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Speech by Robert Ophèle, AMF Chairman - Droit & Croissance Conference "Corporate governance and shareholders engagement: the new normal conference" – Friday 18 October 2019

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Although the issue of shareholder engagement is naturally central to the correct functioning of companies in general, it takes on a special dimension when it comes to listed companies, where fostering an “affectio societatis” is all the more demanding a task. This issue is at the heart of the AMF’s remit, and it has therefore devoted a substantial portion of its forthcoming annual report to governance.

Shareholder dialogue has taken on a special dimension recently with three specific perspectives:

- as part of the debate about activism,
- in the light of the increased integration of sustainable development concerns by companies,
- in the debate on the role and influence of proxy advisors.

I will touch on these three themes briefly this morning.

This year, for various reasons, shareholder activism has been the subject of intense debate in France. Over and above the question of possible changes to the regulatory environment, on which opinions are divided, I believe that a consensus is emerging on the relevance of reinforcing shareholder dialogue by structuring it in a transparent manner.

In accordance with the recommendations of the AFEP-MEDEF corporate governance code, today, a large number of listed companies (actually 26 out of the 40 companies of the SBF 120 index examined this year by the AMF in its annual report) have a board member, the Chairman or a lead director, who is officially in charge of dialogue with shareholders, in particular with those who are not represented on the board of directors. I know that the French Institute of Directors (IFA) is working to improve the quality of this dialogue, but there are questions as to its effectiveness.

First of all, its scope is, in principle, restricted to corporate governance. However, it is clear that the interest of shareholders goes further than simple corporate governance issues and includes the company's strategy and performance. Although performance is mainly a matter for the management, it might be considered useful to extend the scope of exchanges to include strategy - while of course avoiding disclosing inside information.

Secondly, the chosen means of communication – one-on-one exchanges with a director - also appears too restrictive, especially for small shareholders. The British Investor Forum approach, which makes it possible to organise a collective dialogue, appears attractive in this respect and we could draw inspiration from it for companies with a diversified shareholding structure.

Lastly, we can improve upon the transparency of this dialogue. Although the content and follow-up of such dialogue are communicated by the Board, in principle, this communication could legitimately be extended, on a case-by-case basis.

These changes, which would contribute to establishing an ongoing dialogue with the company, would enable shareholders to express their demands in a structured framework and the right answers to be provided at the right time. They would reduce the risks of incorrect analyses or market surges.

My second point concerns the ESG dimension and the shareholders' new decisive role in accelerating and extending its incorporation into the company's strategy.

In contrast to the shareholder dialogue I mentioned earlier, which is organised on a company-by-company basis, we are witnessing the emergence of a shareholder engagement

among major investors around common themes deployed with respect to a group of companies. In particular, it provides the information these investors need to implement management strategies that incorporate ESG criteria. This engagement may also be expressed in their votes at general meetings on the more or less ambitious ESG strategy defined by the companies.

The "Principles for Responsible Investment" (PRI), sponsored by the United Nations Global Compact, are a benchmark in this area and have now been adopted by all the major asset managers and most major institutional investors. The signatories have thus committed for example to integrate ESG issues into their voting policy at general meetings, in particular by submitting or supporting resolutions that take these considerations into account over the long term. Aside from the PRI, investor circles have been created around more specific and more operational issues in order to weigh in at general meetings of shareholders. The Institutional Investors Group on Climate Change (IIGC) or the Climate Action 100+, which are made up of major investors, are examples of these groups. Climate Action 100+ is, for example, particularly attentive to the policies implemented by 161 companies identified as "sensitive" in terms of climate risk. However, we may observe more or less significant divergence between the intentions stated by joining one of these groups and the actual commitments made. The surveys made by the Climate Majority Project or the Asset Owners Disclosure show these divergences, with very limited support for resolutions submitted by shareholders in favour of climate risk control during votes at shareholders meetings. It is clear that supervisors must pay attention to the public commitments made by the entities that they regulate and that are not upheld.

Now that European substantive law integrates the principle that institutional investors, managers and, more generally, market participants must ensure the transparency of their shareholder engagement policy with respect to issuers whose equity securities they hold, either on own account or on behalf of their clients, the AMF (and the ACPR) will be all the more vigilant when it comes to ensuring compliance with the commitments made. The amended SRD Directive requires that institutional investors and asset managers develop and publish a clear shareholder engagement policy and report each year on how they have effectively applied this policy.

It is also interesting to note that the European co-legislators have taken advantage of recent legislative vehicles to extend these transparency principles to other regulated players, in particular investment companies and, more generally, market participants who design and distribute ESG investment products. Although these extensions were made alongside important reforms and in first-level legislation that has not yet been published in the EU Official Journal, and drew little attention from stakeholders during the negotiations, there are now few regulated players in Europe who are not concerned by the obligation to publish reports about their engagement and voting policy.

This brings me naturally to the role of proxy advisors in voting choices during shareholders' general meetings.

The AMF has been consistently in favour of the effective exercise of shareholder voting rights during general meetings. Just as the use of credit rating agencies does not exempt investors from carrying out their own credit risk analysis, using a proxy advisor does not exempt shareholders from their responsibility and therefore from analysing the resolutions submitted for voting at general meetings.

The AMF is nonetheless aware of the useful role played by proxy advisors in analysing the resolutions submitted. Their services contribute to reducing the cost of analysing and processing information about listed companies and help professional investors, in particular those located far from the issuer's country of listing or who manage very diversified portfolios, to carry out their fiduciary and management duties

For a long time, failing a consensus on the role and actual influence of proxy advisors, the good conduct and governance of these players was left to self-regulation. It was considered that the recommendations they issued were part of a contractual relationship with their clients and that regulations such as those put in place for credit rating agencies would be inappropriate and excessive, as the "advice" provided by proxy advisors was not used for regulatory purposes.

The increasing weight of passive management and the high concentration of the proxy advisory sector have led to the voting recommendations issued by one or more firms to have a decisive influence on the adoption or rejection of some resolutions. Some practices have therefore been criticised, sometimes very strongly, by issuers. For example, some proxy advisors have been criticised for their lack of true dialogue with issuers, a "mechanical" approach that does not take into account the specific characteristics of French law and the French market, as well as analyses marred by conflicts of interest. This is because some of these proxy advisors sometimes provide consulting services to issuers for whom they also assess resolutions submitted to the general meeting.

The AMF was one of the first market regulators to draw up the outlines of the good practices to be followed by proxy advisors, by opting for soft law in 2011. In its Recommendation 2011-06, it laid down, for the first time, the principles of transparency of the voting policy of proxy advisors, the quality of the analysis, dialogue with the issuer ahead of general meeting and the disclosure of conflicts of interests that affect the proxy advisor.

European law stepped in at the right time to back up this French initiative, although it had to comply with the timeframe specific to the production of the European standard. The Shareholders Rights Directive (SRD 2), proposed in April 2014 but which has only been applicable since June 2019, contains an article dedicated to the transparency of proxy advisors. Far from requiring the registration of proxy advisors with a national authority or the ESMA, as some parties would have wished, SRD2 requires that proxy advisors who operate in the EU publicly disclose their code of conduct, inform their clients each year of the accuracy and reliability of their activities and manage any conflicts of interest transparently.

Without waiting for the review clause of these European provisions by 2022-2023, the French legislator has entrusted the AMF, via the PACTE law, with the task of preparing an annual report on the application of these provisions by proxy advisors operating in France. As from 2020, it will carry out this task in its annual report on corporate governance.

Whereas Europe is applying these new rules to proxy advisors for the first time, but has chosen a regulation based on transparency and the incitement to refer to a code of conduct rather than on the strict oversight of the profession, there is still a fierce debate in the United States, in particular since the draft corporate governance bill has still not been adopted. Two months ago, the SEC clarified in a guidance that proxy advisors will be liable with respect to their clients in a strict sense (advisory firms are liable to penalties if they give false or misleading voting recommendations or advice). There are two antagonistic views, those who call for strong action by the SEC to regulate this profession, and those who fear that strict oversight will increase costs, affect competition and ultimately be detrimental to shareholders.

It is still too early to say whether the oversight approach chosen by the EU is only a first step, or whether on the contrary, it will represent a lasting response to the controversy created by the use of proxy advisory firms. As for the AMF, it will be sharing its observations impartially with the market place every year, as provided by the law.

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