

SRZ Advises Activist Funds

Diplomacy and discretion apt in Europe

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Activist investors in Europe are grabbing headlines, and some milestones – such as Bill Ackman listing Pershing Square Holdings on Amsterdam’s stock exchange – warrant publicity. But in other cases, activists could achieve their goals more quietly, argues Schulte Roth & Zabel (SRZ) corporate and funds partner Jim McNally.

Although SRZ did not advise Sherborne on its investment in private equity trust Electra, McNally views it as “a good example of a public deal that did not necessarily need that type of publicity.” Indeed, SRZ typically recommends to its activist clients that they operate behind the scenes, at least initially. “Many of the UK deals we are advising on are pre-public, or proposing not to become public,” he says. But McNally accepts that going public is sometimes appropriate and he has seen numerous public campaigns in the United Kingdom – where SRZ’s shareholder activism practice is buzzing. “It has been a busy time. Given the high returns for the activist sector, shareholders are eyeing targets in the UK and Europe,” he continued.

Headquartered in New York City, SRZ opened its London office in 2002. The firm is widely regarded as a go-to law firm for activist investors and it expanded its shareholder activism practice into the UK in 2014. McNally works closely with New York-based SRZ partners Marc Weingarten and Eleazer Klein, who serve as co-heads of the firm’s global shareholder activism practice.

McNally advises activists that are pursuing improvements in both financial and operational efficiencies, but he thinks that “the really low-hanging fruit could be improvements on the operational side.” Yet in Europe, McNally seldom sees activists going all the way to a mandatory bid, and activist shorting has also been conspicuous by its absence.

Activism in Europe operates within different legal systems to the United States. McNally

finds most experienced activists are conversant with the rules in Europe, but “some more opportunistic activists do need to be apprised of the greater complication of UK law.” Specifically, “learning needs to take place on corporate rules, such as the time to call meetings, how to get rid of directors and how to pass resolutions.”

Confrontation vs. consensus

The United States can be more adversarial for legal as well as cultural reasons – 13D filings force investors owning over 5% to state their intentions – though they do have some latitude over the timing of these disclosures, whereas in Europe, the imperative is to inform the market of stakes very quickly, while intentions need not be revealed. McNally adds, “the framework of law in the US is more adversarial because there are two rival ballot papers with separate slates of resolutions, whereas in Europe resolutions would normally be added to a sole ballot paper as part of a consensual and statutory process.” Hence “proxy fights” are not part of the activist lexicon in Europe.

Activism in Europe can be less confrontational on both sides. Whether restrictions on “poison pills” in Europe are *de jure, de facto* or simply considered beyond the pale, the use of poison pills is very rare in Europe. Still, other roadblocks exist. Split boards (typically between management and supervisory functions) need not be as obstructive as poison pills, but dual boards can add hurdles to an activist campaign.

“Activists need to appreciate that shareholder meetings have to take effect at another board level – where shareholders do not have the same rights,” stresses McNally, who thinks activists need to countenance the different rules that apply in Europe. Cross-border deals can magnify the complexity. The Spring Owl and Bwin deal shows how Europe’s multi-jurisdictional environment “is a mix and match of corporate rules and listing rules – and the deal is still not done,” says McNally. “The Netherlands, for instance,

can be a more difficult jurisdiction,” opines McNally. But even there, Dan Loeb’s Third Point has inspired Dutch nutrition firm Royal DSM to spin off three units. Trade union powers and co-determination requirements can also add complication. “In the UK or US the board is a servant of the shareholder base, but in France there is a mandatory trade union representative on some boards,” explains McNally. The union presence can be a challenge as “unions do not always trust activists, are more protective, and will not ally with activists except in limited circumstances – which might include M&A.” But generally, McNally’s experience suggests it is often safe to assume that the union seat is “unavailable.”

Usually, activists in Europe will need to acquire a reasonably sized stake to have a realistic prospect of effecting change, and this is more important in smaller companies where McNally has seen “directors being more nervous about shareholder interaction, so the lower down the chain you go, the more complicated it is.” Activists may need to pass the “magic numbers of ownership percentages that entitle you to call meetings, propose resolutions and get a written slate circulated.”

Proxy solicitors and public relations

But success is not merely predicated on legal protocol. McNally thinks activists need to use other advisers in conjunction with lawyers. Proxy solicitors can help activists gauge how shareholders are likely to vote. Public relations consultants such as Tulchan Communications, Camarco and Greenbrook matter because “as we all know, communication is a key component to any successful campaign. Communications should be clear, strategic and targeted to the right audiences,” states McNally.

Mindful that British broadsheets have branded activists as “vultures,” McNally thinks counsel should be sought before overtures are made, but he accepts that some very well-established and long-

running activists such as Cevian “work very much under the radar” so they might only need to call upon advisors when, and if, something starts to look odd. For cross-border deals McNally finds advisers need “a good understanding of the local market and local shareholders,” for instance, the mix and balance of likely opinions between institutional and retail investors.

Recently, some have questioned whether “activist” is the appropriate label. For example, there are shareholder activists who prefer to be dubbed “constructivist” or “concerned” investors. Amber Capital managing director Joseph Oughourlian has coined a new term of “suggestivist” investor. Knight Vinke’s Eric Knight said at GAIM Monaco that he considers himself an “engaged investor.”

Remarkably, Knight Vinke achieved its objectives (of ending the dual board) at

Shell, despite a small stake. But McNally questions whether every activist could copy this success, pointing out that “the more prominent activist investors can more easily access boards, having come up with fully researched ideas, and having a large capital base to quickly deploy, whereas many other activists have neither the resources nor the reputation.”

In Europe SRZ generally advises a diplomatic approach. McNally acknowledges that “more aggressive strategies can sometimes work in Europe, but the circumstances in which they work are currently more constrained than in the US.”

TCI’s Chris Hohn evinces successful aggressive activism, sometimes entailing public letters criticizing management, and going forward McNally envisages the scope to pursue this approach in Europe will expand. “The UK is starting to understand that the activist is not

a corporate raider and that improvements can be good for activists as well as other shareholders. As more people understand how activists work, we might see the louder and more aggressive activists bite the bullet and make public campaigns.”

Witness that Elliott in 2011 failed to oust directors at Actelion and National Express — but fast-forward to 2015, and Elliott has succeeded in getting two of its nominees appointed to the board of Alliance Trust and set an ultimatum for the trust to turn around performance. Eventually, Europe might emulate the US in becoming more receptive to more strident activism, but for now diplomacy rules. [THFJ](#)

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