DECEMBER 2017

REPORT

DIRECTOR-SHAREHOLDER DIALOGUE COMMISSION

AD HOC COMMITTEE

le club des juristes

DIRECTOR-SHAREHOLDER DIALOGUE COMMISSION

CLUB DES JURISTES REPORT

Ad Hoc committee

DECEMBER 2017

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Foreword

With the government set to launch an Action Plan for Company Growth and Transformation, and with company law likely to undergo substantial changes – especially if the very definition of the partnership agreement is altered – aren't there more pressing issues and priorities than an examination of director-shareholder dialogue? Such dialogue, which directly involves the board or one of its members, may at first appear to be of relatively marginal importance:

– it is far less widespread than the more established dialogue that the executive directors of listed companies already engage in, on their behalf, with the various categories of shareholder – in particular with major investors during road shows or meetings;

– it develops informally on the sidelines of general meetings and as a supplement to the written documentation that issuers (and these days boards themselves) must provide concerning corporate governance;

– it is not covered by hard law, and only barely by soft law;

– and, whether practised or prohibited, it does not seem to carry any immediate legal consequences.

In carrying out its work, however, our Commission has become convinced that the theme of director-shareholder dialogue is neither a fleeting phenomenon nor a minor subject. It concerns the close and natural relationship that may develop – in a manner that is fiduciary rather than financial, behavioural rather than paperwork-based, regular rather than intermittent, and level-headed rather than volatile – between directors and shareholders united by a common concern: that of engagement.

Introduction

Market participants, both internationally and in France, are increasingly clamouring for improved communication between the company and the shareholders, under the notion that developing communications with directors may enable a renewal of dialogue.

This movement is taking place in the context of the adoption of Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement – a directive that, currently, national legislators still have several months to transpose.

This directive expresses a desire for *"greater involvement of shareholders in corporate governance [which] is one of the levers that can help improve the financial and non-financial performance of companies"*.[1] It represents an extension of the communication of 12 December 2012 entitled '*Action Plan: European company law and corporate governance — a modern legal framework for more engaged shareholders and sustainable companies'*, in which the European Commission announced several initiatives in the domain of corporate governance, in particular to encourage long-term shareholder engagement and increase transparency between companies and investors.

This shareholder involvement, which in certain regards appears novel, at least in terms of certain categories of institutional investors, also requires the involvement of the board.

(1) 'Whereas' clause 14 of Directive 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement.

In France, it is established practice for the board of directors to be involved in relations with shareholders and, more broadly, investors, since they are required to control the information that is provided to them. This role was enshrined by the Viénot I report and later the Afep-MEDEF Code.

Extracts from the Viénot I report (1995)

««In exercising its legal prerogatives, the purpose of the board of directors is, in the Committee's opinion, fourfold: it determines the company's strategy, appoints the company's agents tasked with managing it as part of this strategy, controls management, and ensures that quality information is provided to the shareholders and markets via the accounts or when carrying out highly important financial operations."

"Beyond strict adherence to its legal obligations towards shareholders, the board of directors of a listed company has a specific responsibility towards the market. Undoubtedly it is the chairman's task to provide information to the market on a day-to-day basis, but it is the duty of the board to do so on the occasion of the half-yearly and annual accounts or when carrying out financial operations: the board must then ensure the quality of the information, in particular its reliability and clarity, to ensure that the transactions can be carried out in an equitable manner."

§4.1 of the Afep-MEDEF Code

"It is the duty of each board to determine the company's financial communication policy."

This role of the board of directors in providing information to shareholders lies at the heart of the debate around good governance of listed companies. The principle of transparency has already encouraged numerous initiatives to improve the communication of companies to their shareholders, in order to create a relationship of trust between the company and the investor. The European system of transparency is based on the fact that "the value of a listed security depends to a large extent on the information available to the market concerning the issuing company and the security in question".[2] The underlying idea is that the effective role of shareholders is vital to good corporate governance and that investor involvement should be encouraged.[3]

But the documentation that is standardised, generated and framed by the transparency principle, and which therefore incorporates factors relating to governance as well as financial communication, does not always adequately meet investor requirements.

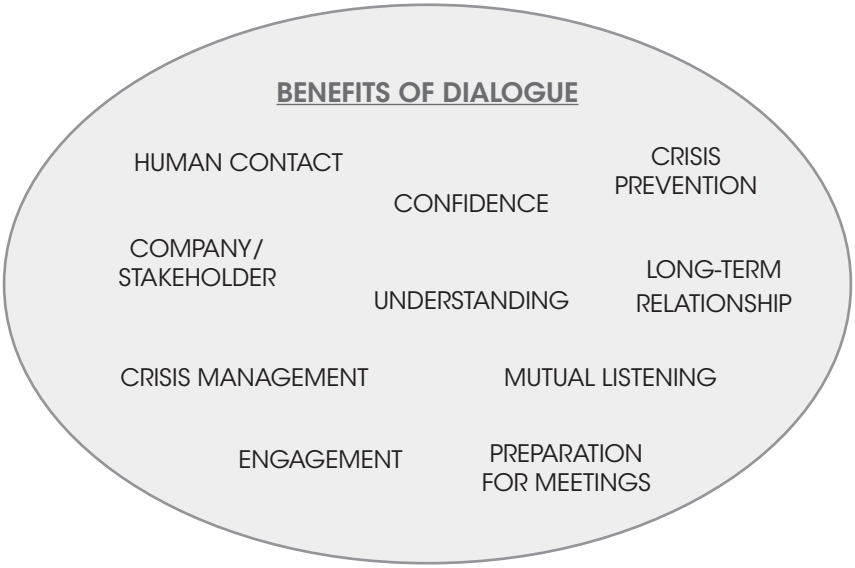
Its limitations thus appear to have triggered the emergence of an informative dialogue, whereby a period of explanation and discussion occurs with the shareholders regarding certain matters regarded as public information.

This practice of dialogue with shareholders has therefore demonstrated the benefit, in parallel with dialogue between investors and the executive management, of increased director involvement.

There is now an increasing desire for directors, in addition to being encouraged to attend shareholder meetings,[4] to be encouraged to enter into direct dialogue with shareholders, on the pattern of what is established practice in England and increasingly also in the United States. This dialogue enables directors to gain greater insight into shareholder expectations, interests and any reasons for the disapproval. It makes it

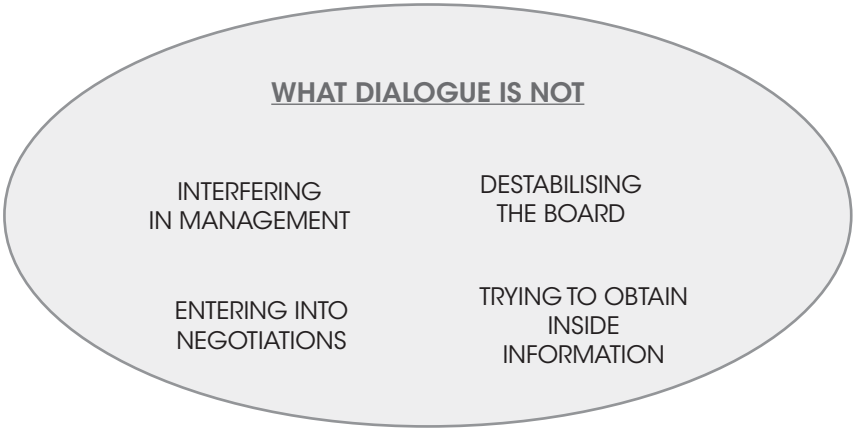
(2) D. Ohl, *Droit des sociétés cotées*, 3rd ed. Litec 2008, no. 86, p. 58.
(3) The preamble of directive 2007/36/CE of 11 July 2007 on the exercise of certain rights of shareholders in listed companies stated that *"effective shareholder control is a pre-requisite to sound corporate governance and should, therefore, be facilitated and encouraged"*.
(4) Final AMF report on general meetings in listed companies 2012, proposal 1 bis.V., now §19 Afep-MEDEF Code of Corporate Governance.

possible to manage in advance of difficulties that may trigger crises. For shareholders, dialogue provides reassurance of the smooth functioning of the board and its alignment with the strategy upheld by management. This results in increased confidence in the company.



To ensure efficiency and prevent investor wariness, the dialogue between shareholders and directors also needs to be credible, i.e. of good quality.

It is also important to set limits and state what dialogue does not cover. This is of course in the interest of the issuers, their boards, and investors themselves.



Recently, in its October 2017 report, the High Committee on Corporate Governance dealt with the subject of dialogue between shareholders and directors, emphasising that *"there has been growing pressure from institutional investors for the establishment of direct dialogue between directors and shareholders. This demand comes in the context of a wider tendency towards their increased involvement in corporate governance."*[5]

In response to the legal uncertainties regularly arising in this area, the Club des Juristes, which had already shared its opinions and recommendations on the issue of increasing dialogue between companies and their shareholders in April 2010,[6] decided to set up a Commission on "Dialogue between directors and shareholders".

This report is the collective result of the Commission's work.

This work consisted of an assessment of the current legal framework for this dialogue **(Part 1)** and, on the basis of interviews and consultations, an overview of existing practice **(Part 2)**.

This enabled the formulation of various recommendations **(Part 3)**.

(5) See Report of the High Committee on Corporate Governance, October 2017, §3.5.
(6) Club des juristes, Europe Commission, Recommendations and best practice for the attention of issuers and institutional investors, April 2010.

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PART 1
The current legal framework for dialogue between shareholders and directors

A legal analysis is an obligatory first step in any discussion of director-shareholder dialogue. Such an analysis must, objectively and without twisting the law in any particular direction, not only establish the existing legal framework (I), but also examine any potential legal obstacles (II) and contextual factors conducive to such dialogue (III).

This first step was the Commission's focus when beginning its work.

I. Existing legal framework

The dialogue between the board of directors (or certain of its members) and shareholders is **not covered by the Code of Commerce** which only sets out the communications that listed companies can, on certain limited occasions, establish with their shareholders.

- the essential part of the regulations deal with establishing a framework for the content and procedures for so-called "regulated" information;

- other than discussions at general meetings, the only arrangement by which shareholders can make their concerns known is by means of written questions, for which there is a strict legal framework.

CODE OF COMMERCE

Written or oral questions

Article L. 225-108

"The board of directors or management board, as applicable, must send or provide shareholders with the necessary documents to enable them to make informed judgements, in full knowledge of the facts, regarding the management and running of the company's business.

The nature of these documents and the procedure for sending or providing them to shareholders shall be determined by a decree of the Conseil d'État.

Starting from the communication described in the above paragraph, any shareholder has the option of addressing written questions, to which the board of directors or management board, as applicable, is required to respond in the course of the meeting. A common response may be provided to these questions if their content is the same.

The response to a written question is deemed to have been provided once it is published on the company's website in a dedicated questions-and-answers section."

Article R. 225-84

"The written questions referred to in the third paragraph of article L. 225-108 shall be sent to the registered office by registered letter with acknowledgement of receipt, addressed to the chairman of the board of directors or management board or electronically to the address specified in the notice to attend, no later than the fourth working day before the date of the general meeting.

They shall be accompanied by a certification of registration either in the registered securities accounts kept by the company, or in the bearer securities accounts kept by an intermediary specified in article L. 211-3 of the Monetary and Financial Code."

Article L. 225-232

"One or several shareholders representing at least 5% of the share capital or an association meeting the conditions set out in article L. 225-120 may, twice a year, address written questions to the chairman of the board of directors or management board concerning any fact that may compromise the continuity of operations. The response shall be communicated to the statutory auditor."

In addition to these legal obligations, listed companies have established a variety of arrangements for their relations with shareholders. AMF has noted the existence of a large number of tools for communication with individual shareholders[7] (clubs, committees, meetings, etc.). Dialogue with other shareholders (institutional, investment funds, activist funds, sovereign funds, employee or family shareholding, state shareholder etc.), meanwhile, is carried out by other channels.[8]

To date, dialogue between shareholders and directors is nonetheless not covered by a**ny AMF regulations or doctrine.** In its recommendation on general meetings, dialogue between directors and shareholders is only provided for via the proposal in which it "encourages all directors and in particular those with specific duties, such as chairmen of advisory committees and senior directors, to attend shareholder meetings" (Proposal 2).[9]

(7) AMF, 2015 Study on the arrangements of listed companies for communication with their individual shareholders, November 2015.
(8) For a summary of existing practices, see Part 2 "The existing practice of dialogue between shareholders and directors – key findings from interviews and consultations carried out by the Commission".
(9) AMF Recommendation, Shareholders meetings of listed companies – DOC-2012-05, modified 24 October 2017.

The **Afep-MEDEF Code** only provides for relations between directors and shareholders in the context of the general meeting, covered in its fifth paragraph.[10] Outside of general meetings, the Afep-MEDEF Code only provides for the individual participation of directors in dialogue with shareholders as part of a "specific duty" that may be assigned to a director, in particular a vice-chairman or senior director, in matters of governance or "relations with the shareholders".[11]

The **AFG recommendations on corporate governance** do not go any further than the Afep-MEDEF Code and limit themselves to the presence of directors at the meeting.[12] They do not cover the question of dialogue between investors and societies, even though AFG congratulates itself on improving dialogue in its voting record.

(10) Attending general meetings is also one of the "ethical" duties of the director (§19 of the Afep-MEDEF Code).
(11) §6.3 of the Afep-MEDEF Code: "When the board decides to assign specific duties to a director, in particular in their capacity as a senior director or vice chairman, in matters of governance of relations with shareholders, these duties and the methods and prerogatives available to them, shall be described in the by-laws. *It is recommended that the senior director be independent.* "
(12) Title 1, A, 7) of the AFG recommendations on corporate governance: "The general meeting is where the board reports to shareholders on the conducting of its duties. The presence of directors or members of the supervisory board is therefore strongly recommended".

AMF RECOMMENDATIONS

Continuous dialogue between issuers and shareholders

Proposal no. 1

« "Conduct a continuous dialogue between issuers and investors, and those advising them, before publication by companies of their draft resolutions and after the general meeting in order to resolve certain areas of disagreement regarding the voting policy in different shareholder categories. In this area, AMF refers to its March 2011 recommendation on proxy advisors;

Establish new exchanges after publication of the meeting notice and take time for discussion;

Where possible, after the meeting has been held, receive any shareholders who wish to discuss disagreements relating to the important points covered in the meeting, in order, where applicable, to obtain insights for the following meeting."

Proposal no. 2

"Encourage all directors and in particular those with specific duties, such as chairmen of advisory committees and senior directors, to attend shareholder meetings."

Afep-MEDEF Code

(revised November 2016)

The board of directors and the general shareholders meeting

"§5.2 The general meeting is a place for decision-making within the domains established by law and a special occasion for the company to communicate with its shareholders*. It is not only a time for the executive bodies to report on the company's activity and the running of the board of directors and its specialist committees, but also* the occasion for an exchange with the shareholders.*"*

In its previous version, the Afep-MEDEF Code stated that the general meeting should be "the occasion for a genuine and open dialogue with the shareholders" (See Code of corporate governance for listed companies, revised November 2015, p. 8 – cf. also MEDEF, APEP-AGREF, Towards better governance of listed companies, Report of the work group chaired by Daniel Bouton, September 2002, p.5).

HCGE ANNUAL REPORT

(October 2017, p. 22 et seq.)

Proposal for framework for dialogue between board of directors and shareholders

"The High Committee considers that the participation of directors in dialogue with shareholders outside of general meetings tends to become an expectation of investors. However, it is recommended that certain precautions be taken. These recommendations are as follows:

- it is the duty of each board to give consideration to the procedures for dialogue;

- if the company's mode of governance takes the form of a separated chairmanship (or a supervisory committee), this duty may fall on the chairman of the board: in this case, it forms part of the "duties assigned in addition to those assigned by law" which must be described in accordance with §2.2 of the Afep-MEDEF Code; it may also be assigned to a senior director or the vice-chairman of the board, or to another director, but it is desirable not to diffuse responsibility by increasing the number of representatives;

- the selected person should preferably have experience in institutional communication, and if necessary receive adequate training;

- the duty must consist firstly in explaining the positions taken by the board in its areas of responsibility (in particular in the area of strategy, governance and executive pay), which have previously been communicated; this involves close coordination with the chairman of the board, if he is not the person to which the duty is assigned;

- it may then also consist of ensuring that the shareholders are receiving the information they expect from the company (and not to supply this information); this involves close coordination with the chief executive or his employees tasked with shareholder relations, and meetings or telephone communications must, unless explicitly required by the parties, be conducted in their presence;

- the director must report to the board on the carrying out of his duties."

> **International comparison**[13]

In the United Kingdom, the ***UK Corporate Governance Code*** establishes the guidelines for the principle of dialogue, while leaving the choice of methods to the board of directors and issuing a reminder of the limitation on equal access of shareholders to information.

Certain articles of the code are therefore expressly dedicated to the dialogue between directors and shareholders, and in particular between non-executive directors and majority shareholders, in order to improve *"mutual understanding of objectives"*.[14] To this end, the Code assigns a specific role to the chairman of the board, who is required to ensure effective communication with shareholders.[15]

While recognising that the main points of contact for shareholders are the chief executive and finance director, the Code states that the board has responsibility for ensuring that a satisfactory dialogue with shareholders takes place, so that directors are aware of the views and problems raised by major shareholders.[16]

In the United States, the **NYSE Corporate Governance Guide** refers to the growing interest of shareholders in direct dialogue with members of the board and in particular with directors who have sufficient capacity or competence (such as members of the pay committee) to respond to specific questions from shareholders.[17]

(13) For details, see Appendices 2, 3 and 4.
(14) Section E.1 of the Corporate Governance Code (see Appendix 2).
(15) Section A.3 of the Corporate Governance Code (see Appendix 2).
(16) The Code expressly states that non-executive directors may meet major shareholders at meetings and that the "senior" non-executive director should attend sufficient meetings with these major shareholders to understand their views and concerns. Section E.1.1 of the *UK Corporate Governance Code* (see Appendix 2).
(17) The NYSE Corporate Governance Guide suggests, for example, designating a committee of directors to serve as the point of contact for major shareholders, or that directors should be prepared and trained for direct meetings with shareholders.

Further, the United States SEC (Securities and Exchange Commission) holds that the restriction on communicating non-public sensitive information to institutional investors does not prevent directors from privately communicating with shareholders provided that the shareholders are not able to purchase or sell securities on the basis of such information *(selective **disclosure**)*. To this end, the American authority suggests implementing certain specific measures such as pre-clearing topics for the director to discuss with the shareholder or having the shareholders concerned sign confidentiality agreements.[18]

In Germany, although there is more caution in limiting involvement in dialogue with shareholders to the chairman of the supervisory board, the ***German Corporate Governance Code*** has, since its reform on 7 February 2017, stated that the chairman of the supervisory board *"should be available – within reasonable limits"* – to discuss supervisory board-related issues with shareholders,[19] without this constituting an obligation.[20]

(18) SEC, Q.101.11, *Compliance and Disclosure Interpretation: Regulation FD*, June 2010 (see Appendix 3).
(19) §5.2 of the German Corporate Governance Code (see Appendix 4). As a reminder, German companies are only familiar with the dual board system, where the distinction between the areas of responsibility of the supervisory board and the management board is certainly more relaxed than between the board of directors and the chief executive.
(20) Press release from the German Corporate Governance Code Commission, 14 February 2017 (see Appendix 4).

II. Potential legal obstacles to director-shareholder dialogue

Several legal obstacles are often used to claim that it is difficult, or even impossible, to establish dialogue between directors and shareholders. We will examine these one by one.

1. Legal representation and hierarchy of corporate bodies

While AMF previously seemed to consider that executives constituted the natural channel for relaying information between the board and shareholders,[21] it now states that it is the responsibility of each company *"to develop the frameworks and tools for shareholder relations, on the basis of its shareholder strategy and the objectives assigned to it"*.[22]

The **principle of the hierarchy of corporate bodies** set out in the "Motte"[23] decree prohibits any body of a *"société anonyme"* type company from encroaching on the responsibilities of another body. This principle would certainly constitute an obstacle to establishing dialogue between the board of directors and shareholders if one considered that by engaging in this dialogue the board of directors was encroaching on the power to represent the company legally assigned to the chief executive.

However, this view is mistaken insofar as the chief executive's power of representation is considered an external power, exercised in relation not to shareholders but to the third parties with which the company engages.[24]

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(21) Response of AMF to the consultation on the Green Paper on the EU Corporate Governance Framework of 22 July 2011 (question no.17): *AMF considers that the principal issue is improving dialogue between companies and their shareholders. Companies could, for example, be encouraged to explain the reasons for each of their resolutions. Executives could also be encouraged to report to the board on the principle concerns communicated by institutional investors in relation to points of governance"*.

(22) AMF, 2015 Study on the arrangements of listed companies for communication with their individual shareholders, p. 15.

(23) Cass. civ., 4 June 1946, S. 1947, I, 153, note Barbry; JCP, 1947, II, 3518, note D. Bastian, stating that the bodies of a *société anonyme* hold legal powers that belong only to them without any other body being able to encroach on these.

(24) The chief executive has a monopoly on representing the company; he is its legal representative (art. L. 225-56 C. com.). However, in favour of the board of director's power of representation, see: J.-F. Carré, "Le pouvoir du conseil d'administration d'engager la société à l'égard des tiers" ["The power of the board of directors to commit the company to third parties"], RJDA, July 2007, p. 1171.

As it is simply an exchange of words, dialogue does not fall under the category of representation in the legal sense.

Further, even if this dialogue is to be considered in terms of a division of powers and duties within the *société anonyme*, this dialogue may be considered to lie within **the duties legally assigned to the board of directors:**

- The board of directors is required to determine the company's business strategy[25] in accordance with the company's interest[26] and in particular that of its shareholders.
- The company's interest may require certain information to be communicated in advance, particularly in order to promote the adoption of important decisions and/or to ensure the approval of certain resolutions that require the support of majority shareholders.
- Such communication enables the board to carry out its duty of ensuring that shareholders are receiving pertinent, balanced and informative information.[27]
- It is a means of ensuring the correct functioning of the board of directors.

An understanding of shareholder views is all the more the legitimate since the board acts as their representative and is liable towards them[28]

(25) Art. L. 225-35. C. com. See also §1.2 of Afep-MEDEF Code: "*It determines the company's strategic direction*".
(26) §1.4 of Afep-MEDEF Code: it acts *"in the company's corporate interest"*.
(27) §4.2 of the Afep-MEDEF Code: *"The board ensures that shareholders and investors are receiving pertinent, balanced and informative information about the strategy and growth model of the company, how it takes into account significant extra-financial matters, and its long-term perspectives;* this duty is to be carried out continuously, and not only at general meetings.
(28) Viénot report, The Board of Directors of Listed Companies, July 1995: "*As the representative of all the shareholders, the board of directors is collectively responsible for carrying out its duties through their general meeting, in relation to which it legally assumes the essential responsibilities*". See also §5.1 of the Afep-MEDEF Code: *"The board of directors is appointed by all the shareholders as its representative"*.

In a sense, one may even consider that the duty of loyalty linked to the directors' role as representatives, appointed by the general meeting to act in the company's interest, justifies their entering into dialogue with shareholders who express a desire to do so.[29]

In terms of the division of duties within the *société anonyme* and the responsibilities of the board of directors, the board is therefore entitled to assume a role of dialogue with shareholders.

2. Collective nature of the board

The board's principle of collective decision-making[30] implies that directors do not, personally, have any individual power.[31] Board decisions can only result from deliberation followed by a vote.[32]

If dialogue with the shareholders, in particular regarding governance and the running of the board, is considered as an act of representation, no director could claim to "represent" the board as a collective body, not even its chairman.[33]

(29) The directors' duty of loyalty towards the company is an inherent part of their responsibility to act in its interest. The existence of a general duty of loyalty for directors in relation to shareholders is less clearly established, although case law has explicitly enshrined such a duty in the context of operations carried out by an "executive" in his personal interest, particularly in the well-known "Vilgrain" ruling (Cass. com., 27 Feb 1996, no. 94-11241, Vilgrain v Alary: JurisData no. 1996-003972).

(30) Although the collective nature of the board of directors is referred to in certain provisions of the Code of Commerce in Title II of Book VIII on statutory auditors (cf. art. L. 823-7, L. 823-8-1, L. 823-16, L. 823-17; L. 823-19 C. com. which refers to *"the collective body tasked with directing"* the company), the principle of collective decision-making is only referred to as such in the provisions on the management and directing of the *société anonyme*. The collective nature of the board of directors is today an established principle in case law (CA Nancy, 17 Sep 1998, JCP E 1999, 1828, note A. Couret), in doctrine (see, for example: P.-G. Gourlay, Le conseil d'administration de la société anonyme ["The Board of Directors of the *société anonyme*"], Sirey, 1971, no. 125; M. Cozian, A. Viandier et F. Deboissy, Droit des sociétés ["Company Law"], LexisNexis, 30th ed., 2017, no. 776; Ph. Delebecque, Conseil d'administration ["Board of Directors"], Rép. sociétés, Dalloz, 2017, np. 3) and by §1.1. of the Afep-MEDEF Code.

(31) Cass. com., 27 March 1990, no. 88-20356, Bull. civ., IV, no. 102, *Defrénois*, Nov 1990, no. 21, p. 1233, note J. Honorat; BJS, June 1990, no. 6, p. 530, note P. Le Cannu. Art. R. 225-29 C. Com. only provides that the board of directors can assign to one or several of its members or to third parties, whether shareholders or not, any special powers of representation for one or several specified purposes.

(32) Taken under the quorum and majority conditions established by binding rules (art. L. 225-37. C. com.).

(33) The power of representing the board of directors was withdrawn by the law of 1 August 2003.

But the ability, granted to a director, to engage in direct dialogue with shareholders should not be considered the same as his exercise of a real power that is incompatible with the collective nature of the board, since dialogue, even of a formal nature, does not constitute decision-making or representation in the legal sense.[34].

In spite of what may be claimed, the principle of collective decision-making does not seem to pose any obstacle to the assignment of a dialogue role to one or several directors. What investors are seeking, through dialogue, is reassurance that the board is operating smoothly, and therefore in a genuinely collective manner. Collective decision-making does not represent an obstacle to dialogue; on the contrary, it is one of the aspects that it may concern.

In addition, it is through collective deliberation that one or several directors may be authorised to enter into dialogue with certain shareholders – a practice which is already quite widely established today.

In particular, directors whose task is to communicate with shareholders may be so designated via the board's by-laws.[35]

In this way, the practice of having a senior director developed,[36] as

(34) E. Gaillard, Le Pouvoir en droit privé [Power in Private Law], Économica, 1985, p. 232; the author defines power as *"the prerogative enabling its holder to express an interest that is at least partially distinct from his own, by issuing unilateral legal acts that are binding on others"*.

(35) More formally, the appointment of a special mandate may take place in accordance with Art. R. 225-29 C. Com., under which *"the board of directors can assign to one or several of its members or to third parties, whether shareholders or not, any special powers of representation for one or several specified purposes."* The limitation of this practice is that the designated directors are obliged to stay within the limits of their mandate.

(36) In its 2014 report on corporate governance and executive pay, AMF noted that twenty companies in the relevant sample taken of thirty-four companies with a single-tier structure combining the roles of chairman and chief executive (including 15 from the CAC 40), i.e. 59% of these companies, compared with 31% in 2012, had designated a senior director (SD) or vice-chairman (VC) in charge of governance. In certain cases, their responsibilities included "dialogue" with shareholders on matters of governance.

illustrated by AMF's annual reports on corporate governance,[37] even if the Afep-MEDEF Code does not designate such a director in the recommendation under the "apply or explain" principle.

The designation of one or several directors to engage in this dialogue raises the question of this director's liability, and/or consequently the liability of the board of directors, in the event that the disclosed information misleads the shareholders.[38] This issue relates to the actual content of the dialogue that takes place with the shareholders.

Subject to this last reservation, it therefore appears that a director who is duly designated and authorised for this purpose by the board may enter into dialogue with shareholders, since this dialogue is not considered the exercise of an individual decision-making power in breach of the principle of collective decision-making.

3. Confidentiality

The Afep-MEDEF Code has extended the duty of discretion established in the Code of Commerce[39] to a genuine confidentiality obligation.[40]

In strictly legal terms, the convergence of this confidentiality obligation with the need for dialogue is a complex issue. It implies that the director must limit himself to communicating only non-confidential and non-

(37) In its 2016 annual report on corporate governance and executive pay in listed companies, AMF gives the particular example of a company whose senior director's duty was *"if necessary to act as a point of contact with Legrand's shareholders, subject to the board's approval of the principle and method for this contact"* (p. 38).

(38) The principle of collective decision-making means that directors incur individual liability for collective breaches committed by the collective body. Cass. com., 30 march 2010, no. 08-17841, *Bull. civ.*, IV, no. 69, *RTD com.* 2010.377, obs. P. Le Cannu and B. Dondero: *"An individual breach is committed by each member of the board of directors or management board of a société anonyme who, through action or abstention, participates in an improper decision made by this body, unless they can demonstrate that they acted as a prudent and diligent director, in particular by opposing the decision"*.

(39) Art. L.225-37 C.com.: directors *"are bound to discretion regarding information of a confidential nature that is presented as such by the chairman of the board"*.

(40) It states that *"with regard to non-public information acquired in the course of his duties, the director is subject to a full confidentiality obligation which exceeds the basic duty of discretion set out in law"*(§19 Afep-MEDEF Code). It adds that the confidentiality obligations of directors shall be specified in by-laws adopted by boards, which often provide for a full confidentiality obligation concerning information that is provided to or shared with the board.

sensitive information by means of a simple informative exchange – which raises the question of the content and usefulness of the dialogue – or must obtain an authorisation to convey confidential information – which raises the issue of the protection of such information and compliance with securities law.

Nonetheless, provided that this dialogue is conducted in the company's interest, this point of convergence can be located and established on the basis of the content of the dialogue. We will see that there is thus a wide range of dialogue possible in relation to subjects considered to be public information *(see below)*.

In practice, the subject of confidentiality is secondary because it is generally fully integrated

4. The inside information restriction

The EU Market Abuse Regulation (MAR)[41] prohibits any person, in particular directors, from disclosing any inside information[42] that they receive.[43] In addition to the risk of constituting a market abuse, the fact that the confidentiality of inside information is no longer ensured implies an obligation for the issuer to publish this information as soon as possible.[44]

(41) Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC.

(42) Defined as *"information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments"* (MAR, art. 7).

(43) The status of inside information entails, for all persons and in particular the issuer and its executives, and until the information is no longer inside information, a prohibition against disclosure of this information to another person, except if it is disclosed *"in the normal course of the exercise of a person's employment, profession or duties"* (MAR, art. 10 and 14). It may be considered that any representative of a legal shareholder entity, who manages or is employed by said entity, communicates such information to the shareholder in the normal course of his duties. In any case, where inside information is communicated to a third party in the normal course of the exercise of an employment, profession or duties [...], they must make complete and effective public disclosure of that information, simultaneously in the case of an intentional disclosure, unless the person receiving the information owes a duty of confidentiality (MAR, art. 17.8).

(44) MAR, art. 17.7.

5. Equality of shareholders

As case law shows,[45] the main restriction on communication with certain individual shareholders results from **compliance with the principle of equal access to information for shareholders.**[46]

The communication of non-sensitive information to shareholders does not, however, appear to be detrimental to the interests of other shareholders as long as knowledge of this information does not enable the investors concerned to purchase or sell the issuer's shares and thus create a breach of equality and distort the market.[47] Implicitly, AMF seems to allow such dialogue since it encourages the establishment of shareholder clubs and committees, even though these are gatherings of seven to twenty shareholders for the purpose of testing certain items of information.[48]

(45) CA Paris, division 5, ch. 9, 19 Dec 2013, no. 12/22644, A. de C. v SA Wendel: *"It was the responsibility of the company Wendel to inform the non-family shareholders of these ongoing procedures as soon as the company was listed, unless it is accepted that the shareholders may be on unequal footing since the Monetary and Financial Code prohibits practices that not only distort the functioning of the market, but also jeopardise the equality of access to information and the treatment of shareholders or their interests.*
In this case, the executives of the company Wendel have been seen to behave as the representatives of the majority shareholders and not of the company, even though by means of the public offering it is soliciting investment from its shareholders in order to fulfil its corporate purpose and the activity chosen by it, i.e. that of an investment fund (investment company specialising in the long-term development of leading companies in a sector and therefore has shares in companies), is focused on attracting investors through the profitability of its shareholdings."
(46) This principal of equality of access to information for shareholders is particularly highlighted by AMF in its 2015 study of communication methods for listed companies in relation to individual shareholders (p.19). *Issuers must ensure compliance with the principle of equality of access to information (article 223-10-1 of AMF general regulations). They must be particularly vigilant in this area, in particular when they implement a restricted access space for members of their shareholders' club"* (same study).
(47) The purpose of the principle of equal access is to allow shareholders to *"access useful information on which to base their judgement of the situation and the company's prospects"* ("La COB et le droit des minoritaires" ["The COB and Minority Shareholder Rights"], BJS, July 1991 – no. 7-8, p. 686).
(48) AMF, 2015 Study on the arrangements of listed companies for communication with their individual shareholders.

III. Contextual factors conducive to director-shareholder dialogue

In modern listed company law, several contextual factors should be noted that appear conducive to director-shareholder dialogue, beginning with the long-term shareholder engagement recently encouraged by Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017.

1. Encouragement of long-term shareholder engagement

While, on the director side, one legal justification for dialogue may be found in the existence of a duty of loyalty towards the company (*see above*), the same process is more difficult to carry out on the shareholder side. While shareholders are required to demonstrate loyalty upon dismissal of an executive or when they exercise their voting rights, they are not bound by this kind of duty of loyalty towards the company.[49]

Nevertheless, asset managers are bound by a duty of loyalty towards their own principals, to whom they must provide evidence that they are diligent and have implemented a system to exercise their rights and duties as shareholders. Hence the engagement of these shareholders in the companies in which they are investing and participating by means of their voting right.

More generally, it is also noted that inertia on the part of certain shareholders, in particular institutional investors, would generate a lack of understanding of the company's interest.[50]

(49) The principle of a shareholder duty of loyalty is not firmly established, with doctrine being rather reserved in this area – for a detailed analysis of this duty of loyalty for shareholders see, in particular: B. Fages, D. Poracchia, *Fiduciary duty of loyalty in French company law*, RTDF no. 3, 2014, p. 51; G.Terrier, *Les Devoirs de l'actionnaire et le droit des sociétés [Shareholder Duties and Company Law]*, Gazette du Palais – 06/06/2016 – special edition no. 2 – page 24.

(50) Le vote des gestionnaires d'OPCVM [UCITS Manager Voting] – Nicolas Cuzacq – Rev. sociétés 2006. 491.

These reasons explain why shareholder participation appears to be a method for the improvement of corporate governance[51] and more widely the global economy.

The Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement seems to develop this asymmetry in the duties of the shareholder and the director. It proposes extending and clarifying the obligations of shareholders, in particular institutional shareholders, noting that their lack of engagement had led to suboptimal governance and performance during the financial crisis.[52] However, it makes no mention of the fact that increasing shareholder engagement is limited by the principle that investors are not supposed to influence the management of the companies in which they are involved, as asserted by certain engagement policies.

By increasing shareholder engagement, the directive seeks to affirm reciprocal obligations which not only reinforce the legitimacy of dialogue, but also emphasise its necessity. In effect, the more shareholders are involved, the more the board of directors is required to take their aspirations into account.

In practical terms, the revised directive lays down a number of prohibitions relating to the transparency of institutional investors and asset managers.

It specifies that institutional investors and asset managers must develop and publish an engagement policy that describes how they incorporate shareholder engagement into their investment strategy. This policy shall describe how they monitor investee companies on relevant matters (including strategy, financial and non-financial performance and corporate governance); and also the manner in which they *"conduct dialogues*

(51) COM/2003/0284 final, Modernising Company Law and Enhancing Corporate Governance in the EU, p. 10. The Commission was at this time already encouraging voting by institutional investors, deeming that *"have an important role to play in the governance of companies in which they invest."* It proposed encouraging voting but not imposing it.
(52) 'Whereas' clause 2 of Directive 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement.

with investee companies" and *"communicate with relevant stakeholders of the investee companies."*[53]

Les investisseurs institutionnels devront également communiquer sur la façon dont les principaux éléments de leur stratégie d'investissement en actions sont compatibles avec le profil et la durée de leurs engagements, en particulier de leurs engagements à long terme. Ces communications permettront ainsi aux émetteurs de mieux connaître les préoccupations des investisseurs.

Institutional investors should also disclose how the main elements of their equity investment strategy are consistent with the profile and duration of their liabilities, in particular their long-term liabilities. Such disclosures will thus enable issuers to better understand the concerns of investors.

Nevertheless, for guidance on their engagement policy and the exercise of voting rights, institutional investors increasingly use the services of proxy advisors, whose excessive influence is often criticised.[54] Improved involvement of these investors may therefore result from their increased freedom vis-à-vis recommendations from these proxy advisors. The directive promotes this approach by requiring these advisors to disclose certain key information relating to the preparation of their research, advice and voting recommendations and any actual or potential conflicts of interests or business relationships that may influence the preparation of the research, advice and voting recommendations.[55]

(53) Art. 3g(a) of Directive 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement – the phrasing appears to provide room to manoeuvre regarding the method of conducting dialogue with shareholders.

(54) AMF was already making such criticisms in 2005 in its report on voting rights at general meetings in France - 6 September 2005: *"This activity [of proxies] is the subject of criticism due to the lack of clarity of activity in the chain between the company and the shareholder using the services of a voting provider, with the result that doubts hang over the systems of proxy voting providers, in particular regarding the casting of a vote in an uninformed, or "blind" manner due to the lack of sufficiently detailed advice. In the worst case, there is a danger that the exercise of voting rights may become a matter of simply marking boxes on voting forms without having reflected on the issue."*

(55) On this topic, the directive also refers to *"whether they have dialogues with the companies"* (art. 3j of Directive 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement).

2. The tendency towards stewardship

The introduction of this policy of engagement demonstrates that a tendency towards the Anglo-Saxon concept of stewardship is becoming apparent. The idea underlying this concept is that the institutional investor acts, on behalf of its clients/beneficiaries, as a steward or long-term manager, within the investee company.

This development reflects an increased concentration of stakeholders in the domain of asset management (whose resources, especially human resources, are extensive), and greater long-term involvement of these managers (their investments are largely made via index funds, and so in a sense are locked in).

Currently, in Europe, passive investors represent on average 25% of all institutional investors in capital for large European valuations (conservative value taking into account the holdings of classic index investors and quantitative investors).[56] This figure is constantly increasing.

In the UK, this development led to the 2012 publication of the ***UK Stewardship Code*** – which is to be revised in 2018. In particular, this code encourages institutional investors to conduct dialogue with companies,[57] on matters that are the subject of votes at general meetings as well as other matters.[58]

Such a Code now exists in the following countries: South Korea, Hong Kong, India, Italy, Japan, Netherlands, Singapore, Switzerland, Taiwan. And recently in the United States with the *Investor Stewardship Group*.[59]

The idea of stewardship therefore undoubtedly goes hand in hand with the development of dialogue.

(56) In the United States, the four largest institutional investors (Vanguard, Fidelity, State Street and Blackrock) held on average around 21% of the share capital of S&P 500 companies in 2016 (publication by Sullivan & Cromwell, "2016 *U.S. Shareholder Activism Review and Analysis"*, 28 November 2016).
(57) Principle 1 of the *UK Stewardship Code*, 2012 (see Appendix 2).
(58) §4 of the *UK Stewardship Code*, 2012 (see Appendix 2).
(59) https://www.isgframework.org/stewardship-principles/

CONCLUSION

The rules applicable to the boards of listed companies seem to allow, without any changes being required, the development of dialogue between directors and certain shareholders:

- The communication of information is strictly limited to **information that does not constitute inside information or confidential information.**
- Direct dialogue between directors and shareholders does not clash with the **hierarchical organisation of powers,** but rather enables the board of directors to carry out the duties assigned to it.
- The **collective nature** of the board of directors is not affected by the exchanges that certain directors may have with shareholders; the board may, in particular, formally appoint the directors in question. Depending on the content of the dialogue, the issue of collective liability can be resolved.
- The **principle of shareholder equality** does not require any prohibition on all disclosure of (non-inside) information.

The directive of 17 May 2017 constitutes a contextual factor that is favourable to dialogue in that it promotes long-term shareholder engagement and underlines a tendency towards the bilateralisation of duties and responsibilities within companies.

PART 2
The existing practice of dialogue between shareholders and directors – key findings from interviews and consultations carried out by the commission

The legal analysis set out in the first part of this report is by no means an exhaustive examination of the topic. Whether continuous or halting, frequent or rare, organised or empirical, director-shareholder dialogue is already a very concrete reality for issuers and their shareholders. It is a full-blown element in the governance of listed companies – and, at the very least, a subject that such companies will inevitably be confronted by if they do not take the initiative and deal with it themselves.

Alongside a purely legal analysis, and in the absence of any literature on the subject, the interviews and consultations carried out by the Commission have provided new insights into this existing practice. The purpose of this part of the report is to convey these insights.

I. A dialogue that both sides want

Indisputably, the first stakeholders to have publicly communicated about dialogue and its benefits are large institutional investors.[60] This comes amid the wider trend towards shareholder engagement.[61] This engagement takes the shape not only of voting at general assemblies, but also, and especially, of regular dialogue conducted with companies. Hence the facilitation of dialogue is described as a priority area for the *Investor Forum*.[62] Several participants in the Commission's work advanced the idea that, in the eyes of shareholders, this dialogue was legitimised by the feeling that the directors they appoint are their representatives.

Another argument in favour of such dialogue, advanced by certain investors, is being able to improve the quality of boards through a more qualitative approach and therefore moving away from a compliance/box-ticking approach that is in part imposed by the often overly legal nature of company documentation on the role and action of the board.

However, it would be a mistake to think that the desire for director-shareholder dialogue only comes from shareholders. In the almost unanimous view of the individuals interviewed or consulted by the Commission on the issuer side (organisations, company representatives, directors, general counsels, board secretaries, investor relations directors and corporate development directors), the desire for dialogue also comes from companies themselves. Companies are not averse – far from it – to creating a

(60) In particular, see, in the context of its Investment Stewardship, the position taken by the asset manager BlackRock on "*Le dialogue actionnarial en France: pour une participation des administrateurs*" ["Shareholder dialogue in France: towards director participation"] – https://www.blackrock.com/corporate/en-gb/literature/market-commentary/blk-le-dialogue-ac-tionnarial-en-francemarch2016.pdf. See also chapter 2 point 7 Dof the Amundi voting policy at *"Dialogue actionnarial: engagement direct du conseil"*["shareholder dialogue: direct board engagement"] http://le-groupe.amundi.com/Un-ac- teur-engage/Developper-une-finance-responsable.

(61) D. A. Katz, L. A. McIntosh, "Corporate Governance Update: The Changing Dynamics of Governance and Engagement", NewYork Law Journal, July 22 2015; Study by Pwc and Weil Gotshal & Manges LLP, "Director dialogue with shareholders — what you need to consider", 2013: https://www.pwc.com/us/en/gover- nance-insights-center/publications/assets/pwc-regulations-fair-disclosure-directors-communicate.pdf; Association of British Insurers, "Improving Corporate Governance And Shareholder Dialogue": www.ivis.co.uk/media/5929/ABI-Report-Improving-Corporate- Governance-and-Shareholder-Engagement.pdf; BlackRock, Ceres, "21st Century Engagement": https://www.blackrock.com/corporate/en-hu/litera- ture/publication/blk-ceres-engagementguide2015.pdf.

(62) https://www.investorforum.org.uk/

communication channel with shareholders who are likely to support the company in its strategy and choices in the area of governance. They are fully aware of the benefits of dialogue for them *(see above)* and, except in specific cases, are generally favourable towards it, without excluding the possibility of it involving the board of directors in one way or another, provided that its legal limits are understood and respected by both parties, directors and shareholders alike.

The reality, therefore, is that director-shareholder dialogue is a desire expressed on both sides. From this angle, French listed companies appear a lot more open than they are sometimes caricatured to be in comparison to their foreign counterparts.

In this regard, the work group heard issuers note, with regret, that some of their investors, in particular international ones, were not always open to this proposed dialogue.

II. A dialogue that is already widely practised

Another important finding from the exploratory work carried out by the Commission is that the absence of any legislative or regulatory framework does not have the effect of inhibiting issuers from practising dialogue.

The accounts gathered reveal that, while the practice is currently less widespread in France than in other countries, in particular the United Kingdom,[63] numerous issuers are already engaged in such dialogue. Several investors note with satisfaction that practice is beginning to change in France.[64]

(63) One large investor observes that in the United Kingdom 100% of its meetings with issuers take place directly with directors, while in France the figure is only 10%.
(64) One investor notes that in 2017 around a third of its dialogues with French CAC 40 companies included the presence of a director, a sharp increase on previous years.

These accounts even show that the relative lack of standards is interpreted by some companies as freedom of organisation, so that the various companies engaging in such dialogue do so in greatly differing ways, both in terms of the parties involved in the dialogue and its format and content.

So far, there have been no abuses of the practice.

The heterogeneous nature of the director-shareholder dialogue practised is in many cases linked to the different investor profiles and issuer situations involved (structure of capital, mode of governance). Each issuer makes arrangements based on its shareholders, who may vary significantly from one case to the next.

III. Investors with varied profiles and objectives

1. Short-term or long-term shareholders

Our interviews revealed a significant divergence in the apprehension towards and practice of dialogue depending on whether it is conducted with short-term or long-term investors. From the issuer's perspective, the benefit of conducting dialogue with short-term investors on matters of governance (or more generally the competence of the board) is fairly low, since such investors are only interested in the immediate yield of their investment and not, as a priority, the company's strategy or governance.

On the other hand, long-term investors are generally more involved and seek to develop communication with the company's governance bodies regarding strategy and governance, in relation to which they may have their own vision. Further, as noted by one large asset manager, long-term investors may possess expertise and analysis that the company would benefit from hearing, due to their very good knowledge of market practices and their extensive screening. Such investors are increasingly eager to conduct dialogue with directors – first and foremost, to ensure that the board of directors is functioning correctly in terms of the rules and practices of good governance and that its members are fully committed to the duties assigned to them *(see below)*.

These investors are therefore looking for a halfway position that does not always please issuers: neither completely disengaged nor fully involved (as they still are not board members),[65] they prefer an intermediate dialogue position.

2. Active and passive managers

Among long-term investors, particular attention was paid during interviews to the behaviour of passive management funds, which are also fervent supporters of direct dialogue with directors. Passive fund investment decisions are based on indexes and algorithmic criteria. This means that their only way of influencing the value of their portfolios is not only through voting on resolutions at general meetings – strategy for which is dictated by their voting policy – but also by how they assess governance by means of a dialogue directly involving a member of the board of directors, on the understanding that a better governed company is a more valued company. This means that what are called 'passive funds' are, in reality, becoming more and more active.

3. Activist funds

During our interviews, the specific case of activist funds was mentioned on several occasions. The representative of one of these funds explained to the Commission that its average investment period is five years, which makes it an *anchor shareholder*. According to the representative, activism is an accelerator of dialogue insofar as it is motivated by an investment based on a programme of value creation that is specific and tailored to the company. More than a mere investor, but less than a genuine owner,

(65) For some investors, not serving on the board is more a matter of impossibility than refusal. See, in the AFG recommendations on corporate governance: *"To ensure independence, the portfolio manager and his employees must not be a director or member of the supervisory board of a company whose securities feature in the fund assets he is managing"*. This recommendation echoes that expressed in art. 70 of the AFG's UCITS ethics regulations.

activists fill the ownership gap" and become a focal point for engagement with management. When an activist is said to be "constructive", they primarily address the board according to a pattern that might be termed "reverse" dialogue (where it is the shareholder who informs the board, and not the other way around).

But practice shows that the activist's approach is not always focused on dialogue. It may also involve attacking the board by accusing it of defects that supposedly prevent it from acting as a representative in the first place.

On the issuer side, the position is clearly very different. The possible introduction or increase of an activist fund stake is a sensitive issue, carrying a risk of destabilising the company. Our interviews revealed that issuers did not think it wise to conduct direct dialogue between directors and a shareholder adopting a hostile approach, in particular by using legislation on executive pay to destabilise the company. The arrival of an activist should be dealt with by the company's management, by implementing a suitable and coordinated communication strategy with dedicated points of contact. Directors should be made aware of this possibility. More generally, dialogue with shareholders, in particular via the board of directors, may enable the prevention of activist situations.

4. Shareholders with representatives on the board

The position of shareholders with representatives on the board (state shareholder, employee representative etc.) is also unusual, in that dialogue with directors already takes place within the board itself.

This is all the more true for institutional investors who, despite the constraints that it imposes on them (e.g. blackout periods), have chosen to serve on the board. As one general counsel observed, this presence on the board is the most perfect form of dialogue.

This dialogue within the board may be enhanced, where applicable, by means of "executive sessions" held without the presence of the company's executive directors, a practice that is becoming widespread.[66]

IV. Issuers in different situations

The diverse profiles of shareholders is matched by the variety of situations in which issuers themselves may find themselves, meaning that they may not all be equally open to dialogue. In particular, director-shareholder dialogue is not approached in the same manner in controlled companies and publicly traded companies, which is not to say that it is only practised by the latter.

1. Presence or absence of a controlling shareholder in companies

Does the shareholder structure influence the requirement for and intensity of director-shareholder dialogue?

At first, the answer may appear to be yes. Thus, companies that are fully publicly traded, where the largest shareholders only have a low proportion of the voting rights, regard this dialogue as an absolute necessity, whether this is in order to attract a small number of loyal long-term shareholders, or to manage in a more timely manner, ahead of the general meeting, to secure the most comfortable percentage of positive votes on important or sensitive resolutions. In such cases the objective is to form a representative panel of shareholders with which to establish the dialogue. While certain shareholders are favourable towards this or even take the initiative themselves, others are more difficult to identify or attain.

(66) See, in this regard, the Report of the High Committee on Corporate Governance, October 2017, p.15.

Conversely, one might imagine that companies with large majority stakes would be less exposed to this theme of director-shareholder dialogue – which, for them, appears to correspond to the requirement to protect minority stakeholders, which is already covered by positive law.

But this contrast is not borne out by reality. Many controlled companies engage in dialogue with their shareholders, in particular by appointing a senior director, a position that is not exclusive to companies without a controlling shareholder. Further, even at companies that outwardly appear not to have organised such dialogue, the Commission noted that major strides towards dialogue had been taken and that, empirically, it was being practised. The more a company is controlled and sees its board members change accordingly, the more important it becomes to show the market that it is operating in line with prevailing standards of governance. Of course, this also applies to companies controlled by a family shareholder.

Further, the introduction and broadening of "say on pay" – through legal provisions that many have described as flawed – means that even controlled companies often feel a need to engage with their shareholders in a preliminary explanatory dialogue on the highly sensitive issue of pay.

Such a dialogue is also necessary when preparing for the general meeting's vote on regulated agreements *("conventions réglementées")* involving the controlling shareholder, who is then stripped of the right to vote.

Finally, independently of these aspects, all companies, even controlled ones, know that dialogue enables the opening of a communication channel that may be useful in the event of a crisis.

In conclusion, capital structures do not significantly affect the necessity of dialogue.

2. Companies with one- and two-tier structures

It appears that whether a company has a one-tier (board of directors together with management) or two-tier (management board and supervisory board) structure does not affect the need for dialogue.

Equally, in *société anonyme* companies, which use a one-tier structure, the choice of whether to combine or split the roles of chairman and chief executive has no impact, insofar as dialogue continues to be necessary even when the executive constitutes a separate role. On the other hand, this choice may affect the determination of stakeholders in this dialogue on the issuer side *(see below)*.

In companies with a management board and supervisory board, dialogue is established naturally with the members of the supervisory board.

V. Content of dialogue

The actual content of the director-shareholder dialogue is a vital issue, as this is where a certain lack of understanding arises among those who are not yet practising it. For issuers and investors for whom such dialogue is already a reality, the issue of content appears broadly to have been clarified. There is an awareness both of what this dialogue does not address, and what it does address.

What does the dialogue not address? The participants in the Commission's work were all clear: the goal of dialogue is not to disclose or seek out inside information; it concerns only public information.

In terms of public information, the company's governance is the principal subject of the dialogue.

1. Governance: the principal subject of dialogue

A large majority of the participants in the Commission's work stated that director-shareholder dialogue should primarily address governance – with strategy falling more within the province of management and forming the subject of separate communication. Investors themselves generally share this idea, insofar as their desire to be able to directly address the board or one of its members derives, precisely, from a desire to promote good governance practices. This also applies to management funds, for whom this dialogue is primarily a means of ensuring that the board is functioning smoothly and that directors are carrying out their role effectively. Their goal is to prevent the company, even if it is performing very well, from one day being caught out by flawed governance practices, poor consideration of extra-financial risk, or underinvestment in long-term drivers of value creation.

In terms of governance, practically all the investors interviewed referred to: the functioning of the board and its membership, succession planning, and executive pay.

Many issuers, meanwhile, are aware that dialogue is necessary to promote the work and running of the board to investors. Over the past few decades, French capitalism has undergone a profound change. The boards of French listed companies now tend to be up to the strictest international standards, and it is necessary to provide a window on their quality. And this requires dialogue. Regardless of whether one views it positively, it appears that such dialogue is a way of appeasing the concerns – in some ways a historical legacy – that certain investors still have with regard to boards.

For such investors, standardised documentation – in particular reports on the running of the board – is not enough for them to assess its actual nature. The issuers and investors interviewed and consulted by the Commission agree on the idea that it is difficult to gain an insight into the running of the board via a descriptive report – even if this is all the law requires. More generally, as a result of an explosion in its volume, the

influence of this standardised documentation is beginning to fade. There is such a thing as too much paperwork. When that happens, discussion regains the upper hand.

In a sense, investor demands are bolstering and accelerating the major transition that has been occurring for several years on the boards of French listed companies.

2. The difficulty of delineating the boundary with strategy

Despite the emphasis on governance, the boundary between governance and strategy can sometimes seem porous or even impossible to delineate. The board is tasked with determining the company's overall direction, and one of its duties is therefore to participate in establishing strategy.

Further, certain subjects falling under governance are directly linked to aspects relating to strategy. This applies, for example, to variable executive pay. Traditionally classified as a purely governance-related subject, it is linked to the question of strategy in terms of anything affecting the performance criteria used by the company. Similarly, in the event of a crisis, shareholders will not want to be limited to a simple discussion of governance, but will seek to understand the reasons for the crisis and, where applicable, to question the company's strategy.

A major asset manager remarked to the Commission that governance is not an end in itself: it is an asset in the service of strategy.

Some issuers resolves this problem of delineation by organising a governance "road show" conducted by the senior director very shortly after the "capital day" organised by the management team, which makes it easier to divide the issues to be tackled between the different meetings and enables the director to refer to the previous meeting for any issue relating purely to strategy.

In this type of "road show", one senior director interviewed by the Commission regularly deals with three closely related subjects: 1/ the running of the board; 2/ the board's understanding of the group's strategic vision and its alignment with it; 3/ executive pay.

The content of this dialogue is then reported to the rest of the board, which is then better informed about shareholder expectations.

Central to the dialogue then, and located halfway between governance and strategy, is the investors' verification that the interests and views of management are aligned with those of the board. This is why it is important to them that public information they are already aware of should be re-conveyed by a member of the board.

3. The connection with CSR and stakeholders

As one major investor pointed out to the Commission, the environmental and social challenges of our time can only be dealt with if there is a chain of responsibility that begins with the final investor and reaches all the way to the management of companies, with the board of directors forming an intermediary link in this chain. Thus, CSR themes may fall within the scope of the dialogue that investors wish to conduct with directors.

VI. Dialogue stakeholders

1. Role of the board secretary and general counsel

The interviews and consultations carried out by the Commission revealed the importance at any listed company of the board secretary and general counsel, who are key stakeholders and focal points in the field of governance. They are the primary and essential conduits for the work and documents produced by the company or the board of directors in matters of corporate governance.

Dialogue with the shareholders is sometimes directly conducted by the board secretary or general counsel, who may in certain cases be assisted by an investor relations professional from inside our outside the company. In the opinion of investors, however, this kind of procedure is no substitute for direct dialogue with the board of directors. The board is not subordinate to management and it is from the board itself that information attesting to its correct functioning must originate.

2. The freedom to decide which director is assigned to conduct dialogue

There is a growing consensus that it is the responsibility of the board itself to decide which director it assigns to conduct dialogue with shareholders and to provide him with a framework for engaging in the dialogue. Chairman of the board, senior director, chairman of the appointments and remuneration committee, or any other director, acting alone or with other directors: all these options are open to companies.

It may also be the case, in the event of a serious crisis where it is necessary to consult the board (public offering, legal proceedings casting doubt on the company, crisis situation, catastrophic event etc.), that the board forms an ad hoc committee to ensure direct communication with shareholders and the market. In this case, it is the chairman of this ad hoc committee that conducts the dialogue.

But regardless of the fact that the issuer's board is free to choose the director assigned to conduct dialogue, certain precautions must still be taken. The interviews and consultations carried out by the Commission have shed light on these precautions, which are also emphasised by the fourth report of the High Committee on Corporate Governance, made public in October 2017 *(see above)*.

3. An experienced and available director

The participants in the Commission's work insisted on the necessity of appointing a director with extensive experience of institutional communication and sufficient knowledge of governance matters. In effect, the director must be sufficiently at ease conducting direct dialogue with shareholders while simultaneously knowing how to apply reasonable limits to this dialogue.

Among the many variables that must be taken into account, there is also the director's availability, insofar as dialogue with shareholders requires a great deal of time and, in some cases, travel – all in coordination with management and its various interactions with investors. However, as the Commission was repeatedly told, the board of directors is not a permanent body, meaning that it is not easy to make one of its members a permanent representative.

Given this need for the director tasked with dialogue to be both experienced and available, it was judged natural by everyone, including investors, that additional remuneration should be provided for this role.

4. A director with support

In practice, directors rarely act alone when meeting investors. Most often, they are accompanied by a person from the management team, who may be the board secretary, the general counsel, or the investor relations manager *(see above)*. The reason for this is not to censor what the director has to say – it is of course the director's own words that investors wish to hear – but to provide a stable framework for the dialogue and to ensure its progress. One director that the Commission spoke to insisted, in particular, on the importance of this support. On their side, investors accept the principle of a supporting figure, while pointing out that this task should not be assigned to service providers from outside the company.

5. The chairman of the board

While he might initially appear to be the perfect candidate for conducting dialogue, the chairman of the board is not always the representative that investors want to speak to. In companies that have chosen to combine the roles of chief executive and chairman of the board, it is difficult to imagine that he might conduct dialogue with investors while leaving aside his executive role. This conflict of roles can only be to the detriment of the dialogue, and investors will feel more like they are talking to the chief executive than the chairman of the board; it will then be harder for them to assess the reality of the board's work and the involvement of its members.

On the other hand, dialogue with the chairman of the board may be more relevant if the company has chosen to separate the roles and the chairman therefore has no executive role. He is then a natural spokesperson for the board he chairs.

In the view of most of the individuals interviewed or consulted, the presence of a non-executive chairman does not prevent dialogue from being established with another director, for example the chairman of the appointments and remuneration committee if this is a different individual, or with the senior director if one exists.

6. The senior director

The position of senior director tends to play a major role in the practice of director-shareholder dialogue. As AMF noted in its 2017 annual report on corporate governance, among societies with a senior director, the published description of duties reveals that 56% of them are tasked with managing relations with shareholders.[67] Particularly when the company is directed by a chairman and managing director, the senior director appears a relatively natural focal point for investors, who can easily identify him and

(67) AMF 2017 report on corporate governance, p. 41.

seek his attention. He often has his own e-mail address which is disclosed to shareholders and to the market.

An examination of the reference documents reveals that, at companies where the task of conducting dialogue is assigned to a senior director, this task takes a very different form, both in terms of its organisation and the delineation of its boundaries.

However, it is often stated that the senior director must report to the board concerning his communications and work. In most cases, he has access to the resources of the board secretariat which he may use to carry out his duties.

The post of senior director is not a requirement in every company and the fact that a company does not have one is not an indication of a lack of dialogue with its shareholders.

VII. Timing and format of dialogue

1. At general meetings

French company law identifies the general meeting as the preferred time for meetings between the company's shareholders and its governance bodies. Thus, paragraph 19 of the Afep-MEDEF Code describes as an ethical duty the requirement for all directors of listed companies to attend the meeting. Some issuers claim to attach great importance to this attendance, in particular for newly elected directors, for whom it presents an opportunity to present themselves to shareholders and to respond to any questions they may have.

According to many of the individuals who contributed to the Commission's work, the limits of dialogue conducted at the general meeting become rapidly apparent. Firstly, this is only an occasional dialogue, since the ordinary general meeting is only held once a year. Also, it is considered by many to be very impersonal, due to the amount of legal and statutory formalities, and the use of voting by post or proxy. Sometimes, due to the

exposure of management, a general meeting may be subject to considerable tensions that are not conducive to level-headed dialogue: irregularities during the meeting, public questioning etc. It must also be noted that general meetings now tend only to attract individual shareholders, for whom this momentary dialogue may be sufficient, whereas it is no longer sufficient for institutional investors.

2. Outside general meetings

Director-shareholder dialogue may be conducted before and after general meetings. The introduction of "say on pay" in France has encouraged companies to approach shareholders prior to the general meeting to defend the executive pay that they have been asked to vote on *(see above)*. However, in addition to the dialogue conducted in relation to specific resolutions, some issuers have established a continuous dialogue with their most important shareholders, in particular via a "road show" dedicated entirely to governance, conference calls, or e-mail exchanges.

The format of the dialogue is largely dependent on the resources that the issuer is able to devote to organising the dialogue. As this continuous dialogue is not formalised in any legal or regulatory text, the company can organise it however it wishes. Both issuers and investors prefer direct contact as far as possible. One risk that was mentioned in the course of the Commission's work was that of dialogue becoming too standardised.

Alongside the dialogue itself, one major asset manager mentioned, as an example of good practice, a letter sent by the chairman to all shareholders.

3. Outside a crisis period/During a crisis period

Two types of dialogue may be established.

On one hand, there is dialogue conducted outside a period of crisis, which is more or less standardised and enables directors to talk to shareholders about matters of governance and/or, to a certain extent, strategy (*see above*). This dialogue may be called preventive in that one of its goals is to strengthen the confidence of investors and prevent a crisis from developing. After a crisis has developed, it is too late to open a communication channel that had previously been closed. This is demonstrated, for example, upon the arrival of an activist shareholder: the more a society has used dialogue to establish a relationship of trust with investors, the more likely it will be to obtain their support.

On the other hand, a form of dialogue also exists during crisis periods, but is very different in nature. During a crisis period, the natural focal point for the shareholder remains the company's management. If the shareholder (or an association of shareholders formed for the occasion) chooses to make contact with the board of directors, this will be because they are challenging the strategy decided by management or dialogue with management has come to a standstill. This particular kind of dialogue was not the focus of the Commission's work. Rather, we focused on dialogue established outside crisis periods, on he grounds that such dialogue is precisely what is needed to avoid a number of such crises.

VIII. Practical obstacles to dialogue

1. The resources of the parties to the dialogue

In order for a dialogue to be established between directors and shareholders, both sides must possess adequate resources. Not every issuer or investor can, or wants to, devote the financial and human resources necessary to promote such dialogue.

This is a genuine issue, as it was emphasised to the Commission several times, on all sides, that dialogue has a cost.

2. Intermediation by proxy advisors and "box ticking"

The issue of the resources of the parties to the dialogue leads directly to the issue of proxy advisors. When investors do not invest sufficient resources in developing internal expertise, they tend to rely on the recommendations given to them by proxy advisors. The natural tendency of the issuer – particularly if their capital is fragmented – will then be to place a high priority on establishing contact with the proxy advisor, in order to provide it with the necessary information for it to give a positive recommendation. The idea is to use the proxy advisor to reach as many investors as possible.

For some, this outsourcing of the shareholder's power to proxy advisors tends to reduce the appeal of a director-shareholder dialogue, which is replaced by a dialogue between issuers and proxy advisors. However, many issuers complain that these agencies refuse to engage in dialogue, and instead make their recommendations based on policies they have established, by means of a "box-ticking" process that fails to take into account the particular circumstances of the company. Some issuers also point to conflicts of interest at proxy advisors which should be subject to stricter regulation. A first step looks set to be taken in this direction with the transposition of the Directive of 17 May 2017 as regards the encouragement of long-term shareholder engagement.

For their part, proxy advisors claim that, as a service provider, their role is not to take the place of investors, and that they are willing to enter into dialogue and subsequently adjust their studies on condition that the dialogue takes place sufficiently in advance of the general meeting. One proxy advisor emphasised that this dialogue was of a different nature to that conducted by shareholders with directors, since the proxy advisor only conducts dialogue with issuers (and not the directors) – and then only when it needs a better understanding of the information communicated by the company. In this regard, the same proxy advisor pointed out that dialogue with issuers was facilitated in the United Kingdom by the greater accessibility of public information. The less time the proxy advisor has to spend collecting information, the more time it has to discuss it with the company's management.

IX. Expectations expressed

1. Legislative intervention is not necessary

The interviews and consultations conducted by the work group established a near-unanimous point of agreement: the existing legal framework allows for director-shareholder dialogue, and legislative intervention to regulate it would not be beneficial. Director-shareholder dialogue is constantly evolving and is subject to rapid developments. Issuers should therefore have the right to experiment. Some companies, incidentally, believe that they do not need to enhance their existing practice since they are performing well and their governance is not being challenged in any way.

2. Retaining freedom while obtaining security

The key idea that emerges from the various opinions gathered is that it is up to companies to organise themselves as they see fit to meet their shareholders' expectations in terms of dialogue with directors. The work of the High Committee on Corporate Governance, which tends to follow this line, has been warmly welcomed.

Several participants in the Commission's work have expressed a desire for the Financial Markets Authority to adopt a position on this subject, if necessary via a recommendation. In doing so, what is important is not to provide a standardised framework for such dialogue, but rather to reassure the issuers engaging in it.

3. A focus on soft law

To further reassure issuers engaging in such dialogue, and also to demonstrate the openness of French listed companies, it has been suggested that the Afep-MEDEF Code, which already recognises the possibility of appointing a senior director, should provide in some way for the possibility of dialogue between directors and shareholders.

PART 3
Summary and recommendations

Continuous dialogue between issuers and their shareholders is traditionally conducted by the chief executive and his staff, at road shows, investor days, shareholder clubs etc.

As part of its duty to defend the company's interests, however, the board of directors naturally takes account of the views of shareholders. It is therefore logical for the board to be able to regularly receive from the chief executive and/or his staff a summary of any observations, comments or questions that shareholders may raise.

If the board of directors so wishes, direct dialogue may certainly be established between one or more of its non-executive members – such as a senior director or committee chair – and shareholders. It is then the responsibility of the board to determine the conditions and procedures according to which this dialogue should be conducted.

It is clear that dialogue with the main shareholders is already established practice within certain large French groups that consider it to be useful. Such dialogue, which is permitted under French law and conforms to international practice, is particularly useful in anticipating crisis situations or, in certain cases, resolving situations where shareholders have concerns about the functioning of the board of directors.

In conclusion, our Commission recommends that Afep and MEDEF give concerted thought to incorporating the subject of director-shareholder dialogue into their Corporate Governance Code. This is not so much to insist on the precautions that such dialogue requires – that is of course necessary – but rather to emphasise its positive aspects and to encourage issuers to conduct such dialogue with investors who request it. A recommendation might therefore be made for these issuers to establish a dialogue policy that involves the board.

The Commission recommends that Afep and MEDEF take a more prescriptive approach when it comes to the appointment of a senior director, who is able to act as the primary independent representative for conducting dialogue with shareholders in companies where the roles of chairman and chief executive are not separated.

Symmetrically, the Commission recommends that AFG give consideration to including director-shareholder dialogue in its recommendations as a practice enabling investors to carry out their duty of monitoring and improving corporate governance.

The Commission recommends that, in current discussions of corporate growth and transformation, which rely on the close connection between the creation of value and good corporate governance, we should not lose sight of the fact that responsibility for corporate governance rests with companies and their shareholders, who should be free to make arrangements based on their specific situation. Improving how boards operate and enhancing the rights of minority shareholders do not necessarily require a heavy-handed legal approach. Alongside standardised arrangements, the dialogue that develops between boards and shareholders is also a discreet but effective part of this process. It is one of the means by which the governance of French listed companies is continuously improving.

The Commission recommends that, in current discussions of the distribution of value and corporate social engagement, the positive role of shareholders should not be underestimated. The dialogue that investors conduct with boards regarding extra-financial issues constitutes one of

the best means of taking into account the environmental and social challenges that companies must face. The company's social engagement and the engagement of shareholders are not polar opposites.

Having made these recommendations, the Commission believes that director-shareholder dialogue does not require any particular intervention by the legislator or the regulatory authority.

APPENDIX 1

REPORT OF THE HIGH COMMITTEE ON CORPORATE GOVERNANCE, OCTOBER 2017

(extracts)

3.5. Role of directors in dialogue with shareholders

The board's involvement in relations with shareholders (and more broadly with investors) has long been a recognised necessity, in particular through the Afep-MEDEF Code. It was referred to as early as the Viénot I report in 1995., which is known to form the basis for the various versions of the Code. In the current version of the Code, this duty is described as follows: "It is the duty of each board of directors to determine the company's financial communication policy" (§ 4.1).

Also, the Code only deals with relations between directors and shareholders in the context of the general meeting, covered in §5.

5. Further, attending general meetings comes under the "ethical"

duties of directors, set out in § 19. The Code has only provided for the individual involvement of directors in dialogue with shareholders outside of general meetings since 2013, where it is described as a "special duty" that may be assigned to a director, in particular a vice-chairman or senior director, and which must then be described (§ 6.3).

The necessity of the board's involvement in relations with shareholders is thus established beyond doubt, insofar as it occurs in two ways: the monitoring of the information provided to shareholders and the market, and participation in general meetings.

However, there has been growing pressure from institutional investors for the establishment of direct dialogue between directors and shareholders. This request comes in the context of a wider tendency towards their increased involvement in corporate governance:

- the establishment of specialised governance services and publication of voting policies at the most structured investors, an increase in the challenging of resolutions at general meetings, stewardship codes, provisions of the EU directive on "shareholders' rights", etc.;
- encouragement of the spread of dialogue with issuers "ahead" of general meetings, in particular by AMF (2011 recommendation on proxy advisors, 2012 report on general meetings, etc.) and proxy advisors;
- strengthening of resources and practices on the issuer side (investor relations services, telephone conferences and "road shows", advance negotiation of meeting resolutions with main shareholders and proxy advisors, etc.)

According to certain institutional investors who publish their corporate governance policy, direct access to directors is particularly justified in the following circumstances: specific crisis or concern, need to verify that the board is correctly fulfilling its duties, major operations.

Dialogue with directors is common practice in the United Kingdom and the United States, while also being regulated. The UK Corporate Governance Code states that dialogue with shareholders is the collective responsibility of the board, but assigns a specific role to the chairman and senior independent director: the chairman should "discuss governance and strategy" with the main shareholders, ensure that their concerns are brought to the board's knowledge, and ensure that independent directors, and in particular the senior independent director, participate in meetings with shareholders if the latter so desire. In the United States (where there is no Governance Code in the European sense), the board organisations recommend dialogue involving the independent directors, in particular the chairman and lead director, with long-term major shareholders.

This practice runs up against several obstacles in France, which are not always clear to foreign investors: an unfavourable legal context, and practical difficulties which are a more sensitive issue than elsewhere due to the responsibilities of executive management. On a legal level, caution when it comes to individual contact between directors and shareholders or investors is justified by:

- the desire not to upset the collective nature of the board, which prevents a director from publicly taking a personal position;
- the necessity of meeting public disclosure obligations that arises when communicating with investors. While such communication may not lead to any commitment on behalf of the company, it may lead to some investors being provided with information covered by these obligations, which of course also apply to the company's management and its employees. But directors may hesitate to take on this responsibility, which does not match the strict definition of their role.

This legal consideration is compounded by the practical risk of contradictions between what directors say and positions adopted by management, especially since the objective of shareholders is often to confirm information provided by the "official voice".

It should be noted that German issuers, subject to comparable pressure to what we are seeing here even though their legal model is as far removed from the Anglo-American model as ours is, have also demonstrated caution. The latest version of the German Corporate Governance Code, adopted in February 2017, includes the following addition: "the Supervisory Board Chair should be available – within reasonable limits – to discuss Supervisory Board-related issues with investors" (§5.2). Involvement in dialogue with shareholders is thus limited to the chairman (who, in accordance with statute, represents shareholders on a body where, in large companies, one third or half of the members are employee representatives). It should also be recalled that in Germany the board is by requirement a "supervisory board". The distinction between their areas of competence and those of the "management board" is of course more relaxed in the case of the combination of a board of directors and chief executive.

The High Committee considers that the participation of directors in dialogue with shareholders outside of general meetings tends to become an expectation of investors. However, it is recommended that certain precautions be taken. These recommendations are as follows:

- it is the duty of each board to give consideration to the procedures for dialogue;
- if the company's mode of governance takes the form of a separated chairmanship (or a supervisory committee), this duty may fall on the chairman of the board: in this case, it forms part of the "duties assigned in addition to those assigned by law" which must be described in accordance with §2.2 of the Afep-MEDEF Code; it may also be assigned to a senior director or the vice-chairman of the board, or to another director, but it is desirable not to diffuse responsibility by increasing the number of representatives;
- the selected person should preferably have experience in institutional communication, and if necessary receive adequate training;
- the duty must consist firstly in explaining the positions taken by the board in its areas of responsibility (in particular in the area of strategy, governance and executive pay), which have previously been communicated; this involves close coordination with the chairman of the board, if he is not the person to which the duty is assigned;
- it may then also consist of ensuring that the shareholders are receiving the information they expect from the company (and not to supply this information); this involves close coordination with the chief executive or his employees tasked with shareholder relations, and meetings or telephone communications must, unless explicitly required by the parties, be conducted in their presence;
- the director must report to the board on the carrying out of his duties.

APPENDIX 2

UK CORPORATE GOVERNANCE CODE 2016 (Royaume-Uni)

(extracts)

Section A: Leadership

[…]

A. 3: The Chairman

Main Principle

The chairman is responsible for leadership of the board and ensuring its effectiveness on all aspects of its role.

Supporting Principles

The chairman is responsible for setting the board's agenda and ensuring that adequate time is available for discussion of all agenda items, in particular strategic issues. The chairman should also promote a culture of openness and debate by facilitating the effective contribution of non-executive directors in particular and ensuring constructive relations between executive and non-executive directors.

The chairman is responsible for ensuring that the directors receive accurate, timely and clear information. The chairman should ensure effective communication with shareholders.

Code Provision

A.3.1. The chairman should on appointment meet the independence criteria set out in B.1.1 below. A chief executive should not go on to be chairman of the same company. If exceptionally a board decides that a chief executive should become chairman, the board should consult major shareholders in advance and should set out its reasons to shareholders at the time of the appointment and in the next annual report. *[footnote: Compliance or otherwise with this provision need only be reported for the year in which the appointment is made.]*

Section B: Effectiveness

[…]

B. 4: Development

Main Principle

All directors should receive induction on joining the board and should regularly update and refresh their skills and knowledge.

Supporting Principles

The chairman should ensure that the directors continually update their skills and the knowledge and familiarity with the company required to fulfil their role both on the board and on board committees. The company should provide the necessary resources for developing and updating its directors' knowledge and capabilities.

To function effectively all directors need appropriate knowledge of the company and access to its operations and staff.

Code Provision

B.4.1. The chairman should ensure that new directors receive a full, formal and tailored induction on joining the board. As part of this, directors should avail themselves of opportunities to meet major shareholders.

B.4.2. The chairman should regularly review and agree with each director their training and development needs.

Section E: Relations with shareholders

E.1: Dialogue with Shareholders

Main Principle

There should be a dialogue with shareholders based on the mutual understanding of objectives. The board as a whole has responsibility for ensuring that a satisfactory dialogue with shareholders takes place. [footnote: Nothing in these principles or provisions should be taken to override the general requirements of law to treat shareholders equally in access to information.]

Supporting Principles

Whilst recognising that most shareholder contact is with the chief executive and finance director, the chairman should ensure that all directors are made aware of their major shareholders' issues and concerns.

The board should keep in touch with shareholder opinion in whatever ways are most practical and efficient.

Code Provisions

E.1.1. The chairman should ensure that the views of shareholders are communicated to the board as a whole. The chairman should discuss governance and strategy with major shareholders. Non-executive directors should be offered the opportunity to attend scheduled meetings with major shareholders and should expect to attend meetings if requested by major shareholders. The senior independent director should attend sufficient meetings with a range of major shareholders to listen to their views in order to help develop a balanced understanding of the issues and concerns of major shareholders.

E.1.2. The board should state in the annual report the steps they have taken to ensure that the members of the board, and in particular the non-executive directors, develop an understanding of the views of major shareholders about the company, for example through direct face-to-face contact, analysts' or brokers' briefings and surveys of shareholder opinion.

E.2: Constructive Use of General Meetings

Main Principle

The board should use general meetings to communicate with investors and to encourage their participation.

Code Provisions

E.2.1. At any general meeting, the company should propose a separate resolution on each substantially separate issue, and should in particular propose a resolution at the AGM relating to the report and accounts. For each resolution, proxy appointment forms should provide shareholders with the option to direct their proxy to vote either for or against the resolution or to withhold their vote. The proxy form and any announcement of the results of a vote should make it clear that a 'vote withheld' is not a vote in law and will not be counted in the calculation of the proportion of the votes for and against the resolution.

E.2.2. The company should ensure that all valid proxy appointments received for general meetings are properly recorded and counted. For each resolution, where a vote has been taken on a show of hands, the company should ensure that the following information is given at the meeting and made available as soon as reasonably practicable on a website which is maintained by or on behalf of the company:

* the number of shares in respect of which proxy appointments have been validly

made;

* the number of votes for the resolution;

* the number of votes against the resolution; and

* the number of shares in respect of which the vote was directed to be withheld.

When, in the opinion of the board, a significant proportion of votes have been cast against a resolution at any general meeting, the company should explain when announcing the results of voting what actions it intends to take to understand the reasons behind the vote result.

E.2.3. The chairman should arrange for the chairmen of the audit, remuneration and nomination committees to be available to answer questions at the AGM and for all directors to attend.

E.2.4. The company should arrange for the Notice of the AGM and related papers to be sent to shareholders at least 20 working days before the meeting. For other general meetings this should be at least 14 working days in advance.

APPENDIX 3

COMPLIANCE AND DISCLOSURE INTERPRETATIONS ("C&DIS")

OF REGULATION FAIR DISCLOSURE ("REGULATION FD") (United States)

(extracts)

Section 101. Rule 100: General Rule Regarding Selective Disclosure

[...]

Question 101.11

Question: Does Regulation FD prohibit directors from speaking privately with a shareholder or groups of shareholders?

Answer: No. Regulation FD prohibits a company or a person acting on its behalf — such as directors, executive officers and investor relations personnel — from selectively disclosing material, non-public information to a shareholder under circumstances in which it is reasonably foreseeable that the shareholder will purchase or sell the company's securities on the basis of that information. If a company's directors are authorized to speak on behalf of the company and plan on speaking privately with a shareholder or group of shareholders, then the company should consider implementing policies and procedures intended to help avoid Regulation FD violations, such as pre-clearing discussion topics with the shareholder or having company counsel participate in the meeting. In addition, because Regulation FD does not apply to disclosures made to a person who expressly agrees to maintain the disclosed information in confidence, a private communication between an independent director and a shareholder would not present Regulation FD issues if the shareholder provided such an express agreement. [June 4, 2010]

NYSE: CORPORATE GOVERNANCE GUIDE (NOVEMBRE 2014) (United States)

(extracts)

Collaborative dimension (page 18)

Our discussion of the quantitative and qualitative dimensions of governance has focused almost exclusively on attributes and behaviors of corporate issuers and their boards. Increasingly, however, both investors and issuers alike are devoting more resources and energy to engaging with one another. This engagement takes various forms at various times but is an increasingly common and effective means of bringing about change. Engagement is likely to be a discussion topic at practically every corporate governance and director education conference, and at least two cross-constituency industry groups—the Shareholder-Director Exchange (SDX) and The Conference Board Governance Center— issued reports on corporate/shareholder engagement in the first quarter of 2014. While discussion of engagement often jumps right to the one-on-one dialogue between investors and company executives or board members, the Conference Board's Guidelines for Investor Engagement (March 2014) makes the point that in many respects engagement, broadly defined, begins with companies' disclosures to investors generally, as well as investors' disclosures regarding their views on key issues. The more context behind their decisions and actions that issuers can provide in their public disclosures, the better positioned investors are to make informed decisions— either regarding voting at the company's shareholder meeting or further engagement.

Likewise, the more transparent investors are with their points of view on key issues, the better positioned investee companies are to be responsive to those concerns. Nonetheless, there are often instances in which one-to-one engagement—beyond communicating through disclosure— between investors and issuers is a productive exercise.

While it is increasingly common for companies and their largest investors to have routinely scheduled opportunities to exchange views (often at a different time of year than the company's annual meeting), the majority of engagements are still reactive—initiated by one party or the other in response to a particular issue. The bulk of reactive engagement initiated by companies tends to be driven by a few factors. Among these are adverse recommendations issued by proxy advisory firms on company proposals or votes actually cast against company proposals by investors. In these instances, executives or board members reach out to investors to explain the company's rationale for supporting their proposals and seek either to refute proxy advisory firm recommendations against them or to convince investors to reconsider their votes. Investors typically reach out to companies either to clarify information regarding or communicate concerns with proposals to be presented at a shareholder meeting, or to discuss concerns with some aspect of corporate governance (that may or may not be the subject of a shareholder vote). For example, some institutional investors will write to or otherwise contact a subset of companies in their portfolio at which they're seeking to effect some sort of governance reform (eg adoption of majority voting). This outreach is typically the first step in a dialogue between the investor and the company and very often results in the adoption of responsive changes by the company. There has been ongoing discussion—and ample coverage in the two engagement studies cited earlier—as to the appropriate participants from the company in this dialogue. Investors are increasingly interested in discussing certain matters with members of the board, as opposed to members of management. In particular, where the decision-making on a particular matter is exclusively in the purview of the board (eg compensation of the CEO), investors are more inclined to expect dialogue with the relevant member(s) of the board (eg the chair of the compensation committee for concerns related to CEO pay). To this end, we believe that boards may be well-served by the designation of a committee of directors to serve as the focal point for engagement and other interactions with key shareholders.

16 Communications strategies (page 124)

Boards of directors and management teams are now routinely challenged—both privately and publicly—by investors, sellside analysts, industry experts, regulators, and others. They are finding that their decisions are increasingly being scrutinized— from executive compensation, corporate governance practices, and capital allocation to the ability to develop and implement strategic plans. Boards and management teams that are perceived to be lax or indifferent in addressing these issues often face public opposition and proxy challenges by activist investors. Notably, traditional institutional investors are no longer sitting on the sidelines: they are increasingly supporting activist activity—and in some cases, instigating it. The best defense is often a good offense. This begins with execution and shareholder returns. Ensuring that the investment community understands and supports a company's strategy is also an important element. Board engagement and strategic investor communications can help foster this understanding. While engagement and advance preparation will not prevent shareholder activism, it can significantly influence the outcome when a proxy contest occurs.

Communications in peacetime

The traditional role of a board of directors has been to set strategy and to hold management accountable for executing that strategy. But the role of the board has evolved. The expectation for regular dialogue between the executive management team and shareholders, which has long been "best practice" in investor relations, today has been extended to directors as well. Investors expect directors to be knowledgeable about the business, engaged in the strategy, and accessible to answer questions and share points of view on the company, its peers, and the industry landscape.

Externally, the board has an unmatched degree of authority and credibility. It can reinforce and support the management team, while at the same time holding them accountable for performance. Accordingly, when speaking with investors, they must strike a balance so as to not undermine management.

Ensuring that management remains the primary spokespersons with shareholders, particularly outside of a proxy contest, will help achieve this balance. Director/ investor communications should largely occur around normal course events where management is present, such as investor days, or in select investor roadshow meetings when a director's presence can help support the company's investment rationale or an investor relationship. Director accessibility and outreach should also be considered when shareholders are questioning boardlevel matters, such as company leadership, executive compensation or governance policies outside of management's purview.

At smaller companies with fewer resources, directors may take on a more active communications posture to augment the executive management team. At organizations where the chair and CEO roles are combined, a strong independent lead director can be an influential counterweight. Directors can be important ambassadors to the investment community. Providing shareholders with access to a director reinforces that a company (1) has an active and engaged board, (2) is committed to sound governance policies and practices, and (3) takes seriously the views of its shareholders. Such director/ shareholder relationships can also be important in establishing trust and a strong base of supportive shareholders. Indeed, if a company first undertakes serious outreach to the investment community when a proxy contest is underway or imminent, it is likely to be too late to establish the relationships and credibility needed to mount a formidable defense. When identifying targets for investor/ director meetings, it is important to consider not just an institution's portfolio managers with whom management regularly interacts but also that institution's governance/proxy advisory boards. Often in a proxy contest, these governance bodies, sometimes in conjunction with and sometimes instead of the portfolio managers, are the ones who control the voting of an institution's shares.

While establishing a relationship in advance may not be determinative in a vote, it can help create a climate of greater receptivity and trust. Before any meeting with investors— activist or otherwise— board members should be informed and prepared. Directors must be armed with details about management's prior engagement with the shareholder, the shareholder's investment focus and history with the company, as well as any public or private statements that the shareholder has made about the company. Directors are encouraged to run through mock Q&As and other role-playing exercises to prepare for investor meetings and ensure that directors know how far they can go on key topics. […]

APPENDIX 4

GERMAN CORPORATE GOVERNANCE CODE (FEBRUARY 2017) (Germany)

(extracts)

5.2 Duties and Authorities of the Supervisory Board Chair (amended 7th February 2017)

The Supervisory Board Chair is elected by the Supervisory Board from among its members. The Chair coordinates the activities of the Supervisory Board, chairs its meetings and saveguards the matters of the Supervisory Board externally.

The Supervisory Board Chair should be available – within reasonable limits – to discuss Supervisory Board-related issues with investors.

Between meetings, the Supervisory Board Chair shall be in regular contact with the Management Board, in particular the Management Board Chair or Spokesperson, in order to discuss with them issues of strategy, planning, business development, the risk situation, risk management and compliance of the company. The Management Board Chair or Spokesperson informs the Supervisory Board Chair without undue delay of major events that are of material importance for the assessment of the company's status and performance, and for the management of the company. The Supervisory Board Chair subsequently informs the Supervisory Board and, if required, shall convene an extraordinary Supervisory Board meeting.

Extract from a press release from the Governance Code Commission on 14 February 2017

Press release dated 14 February 2017

Regierungskommission Deutscher Corporate Governance Kodex

Resolutions published for changes to the German Corporate Governance Code in 2017

[...]

International best practice concerning investor dialogue

The Regierungskommission discussed, in great detail, the issue as to whether the Chairman of the Supervisory Board should be required (and permitted) to engage in dialogue with investors, in line with international best practice as well as common practice already established in many cases in Germany. Having duly considered all arguments made, the Regierungskommission now suggests that the Chairman of the Supervisory Board be prepared (under appropriate conditions) to discuss topics relevant to the Supervisory Board with investors (section 5.2). These are issues within the sole responsibility of the Supervisory Board, and which it must decide upon on its own. In accordance with this suggestion, the Chairman of the Supervisory Board will have certain discretion with whom and when he/she would like to conduct a discussion.

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