

Shareholder Activism in France

Current Debates and Reform Prospects

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I. INTRODUCTION–GENERAL ASPECTS OF SHAREHOLDER ACTIVISM IN FRANCE

For many years in France, shareholder activism was considered a foreign phenomenon. Although 2022 was recognized as a record year for shareholder activism in France, a decline was observed after 2023.¹ However,

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1 S. GOLSHANI/D. LAMARCHE/F. THILLAYE/V. SEGARD, France. Trends and developments, in: Chambers Global Practice Guides – Shareholders’ Rights and Shareholder Activism 2024 (2024) 85, <https://gpg-pdf.chambers.com/view/746828656/84/>. For an overall description of the situation from a legal point of view, see A.-C.

France remains under scrutiny by activists, and according to a survey, it is the second-best European country, after the UK, for the opportunities it provides for activist campaigns.² Since 2019, lively debates on the issue have been ongoing. Several questions may arise. The first is on the appropriateness of regulating shareholder activism. Even if an activist appears, would they not be a shareholder like any other? It is true that in France, where shareholders' rights are particularly well protected, there may be some reluctance to limit shareholders' rights. Furthermore, it is difficult to provide a precise definition of shareholder activism, as it takes so many different forms. The current trend of climate-related actions makes the situation even more complicated, blurring the lines and presenting situations that should be considered problematic.

In the above context, how can shareholder activism, including undesirable shareholder behaviors, be regulated? Several proposals were made by different stakeholder groups in France between 2019 and 2020 suggesting solutions to address this issue. This was followed by the publication of the position of the French financial regulator, the Autorité des Marchés Financiers (hereinafter the "AMF"). These publications reveal a general trend towards a soft form of regulation, a trend that remains evident today. This article aims to give an overview of the discussion in France and to briefly analyze the current state of the issue, which appears to concern the tools provided by financial market law rather than corporate law.

II. LAUNCHING THE DEBATE: THE WOERTH–DIRX REPORT (2019)

The first comprehensive report on the situation in France is an informative report submitted in October 2019 to the French National Assembly by Éric Woerth and Benjamin Dirx.³ The report provides an overview of the situation in France in the Brexit context, with an analysis of activist campaigns

MULLER, *Droit financier. Les opérations de marché : l'introduction en bourse et ses conséquences, les transactions, les offres publiques d'acquisition* [Financial Law. Market Operations: Initial Public Offerings and their Consequences, Transactions, Takeover Bids] (2023) 600–618.

2 SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, *Activist Investing in Europe 2024* (2024) 12, https://www.skadden.com/-/media/files/publications/2024/02/the-informed-board/activist_investing_in_europe_2024.pdf?rev=8d8a6aa2daa74afab28ba9d57542cef2&hash=5EA5FB36851012F9D8D19F06DAD9AB30.

3 É. WOERTH/B. DIRX, *Rapport d'information en conclusion des travaux d'une mission d'information relative à l'activisme actionnarial* [Information report concluding the work of a fact-finding mission on shareholder activism] (2 October 2019), https://www.assemblee-nationale.fr/dyn/15/rapports/cion_fin/115b2287_rapport-information.pdf.

in Europe. The report states that few active campaigns were being conducted in France.⁴ It observes that activism had taken multiple forms: “event driven” campaigns by investment funds, “short sellers” betting on prices, and medium-term investors wishing to correct undervaluation.⁵

The report was published in a context in which attention was focused on increasing the attractiveness of Paris as the leading financial center in Europe. It makes thirteen recommendations for improving the supervision of activist behavior without harming markets. These recommendations include the following points: (i) strengthening market transparency and improving issuers’ knowledge of their shareholders, (ii) reducing asymmetries in communication and information between activist funds and listed companies, (iii) closely regulating short selling and encouraging transparency in the securities lending market, and (iv) providing additional regulatory powers to the AMF, the financial regulator.⁶

The publication of the report sparked lively debates on how to understand and respond to shareholder activism. Although there were no major legal reforms, the AMF was wary about the situation, and Robert OPHÈLE, the former chairman of the AMF, released a statement on the topic on 11 July 2019.⁷ Concerned with the abnormally destabilizing effects on issuers and markets, but stating that developments must remain limited in scale (and scope), he made several recommendations that will be considered below: (i) the introduction of a 3% threshold for major shareholding reporting for large capitalizations, (ii) a new obligation to declare intent when crossing the threshold of 5% of capital or voting rights for large capitalizations, and (iii) a reporting obligation for short positions on debt instruments (including credit default swaps (CDS)).⁸ The position adopted here is that the European framework provides adequate standards.⁹

III. PROPOSALS FROM STAKEHOLDER GROUPS

Several proposals have been made on the issue in a very short period. The originality of the debate lies in the diversity of the participants: think tanks, issuer groups, and market representatives.

4 WOERTH/DIRX, *supra* note 3, 18.

5 WOERTH/DIRX, *supra* note 3, 21–45.

6 For a summary of the report, see WOERTH/DIRX, *supra* note 3, 9.

7 AMF, Contribution de Robert Ophèle aux réflexions sur l’activisme en bourse [Robert Ophèle’s contribution to the debate on stock market activism] (11 July 2019), <https://www.amf-france.org/fr/actualites-publications/prises-de-parole/contribution-de-robert-ophele-aux-reflexions-sur-lactivisme-en-bourse>.

8 AMF, *supra* note 7.

9 AMF, *supra* note 7.

1. *Le Club des Juristes Report (2019)*

The first to publish a report was the Club des juristes, a French think tank created in 2007. The report, prepared by a working group chaired by Michel Prada, who served as chairman of the AMF from 2003 to 2008, made ten recommendations that can be summarized as follows: (i) provide a framework for activist campaigns through better transparency, (ii) increase dialogue between issuers and investors, (iii) strengthen the powers of regulators (the AMF and the European Securities Markets Authority (hereinafter referred to as the “ESMA”)), and (iv) indicate directions for future amendments.¹⁰

The report’s particularity is that its recommendations did not require a massive legislative intervention.¹¹ Its main expectation is that regulatory authorities play an active role. It emphasizes the impact of AMF recommendations and the importance of clarifying rules on the information publicized by activists as part of their campaigns.¹² Given the increasingly prevalent practice of short selling, the report recommends requiring a declaration of intent when certain thresholds are crossed or requiring aggregate disclosures in specific situations, particularly where investors are acting “in concert” within the meaning of threshold-crossing declarations.¹³ Regarding the notion of “acting in concert (action de concert)”, the report advocates specifying the behaviors likely to allow the characterization of acting in concert in the context of an activist campaign by following the example of the White List drawn up by the 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).¹⁴

The report makes several parallel suggestions. To take a few examples, one suggestion is that the French Monetary and Financial Code be amended to give greater powers to the AMF such that its powers under Article L. 621-18 of the code include the ability to require investors—not just issuers—to correct or supplement their public disclosures to guarantee a fair framework for the activist campaign. Another suggested approach is to create a platform dedicated to shareholder dialogue, which would allow investors to consolidate their demands and engage in dialogue with issuers.¹⁵

10 LE CLUB DES JURISTES, Groupe de travail présidé par Michel Prada, Rapport activisme actionnarial [Report on shareholder activism] (November 2019), <https://think-tank.leclubdesjuristes.com/wp-content/uploads/2019/11/Activisme-actionnarial-Le-Club-des-juristes-nov.2019.pdf>

11 LE CLUB DES JURISTES, *supra* note 10, 14.

12 LE CLUB DES JURISTES, *supra* note 10, 31–33 (recommendation no. 1 and no. 2).

13 LE CLUB DES JURISTES, *supra* note 10, 34–35 (recommendation no. 4).

14 LE CLUB DES JURISTES, *supra* note 10, 46 (recommendation no. 10).

2. AFEP Report (2019)

The Association Française des Entreprises Privées (French Association of Private Enterprises, hereinafter referred to as the “AFEP”) is a French association representing 118 of the largest private corporations in France.¹⁶ It has historically taken an active part in the public debate, especially on issues related to listed companies. For example, one of the French Corporate Governance Codes (the AFEP–MEDEF Code) for listed companies is prepared jointly by the AFEP and the Mouvement des Entreprises de France.

The AFEP’s report represents the issuers’ perspective on shareholder activism. Its clear purpose is to clarify possible actions that issuers can take to oppose the negative effects of certain “short-termist” shareholder activities.¹⁷ The report seems to be mainly hostile to short-termism and therefore lists some effective defensive practices for issuers.¹⁸ Regarding the legislative and regulatory frameworks, its recommendations include amending the AMF regulatory rules to improve the transparency of activists’ identities and conflicts of interest, introducing new regulations to ensure the objectivity of disclosures by activists, and revising the monetary sanctions imposed by the AMF.¹⁹ The aim of these recommendations is to improve financial communication between activist funds and issuers. The AFEP report recommends reforming the major shareholding disclosure system to improve transparency when investors cross ownership thresholds via derivative instruments. According to the AFEP report, the current system of major shareholding disclosure does not reflect the true economic exposure of investors who use hedging instruments.²⁰ Consequently, the current system does not reveal the precise financial interests guiding investors.²¹ Another proposal is to revise the French Commercial Code to provide for the automatic suspension of voting rights in the event of non-compliance with threshold-crossing disclosure requirements stipulated in the articles of association.²² The report cites the need to revise the short-selling regulation, whereby issuers can be notified of net short positions exceeding the thresh-

15 LE CLUB DES JURISTES, *supra* note 10, 40 (recommendation no. 6), 45 (recommendation no. 9).

16 AFEP, About us, <https://afep.com/en/afep/>.

17 AFEP, Activisme actionnarial (December 2019) 3, https://afep.com/wp-content/uploads/2019/12/Activisme-actionnarial_Décembre-2019.pdf

18 The report underlines that the company’s performance remains the best means of defense but notes that it is also important to prepare to react to the sudden arrival of an activist fund. See AFEP, *supra* note 17, 7–8.

19 AFEP, *supra* note 17, 9.

20 AFEP, *supra* note 17, 11.

21 AFEP, *supra* note 17, 11.

22 AFEP, *supra* note 17, 12.

olds of 0.1% and 0.2% of capital.²³ It is also noteworthy that the AFEP has shown reluctance to lower the first legal threshold for major shareholding disclosure to 3% (from currently 5%) or to lower the first threshold for declarations of intent to 5% (from currently 10%).²⁴

3. Paris Europlace Report (2020)

Paris Europlace is an association of participants from the French financial sector that promotes the Paris market.²⁵ Concerned about the behavior of certain activists, the Paris Europlace report²⁶ made eight recommendations, focusing on measures to improve dialogue.²⁷ The report addresses issues related to the disclosure of shareholders' identities, the information transmitted to the AMF (which is then disclosed to the public), and the duty of vigilance for both issuers and shareholders in their statements. It also proposes the idea of setting up an ad-hoc working group to more closely examine sanctions regarding threshold-crossing disclosure requirements stipulated in the articles of association. Moreover, the report addresses the prevention of abuses in short selling by focusing on increased transparency regarding short positions and the establishment of centralized markets for securities lending.

IV. THE FRENCH REGULATOR'S POSITION ON SHAREHOLDER ACTIVISM

In response to these recommendations, the French markets regulator AMF published a follow-up to the reports on shareholder activism published between 2019 and 2020.²⁸ Strangely, the AMF considers that the current legal framework requires no major changes. It proposes several targeted measures to: (i) improve the transparency of investors' long positions, (ii) ensure improved transparency of investors' financial exposure, (iii) promote open, good-faith and fair dialogue between issuers and their share-

23 AFEP, *supra* note 17, 12.

24 AFEP, *supra* note 17, 14.

25 Paris Europlace, About, <https://www.paris-europlace.com/en/paris-europlace/about-1250>.

26 Paris Europlace, Gouvernance actionnariale et pratiques de marché [Shareholder governance and market practices] (January 2020).

27 L'Agefi, Paris Europlace milite pour un encadrement des activistes [Paris Europlace calls for a framework for activists] (9 January 2020), <https://www.agefi.fr/news/entreprises/paris-europlace-milite-pour-un-encadrement-des-activistes>.

28 AMF, Communication de l'AMF sur l'activisme actionnarial [AMF statement on shareholder activism] (April 2020), https://www.amf-france.org/sites/institutionnel/files/2020-04/communication-amf-sur-activisme-actionnarial_avril20_2.pdf.

holders, and (iv) increase the analysis and response capabilities of the AMF concerning activist campaigns.²⁹

The AMF's position attracted considerable attention but did not lead to significant reforms. The AMF did not favor adopting a legal definition of shareholder activism.³⁰ According to the AMF, there is no apparent intrinsic definition of "activist" shareholders or any way to distinguish them, in absolute terms, from merely "active" shareholders.³¹ Regarding the introduction of a legal threshold beyond the 5% threshold for major shareholding disclosure, the AMF considers that contractual freedom should remain the essence of the system. Thus, its position is that issuers should be able to choose whether to introduce and determine the level of such thresholds in their articles of association.³² The AMF's position therefore contrasts with the European trend, in which a 3% threshold seems to be the norm.³³

Although it favors the status quo, the AMF's position includes several points that may prompt a response. Indeed, the AMF has explored revising its doctrine to include certain developments and recommendations on shareholder dialogue,³⁴ and such revisions have taken shape. The AMF's "Guide on ongoing information and management of inside information" (Position-recommandation AMF 2016-08) was revised in 2021,³⁵ and this may well be the most important outcome of this issue. The first notable change is an amendment that specifies that issuers may provide the market with any necessary information, even during a "quiet period" (para. 1.6.1). Second, the revision recommends that any shareholder initiating a public campaign should, without delay, inform the concerned issuer of any substantial information—such as in a "white paper"—that it sends to other shareholders (para. 1.6.5, "Recommandation").³⁶ There is also a further recommendation regarding information on takeover bids that would require vigilance during both the pre-bid and the bid periods in declarations by the

29 AMF, *supra* note 28, 2.

30 AMF, *supra* note 28, 6.

31 AMF, *supra* note 28, 6.

32 AMF, *supra* note 28, 8.

33 For a comparison, see AMF, *supra* note 28, 7.

34 AMF, *supra* note 28, 2, 9.

35 AMF, Actualité, 17 March 2021, Activisme actionnarial: évolution de la doctrine de l'AMF [Shareholder activism: Changes in AMF doctrine], Bulletin Joly Bourse n° 200b5 (May 2021) 6.

36 AMF, Guide de l'information permanente et de la gestion de l'information privilégiée [Guide on ongoing information and management of inside information], Position-recommandation DOC-2016-08, <https://www.amf-france.org/fr/reglementation/doctrine/doc-2016-08?from=b3f21baf-0d59-4443-9728-121437da7905|9965b8b6-473a-40f9-88ea-edd61a126f6f|a4cba3ea-8384-4647-9b22-80da5fe201c2>.

shareholders of or persons with financial exposure to the bidder or the target company by virtue of agreements or financial instruments mentioned in I of Article L. 233-9 of the Commercial Code, or in declarations by their managers, agents and advisers (para. 1.6.7, “Recommandation”).

Regarding shareholder dialogue, the AMF guide now indicates good practices for improving dialogue. These practices were already explained in another AMF recommendation regarding corporate governance in listed companies that adhere to the AFEP–MEDEF corporate governance code (“Gouvernement d’entreprise et rémunération des dirigeants des sociétés se référant au code AFEP-MEDEF : présentation consolidée des recommandations contenues dans les rapports annuels de l’AMF”, AMF recommandation DOC-2012-02).³⁷ These include recommendations to disclose the presentation materials produced for governance “roadshows” on the company website and to consider appropriate disclosures in the event of a contested vote at annual shareholder general meetings (para. 1.6.6, “Recommandation”). Despite the repetition of what was stated in another AMF document, a consequence of this revision is to extend the scope of application to issuers whose securities are admitted to trading on a regulated market, a multilateral trading facility, or an organized trading facility, and no longer only to issuers declaring compliance with the AFEP–MEDEF code.³⁸ The guide also emphasizes the importance of engaging in ongoing dialogue on the main issues of concern to shareholders, including social, environmental and governance (ESG) strategies and performance (para. 1.6.6, “Recommandation”).

Given that the AMF, which for the most part—aside from the several recommendations in the aforementioned “Guide de l’information permanente et de la gestion de l’information privilégiée”—has been reluctant to robustly pursue shareholder activism, some issuers have found themselves left to their fate. The French Institute of Administrators (Institut Français des Adminis-

37 AMF, Gouvernement d’entreprise et rémunération des dirigeants des sociétés se référant au code AFEP-MEDEF : présentation consolidée des recommandations contenues dans les rapports annuels de l’AMF [Corporate governance and executive compensation in companies that refer to the AFEP-MEDEF code: consolidated presentation of the recommendations contained in the AMF’s annual reports], Recommendation DOC-2012-02, <https://www.amf-france.org/fr/reglementation/doctrine/doc-2012-02>. The AMF recommendations on the organization of shareholder general meetings in listed companies (AMF, Recommendation AMF DOC-2012-05 Les assemblées générales d’actionnaires des sociétés cotées [Shareholder general meetings in listed companies], <https://www.amf-france.org/fr/reglementation/doctrine/doc-2012-05>) are also included in the guide (propositions no 1.1–1.10).

38 AMF, Guide de l’information permanente et de la gestion de l’information privilégiée, Position-recommandation DOC-2016-08, *supra* note 36, para. 1.6.6.

trateurs, hereinafter the “FIA”) in October 2021 published a note, prepared by its law committee, entitled “L’administrateur face à une campagne activiste” [The director facing an activist campaign],³⁹ indicating that France ranks third in Europe, following the UK and Germany, for the highest level of activist activity.⁴⁰ France is confronting a movement gathering momentum worldwide: Shareholders are becoming more active. According to the FIA note, campaigns may be triggered by specific factors: government interventions in strategic companies during takeover attempts; the growing influence of the “Big Three”,⁴¹ in which share ownership is concentrated, creating a more favorable environment for shareholder activism.⁴²

The note on directors facing activist campaigns indicates several good practices for board members, but the content is nothing new. The practices can be divided into two categories, one preventive, the other deterrent. On the prevention side, emphasis is placed on the importance of conducting shareholder dialogue with competent directors, the necessity of dialogue with investors who are not yet shareholders, preparation for possible activist campaigns, and board composition.⁴³ On the deterrent side, the note outlines considerations of the engagement strategy, including studying activist practices, establishing a single line of communication between the company and the activist, and refraining from expressions of individual views or views that differ from those of the board or management.⁴⁴

V. AN ASSERTIVE CHOICE OF A SOFT FORM OF REGULATION?

A few years later, where do things stand? Although legislative solutions have been proposed in the past, the reforms at present seem to be mostly limited to soft law options. This trend is confirmed by two initiatives, one by the Club des juristes and the other by Paris Europlace.

The Club des juristes published a new report in December 2022 consisting of two parts. The first part re-examines the recommendations from 2019 in the current context and in light of new practices. The second part summarizes the status of implementation of its 2019 recommendations. In par-

39 INSTITUT FRANÇAIS DES ADMINISTRATEURS, Les notes de l’IFA: L’administrateur face à une campagne activiste [The director facing an activist campaign] (October 2021), <https://www.ifa-asso.com/mediatheques/ladministrateur-face-a-une-campagne-activiste/>.

40 INSTITUT FRANÇAIS DES ADMINISTRATEURS, *supra* note 39, 1.

41 The “Big Three” are the largest asset managers: BlackRock, Vanguard and State Street.

42 INSTITUT FRANÇAIS DES ADMINISTRATEURS, *supra* note 39, 4–5.

43 INSTITUT FRANÇAIS DES ADMINISTRATEURS, *supra* note 39, 7–10.

44 INSTITUT FRANÇAIS DES ADMINISTRATEURS, *supra* note 39, 10–12.

ticular, the report emphasizes the emergence of a form of activism, new to France, conducted by non-governmental organizations with social and environmental concerns;⁴⁵ but the Club's position still appears to be generally in line with the views it expressed in 2019.

To specify procedures for shareholder dialogue, the report recommends developing a guide on shareholder dialogue and revising the AMF's "Guide de l'information permanente et de la gestion de l'information privilégiée" (Position-recommandation DOC-2016-08). This would be done by introducing, through a new recommendation, a reasonable period between attempting to engage in dialogue with the issuer and launching a public campaign (giving the activist and issuer enough time to engage in dialogue before the public campaign and allowing the issuer to rectify/clarify any material errors in white papers), and by restraining activists from communicating with markets during "quiet periods".⁴⁶

Regarding shareholder dialogue, the report would require the AMF to recommend that activists disclose their shareholding levels.⁴⁷ Alongside recommendations to the AMF, the report also makes recommendations to the ESMA that it complete its Q&A on the Market Abuse Regulation⁴⁸ to clarify the extent to which the regulations on investment recommendations apply to public information disseminated by activists, such as in white papers.⁴⁹

In June 2024, Paris Europlace published its "Guide du dialogue actionnarial" (Guide on shareholder dialogue), the product of a working group, again chaired by Michel Prada, intended to describe good practices for regular constructive dialogue. Not legally binding,⁵⁰ these practices clearly demonstrate France's preference for a soft form of regulation of shareholder activism. A closer look at this guide's content reveals that it only considers "private" dialogue that shareholders may engage in with company management; it does not address "public" dialogue, such as discussions that may occur during shareholder general meetings.⁵¹ This guide can be summarized as containing four principles, six good practices for issuers, and

45 LE CLUB DES JURISTES, Rapport Activisme actionnarial [Report on shareholder activism] (December 2022) 6, <https://think-tank.leclubdesjuristes.com/wp-content/uploads/2022/12/Activisme-actionnarial-Le-Club-des-juristes-Dec-2022.pdf>.

46 LE CLUB DES JURISTES, *supra* note 45, 10–12.

47 LE CLUB DES JURISTES, *supra* note 45, 14.

48 ESMA, Q&A on the Market Abuse Regulation (MAR), ESMA70-145-111, version 17, Last updated on 15 November 2022.

49 LE CLUB DES JURISTES, *supra* note 45, 18.

50 PARIS EUROPLACE, Guide du dialogue actionnarial [Guide on shareholder dialogue] (June 2024), 2, https://www.paris-europlace.com/global/gene/link.php?news_link=2024094446_2094611245_2024-guide-dialogue-actionnarial-vf.pdf&fg=1.

51 PARIS EUROPLACE, *supra* note 50, 2.

four good practices for shareholders. The principles are quite simple: continually engage in dialogue; engage in broad, open dialogue; engage in constructive dialogue, and promote dialogue to ensure fair and equitable discussions.⁵² Regarding good practices, issuers are encouraged to allocate resources and establish policies on shareholder activism; to appoint a director charged with shareholder relations; or, to establish internal procedures and tools to facilitate communication with shareholders.⁵³ Shareholders are invited to respect the dialogue framework, provide information requested of them, and respond to companies seeking dialogue.⁵⁴ Although this guide emphasizes pursuing dialogue when both sides demur,⁵⁵ it does not seem entirely realistic that these recommendations will always be followed.

Why focus on soft forms of regulation, even when they are not certain to be effective? The answer seems related to the French understanding of shareholder activism. In France, responsibility for addressing this issue at the regulatory level lies with the financial markets regulator. At first glance, it appears that shareholder activism is more closely tied to capital markets law than company law. Indeed, the proposals and recommendations on this issue mainly concern capital markets law. The separation between company law and capital markets law is not the same as in some other jurisdictions;⁵⁶ in this context, the AMF publishes an annual report on corporate governance and executive compensation in listed companies⁵⁷ and openly discloses its views of shareholder activism-related initiatives. For example, the latest guide on shareholder dialogue published by Paris Europlace was received by the AMF as follows: “The AMF, which has long encouraged issuers and shareholders to engage in ongoing dialogue including on environmental and climate change issues, welcomes this initiative by Paris Europlace, which helps to promote and encourage shareholder dialogue.”⁵⁸ As far as listed companies are concerned, the policy response to matters of dialogue falls within the competence of the AMF, and shareholder activism is both a matter of corpo-

52 PARIS EUROPLACE, *supra* note 50, 3.

53 PARIS EUROPLACE, *supra* note 50, 5.

54 PARIS EUROPLACE, *supra* note 50, 6.

55 PARIS EUROPLACE, *supra* note 50, 5–6.

56 For example, the Japanese Financial Services Agency does not usually directly interfere in corporate law-related matters.

57 AMF, Rapport sur le gouvernement d’entreprise et la rémunération des dirigeants des sociétés cotées [Report on corporate governance and executive compensation in listed companies].

58 AMF, Rapport sur le gouvernement d’entreprise et la rémunération des dirigeants des sociétés cotées (2024) 17, https://www.amf-france.org/sites/institutionnel/files/private/2024-12/rapport-2024-sur-le-gouvernement-dentreprise-et-la-remuneration-des-dirigeants_0.pdf

rate governance and an investment-related issue. The difficulty is the extent of what needs to be done; corporate governance requires greater confidence in the voices of shareholders, whereas certain investor behaviors require better regulation under financial market law. Under these conditions, it seems more reasonable to begin with flexible rules.

VI. CONCLUSION

Although it only took a few years for shareholder activism to become a well-recognized phenomenon in France—with French issuers sometimes reacting defiantly—radical measures seem to have been avoided for now. The possible reasons are not easy to explain. Whereas some fear that the constraints will infringe on the shareholder’s freedom of expression,⁵⁹ especially in the light of the European Court of Human Rights judgement in favor of a “right of criticism” on the part of shareholders,⁶⁰ others point out the dangers of behind-the-scenes dialogue between issuers and shareholders, stating that it may violate the prohibition on selective disclosure of information as stated in Art. 223-10-1 of the “Règlement général de l’AMF” [The AMF general regulation].⁶¹ A strong form of regulation of shareholder activism could detract from the attractiveness of the Paris financial center,⁶² not to mention fail to enhance it, which is one of the current legislator’s priorities.⁶³ In our view, the question of shareholder activ-

59 Q. BERTRAND, Les nouvelles propositions du Club des juristes sur l’activisme actionnarial et la libre expression de l’actionnaire actif [New proposals from the Club des juristes on shareholder activism and the free expression of active shareholders], Bulletin Joly Bourse, no. BJB201d9 (March 2023) 40, 44.

60 European Court of Human Rights, 30 June 2020, *Petro Carbo Chem S.E. vs. Romania*, Application No. 21768/12, [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-203312%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-203312%22]}). For a French perspective on this case, see A. COURET, Le droit de critique de l’associé [The *associé*’s right to criticism], Bulletin Joly Sociétés n°121j3 (November 2020) 22.

61 F. DRUMMOND, Dialogue actionnarial: promouvoir peut-être, sécuriser surtout [Shareholder dialogue: promoting perhaps, securing above all], Bulletin Joly Bourse n° BJB202a0 (November 2024) 1. Indeed, the article 223-10-1 stipulates that “All issuers must ensure that the public enjoys equal and simultaneous access to the information sources and channels that the issuer or its advisors make available specifically to investment analysts, particularly with regard to financial transactions.”

62 A. GAUDEMET, Activisme actionnarial: le débat ne se joue pas où l’on croit [Shareholder activism: the debate is not where you think it is], Bulletin Joly Bourse n° 118s3 (November 2019) 63.

63 In 2024, new legislation was adopted aiming to enhance the attractiveness of the Paris Financial Centre (Loi n° 2024-537 du 13 juin 2024 visant à accroître le financement des entreprises et l’attractivité de la France).

ism may be partly resolved through the shareholder identification system now in place at the European level through the Shareholder Rights Directive II (SRD II). Although the companies themselves bear the costs of shareholder identification, a potential increase in share capital can be identified this way, and it would be an effective tool for rectifying asymmetries in the understanding of companies' capital structures. Although France has long been protected, both by having fewer listed companies and by their particular shareholding structures with a high proportion of controlling shareholders, be they families, the state, or block holders,⁶⁴ given the increase in the number of activists and their fields of action, the side-effects of an ambiguous regulatory approach remain to be seen.

SUMMARY

Although shareholder activism was considered a foreign phenomenon in France for many years, the presence of activists is no longer an unfamiliar occurrence. Since 2019, lively debates on the issue have been ongoing. Initially, these took the form of proposals made by various stakeholder groups in France between 2019 and 2020, suggesting solutions for addressing shareholder activism. This was followed by the publication of the position of the French financial regulator, the Autorité des Marchés Financiers. More recently, two initiatives include recommendations that to a significant extent align with prior regulatory proposals, emphasizing in particular the regulation of shareholder dialogue. The analysis of the situation in France reveals a general trend towards a soft form of regulation, with a special emphasis on the tools provided by financial market law, rather than corporate law. The avoidance of strong measures to prevent or regulate activist campaigns can be explained by France's delicate situation: any regulation must respect the freedom of expression granted to shareholders and increase market attractiveness to investors; at the same time, regulations must respond to the danger posed by behind-the-scenes dialogue between issuers and shareholders and address issuers' rising demand for tools to deal with certain activist behavior. This leads to a deliberate choice of flexible rules that offer a wide range of solutions to the various situations associated with the phenomenon.

64 MULLER, *supra* note 1, 605–606.