services and consumer & retail. Industrial & chemicals is the only other sector where more than 10% of respondents regard activist campaigns as particularly likely.

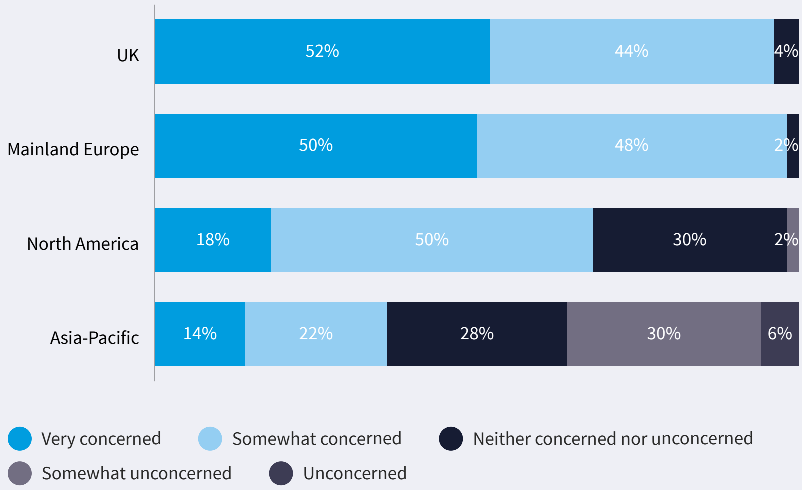
One other trend to look out for over the year ahead is the growth of more visible activism. In the past, activist investors have often sought to exert their influence behind the scenes, working quietly with boards to drive change, rather than looking for wider attention and support.

However, almost all respondents – both corporates and activist investors – think activists in Europe are adopting a more public strategy, often with campaigns in the media, to secure their goals. Almost half of respondents (46%) strongly agree with this view, up from 24% who felt this way in last year's study.

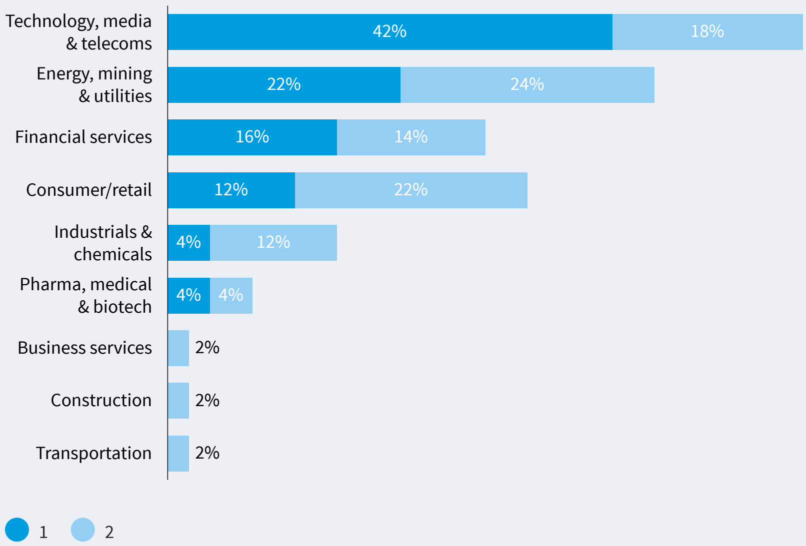
"There has been a change in the way activists operate," says an independent director of a French corporate. "They have an agenda and want everyone to know what performance or actions they expect from investee companies. Most campaigns are now taking place in public."

In Italy, the partner of one activist investor says this is very deliberate. "When an activist proposes big changes at the

To what extent should companies in Europe be concerned about becoming targets from activists based in the following regions over the next 12 months? (Select one option for each region)



In Europe, in which industries do you expect to see the most activist campaigns over the next 12 months? (Select top two and rank 1-2)



> Public campaigns force companies to engage with activists as well as non-activist investors. This can be a significant source of pressure and commitment in terms of timing, communication and investment.

Pascal Bine, Partner in Skadden's Paris office

company, a public strategy can help get the required votes and attention of current shareholders," they explain. "Moreover, we can get responses to our demands quickly using this approach."

2 Demands and the veil of ESG

Environmental changes/ESG loom ever larger in activist demands. More than a quarter of respondents (28%) rank such issues in first place when asked which concerns are likely to be at the centre of campaigns over the year ahead; a further 22% rank environmental changes/ESG in second place, again the largest such share.

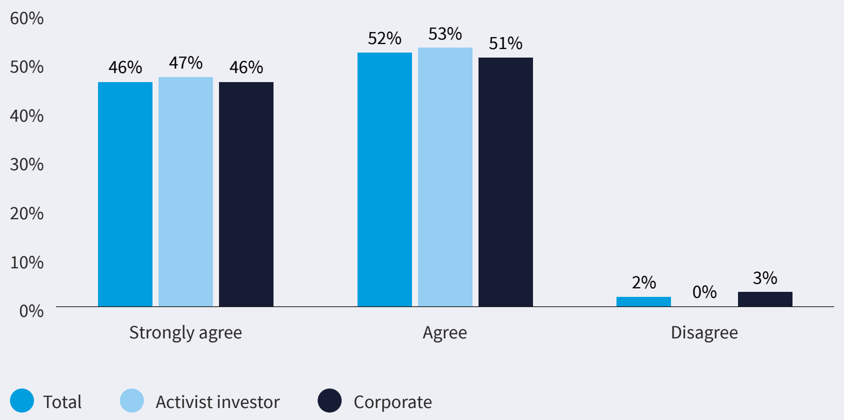
That represents a significant advance on last year when environmental issues accrued only 14% of first-place votes. "Activists will prioritise these issues because of the rapid climate change and their net-zero priorities," says the CEO of a corporate in Switzerland. "Companies haven't been able to set aside funds for climate initiatives as planned because external disruption has taken most of their time, but that may not be accepted by activist investors."

Part of the story, suggests a Swiss activist investor, is concern about some of the overblown claims that companies may be making on their sustainability performance. "Since the issue of greenwashing has emerged, activists have to review standards more closely," the investor's managing partner argues.

Still, other issues remain important to activists as well. Concern about governance issues – the most pressing matter in last year's survey – remains heightened. More than a quarter of respondents (26%) rank these first when predicting the most prevalent types of demands over the coming 12 months.

"The main demand reflects the need for more transparency in the governance structure," says a board member at a French corporate. "Activists want to know exactly how capital is being employed and whether there is enough capital to support growth."

To what extent do you agree with the following statement: 'Over the next 12 months, activists in Europe will increasingly employ a strategy of visible, public activism (i.e. public letters, media & campaigns), as opposed to one of private, 'quiet', confidential activism'? (Select one)



> In the past, activists would usually demand that the CEO and chair go. Today, the more common demand is for the appointment of a 'challenger' non-executive director offering alternative perspective. Companies facing attempts to remove their lead executives would naturally fight back, whereas adding a fresh voice to the board may be something to be welcomed.
>
> **George Knighton, Partner in Skadden's London office**

There is also a widespread expectation that activists will seek change at the top of businesses, a long-favoured approach. More than a third of respondents (38%) select management or board changes as one of the top-two demands that activists will make this year.

"Activists do question the decision to hold on to the same board members, and they will drive companies to think about diversity, equity and inclusion clauses," says the managing director of a corporate in the UK. "There are many companies who have not found the right balance yet."

More broadly, these areas of emphasis also reflect growing investor interest across the board with regard to ESG issues. Asset managers globally are expected to increase their ESG-related assets under management to

US$33.9tn by 2026, up from US$18.4tn in 2021 according to a study from PwC published in 2022.

In this context, 96% of respondents to this survey agree with the suggestion that activists will increasingly prioritise ESG issues in their campaigns. Overall, that includes 28% of respondents who strongly agree with this idea, with that figure rising to 53% among activist investors themselves.

"Activist investors are determined to bring ESG issues to light," says the head of business development at a German activist investor. "There are an extensive range of issues that need to be discussed with company management, including data security, board composition and diversity. All these concerns have to be discussed, because failing to do so might lead to complacent ESG standards."

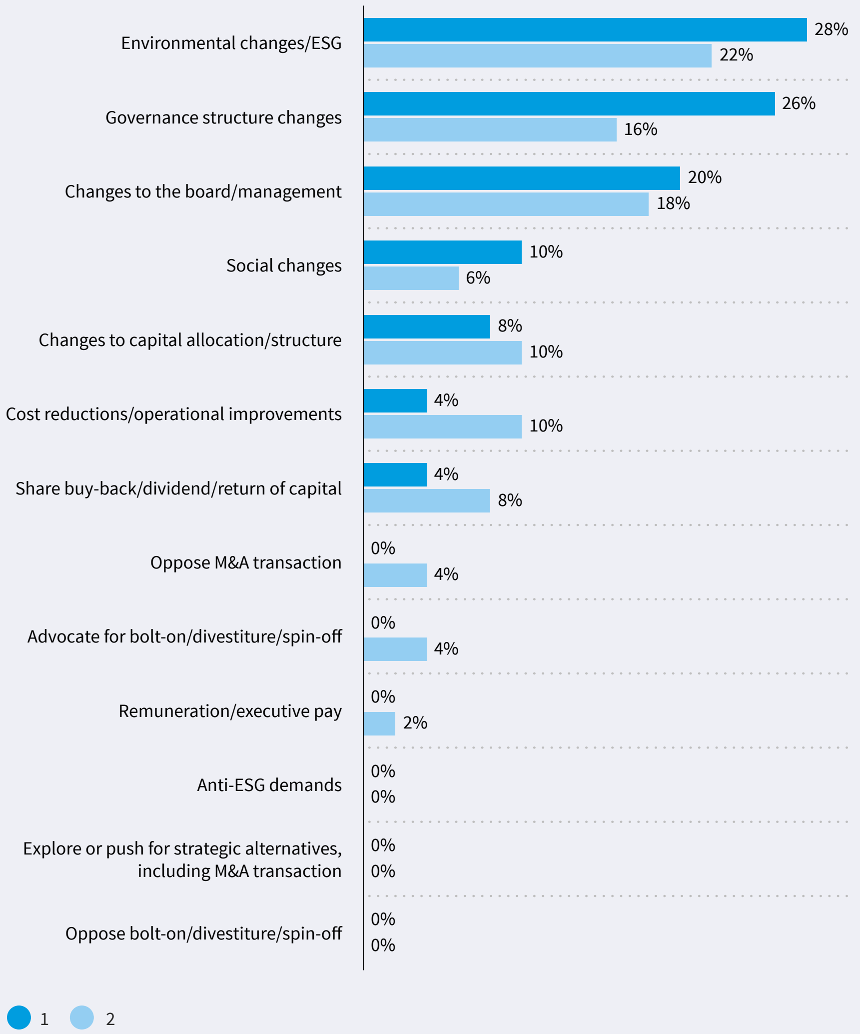
"Many organisations have not prioritised ESG, due to other pressing concerns," adds the CEO of a UK corporate. "Extreme action will be taken by investors if the ESG framework is not strong."

Overplaying ESG
However, there is some evidence that the ESG ambitions of activist investors are starting to run ahead of the views of other shareholders – building momentum behind some ESG-centric campaigns may prove to be difficult. Corporates may take some solace from that.

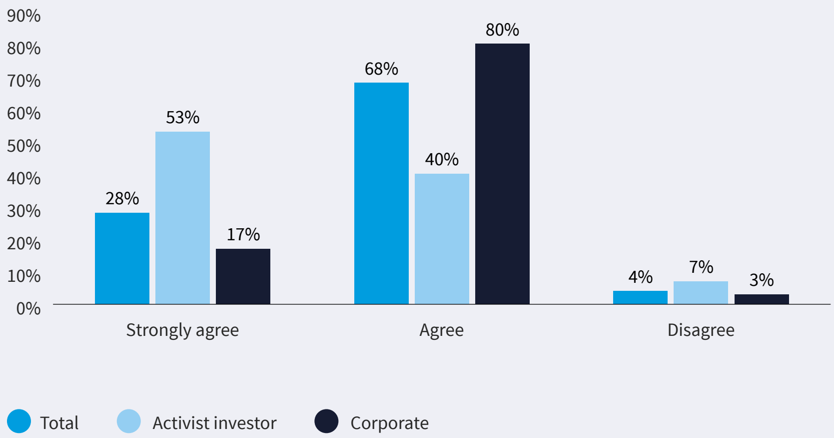
More than two-thirds of respondents overall (68%) agree with the suggestion that, over the past 12 months, activist investors have become more prescriptive about their ESG concerns and that they are thus less likely to win broad shareholder support for their demands. Activists recognise this, too – 80% agree with this suggestion, including 20% who strongly agree.

"Activists have to think about the perceptions of all shareholders before setting forth their demands," warns the managing director of an activist investor in France. "With more prescriptive demands, there is a danger other shareholders may feel a bit ignored, or they may already feel the company is performing strongly on ESG practices."

Of the various categories of activist demands, which of the following do you believe will be the most prevalent in Europe over the next 12 months? (Select top two and rank 1-2)



To what extent do you agree with the following statement: 'Activists will increasingly prioritise environmental, social and governance (ESG) issues in their campaign demands'? (Select one)



> In 2023, reflecting geopolitical issues and the war in Europe, shares in companies active in ESG industries fared relatively poorly. While ESG funds and activists stuck to their investing principles, the general shareholder base became less involved.

Matthias Horbach, Partner in Skadden's Frankfurt office

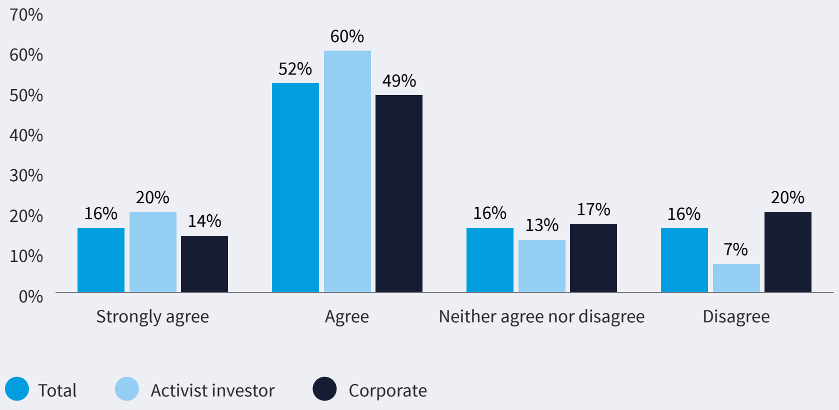
The reality is that many shareholders currently have other concerns, argues the CEO of a German corporate. "Given the situation in Europe and the companies affected in the wake of the geopolitical tensions, shareholders are more concerned about the business's bottom line," the executive says. "They understand that financial stability issues take precedence over other factors, as long as the company complies with the relevant regulation."

Activists appreciate this, too, of course. They are also focused on financial stability and performance. Indeed, when it comes to campaigns for leadership changes at the top of companies, it is notable that these are most likely to follow a period of disappointing performance. Almost a third of respondents (32%) cite underwhelming shareholder return as the issue most likely to motivate activists' demands for changes at board level, and a further 12% pick it out as the second most likely driver of such demands.

Other drivers vary. Again in the ESG domain, a lack of diversity is also regarded as a common reason to demand change. Governance is part of the story too, with respondents pointing to board tenure as a key issue – where directors are perceived as having served for too long, they are vulnerable to activist campaigns.

It is also worth pointing out that investors are interested in proper representation and accountability. Some 40% of respondents say a lack of representation of minority shareholders or a failure to appoint independent directors is one of the two issues most likely to prompt an activist campaign.

To what extent do you agree with the following statement: 'Activists have recently become more prescriptive in their ESG-related demands and are less likely to find broader shareholder approval for these demands than they were 12 months ago'? (Select one)

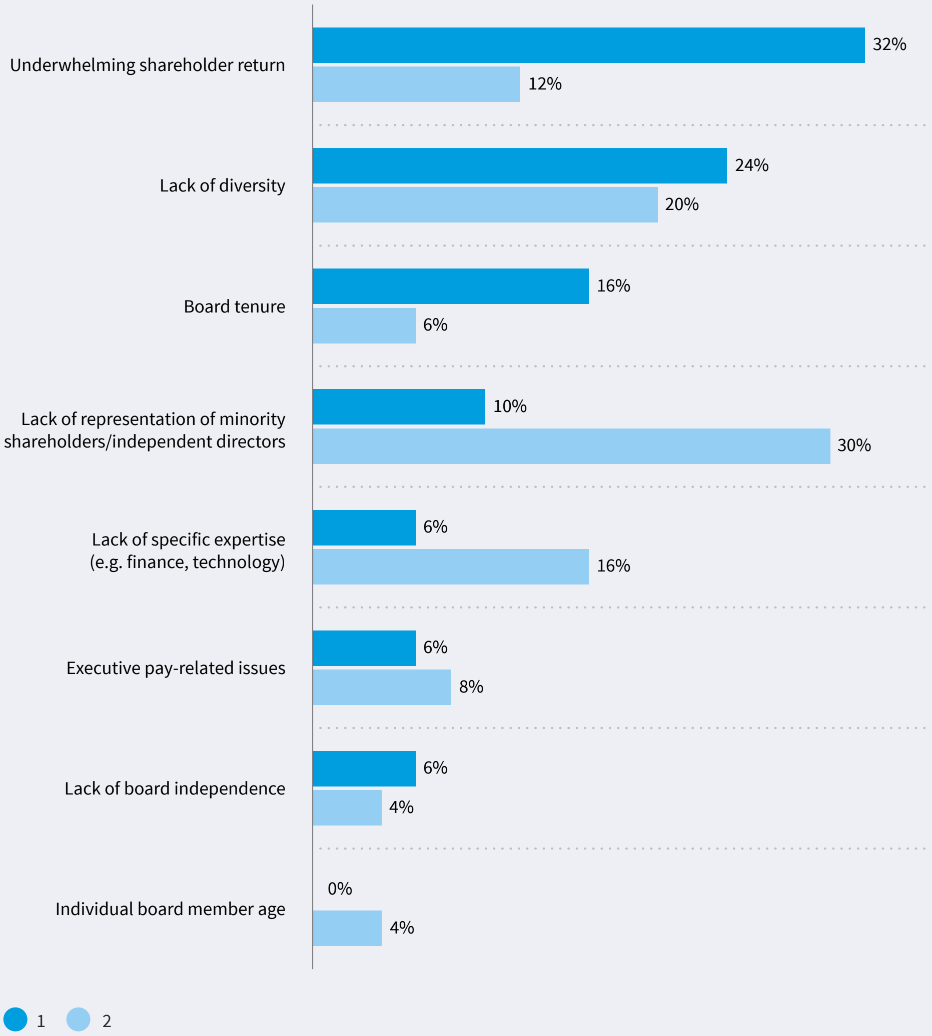


Nevertheless, respondents expect activists to continue to closely scrutinise shareholder returns. Almost half overall (48%) anticipate that a particular activist focus for the year ahead will be share buy-back or dividend issues. After a period of lacklustre stock market performance in much of Europe, investors are expected to demand stronger returns, even if they have to come through buy-backs or dividend payments.

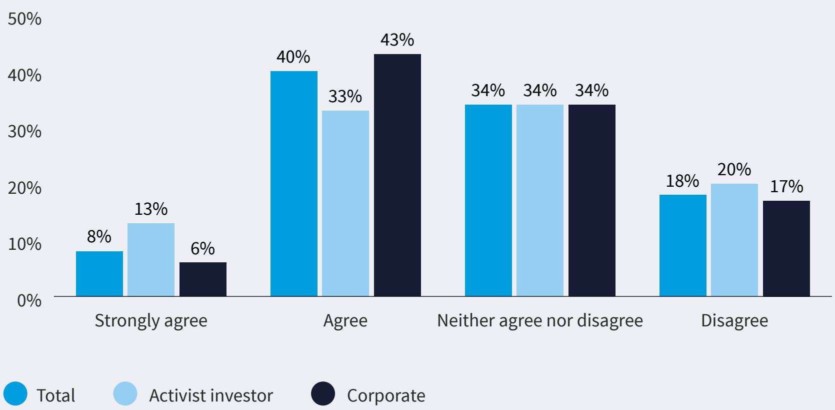
"The performance of many companies in the region has declined due to economic and geopolitical struggles," says the partner of an activist investor in Switzerland. "In this situation, the dividend does not remain stable, and funds are locked in for investors. Buy-backs can free up funds for better opportunities and will impact the share price positively as well."

Some activists may be eyeing a way out of underperforming investments, adds a partner in an activist investor in France. "If the company is not financially stable, it would be better to push for a buy-back, rather than wait for the performance and dividend to pick up," the partner says. "This would be a good strategy for investors to exit from investments."

What are activists' main motivations when demanding changes to the board/management of a company? (Select top two and rank 1-2)



To what extent do you agree with the following statement: 'Activists will particularly focus on share buy-back or dividend issues over the next 12 months'? (Select one)



3 Lines of defence

Many boards are implementing both preventative tactics to reduce the chances of a campaign arising in the first instance and defensive measures they can use if and when a campaign does go public.

Certainly, preventative tactics provide a defensive bulwark, with many organisations stressing the importance of building strong relationships with shareholders over time, rather than seeking to engage only in the event of a threat. Activists may still have concerns or issues to press, but they may then be prepared to do so less forcefully and publicly.

Above all, more than two-thirds of respondents (68%) point to the need for businesses to maintain transparent disclosure practices. This can be an effective tactic against activism, with 26% of respondents picking it as the most important measure boards can adopt. Other tactics deemed to be especially useful include efforts to promote regular engagement with shareholders, pre-emptive board changes and regular scrutiny of governance arrangements. Third-party advice can also be valuable – consultants can provide feedback on shareholder sentiment, for example, and offer support in other areas too.

“Maintaining transparent disclosure practices increases trust in the company overall,” argues the director of one French corporate. “Activist investors will find the necessary information in these disclosures, and they will not be aggressive in pursuing changes within the organisation; they are more likely to make suggestions in a confidential manner.”

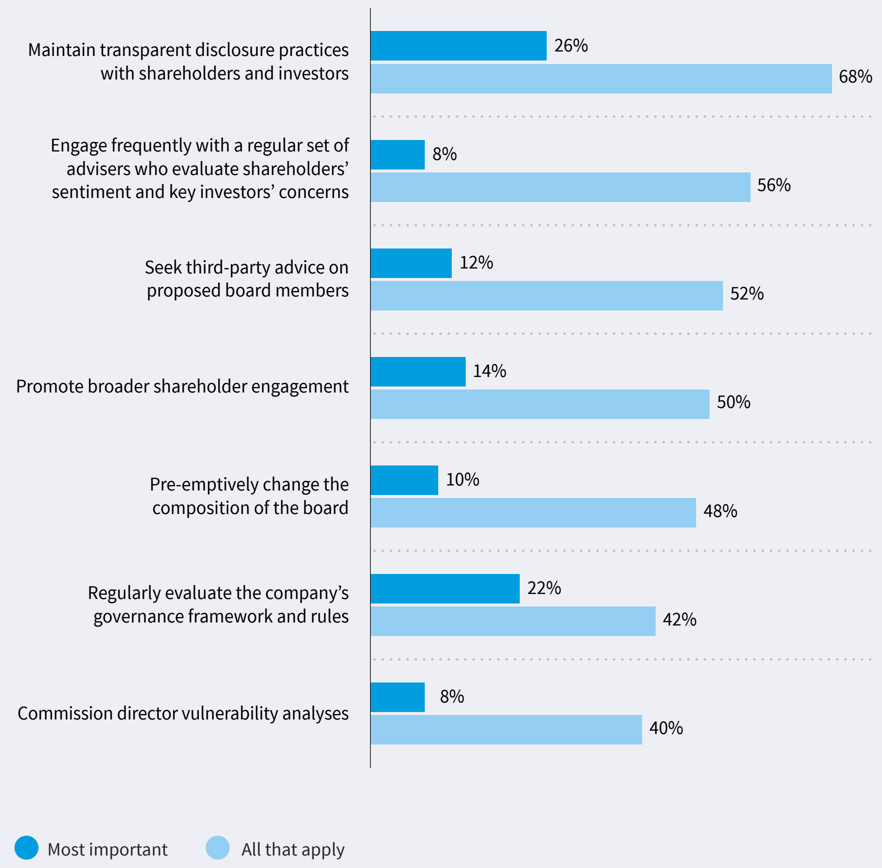
Also in France, the partner in an activist investor adds: “By evaluating its governance frameworks, the company can identify problem areas and make policy changes as needed, rather than letting these problems build up until an activist points out the issues.”

Where activist campaigns do escalate and go public, boards may feel they need to adopt a different range of tactics. For example, more than three-quarters of respondents (82%) identify direct communication with the activist as potentially effective, and more than a third (38%) cite it as the single most important step that a company facing a campaign can take.

“Communication with the activist is becoming more popular,” according to the CEO of a German corporate. “This may have positive outcomes, if the discussions are handled by experts and the company is adequately prepared.” A board member of a French corporate agrees: “This can be an effective way to reduce friction – the activist will know that decision-makers are open to suggestions and that their demands will be acknowledged.”

Indeed, boards will want to put a broad communications strategy at the heart of their defence. Almost a quarter of respondents (24%) say it is imperative to engage positively with

In your view, what are the most effective preventative measures that companies can use to mitigate the chances of activist campaigns? (Select all that apply and the most important)



> In almost all cases there is a benefit to engaging with activists. It shows the company is willing to talk with its investors, and some of the ideas may be worthwhile. The company will learn something from the dialogue.

George Knighton, Partner in Skadden’s London office

the entire investor base, while 18% say communication with the market can be an effective tactic. Getting the company's story out there can galvanise support.

"Sharing views openly is an expectation from shareholders," says the CEO of a French corporate. "They want to know whether their funds are being put to ideal use. Providing them with information upfront is essential. They trust the company and will not support public activist campaigns."

More aggressive responses, by contrast, attract less support from respondents. For example, while 42% say some form of litigation targeting the activist might be appropriate, just 8% regard this as likely to be the most effective defensive tactic.

Changing the company's bylaws is regarded as even less useful. "It's less practical," warns a board member at an Italian corporate. "Activists' demands may evolve over time and changes will not be future-proof." Similarly, few respondents on either side of the aisle advocate for M&A (either acquisitions or divestments) as a defensive strategy. "These might be detrimental to the company's long-term plans," remarks the COO of an activist investor in France.

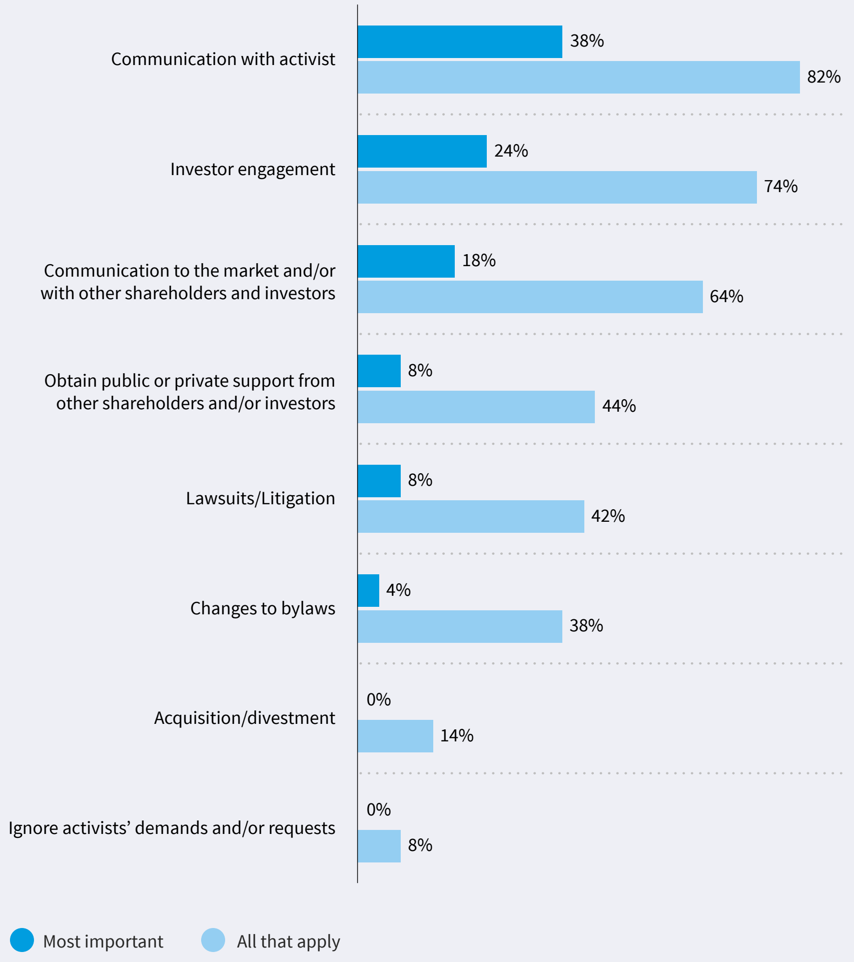
However, doing nothing is not an option. Just 8% of respondents to this study suggest boards facing an investor-led campaign should even consider simply ignoring the demands of activists.

"It's always better to acknowledge the activists' demands," says the CEO of a German corporate. "Ignoring the issue is unwise and companies have started improving their relationship with investors. It is a better idea to hear the activists' demands out – sometimes, simple steps or suggestions offered by them can be useful."

To win friends and influence people

Nevertheless, there is no easy answer. One view in recent times has been that if boards build very close relationships with their largest institutional shareholders, they may be able to ensure activists have little room for manoeuvre. Boards reason

What are the most effective defensive tactics that companies use when faced with a public activist campaign? (Select all that apply and the most important)



that if they can count on the support of their largest investors, activists with small stakes will not have the leverage they require to push their agendas.

However, respondents to this study largely reject this strategy. Just 28% agree or strongly agree that increased engagement with large institutional investors will diminish the role of activist investors. Among activists specifically, only 13% agree.

The reality, respondents point out, is that large institutional shareholders will often have many of the same concerns as the activists. "Major shareholders are often affected negatively if companies do not pursue growth and strategic opportunities on time," points out the president of an activist investor in Switzerland.

"Even if companies are forthcoming about opportunities and risks, this will not change the outcomes. We have to push for better outcomes by providing useful suggestions and demanding changes."

The CEO of a Swiss corporate, meanwhile, points out that activists are unlikely to be daunted. "There are activist investors who want to continue challenging the decisions and approach of the company. They are not content with the board's short-term or the long-term plans," the executive says. "They will continue to make demands even if investor engagement is increased."

Indeed, more than half of respondents (54%) believe that institutional investors will be at least somewhat accepting of activist investors over the next 12 months. And with 78% retail investors expected to be accepting or neutral, boards cannot expect their shareholder bases to come riding to their rescue in the event of an activist threat.

This is not to suggest respondents are relishing the prospect of engaging with the activists. Some 90% of respondents expects boards of directors to be intolerant of activist campaigns, including 30% who say they will be very intolerant. That suggests potential for confrontation, even if management teams are prepared to be more accommodating.

4 Codes of conduct

Inevitably, given their often-charged relationship, both sides in these arguments feel they are at a disadvantage – the vast majority of corporates (80%) think the activists hold all the cards, while many activist investors (47%) think the balance of power is skewed in favour of corporates, though that does leave 53% who feel the balance is broadly equal.

Both camps have some reasonable arguments. For example, corporates feel that disruption and economic headwinds have strengthened activists' hands. "Companies weren't ideally managed during the pandemic because management teams were not accustomed to such sudden disruptions. This gave activists the opportunity to criticise," reflects a board member of an Italian corporate.

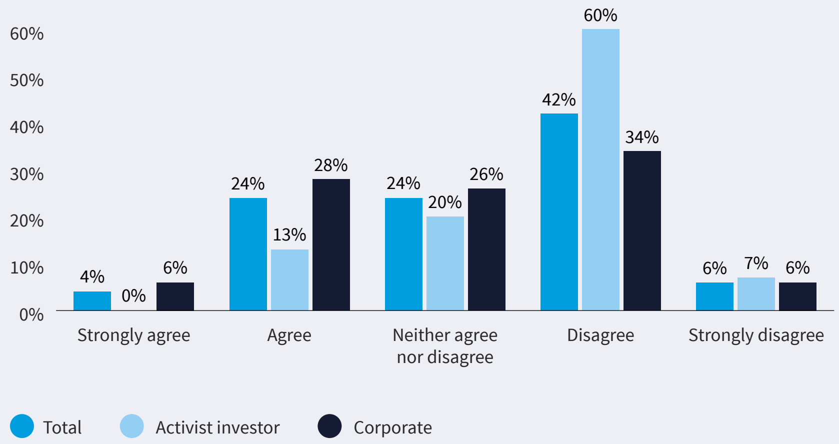
The increasing number of channels available to activists to push their message is another factor, says a board member at a German corporate. "Activist investors are taking full advantage of public platforms," they say.

One counterargument, according to the president of a Swiss activist investor, is that management teams are in control of decision-making processes. "We do not have as much power as companies portray," the executive says. "Companies can make proactive choices, to avoid the demands of an activist."

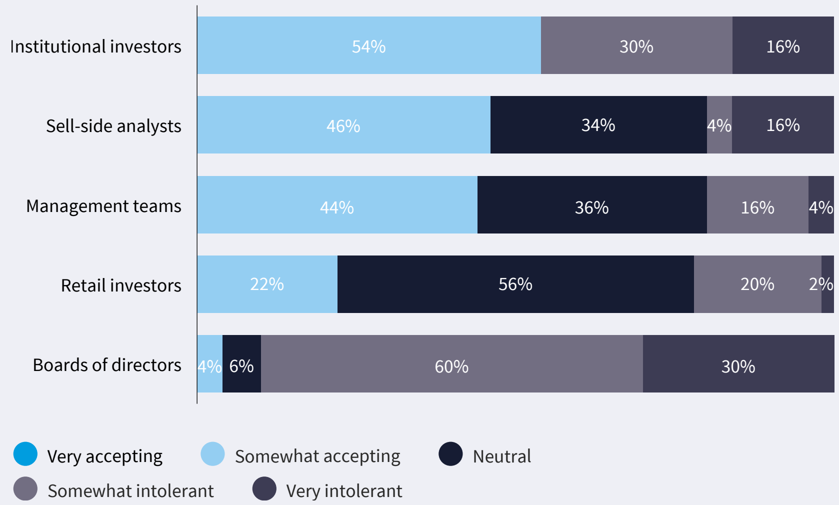
In France, meanwhile, a partner at an activist investor complains about an uneven playing field. "The law supports companies more than it does activists," they argue. "Activists have to struggle to get the attention of other shareholders and even if their voice is heard, there is no guarantee their demands will be accepted."

Naturally, such views are often entrenched, but some parties are more sanguine about the reality on the ground. "I feel activists and corporates have equal power and this is often ideal for the interests of the company and all its stakeholders," says the CEO of a Swiss corporate.

To what extent do you agree with the following statement: 'Increasing engagement between large, institutional investors and the companies in which they control major shareholdings will greatly diminish the role of activist investors.' (Select one)



Over the next 12 months, how accepting or intolerant do you believe the following stakeholders will be of activist investors and public campaigns? (Select one option for each stakeholder type)



Such a balanced view is to be encouraged. One danger of both sides believing that the odds are stacked against them is that campaigns become unnecessarily bitter.

Looking forward, both activists and corporates believe there is a case for changing the legal framework around campaigns.

Corporates, for example, believe activists should be subject to the same sort of restrictions that insiders face around dealing. Almost a third (32%) are in favour of extending the black-out period to activist investors. Corporates also think activists should be required to engage with the company in confidence before they launch more aggressive tactics. Almost a quarter (23%) want to see mandatory dialogue periods prior to any public campaigns.

"Extending the black-out period should be considered," says the CEO of a Swiss corporate. "There should be legal provisions to avoid problems relating to the sale and purchase period of shares. Disputes during public campaigns would be reduced to some extent if the black-out period norms were updated."

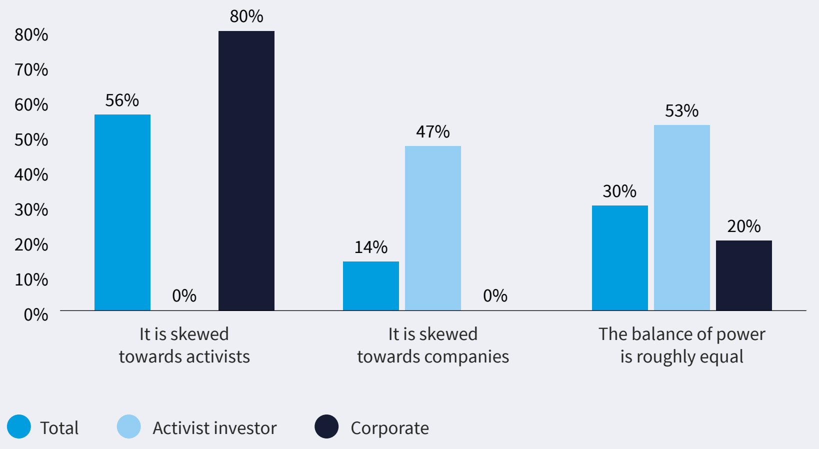
As for activists, they are focused on different types of change. For example, more than a quarter of these respondents (27%) would back the launch of a shareholder dialogue platform within each company, providing them with a formal means through which to make their views clear – and to get feedback – as well as to accurately document all interactions.

"A formal structure should be created to record the dialogue with shareholders," clarifies the partner of a French activist. "It should be governed by specific rules to protect the interests and the information shared with parties. Public campaigns can get out of hand and people point fingers when there are major issues, but a public dialogue platform would help govern the campaign effectively."

In addition, 20% of activists favour increasing the powers of financial market authorities, while the same proportion believe the minimum crossing threshold for the declaration of a shareholding should be lowered. The partner of an Italian activist argues: "Lowering the minimum crossing threshold means that voting rights will be used more fairly."

Naturally, there is little consensus on which changes should be prioritised, with activists and corporates keen to push for the shifts they favour. However, there is some corporate support for a shareholder dialogue platform. "It would be helpful in tracking the flow of information," concedes a board member at a German corporate. "There are rules to govern shareholder meetings, but campaign meetings and discussions should also be governed with the same level of strictness."

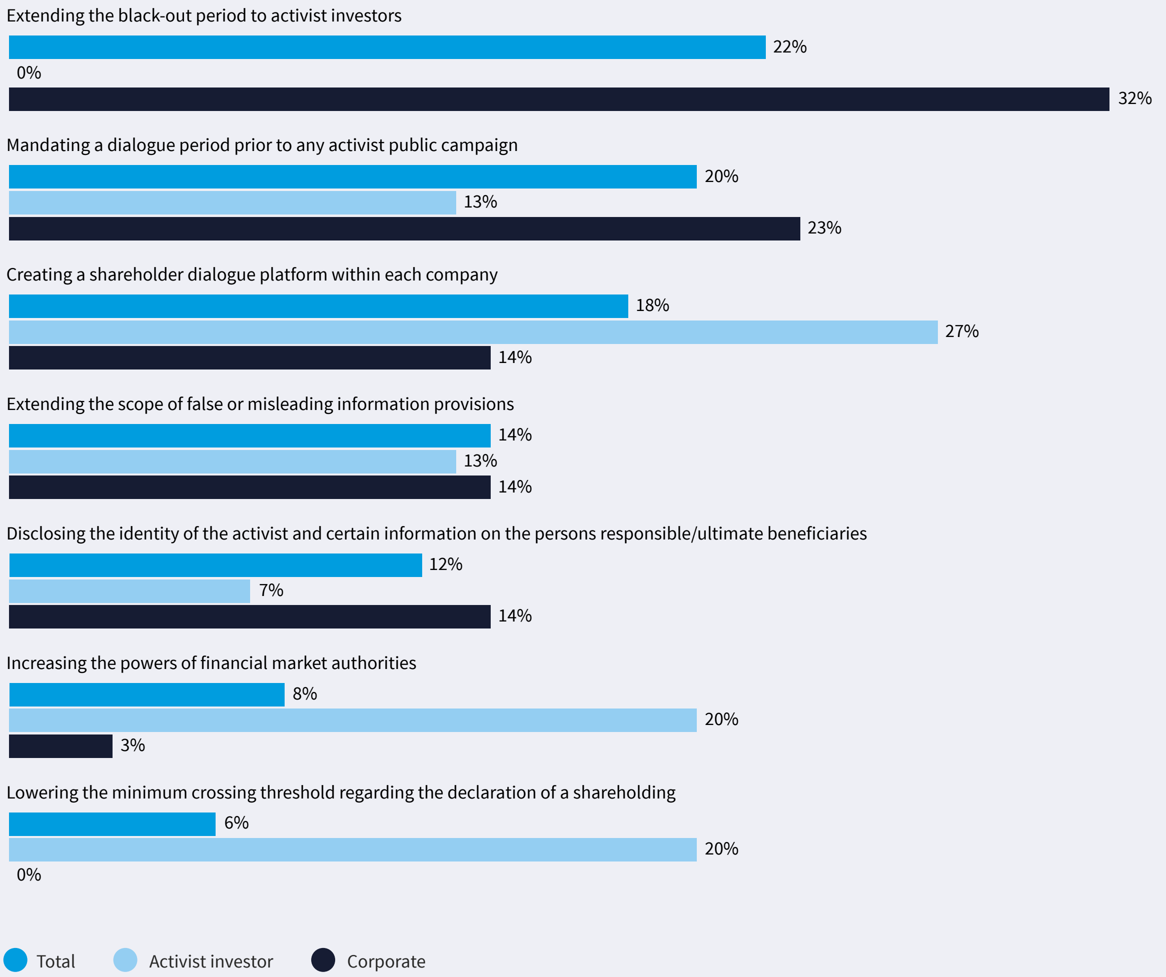
Regarding the 'balance of power' between activists and companies, do you think it is roughly equal, or skewed more towards one side? (Select one)



New laws that are targeted at governing activist campaigns are not currently atop lawmakers' list of priorities, and are unlikely to be in the short term at least. Still, they won't hesitate to act if major dysfunctions do become apparent."

Holger Hofmeister, Partner in Skadden's Frankfurt office

On which area do you believe the evolution of the legal framework should focus with respect to activist investors and public campaigns? (Select one)



With increased tensions feeding the public debate, boards may find themselves in the crossfire between activists' differing – and potentially contradictory – views for the same company in campaigns in 2024.

Armand Grumberg, Head of Skadden's European M&A practice

All eyes ahead

Activist investors are not going anywhere. In a difficult environment for European companies, there is every reason to expect more divisive campaigns over the next 12 months, with many undoubtedly entering the public domain.

Indeed, wherever corporates look, there is scope for tension. As management teams continue to adjust to an era of higher interest rates, investors will disagree about how and where to allocate capital. Geopolitical tensions – with Russia, in the Middle East, and further afield – create a constant stream of tribulations that corporates will have to navigate.

The ESG debate only adds to the pressure. On the environment, some activists will want companies to move more quickly with net-zero plans, while others will be in favour of a slowdown that prioritises near-term financial performance. Arguments over social issues, from diversity to supply-chain practices, will persist. Governance matters have long preoccupied activist investors.

The challenge for corporates is to juggle these issues without becoming overly defensive. Frank, honest and open dialogue with a broad range of shareholders will build trust, potentially heading off confrontation or at least securing support for the company if an activist does present a challenge. It is vital that the board is always able to articulate a narrative of long-term value creation and point to the steps it is taking in support of that vision.

Even then, activists may not be deterred. Stock market volatility may be a trigger for a campaign or there may simply be a disagreement about the best value-creation strategy for the business. Some activists, if not most, may focus on short-term goals rather than the long-term strategies.

Management teams and boards unable to respond robustly to activists risk putting themselves in precarious positions. That does not mean aggressively pushing back at the first sign of dissent – engaging with activists, even after a campaign has gone public, may present the best route to finding common ground. Equally, however, boards should not be afraid to take firm action where they believe it is necessary and warranted.

Many of our survey respondents see this backdrop as driving new trends in activism. They point, for example, to the growing use of digital technologies to support engagement. There is also a widespread expectation that many more companies will begin to work with third-party advisers with the tools to help them manage interactions with activists.

Advisory firms' role will span everything from monitoring and reporting on shareholder sentiment to playing an active part in companies' defences against activist campaigns. Such support will therefore enable more companies to head off campaigns before they emerge, and to support their defence if a public confrontation takes place.

In short, both corporates and activists themselves are expecting to be busy over the next 12 months. Both sides will want to avoid unnecessary flashpoints, engaging where possible to reach agreement without public conflict. Inevitably, however, that will not always be possible.

Key takeaways:

1. A new era begins. Our survey of both corporates and activists suggests shareholder activist campaigns in Europe are set to play out increasingly in the public eye; they may also be more acrimonious. One corporate director in France talks of "a complete transformation in the way activist campaigns are managed", magnified by the "recession-like climate" in Europe. Around two-thirds of activists surveyed for this study expect to undertake at least three campaigns over the next 12 months – corporates must not underestimate activists' appetite for campaigns. In addition, with the rise of first-time activists, there will be further unpredictability in activists' patterns and tactics, which in turn requires a higher degree of preparation from companies.

2. Targets locked. Activists have certain sectors in their sights. The CEO of a Swiss corporate believes "activist campaigns will target fast-growth industries", reflecting rising capital inflows and increased investor attention in these sectors. Companies in the innovation-rich TMT industry are expected to see the lion's share of activist campaigns.
To unlock capital, investors may increasingly "demand buy-backs to free up funds for better opportunities", as an activist in Switzerland explains.

3. Preach proactivity. European corporates are dealing with numerous risk factors. This requires boards and management teams to work even harder at identifying weaknesses, communicating with shareholders, maintaining transparent disclosure practices and building up defences against possible public activist campaigns. As the CEO of a German corporate says, "Companies have to look for vulnerabilities within their system and governance framework before activists get a chance to point these out." Trusted advisers can provide vital support, but in times of strife, proactivity is paramount.

About Skadden

Skadden is a global leader among law firms involved in mergers and acquisitions and other corporate transactions, and a top adviser for clients on corporate governance, takeover preparedness, contests for corporate control, proxy fights, and other forms of shareholder activism defence. We provide clients with an integrated team from different areas of law, including attorneys from our M&A, corporate governance, and litigation practices. Our diversity of experience helps clients address the full spectrum of issues presented by activists and is key to helping our clients prepare for and respond to activist shareholders advocating strategic, financial, or structural changes.

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