

# French Stock Market Regulator Publishes a Report on Activism

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Since mid-2019, an active debate has been growing in France on shareholder activism and its regulation. Four reports have been published by various committees and think tanks since last fall.<sup>1</sup>

Currently, two very vigorous activist campaigns are broadly covered by the media in France: Amber Capital's failed attempt to designate a majority of the members of the board of directors of Lagardère Group on May 5; and the opposition by Charity Investment Asset Management ("CIAM") to SCOR's compensation scheme. But such activism is not a recent phenomenon in France, which has in the past witnessed a number of high-profile activist campaigns, such as CIAM's attempt to block the alliance between Renault and Fiat Chrysler Automobiles in 2019, TCI's activism in the merger between Safran and Zodiac Aerospace in 2017, and Cevian's investment in Rexel in 2017.

The French stock market regulator, *Autorité des marchés financiers* (the "AMF"), has played a key role in these activist campaigns. French-listed companies have generally sought its support in warding off activists, in particular where the activists have been non-French hedge funds. The AMF, for its part, has acted on a case-by-case basis and so far has not sought to take any general overarching policy position.

This changed recently when the AMF entered the debate by publishing on April 28, 2020 its report on shareholder activism, which includes recommendations on subjects discussed in the four above-mentioned reports.

Given the general belief that the French government and establishment do not view activists favorably, it is striking that the AMF underlines the potential benefits of shareholder activism: "*activist investors may contribute to proper price formation in markets, and to an improvement in the corporate governance and management of the issuers,*

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<sup>1</sup> (i) On October 2, 2019 by a special committee set up by the French Parliament; (ii) on November 7, 2019 by an ad hoc committee of the legal think tank *Club des Juristes*; (iii) on December 10, 2019 by an organization representing 113 of the largest French corporations *Association Française des Entreprises Privées*; and (iv) on January 9, 2020 by an organization in charge of promoting and developing the Paris financial marketplace *Paris EUROPLACE*.

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*especially in a context characterized by a surge in the number of passive investors and a reduction in the diversity of research and market participants.”*

The AMF has generally taken a pragmatic approach towards activist investors in its report. Its focus is on:

- improving the transparency of activists regarding their ownership stakes, intentions and conflicts of interest;
- encouraging more substantive dialogue between the companies and their shareholders; and
- punishing or prohibiting the dissemination of false or misleading information.

#### TRANSPARENCY REQUIREMENTS

The AMF suggests strengthening the requirements for disclosure of ownership interests. According to the AMF, these modifications should not be problematic as activist investors generally readily disclose such information, because they aim at putting pressure on issuers and rallying other shareholders to their cause. The AMF suggests the following enhancements to the existing disclosure requirements:

- **Legal Major Holdings Thresholds:** Some reports have highlighted that a number of European countries introduced a 3% threshold for the disclosure of share ownership, much lower than the 5% threshold in the Transparency Directive.<sup>2</sup> The AMF is therefore considering a similar change: i.e., lowering the disclosure threshold to ownership of 3% voting rights (but not share capital) and may exempt holders that are UCITS funds or companies listed on a growth market for SMEs.
- **Nature of the Disclosure:** The articles of French-listed companies can impose additional disclosure requirements. The AMF’s view is that it should not interfere with these requirements, as articles are considered a contractual matter between a company and its shareholders. However, the AMF suggests that the method of calculation of ownership thresholds (which currently depends on the articles of each company) be harmonized with the general legal regime and the AMF rules. In addition, the AMF believes that companies should publicly disclose the notifications they receive from investors in compliance with the requirements of the articles:

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<sup>2</sup> Directive 2004/109/EC on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, as amended and modified (“Transparency Directive”).

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currently, a company is only required to disclose this information in its annual report. Consequently, the market may discover the investment of an activist investor well after the company does, i.e., only once the investor crosses the legal threshold of 5% (requiring an immediate public disclosure) or upon the publication of the company's annual report, while the company itself will know about the activist's ownership when it has acquired a much smaller stake (in some articles, the notification threshold is as low as 0.5% of the share capital or voting rights).

With respect to tender offers, the AMF suggests amending its general regulation in order to extend to the shareholders of the initiator or of the targeted company the obligation to “*demonstrate particular vigilance in their statements.*”<sup>3</sup>

### ACTIVISTS' WHITE PAPERS

The AMF will also amend its policies to recommend that shareholders who initiate a public campaign immediately disclose to the targeted company the information sent to other shareholders. This recommendation specifically targets white papers: activist investors often publish or send to other shareholders a “white paper” in which they describe all their analyses on the targeted company (including governance critique, financial analysis, strategic review, comparison to peer group, etc.). The AMF considers that it is necessary to protect the targeted company and to enable the company to have knowledge of such information and to respond in due time, and more broadly, that the amended policy would contribute to better information in the financial market.

These white papers, as well as other statements by an investor, should comply with general provisions of the Market Abuse Regulation,<sup>4</sup> in particular regarding market manipulation. In addition, the AMF intends to seek clarification from the European Securities and Markets Authority (the “ESMA”) regarding the applicability of Delegated Regulation n° 2016/958.<sup>5</sup> This delegated regulation supplementing the MAR imposes disclosure requirements on persons producing “*investment recommendations or other information recommending or suggesting an investment strategy.*” Disclosure needs to, in particular, include the identity of the individuals involved in such investment recommendations, distinguish factual information from interpretations or opinions, indicate all material sources of information and disclose conflicts of interest. The AMF intends to clarify (i) whether the delegated regulation is also applicable to activist

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<sup>3</sup> Article 231-36 of the general regulation of the AMF.

<sup>4</sup> Regulation (EU) n° 596/2014 of April 16, 2014 on market abuse (the “Market Abuse Regulation” or “MAR”).

<sup>5</sup> Delegated Regulation (EU) 2016/958 of March 9, 2016 supplementing Regulation (EU) n° 596/2014 with regard to regulatory technical standards for the technical arrangements for objective presentation of investment recommendations or other information recommending or suggesting an investment strategy and for disclosure of particular interests or indications of conflicts of interest.

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investors and their white papers, and (ii) what information needs to be provided on conflicts of interests (which the AMF currently considers to be generally “*often generic and/or incomplete*”). It will therefore ask the ESMA to clarify a European harmonized position of these questions.<sup>6</sup>

#### OTHER RECOMMENDATIONS

Contrary to expectations, the AMF does not suggest major amendments to the regulation of short selling or securities lending. The AMF mainly recaps the applicable European regulation and asserts that it will support at the European level its proposal to request short-selling investors to disclose their exposure in debt instruments (and, in particular, bonds and credit default swaps).

The AMF finally states that it intends to request that the French parliament strengthen the AMF’s enforcement powers by enabling it to (i) impose penalty payments with respect to its administrative injunctions constraining persons to comply with such injunctions or (ii) require investors (including activists) to make corrective or supplementary disclosure if errors or omissions have been identified in their public statements.

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Please do not hesitate to contact us with any questions.

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<sup>6</sup> Such position to be taken in ESMA’s Q&A on MAR: <https://www.esma.europa.eu/document/qa-market-abuse-regulation>.

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