

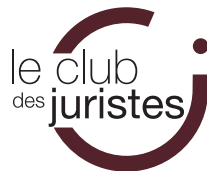
DECEMBER 2022

REPORT

SHAREHOLDER ACTIVISM

Working group chaired by Michel PRADA,
Former Chairman of the French Financial Markets Authority (AMF)

Rapporteur : Benjamin KANOVITCH, Lawyer, Bredin Prat



SHAREHOLDER ACTIVISM

CLUB DES JURISTES REPORT

Ad hoc committee
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4, rue de la Planche 75007 Paris
Tel. : +33 1 53 63 40 04
www.leclubdesjuristes.com

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PART I



FOLLOW-UP REPORT



- Following several reports on shareholder activism by various committees and organisations in France,¹ and in particular the report of the Fact-Finding Mission on Shareholder Activism organised by the French National Assembly, the Club des Juristes 'Shareholder Activism' Committee (the '**Committee**') published a report on 7 November 2019 that made ten recommendations (the '**Report**').
- In 2019, the Committee identified activist shareholder behaviours that could compromise transparency, loyal and fair dialogue between issuers and activists or the proper functioning of the market, and proposed recommendations for regulating campaigns and promoting good practice.² Three years after publication of the Report, the Committee, which still does not intend to take sides in the economic and political debate between supporters and opponents of shareholder activism, wanted to re-examine its recommendations in light of the new economic and regulatory environment.
- As regards the statistics, shareholder activism truly gained momentum in 2022.³ Against the backdrop of post-pandemic economic recovery and global instability, shareholders took activism to levels unseen since 2018, a record year. This resurgence is due partly to the resumption of growth and the economic uncertainty, prompting shareholders to be especially vigilant in analysing the financial viability of business strategies, but it is also largely due to the renewed purpose and rejuvenation of activists.
- Since the PACTE law, issuers have increasingly been faced with campaigns relating to social and environmental issues or to communications sent to shareholders on these issues. ESG (Environmental, Social and Governance) issues, which were traditionally raised as ancillary aspects of economic proposals, are now presented in specific separate proposals, using procedures similar to those of traditional activist campaigns.

1 Report of 2 October 2019 published following the work of a 'Fact-Finding Mission on Shareholder Activism', set up by the French National Assembly's Finance Committee, whose co-rapporteurs were Eric Woerth and Benjamin Dix; 'Shareholder Activism' report published by the AFEP on 10 December 2019; Europlace working group report of 9 January 2020 made up of two documents, 'Shareholder Governance and Market Practices' and 'Responsible Shareholders'; document published by the French Institute of Directors (October 2021) on "Directors in the face of an activist campaign".

2 AMF, 2019 Report on Corporate Governance and Executive Compensation in Listed Companies, 3 December 2019, p. 25: '*As the AMF Chairman points out, activism can 'contribute to proper price formation on the markets and to improving the governance and management of issuers'. However, it can also be a force that is "abnormally destabilising, both for issuers and for the orderly operation of the market'.*

3 Based on a global survey by Lazard, 'Lazard's Q3 2022 Review of Shareholder Activism', October 2022, the number of campaigns increased by 39% between 2021 and 2022 (up to and including Q3). As at Q3 2022, with 171 campaigns since the beginning of the year, compared with 173 for the whole of 2021.

- This trend is notably due to the fact that activist campaigns are no longer exclusively carried out by investors.⁴ Certain NGOs launch real activist campaigns focusing exclusively on such social and environmental concerns figuring on their agenda. The growth in ESG campaigns is also underpinned by the creation of several specialist funds, seeking to reconcile financial performance and ESG criteria. Campaigns are sometimes carried out by investors who have formed an alliance, where appropriate in the form of a coalition, or even by investors allied to NGOs, possibly with no economic demands.⁵
- This new form of activism, which takes advantage of general meetings to inform the issuer, the market and also the general public on social and environmental issues, uses facilities provided by corporate law to influence businesses, sometimes even questioning the limits of the law. Requests for 'climate' resolutions to be included on the agenda of general meetings have sparked debate on the principle of hierarchy of the decision-making bodies within companies, so much so that the French Treasury decided to set up a dedicated working group within the HCJP (*Haut Comité Juridique de la Place Financière de Paris*) to consider reform of the relevant laws.⁶
- Since the publication of the Report in 2019, the AMF has adapted its policy on shareholder activism⁷ and updated its recommendations,⁸ notably integrating some of the recommendations set out in the Report.⁹ The Committee shares the AMF's view that *'due to the diversity of activist practices and the complexity of defining an activist shareholder'*, it would not be appropriate to put in place a specific legal framework for activists.¹⁰ In addition, as in 2019, the Committee believes that soft law is the best way of spreading good practice among both activists and issuers. In this regard, market regulators have a key role to play in the regulation of shareholder activism through their influence.

4 'Shareholder Activism' Committee Report, p. 8: 'An activist campaign can be defined as the behaviour of an investor using the rights granted to minority shareholders to influence the strategy, financial situation or governance of the issuer by means of a public statement. The activist has a particular objective, which may vary according to the activist and the specific circumstances of each campaign'.

5 According to a survey involving 322 listed companies in Europe, BNP Paribas Exane, 'International ESG Corporate Survey', October 2022, three out of four companies consider that less than 50% of ESG issues addressed by investors have a financial impact.

6 The Treasury pointed out in its guidelines that climate resolutions raise legal questions, including the authority of shareholders to speak on a subject that is traditionally the sole responsibility of the Board of Directors, and the legal basis of a purely advisory vote.

7 AMF, 'AMF report on shareholder activism', 28 April 2020.

8 AMF, 'Shareholder activism: the AMF changes its policy', 17 March 2021.

9 See table in Annex outlining (i) the recommendations made by the Committee in its Report; (ii) the targeted measures proposed by the AMF in its report on shareholder activism of 28 April 2020; and (iii) the changes to its policy adopted and outlined in its statement of 17 March 2021.

10 AMF, 'AMF report on shareholder activism', 28 April 2020.

- The Committee wanted to re-examine the recommendations made in the Report following the change in AMF policy and, alongside organisations representing issuers and investors (AFG, Cliff and SFAF), review them in light of the current situation and new practices. It is clear from this assessment that some of the developments called for in 2019 relating to private dialogue between investors and issuers, **(1.)** on the transparency of shareholders carrying out an activist campaign **(2.)** and behaviour around the time of a general meeting **(3.)**, are still relevant today.

CHAPTER I

FRAMEWORK OF PRIVATE DIALOGUE BETWEEN INVESTORS AND ISSUERS

A. Strengthening ongoing dialogue between investors and issuers

- The Committee welcomes the actions taken by the AMF to strengthen dialogue between investors and issuers, in line with its recommendations.¹¹ The AMF has included new recommendations to this effect in its Guide to ongoing information and management of inside information:¹²
 - Firstly, the guide reiterates the need for dialogue between the board and shareholders on the main topics of concern to shareholders, particularly issues relating to ESG strategy and performance, if necessary through a lead director;
 - The AMF also recommends that presentation materials prepared for 'governance roadshows' are published on the company's website;
 - Finally, in case of a contested vote at a general meeting, the AMF recommends considering making a statement on the steps taken by the board following this vote.
- In response to the recommendation on creating a shareholder dialogue platform proposed by the Committee,¹³ the AMF believes that *the development of shareholder dialogue platforms by issuers, which is recommended in one report, seems a good idea, because it could foster such dialogue, but may also make it more inclusive, notably by allowing the effective participation of non-institutional minority shareholders in this process*.¹⁴ In this respect, the Committee points out that any initiatives relating to dialogue, whatever form they may take, should always be carried out jointly by the various parties.

11 Recommendation no. 7 of the Report: 'The Committee noted the unanimous view of the people it interviewed that shareholder dialogue is the best way to preventing activist campaigns. Following on from the work of the Club des Juristes on dialogue between directors and shareholders, the Committee recommends having a systematic dialogue process before the launching of a public activist campaign. Before activists release a white paper, issuers must have sufficient time to respond to the arguments raised and correct any errors before public release. In order to improve the quality of dialogue, stakeholders could agree on common principles and issuers, investors, regulators and other market participants could jointly prepare a guide to shareholder dialogue.'

12 These recommendations, already considered by AMF Recommendation no. 2012-02 aimed at companies that follow the AFEP-MEDEF code, now apply to all issuers whose securities are traded or are subject to a request for admission to trading on a regulated market, multilateral trading facility or organised trading facility.

13 Recommendation no. 6 of the Report: 'Collective investor engagement may also be promoted by setting up a shareholder dialogue platform enabling investors to pool their demands and engage in dialogue, where appropriate, with the issuer.'

14 AMF, 'AMF report on shareholder activism', 28 April 2020, p. 8.

- Dialogue between shareholders and issuers is also promoted in the development of shareholder engagement in national and European law. Issued further to implementation of the PACTE law (transposing the SRD II Directive¹⁵), French Decree no. 2019-1235 of 27 November 2019, added a provision to Article R. 533-16 of the French Monetary and Financial Code, requiring that *'shareholder engagement policy [...] describes how the following is ensured [...]: 1) Monitoring of strategy, financial and non-financial performance, risks, capital structure, social and environmental impact and corporate governance; 2) Dialogue with owned companies [...].'*¹⁶ This system applies in particular to French and European management companies.¹⁷
- In light of the discernible progress in terms of dialogue brought about by the work of the AMF, the Committee would strongly support the drawing up of a good practice guide to organising dialogue between shareholders and issuers. The flexibility inherent in good practice guides would allow, if necessary, the parties to the dialogue to decide not to follow it if the solutions set out in the guide were not appropriate to their situation.
- The very principle of a dialogue guide implies that good practice is accepted by all stakeholders in the dialogue. Therefore, such a guide, which could only be organised by private actors, should be drawn up by a panel that is sufficiently representative of all stakeholders. The Committee, which stands ready to support this process, would also like to see the regulator involved in the drawing up of this guide; for example, as an observer. Its involvement would be an additional guarantee of balance and would in turn promote the dissemination of good practice on the market.
- The stakeholders involved in drawing up this guide could rally behind shared objectives, such as: fluidity of interactions; giving better consideration of dialogue initiatives launched outside of general meeting periods by any shareholder, so as to foresee, detect, and possibly resolve disagreements; defining the purpose of dialogue between shareholders and issuers; improving market information, in

15 Directive (EU) 2017/828 of 17 May 2017 ('SRD II') amending Directive 2007/36/EC of 11 July 2007 ('SRD I') as regards the encouragement of long-term shareholder engagement.

16 This is a measure transposing Article 3 octies of Directive (EU) 2017/828 of 17 May 2017, known as SRD II: *'Institutional investors and asset managers develop and release an engagement policy describing how they include shareholder engagement in their investment strategy. This policy describes how they ensure the monitoring of owned companies on relevant issues, including strategy, financial and non-financial performance and risk, capital structure, social and environmental impact and corporate governance, entering into dialogue with owned companies, exercising voting and other rights attached to shares, cooperating with other shareholders, communicating with relevant stakeholders of owned companies and managing real or potential conflicts of interest in relation to their engagement.'*

17 Art. L. 533-22 of the French Monetary and Financial Code.

particular on the effectiveness of dialogue initiated prior to the launch of a public campaign, etc.

► The Committee highlights progress in terms of shareholder dialogue. It would be helpful if, in addition to the work of the AMF, **the conditions for such a dialogue were further clarified** so that the various stakeholders could determine what is welcome and what is unwelcome in terms of shareholder dialogue.

► **A shareholder dialogue guide** setting out the good practice guidelines would thus provide a framework for and facilitate discussions between shareholders and issuers. The Committee reiterates its wish to see stakeholders, including issuers, investors, regulators and other market participants, work together to draw up such a guide and points out that certain of its members could participate in this work.

B. Establishing regular dialogue as part of an activist campaign

■ Reasonable notice period before the release of a 'white paper'

- The Committee highlights the change in AMF policy on shareholder dialogue. The AMF now recommends *'that dialogue be attempted between the investor concerned and the issuer before any public campaign.'*¹⁸
- In order to progress further in establishing loyal dialogue between activist shareholders and issuers, the Committee would support a new update to AMF Position - Recommendation no. 2016-08. This could, as is the case for dialogue between proxy firms and issuers,¹⁹ introduce a minimum period of time between the attempt at dialogue with the issuer and the launch of the public campaign.
- To encourage dialogue, the Committee would be in favour of sending the 'white paper' to the issuer on a confidential basis prior to its public release. The issuer could then report material errors, challenge interpretations or make comments,²⁰ which could, if necessary, be included in or attached to the 'white paper'. The Committee believes that this measure encouraging dialogue, would thus improve the quality of information disclosed to the market by activists through their 'white paper'.

18 AMF, 'Shareholder activism: the AMF changes its policy', 17 March 2021; AMF Position - Recommendation no. 2016-08, 'Guide to ongoing information and management of inside information', updated on 29 April 2021, p. 32.

19 AMF Recommendation no. 2011-06, Proxy firms, p. 3: *'The AMF recommends that the proxy firm submit its draft report to the company concerned for any comments and, if it has not submitted it, state this clearly in the analysis report and explain the reasons behind this. The AMF also recommends following the rules set out below: - The company has at least 24 hours to make any remarks or comments, provided the company has submitted its draft resolutions, related board reports and any other relevant documents to the agency within 35 days before the general meeting.'*

20 AMF Recommendation no. 2011-06, 'Proxy firms', p. 3.

► The Committee believes that AMF Position - Recommendation no. 2016-08 should be accompanied by the introduction of a reasonable minimum period of time between the attempt at dialogue with the issuer and the launch of the public campaign. Such reasonable period of time must be of a sufficient duration to allow a dialogue to be established between the activist and the issuer prior to any public campaign. The introduction of such a minimum period would also allow the issuer to correct/explain any material errors, consider contested interpretations and/or respond to the arguments raised by an activist before the public release of the 'white paper'.

■ Market communications during quiet periods

- The AMF, which had already clarified that the silence observed by issuers during quiet periods did not prevent them from *'providing the market with information covered under the ongoing disclosure obligation'*,²¹ added that they could also, *'in accordance with the European Market Abuse Regulation, provide any necessary information to the market in response to public statements or information concerning it'*.
- The Committee welcomes the clarification provided by the AMF on this subject to the extent that this clarification contributes to the application of the adversarial principle with regard to activism²².

21 AMF Position - Recommendation no. 2016-08, 'Guide to ongoing information and management of inside information', updated on 29 April 2021, p. 26.

22 O. de Baillencourt, J. Granotier, 'AMF statement on shareholder activism: the (delicate) art of recommendations' (in French) (*Communiqué AMF sur l'activisme actionnarial : de l'art (délicat) des recommandations*), *Droit des Sociétés*, no. 5, May 2021.

► The Committee highlights that accounts preparation periods are particularly sensitive for issuers, who cannot risk publishing incorrect or inaccurate information. Therefore, the Committee requests that the AMF **expand on its Position - Recommendation no. 2016-08 to recommend that investors do not release statements or publications during 'quiet periods'**.²³ However, the Committee does not want to prevent investors from disclosing certain important information to the market if the circumstances so require. For this reason, the Committee also requests that the AMF provide an opportunity for **investors to speak out in exceptional circumstances during 'quiet periods'**, while allowing issuers to respond to these public statements.

C. Facilitating dialogue by identifying shareholders

- The ongoing dialogue that issuers would benefit from establishing with their shareholders requires that they know their shareholder base. Since the publication of the Report and in accordance with the PACTE law²⁴, the law known as 'DDADUE 2'²⁵ has supplemented and streamlined the process of identifying the owners of bearer shares. Identifiable bearer shares (*titres au porteur identifiable - TPI*) notably allow an issuer to identify an investor's increasing share acquisitions before such investor is required to file a legal or statutory threshold-crossing declaration.
- The Committee notes that despite improvements in shareholder identification, shareholders themselves have limited capacity to identify other investors. The 'list of shareholders', which every shareholder has the right to view or obtain a copy of,²⁶ is rarely used in practice. The Committee may deem it useful to consider how to facilitate identification of shareholders among themselves.
- In its 2020 statement on shareholder activism, the AMF reported on proposals to lower the statutory declaration threshold to 3% of capital or voting rights, noting that France is the only 'major' country to have limited itself to the 5% threshold provided for by the European

²³ Recommendation no. 3 of the Report: *'In order to ensure loyal and fair dialogue between issuers and activists, the latter must refrain from releasing statements or publications during the 'quiet periods' to which issuers are subject. At the same time, the conditions under which issuers may respond in these circumstances could be clarified.'*

²⁴ Law no. 2019-486 of 22 May 2019 on business growth and transformation.

²⁵ Law no. 2021-1308 of 8 October 2021 introducing various provisions to bring French law into line with European Union law with respect to transport, environment, economy and finance, supplemented by Decree no. 2022-888 of 14 June 2022 on shareholder identification, the provision of information and facilitation of the exercise of shareholder rights.

²⁶ Art. R. 225-90 of the French Commercial Code.

directive.²⁷ However, the issue of the regime applicable to statutory threshold-crossing (calculation of thresholds, sanctions, publicity, etc.) is the subject of ongoing debate.²⁸

- The Committee believes that the size of the investor's stake is generally not considered a determining factor in launching an activist campaign,²⁹ although if it is small, this may limit the resources available.³⁰ Furthermore, shareholders are often identified through statutory threshold-crossing declarations. Thus, a blanket lowering of statutory declaration thresholds would risk discouraging some investors, insofar as this would prematurely move the dialogue between issuers and activists into the public sphere and may prevent measured dialogue.³¹
- Likewise, the AMF's proposal to require investors to 'publish, on their website, statutory threshold-crossing declarations sent to them'³² would risk curtailing dialogue. In fact, confidential discussions between issuers and activists before a campaign provide an opportunity for more measured dialogue and may in some cases avoid the launch of a public campaign.
- The Committee would support a discussion on the sanction applicable in case of non-compliance with the obligation to file a statutory threshold-crossing declaration. Indeed, the Committee believes that the loss of voting rights referred to in Article L. 233-7 of the French Commercial Code is not an appropriate sanction in the case of activist

27 AMF, 'AMF report on shareholder activism', 28 April 2020, p. 7; A. Pietrancosta, A. Marraud des Grottes, 'Proposals on shareholder activism relating to the crossing of thresholds: an opportunity to clarify the matter' (in French) (*Propositions sur l'activisme actionnarial relatives aux franchissements de seuils : une occasion de clarifier le dispositif*), BJS, October 2020, no. 10, p. 56; AMF, 'AMF report on shareholder activism', 28 April 2020, p. 8; Response to US Critics of the French Securities Regulator Position on Activism, Harvard Law School Forum on Corporate Governance, 26 June 2020; O. de Baillencourt, J. Granotier, 'AMF statement on shareholder activism: the (delicate) art of recommendations' (in French) (*Communiqué AMF sur l'activisme actionnarial : de l'art (délicat) des recommandations*), *Droit des Sociétés*, no. 5, May 2021.

28 'Proposals on shareholder activism relating to the crossing of thresholds: an opportunity to clarify the matter' (in French) (*Propositions sur l'activisme actionnarial relatives aux franchissements de seuils : une occasion de clarifier le dispositif*), BJS, October 2020, no. 10, p. 56; AMF, 'AMF report on shareholder activism', 28 April 2020, p. 8.

29 For example, Bluebell's 'One Share ESG Campaign' against Solvay and focused on ESG issues or the campaign carried out by Engine no. 1 against Exxon with 0.02% of the share capital.

30 Under Articles L. 225-105 and R. 225-71 of the French Commercial Code, one or more shareholders may request for items or draft resolutions to be included on the agenda, adding to the agenda or amending draft resolutions submitted by the convener of the meeting, if they represent a certain percentage of the capital. The thresholds are on a sliding scale according to the amount of share capital. Furthermore, individual shareholders who can prove that they have held registered shares for at least two years and together hold at least 5% of the voting rights can come together to represent their interests within the issuer. The thresholds are twice as high as for individual shareholders.

31 B. Kanovitch, 'Shareholder activism - The dawn of a new era?' (in French) (*Activisme actionnarial : A l'aube d'une ère nouvelle ?*), *Le Club des Juristes*, 29 April 2020.

32 AMF, 'AMF report on shareholder activism', 28 April 2020, p. 9.

shareholders, who do not need to use their voting rights to carry out their campaign.

CHAPTER II

IMPROVING TRANSPARENCY IN ACTIVIST CAMPAIGNS

A. Disclosing the size of the investor's stake

- In its first recommendation³³, the Committee highlighted that the rebalancing of the relationship between issuers and activists would best be achieved by strengthening the disclosure programme applicable to investors directly or indirectly taking public positions with a view to influencing the strategy, financial situation or governance of an issuer. It specified that activists must disclose the size of their stake, the type of securities held and their hedging, if any, and update this information in accordance with developments in the campaign.
- The Committee believes it is always advisable that any investor taking public positions with a view to influencing the strategy, financial situation or governance of an issuer be required, in addition to the obligation to file a statutory threshold-crossing declaration, to disclose the size of their stake to the issuer and, more generally, the public.

► The Committee would like the AMF to propose **a recommendation that any investor taking public positions with a view to influencing the strategy, financial situation or governance of an issuer should disclose the size of their stake to the issuer and, more generally, the public** (in addition to the obligation to file a statutory threshold-crossing declaration).

B. Short selling and short positions

- In response to the Committee's recommendation calling, like other activism working groups, for additional provisions to supplement

³³ Recommendation no. 1 of the Report: 'The Committee believes that rebalancing the relationship between issuers and activists would best be achieved by strengthening the disclosure programme applicable to investors directly or indirectly taking public positions with a view to influencing the strategy, financial situation or governance of an issuer. Activists having taken a public position should declare the size of their stake, the type of securities held and their hedging, if any. This information should be updated in accordance with developments in the campaign. In the event of rumours that an activist campaign is being prepared, the AMF could ask the investor to confirm or deny the information'; AMF, 'AMF report on shareholder activism', 28 April 2020, p. 8.

current European regulations on the transparency of short positions arising out of Regulation (EU) no. 236/2012 of 14 March 2012 on short selling,³⁴ the AMF clarified in its 2020 statement that *'the data [...] shows that activist campaigns based on massive short selling are very rare'*.³⁵

- However, in an effort to ensure greater transparency on the economic exposure of investors, the AMF has proposed supplementing the declaration of net short positions on shares with information on debt instruments. The investor must also publish their *'legal entity identifier'* (LEI)³⁶ and the bonds and CDS they hold at the same time.
- The Committee would also be in favour of supplementing the declaration of net short positions on shares with the declaration of intent if certain thresholds are crossed, and of identifying situations in which several investors together meet the reporting requirements. Investors acting in concert within the meaning of threshold-crossing declarations may be required to file joint declarations.
- The Committee maintains that a change to Regulation (EU) no. 236/2012 of 14 March 2012 to supplement the content of the declaration of net short positions on shares would be justified. The Committee notes the AMF's statement that it is ready to support proposals to this effect at the European level.³⁷

34 Recommendation no. 4 of the Report: *'T Current regulations on the transparency of short positions could be supplemented by (i) disclosure of all positions similar to short positions (put options, etc.); (ii) a declaration of intent in the event that certain ownership thresholds are crossed; (iii) aggregate disclosures in certain situations (in particular in the event that investors are acting in concert within the meaning of threshold-crossing declarations); and (iv) the disclosure of the identity of investors who have loaned securities to the activist. The regulations on threshold crossing could be strengthened if necessary (time limits, content)'.*

35 AMF, 'AMF report on shareholder activism', 28 April 2020, p. 9.

36 The LEI is a unique identifier of financial market participants.

37 AMF, 'AMF report on shareholder activism', 28 April 2020, p. 10.

► The Committee reiterates its recommendation to **amend Regulation (EU) no. 236/2012 of 14 March 2012 on short selling** to supplement the content of the declaration of net short positions on shares with information on debt instruments. The Committee would also support widening the reporting requirements to investors acting in concert.

C. Public information disclosed by activists ('White paper')

■ Quality of information provided by investors

- Pursuant to the Committee's recommendation,³⁸ the AMF has acknowledged that activist campaigns raise the issue of whether the investment recommendations regime should be applicable to public information disclosed by activists. In its April 2020 report, the AMF stated that it would *'approach the ESMA and the European Commission to seek clarification on the interpretation³⁹ of the scope of Delegated Regulation no. 2016/958 applicable to investment recommendations, in particular its potential applicability to shareholders and 'activist' behaviour'*.⁴⁰
- In the Committee's view, private dialogue between the issuer and investors should be encouraged as a matter of priority. However, case law (jurisprudence) recognizes the right of shareholders to criticize executives as a matter of freedom of expression.⁴¹ When activists speak publicly, they should be required to ensure that the information contained in their *'white paper'* is reliable and to handle any conflicts of interest properly, as provided for in the investment recommendations. Depending on the purpose of the campaign, the information provided by activists may meet the definition of information recommending or suggesting an investment strategy under the MAR regulation, namely information *'provided by an independent analyst, investment firm, credit institution, any other person whose main activity is the provision of investment recommendations, or an individual working on*

38 Recommendation no. 2 of the Report: *'The Committee recommends that public information disclosed by activists as part of a campaign be subject to rules similar to those applicable to investment recommendations, to ensure the objectivity of the information contained in white papers published by activists and the proper handling of conflicts of interest. In this regard, it should be clarified whether the existing regulation (Delegated Regulation no. 2016/958 of 9 March 2016) already applies in this context. Failing this, it should be recommended that activists apply similar rules in their campaign. It is also proposed that, during a public campaign, the activist (i) explains to what extent his approach integrates, for the company, its corporate interest, taking into account the social and environmental issues related to its activities; and (ii) publishes all the documents he sends privately to other shareholders. Finally, it proposes drawing on the rules on active solicitation of proxies to ensure transparency concerning the reasons for their vote.'*

39 As part of the ESMA's Q&A on the Market Abuse Regulation (MAR).

40 AMF, 'AMF report on shareholder activism, 28 April 2020', p. 9.

41 CEDH, 30 June 2020, Petro Carbo Chem, no 21768/12; BJS 2020, no. 11, p. 22, cf. A. Couret's note; RTD com. 2020.867, obs. A. Lecourt; Rev. soc. 2021.39, cf. G. Parleani's note: Shareholders may be 'motivated by a desire to exercise active control over the company in order to improve its governance and foster long-term value creation'.

their behalf [...] who, directly or indirectly, makes a given investment proposal in relation to a financial instrument or issuer'.⁴² The regulation specifies that the definition also applies to information provided 'by persons other than those referred to [...] who directly propose a given investment decision in relation to a financial instrument'.⁴³

- The Committee wishes to draw attention to the imbalance between issuers, who are required to provide accurate, truthful and correct information under the Market Abuse Regulation,⁴⁴ and activists who provide information to the market, who are currently not subject to such standard. This is particularly true since, as the Committee pointed out to justify the proposal to treat activists in the same way as financial analysts for the purposes of Delegated Regulation no. 2016/958,⁴⁵ activists can demonstrate significant ability to convince the market.

The Committee believes that a balanced approach could be to apply a similar standard to activists as the one imposed by Delegated Regulation no. 2016/958 on financial analysts. The Committee believes that some of the provisions set out in this regulation would be particularly relevant to activist campaigns:

- Article 3 of the delegated regulation could be a starting point for drawing up a standard: *'persons who make recommendations must ensure that their recommendations meet the following requirements: a) facts are clearly distinguished from interpretations, estimates, opinions and other non-factual information; b) all important sources of the recommendation are clearly provided; c) all sources of information are reliable or, where this is not the case, the recommendation makes this clear [...]*;
- In particular, Article 5 provides that persons who make recommendations must *'disclose in their recommendations all relationships and circumstances that may reasonably be expected to impair the objectivity of the recommendation, including interests or conflicts of interest'* and Article 6, that all persons who make recommendations must disclose their market position as soon as they hold at least 0.5% of the capital of the company that is the subject of the recommendation.

42 Regulation (EU) no. 596/2014 of 16 April 2014 on market abuse, Article 3, paragraph 1, point 34). For a critical analysis, see A. Pietrancosta, 'Proposals on the necessary clarification of market abuse offences in the context of shareholder activism', *Mélanges en l'honneur d'Alain Couret*, ed. Francis Lefebvre - Dalloz, 2020, p. 595.

43 E.g., see AMF, 'Press Release', 17 December 2019. The AMF states that it has sent an observation letter to an investor regarding the dissemination of investment recommendations.

44 Article 223-1 of the General Regulation of the AMF.

45 Report, p. 30 stated: *'even though activists do not present their investment proposals as investment recommendations, they aim to convince other shareholders of the relevance of their strategic, financial and managerial vision for the company. Activists enjoy significant market credibility and the dissemination of their proposal in the form of a white paper raises similar problems to the recommendations of analysts'*.

► The Committee encourages the ESMA to specify to what extent **the rules governing investment recommendations could be applied to public information disclosed by activists** by supplementing, where appropriate, its **Q&A on the European Market Abuse Regulation**.⁴⁶

- In order to convince the shareholders, an investor launching a campaign can propose a different strategy from that decided by the board. Therefore, where the investor may come to propose new ways of promoting the company's corporate interest, and in view of the rise in shareholder engagement and consideration of social and environmental issues by investors,⁴⁷ the Committee believes that any investor launching a campaign should explain how their approach takes into account the social and environmental issues specific to the company's activity.⁴⁸
- In this respect, Directive (EU) 2017/828 of 17 May 2017 ('SRD II')⁴⁹ amending Directive 2007/36/EC of 11 July 2007 ('SRD I') as regards the encouragement of long-term shareholder engagement stipulates that '*Institutional investors and asset managers develop and release an engagement policy describing how they include shareholder engagement in their investment strategy. This policy describes how they ensure the monitoring of owned companies on relevant issues, including strategy, financial and non-financial performance and risk, capital structure, social and environmental impact and corporate governance, entering into dialogue with owned companies, exercising voting and other rights attached to shares, cooperating with other shareholders, communicating with relevant stakeholders of owned companies and managing real or potential conflicts of interest in relation to their engagement*'.

46 ESMA, Q&A on the Market Abuse Regulation (MAR), ESMA70-145-111, version 15, Last updated on 6 August 2021.

47 The new Article D. 533-16-1 of the French Monetary and Financial Code introduced by the decree of 27 May 2021 pursuant to the Energy and Climate Act requires management firms to publish a '*Report on the voting policy, in particular regarding tabling and voting at general meetings on resolutions on environmental, social and governance issues*'.

48 Recommendation no. 2 of the Report.
Contra: D. Schmidt, 'Quatre questions sur l'activisme actionnarial en droit français / Four questions on shareholder activism in French law', Dossier: Shareholder Activism between Values and Interests / Valeurs et intérêts de l'activisme actionnarial, *Revue internationale des services financiers / International Journal for Financial Services* 2021/4, April 2022, p. 61.

49 Transposed by the 'PACTE' law and Decree no. 2019-1235 of 27 November 2019. Article L. 533-22 of the French Monetary and Financial Code (amended by the PACTE law) requires certain asset management companies to draw up and publish a shareholder engagement policy describing how they incorporate their role as shareholders in their investment strategy. In particular, this policy describes how the following is ensured: monitoring of strategy, financial and non-financial performance, risks, capital structure, social and environmental impact and corporate governance; dialogue with owned companies; exercising voting and other rights attached to shares; cooperating with other shareholders, etc. (French Monetary and Financial Code, Art. R 533-16, I).

► The Committee believes that it would be appropriate to recommend that any investor launching a campaign should explain how their approach notably takes into account the social and environmental issues specific to the company's activity, like the rules applicable to institutional investors and asset managers.

► The Committee also calls on the AMF to consider **expanding on AMF Recommendation 2012-05** so that the explanatory statement drawn up by the shareholder making a request for a draft resolution to be put to the general meeting explains how the draft resolution takes into account the social and environmental issues specific to the company's activity.⁵⁰

■ **Sharing information with the issuer**

- The AMF has decided to include a specific section on loyal and fair dialogue in activist campaigns in its Guide to ongoing information and management of inside information: *'The AMF recommends that any investor launching a public campaign with regard to an issuer should immediately send drafts and proposals to the issuer, as well as the relevant arguments (contained, where appropriate, in a document such as a 'white paper') presented, as the case may be, by this investor to shareholders. Furthermore, when an investor launches a public campaign with regard to an issuer, it is good practice for the investor in question to make these drafts and proposals public, to ensure sound market information and shareholder equality'*.⁵¹

■ **'Symmetrical' power of the AMF to issue injunctions**

- In the past, the AMF has made very little use of its power to issue administrative injunctions.⁵² In order to protect information provided to the market in a more protective legal framework than that of press releases⁵³, it would be helpful to review the legal provisions governing these enforcement powers, which can be subject to appeal. Indeed, in the context of a public campaign, it would appear inappropriate that the effectiveness of market protection rules depends solely on the risk of ex-post sanctions.⁵⁴

50 Recommendation DOC-2012-05, General meetings of shareholders of listed companies, updated on 29 April 2021.

51 AMF Position - Recommendation no. 2016-08, 'Guide to ongoing information and management of inside information', updated on 29 April 2021, p. 31/32.

52 In a recent ESG campaign, the AMF also declared that it did not have jurisdiction to order an issuer, at the request of shareholders, to include a draft resolution on the agenda of its general meeting.

53 For example, the AMF reiterates the fundamental right of shareholders to cast their vote at general meetings, 3 May 2020.

54 Furthermore, there is no case law in which an investor has been convicted for the dissemination of false or misleading information.

Article L. 621-1 of the French Monetary and Financial Code provides that the AMF *'ensures the protection of savings invested in financial instruments'* and *'also ensures that investors are kept informed and ensures the proper functioning of the financial instrument markets'*. The AMF Board may, under Article L. 621-14 II of the same Code, *'order'* measures to address, on the one hand, *'non-compliance'* with legislation *'to protect investors against insider dealing'*, and on the other hand, *'any other non-compliance that may undermine the protection of investors or the proper functioning of the markets'*. With regard to information published by issuers, the AMF may, under Article L. 621-18 of the French Monetary and Financial Code, *'require issuers, and persons who control or are controlled by issuers [...] to provide all relevant documents and information'* and *'order these issuers to publish corrections or additions where inaccuracies or omissions have been identified in the published documents'*.

- In general, the AMF's injunction powers would benefit from being more clearly defined and more comprehensive:
 - For example, the first recommendation of the Report, for all investors *'taking public positions with a view to influencing strategy, financial situation or governance to be [...] required to declare the size of their stake to the issuer and the public'*, is only meaningful if it is accompanied by a clarification as to whether the AMF has injunction powers in this area, which is the only way to address non-compliance in a timely manner.
 - The AMF has itself also noted that Article L. 621-18 could be *'expanded'* to enable it *'to order any investor with economic exposure to the securities of a listed issuer to publish corrections or additions where inaccuracies or omissions have been identified in their public statements'*.⁵⁵ The Committee fully supports this request by the AMF, which is consistent with Recommendation no. 9 of the Report.⁵⁶ This reform would be an important step forward in the fight against information that could have a speculative adverse effect on the share price. The Committee also reiterates its position⁵⁷ on the usefulness of strengthening the AMF's injunction powers in case of market manipulation by an activist shareholder. This is particularly true for behaviour that *'may fix the price of a [...] financial instrument at an abnormal or artificial level'*.⁵⁸

55 AMF, 'AMF report on shareholder activism', 28 April 2020, p. 11.

56 Recommendation no. 9 of the Report: *'The Committee recommends that consideration be given to strengthening the AMF's resources and role. In order to ensure a fair framework for activist campaigns, the AMF's powers provided for in Article L. 621-18 of the French Monetary and Financial Code could be expanded to require investors, not just issuers, to make corrections or additions to their public statements.'*

57 Committee Report, p. 34.

58 Regulation (EU) no. 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse, Art. 12.

- Similarly, the AMF stated that it would be prepared, ‘in urgent cases’, to give its opinion on the applicability of Delegated Regulation no. 2016/958 concerning investment recommendations to public statements and to order the investor in question to comply with the said regulation.⁵⁹

- With regard to the scope of injunction powers, the Committee supports the AMF’s proposal in its April 2020 report on shareholder activism to ‘provide the regulator with the power to impose fines in administrative injunction cases, which is currently only possible in the event of a court injunction sought by the AMF’.⁶⁰

In any case, the Committee believes that seeking a court injunction, as the AMF did recently,⁶¹ at least allows for a rapid and effective response and believes that it is a good way of strengthening the protection of information provided to the market while awaiting legislative action.

▶ The Committee believes that **strengthening the injunction powers of the AMF is essential**. In accordance with the Committee’s recommendations, **these injunction powers could even be expanded so that they are not limited to the correction of false or misleading information**. In particular, it would be desirable for the AMF to be able to intervene in cases of market manipulation or order shareholders carrying out an activist campaign to declare the size of their stake to the issuer and the public.

▶ The Committee also supports the AMF’s proposal to give the regulator the power to **impose fines in administrative injunction cases**.

▶ However, the Committee points out that expanding the AMF’s powers would require legislative action and proposes **amending Articles L. 621-14 and L. 621-18 of the French Monetary and Financial Code**.

59 AMF, ‘AMF report on shareholder activism’, 28 April 2020, p. 11.

60 AMF, ‘AMF report on shareholder activism’, 28 April 2020, p. 11.

61 Recent example: an AMF press release dated 21 June 2022 stated that on 30 May 2022, at the request of the President of the AMF, the Vice-President of the Court of Paris ordered Dynamic Treasure Group Limited, on the basis of Article L. 621-14 III of the French Monetary and Financial Code, to submit threshold-crossing declarations and declarations of intent, pursuant to Article L. 233-7 of the French Commercial Code and Articles 223-14 and 223-17 of the General Regulation of the AMF, within seven days of service of the order.

CHAPTER III

INVOLVEMENT OF ACTIVISTS IN GENERAL MEETINGS

A. *Acting in concert*

- It is common practice to combine several funds around a common goal, in line with wolf pack⁶² strategies, which are very common in the United States.
- The Committee had recommended specifying behaviour that may be characterised as acting in concert in an activist campaign.⁶³ In response, the AMF stated that 'it would approach the ESMA to ask it, based on the white list published with regard to acting in concert, to define activist behaviour that is not in itself deemed to constitute acting in concert'.⁶⁴

▶ Given the uncertainty about how to characterise coordinated relationships, with regard to the notion of acting in concert, between activist shareholders themselves or between activist shareholders and certain investors,⁶⁵ the Committee reaffirms that **it would be beneficial if the ESMA would address this issue.**⁶⁶

B. *Active solicitation of proxies*

- With regard to active solicitation of proxies⁶⁷ (widely practised in

62 Expression used by Thomas W. Briggs, *Corporate Governance and the New Hedge Fund Activism: An empirical analysis*, J. Corp. L., Summer 2007, p. 1589.

63 Recommendation no. 10 of the Report: 'The Committee recommends specifying the behaviours likely to be characterised as acting in concert in the context of an activist campaign, along the lines of the white list drawn up by ESMA for the Takeover Directive (ESMA, 12 November 2013, Information on shareholder cooperation and acting in concert under the Takeover Bids Directive, ESMA/2013/1642).'

64 AMF, 'AMF report on shareholder activism', 28 April 2020, p. 12.

65 D. Schmidt, 'Quatre questions sur l'activisme actionnarial en droit français / Four questions on shareholder activism in French law', Dossier: Shareholder Activism between Values and Interests / Valeurs et intérêts de l'activisme actionnarial, *Revue internationale des services financiers / International Journal for Financial Services* 2021/4, April 2022, p. 61.

66 See also: IFA, document published by the French Institute of Directors (October 2021) on "Directors in the face of an activist campaign" (in French) ('L'administrateur face à une campagne activiste'), p. 11.

67 Active solicitation of proxies was authorised by Order no. 2010-1511 of 9 December 2010 and its implementing decree of 23 December 2010, which transposed into French law the provisions of European Directive 2007/36/EC of 11 July 2007 on the exercise of certain rights of shareholders in listed companies.

Active solicitation of proxies is defined by Article L. 22-10-41 of the French Commercial Code as 'directly or indirectly asking one or more shareholders, in any form and by any means, for a proxy to represent them at the meeting'; Recommendation no. 2 of the Report.

the United States but almost non-existent in France), the applicable regime – which requires the person actively soliciting a proxy to provide information to the solicited shareholders and the market – could be extended to all shareholders who have submitted draft resolutions or publicly opposed the adoption of a resolution by the general meeting proposed by the Board and lobbied shareholders (get out the vote). The current regime applies only to the solicitation of proxies. Calling for someone to vote a certain way without obtaining a proxy does not fall within the scope of the rules on active solicitation of proxies. The transparency obligations arising therefrom are thus easy to circumvent.

► The Committee emphasises that an **extension of the regime applicable to the active solicitation of proxies** would require legislative action. Reform of Article L. 22-10-41 of the French Commercial Code should extend to get-out-the-vote activities by shareholders who have submitted draft resolutions or publicly opposed the adoption by the general meeting of a resolution proposed by the Board.

► Failing this, given the comparable effects of the techniques for calling on people to exercise their right to vote and active solicitation of proxies, the Committee believes that a balanced approach could be for the AMF to recommend that shareholders calling on other shareholders to exercise their right to vote could be encouraged to publish their voting policy and how they intend to vote, on similar terms as those applicable in case of active solicitation of proxies.

C. Empty Voting⁶⁸

- The AMF pointed out that the good practice, whereby asset managers should repatriate loaned securities and exercise their voting rights,

68 Recommendation no. 5 of the Report: *'Depriving borrowers of the voting rights attached to loaned securities could be reconsidered to combat empty voting. The practice adopted by certain institutional investors of including that prohibition in their securities lending agreements could be encouraged to avoid recourse to the law.'*

In addition, it should be noted that Directive (EU) 2017/828 of 17 May 2017 ('SRD II') amending Directive 2007/36/EC of 11 July 2007 ('SRD I') as regards the encouragement of long-term shareholder engagement, in Recital 21 and Article 3 decies, lays down transparency rules for asset managers, transposed into the French Monetary and Financial Code by the 'PACTE' law and Decree no. 2019-1235 of 27 November 2019. Article L. 533-22 of the French Monetary and Financial Code (amended by the PACTE law) requires certain asset management companies to draw up and publish a shareholder engagement policy describing how they incorporate their role as shareholders in their investment strategy. The statement referred to in Part II of Article L. 533-22 includes the following information: *'the usual practices of asset management companies regarding securities lending and, where applicable, how they are applied in accordance with the shareholder engagement policy, in particular during general meetings of owned companies under the agreement (Art. R 533-16-0(4) of the French Monetary and Financial Code).*

was referred to in point 3 of Recommendation no. 12 of the 2005 Mansion report.⁶⁹ Therefore, the AMF did not consider it necessary to change its policy on the issue of empty voting, especially given that *'such a practice by activist shareholders in order to disrupt the general meetings of French issuers is marginal'*.⁷⁰

⁶⁹ Working group chaired by Yves Mansion, 'Improving the exercise of shareholder voting rights in France', 15 September 2005.

⁷⁰ AMF, 'Shareholder activism: the AMF changes its policy', 17 March 2021.

MEMBERS OF THE COMMITTEE

■ CHAIR:

Michel PRADA, Former Chairman of the French Financial Markets Authority (AMF)

■ RAPPORTEUR:

Benjamin KANOVITCH, Lawyer, Bredin Prat

■ MEMBERS:

Olivier DIAZ, Lawyer, Gide Loyrette Nouel

Bertrand FAGES, Professor at the Sorbonne Law School, University of Paris 1 Panthéon-Sorbonne

Nicolas HUET, Corporate Secretary and Member of the Executive Board, Eurazeo

Jean-Pierre MARTEL, Lawyer, Orrick Rambaud Martel

Hervé PHILIPPE, Member of the Management Board and Chief Financial Officer, Vivendi

Alain PIETRANCOSTA, Professor at the Sorbonne Law School, University of Paris 1 Panthéon-Sorbonne

Jean-Florent RÉROLLE, CEO, VienGi

Emmanuelle SALLES, Head of Legal Department, Enedis

Bénédicte THIBORD, Managing Director, Exane BNP Paribas

Agnès TOURAINE, Director

■ OBSERVERS:

Charlotte AST, French Treasury

Olivier BOULON, AMF

Olivier DOUVRELEUR, Attorney-General to the Commercial, Financial and Economic Division of the Court of Cassation

Romain DUMONT, Lecturer, University of Paris 1 Panthéon-Sorbonne, Former Secretary to the Committee

Mehdi EZAIM, French Treasury

■ SECRETARY:

Théo VUARNET, PhD student at the Sorbonne Law School, University of Paris 1 Panthéon-Sorbonne

With the contribution of **Myriam EPELBAUM**, **Thomas SHARPS**, **Bénédicte ERBIN**, Lawyers, Bredin Prat

INTERVIEWEES

- ▶ **Michael HERSKOVICH**, Chair of the Corporate Governance Committee of the French Asset Management Association (AFG)
- ▶ **Olivier PSAUME**, Chair of Cliff (French association of financial communication professionals)
- ▶ **Sophie PALLIEZ-CAPIAN**, Vice-Chair of Cliff (French association of financial communication professionals)
- ▶ **Martine LEONARD**, Chair of the French Society of Financial Analysts (SFAF)
- ▶ **Hubert MATHET**, Vice-Chair of the French Society of Financial Analysts (SFAF)

PART II



IMPLEMENTATION BY THE AMF OF THE RECOMMENDATIONS MADE BY THE CLUB DES JURISTES IN ITS REPORT PUBLISHED ON 7 NOVEMBER 2019

► The Committee believes that rebalancing the relationship between issuers and activists would best be achieved by **strengthening the disclosure programme** applicable to investors directly or indirectly taking public positions with a view to influencing the strategy, financial situation or governance of an issuer. Activists having taken a public position should declare the size of their stake, the type of securities held and their hedging, if any. This information should be updated in accordance with developments in the campaign. In the event of rumours that an activist campaign is being prepared, the AMF could ask the investor to confirm or deny the information.

► **With regard to the introduction of a 3% statutory declaration threshold, the AMF stated that:**

'Some have proposed adding a statutory declaration threshold of 3% of capital or voting rights. In fact, France is the only 'major' country to have limited itself to the 5% threshold provided for by the European directive. [...] The constraints inherent in such a lowering of the legal threshold could be significantly reduced if this did not apply to all securities (e.g., by exempting stocks listed on a growth market for SMEs) or to all holders (e.g., by exempting UCITS), or if it only concerned voting rights. The lowering of thresholds is not directly related to a desire to regulate activism, insofar as activists readily disclose their acquisition of a stake in an issuer, whatever the level of their holding, because they generally endeavour to exert influence on the issuer publicly or carry the other shareholders along with them. However, it contributes to a better knowledge of the share ownership structure and therefore to market transparency.'⁷¹

► **With regard to the statutory threshold-crossing regime, the AMF stated that:**

'Debates on transparency also concern the statutory threshold-crossing regime. Regarding this, the AMF believes that contractual freedom should remain the essence of this system, and that issuers should be able to choose to introduce such thresholds and determine their level. Nevertheless, it seems advisable to provide for a uniform calculation method regarding statutory threshold crossing, taking into account the cases of assimilation provided for in Article L. 233-9 of the French Commercial Code.

71 AMF, AMF report on shareholder activism, 28 April 2020, p. 7..

Furthermore, the civil sanctions applicable in the case of undeclared statutory threshold crossing, which are the subject of policy debates, require clarification.

*Lastly, in the interests of transparency and sound market information, it seems advisable to stipulate, at the very least for issuers whose shares are admitted to trading on a regulated market, that they publish, on their website, statutory threshold-crossing declarations sent to them. The responsibility would mainly weigh on investors who would have a legal obligation to report any statutory threshold crossing to the issuer, it being incumbent on the issuer in question to publish any report received from the latter on their website. Accordingly, an administrative sanction could be provided for in cases of failure by the investor the issuer to comply with their obligations.*⁷²

► **With regard to marketplace initiatives or technological solutions to enable issuers to better understand their shareholders, the AMF stated that:**

'It would be useful, as recommended in one report, to 'encourage private innovation - marketplace initiatives, development of technological solutions, etc. - designed to ultimately enable any listed company to quickly, easily and cheaply find out the composition of its shareholder base,'⁷³ complementing the recent legal and regulatory measures which should enhance the efficiency of the identifiable bearer securities procedure.'⁷⁴

AMF REPORT

17 march 2021

► No developments on these issues in this AMF statement.

⁷² AMF, 'AMF report on shareholder activism', 28 April 2020, p. 9.

⁷³ Recommendation no. 4 of the Woerth Report.

⁷⁴ Article 198 of Law no. 2019-486 of 22 May 2019 on business growth and transformation (known as the 'PACTE law') and Article 3 of Decree no. 2019-1235 of 27 November 2019.

RECOMMENDATIONS OF THE COMMITTEE #2 7 november 2019

- ▶ The Committee recommends that **public information disclosed by activists as part of a campaign be subject to rules similar to those applicable to investment recommendations**, to ensure the objectivity of the information contained in white papers published by activists and the proper handling of conflicts of interest. In this regard, it should be clarified whether the existing regulation (Delegated Regulation no. 2016/958 of 9 March 2016) already applies in this context. Failing this, it should be recommended that activists apply similar rules in their campaign.
- ▶ It is also proposed that, during a public campaign, the activist (i) explains to what extent his approach integrates, for the company, its corporate interest, taking into account the social and environmental issues related to its activities; and (ii) publish all the documents they send privately to other shareholders.
- ▶ Finally, it proposes drawing on the rules on active solicitation of proxies to ensure transparency concerning the reasons for their vote.

AMF REPORT

28 april 2020

▶ The AMF stated that:

'Given the problems that could arise from assessing the scope of application of Delegated Regulation No. 2016/958, the AMF will approach ESMA and the European Commission to ask for clarifications⁷⁵ concerning interpretation of the scope of application of this regulation, notably in its potential application to 'activist' shareholders and behaviours. The AMF will also apply to ESMA and the European Commission to ask them for precise details concerning the extent of the information on conflicts of interest which must be provided by the author of an investment recommendation. The AMF has noted, in practice, that this information is often generic and/or incomplete, even though it is provided for the purpose of usefully informing the market, notably regarding the positions held by those authors.'⁷⁶

▶ L'AMF a également indiqué que :

'If investor information and the proper functioning of markets require rapid intervention by the regulator, the AMF will be able to take a decision, promptly, in the event of a dispute concerning the applicability to a public statement of the regulations on investment recommendations. In such a situation, the AMF, on request from a person with a legitimate interest, may therefore, as a matter of urgency, give its opinion on the applicability of

⁷⁵ As part of the ESMA's 'Q&A on the Market Abuse Regulation (MAR)'.

⁷⁶ AMF, AMF report on shareholder activism, 28 April 2020, p. 9.

Delegated Regulation no. 2016/958 to public statements and, if necessary, order the investor in question to comply with the said regulations.⁷⁷

AMF REPORT

17 march 2021

- ▶ No developments on these issues in this AMF statement.

⁷⁷ AMF, AMF report on shareholder activism, 28 April 2020, p. 11.

RECOMMENDATIONS OF THE COMMITTEE #3 7 november 2019

- ▶ In order to ensure loyal and fair dialogue between issuers and activists, the latter must refrain from **releasing statements or publications during the 'quiet periods'** to which issuers are subject. At the same time, the conditions under which issuers may respond in these circumstances could be clarified.

AMF REPORT

28 april 2020

- ▶ The AMF stated that it:

'Will amend its policy to clarify that, subject to the Market Abuse Regulation in particular, issuers may provide the market with any necessary information, even during a 'quiet period', in response to public statements concerning them'⁷⁸.

AMF REPORT

17 march 2021

- ▶ Amendment of paragraph 1.6.1 of the Guide to ongoing information and management of inside information

1.6.1. Introduction of an embargo period before the publication of annual, half-yearly or quarterly results

Recommendation:

'To avoid the risk of releasing piecemeal financial information that may lead the recipients of such information to anticipate the issuer's results prior to their publication, the AMF recommends that issuers observe an embargo period, prior to the announcement of their annual, half-yearly or quarterly results, during which they refuse to provide new information on their business performance and results to financial analysts and investors. To ensure maximum efficiency of this embargo period, the issuer should raise awareness among key staff, including those at operational levels, who are likely to be contacted and asked to comment.

The duration of this period should be adjusted to reflect the specific characteristics of each issuer, taking into account in particular the speed with which it publishes its results. Issuers are encouraged to determine and inform the market about the maximum period for the process of centralising and compiling accounting information, to avoid undue interruptions to the necessary dialogue with the market. As a guide, a fifteen-day embargo

⁷⁸ AMF, AMF report on shareholder activism, 28 April 2020, p. 9.

before publication of the results would be satisfactory.

*This embargo period concerning the results does not, however, exempt the issuer from providing the market with information about matters covered by its ongoing disclosure obligations, **or prevent it, in accordance with the European Market Abuse Regulation, from providing any necessary information to the market in response to public statements or information concerning it.***

RECOMMENDATIONS OF THE COMMITTEE #4 7 november 2019

► Current regulations on the **transparency of short positions** could be supplemented by (i) disclosure of all positions similar to short positions (put options, etc.); (ii) a declaration of intent in the event that certain ownership thresholds are crossed; (iii) aggregate disclosures in certain situations (in particular in the event that investors are acting in concert within the meaning of threshold-crossing declarations); and (iv) the disclosure of the identity of investors who have loaned securities to the activist. The regulations on threshold crossing could be strengthened if necessary (time limits, content).

AMF REPORT

28 april 2020

► With regard to short selling and short positions, the AMF stated that:

'Several proposals in the aforementioned reports on shareholder activism concern short selling. Although it can give rise to excesses, it is important to note that short selling activities are generally beneficial for the market, notably in terms of price formation and liquidity'

In this respect, the AMF points out that Regulation (EU) no. 236/2012 has largely standardised short-selling rules and practices at the European level.⁷⁹ Moreover, the data available to the AMF shows that activist campaigns based on massive short selling are very rare.

Finally, the existing framework already allows the regulator to react in the event of exceptional circumstances and abnormal functioning of the market.⁸⁰ It follows that it would not be advisable, as things stand, to recommend a radical change in the regulations applicable in this area.

However, in order to ensure greater transparency regarding investors' financial exposure, the AMF considers that it would be advisable to supplement the reporting of net short positions in shares, when this is required,⁸¹ with information on debt instruments, and in particular bonds and CDS⁸² held at the same time by the investor.

79 Regulation (EU) no. 236/2012 of the Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps.

80 Regulation (EU) no. 236/2012 provides for three cases requiring intervention by the relevant authorities.

81 Regulation (EU) no. 236/2012 provides for the reporting of net short positions on shares, with (i) a report to the relevant authority when the threshold of 0.2% of the company's issued capital is exceeded and for each 0.1% above that (ii) publication when the threshold of 0.5% is exceeded and for each 0.1% above that.

Moreover, these reports should also include the 'LEI' of the reporting entity, to ensure more accurate identification of the persons making the reports. The AMF will therefore support such proposals at the European level.⁸⁴

► **In addition, the AMF also stated that:**

'Expanding the content of threshold crossing declarations by requiring that reporting entities include additional information on their holdings of financial instruments with an optional component for hedging purposes (e.g., put or call options) could also be considered.'⁸⁵

AMF REPORT

17 march 2021

- No developments on these issues in this AMF statement.

82 In the case of indebted issuers, there is a very clear negative correlation between the share price and the CDS premium.

83 The 'LEI' (Legal Entity Identifier) is a unique identifier of financial market participants.

84 AMF, 'AMF report on shareholder activism', 28 April 2020, p. 9/10.

85 AMF, 'AMF report on shareholder activism', 28 April 2020, p. 7.

RECOMMENDATIONS OF THE COMMITTEE #5 7 november 2019

► **Depriving borrowers of the voting rights attached to loaned securities** could be reconsidered to combat empty voting. The practice adopted by certain institutional investors of **including that prohibition in their securities lending agreements** could be encouraged to avoid recourse to the law.

AMF REPORT

28 april 2020

► The AMF stated that:

'As regards securities lending, the AMF notes that the use of such practices by activist shareholders with a view to disrupting general meetings of French issuers is marginal. However, the AMF intends to reiterate, in a recommendation, that it is good practice for asset managers to repatriate loaned securities and to exercise their voting rights.'⁸⁶

► The AMF also stated that:

*'It considers that the development of any private initiatives aimed at the emergence of a centralised marketplace for securities lending and borrowing, as proposed by some reports, would be useful.'*⁸⁷

AMF REPORT

17 march 2021

► Recommendation that asset managers repatriate, for general meetings, loaned securities and that they exercise their voting rights

The AMF points out that this *'good practice' was mentioned in point 3 of Recommendation no. 12 of the 2005 Mansion Report*⁸⁸, in the following terms: *'Asset managers are advised, with respect to general meetings, to recover the securities they have loaned and to exercise the voting rights attached thereto'.*

⁸⁶ AMF, 'AMF report on shareholder activism', 28 April 2020, p. 10.

⁸⁷ Recommendation no. 9 of the Woerth Report and Recommendation no. 7 of the Europlace Report.

⁸⁸ Working group chaired by Yves Mansion, 'Improving the exercise of shareholder voting rights in France', 15 September 2005.

RECOMMENDATIONS OF THE COMMITTEE #6 7 november 2019

- ▶ Collective investor engagement may also be promoted by setting up **a shareholder dialogue platform** enabling investors to pool their demands and engage in dialogue, where appropriate, with the issuer.

AMF REPORT 28 april 2020

▶ **The AMF stated that:**

'The development of shareholder dialogue platforms by issuers, which is recommended in one report, makes sense inasmuch as it may promote such a dialogue, but also make it more inclusive, in particular by enabling the effective participation of non-institutional minority shareholders in this process'⁸⁹.

AMF REPORT 17 march 2021

- ▶ No developments on these issues in this AMF statement.

89 AMF, 'AMF report on shareholder activism', 28 April 2020, p. 8.

RECOMMENDATIONS OF THE COMMITTEE #7 7 november 2019

- ▶ The Committee noted the unanimous view of the people it interviewed that shareholder dialogue is the best way to preventing activist campaigns. Following on from the work of the Club des Juristes on dialogue between directors and shareholders, the Committee recommends having a systematic **dialogue process before the launching of a public activist campaign**. Before activists release a white paper, issuers must have **sufficient time to respond** to the arguments raised and correct any errors before public release.
- ▶ In order to improve the quality of dialogue, stakeholders could agree on common principles and issuers, investors, regulators and other market participants could jointly prepare a **guide to shareholder dialogue**.

AMF REPORT

28 april 2020

- ▶ With regard to loyal and fair dialogue between issuers and activist investors, the AMF stated that:

*'In order to foster loyal and fair debate between issuers and activist investors, the AMF will also add to its policy by recommending that any shareholder who launches a public campaign should immediately disclose to the investor in question the material information (such as 'white papers') that it is sending to other shareholders.'*⁹⁰

- ▶ With regard to shareholder dialogue, the AMF pointed out that:

'The existence of transparent, regular and open dialogue between an issuer and its shareholders is undoubtedly one of the keys to preventing the excesses of activist campaigns and, where appropriate, attenuating their potentially destabilising effects.'

The AMF also noted that *'many issuers already assign great importance to this dialogue and devote sometimes significant resources to it. In this regard, a clarification of the principles and rules that could govern such a dialogue is recommended by some of the aforementioned reports'*.

With this in mind, the AMF stated that it would supplement its policy: 'to include certain developments and recommendations on shareholder dialogue'.⁹¹

90 AMF, 'AMF report on shareholder activism', 28 April 2020, p. 9.

91 AMF, 'AMF report on shareholder activism', 28 April 2020, p. 8.

► Additions to the Guide to ongoing information and management of inside information

1.6.5. *Loyal and fair dialogue in activist campaigns*

[...]

Recommendation:

In order to foster loyal and fair dialogue between issuers and shareholders, the AMF recommends that any investor launching a public campaign with regard to an issuer should immediately send drafts and proposals to the issuer, as well as the relevant arguments (contained, where appropriate, in a document such as a ‘white paper’) presented, as the case may be, by this investor to shareholders. Furthermore, when an investor launches a public campaign with regard to an issuer, it is good practice for the investor in question to make these drafts and proposals public, to ensure sound market information and shareholder equality.

It is also recommended that dialogue should be attempted between the investor concerned and the issuer before any public campaign.

► Recommendations on shareholder dialogue

• Summary of existing recommendations on ongoing dialogue between shareholders and issuers

The AMF notes that its policy already contains several recommendations on shareholder dialogue. In its Recommendation no. 2012-05 on the general meetings of shareholders of listed companies (updated in October 2018), the AMF recommends implementing several proposals (nos. 1.1 to 1.10) on ‘*ongoing dialogue between shareholders and issuers*’. These proposals, which are part of AMF policy, are sometimes read exclusively in the context of general meetings.

Stressing the importance of these recommendations, the AMF decided to include them in the Guide to ongoing information and management of inside information, in a section dedicated to dialogue between shareholders and issuers, emphasising the ongoing nature of such a dialogue.





- Recommendation on dialogue between the board and shareholders

The AMF decided to include a recommendation on this subject in the Guide to ongoing information and management of inside information, as follows: **'It is recommended that issuers initiate a dialogue between the board and shareholders, if necessary through a lead director, on the main topics of concern to shareholders, particularly issues relating to Environmental, Social and Governance (ESG) strategy and performance'**.

- Recommendation on presentation materials prepared for 'roadshows' and consideration of the possibility of issuing a statement in the event of a contested vote at a general meeting

AMF Recommendation no. 2012-02 on corporate governance includes two recommendations on shareholder dialogue, as follows:

'The AMF recommends that presentation materials prepared for 'governance roadshows' are published on the company's website.

Moreover, in the event of a contested vote at a general meeting, the AMF recommends that companies consider the possibility of issuing a statement on the steps taken by the board following this vote'.

It should be noted that AMF Recommendation no. 2012-02 is aimed at companies adopting the AFEP-MEDEF code.

In order to expand the scope of the two recommendations set out above, **the AMF decided to include them in its Guide to ongoing information and management of inside information which, in addition to issuers having adopted the AFEP-MEDEF Code, is also aimed at issuers whose financial securities are traded or subject to a request for admission to trading on a regulated market, multilateral trading facility or organised trading facility.**

RECOMMENDATIONS OF THE COMMITTEE #8 7 november 2019

- ▶ The method for preparing corporate governance codes could also be re-examined to ensure that it is accepted as widely as possible by **investors. Investors could thus come together in a single committee** to speak to issuers with one voice.

AMF REPORT 28 april 2020

- ▶ No developments on these issues in this AMF statement.

AMF REPORT 17 march 2021

- ▶ No developments on these issues in this AMF statement.

RECOMMENDATIONS OF THE COMMITTEE #9 7 november 2019

► The Committee recommends that consideration be given to **strengthening the AMF's resources and role**. In order to ensure a fair framework for activist campaigns, the AMF's powers provided for in Article L. 621-18 of the French Monetary and Financial Code could be expanded to require investors, not just issuers, to make corrections or additions to their public statements.

AMF REPORT

28 april 2020

► The AMF recommended three reforms to increase the effectiveness of its enforcement actions, in particular in activist situations:

- 1. The AMF recommended** *'amending Article L. 621-14 of the French Monetary and Financial Code in order to provide the regulator with the power to impose fines in administrative injunction cases, which is currently possible only in the event of a court injunction sought by the AMF. Granting such a power will have the advantage of making administrative injunctions issued by the AMF more dissuasive and coercive;*
- 2. The AMF proposed that** *'the scope of Article L. 621-18 of the French Monetary and Financial Code – which currently concerns issuers only – could be usefully extended to allow the AMF to order any investor financially exposed to the securities of a listed issuer to publish corrections or additions if errors or omissions have been identified in their public statements. Failing that, the AMF could publish them itself. The aim is to allow the AMF to act quickly, especially in the event of the publication of clearly false or misleading information concerning an issuer';*
- 3. The AMF proposed** *'amending Article 231-36 of its General Regulation applicable in a public offering period, so as to extend to the shareholders (and their representatives or proxies) of the offeror or the target company the obligations provided for in this provision, in particular an obligation of special vigilance in their statements. Experience indeed shows that shareholders, especially activists, can play a significant role in the execution of public offers, so it seems a good idea to make their statements, in this specific context, subject to the same obligation of vigilance as 'persons concerned by the offering' within the meaning of the General Regulation of the AMF.'⁹²*

92 AMF, 'AMF report on shareholder activism', 28 April 2020, p. 11.

► Special vigilance by shareholders in their statements in the event of a public offer

The AMF decided not to propose amending its General Regulation but to include a recommendation in this regard in its policy. Article 231-36(1) of the General Regulation of the AMF, which requires persons concerned by a public offer, their directors and their boards to show special vigilance in their statements, therefore remains unchanged. It should be noted that under Article 231-2(3), 'persons involved in the offer' means 'the offeror and the target company, as well as any persons or entities acting in concert with either of these parties'.

With regard to the shareholders of the offeror or of the target company, as well as persons financially exposed to the offeror or the target company, a recommendation has been added to the Guide to ongoing information and management of inside information, as follows:

1.6.7. Special vigilance by shareholders in their statements in the event of a public offer

[...]

Recommendation:

During the offer period within the meaning of Article 231-2(6) of the General Regulation of the AMF, it is recommended that the shareholders of the offeror or of the target company, that persons financially exposed to the offeror or to the target company by virtue of agreements or financial instruments referred to in Part I of Article L. 233-9 of the French Commercial Code, that their senior executives, their officers and their advisers, exercise particular vigilance in their statements. This recommendation also applies during the pre-offer period.

RECOMMENDATIONS OF THE COMMITTEE #10 7 november 2019

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

AMF REPORT

28 april 2020

▶ **The AMF stated that:**

'It will approach the ESMA to request that there be defined, on the model of the white list published regarding acting in concert, activist behaviours which are not in themselves liable to be presumed as constituting acting in concert'.⁹³

AMF REPORT

17 march 2021

- ▶ No developments on these issues in this AMF statement.

93 AMF, 'AMF report on shareholder activism', 28 April 2020, p. 12.

