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French Financial Markets Authority Proposes New Measures Concerning Shareholder Activism

AMF Proposals Aiming at Improving Transparency of Market Transactions and Dialogue Among Shareholders and Issuers, and at Strengthening the AMF's Capabilities During Activist Campaigns

SUMMARY

On April 27, 2020, the French financial markets authority, the *Autorité des marchés financiers* (the “AMF”), published various proposals with respect to the shareholder activism controversy in France.¹ Following the publication of recommendations and proposals by several French institutions, organizations and think tanks in late 2019 and January 2020, the AMF has proposed new measures to better control excessive behavior in – but not to prevent – shareholder activism campaigns. These measures aim at improving transparency of market transactions and dialogue between shareholders and issuers, and at strengthening the AMF's analysis and response capabilities during activist campaigns.

BACKGROUND AND AMF PROPOSALS

On January 8, 2020, Mr. Robert Ophèle, Chairman of the AMF, stated in his New Year's greetings that the AMF intended to clarify its approach regarding shareholder activism by the end of Q1 2020.² These proposals were published on April 27, 2020, and are in line with several recommendations published by various French institutions, organizations and think tanks since October 2019.

Public Debate in France on Shareholder Activism

Shareholder activism has been a major topic in France during the past several months, in light of the growing number of activist campaigns in France.

The current discussions started on October 2, 2019, with the release of the recommendations of the “*Mission d’information sur l’activisme actionnarial*” (the “Parliamentary Committee”) of the Finance Commission of the French National Assembly, later published as part of the full report of the Parliamentary Committee.³ On November 7, 2019, a working group of the French *Club des Juristes* published its report and recommendations regarding shareholder activism.⁴ On December 10, 2019, AFEP, an industry body representing France’s largest companies, issued its report on shareholder activism,⁵ while Paris Europlace, an organization in charge of promoting and developing the Paris financial marketplace, published on January 6, 2020, the proposals of its working group on shareholder governance and market practices.⁶

Measures Proposed by the AMF Concerning Shareholder Activism

The AMF has addressed the public debate concerning shareholder activism in France through the publication of several proposals to better control perceived excessive behavior in activist campaigns, but not preventing such campaigns.

While acknowledging the role of shareholder activism, in particular in improving corporate governance and defending the interests of minority shareholders, the AMF considers that strengthened supervisory measures should be put in place to mitigate or prevent “excessive” activist behavior that could destabilize issuers, adversely affect the proper functioning of financial markets and, potentially, place investors at a disadvantage. As indicated in the AMF’s press release, “*the challenge [...] is not how to prevent activism, but how to set limits and make sure that it is able to control excesses*” (“*la problématique n’est [...] pas d’empêcher l’activisme mais d’en fixer les limites et de se donner la capacité à en maîtriser les excès*”).⁷

The AMF is not, however, in favor of adopting a legal definition of “shareholder activism,” given the wide variety of situations and practices such definition would encompass and the fact that there is no “indisputable criterion” that could definitively distinguish an “activist” shareholder from an “active” shareholder. As a result, the AMF does not support the creation of a specific French legal regime for activist shareholders.

In light of its experience with activist situations, the AMF considers that the current regulatory framework applicable to shareholder activism is robust and flexible enough for the regulator to take action when investor actions which are identified are potentially disruptive for the market and issuers. As this regulatory framework mostly derives from European regulations, which consequently prevents the adoption of overlapping national measures, the AMF notes that no material change to such framework would be necessary, whether at European or French level, and proposes a set of targeted measures, which are further described below.

- A. *Transparency on Stake-Building and Shareholders.*** The AMF proposes to enhance transparency on stake-building by lowering the 5% mandatory reporting threshold to, most likely, 3%—the AMF does not take a clear position—and making public any crossing of an additional threshold set forth in the company's articles of association.

Shareholders are currently required to notify (i) to the issuer and the AMF any crossing, upwards or downwards, of certain mandatory ownership thresholds, starting at 5% of the share capital or voting rights of the issuer (those reports being subsequently made public by the AMF);⁸ and (ii) to the issuer (on a confidential basis) the crossing, upwards or downwards, of the thresholds set forth in the issuer's articles of association, if any, which cannot be in increments of less than 0.5% of the share capital or voting rights.⁹

The AMF notes that France is the only major jurisdiction within the European Union with its lowest mandatory public reporting threshold set at 5%, while other Member States set their lowest public reporting thresholds at 1%, 2% or 3%, as in Germany, Italy, the Netherlands, Spain and the United Kingdom. Adding a new 3% mandatory reporting threshold would be in line with several of the above-mentioned reports from French institutions and think tanks. The constraints resulting from the lowering of the first mandatory reporting threshold could be significantly alleviated, in the AMF's view, if it were not applicable to certain securities (e.g., securities listed on an SME growth market) or holders (such as UCITS), or were applicable to voting rights only. In addition to the lowering of the first mandatory reporting threshold, the AMF suggests that the scope of the reporting requirements be extended and cover financial instruments that include an optional component for hedging purposes (such as puts and calls).

As regards additional reporting thresholds set forth in issuers' articles of association, the AMF considers that issuers whose shares are listed on a regulated market should be required to make public the notifications received upon crossing of these thresholds. Also, the AMF is of the view that these additional reporting requirements, although not mandatory, should be clarified and their calculation methodology be harmonized with that of mandatory reporting requirements, including, in particular, the extension rules set forth in Article L. 233-9 of the French *Code de commerce* (which cover, in particular, cash- and equity-settled derivatives). In addition, the AMF notes that civil penalties applicable in case of breach of these additional reporting thresholds should be clarified.

- B. *Greater Transparency with Respect to Short-Selling.*** The AMF calls for improved transparency regarding investors' financial exposure to an issuer's financial instruments, while acknowledging that "if [short-selling] may be conducive to excess, [...] [it] is generally beneficial for the market, particularly in terms of price formation and liquidity." The AMF also notes that, based on available data, activist campaigns that rely on significant short-selling are "very rare."

As noted by the AMF, short-selling rules and practices have been largely harmonized by Regulation (EU) No. 236/2012 of the European Parliament and of the Council of March 14, 2012, on short-selling and certain aspects of credit default swaps (as amended, the “EU Short-Selling Regulation”). Under the EU Short-Selling Regulation, investors are required to notify the AMF upon crossing, upwards or downwards, any relevant reporting thresholds, starting from 0.2% of the share capital (and every increment of 0.1% thereafter).¹⁰ Net short positions are then publicly disclosed by the AMF upon crossing, upwards or downwards, 0.5% of the share capital (and every increment of 0.1% thereafter).¹¹

As the EU regulatory framework already allows competent authorities, including the European Securities and Markets Authority (“ESMA”) and the AMF, to respond to exceptional circumstances or cases of abnormal functioning of the market, the AMF does not consider that material changes to this regulatory framework would be necessary. These emergency powers have indeed been recently used by ESMA and the AMF in the context of the COVID-19 outbreak. For instance, ESMA lowered for a three-month period the above-mentioned reporting threshold from 0.2% to 0.1%, in respect of issuers whose shares are admitted to trading on an EU-regulated market, subject to certain exemptions (e.g., market making or stabilization activities; principal venue for the trading of these shares being located in a third country).¹² In addition, the AMF prohibited net short positions in relation to any equity securities traded on a French trading venue and for which the AMF is the competent authority for a 20-day period, subsequently extended up to May 18, 2020.¹³

However, the AMF suggests to supplement the reporting on net short positions with respect to share capital with information on (i) debt instruments held by the investor (e.g., bonds and credit default swaps) and (ii) the legal entity identifier of the investor. The AMF will therefore support EU proposals in this respect, as it is not competent to directly amend the applicable EU regulatory framework.

C. *Fair and Open Dialogue Among Issuers and Shareholders.* The AMF notes that “a transparent and open dialogue between an issuer and its shareholders, on a regular basis, is undoubtedly one of the keys to prevent the excesses of activist campaigns and [...] reduce their potentially destabilizing impact.” Following recommendations from several French institutions, organizations and think tanks to clarify its current position statement on inside information,¹⁴ the AMF announced that its guidance will be revised to include developments and recommendations on shareholder dialogue.

- **“*Quiet Periods.*”** The AMF will revise its recommendation on so-called “quiet periods” to clarify that issuers may provide useful or necessary information to the market, even during a “quiet period,” in response to public allegations from activist investors, provided that they comply with Regulation (EU) No. 596/2014 of April 16, 2014, on market abuse (as amended, the “Market Abuse Regulation”). In order to avoid the publication of incomplete financial information, which could be misleading to investors or allow them to draw a conclusion on an issuer’s results before their publication, the AMF currently recommends that issuers do not provide financial analysts and investors with new information on the progress of their business and their results during a 15-day period before the publication of their annual or interim results (the “quiet period”).¹⁵ Although the current AMF recommendation specifies that quiet period requirements should not prevent an issuer from publicly disclosing information otherwise required to be published under

the Market Abuse Regulation, it could be construed as preventing an issuer from making public announcements during a quiet period. Following the issuance of its revised recommendation, the AMF's position will be in line with U.S. and UK practices, where no similar legal requirements exist, or with the German practice of self-imposed quiet periods, which constitute investor relations practice and would not legally prevent an issuer from responding to an activist campaign.

- **Information Shared by an Activist with Shareholders.** The AMF will recommend that investors launching an activist campaign communicate without delay to the relevant issuer any substantial information shared with other shareholders (e.g., white papers), so as to enable the issuer to respond effectively to public statements concerning it.
- **Investment Recommendations Requirements.** In their above-mentioned reports, several commentators argued that activists should be required to comply with disclosure principles similar to those imposed on persons disseminating investment recommendations. While not expressly replying to those recommendations, the AMF acknowledges that activist campaigns raise the question of whether public statements made by activist investors should comply with the rules applicable to investment recommendations. In particular, it is unclear whether the Market Abuse Regulation and regulations promulgated thereunder¹⁶ are applicable to some or all activist campaigns, due to difficulties in interpreting their provisions and/or certain definitions set forth therein (e.g., the concept of “suggesting an investment strategy”). The AMF states that it will engage with ESMA and the European Commission in order to solicit interpretative guidance on this issue through ESMA's Q&A on the Market Abuse Regulation and to ask further clarifications on the amount of information regarding conflicts of interests that should be provided by a person issuing an investment recommendation. Furthermore, in cases where investor information and proper functioning of the financial markets require swift action from the regulator, the AMF proposes to issue, on an emergency basis, its opinion on the application of the investment recommendation requirements to an activist investor's public statements and, if necessary, compel such investor to comply with those requirements.

D. Increasing the AMF's Capabilities in an Activist Campaign Context. The AMF calls for increased analysis and response capabilities so that it may be able to provide swift and appropriate answers, including taking regulatory action, when the circumstances so require.

More specifically, the AMF suggests revisions to several Articles of the French *Code monétaire et financier*¹⁷ so that the AMF be allowed to impose monetary penalties in respect of administrative injunctions and to order investors with a financial exposure to the financial instruments of an issuer to make corrective or supplementary publications, if errors or omissions have been identified in investors' public statements – currently, the AMF can impose corrective or supplementary publications only to the issuer itself.

In addition, the AMF proposes to amend its General Regulations¹⁸ so that, in the context of a tender offer, the shareholders (and their representatives or proxies) of the offeror and the target company be subject to additional obligations, including, in particular, a strict due diligence obligation regarding their public statements.

Lastly, the AMF will engage with ESMA to suggest the publication of a “white list” of activist behaviors, which would set out behaviors that may not, in and of themselves, lead to a conclusion that

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shareholders are acting in concert. This list would be based on the current “White List” of activities published by ESMA.

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ENDNOTES

- 1 See AMF, press release “The AMF proposes several targeted measures concerning shareholder activism” and statement “Shareholder Activism,” dated April 27, 2020, <https://www.amf-france.org/en/news-publications/news-releases/amf-news-releases/amf-proposes-several-targeted-measures-concerning-shareholder-activism?xtor=EREC-1-%5Bfluxrss%5D> and https://www.amf-france.org/sites/default/files/2020-04/communication-amf-sur-activisme-actionnarial_avril20_2.pdf (respectively).
- 2 See the speech delivered by Mr. Robert Ophèle, Chairman of the AMF, for its 2020 New Year's greetings, <https://www.amf-france.org/en/news-publications/public-statements/speech-robert-ophele-amf-chairman-2020-new-year-wishes-wednesday-8-january-palais-brongniart>.
- 3 See Report of the “*Mission d’information sur l’activisme actionnarial*” of the Finance Commission of the French National Assembly, October 2, 2019, http://www.assemblee-nationale.fr/dyn/15/dossiers/activisme_actionnarial_rap-info.
- 4 See Report of *Club des Juristes*, “Shareholder Activism,” Ad-Hoc Commission, November 2019, <https://www.leclubdesjuristes.com/wp-content/uploads/2019/11/Shareholder-Activism-Le-Club-des-juristes-nov.2019.pdf>.
- 5 See Report of Afep, “Shareholder Activism” (in French only), December 10, 2019, <https://afep.com/publications/position-de-la-fep-sur-l-activisme-actionnarial/>.
- 6 See Report of the Paris Europlace working group on shareholder governance and market practices (in French only), January 6, 2020, <https://paris-europlace.com/fr/publications>.
- 7 See AMF, “The AMF proposes several targeted measures concerning shareholder activism,” dated April 27, 2020, <https://www.amf-france.org/en/news-publications/news-releases/amf-news-releases/amf-proposes-several-targeted-measures-concerning-shareholder-activism?xtor=EREC-1-%5Bfluxrss%5D>.
- 8 See French *Code de commerce*, Art. L. 233-7, and AMF General Regulations, Arts. 223-11 *et seq.*
- 9 See French *Code de commerce*, Art. L. 233-7(III).
- 10 See EU Short-Selling Regulation, Art. 5(2).
- 11 See EU Short-Selling Regulation, Art. 6(2).
- 12 See ESMA, Decision, dated March 16, 2020, ESMA70-155-9546, https://www.esma.europa.eu/sites/default/files/library/esma70-155-9546_esma_decision_-_article_28_ssr_reporting_threshold.pdf.
- 13 See AMF Chairman’s decision, dated March 17, 2020, <https://www.amf-france.org/sites/default/files/2020-03/decision-du-president-art-20-eng-publiee-le-18-au-matin.pdf>; AMF Board’s decision, dated March 17, 2020, <https://www.amf-france.org/sites/default/files/2020-03/20200317-decision-du-college-art-20-clean-veng.pdf>; AMF Board’s decision, dated April 14, 2020, https://www.amf-france.org/sites/default/files/2020-04/decision-du-college-art-20-eng-renouvellement-clean_0.pdf; and S&C Publication “French Financial Markets Authority Announces Ban on Short-Selling on All French Trading Venues,” dated March 18, 2020, <https://www.sullcrom.com/french-financial-markets-authority-announces-ban-on-short-selling-on-all-french-trading-venues>.
- 14 See AMF Position-Recommendation, Guide on ongoing information and the management of inside information, DOC-2016-08 (in French only).
- 15 See AMF Position-Recommendation, Guide on ongoing information and the management of inside information, DOC-2016-08, p. 25.
- 16 See Delegated Regulation (EU) 2016/958 of March 9, 2016 supplementing Regulation (EU) No. 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, as amended.

ENDNOTES (CONTINUED)

¹⁷ See French *Code monétaire et financier*, Arts. L. 621-14 and L. 621-18.

¹⁸ See AMF General Regulations, Art. 231-36.

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