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Reconsidering Activism in France

On April 27, 2020, France's financial markets regulator, the Autorité des marchés financiers ("AMF"), released a report containing certain proposals and observations regarding shareholder activism. The report was issued following the AMF's review of recent activism matters in France, including its recent €20m fine levied against Elliott Management for obstructing an investigation into a takeover bid and failing to adequately disclose its positions in connection with the 2015 tender offer by XPO Logistics for Norbert Dentressangle.

In its report, the AMF recommended lowering the mandatory reporting threshold for investors to publicly disclose their ownership from 5% to 3% of the issuer's share capital or voting rights, as is already the case in a number of other European jurisdictions. The AMF announced that it would be modifying its guidance on "quiet periods" to clarify that issuers may provide any information necessary to respond to public statements about them by activist investors, and that it would be supporting proposals to expand the required disclosures on short-selling to include information on activist investors' exposure to debt instruments. The AMF also requested legislation to give it additional capabilities to provide rapid responses in the activist campaign context – specifically, the AMF proposed that its ability to require additional disclosures if errors or omissions have been found in public statements be expanded from issuers to also capture investors, and that the obligations imposed on bidders and targets in takeover bid situations, including due diligence obligations for public statements, also be applied to their shareholders.

Surprisingly, the AMF's report then suggested that there is relative consensus on the usefulness of shareholder activism in improving corporate governance and defending the interests of minority shareholders, determining that the dangers of shareholder activism are only in "excessive" activist behavior. The report pointed to several academic studies highlighting the positive effects of activist behavior.

In taking such view, the AMF has clearly overlooked recent academic studies which have taken the contrary view with regard to shareholder activism, including DesJardine and Durand's article in the *Strategic Management Journal*; deHaan, Larcker and McClure's working paper published by the European Corporate Governance Institute; Allaire and Dauphin's article in the *International Journal of Disclosure and Governance*; Bower and Paine's article in the *Harvard Business Review*; and Colin Mayer's book, *Prosperity: Better Business Makes the Greater Good*. These articles and Professor Mayer's book make up only a portion of the large body of empirical and experiential evidence that pressure from activists does not create shareholder value, but simply shifts value from shareholders and other stakeholders to short-term speculators.

In view of these findings and the recent actions by the Business Roundtable and the World Economic Forum, we hope that the AMF will reconsider its conclusions with respect to supporting activist investors.

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