

# SHAREHOLDER ACTIVISM

## CLUB DES JURISTES REPORT

Ad hoc commission  
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4, rue de la Planche 75007 Paris  
Phone: 01 53 63 40 04  
[www.leclubdesjuristes.com](http://www.leclubdesjuristes.com)

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## INTRODUCTION

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- ▶ All market participants generally regard shareholder involvement as vital to an issuer's smooth running, which is why it is encouraged by market authorities. So how can we be surprised if a given shareholder takes a particularly active approach?
- ▶ Shareholder activism first appeared in the USA in the 1930s<sup>1</sup>. It bloomed in the same country in the 1970s and 1980s, and now occurs wherever shareholders have seen their rights enhanced, examples being Italy, Germany, the Netherlands and the UK. Accordingly, interest in the subject has increased in Europe, starting with activist campaigns in the 2000s. More than European shareholders mimicking their US counterparts, we have seen US activists export their activities to Europe<sup>2</sup>. Almost half of the companies targeted in 2018 were not American<sup>3</sup>. It seems that activism has grown alongside, and sometimes in connection with, the spread of passive security management on behalf of third parties. Unlike index-based asset management, which does not allow investors to get involved with a specific company, activist shareholders make targeted efforts and claim to improve the way the market works.
- ▶ Activist funds have grown significantly, gaining credibility and strength at the same time. For example, U.S. activists reached \$250.3 billion in assets under management in the second quarter of 2018, compared to \$94.7 billion in the fourth quarter of 2010. Activist investors now have colossal power, with \$65 billion of capital deployed in activist campaigns in 2018<sup>4</sup>. Campaigns in Europe are no longer an occasional occurrence. There were 58 campaigns in 2018, and activist funds are now clearly an established part of the stock market landscape<sup>5</sup>.
- ▶ Today, shareholder activism is so diverse that it is very hard to say where it begins and ends, and therefore very hard to govern. As a result,

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1. R. CRETE, S. ROUSSEAU, "De la passivité à l'activisme des investisseurs institutionnels au sein des corporations : le reflet de la diversité des facteurs d'influence" ("From a passive to an activist approach among institutional investors within corporations: diverse influencing factors"), *McGill Law Journal* 1997, Vol. 42, 864-959.

2. G. AGBODJAN, P. THOMAS "L'activisme actionnarial dans l'environnement juridique français" ("Shareholder activism in the French legal environment"), *RDBF* 2018, n° 5, study 16; B. KANOVITCH, J. R. CAMMAKER, Shareholder activism in the U.S. and Europe, Paris 1 Panthéon-Sorbonne & Harvard Law School, September 2018.

3. ACTIVIST INSIGHT, The activist investing annual review, 2019, p. 6.

4. LAZARD, Review of Shareholder Activism, 2019, p. 2.

5. LAZARD, Review of Shareholder Activism, 2019, p. 12.

there are no specific regulations applicable to activist shareholders alone. Activists are subject only to the general law that applies to any investor and it is precisely these ordinary rights, enjoyed by any shareholder, which they rely on. Activists invoke their rights as minority shareholders, examples being tabling written questions in an AGM, presenting alternative draft resolutions, requesting a management appraisal and demanding periodic or ongoing disclosure. However, the exercise of these rights by an activist may appear particularly radical or, according to some, unfair, and may risk damaging the company's social interest. As a result, they may stray outside of the framework intended by the legislature, sometimes causing difficulties for the company.

- ▶ Logically, the general law provides tools to respond to this situation: identification of shareholders, disclosure when ownership thresholds are crossed, declarations of intent, disclosure of temporary transfers of securities, disclosure of net short positions, disclosure to the Banque de France, disclosure of shareholder agreement clauses, rules governing the active collection of proxies and transparency regarding investment funds' voting policies<sup>6</sup>. However, the general law appears to be insufficient to deal with the wide range of tools available to activists and their legal sophistication.
- ▶ The prospect of appropriate regulation or improvement of best practices requires first of all to define shareholder activism.
- ▶ An activist campaign can be defined as the behavior of an investor using the rights granted to minority shareholders in order to influence the strategy, financial position or governance of an issuer by initial means of a public statement. The activist has a specific goal that can vary between activists and the particular circumstances of each campaign. Activism can be short or long, with, as the case may be, objectives that are strictly economic, environmental or social (ESG), and each activist develops its own ways of operating. Although there are undeniable differences between types of activism, the difficulties it raises are common to all of them and justify activism being treated as a whole.
- ▶ Activism should not be confused with a shareholder's occasional position on a particular subject, when his investment is not motivated by this criticism alone. An investor may thus be hostile to double voting rights and let it be known, including by actively soliciting proxies, without being qualified as an activist because the value creation sought is not based exclusively on this criticism. In the event that the expected return on investment is based solely on a strategy of contestation, the investor' behavior then turns into a form of economic activism.
- ▶ Looking forward, shareholder activism has sometimes been dealt with as part of work on other company law or stock market law subject

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6. See below, appendix 2.



matter, as well as reports prepared by the Club des Juristes, as part of its Europe Commission and Director-Shareholder Dialogue Commission. The AMF<sup>7</sup>, as well as French<sup>8</sup> and European<sup>9</sup> legislators have identified the issue, although they have not yet proposed a specific legal regime.

- ▶ 2018 was a record year for shareholder activism<sup>10</sup>, and the rise of activists, in Europe and France specifically, has become an industry issue that public authorities in particular want to address, as shown by the Assemblée Nationale's fact-finding mission relating to shareholder activism<sup>11</sup> and recent statements by the Minister for the Economy and Finance<sup>12</sup>. Companies regard this as a sensitive subject and have already taken individual steps accordingly<sup>13</sup>. AFEP (Association Française des Entreprises Privées - French Private Business Association) and Paris Europlace have also initiated discussions on the subject.
- ▶ At the same time, shareholder activism has for several years given rise to a lively academic debate on its long-term economic and social effects, in both the USA<sup>14</sup> and France<sup>15</sup>. For its supporters, shareholder activism allows a company to create shareholder and economic value over the long term. For others, any beneficial effects are only identified over the short term whereas, on the contrary, issuers should focus on long-term value creation by trying harder to factor in social and environmental matters, as enacted in France by the PACTE act<sup>16</sup> following the Notat Sénard report<sup>17</sup> and in the USA by the recent stance taken by the Business Roundtable<sup>18</sup>.

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7. C. UZAN, "La montée en puissance des actionnaires : le droit à l'épreuve des pratiques de marché et de l'activisme actionnarial" ("The rise of the shareholder: the law being tested by market practices and shareholder activism"), in *Les entretiens 2008 de l'AMF – Les nouveaux enjeux des marchés financiers; Industry group chaired by Yves Mansion, Rapport sur les opérations de prêt emprunt de titres en période d'assemblée générale d'actionnaires* ("AMF 2008 discussions – New issues for financial markets; Report on share lending/borrowing transactions around the time of an AGM"), 2008, p. 2. "Aside from securities lending, the real, more general, issue is that of activism, which is adopted by certain 'short-termist' shareholders acquiring large amounts of shares just before an AGM in order to destabilize the company's management, without taking on the corresponding risk"; A. OSEREDCZUK, "La régulation de la gestion d'actifs face aux défis européens et internationaux" ("The regulation of asset management in the context of European and international challenges") in *Les entretiens 2008 de l'AMF – Quel cadre de régulation pour faire face aux enjeux européens et internationaux ?* ("AMF 2008 discussions – What is the right regulatory framework to deal with European and international issues"), p. 13 and p. 14.

8. Assemblée nationale, *Rapport d'information n° 2551 sur l'investissement étranger en France* ("Information report n°: 2551 on foreign investment in France"), 2015, p. 36; Assemblée nationale, *Rapport d'information n° 737 sur la transparence de la gouvernance des grandes entreprises* ("Information report n°: 737 on transparency in the governance of large corporations"), 2013, p. 43; Assemblée nationale, *Rapport n° 897 rect. fait au nom de la Commission d'enquête chargée d'examiner les décisions de l'État en matière de politique industrielle, au regard des fusions d'entreprises intervenues récemment, notamment dans les cas d'Alstom, d'Alcatel et de STX, ainsi que les moyens susceptibles de protéger nos fleurons industriels nationaux dans un contexte commercial mondialisé* ("Amended Report n°: 897 on behalf of the investigation committee tasked with examining the State's decisions regarding industrial policy, in view of recent business combinations, particularly those involving Alstom, Alcatel and STX, along with ways to protect our national industrial flagships in a globalized trade context"), t. I, p. 145, p. 270 and t. II, p. 114, p. 293, p. 297, p. 298, p. 486, p. 623; M. Prada's hearing before the Senate Finance Committee, 14 February 2007.

9. European Commission green paper COM(2001)366 of 19 July 2001, "Promoting a European framework for Corporate Social Responsibility", n°: 85; Opinion of the European Economic and Social Committee of 26 September 2007 on "The economic and social consequences of financial market trends"; Opinion of the European Economic and Social Committee of 5 November 2009 on "The impact of private equity, hedge and sovereign funds on industrial change in Europe"; European Commission green paper COM(2011)164 of 5 April 2011, "The EU corporate governance framework"; Explanatory memorandum relating to Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers, p. 3.

- ▶ It is against this background that the Club des Juristes decided to create a multidisciplinary commission tasked with reviewing the issues raised by shareholder activism and possibly suggesting ways to improve the legal environment and practices regarding it.
- ▶ The Commission's purpose was not to take sides in the economic, political and sometimes "philosophical" debate between supporters and opponents of shareholder activism, nor to take a position on the merits of any specific – ongoing or past – activist campaigns. Instead, its objective was to identify behaviors that could affect market transparency, loyalty among market players and the proper functioning of the market, and, more generally, to examine, from a technical perspective, rules and best practices that could be applied to activist campaigns.
- ▶ The work done by the Club des Juristes Commission consisted of arranging interviews with some thirty stakeholders in the area of shareholder activism, representatives of issuers and investors, market intermediaries and qualified professionals, in order to benefit from their experience and obtain their opinions about possible future legal arrangements. The relevant authorities took part in the Commission's work as observers, and are in no way bound by the Commission's conclusions. To supplement the analysis, a survey was carried out

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- 10. LAZARD, Review of Shareholder Activism, 2019, p. 1.
  - 11. E. WOERTH, B. DIRX, *Rapport d'information n° 2287 sur l'activisme actionnarial* ("Report n°: 2287 on shareholder activism"), 2019.
  - 12. On 5 April 2009, the Minister for the Economy said that consideration should be given to "new national tools that will enable us to resist these activist funds more effectively". "It's obviously a subject that I'm very close to, because an activist fund that destroys value is not consistent with the new kind of capitalism I want to build".
  - 13. See below, appendix 3.
  - 14. See in particular B. ARAUJO, A. ROBBINS, *The Modern Dilemma: Balancing Short and Long-Term Business Pressures*, World Economic Forum, 2019; L. A. BEBCHUK, A. BRAV, W. JIANG, *The long-term effects of hedge fund activism*, 115 Colum. L. Rev., 2015; J. C. COFFEE, JR. & D. PALIA, *The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance*, Columbia Law School Working Paper n°: 521, 2015; M. LIPTON, S. A. ROSENBLUM, K. L. CAIN, S. V. NILES, *Corporate Purpose: Stakeholders and Long-Term Growth*, Harvard Law School Forum on Corporate Governance and Financial Regulation, 2019; M. LIPTON, Z. S. PODOLSKY, *Activism: The State of Play*, Harvard Law School Forum on Corporate Governance and Financial Regulation, 2018; M. LIPTON, ANNA SHIFFLET, *New Theory in Corporate Governance Undermines Theories Relied on by Proponents of Short-Termism and Shareholder Activism*, Harvard Law School Forum on Corporate Governance and Financial Regulation, 2016.
  - 15. See in particular V. DE BEAUFORT, "L'engagement actionnarial en France, vecteur de gouvernance pérenne?" (Shareholder engagement in France, a long-term governance driver?), *Rev. sociétés* 2019, p. 375; B. KANOVITCH, J. R. CAMMAKER, Shareholder activism in the U.S. and Europe, Paris 1 Panthéon-Sorbonne & Harvard Law School, September 2018; E. FOUREL, A. GUENAOUI, P. OUDIN ET S. VERMEILLE, "Pour une véritable gouvernance d'entreprise en France – Réflexions sur l'activisme actionnarial" ("Genuine corporate governance in France – Thoughts on shareholder activism"), available at the droitetcroissance.fr website; C. NEUVILLE, A. GUENAOUI, A. D'ANDLAU, E. DUBOIS, L. BOISSEAU, M. GOLDBERG-DARMON, P. LEROY, H. DE VAUPLANE, "Fonds activistes : opportunité ou menace pour l'économie ?" ("Activist funds: opportunity or threat for the economy"), *JCP E* 2018, n°: 1439; M. NUSSENBAUM, "L'impact de l'action des fonds activistes sur la valeur actionnariale" ("The impact of activist funds' actions on shareholder value"), *JCP E* 2018, n°: 1438; R. THOMAS, "L'activisme est un comportement d'investisseur" ("Activism is a key trait of an investor"), *Analyse financière* 2018, n°: 68.
  - 16. Act n°: 2019-486 of 22 May 2019 on growth and business transformation.
  - 17. N. NOTAT and J.-D. SÉNARD, with the help of J.-B. BARFETY, *L'entreprise, objet d'intérêt collectif* ("The company: an entity in the collective interest"), 2018.
  - 18. BUSINESS ROUNDTABLE, *Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans'*, 19 August 2019.
  - 19. See below, appendix 3.

among approximately 200 CFOs and heads of investor relations working for listed companies<sup>19</sup>.

- ▶ This report is the result of the work done by the Commission which, after reviewing the current state of shareholder activism and identifying the areas that require improvement (first section), proposes several ways to enhance the legal framework or best practices that govern shareholder engagement as practiced by activists (second section).

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# SUMMARY OF RECOMMENDATIONS

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## 1. Requirement of greater transparency in activist campaigns

- ▶ **RECOMMENDATION 1:** The Commission believes that rebalancing the relationship between issuers and activists requires, as a priority, **stronger transparency measures applicable to investors taking public positions**, directly or indirectly, aimed at influencing an issuer's strategy, financial position or governance. An activist taking a public position should disclose, *inter alia*, the number of shares and voting rights and the type of securities held in the issuer, along with any hedging position. This information should be updated as the campaign progresses. The AMF could also ask the investor to confirm or deny the rumors that an activist campaign is being prepared.
- ▶ **RECOMMENDATION 2:** The Commission recommends that **information made public by activists as part of a campaign should be subject to rules inspired by those applying to investment recommendations**, in order to ensure the objective nature of information included in the white papers published by activists and the appropriate treatment of conflicts of interest. In this respect, it would be appropriate to specify whether the current regulations (Commission Delegated Regulation (EU) 2016/958 of 9 March 2016) already apply in such context. Otherwise, the Commission recommends that activists apply similar rules in the context of their campaign. It is also proposed that, during a public campaign, the activist (i) explains to what extent its approach considers "the company's social interest and takes into consideration the social and environmental issues related to the company's activity" and (ii) publishes all documents that it sends privately to other shareholders. Finally, the legal framework applicable to activist campaigns could be partly inspired by the rules on **active solicitation of proxies** to ensure transparency regarding the rationale for their vote.
- ▶ **RECOMMENDATION 3:** In order to ensure fair dialogue between issuers and activists, the latter should refrain from making any **communications or publications during the "quiet periods"** to which issuers are subject. Cumulatively, the conditions governing the way issuers can respond in these circumstances could be clarified.
- ▶ **RECOMMENDATION 4:** Current regulations regarding the **transparency of short positions** could be supplemented by (i) the disclosure of all

positions held by the shareholder that are close to short positions (puts, etc.), (ii) a declaration of intent in the event that certain ownership thresholds are crossed, (iii) aggregate disclosures in certain situations (in particular in the event that investors are acting in concert within the meaning of threshold crossing declarations) and (iv) the disclosure of the identity of the investors lending their shares to the activist. The regulations on threshold crossing could be strengthened if necessary (deadlines, content).

- ▶ **RECOMMENDATION 5:** Further consideration could be given to **depriving the borrower of the voting rights attached to the shares lent**, as an effective way of combating “empty voting”. To avoid the need for legal recourse, the practice adopted by certain institutional investors of setting out that prohibition **directly in their securities lending agreements** could be encouraged.

## 2. Increased dialogue between issuers and investors

- ▶ **RECOMMENDATION 6:** Collective investor engagement might also be promoted by setting up a **shareholder dialogue platform** enabling investors to pool their demands and engage in dialogue, where appropriate, with the issuer.
- ▶ **RECOMMENDATION 7:** The Commission noted the unanimous view among the people it interviewed that shareholder dialogue is the best way to prevent activist campaigns. Following on from the Club des Juristes’ work on dialogue between directors and shareholders, the Commission recommends having a systematic **dialogue process prior to the launching of a public activist campaign**. For example, before activists disseminate a white paper, issuers must have **sufficient time to respond** to the arguments raised and correct any errors before public release, similarly to what has been imposed on proxy advisors and rating agencies.
- ▶ In order to improve the quality of the dialogue, involved parties could agree on common principles and issuers, investors, regulators and other market participants could jointly develop a **guide to shareholder dialogue**.
- ▶ **RECOMMENDATION 8:** The method for preparing the corporate governance code could also be re-examined, to ensure that it is accepted as widely as possible by investors. **Investors could thus meet in a single committee** to speak to issuers with one voice.

## 3. Consideration of the AMF and ESMA’s role

- ▶ **RECOMMENDATION 9:** The Commission recommends that consideration be given to **strengthening the AMF’s resources and role**. To ensure a fair framework for activist campaigns, the AMF’s powers under Article L. 621-18 of the French Monetary and Financial Code could be

extended to require investors, not just issuers, to correct or supplement their public statements.

- ▶ **RECOMMENDATION 10:** The Commission recommends clarifying behaviors likely to be characterized as acting in concert in the context of an activist campaign, along the lines of the white list drawn up by ESMA for the Takeover Directive (ESMA, 12 November 2013, Information on shareholder cooperation and acting in concert under the Takeover Bids Directive, ESMA/2013/1642).

#### **4. Necessary standards**

- ▶ For the most part, the recommendations considered by the Commission do not require legislative intervention but rather intervention by the regulatory authorities (AMF and ESMA).
- ▶ For the AMF, this would require the adoption of a recommendation on the transparency and fairness of activist campaigns (Recommendations 1, 2, 3, 5) and shareholder dialogue (Recommendations 6 and 7).
- ▶ On the part of ESMA, this would require clarification of the legal framework applicable to investment recommendations (Recommendation 2) and the notion of acting in concert (Recommendation 10).
- ▶ On the part of the legislator, this would require action on short positions and threshold crossing (Recommendation 4), the increase of the AMF's financial resources (Recommendation 9) and the extension of the scope of Article L. 621-18 of the French Monetary and Financial Code (Recommendation 9).
- ▶ In the context of the ongoing revision of MAR, efforts should be made to ensure greater legal certainty regarding market abuse.
- ▶ The Commission is obviously ready to participate in regular monitoring of the drafting of texts and the implementation of the recommendations of this report.

# SECTION 1



## **CURRENT SITUATION**



- The task of reviewing the current situation regarding shareholder activism is particularly tricky because activists are a highly diverse group (I). The Club des Juristes' Commission therefore sought to identify the potentially debatable behaviors that have been observed (II).

## CHAPTER I

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### DEFINING ACTIVISM GIVEN THE DIVERSE NATURE OF ACTIVISTS

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- Shareholder activism is so diverse that it is very hard to say where it begins and ends. However, it is necessary to seek a rigorous and reliable definition with a view to appropriate regulation and the formulation of best practices specific to activism.

#### 1. Absence of a legal definition of shareholder activism

- The definitions of activism put forward in legal doctrine are not sufficient for the concept to be regulated by law. The challenge of any definition is to establish the internal and external limits of a concept. The definition must be fit for purpose, and this is especially important since it determines the scope of application of the legal rule. Several criteria have been proposed to define "activism".

#### ***Involvement in the company***

- The activist is generally a company managing an investment fund that, above all, wants to make active use of its shareholder rights. As a result, certain definitions are based on this behavior. Activism is thus defined as "the influence of minority shareholders over the governance, strategy, financial policy or management of a company"<sup>20</sup>, or "the effective and strategic exercise of prerogatives by one or more shareholders who decide to assert their rights either regarding the running of the company, whether it is solvent or in difficulty, or as part of a capital market transaction"<sup>21</sup>.

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20. A. GRUMBERG, "Pour un activisme actionnarial constructif" ("In favor of constructive shareholder activism"), *Les Échos*, 19 October 2015.

21. M. GOLDBERG-DARMON, C. RUELLAN, "L'émergence d'un nouvel activisme actionnarial" ("The emergence of a new form of shareholder activism"), *Actes pratiques & ingénierie sociétaire* November-December 2016, p. 1.



- Other authors focus on the amount of energy expended: activism is “a doctrine or a practice that puts the emphasis on direct and vigorous action, more specifically in order to express support for or opposition to a controversial issue”<sup>22</sup>.

### **Criticism of management**

- If activism attracts as much reaction as interest, that is probably because it involves challenging the choices made by managers, and indeed destabilizing the managers themselves: the activist is therefore “a shareholder who challenges a company’s existing management”<sup>23</sup> and does not hesitate to put pressure on management<sup>24</sup>.

### **The simultaneous purchase of shares and criticism of management**

- The use of shareholder rights and the criticism of management are not the sole preserve of activists. Accordingly, an activist is not an investor whose comments consist solely of criticism. By analyzing the chronology of or motivation behind investors’ actions, activism can therefore be identified when investors “acquire shares with the purpose of encouraging the company to take measures capable of significantly increasing its stock market value”<sup>25</sup>.

### **Body of evidence**

- Other definitions use several of the aforementioned criteria. The most comprehensive definition is as follows: “an investor acquiring an equity stake in a listed company in order to use its shareholder rights and power of influence to make, with respect to the company’s management, demands or criticisms of varying levels of hostility, motivated by financial or extra-financial objectives”<sup>26</sup>. These criteria can therefore be seen as cumulative conditions or as components of a body of evidence that characterize activism.
- Similarly, reference can be made to a “process of challenging, initiated by one or more minority shareholders”, and to “the exercise and application by minority shareholders of the rights attached to the shares of a company that they hold, in order to influence the company’s governance”<sup>27</sup>. This is also the approach of AFEP’s working group. After

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22. R. CRETE, S. ROUSSEAU, “De la passivité à l’activisme des investisseurs institutionnels au sein des corporations : le reflet de la diversité des facteurs d’influence” (“From a passive to an activist approach among institutional investors within corporations: diverse influencing factors”), *McGill Law Journal* 1997, Vol. 42, 864-959.

23. O. DE VILMORIN, A. BERDOU, “Vade-mecum de l’actionnaire activiste” (“THE ACTIVIST SHAREHOLDER’S HANDBOOK”), *BJB* 2016, n° 1, p. 16.

24. E. DUBOIS *in* C. NEUVILLE, A. GUENAOUI, A. D’ANDLAU, E. DUBOIS, L. BOISSEAU, M. GOLDBERG-DARMON, P. LEROY, H. DE VAUPLANE, “Fonds activistes : opportunité ou menace pour l’économie ?” (“Activist funds: an opportunity or threat for the economy?”), *JCP E* 2018, n°. 1439.

25. S. SCHILLER, “L’environnement réglementaire des fonds activistes” (“The regulatory environment of activist funds”), *JCP E* 2018, n°. 1437.

26. N. BOMBRUN, J. AMSELLEM-VIGANO, “Développement de l’activisme actionnarial : Comment anticiper une campagne activiste ?” (“Development of shareholder activism: how to anticipate an activist campaign”), *RTDF* 2019.3.

27. V. DE BEAUFORT, “L’activisme actionnarial” (“Shareholder activism”), presentation online at <http://europe.vivianedebeaufort.fr/wp-content/uploads/2017/11/Activisme-actionnarial-MS-DAIM-ESSEC.pdf>, consulted on 23 September 2019.

emphasizing the difficulty of defining activism, AFEP proposes using the “body of evidence” approach.

- All these definitions are good descriptions of activism, but none of them allows an activist to be identified in legal terms. They include other investors who may qualify as active but not as activists, unless their simple right to criticize is confused with a genuine activist campaign.

## **2. The essentially varying nature of shareholder activism**

- The difficulty in defining activism also results from the wide variety of objectives and methods adopted by activists.

### ***Varying focus on activism among investment funds***

- Some companies managing investment funds specialize in shareholder activism to such an extent that it is their main selling point. For others, activism is just one management method among others. These fund managers may occasionally take a “passive” position, without triggering an activist campaign. As a result, activism is not an inherent feature of certain funds.
- Other investors are occasional activists, who only act in “special situations”.

### ***Varying positions***

- Some activists hold more than 5% or 10% of the target company's capital, while some only have a small stake and others limit themselves to short selling.
- It is also possible to classify activists in two categories. Some are short-term in that they only use derivatives and in particular short selling. Others are long-term because they actually invest in the company through the acquisition of shares.

### ***Varying and contradictory concerns***

- Activists' grounds for criticism are varied and can even be contradictory: activist's criticism can focus on matters such as the company's strategy, its financial statements, its management and/or ESG (environmental, social and governance) criteria. We have seen fund managers vote for the renewal of managers' terms of office, and against a company's governance organization.

### ***Short term vs. long term***

- Some funds are “short-termist”, while others seek to approximate private equity strategies by seeking involvement in the company's governance and influence over the company's management in order to get it to adjust its medium-term strategy.
- The meaning of “long-term” is the subject of great controversy between stakeholders. Long-only investors stress their focus on the long

term and their alignment with corporate interest. They even present themselves as the most effective defenders of corporate interest, combatting any abuse by management. Their stance is supported by the fact that they hold their shares for a much longer period than the average investor. The activists we interviewed are proud of their reputation and the credibility of their analysis, and say that, as a result, they would not risk damaging those attributes by carrying out short-termist transactions.

- In the heat of the moment, it is often hard to say whether an activist's strategy is short-termist or not. This can only be established after the fact.

### ***Uncertain relationship with major investors***

- The boundary between the activist and other shareholders is sometimes porous. Although institutional investors and "passive" funds are traditionally seen as supportive of management, they are now more active and are happy to vote against resolutions presented by management, and even sometimes to make their position public. Some may prefer to remain discreet: without being activists themselves, they support activist funds or encourage them to act. Other investors, meanwhile, refuse to express support for activists in public or in private or only support some activists and not others.

### ***Activism characterized by behavior***

- It is impossible to define activists as a legal category of shareholder. Activism, however, can be defined as a type of behavior over a given period.
- The Commission therefore took a particular interest in the behavior of activists who, after studying a company for a long time and acquiring a minority shareholding, short or long, but possibly significant, seek to change the company's governance or strategy, generally via a "robust" dialogue with its directors and then, as the case may be, launching a public campaign intended to gain the support of other shareholders.
- The argument between issuers and investors has intensified in recent years over behaviors that consist in taking advantage of the asymmetries between the rules applicable to issuers and the rules applicable to investors. Issuers accuse activists of abusing regulatory asymmetry in their favor, while activists criticize the asymmetry of power and information in favor of the issuers that hinders their campaigns.
- In practical terms, communication rules place few constraints on activists whereas, for a company, each communication with shareholders is subject to strict rules as regards its content, accuracy, frequency and scope of distribution. However, some dispute the true nature of this asymmetry and point out the informational superiority of the issuer.

- The company can also reach its shareholders easily, in particular those with significant shareholdings, of which it has more detailed knowledge than the market, through ownership thresholds provided for in issuers' articles of association or the procedure for identifiable bearer shares, whereas the activist has no organized access to other shareholders, apart from in an AGM, where it can make official statements and meet other shareholders. In addition, directors can use the company's resources, including financial resources, to defend themselves even where they are the ones who are being personally criticized, while the activist claims to represent corporate interest more effectively.
- The debatable behaviors seen on both sides turn precisely on this asymmetry considered by both the issuers and the activists to their disadvantage.

## CHAPTER II

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### BEHAVIORS THAT ARE SOMETIMES DEBATABLE

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- Past activist campaigns have involved certain behaviors that are open to criticism. Views differ greatly between issuers and activists. The behaviors in question can be seen at all stages of a campaign.

#### 1. Position-building

- The first part of activist campaigns consists of position-building, and this has given rise to concern. Issuers criticize the use of aggressive financial techniques, including the use of derivatives, for the purpose of concealment and circumventing rules relating to ownership thresholds provided for in issuers' articles of association or laid down by statute. This concealment is all the easier as MiFID<sup>29</sup> has led to liquidity fragmentation. The activists we interviewed said that they do not build positions in an opaque way, making only marginal use of derivatives, which are now covered to a large extent by regulations on threshold crossing disclosures, and dispute the basis of this criticism.
- All agree that there must be a correlation between activism and economic exposure, following on from analysis already carried out in

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28. Proposing that the issuer keep a "register of so-called one-to-one contacts with its shareholders having, for example, a shareholding or voting rights greater than 0.5% of the share capital": F. PELTIER, presentation at the Law & Trade Conference "Corporate Governance & Shareholder Engagement: the new normal", 18 October 2019.

29. Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments

relation to empty voting. To the extent that an activist seeks to influence the running of a company, its position is only legitimate if it assumes the consequences of that aim by being exposed to the company's risks through the outright ownership of shares. The activists we interviewed said that they seek to be above reproach: because they adopt a critical position with respect to the company, they must themselves be above any criticism, otherwise their message may be discredited.

- Opaque methods of position-building go back to recurring concerns relating to shareholder identification. Despite improvements resulting from the Shareholder Rights Directive II<sup>30</sup>, there are still many criticisms because it is not possible to take a dynamic snapshot of the ownership structure. The procedure involving identifiable bearer shares is costly, unreliable and always lags behind market movements. Threshold crossing disclosures and declarations of intent take place on a one-off basis, and do not allow regular monitoring of changes in shareholding. The content of these disclosures is not sufficient to allow a proper understanding of a shareholder's position. Activists claim that they are above reproach in this area as well, because they comply with regulations. They also highlight the frequent use by issuers of the provision relating to reportable thresholds in the articles of association, which can start at 0.5% of the share capital and therefore allow issuers alone to be aware of the positions of their significant shareholders.

## 2. Dialogue with shareholders

- Once an investor owns shares in a company, it is reasonable to expect a constructive and private dialogue between the activist and the issuer when the activist makes its initial observations. The evidence shows that this approach is taken in almost every case<sup>31</sup>.

### ***Quality of dialogue with the activist***

- In the best-case scenario, an attempt to establish dialogue results in a truce, which does not appear to be unusual and is not necessarily publicized. In many cases, however (although they are in the minority compared with the overall functioning of the market), the dialogue attempted fails because of mutual misunderstanding<sup>32</sup>.
- Activist investors are suspected by their targets of being agitators solely concerned with the short term, which they strongly deny. They insist that they are seeking to protect corporate interest and create long-term value, which is vital to gain the support of other shareholders and maintain their credibility.
- Activists have sometimes had their request for dialogue rejected, or have been denied access to the board. Even if dialogue is formally

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30. Directive 2007/36/EC of 11 July 2007 on the exercise of certain rights of shareholders in listed companies.

31. Taking a similar view, see below, appendix 3.

32. See below, appendix 3.

established, some issuers apparently fail to engage properly with the demands of activist shareholders. However, the activists we interviewed place a lot of importance on meeting with the company's management and directors because the directors are the ones best placed to explain how their industry works. Most companies are prepared to engage in dialogue at the highest level<sup>33</sup>. That dialogue is particularly important for activists that intend to become major shareholders in a widely-held company and so want to avoid any conflict.

- On the other hand, some activists choose speed or surprise effect, thus preventing any dialogue prior to the launch of the public campaign. The issuer is then reduced to either accepting or refusing the activist's demands. More generally, we see that an activist shareholder escalates matters much more quickly than other investors. If the activist's efforts are blocked, it adopts a public strategy aimed at gaining support for its action from other shareholders.
- The survey showed that target companies that sought to explain their position had ended up with a constructive, calm dialogue with activists<sup>34</sup>.

### ***Frequency of dialogue with other shareholders***

- Dialogue with shareholders is of strategic importance for issuers, not just in its relationship with activists but also with other shareholders. The traditional advice given to issuers is to establish a regular, high-quality dialogue with their main shareholders. That dialogue plays a preventative role, especially since activists' criticisms are often based on those of other shareholders who have given up the fight or do not wish to expose themselves directly. Dialogue also plays a remedial role if the issuer can secure the support of a solid shareholder group during its campaign.

### ***Limits on inside information***

- Although this difficulty has already been mentioned<sup>35</sup>, the risk of inside information being exchanged as part of a private dialogue is often a source of concern. However, several of the interviews we held show that this risk is hugely overstated. Managers who take part in investor road shows know how to answer investor questions while complying with inside information rules, especially since discussions with activists often do not concern a shortage of information but rather, on the basis of existing public information, a discrepancy in the company's analysis. To avoid any risk, some activists publish all of their discussions on their websites. However, that precaution makes it impossible to have a purely private dialogue and therefore leads to a public campaign.

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33. See below, appendix 3.

34. See below, appendix 3.

35. CLUB DES JURISTES' AD HOC COMMISSION on Director-Shareholder Dialogue, December 2017, p. 33.

### 3. Public campaigns

- If private dialogue fails, a public campaign is launched. When the activist campaign becomes public, issuers criticize the aggressive approach taken by activists, whereas the activists we interviewed say they take a constructive approach because they are involved in the company's strategy in a practical way.

#### ***Quality of information***

- Issuers cast doubt on the accuracy of activists' analysis. Above all, communication by activists is regarded as imbalanced and ambiguous, overly focused on subjective matters.
- Meanwhile, activists emphasize the extent of their preparatory work and state that the success of a campaign is determined by the strength of their analysis, not their reputation. They claim that they carry out extensive research, representing three to six months of work. Meetings are organized with the company at different levels, and with the company's main rivals, customers, suppliers, former directors, and employees.

#### ***The timing of disclosure***

- Issuers are very concerned about the time when activists choose to launch their campaigns and reveal their documentation. If an activist publishes its analysis during a quiet period, its voice is amplified, the effect of which is increased if it sets up a website dedicated to the campaign, since the company cannot respond. The activists we interviewed denied that this poses any problem given the very short duration of the quiet period and the fact that activists' period of influence is often limited to the period preceding the AGM, whereas issuers communicate on their results all year round except during the quiet period.

#### ***The intended recipients of information***

- Communication with other shareholders is the main area of concern because it determines the success of a campaign. Activists stress that it is hard for them to interact with other shareholders, whose identity they do not know.
- From the issuer's point of view, road shows held by an activist in private can be frustrating. They are a way for an activist to adapt its speech to its interlocutor, sometimes resulting in the delivery of contradictory messages to other shareholders. As a result, not all shareholders are informed to the same degree. The issuer has no access to these interactions and therefore cannot respond to them.

### 4. Voting in AGMs

#### ***Transparency of the AGM***

- As regards voting in an AGM, each party doubts the other's sincerity and fears that it is manipulating the vote. Shareholders that have

borrowed shares and vote in an AGM are a key concern for issuers, who demand that votes coincide with economic exposure and criticize “empty voting”. However, the activists we interviewed stated that they do not practice empty voting. Article L. 225-126 of the French Commercial Code requiring a declaration by the borrower does not seem to be applied.

- Activists criticize the lack of transparency in AGMs, since they have great difficulties checking that votes are conducted properly. The Shareholder Rights Directive II<sup>36</sup> allows all shareholders to obtain a voting confirmation, but it is hard to be sure that all votes have been properly taken into account.

### ***The role of other shareholders***

- Activists who submit resolutions during shareholders' meeting need the support of other shareholders. Institutional investors and investment funds can back an activist's initiative. They are especially motivated to do so since they have a fiduciary duty to their clients. Although large investment funds are not capable of carrying out an in-depth study on each company because of the large number of positions they hold in their portfolios<sup>37</sup>, they can support the initiative of an activist that has produced a study by focusing on a small number of companies and thus give it extra resonance.
- The investors we interviewed verified that an activist's investment argument often creates long-term value for all stakeholders. Where the activist puts forward candidates for the board of directors, the quality of each candidate and the need for change in the issuer's governance determine which way the vote goes.

### ***The role of proxy advisors***

- Proxy advisors recommended voting in favor of the resolutions put forward by the activist in half of cases, and have seen a sharp improvement in the relevance of resolutions in recent years.
- There are two limitations when analyzing an activist's argument. Firstly, proxy advisors only express a view if the activist campaign gets to the AGM. They therefore only have a very limited time, a few weeks, to study these resolutions and meet with the company and the activist. Secondly, the proxy advisors interviewed said that they base their recommendations solely on public information. This method works against activists who would limit themselves to private discussions with other shareholders. It should not only encourage them to increase their public communication but also to avoid using different speeches depending on the interlocutor.

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36. Directive 2007/36/EC of 11 July 2007 on the exercise of certain rights of shareholders in listed companies.

37. A. DE LA CRUZ, A. MEDINA, Y. TANG, Owners of the World's Listed Companies, OECD Capital Market Series, 2019, p. 5, p. 6 et p. 22.



- Before supporting the resolutions put forward by an activist, proxy advisors ensure that a change is necessary and that the solution proposed by the activist is the best one, compared with the status quo or other proposals.
- Proxy advisors' clients tend to carry out their own analysis in relation to resolutions put forward by activists, but they can still consult voting recommendations when making that analysis.
- In conclusion, the Commission noted that, despite the great tension between issuers and activist shareholders, the people we interviewed are very cautious regarding new regulations. They all recognize that shareholder engagement is required to ensure the proper functioning of the market and its depth. They are all aware of the risks that the Paris financial center would be taking if it adopted overly specific rules that differed from those in other centers (even if French regulations could move away significantly from European standards). Finally, they are all aware that the market represents a delicate balance, and that effort must be made to ensure that regulations do not have unintended or adverse consequences.
- However, the current situation cannot be regarded as satisfactory, because asymmetries exist that are probably unjustified in certain cases<sup>38</sup> and because it would be desirable to correct certain excessive behaviors. Although views differ, the conclusion is unanimous: we need to restore balance between issuers and investors.

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38. Asymmetry is one of the main subjects of the recommendations made by the Assemblée Nationale's fact-finding mission: E. WOERTH, B. DIRX, *Rapport d'information n° 2287 sur l'activisme actionnarial* ("Report n°. 2287 on shareholder activism"), 2019.

# SECTION 2



## **AREAS FOR DISCUSSION**



- To balance the rights and duties of issuers and investors, the Club des Juristes' Commission sought to formulate proposals to improve the supervision of activist campaigns (I), while strengthening dialogue between issuers and investors (II). Finally, a discussion about the role of the AMF and ESMA could be initiated (III).

## CHAPTER I

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### SUPERVISION OF ACTIVIST CAMPAIGNS

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- Issuers criticize the fact that there is no "equality of arms" in an activist campaign<sup>39</sup>. To ensure a balanced issuer-activist relationship in the heat of the moment, consideration could be given to adopting new transparency rules (1), improving supervision of short selling (2) and supervising securities lending/borrowing around the time of an AGM (3). The application of transparency rules in the event of proxy fights could also be considered (4).

#### 1. New transparency rules

##### ***The announcement of an activist campaign***

- Transparency is a key area of discussion, for both short and long-term activists<sup>40</sup>, because it has the advantage of avoiding interference with shareholder activism, while ensuring a fair relationship between issuers and investors<sup>41</sup> and fair trading in the financial markets<sup>42</sup>.
- The strengthening of transparency rules could take place through a general lowering of statutory ownership disclosure thresholds and thresholds for declarations of intent. In this respect, the possibility of adding, for "large caps" (companies with a market cap of over €1 billion), an obligation to disclose when crossing a threshold of 3% of share capital or voting rights (in addition to the current 5% threshold),

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39. See below, appendix 3.

40. Transparency is also one of the main topics of recommendations made by the Assemblée Nationale's fact-finding mission: E. WOERTH, B. DIRX, *Rapport d'information n° 2287 sur l'activisme actionnarial* ("Report n°. 2287 on shareholder activism"), 2019.

41. Suggesting a duty of fair dealing for investment funds, because of their influence over the company: I. PARACHKÉVOVA, "Les obligations des fonds d'investissement au sein des sociétés cotées" ("The obligations of investment funds in listed companies"), *Rev. sociétés* 2015, p. 75.

42. See below, appendix 3.

as in the UK, along with the obligation to make a declaration of intent when crossing a threshold of 5% of share capital and voting rights (as well as the current 10% threshold), has been raised<sup>43</sup>.

- The Commission took a particular interest in the development of transparency in the context of an activist campaign, while complying with the constraints shared by the persons interviewed. There is a consensus in favor of exercising extreme caution when considering increasing transparency requirements. If it were imposed on all market participants, the resulting publicity and administrative burden could have perverse effects, which would far outweigh the benefits and could eventually damage shareholder dialogue. Experience also shows that both issuers and activists much prefer private dialogue<sup>44</sup>. In this respect, providing for threshold crossing declarations in their articles of association may be a way for issuers to increase transparency for their own benefit, without the activist shareholders' stake automatically becoming public.
- A general lowering of statutory ownership disclosure thresholds and thresholds for declarations of intent could discourage a large number of investors, including passive ones. For all investors, this would risk requiring them to reduce their investment in order to curtail the costs associated with declarations. For activists, this would prematurely shift the dialogue between issuers and activists into the public sphere and would prevent a peaceful dialogue.
- As a result, no additional disclosures should be required as long as the activist is acting in a private context. However, as soon as an activist goes public, new transparency requirements should be adopted.
- New rules could impose transparency obligations on investors that have made public statements, directly or indirectly, in order to influence an issuer's strategy, financial position or governance. That would include situations in which the investor's positions have been disclosed publicly, in particular through the press. Since in such situations the investor freely decides to bring publicity to its actions, this new transparency would merely supplement the content of the public communication it has carried out. Such an obligation would not prevent investment and would have the advantage of not putting constraints on all investors. The public positions in question would correspond to material criticisms made by an activist calling for an alternative, and would not concern the situation where an institutional investor makes public which way it voted on each AGM resolution or makes a simple public statement of its general policy. Provision should be made for a *de minimis* alternative, so as not to place excessive restrictions on freedom of expression: the

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43. Robert Ophèle's contribution to discussions regarding stockmarket activism, 11 July 2019

44. See below, appendix 3.

increased transparency would only apply to investors that have taken a public stance and that own more than a certain proportion, for example 0.5%, of the target company's capital or voting rights or a threshold depending on the amount of the investment.

- The declaration could be required by the AMF, inspired by the “put up or shut up” mechanism applied to rumors that a public offering is being prepared (article L. 433-1 V of the French Monetary and Financial Code). Even where a shareholder remains within a private setting, if it contacts other shareholders rather than just entering into a dialogue with the company, it inevitably prompts rumors about a future public campaign. An anti-rumor arrangement would therefore have the benefit of forcing the shareholder to make a public statement if it has contacted a certain number of investors and if there are rumors that an activist campaign is being prepared. The Commission des sanctions (enforcement committee) of the AMF could even impose a sanction on an investor who does not answer correctly, by using Article 223-6, paragraph 1 of the AMF's General Regulation according to which "Any person that is preparing a financial transaction likely to have a significant impact in the market price of a financial instrument, or on the financial position and rights of holders of that financial instrument, must disclose the characteristics of the transaction to the public as soon as possible". The notion of financial transaction is broad enough to encompass the case of the acquisition of a minority stake followed by an activist campaign.
- The disclosures required when an ownership threshold is crossed, as well as declarations of intent, are also relevant in the context of an activist campaign. The transparency required of the activist could therefore relate to the same subjects (articles L. 233-7, L. 233-9, L. 247-2 and R. 233-1 of the French Commercial Code, articles 223-14 and following of the AMF's General Regulation). In particular, this would make it possible to require the activist to reveal the number of shares and voting rights held in the issuer, along with any hedging position. Understanding the activist's economic exposure will help to assess how credible it is and to understand its strategy.
- The content of a declaration could also be defined, for example by mentioning the type of stake held, the beneficial owner, any hedging, and the identity of the lender in a securities lending/borrowing arrangement.
- The AMF could also state that it will pay particular attention to the quality (clarity and completeness) of the content of threshold crossing disclosures in this context.
- Once that disclosure has been made, the activist shareholder would have to update it regularly for as long as the activist campaign continues, because the justification for the disclosure would also continue. The form of that update should be identical to that of the public disclosures made regarding the campaign.

- The deadline for making a threshold crossing disclosure could also be reduced to one or two days, given current technical resources.

### ***The white paper***

- Although activists are regarded as highly sophisticated financial operators, they are sometimes criticized by the issuers for the insufficient and exaggerated nature of their arguments<sup>45</sup>.
- Without commenting on the validity of that criticism, it could be useful to consider introducing a **legal framework partly inspired by the framework in place for investment recommendations by financial analysts**. Although an activist does not present its investment argument as a genuine investment recommendation, it seeks to convince other shareholders that its view of the company's strategy, finances and management is correct. Activists enjoy a large amount of credibility in the market, and setting out their arguments in the form of a white paper raises difficulties similar to those of analyst recommendations.
- Despite the similarity, activists should not be treated like professional makers of investment recommendations because their approach is different: instead of receiving remuneration directly for their analysis, they take genuine risks by investing their own money in their investment argument.
- With regard to the investment recommendations themselves, the regulations seek to ensure the objectiveness of investment recommendations and the proper treatment of conflicts of interest<sup>46</sup>. In particular, facts must be distinguished from interpretations, estimates, opinions and other non-factual information. The communication must include a summary of all valuation bases or all methods and underlying assumptions made to value a financial instrument or an issuer, or to set a price target.
- There is a debate about whether an activists' publications should be deemed investment recommendations. Some authors go so far as to say that the legal framework for investment recommendations already applies to activists during a campaign. To support their argument, the definitions adopted by European texts can cover the activist's situation. Similarly, investment recommendations are indeed broadly defined: "information recommending or suggesting an investment strategy, explicitly or implicitly, concerning one or several financial instruments or the issuers, including any opinion as to the present or future value or price of such instruments, intended for distribution channels or for the

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45. See below, appendix 3.

46. Commission Delegated Regulation (EU) 2016/958 of 9 March 2016 supplementing Regulation (EU) N° 596/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the technical arrangements for objective presentation of investment recommendations or other information recommending or suggesting an investment strategy and for disclosure of particular interests or indications of conflicts of interest.

47. Article 3(1)(35)(ii) of Regulation (EU) No 596/2014 of 16 April 2014 on market abuse (market abuse regulation or MAR).

public"<sup>47</sup>. In addition, the notion of an expert adopted by the delegated regulation is "a person who repeatedly proposes investment decisions in respect of financial instruments and who: (i) presents himself as having financial expertise or experience; or (ii) puts forward his recommendations in such a way that other persons would reasonably believe he has financial expertise or experience"<sup>48</sup>. The delegated regulation's scope of application is also particularly broad because it includes the mere suggestion of an investment strategy. By setting out a regime specific to non-professionals, the delegated regulation is expressly intended to apply more broadly than to recommendations in the strict sense. However, the MAR Regulation provides that the definition of information recommending or suggesting an investment strategy includes only those persons who "directly propose a particular investment decision in respect of a financial instrument"<sup>49</sup>. Activists, as well as issuers who answer publicly, therefore fall within a grey area of the MAR and the delegated regulation on investment recommendations.

- Without taking a position on the applicability of the legal framework relating to investment recommendations by activists, the Commission sees an opportunity to increase legal certainty, either by ESMA's confirmation of this extensive interpretation or by the introduction of a similar mechanism applicable to activist campaigns. This would be inspired by the investment recommendations regulation without including all of its provisions.
- As with the AMF's guide to investment research<sup>50</sup> and its recommendation on proxy voting advisory firms<sup>51</sup>, an AMF recommendation would be the preferred way of achieving that extension. In this respect, the AMF has already issued a reminder of rules applicable to investment recommendations, on 2 May 2016. It could consider specifying how this regime applies to an activist campaign.

### ***The quiet period***

- Consideration should be given to the **controversy regarding action taken by activists during quiet periods**. Issuers want activists to refrain from communicating about an issuer during periods in which the issuer and analysts must also refrain from communicating<sup>52</sup>. This rule of good conduct would also prevent activists from using the quiet period before the announcement of the issuer's full-year or interim results to amplify their voice when putting forward investment arguments.
- If an activist has made an announcement just before the start of the quiet period, the issuer should be able to respond immediately, as an

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48. Article 1 of the aforementioned delegated regulation.

49. Article 3(1)(34)(ii) of Regulation (EU) N° 596/2014 of 16 April 2014 on market abuse (market abuse regulation or MAR).

50. *AMF, Guide relatif à l'analyse financière* ("Guide to investment research"), AMF Position-Recommendation n°. 2013-25.

51. AMF, *Proxy voting advisory firms*, AMF Recommendation n°. 2011-06.

52. See below, appendix 3.

exception to quiet-period rules. However, the issuer might prefer to take a cautious approach and delay its response. In such case, it could make an immediate statement saying that the activist's publication is inaccurate or incomplete and that it will respond at the end of the quiet period.

- To ensure that this rule is properly applied, each issuer would have to publish its quiet period dates on its website<sup>53</sup>.
- Finally, it seems necessary to reiterate that, in legal terms, there is nothing stopping an issuer from communicating during a quiet period. During a quiet period, an issuer remains silent, meets no-one and delays the publication of information until quarterly reporting, half-year results or full-year results have been unveiled. However, this is mainly market practice, without any formal basis. The AMF recommends a blackout: "To avoid the risk of disclosing incomplete financial information that may cause recipients to anticipate the company's results before they are published, the AMF recommends that issuers adopt, before announcing their full-year, half-year or quarterly results, a period during which they refuse to give financial analysts and investors new information about their business or results. To ensure that this "blackout" period is as effective as possible, the company should raise awareness of it among its key people who may be asked questions, including operational staff"<sup>54</sup>.
- However, this practice reflects the caution that needs to be taken with respect to financial disclosure given the risk of information being deemed false or misleading after the fact, or of inside information being disclosed only to certain people. Since the quiet period is simply market practice, the issuer can break its silence exceptionally if justified by the situation. Regarding inside information, the Commission des Opérations de Bourse (COB) specified the following: "This blackout period regarding earnings does not, however, dispense the company from its obligation to provide the market with specific information concerning any significant event that occurs during this period and which may have a significant impact on the price of a financial instrument or the situation and rights of holders of this instrument"<sup>55</sup>. The AMF takes a similar approach: "The AMF wants [...] to reiterate that the use of a blackout procedure does not release management from its responsibilities and obligations regarding the disclosure and use of sensitive information"<sup>56</sup>.

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53. Taking a similar view, see: AMF, *Guide to ongoing disclosure and management of inside information*, Position-recommendation DOC-2016-08, n°. 1.6.1, para. 2.

54. AMF, *Guide to ongoing disclosure and management of inside information*, Position-recommendation DOC-2016-08, n°. 1.6.1, para. 1. Regarding the principle of equal access to information: AMF, *Periodic disclosure guide for companies listed on a regulated market*, Position-recommendation DOC-2016-05, n°. 4.3. See also n°. 13.3.

55. COB, Report of the working group chaired by Mr. Jean-François Lepetit on "profit warnings" and proposed recommendations, 2000, p. 17.

56. AMF, "L'AMF rappelle aux dirigeants de société que la communication sous embargo ne les dégage pas de leur responsabilité" ("The AMF reminds company managers that information blackouts do not release them from their responsibilities"), *Autorité des Marchés Financiers Monthly Review*, 2004, n°. 7, p. 143; AMF, *Guide to ongoing disclosure and management of inside information*, Position-recommendation DOC-2016-08, n°. 1.6.1, para. 3.



- ▶ **RECOMMENDATION 1:** The Commission believes that rebalancing the relationship between issuers and activists requires, as a priority, stronger transparency measures applicable to investors taking public positions, directly or indirectly, aimed at influencing an issuer's strategy, financial position or governance. An activist taking a public position should disclose, *inter alia*, the number of shares and voting rights held in the issuer and the type of securities held, along with any hedging position. This information should be updated as the campaign progresses. The AMF could also ask the investor to confirm or deny the rumors that an activist campaign is being prepared.
- ▶ **RECOMMENDATION 2:** The Commission recommends that information made public by activists as part of a campaign should be subject to rules inspired by those applying to investment recommendations, in order to ensure the objective nature of information included in the white papers published by activists and the appropriate treatment of conflicts of interest. In this respect, it would be appropriate to specify whether the current regulations (Commission Delegated Regulation (EU) 2016/958 of 9 March 2016) already apply in such context. Otherwise, the Commission recommends that activists apply similar rules as part of their campaign. [...]
- ▶ **RECOMMENDATION 3:** In order to ensure fair dialogue between issuers and activists, the latter should refrain from making any communications or publications during the "quiet periods" to which issuers are subject. Cumulatively, the conditions governing the way issuers can respond in these circumstances could be clarified.

## 2. Rules regarding short selling

- Although this practice seems remote from the methods traditionally used by activist shareholders, most of which take a long-only approach, it could be useful to carry out a new assessment of the system introduced by regulation (EU) 236/2012 given the recent rise in short selling<sup>57</sup>.
- This new assessment could, as the case may be, give greater precision to the current system, which is limited to a simple threshold crossing disclosure<sup>58</sup>, and could supplement it **with a declaration of intent in the event that certain ownership thresholds are crossed or by aggregate disclosures in certain situations (particularly reflecting agreements**

57. Supervision of short selling is one of the main topics of recommendations made by the Assemblée Nationale's fact-finding mission: E. WOERTH, B. DIRX, *Rapport d'information n° 2287 sur l'activisme actionnarial ("Report n° 2287 on shareholder activism")*, 2019.

58. In particular, consideration was given to (i) setting out in the threshold crossing disclosure the type of transaction resulting in the threshold being crossed and the type of instruments ensuring delivery on the unwinding date, (ii) providing certain information on the holding of financial instruments like CDSs and convertible bonds, whose valuation is correlated with that of the forward sale agreement or (iii) giving information in the event that a simultaneous position is taken on debt instruments.

or instances of acting in concert when making threshold crossing disclosures). The threshold crossing declaration should specify all positions held by the shareholder that are close to short positions, such as puts.

- Consideration could be given to including financial instruments such as credit default swaps (CDSs) or convertible bonds – whose valuation is correlated with that of the forward sale agreement, and which forms part of a market participant's net exposure to a listed company – when calculating short positions subject to threshold crossing disclosures<sup>59</sup>.
- To combat excessive use of short selling, the AMF should have greater power to give directions where price manipulation is taking place, and particularly in the event of behavior that "is likely to secure the price of [...] financial instruments [...] at an abnormal or artificial level"<sup>60</sup> without it being necessary, according to the Commission, to introduce a presumption of abnormal market functioning where short-selling of a financial instrument exceeds certain limits<sup>61</sup>.
- Finally, it could be a good idea to force short sellers to disclose the identity of the investors who lent the securities. A specific rule could also apply to institutional investors in order to increase accountability where securities lending/borrowing arrangements are used, with lenders being forced to be accountable for their decisions during an activist campaign.
- Finally, it could be a good idea to force short sellers to disclose the identity of the investors who lent the securities. A specific rule could also apply to institutional investors in order to increase accountability where securities lending/borrowing arrangements are used, with lenders being forced to be accountable for their decisions during an activist campaign.

► **RECOMMENDATION 4:** Current regulations regarding the **transparency of short positions** could be supplemented by (i) the disclosure of all positions held by the shareholder that are close to short positions (puts, etc.), (ii) a declaration of intent in the event that certain ownership thresholds are crossed, (iii) aggregate disclosures in certain situations (in particular in the event that investors are acting in concert within the meaning of threshold crossing declarations) and (iv) the disclosure of the identity of the investors lending their shares to the activist. The regulations on threshold crossing could be strengthened if necessary (deadlines, content).

59. Taking a similar view, see: E. WOERTH, B. DIRX, *Rapport d'information n° 2287 sur l'activisme actionnarial* ("Report n° 2287 on shareholder activism"), 2019, recommendation n°. 9.

60. Article 12 of MAR.

61. Taking a contrary view, see: E. WOERTH, B. DIRX, *Rapport d'information n° 2287 sur l'activisme actionnarial* ("Report n° 2287 on shareholder activism"), 2019, recommendation n°. 9.

### 3. Supervision of securities lending/borrowing at the time of an AGM

- For a long-term activist, securities lending/borrowing arrangements make it possible to acquire a large number of shares just before an AGM in order to strengthen its position in the meeting, without being exposed to the related economic risk. As such, the practice runs counter to a guiding principle of company law, which is that shareholders are given the right to take part in collective decisions as a result of and in proportion to their economic exposure. However, there are several examples showing that it is legally possible to separate economic exposure from the voting rights attached to the shares<sup>62</sup>.
- Having voting rights exercisable only by the lender and suspending voting rights for the borrower of securities had been considered in the report by the AMF's working group on securities lending/borrowing transactions, while emphasizing the difficulties in implementing such arrangement<sup>63</sup>. Although having voting rights only exercisable by the lender is ruled out, because of the major technical difficulties mentioned at the time, the suspension of voting rights could be reconsidered<sup>64</sup>. The suspension could depend on a timing criterion (only concerning shares acquired a certain time before the AGM) and would be applied by the issuer based on lending/borrowing disclosures that must be made, failing which voting rights will be withdrawn (article L. 225-126 of the French Commercial Code). Consideration could also be given to reassigning shares to the lender during the AGM period, which is the solution adopted by certain asset management companies<sup>65</sup>.
- Other deterrent punishments had been discussed: having a commercial court place securities in escrow as an interim measure, legally suspending voting rights at the request of the company, a shareholder or the AMF, and pecuniary sanctions.
- As the Mansion report highlighted, the terms of this framework for voting rights would have to be set to ensure the proper functioning of the securities lending market, and to avoid increasing the legal risks relating to AGMs. Legislative intervention would be necessary.

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62. Article L. 228-3-2 of the French Commercial Code states that a registered intermediary may, under a general securities management mandate, pass on the votes or powers of a non-resident shareholder in an AGM. This is also the case with article 2023 of the French Civil Code, which gives a trustee the broadest powers over trust assets, with the trustee's exercise of voting rights being separated from the beneficial owner's economic interest. Finally, it is the case with agents that usually have no economic interest (M. THOUCH, T. AMICO, "Empty voting", *Revue de Droit bancaire et financier* 2008, n° 5, p. 7).

63. AMF, *Rapport sur les opérations de prêt emprunt de titres en période d'assemblée générale d'actionnaires* ("Report on share lending/borrowing transactions around the time of an AGM"), industry group chaired by Yves Mansion, 2008, p. 12 and following.

64. Taking the view that lending/borrowing leads to obtaining voting rights by deception: A. COURET, "La promotion du droit de vote : vers une authentique démocratie actionnariale ?" ("Promoting voting rights: towards genuine shareholder democracy?", *RJ com.* 2018, n° 6, p. 457).

65. This is the solution adopted in certain codes of conduct, such as the AFG's code of ethics for collective investment schemes and individual investment management mandates, and by the European Securities Markets Expert Group (ESME, *First report of ESME on the Transparency Directive*, 5 December 2007).

- The investment fund managers we interviewed said that they do not want to give up lending/borrowing, but an interesting contractual practice has developed: some lending agreements forbid the borrower from using the voting rights attached to the shares they are borrowing. This is the solution recommended by the *European Corporate Governance Forum*<sup>66</sup> and by the *International Corporate Governance Network*<sup>67</sup>, which publishes a securities lending code. The UK Money Markets Code also has certain provisions relating to securities lending, stating that shares must not be borrowed for the sole purpose of using their voting rights. The practice of including a voting ban in standard agreements could be widespread.
- It is above all the inapplicability of the law (Article L. 225-126 regarding the declaration of securities lending and borrowing during a general meeting) which calls for greater understanding. Discussions should be held, if necessary at European level, to develop greater transparency in securities lending and borrowing<sup>68</sup>.

► **RECOMMENDATION 5:** Further consideration could be given to **depriving the borrower of the voting rights attached to the shares lent**, as an effective way of combating “empty voting”. To avoid the need for legal recourse, the practice adopted by certain institutional investors of setting out that prohibition **directly in their securities lending agreements** could be encouraged.

#### 4. Extending regulations regarding the active collection of proxies to activist campaigns

- Rules regarding the active collection of proxies (articles L. 225-106-1 and following and R. 225-82-3 of the French Commercial Code) resulting from the Shareholder Rights Directive<sup>69</sup> could be used to **supervise proxy fights** for long-term activists. Although an activist does not always explicitly seek proxies and so does not take on any fiduciary duty, a public campaign around the time of an AGM is intended to get other shareholders to support its investment argument and obtain favorable votes in the AGM. The issues are therefore sufficiently similar to require that activists during a campaign also show “an adequate degree of reliability and transparency”<sup>70</sup>. In that respect, the definition of the active collection of proxies already seems broad enough to include any solicitation that encourages shareholders to grant a proxy, without

66. *European Corporate Governance Forum*, Annual Report 2008, p. 3 et 4.

67. ICGN, *Securities Lending Codes of Best Practice* (2016).

68. Encouraging financial centers to develop transparency tools and supporting the development of a centralized securities lending/borrowing market: E. WOERTH, B. DIRX, *Rapport d'information n° 2287 sur l'activisme actionnarial* (“Report n° 2287 on shareholder activism”), 2019, recommendation n°. 10.

69. Directive 2007/36/EC of 11 July 2007 on the exercise of certain rights of shareholders in listed companies.

70. Directive 2007/36/CE of 11 July 2007, op. cit., paragraph 10 of the preamble.

necessarily having that purpose or effect<sup>71</sup>. The same requirement for transparency could apply to an activist shareholder that has submitted draft resolutions or has publicly opposed a draft resolution proposed by the board of directors in the AGM. This would require the shareholder to clarify the rationale for its vote, to comply with it in the AGM (article L. 225-106-2 of the French Commercial Code), and to manage any **conflicts of interest** to which it may be exposed. More broadly, this investor should also disclose any relationship or circumstance that could be reasonably thought to harm the objectiveness of the information shared, including the shareholder's potential conflicts of interest with the issuer to which its campaign relates directly or indirectly. Establishing such systematic communication would be consistent with the rules governing *proxy fights* in the United States.

- In addition to existing rules, several ideas have emerged. To mirror (i) the obligation for a company to be managed in accordance with its corporate interest, in a way that takes into account the social and environmental issues of its business (article 1833(2) of the French Civil Code), and (ii) the obligation to prepare a statement of extra-financial performance (article L. 225-102-1 of the French Commercial Code), the activist could be required to explain to what extent its approach considers the company's social interest and takes into consideration the social and environmental issues related to the company's business.
- Finally, an activist that has embarked upon a public campaign should publish all documents that it sends privately to other shareholders, not just to ensure equal information for all shareholders but also to ensure the loyalty of the dialogue with the issuer.

► **RECOMMENDATION 2:** [...] It is also proposed that, during a public campaign, the activist (i) explains to what extent its approach considers “the company's social interest and takes into consideration the social and environmental issues related to the company's activity” and (ii) publishes all documents that it sends privately to other shareholders. Finally, the legal framework applicable to activist campaigns could be partly inspired by the rules on **active solicitation of proxies** to ensure transparency regarding the rationale for their vote.

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71. A. OMAGGIO, “Transposition de la Directive relative aux droits des actionnaires de sociétés cotées” (‘Transposition of the Shareholder Rights Directive’), JCP G 2011, p. 331.

## CHAPTER II

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# IMPROVING DIALOGUE BETWEEN ISSUERS AND INVESTORS

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- To meet investor expectations, the creation of a shareholder dialogue platform (A) and, more generally, the promotion of shareholder dialogue ahead of and during the campaign (B) would be useful developments. From the point of view of improving corporate governance, investor involvement in the process of preparing the corporate governance code should be discussed (C).

### **1. Collective dialogue: creation of a shareholder dialogue platform**

- Without replacing individual dialogue, the creation of a shareholder dialogue platform would help organize collective “engagement” with issuers. A platform of this kind would be an appropriate framework for responding to shareholder requests and for engaging in an ongoing dialogue, particularly regarding governance.
- Several initiatives adopted by financial centers provide valuable insights.
- The UK Investor Forum is useful (i) for professional investors who find it hard to access directors and (ii) as a way of resolving disputes that cannot be resolved through individual dialogue. It is probably the most structured and well developed form of organized collective dialogue, with a specific budget and governance. In practice, after sending a letter to the company to present the views of shareholders, a member of the Investor Forum meets management to present to it the joint requests made by those shareholders. The Investor Forum is an attractive framework for collective dialogue because acting in concert should logically be ruled out in this case. Collective engagement taking place through the Investor Forum is disclosed after the fact. We are obviously not proposing to duplicate the Investor Forum exactly, but to draw inspiration from it and adjust it to the specific features of the Paris market.
- The Principles for Responsible Investment (PRI) also constitute innovative market practice. Investors from around the world have signed up to the PRI, and signatories receive a number of services. They include PRI-coordinated engagements, which seek to maximize investors’ collective impact regarding ESG criteria. In particular, investors can appoint a single investor to lead the dialogue with an issuer, a lead investor responsible for meeting with the company and setting priorities. Generally, PRIs do not focus on a particular company

but rather seek to solve identified issues in a global way, such as the fight against corruption or tax evasion. PRIs make extensive use of digital tools to disseminate information and to collaborate. The approach is even more welcome as several companies have declared that they are seeking responsible investors who are particularly attentive to ESG criteria.

- In the Netherlands, *Eumedion* provides its members with a platform to organize collective dialogue with listed companies. A lead investor is appointed to monitor a given company and lead the dialogue with it, with other investors able to opt in and join the dialogue.
- In Japan, the Institutional Investors Collective Engagement Forum (IICEF) organizes collective dialogue with the aim of ensuring better mutual understanding but not to demand significant changes in a company's business. After an exchange of letters with the IICEF, the issuer meets the investors who wish to attend.
- Collective dialogue is also organized by the Carbon Disclosure Project (CDP), Shareholders for Change (SfC), the Access to Medicine Foundation (ATM) and the Climate Action 100+ initiative as well as, more informally, by the International Corporate Governance Network (ICGN), the European Fund And Asset Management Association (EFAMA) and the European Sustainable Investment Forum (EUROSIF).
- Using these methods, issuers could head off any activist campaign and, if a campaign were to take place, hold an effective dialogue with shareholders. Such a platform would be especially attractive for activists that complain that they have no way of holding discussions with other shareholders outside the AGM, whereas such discussions are essential to a campaign's success. For the company, collective engagement also has the benefit of letting the company know the joint demands of its shareholders, and preventing the dialogue being dominated by any one shareholder. Efforts should be made to ensure that the dialogue platform itself is not dominated by certain investors at the expense of others.
- The success of such a platform depends on the broadest investor involvement, and must not be limited to French investors. As a result, the platform should ideally organize the dialogue at the European level, in order to bring together investors and issuers from across Europe. A non-mandatory arrangement involving investor associations (AFG, PRI) would be preferable, with the use of digital tools to facilitate discussion.
- Depending on the initiative, the shareholder dialogue platform could cover the whole of Europe or just France. A meeting organized by France's Ministry for the Economy and Finance would promote the dialogue platform, as happened with the CSR Platform introduced by the Prime Minister as part of the France Stratégie initiative in 2013. The

European Commission could also get involved, organizing a platform at the European level.

- In addition, institutional investors and asset management companies should all indicate in their voting policies the extent to which they take into account activists' demands.

► **RECOMMENDATION 6:** Collective investor engagement might also be promoted by setting up a **shareholder dialogue platform** enabling investors to pool their demands and engage in dialogue, where appropriate, with the issuer.

## 2. Strengthening shareholder dialogue ahead of a campaign

- The Club des Juristes has already worked on shareholder dialogue. In particular, it has proposed that the AFEP-MEDEF code include a recommendation that issuers set up a policy of dialogue involving the board of directors<sup>72</sup>. It has also suggested to the AFG that it hold discussions with a view to adopting a recommendation in favor of dialogue between directors and shareholders<sup>73</sup>. No intervention by the legislator or regulatory authority has been proposed<sup>74</sup>. Since it was revised in June 2018, the AFEP-MEDEF code has a specific provision in this area: "Shareholder relations with the Board of Directors, particularly with regard to corporate governance aspects, may be entrusted to the Chairman of the Board of Directors or, if applicable, to the Lead Director. He or she shall report on this task to the Board of Directors" (section 4.4). However, in its 2018 report, the Haut Comité de Gouvernement d'Entreprise (HCGE) considered that this wording of the Code remains slightly below the British code, which invites the Chairman to discuss with major shareholders, not only on governance but also on strategy and performance<sup>75</sup>.
- Despite these interventions and the undeniable advantages of dialogue for issuers<sup>76</sup>, the activists we interviewed still highlighted the difficulties they had in holding discussions with directors and executive managers, while issuers expressed regret that shareholders do not engage more in regular dialogue<sup>77</sup>. However, only regular, high-quality dialogue at an early stage is capable of preventing activist campaigns that may destabilize the issuers concerned. In addition, once the activist campaign is underway, constructive dialogue with the activist and other shareholders remains the most appropriate response.

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72. Club des Juristes' Ad Hoc Commission on Director-Shareholder Dialogue, December 2017, p. 62.

73. *ibid.*

74. *ibid.*

75. HCGE, report 2018, p. 24.

76. See below, appendix 3.

77. See below, appendix 3.



- The previous work done by the Club des Juristes sought precisely to provide reassurance by removing each potential obstacle to director/shareholder dialogue: such dialogue is not prevented by either legal representation, the hierarchy of corporate bodies<sup>78</sup>, the collegial nature of the board<sup>79</sup> or confidentiality requirements<sup>80</sup>, provided that inside information is not disclosed<sup>81</sup>.
- Our survey confirms that issuers are open to dialogue, including at the highest levels of management<sup>82</sup>. Both the survey and the activists we interviewed state that constructive discussions with management and the board are always preferred<sup>83</sup>. It is only when they fail that the campaign becomes public.
- As a result, we propose making this dialogue a compulsory preliminary stage before a public activist campaign is launched by a short or long-term activist. For example, before a white paper is disseminated, issuers must have a brief time to respond to the arguments raised by the activist and correct any errors. That obligation is similar to the substantive legal provisions that already require proxy advisors and rating agencies to engage in dialogue with issuers, precisely because their announcements can produce a shock<sup>84</sup>.
- For an activist with a short position, that dialogue would probably be more rapid. It would essentially serve to check the accuracy of the information that interests the activist.
- The rule rendering dialogue a compulsory preliminary stage before a public activist campaign is launched could take the form of a recommendation made by the AMF.
- To improve the quality of dialogue, stakeholders could agree common principles and a shareholder dialogue guide could be prepared jointly by issuers, investors, regulators and other market participants<sup>85</sup>.

► **RECOMMENDATION 7:** The Commission noted the unanimous view among the people it interviewed that shareholder dialogue is the best way to prevent activist campaigns. Following on from the Club des

78. Club des Juristes' Ad Hoc Commission on Director-Shareholder Dialogue, December 2017, p. 30.

79. Barring the disclosure of misleading information: *ibid.*, p. 32.

80. *ibid.*, p. 33.

81. *ibid.*

82. See below, appendix 3.

83. See below, appendix 3.

84. Article 3 undecies, 2°, f of Directive 2007/36/EC of 11 July 2007 on the exercise of certain rights of shareholders in listed companies; Annex I, Section D, 3° of Regulation (EC) 1060/2009 of 16 September 2009 on credit rating agencies.

85. Taking a similar view, see: E. WOERTH, B. DIRX, *Rapport d'information n° 2287 sur l'activisme actionnarial* (*Report n° 2287 on shareholder activism*), 2019, recommendation n°. 7.

Juristes' work on dialogue between directors and shareholders, the Commission recommends having a systematic **dialogue process prior to the launching of a public activist campaign**. For example, before activists disseminate a white paper, issuers must have sufficient time to respond to the arguments raised and correct any errors before public release, similarly to what has been imposed on proxy advisors and rating agencies.

In order to improve the quality of the dialogue, involved parties could agree on common principles and issuers, investors, regulators and other market participants could jointly develop a **guide to shareholder dialogue**.

### 3. The method used to prepare the corporate governance code

- One activist fund we interviewed emphasized the frequent criticism of the methods used to prepare the AFEP-MEDEF code. Since 2017, once the draft of the revised code has been prepared jointly by AFEP and MEDEF, it is made public so that any interested party can have input (section 28 of the code). That public consultation is carried out under the supervision of a qualified and independent person. While taking into account the various contributions, however, AFEP and MEDEF – which represent businesses – retain control over the code's final wording. Some stakeholders, including investors, have criticized the fact that the process merely involves consultation, and have demanded that the code be jointly drafted<sup>86</sup>. However, involving stakeholders in the process would raise the problem of appointing representatives for each stakeholder. In particular, it has been noted that investors do not speak with one voice.
- Corporate governance is the most common area of concern among activists. The fact that the code is prepared by organizations thought to be favorable to issuers leads to the assumption that the code's recommendations are not suited to investor needs and serve the interests of issuers and their managers, although that is debatable<sup>87</sup>.
- With a view to rebalancing the rights and obligations of issuers and investors, the method for preparing the corporate governance code could therefore be re-examined, to ensure that it is accepted as widely as possible by investors. It could for example include the creation of an investor committee with which AFEP and MEDEF could hold discussions before the draft code is published.

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86. B. FAGES, *Summary of the responses to the public consultation of 26 February 2018 on the revision of the corporate governance code of listed corporations*, 26 June 2018, n°. 75, available on the MEDEF website.

87. *ibid.*

► **RECOMMENDATION 8:** The method for preparing the corporate governance code could also be re-examined, to ensure that it is accepted as widely as possible by investors. **Investors could thus meet in a single committee** to speak to issuers with one voice.

## CHAPTER III

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### DISCUSSIONS ABOUT THE ROLE OF THE AMF AND ESMA

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■ The topic of activism provides an opportunity to propose changes to matters that are not specific to activism, but that are highlighted by activist campaigns. In that respect, the role of the AMF to ensure a fair framework for activist campaigns is particularly crucial.

#### 1. Involvement of the AMF

■ Although the demands on it are great, the AMF has limited capacity to intervene in an activist campaign. The AMF's role should be strengthened, especially since Paris is in the process of becoming Europe's next leading financial center post-Brexit.

■ At the moment, the AMF is limited by its financial resources, which should increase as its brief expands. Whereas tax receipts allocated to the AMF amounted to €120 million in 2018, its budget remains capped and any surplus revenue goes back to the central government budget each year. In its 2018 annual report, the AMF stated that its financial resources cap – €94 million in 2016, 2017 and 2018 – was not enough for it to meet the various challenges it faces, particularly in relation to new regulations. However, France's 2019 finance act raised the revenue cap to €96.5 million. That cap will have to be re-examined in 2020 if the AMF is to continue meeting its workload, which increases every year<sup>88</sup>.

■ It is also limited by its powers. The parties involved in a campaign need an immediate response, since investigations and sanctions do not operate on the same timescale as the market<sup>89</sup>. The AMF must therefore increase its analysis resources and become more responsive.

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88. Taking a similar view, see also: E. WOERTH, B. DIRX, *Rapport d'information n° 2287 sur l'activisme actionnarial* ("Report no. 2287 on shareholder activism"), 2019, recommendation n°. 13.

89. Taking a similar view, see also: E. WOERTH, B. DIRX, *Rapport d'information n° 2287 sur l'activisme actionnarial* ("Report no. 2287 on shareholder activism"), 2019.

- In line with the Commission's balanced approach, it took a particular interest in the administrative injunction procedure provided for in Article L. 621-18, paragraph 3 of the French Monetary and Financial Code which currently only concerns issuers. On this basis of this text, the AMF may, in particular, "order issuers to make corrective or additional publications in the event that inaccuracies or omissions have been identified in the published documents". In the event of refusal or inertia on the part of the addressee of the injunction, the AMF may even "make these corrective or additional publications itself". By symmetry, this injunction could be made applicable to short or long-term activists taking a public position on an issuer. This extension would ensure the effectiveness of the transparency measures proposed by the Commission and would also enable the AMF to react quickly when an activist campaign is launched.

► **RECOMMENDATION 9:** The Commission recommends that consideration be given to **strengthening the AMF's resources and role**. To ensure a fair framework for activist campaigns, the AMF's powers under Article L. 621-18 of the French Monetary and Financial Code could be extended to require investors, not just issuers, to correct or supplement their public statements.

## 2. Uncertainties about the notion of acting in concert

- The notion of acting in concert, within the meaning of article L. 233-10 of the French Commercial Code, is not easy to understand in relation to an activist campaign launched by a short or long-term activist. Acting in concert occurs either when an agreement is formed between the signatories, or when a new partner joins an existing agreement.
- In the specific context of an activist campaign, various people we interviewed mentioned a "wolf pack" effect, which amplifies the campaign<sup>90</sup>.
- Does this constitute acting in concert?
- When investors work together as part of a collective commitment, they are not acting in concert if each of them can change its opinion and vote at its own discretion<sup>91</sup>. Shareholders can work together, undertake to work together, share the same opinion about company policy and vote in the same way without acting in concert. However, although

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90. J. C. COFFEE, JR. & D. PALIA, *The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance*, Columbia Law School Working Paper n°. 521, 2015.

91. The Brussels appeal court, in its judgment of 6 August 1992, said that "a simple gentleman's agreement or de facto situation arising from parallel behavior among shareholders sharing the same strategy, without prior consultation, would be insufficient".

persons will only be deemed to be acting in concert where there is an agreement requiring the partners to implement a policy that is common to them all, evidence of acting in concert can take any form, including the behavior of the partners.

- Case law has confirmed that an instance of acting in concert could be deduced from the attitude of shareholders using the “body of evidence” technique. In particular, the AMF considered individuals to be acting in concert<sup>92</sup> where “*the behavior reflected an organized and convergent approach aimed at having the AGM vote in favor of changes to Eiffage’s board of directors for its benefit*”, as confirmed in the *Eiffage v. Sacyr*<sup>93</sup> case. The judgment in the *Riber* case states that where shareholders have agreed to try to have several members appointed to the supervisory board, while conferring between themselves about the company’s management for several months without changing it, they can be regarded as acting in concert<sup>94</sup>.
- The case law uses the notion of an “organized collective approach”, which assumes that the entities in question act voluntarily as part of a strategy, as opposed to a simple co-occurrence of behavior, which would not constitute acting in concert.
- ESMA could thus clarify the notion of acting in concert in the context of an activist campaign, where several shareholders act in a parallel fashion as part of an organized and convergent approach.
- The white list technique adopted by ESMA in relation to the Takeover Directive could be used to clarify this situation<sup>95</sup>.

► **RECOMMENDATION 10:** The Commission recommends clarifying behaviors likely to be characterized as acting in concert in the context of an activist campaign, along the lines of the white list drawn up by ESMA for the Takeover Directive (ESMA, 12 November 2013, Information on shareholder cooperation and acting in concert under the Takeover Bids Directive, ESMA/2013/1642).

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92. AMF, 26 June 2007, n°: 207C1202.

93. Paris, 2 April 2008.

94. Com., 9 January, 2019, n°: 16-14727.

95. ESMA, 12 November 2013, *Information on shareholder cooperation and acting in concert under the Takeover Bids Directive*, ESMA/2013/1642.

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## CONCLUSION

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- At the end of its work, the Commission has reached the conclusion that the development of shareholder activism, unlike index management, does not require major legislative or regulatory reform, because of the collateral effects on the image of the market that such reform could have.
- The multidisciplinary composition of the Commission has also enabled it to adopt a balanced approach based on consensus. The Commission thus mainly recommends adjustments to stock market regulation and market practices to regulate the conduct of activists' campaigns and to improve engagement between issuers and investors. Public campaigns are often the consequence of the absence or failure of such engagement and it is in these circumstances that the most delicate issues arise with regard to the transparency of positions, fair trade and the proper functioning of the market.
- The Commission therefore focused on the conditions for conducting activist public campaigns and not on the activists themselves, whose legal characterization may be difficult given the diverse nature of activists. The Commission's initial recommendations thus concern the legal framework for activist campaigns by promoting greater transparency of their economic exposure and substantive positions.
- The Commission considers that promoting the use of soft law would allow good practices to spread among investors and issuers alike. In this respect, market regulators, such as the AMF and ESMA, have an essential role to play in regulating shareholder activism, through their "influential authority". It is also the responsibility of institutional investors and "index" asset managers to contribute, through their investment policy, to encouraging compliance with these recommendations by issuers and activist investors.
- Finally, it seems necessary to strengthen the AMF's resources and powers - particularly in relation to injunctions - to prevent or put an end to crisis situations.
- The Commission is aware that the possible implementation of these recommendations will be over time and may evolve as practices change. It is therefore ready to participate in regular monitoring of the drafting of texts and the implementation of the recommendations of this report.

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# APPENDIX 1

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## LIST OF INTERVIEWEES

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- ▶ **Patricia Barbizet**, Director
- ▶ **Catherine Berjal**, AIMA
- ▶ **Paul Chandler**, Director of stewardship, Principles for Responsible Investment
- ▶ **John C. Coffee**, Professor at Columbia Law School and director of the Center on Corporate Governance
- ▶ **Anne-Sophie d'Andlau**, Partner, deputy CEO, CI-AM
- ▶ **Odile de Brosse**s, Head of the legal department, AFEP
- ▶ **Sébastien de la Rivière**, Portfolio manager, Elliott Advisors
- ▶ **Édouard Dubois**, Vice-president Investment Stewardship, Blackrock
- ▶ **Olivier Fortesa**, Portfolio manager, Amber Capital
- ▶ **Elsa Fraysse**, Asset manager, Rothschild & Cie
- ▶ **Patrick Fiorani**, Research and engagement, Glass Lewis
- ▶ **Jesse M. Fried**, Professor at Harvard Law School
- ▶ **François Funck-Brentano**, Managing partner, Lazard Frères
- ▶ **Mark Grothe**, Senior analyst, M&A and contested situations, Glass Lewis
- ▶ **Michael Herskovich**, Chairman of the corporate governance committee, AFG
- ▶ **Claire Jolly**, Head of government, Elliott Advisors,
- ▶ **Athanasia Karananou**, Head of governance issues, Principles for Responsible Investment
- ▶ **Cédric Laverie**, Head of governance research, ISS Governance
- ▶ **Christopher Leonard**, Head of legal, Elliott Advisors
- ▶ **Martin Lipton**, Attorney at law, Wachtell Lipton Rosen & Katz
- ▶ **Marie Luchet**, Continental Europe director, Principles for Responsible Investment
- ▶ **Raphaël Michonneau**, Senior analyst, Elliott Advisors
- ▶ **Andrew Ninian**, Director, stewardship & corporate governance, Investment Association
- ▶ **Joëlle Simon**, Head of legal, Medef
- ▶ **Richard Thomas**, Shareholder advisory, Lazard Frères
- ▶ **Le Quang Tran Van**, Head of financial affairs, Afep
- ▶ **Jérôme Vitulo**, Chairman of the "commercial law" commission, Medef
- ▶ **François Wat**, Managing partner, Rothschild & Cie
- ▶ **Harlan Zimmermann**, Senior partner, Cevian Capital



# APPENDIX 2

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## SUMMARY OF INVESTOR OBLIGATIONS

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The following obligations are those owed by all investors owning shares in a listed company in France and do not just relate to activists.

### **Disclosure of a non-resident shareholder's identity**<sup>96</sup>

Where the shareholder of a listed company is resident outside France, an intermediary may be registered on its behalf and use the voting rights attached to the shares concerned<sup>97</sup>.

When the account or accounts are opened, the intermediary must, at its own initiative, disclose to the account-keeper (issuer or authorized financial intermediary) that it is an intermediary holding shares for another party<sup>98</sup>.

**Before granting proxies or voting in an AGM**, the intermediary is required, at the issuer's request, to provide the list of non-resident holders of the shares to which the voting rights are attached and the number of shares held by each of them, failing which the proxies or votes will not be taken into account in the AGM<sup>99</sup>.

As regards the identification of shareholders:

- **For bearer shares**, the articles of association<sup>100</sup> may state that the issuer can ask the **central securities depository at any time**<sup>101</sup> for the identity of shareholders and the number of shares they hold<sup>102</sup>. After seeing the list, the issuer can ask whether the holders are holding shares on their own behalf or on behalf of third parties, along with information allowing it to identify the real owners;

- **For registered shares**, the registered intermediary is required to reveal the identity of the shareholders and the number of shares held by each of them **at the request of the issuer**, which may be made at any time.

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96. Articles L. 228-1 and following and R. 228-1 and following of the French Commercial Code, article L. 211-4(2) of the French Monetary and Financial Code.

97. Articles L. 225-107-1 and L. 228-3-2 of the French Commercial Code. This option is an exception to the legal principle under which only the actual owner of the shares can be recorded in the shareholder account. The PACTE act broadens the scope of this option to include securities admitted for trading on one or more multilateral trading facilities (MTFs) authorized in France, another EU member-state or a state that is party to the EEA agreement, or on a market regarded as equivalent to a regulated market.

98. Article L. 228-1(8) of the French Commercial Code.

99. Article L. 228-3-2 of the French Commercial Code.

100. Since the PACTE act, there has been no obligation for the articles of association to provide for this procedure.

101. Since the PACTE act, information requests may be sent directly to the intermediaries.

102. Article L. 228-2(II)(2) of the French Commercial Code for bearer shares and article L. 228-3(1) for registered shares.

If the rules are not followed, the shares are deprived of their voting rights and the corresponding dividend payment is delayed.

It should be noted that certain articles of association require all shares in the relevant company to be registered<sup>103</sup> or when the shareholder owns more than a certain stake in the company<sup>104</sup>.

### **Threshold crossing disclosure**<sup>105</sup>

The law requires shareholders in listed companies to make a disclosure when their stake rises above or falls below certain statutory thresholds<sup>106</sup>, starting at 5%. This disclosure, which must be made to the issuer concerned and to the AMF by the fourth trading day following the day on which the threshold was crossed, is made public.

The articles of association may contain an obligation to make disclosures when other thresholds are crossed, although the threshold cannot be less than 0.5%.

A failure to disclose the crossing of a statutory threshold is punished by automatically depriving the shares of their voting rights for a period of 2 years from the date the situation is remedied, while a failure to disclose the crossing of a threshold contained in the articles of association can only cause the shares to be deprived of their voting rights, if the articles of association provide for that punishment, on the request of a shareholder holding a certain proportion of the company's capital.

### **Declaration of intent**<sup>107</sup>

An investor must, when crossing the 10%, 15%, 20% and 25% ownership thresholds, disclose for the following six months the objectives that it is intending to pursue, and in particular state:

- whether it is planning to stop or continue buying shares and to acquire control over the company,
- whether it intends to request the appointment of directors, members of the management board or members of the supervisory board,
- its intended strategy with respect to the issuer along with the transactions to implement it, such as a merger, reorganization or issue of securities.

The AMF makes that information public, along with any update if the shareholder's intention changes within the six-month period.

Shareholders that do not make those disclosures as required could see its shares exceeding the stake that was not correctly disclosed

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103. Article 6.1 of ArcelorMittal's articles of association and 7(1) of Michelin's articles of association.

104. Article 7(3) of Alcatel-Lucent's articles of association.

105. Articles L. 233-7, L. 233-9, L. 247-2 and R. 233-1 of the French Commercial Code, articles 223-14 and following of the AMF's General Regulation.

106. 5%, 10%, 15%, 20%, 25%, 30%, 1/3, 50%, 2/3, 90% and 95%.

107. Articles L. 233-7(VII) and R. 233-1-1 of the French Commercial Code, article 223-17 of the AMF's General Regulation.

deprived of their voting rights for a period of 2 years from the time proper notification was given.

### **Disclosure of a planned transaction**

Any person that is preparing, on its own behalf, a financial transaction liable to have a significant impact on the price – such as a substantial increase in its stake in a company<sup>108</sup> – must disclose the characteristics of the transaction to the public as soon as possible<sup>109</sup>.

### **Disclosure of temporary transfers of securities (“empty voting”)<sup>110</sup>**

Temporary assignments or any transaction granting the right or imposing an obligation to resell or return shares representing more than 0.5% of the voting rights must be disclosed to the issuer concerned and to the AMF by the date on which shareholders are registered prior to the AGM, stating the identity of the assignor, the timeframe of the transaction agreement and any voting agreement, failing which the shares will lose their voting rights. That information is made public.

### **Transparency of securities financing transactions and of reuse<sup>111</sup>**

#### **- Securities financing transactions<sup>112</sup>**

Counterparties, financial<sup>113</sup> or non-financial<sup>114</sup>, must disclose to the supervisory authorities the elements of any securities financial transactions that they have carried out, along with any amendment to or termination of such transactions, to a central database registered with ESMA and retain a copy.

UCITS management companies, UCITS investment companies and AIF managers inform investors about their use of securities financing transactions and total return swaps in periodic reports and precontractual documentation (including prospectuses).

#### **- Reuse of securities pledged as collateral<sup>115</sup>**

To reuse financial instruments received under a collateral arrangement, the counterparty must inform the party receiving the guarantee in writing

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108. AMF Enforcement Committee, 25 June 2013, *LVMH*.

109. Article 223-6 of the AMF's General Regulation. If confidentiality is temporarily necessary to carry out the transaction and if the person is able to ensure such confidentiality, he may assume responsibility for deferring disclosure of those characteristics.

110. Article L. 225-126 of the French Commercial Code and article 223-38 of the AMF's General Regulation.

111. Regulation (EU) 2015/2365 of the European Parliament and of the Council of 25 November 2015 on transparency of securities financing transactions and of reuse and amending Regulation (EU) N° 648/2012.

112. Defined as a "a repurchase transaction", "securities or commodities lending and securities or commodities borrowing", "a buy-sell back transaction or sell-buy back transaction" and "a margin lending transaction".

113. Investment company, credit institution, insurance company, UCITS, AIF etc.

114. Company other than financial counterparties operating in the field of securities financing transactions and the reuse of securities pledged as collateral.

115. Defined as "the use by a receiving counterparty, in its own name and on its own account or on the account of another counterparty, including any natural person, of financial instruments received under a collateral arrangement, such use comprising transfer of title or exercise of a right of use in accordance with Article 5 of Directive 2002/47/EC but not including the liquidation of a financial instrument in the event of default of the providing counterparty".

of the risks of the transaction and obtain the express prior consent to the reuse of the securities from the party receiving the guarantee.

***Disclosure of net short positions in the event of short selling*<sup>116</sup>**

Each holder of a net short position equal to or greater than 0.2% of the capital must disclose it to the AMF within one trading day, and the disclosure is made public by the AMF for positions of over 0.5%.

Each time the position then crosses a threshold that is a multiple of 0.1% of the capital, upward or downward, that change in position should be disclosed.

***Disclosure to the Banque de France*<sup>117</sup>**

Transactions through which non-residents acquire at least or cross the threshold of 10% of a French company's capital or voting rights must be disclosed within 20 business days of the day they take place, where their amount exceeds €15 million.

***Disclosure of clauses in shareholder agreements*<sup>118</sup>**

Any clause in an agreement setting out preferential terms for the sale or purchase of shares in a listed company and relating to at least 0.5% of the issuer's capital or voting rights must be disclosed to the company concerned and to the AMF within 5 trading days of the agreement being signed. That information is made public.

***Collection of proxies*<sup>119</sup>**

Any person that actively collects proxies by proposing, in any form, to receive powers to represent shareholders in a general meeting must publish a "voting policy" including: the principles to which the proxy intends to refer when exercising the voting rights; a presentation of its voting policy broken down by sections corresponding to the various types of resolutions submitted to general meetings; a description of the procedures intended to detect, prevent and manage conflicts of interest that could affect the independent exercise of voting rights.

If the person breaches those rules, it may not take part in general meetings as a proxy for three years.

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116. Article 6 of Regulation n° 236/2012 of 14 March 2012 on short selling and certain aspects of credit default swaps, Commission Delegated Regulation (EU) 2016/958 of 9 March 2016 supplementing Regulation (EU) N° 596/2014 of the European Parliament and of the Council with regard to regulatory technical standards for the technical arrangements for objective presentation of investment recommendations or other information recommending or suggesting an investment strategy and for disclosure of particular interests or indications of conflicts of interest, articles 20 and following of Annex I of Regulation n° 596/2014 of 16 April 2014 on market abuse and article 223-37 of the AMF General Regulation.

117. Article L. 141-6 of the French Monetary and Financial Code, decision n°. 2007-01 of 11 April 2007 of the Monetary Committee of Banque de France's General Council, decision n°. 2009-04 of 28 December 2009 of the governor of the Banque de France on the disclosure of statistical information by financial intermediaries for the calculation of the balance of payments and external position.

118. Article L. 233-11 of the French Commercial Code and article 223-18 of the AMF's General Regulation.

119. Articles L. 225-106-1 and following and R. 225-82-3 of the French Commercial Code.

### **Transparency regarding the voting policies of investment funds<sup>120</sup>**

Asset management companies must disclose their practices as regards exercising voting rights. The AMF also recommends that investment recommendations be prepared honestly, fairly and impartially and presented clearly and precisely, with the identification of any conflicts of interest.

The PACTE act has increased the transparency requirements. Asset management companies and investment companies, in particular, must now prepare and publish a **shareholder engagement policy** describing how they integrate their role as a shareholder within their investment strategy, and publish each year a **report** on how they implement that policy.

Institutional investors must disclose *“how the main elements of their equity investment strategy are consistent with the profile and duration of their liabilities, in particular long-term liabilities, and how they contribute to the medium to long-term performance of their assets”*.

Where an institutional investor forms a portfolio management mandate or a mandate to subscribe to a collective investment with an asset management company or investment company:

- the institutional investor must publish the information relating to the asset management mandate;
- the asset manager must disclose to the institutional investor *“information on how its investment strategy and the implementation thereof comply with the agreement and contribute to the medium and long-term performance of the assets of the investor that is a party to the agreement or of the collective investment”*.

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<sup>120</sup>. Articles L. 533-22 and following and D. 533-16-1 of the French Monetary and Financial Code, articles 319-21 and following and 321-132 and following of the AMF's General Regulation

# APPENDIX 3

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## SURVEY SENT TO EUROPEAN ISSUERS

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### Introduction

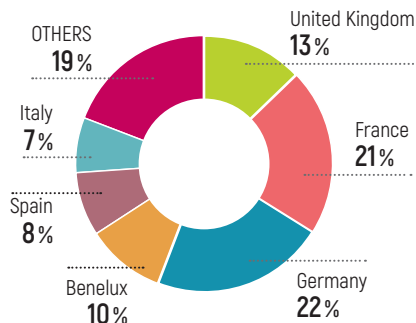
The growth of shareholder activism in Europe has become an important focus for political authorities as well as regulators.

In order to contribute to the debate, the French legal think-tank, the *Club des Juristes*, has set up a Commission, chaired by Michel Prada (former Chairman of the AMF, the French securities regulator).

The Commission's aim is not to take sides in the debate between supporters and critics of shareholder activism. Its objective is to identify behavior that could be harmful to the transparency, fairness and proper functioning of the market, and to examine, from a technical perspective, the legal framework and good practices that could be applied, when necessary, to shareholder activist campaigns.

The purpose of this survey is to better understand the position of issuers in this respect. It was sent by Exane BNP Paribas to more than 2000 Investor Relations Managers and Chief Financial Officers of European corporate issuers to know their experience about shareholder activism and, more generally, shareholder engagement.

**195 companies have answered to the online survey from July 10, 2019 to August 1, 2019, including heads of IR or CFOs. 80 preferred to remain anonymous. Within the others, 13% belong to issuers from United Kingdom, 21% from France, 22% from Germany, 10% from Benelux, 8% from Spain and 7% from Italy.**

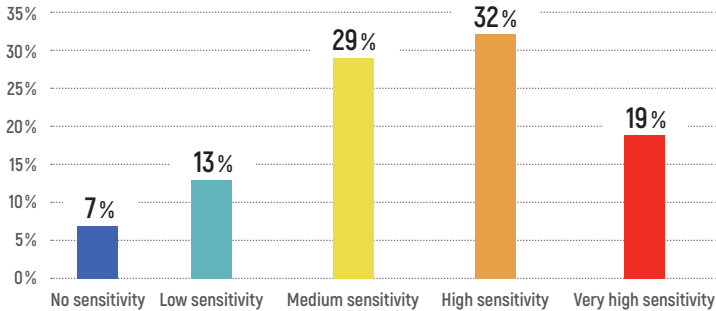


### Key learnings:

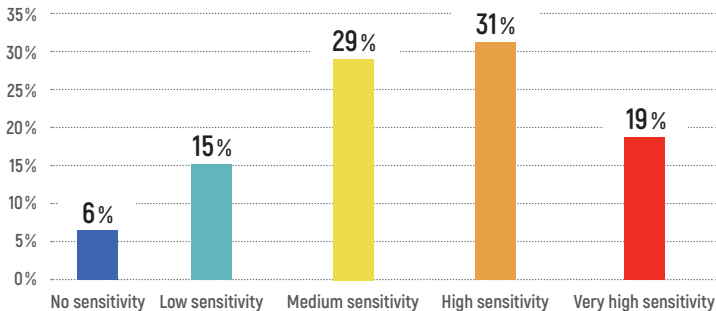
- Shareholder activism has become a highly sensitive issue for managements.
- Many issuers have already implemented internal actions to deal with shareholder activism.
- Private dialogue at the top level is the preferred way to react.
- Quality of the dialog is an important ground to improve, dialogue often being constructive.
- Issuers wish a regulation of the public communication by activists, especially better transparency and accuracy of information.

### How sensitive are your Chairman and CEO to the activism risk?

Sensitivity of the Chairman to the activism risk



Sensitivity of the CEO to the activism risk

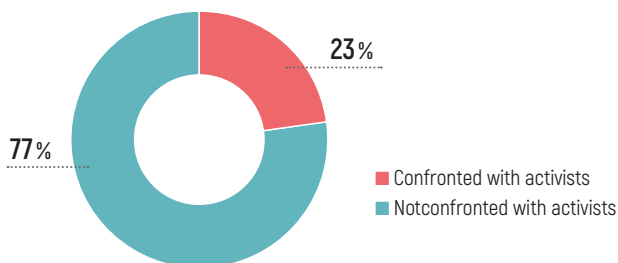


The survey shows that shareholder activism has become a prominent, and likely permanent, feature of the corporate landscape, as **the majority of the issuers consider their chairman or CEO to be highly sensitive to the activism risk**. Some issuers even consider activism to be part of normal listed company life.

Boards of directors, management and the markets have increasingly become more attuned to shareholder activism, and engaging with investors is a priority for boards and management as a hallmark of basic good governance.

- ▶ *"The activism risk is now part of normal listed company life."*
- ▶ *"There is some concern about this matter within the Board, though we have not been a part of the goal of such kind of funds yet."*
- ▶ *"We know they (activists) are out there, but have not (yet) identified this as an imminent risk to our company."*
- ▶ *"We think it is unlikely, given our performance, that we would be the subject of an activist campaign. However, the Board keeps this under review and remains watchful."*
- ▶ *"With one large majority shareholder, the sensitivity to activism for our Chairman is not as pronounced while our CEO still has memories of past interactions with activist investors during AGMs."*

◆ **Have you ever been confronted with activist shareholders over the last 12 months?**





- ▶ “We have been confronted to a French fund but it never came to the AGM despite admission card requested. Many funds are not activists but certainly more active.”
- ▶ “Letters are sent to our chairman with generally not very relevant arguments.”
- ▶ “We had and have investor meetings with known activist shareholders and are sensitive to these.”
- ▶ “We have an activist shareholder who publishes his views in letters to the public.”

 **Please briefly describe the methods used and the objective sought by these activists**

50 issuers made substantive comments on the methods used and the objective sought by the activists they were confronted with over the last 12 months.

As regard methods used by the activists, the survey shows that they **traditionally tend to build up pressure on the company** by acquiring a minority stake in the company and using their shareholder's rights to have a better understanding of the company's strategy through, *inter alia*, traditional Q&A sessions and comments during shareholders' meetings.

An activist **often begins a campaign by engaging in a private dialogue** with the company's management, even before its stake in the company becomes public, through meeting requests with the management, letters sent to management, emails and phone calls.

However, the survey reveals that activists also tend to influence the company's strategy through private or public engagement with the board or the management by requesting board seats or challenging board members on a broad spectrum of matters, such as board compensation, operational performance of the company, board diversity and independence of board members.

If activists decide that they cannot achieve their objectives through non-public engagements with the board or the management, they may wage public campaigns with the aim of attracting the support of other shareholders for their objectives.

Elements of public campaigns include, *inter alia*, issuance of press releases or 'white papers' presenting the activist's investment thesis and analysis, postings of relevant information on websites prepared by them for the campaigns, placing web advertisements, dissemination of letters to shareholders, provision of information through the media.

As regard objectives sought by the activists, the most common objective of shareholder activism is to improve capital efficiency in order to increase the value of their investment.

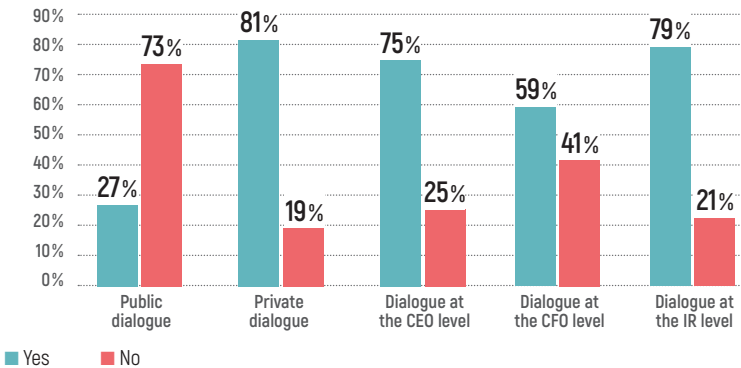
Event-driven activists can also seek to assert their influence on a company's then-current corporate activity, particularly in relation to a takeover or other M&A situation.

- ▶ “Method: buy shareholding; intense direct engagement, proposing alternative corporate finance/actions objective: ensure alignment and discipline of management with shareholder interest.”
- ▶ “Objective is around CEO remuneration and consists in letter sent to the Chairman/CEO/CFO/IR.”
- ▶ “Letters sent to management, emails and phone calls, mostly seeking to influence our reporting on ESG matters.”
- ▶ “Suggested corporate action, request for board seat, implied support of other shareholders.”
- ▶ “With a stake taken of 2%, activists vocal in press and at AGM in order to separate the Chairman and CEO roles, remove lead independent director from board.”
- ▶ “Wide consensus solicitation via white paper document, focusing on governance change and on corporate restructuring, with a “forensic” more than financial approach, based on discrediting previous main shareholder.”
- ▶ “In our specific case trying to motivate the main industrial shareholder to enter into a domination agreement with our company which would trigger a public bid (at a higher price). Activists have been trying to seek out to align forces, which did not succeed so far due to heterogeneous interests. Activists came up with own motions for our AGM.”
- ▶ “Private engagement Discussions directly with other shareholders Public statement Background briefing to media and sell-side.”
- ▶ “The methods are classical official letters published on the activist's website and sent to the board of directors as well as the supervisory board members. Sometimes the activist even sends the same letters to our current or former banking partners, who remained puzzled by the fact that the activist disposed of their contact. He definitely did not get the contact names from us. This in my view could be a breach of GDPR rules on behalf of the activist.”

- ▶ “Direct contact with the company - White Paper to investors - Declarations to journalists Objective: trigger a change in strategy to increase value creation.”
- ▶ “Desiring short term financial engineering-oriented catalysts to create a positive share price reaction. Lacking industry knowledge and a more strategic long-term perspective.”
- ▶ “The first approach was to have intensive talks with Management in order to understand the market and the business model. Their objectives, as communicated by them, are to put one of their industry experts in the Board. Before they do this, however, a due diligence study of our company would be made to see if the business model is one they would be interested in.”
- ▶ “Methods: Letter writing, AGM Q and A, public media Objective: Change in governance and CEO.”



### Have you initiated or attempted to initiate a public or a private dialogue with these activists?



The survey reveals that **most issuers initiated or attempted to initiate a dialogue with the activists** they were confronted with over the last 12 months.

Issuers tend to **engage in a private dialogue rather than initiate a public dialogue** and if they go into public, they almost systematically had a private dialogue beforehand. According to the survey, a private dialogue did not precede the public dialogue only once.

Many issuers indicate that they have or would have **treated the activist in the same way as other shareholders** and, accordingly, have or would

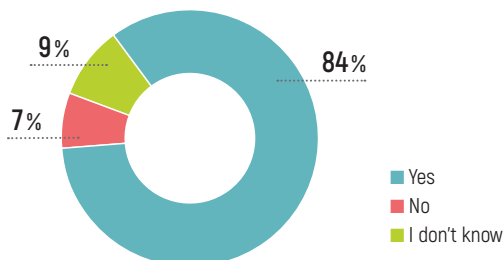
have accepted to engage in a private dialogue to address the issues raised by the activist.

The survey reveals that issuers tend to engage dialogue at IR level as well as at CFO or CEO level. Some issuers indicate that they have or would have engaged dialogue with an activist at all levels, including CEO, CFO and IR.

One issuer indicates that the main issue when entering into a dialogue with an activist is to ensure that all shareholders have access to equal information at the same time.

- ▶ "As with any other investors we have offered dialogue."
- ▶ ""IR has engaged in calls to understand perspectives and concerns from these investors or answered their letters."
- ▶ ""Took the view that they should be treated as any other shareholder."
- ▶ ""We have not had an approach - if we did, we would plan a private dialogue at all levels, including CEO, CFO and IR."
- ▶ ""We have not "initiated", they have and that was at the IR level."
- ▶ ""Activist shareholders get the same service like every institutional investor."
- ▶ ""There have been several meetings with the activist and our CEO, the chairman of the supervisory board and head of IR. The tricky thing here is to make sure all shareholders get equal information at the same moment."
- ▶ ""We engage with them as we'd do with any other investor."

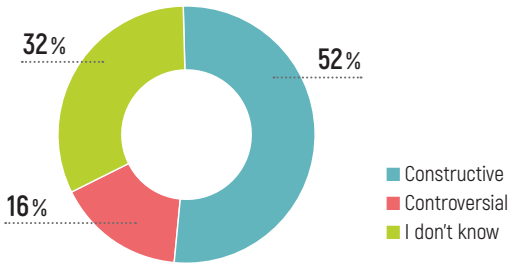
### ◆ Have they agreed to establish a dialogue?



Experience shows that **dialogue with activists has become common** and that issuers are no longer afraid of interacting with them. There is some concern about the time spent.

▶ “We organize governance roadshows based on last AGM votes and letters received by the most active, if not activist shareholders. They generally welcome this kind of request, as we organize ourselves governance roadshows, no offer existing with brokers.”

### Was this dialogue constructive or controversial?



The **dialogue established between issuers and activists was mainly constructive** but the number of cases where it was controversial is significant. Evolution is possible: a former controversial dialogue can turn into a constructive dialogue.

▶ “Mostly constructive but also controversial on some issues.”

▶ “Started a bit rough (with previous management) before it turned constructive.”

▶ “They quickly decided that our strategy was appropriate, and our plan execution was also sound and gradually they sold out of the stock.”

## What are the main obstacles you have encountered in your dealings with these activists?

Whereas the dialogue is systematic, **the quality of the dialogue faces some issues**, at least at the beginning.

There is some **initial misunderstanding between issuers and activists** that can be addressed when the issuer strives to explain. Issuers can be suspicious, trying to "read through" the requests, looking for a hidden agenda and comparing activists to populists. Issuers often blame the narrow analysis of activists, as they seem to focus on short-termism and governance matters, without suggesting any strategy orientation, while the managers' approach is to execute the strategy on a stand-alone basis. The gap between investment horizons is also a major concern.

Issuers also complain about **the accuracy of information** used by activists to form their opinions, their lack of rationality combined with their high-level analysis and the lack of trust between the parties, especially when activists are using all the loopholes they can find in the regulation.

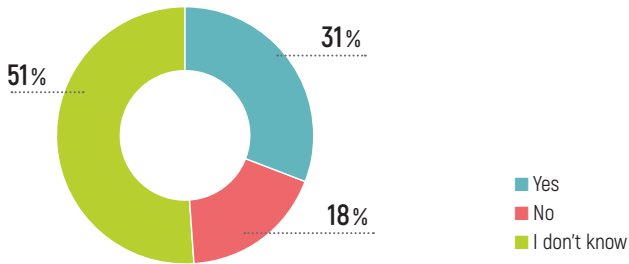
These obstacles need to be overcome in order to establish a better dialogue and eventually find common ground, if any.

Furthermore, issuers are worried about the legal framework of the dialogue and wonder about the level of information to be disclosed by the investors.

- ▶ "Ability of senior management to "read through" the requests and ability to counter-balance the activist through other large shareholders."
- ▶ "Activists are like populist politicians. They sometimes use very poor arguments and high-level analysis that are full of mistakes."
- ▶ "Different views: Our approach is to execute our strategy on a stand-alone basis. Activists have a different agenda with a short-term execution approach to raise short-term gains."
- ▶ "Incorrect data that they were using to make the argument."
- ▶ "Initially, it was a lack of understanding on their behalf, but we found them reasonable to deal with and ended up on excellent terms."
- ▶ "It depends on the profile of the activist. Main obstacle is that we are much more constraint than they are. Regulation is key for issuer, some of the activists have a non-orthodox approach and are using all the loopholes they can find."

- ▶ “Lack of trust, undisclosed recordings of conversations.”
- ▶ “Mis-aligned investment horizons.”
- ▶ “They had zero strategic objective suggestions. Their focus was only on governance.”
- ▶ “To keep information sharing equal between all shareholders.”
- ▶ “Very hostile message from activist fund in media.”
- ▶ “We would like them to really study the company’s case but as the capital is controlled, they have little chance to see their action fruitful and they probably prefer to focus on more palatable targets.”

◆ **Do you think there is an asymmetry between the regulations applicable to activists and those applicable to issuers?**



The existence of an asymmetry in the regulations is not entrenched. Nevertheless, those considering this asymmetry are categoric: issuers are subject to very strict regulations while activists benefit from a confused situation, in particular with regard to the rules relating to the transparency of shares ownership (e.g., derivatives, money at stake, hedging etc.)

For example, one issuer indicates that regulation shall be amended (i) to avoid “naked voting” which consists in hedging its economic exposure to the stock purchased before in the company and (ii) to prevent a borrower of shares from exercising voting rights without incurring a long-term economic exposure to the value of the shares.

**The possible asymmetry mainly relates to the information publicly disclosed.** Issuers complain about the freedom activists have in their communication while issuers are subject to stringent and restrictive regulation, especially during black-out periods before financial publications.

Activists are not subject to any regulatory framework in this respect and seem free to wage a public campaign based on non-accurate and unbalanced information according to issuers.

The requirements applicable to activists could be similar to the existing requirements for issuers. Some issuers wish them to have accurate or balanced disclosure.

- ▶ “Activists can hide their positions so you don't know what they own and there is a large asymmetry between their ability to attack you in public - with no requirement for accuracy or balance in their views - and your ability to defend yourself, which largely risks fuelling even more noise which helps the activist's agenda.”
- ▶ “Activists can publicly say what they want, while companies are bound by disclosure rules.”
- ▶ “Companies must take into account the interests of all stakeholders as a whole, while activists just only focus on shareholders.”
- ▶ “The problem is the so-called "naked voting", where an activist more or less hedges its economic exposure to the stock it has purchased, while many other investors while voting are exposed to economic risk (think of the long-only funds). In addition, one can vote even if on record date stock has been merely borrowed. Related asymmetry really resides among shareholders, therefore unbalancing the Company AGM activities.”
- ▶ “Usable methods are skewed in their favour, eg means of influencing public opinion and some methods used to put pressure on management could not be possibly used reciprocally by management.”
- ▶ “Yes, at 2 levels: knowledge in activists' position in terms of shareholding (real holding/derivatives, money at stake/hedging) and regulatory framework for public communication: no legal frame for activists (no limitation, no disclosure on due diligence and methodology, no restriction on calendar -black-out period before financial publications).”
- ▶ “Yes, very simply the rules of disclosure that relate to public companies are more stringent and restrictive than those that relate to private entities such as activist funds.”
- ▶ “Yes. There is a huge amount of transparency required from listed companies, while activists don't have much to disclose.”



 **In your opinion, and if necessary, what propositions could be made to design a better level playing field between activists and issuers?**

45 issuers made substantive comments concerning the propositions to be made to design a better level playing field between activists and issuers.

The survey shows issuers' willingness to design a better framework for interaction with activists. **The majority of propositions are inspired by existing obligations and try to extend them.**

**Transparency is the main concern.** Issuers wish specific disclosures for activists regarding their position in the capital, including derivatives, how much assets under management they have, the conflicts of interests, their intentions and concerns, in order to have a full picture of the company's shareholder base available to the company and to other shareholders.

Issuers call for clear identification of shareholders. One suggested clear prohibition of acting in concert between various investors and another recommended the introduction of lower shareholding thresholds.

These disclosures should be required as soon as activists begin their campaigns and be regularly updated. A tight regime of disclosure requirements can lead to transparency with respect to stakebuilding, thereby creating a level playing field for both management and activist.

As regard communication requirements, quiet periods are a strong issue. They are representative of the asymmetry between activists and issuers. Activists should be subject to the same rules as issuers and thus prohibited to act within quiet periods.

A waiting period of one year and a minimum of shareholding were proposed before an activist could launch a campaign against the issuer. One issuer considers that if activists have met the company management, they should be barred from trading their shares in the company until the next reporting date as they might dispose of insider information.

Regarding the opinion expressed by activists, fairness and level of depth of due diligence and calculation methodology could be required.

Improvements are also expected from issuers, such as a stronger IR team and a high listening mode from senior management.

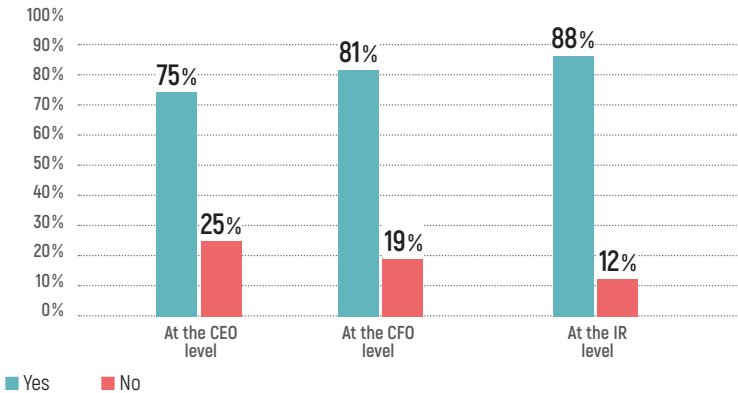
More generally, issuers want the activists to be subject to the same regulations as the issuers themselves and to have a code of conduct. This way, no asymmetry would be reported. It was suggested that the better level for a legal framework would be a European regulation.

- ▶ "A much better identification of Issuer's shareholding structure."
- ▶ "A stronger IR team and a high listening mode from senior management."
- ▶ "Activists should be required to disclose their holdings to the public on a regular basis and their intentions. If activists meet company management, they should be barred from trading the shares until the next reporting date as they might dispose of insider information."
- ▶ "An activist should have to own a certain % of shares for say a period of time (1 year) to be allowed to engage with the company."
- ▶ "Clearer identification of shareholders, Constructive dialogue."
- ▶ "Crucial is that they have the same disclosure obligations as a usual investor - ie derivative instruments as well as direct equity."
- ▶ "Each fund activist or just active has its own rules and principles generally «whiter than white » or more stringent compared with current common rules. It's essentially impossible to be compliant with each one. Common acceptable principle should be put in place to keep companies manageable by teams. Finally, a fund hasn't the whole trust and may be wrong when analysing a company action or decision. We see a lot of arrogance from certain funds."
- ▶ "Forcing activists to act in a reliable transnational/at least Europe wide legal framework."
- ▶ "Hard evidence of ownership and full public disclosure of (short) position required."
- ▶ "Impose disclosure obligations for activists, including: - transparency on level of real investment at stake - potential conflicts of interests - loyalty/fairness/level of depth of due diligence and calculation methodology when stating a recommendation, - respect the black-out periods applicable to issuers."
- ▶ "Introduce lower thresholds for Investors/activists to come out of the closet, better regulation of communication timing of activists Investors."
- ▶ "It is important that the duty of care for activists to ensure their statements are correct is nearer to the same level that applies to the companies themselves. Otherwise, the issuers are forced onto the defensive and this is often not in the best interests of all other stakeholders, particularly employees."
- ▶ "Management is bound by a code of conduct and that should also apply to activists."

- ▶ “My impression is that the priority is to create full symmetry among investors, rather than between investors and issuers. The latter are really 2 different entities; the former set the Company strategy and priorities, the latter execute and operate. A real symmetry can be reached if - on one side - all investors have the same playing field, and on the other side the Management of the Company is solid and credible, hence giving "market power" to the Issuer. Rules can help, but the balance is a complicated exercise, which needs to be continuously refreshed through performance, on the Company side, and by a long term approach by investors, calling for sustainable value generation.”



**Do you accept to meet activists  
(conferences, investor trips, roadshows)?**

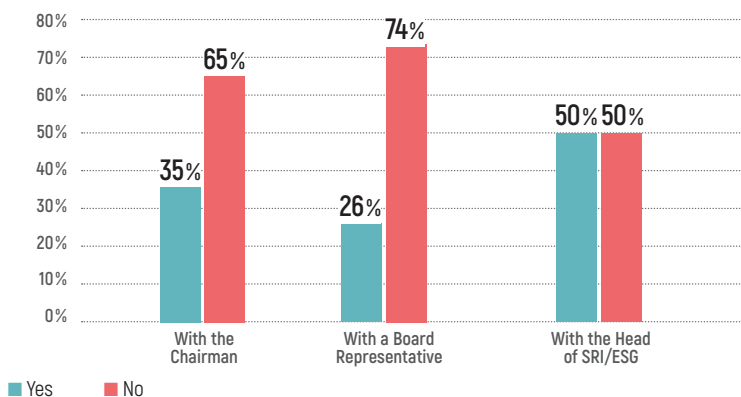


The dialogue with activists is definitely considered as a good option for issuers and the top management is generally available for these interactions. Issuers insist to dialogue with activists the same way they dialogue with other investors. Interestingly, much more issuers are open to a dialogue at the CFO level than the issuers who actually did so.

- ▶ “Not CFO/CEO level in the first instance.”
- ▶ “Not if we know they are activists, but they seldom disclose their intent.”
- ▶ “Open door Policy as long as people are polite enough.”
- ▶ “They were invited to our investor days.”
- ▶ “We are open to engagement particularly at conferences. From a roadshow perspective they will not be a priority for executive engagement.”

- ▶ “We believe that it is better to proactively talk to them and understand their motives than to hide from them. If they want to act, they will, regardless of management meeting with them or not.”
- ▶ “We do but we carefully select and prepare meetings.”
- ▶ “We treat them as any large shareholders when it comes to meetings.”
- ▶ “Yet, we are not especially fond of meeting them. However, we think we cannot refuse a meeting request with them, at CFO or IR level.”
- ▶ “You need to meet and speak with activists, always representing the best interest of the Company. All investors need to have a fair and common treatment. No investor or group of investors, in turn, should try to influence the Company for its own interest, and against the interest of the other investors, and of the Company itself.”

 **Do you plan to set-up some corporate governance roadshows over the next twelve months?**



The surveys shows that most of the issuers do not intend to set up corporate roadshows with the Chairman or a Board Representative. However, **half of the issuers plan to set-up corporate governance roadshows with the Head of SRI/ESG** and some issuers indicate that their roadshows also involve the company secretariat, representatives of the legal department, independent directors or the CFO.

One issuer indicates that SRI/ESG matters are constantly evolving and investors' approach is still heterogeneous. Therefore, meetings with investors are mainly on request as long as the foundations of SRI/ESG topics are not laid down internally.

- ▶ “Corporate governance roadshow is set with the General counsel. We will reinforce the process at the end of this year to meet with passive funds.”
- ▶ “ESG story is in flux - as the legal settings are in development mode. There is no full clarity on the benchmarks. Approach of investors is heterogeneous. So far we have been concentrating to lay the foundations for SRI/ESG topics internally and to cope with the changing legal landscape externally. We are open minded to talk to ESG investors - mainly on request.”
- ▶ “From time to time there are investor meetings with the Chairman on Corporate Governance.”
- ▶ “Governance roadshow will also involve Legal VP (in addition to Head of IR).”
- ▶ “Sustainability manager, Company secretariat and IR are spokespersons on ESG.”
- ▶ “Targeting is critical for this type of RS, which should be organized with the General Secretary, a representative of our Legal Department and IRO.”
- ▶ “We are analysing the possibility to set up Corporate governance roadshows, but the plan and the company’s representative is still to be decided.”
- ▶ “We have regular Chairman and ESG roadshows.”
- ▶ “With CFO, Lead Independent director and IR specialist on ESG topics.”



### **How do you interact with investors’ governance/ stewardship teams?**

116 issuers made substantive comments concerning the means they are using to interact with investors’ governance or stewardship teams. A strong response to an activist by the board and management and their advisers often includes, among other things, **maintaining dialogue with relevant regulators, proxy advisers and other key constituencies**, including other significant shareholders.

The survey reveals that most issuers tend to maintain a private, direct and regular dialogue with the governance of their shareholders through conference calls, meetings, emails, direct contacts or proxy agents. Some even consider the investors to be more and more relevant for the proper development of company governance standards, as they often provide valuable insight.

The dialogue thus provides the opportunity for the company's members of the board to assess the activists' views on the company's strategy, and shows their willingness to listen to the activist shareholders' concerns and suggestions.

**The dialogue is mainly engaged with the key shareholders of the company**, which include, *inter alia*, top active and passive investors, analysts, proxy advisors etc. However, the dialogue can sometimes be made public through governance roadshows, annual reports or executive summaries published on the company's website. Gaining the support of (other) shareholders might prove pivotal in fending off an activist shareholder.

Nevertheless, for a lot of issuers, the dialogue with investors is only engaged upon request of the investors or ahead of the shareholders' meetings in order to have a view on their main guidelines before the shareholders' meetings with respect to the resolutions to be submitted to the shareholders. A limited access to contact details of governance and Stewardship teams due to a lack of contact databases available can sometimes explain the limited contact between issuer and investors.

The survey shows that the dialogue is often engaged with the IR department, the corporate secretariat and lead independent directors.

- ▶ "Before every AGM we engage with the governance of our key shareholders."
- ▶ "Calls/meetings, emails around AGM time /Direct contact, usually event-driven or upon request, conference calls or meetings on roadshows."
- ▶ "Currently no/limited interaction."
- ▶ "Direct emails and phone calls or through PMs / Through proxy agent."
- ▶ "Directly and regularly. They are very relevant for the proper development of Company governance standards, as they often provide valuable insight."
- ▶ "Frequently (Roadshows, calls, conferences) through IR team members focused on the topic."
- ▶ "Governance Roadshows and Executive Summaries on special topics, which we publish on our website and disseminate to key stakeholders directly (top active and passive investors, analysts, proxy advisors)."
- ▶ "Not enough and interactions are too much directly related to shareholders' meetings and votes. As such, this is an area of improvement that we have clearly identified, thus a Governance roadshow is planned in November."

- ▶ “On a yearly basis Directly at IR level / Most meetings led by IR with Board or Exec presence if requested.”
- ▶ “On an adhoc basis when a meeting is requested. many of our shareholders are small funds.”
- ▶ “Proactive contact with governance investors before draft of resolutions is submitted to the board in order to know their main guidelines.”
- ▶ “Regular dialogue outside proxy season with Lead Independent Director to cover mid-term governance topics; and before proxy season to get feedback on shareholders' meeting agenda. These teams are more and more part of overall business discussions with portfolio managers.”
- ▶ “So far no easy access to contact details of governance and Stewardship Teams at passive money Managers. So far no contact databases available like IR INSIGHT for PM/Analyst contact Details. No Broker publications available e.g. about relevant stewardship contacts at top 20 passive Money managers.”
- ▶ “Through public disclosure in online reports and annual report and accounts. Offer Chairman meetings to large shareholders and Chair of RemCom offers to engage with shareholders with regard to executive remuneration and policies.”
- ▶ “We organise calls ahead of the AGM to discuss resolutions with the top 20 investors: IR + Corporate Secretary.”



### **Which kind of actions have you internally implemented to deal with shareholder activism?**

80 issuers made substantive comments concerning actions internally implemented to deal with shareholder activism.

**In general, issuers tend to adopt a proactive strategy to anticipate and prepare for a potential activist campaign.** There are a number of steps that a company could take prior to being targeted by a shareholder activist. Such steps may include the following: conducting regular strategic reviews to identify areas of interest for activists, monitoring the company's shareholder base to identify beneficial ownership, increased levels of stock borrowing and the use of derivatives, maintaining good corporate governance standards, identifying and anticipating areas of vulnerability and conducting white paper exercises with the company's management taking the position of an activist shareholder.

According to the survey, **many issuers start by monitoring trades, shareholders' behavior and shareholdings, to track short positions or flag potential engagements with potential activists or to identify whether**

relevant thresholds are crossed and the consequences this may bring, such as making a disclosure or having to make a mandatory bid.

In addition to monitoring a company's shareholders, a company's advisers team can assist the company by routinely assessing the company's strengths and vulnerabilities to activism, reviewing its structural defences and keeping current on the evolving corporate governance practices and preferences of its shareholders and the broader market. This workgroup traditionally involves the CFO, the head of IR, the corporate secretary, and members of the board.

Finally, defence manuals can be compiled to set out in detail which internal departments and which external advisers are to be involved in the event of an imminent attack, which steps need to be taken at a specific phase of a campaign and which approaches should be followed with respect to the activist, the key shareholders and the media in terms of communication.

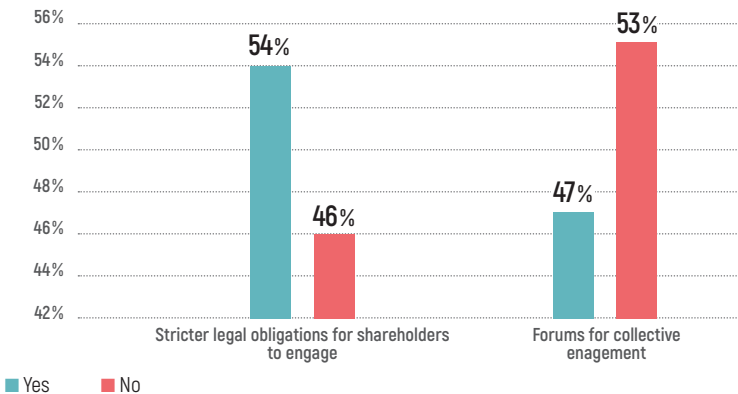
These manuals are sometimes approved by the board of directors if needed.

- ▶ "“Stress test” strategy, performance and governance, prepare defence mandate and activities.”
- ▶ “Tracking short positions and flagging potential engagements with potential activists.”
- ▶ “Annual review of activism risks at Board level / Dedicated activist project teams.”
- ▶ “Close monitoring of shareholding moves, plain vanilla AGM resolutions, share buyback.”
- ▶ “Defence/ Activism Planning / Defence book preparation.”
- ▶ “Detection (analysis of positions), Proactive dialogue on governance.”
- ▶ “External consultancy for defence.”
- ▶ “Frequent shareholder ID analysis.”
- ▶ “Monitoring shareholder registers. We have not been susceptible to activist interest in our history to date.”
- ▶ “Nothing particular. We consider monitoring daily Trading closer.”
- ▶ “Reinforcement of existing processes; taskforce for coordination.”



- ▶ “Set up a workgroup with CFO, IRs, head of strategy, corporate secretary, communication and externals advisors to monitor, define appropriate actions and report to the Board.”
- ▶ “War room; engagement drawer plan approved by Board of Directors (if ever needed); agree parameters of communication internally in advance.”
- ▶ “We defined a manual including for such a case.”
- ▶ “We established clear rules who would be in contact with the activist and have updated our defence routines.”
- ▶ “We have a playbook developed as part of our defence planning.”
- ▶ “We have prepared the organization (crisis unit) and the counter arguments in case of an “attack”.”
- ▶ “We have two banks as advisors and annually update our rebuttal arguments. We also have the defense procedures worked out in detail.”

◆ **What might improve the engagement with major institutional shareholders?**



While issuers traditionally seem to favour soft law and the development of private dialogue with investors, the survey shows that most of the issuers believe stricter legal obligations for shareholders to engage, rather than forums for collective engagement, might improve the engagement with major institutional shareholders. Most of the issuers thus consider that regulations shall be amended in order to ensure a common level playing field for all investors.

According to the survey, issuers tend to think that **institutional proxy advisers can be considered as regulatory bodies** because of the influence they have over the shareholders.

Most of the issuers consider that **investors should take their role as shareholders more seriously**, by getting to know the company's corporate governance structure and strategy and by voting autonomously, without relying blindly on proxy advisers. Some issuers thus point the issue of low voting terms to which stricter legal obligations for shareholders to engage could cope.

Some issuers also suggest that a better level of transparency regarding, *inter alia*, the ownership of the shares - including, in particular, in the case of securities lending - might improve the engagement with major institutional shareholders.

One can expect the level of transparency to be improved as the Shareholder Rights Directive, recently amended, provides further transparency regarding the identity of shareholders, a comply or explain requirement for institutional shareholders to develop and disclose a shareholder engagement policy and new transparency requirements for proxy advisers.

Almost one third of the issuers remain sceptical concerning a potential improvement or are comfortable with the current regulation. One issuer believes that adding an extra layer to the current regulation might be irrelevant due to the complexity of the rules already in place.

- ▶ "A higher awareness on the matter needs to be reached. My impression is that Institutions and Governmental bodies of single Countries need to improve their knowledge on international activism precedent, and take steps to ensure a common level playing field for all investors."
- ▶ "I believe all investors should take ownership of their votes rather than blindly go with the likes of ISS who are more and more overwhelmed and conflicted."
- ▶ "I do not believe in regulation, not even soft law. Perhaps investors should take their ownership role up for revision I believe many are too passive. They use proxy advisors to cast the vote at the Annual General Meeting, this should not be necessary, knowing a company's corporate governance structure and history should be mandatory if you invest in a company."
- ▶ "I do not know the UK setup, but currently most interaction happens via proxy advisors, and to some extend the proxy advisors become regulatory bodies."

- ▶ “Keep on offering investor conferences and further strengthen direct or indirect corporate access.”
- ▶ “Let's just set up commonly acceptable rules and ensure that in the spirit of common law, activists aren't trying to add additional constraints to an already thick mille-feuille.”
- ▶ “Low voting turn out for EGM and AGM resolutions is disappointing. Mandated voting for large holders would be beneficial.”
- ▶ “More transparency on who owns what, who is lending shares to whom.”
- ▶ “The issue is not whether or not they engage, but whether they engage on matters of real strategic relevance. Governance is not the answer to strategic challenges, better strategy is the answer, but increasingly 'active' institutional managers lack the resources to have real expertise given the pressures they are facing from passive managers. And passive managers are only interested in governance, which only helps to a point.”

 **Appendix: Questions from the survey**

**1. How sensitive are your Chairman and CEO to the activism risk?**

	5 (highly sensitive)	4	3	2	1 (not sensitive)	I don't know
Chairman						
CEO						

Comments

**2. Have you ever been confronted with activist shareholders over the last 12 months?**

- Yes    No    I don't know

Comments

**3. Please briefly describe the methods used and the objective sought by these activists.**

**4. Have you initiated or attempted to initiate a public or a private dialogue with these activists?**

	Yes	No
Public dialogue		
Private dialogue		
At the CEO level		
At the CFO level		
At the IR level		

**5. Have they agreed to establish a dialogue?**

Yes    No    I don't know

Comments

**6. Was this dialogue constructive or controversial?**

Constructive    Controversial    I don't know

Comments

**7. What are the main obstacles you have encountered in your dealings with these activists?**

**8. Do you think there is an asymmetry between the regulations applicable to activists and those applicable to issuers?**

Yes    No    I don't know

Comments

**9. In your opinion, and if necessary, what propositions could be made to design a better level playing field between activists and issuers?**

**10. Do you accept to meet activists (conferences, investor trips, roadshows)?**

	Yes	No
At the CEO level		
At the CFO level		
At the IR level		

Comments

**11. Do you plan to set-up some Corporate governance roadshows over the next 12 months?**

	Yes	No	I don't know
With the Chairman			
With a Board representative			
With the Head of SRI/ESG			

Comments

**12. How do you interact with investors' governance/stewardship teams?**

**13. Which kind of actions have you internally implemented to deal with shareholder activism?**

**14. What might improve the engagement with major institutional shareholders?**

	Yes	No
Stricter legal obligations for shareholders to engage		
Forums for collective engagement (eg. Investor forum in the UK)		

Comments

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