Proxy Contests in France

The ouster of the Eurotunnel board on April 7, 2004 after a highly publicized legal dispute and proxy contest reflects a fundamental transformation of French corporate governance. Proxy contests in France are exceedingly rare, but recent episodes show that shareholder activism is on the rise. This change is largely the result of a shift in French market mentality, driven by increased investment in French stocks by non-French investment funds. Recent legal reforms in France have also bolstered shareholder democracy.

Groupe André and Eurotunnel

Two large proxy contests illustrate the current trend toward greater shareholder activism.

In 2000, Guy Wyser-Pratte, a New York-based arbitrageur and a shareholder in Groupe André (today Vivarte), launched a press campaign demanding that he and Sophie L’Hélias, a shareholder activist based in Washington, D.C., be given seats on the board, and that Group André establish a “conflicts of interest” committee comprised entirely of independent directors. He was joined in his demands by a UK investment fund, NR Atticus, and following a proxy solicitation campaign, succeeded in replacing the incumbent board. Ultimately, five board seats were allocated to designees of NR Atticus and Wyser-Pratte.

In April 2004 the board of Eurotunnel lost a proxy contest led by Nicolas Miguet, a minority shareholder activist, supported by several international institutional investors. This was the first proxy contest to make use of recent legal reforms, discussed below, that facilitate shareholder initiatives by allowing shareholders representing at least 5% of a company’s shares to request a court to convene a general assembly. At the general assembly held on April 7, 2004, Mr. Miguet’s slate of directors received 63.42% of the votes cast, representing 64,000 shareholders and 35% of the company’s capital. This turnout contrasts starkly with Eurotunnel’s previous general assemblies, in which an average of less than 10% of shareholders participated.

Regulation and legal reforms

Unlike the United States, where proxy solicitations are heavily regulated, France does not have separate securities regulations concerning the conduct of proxy
contests. In France, a dissident shareholder or shareholder association is bound only by the general obligation to avoid disseminating “false or misleading information” concerning the company. There has as yet been no case law interpreting this requirement in the context of a proxy contest. However, following the Eurotunnel proxy contest, the Autorité des marchés financiers (the “AMF”), the French stock market regulator, has launched an investigation of Mr. Miguet, the leader of the Eurotunnel minority investors, for possible dissemination of misleading information and market manipulation.

There is no special form that proxy solicitations must take, and there is no requirement that the AMF review the solicitation in advance. There is no legal limit on the number of proxies that may be held by a shareholder.1 There is no requirement that proxy holders have been shareholders for any extended period of time.

In addition, general assemblies of shareholders in France have greater flexibility and power than their American counterparts. Most importantly, they may dismiss board members at any time, without cause. Staggered boards, as found in many U.S. companies, do not exist in France.

Over the last several years, the rules governing proxy contests in France have been modified by two legislative initiatives: the New Economic Regulations Law, adopted on May 15, 2001 (the “NER Law”), and the Financial Security Law, adopted on August 1, 2003 (the “FS Law”).

The NER Law and FS Law instituted several changes. The NER Law reduced the threshold for certain shareholder initiatives from 10% to 5% of the company’s capital stock. One or more shareholders holding or representing 5% of the company’s shares may now exercise the rights to: (i) demand the dismissal or resignation of the company’s commissaire aux comptes;2 (ii) request a judge to order the convening of a general assembly;3 (iii) request that a court appoint an expert to evaluate management’s activities;4 and (iv) propose resolutions that the company must place on the general assembly’s agenda.5

In addition, any shareholder, regardless of the number of shares held, may pose written questions to the board, which must be answered during the company’s annual general assembly.6

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1 There is some dispute as to whether corporations may impose such limits in their bylaws. Such a limitation would not seem likely to create practical difficulties for an otherwise well-organized proxy contest. However, proxies must be granted personally to another shareholder, whether a corporation or an individual, and may not be assigned by that individual to any third party. Art. 132, para. 1 of Decree no. 67-236, dated March 23, 1967.
4 Art. L. 225-231 of the French Commercial Code. The right to demand a court appointed expert review also extends to shareholder associations, in the context of listed companies.
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The NER Law relaxed rules on participation in general assemblies by videoconference, and prohibited the practice of limiting participation to shareholders holding a certain percentage of the shares. The NER Law has also increased corporate information disclosure requirements, and in particular requires companies to publish the personal remuneration received by each of the directors, and the number of other directorships held by each board member.

In addition, the FS Law granted shareholder associations the procedural right to legally represent groups of shareholders who have suffered direct or indirect injury to their interests. This provision moves in the direction of American-style class action suits, and substantially increases the power of shareholder activists.

Taken together, the NER Law and FS Law have significantly expanded the information available to shareholders and their control over the board, and will make it easier for shareholder groups to conduct proxy contests or bring legal challenges against management.

Market factors

Foreign institutional investors now play a significant role in the French market. As of 1997, approximately 37% of French market capitalization was held by non-resident shareholders. According to the IMF, foreign equity portfolio investment in France in 2002 has grown to roughly $290 billion, of which roughly $120 billion originated in the United States and Great Britain. Such investors will insist on active involvement in the governance of their portfolio companies. Institutional investors holding significant participations can expect to receive benefits from better management that will cover the costs of involvement in a proxy contest.

In addition, corporate management has come under increased media and judicial scrutiny in recent years. Shareholders have become more aware of corporate governance problems in major corporations as a result of scandals such as Vivendi, Elf and Crédit Lyonnais, and high-profile corporate trials, such as the conviction for abuse of corporate assets of Bernard Tapie, former CEO of the French corporation Testut.

Obstacles to French proxy contests

Notwithstanding recent developments, a number of serious legal and practical obstacles to the success of French proxy contests remain.

- **Shareholder alliances.** The capital of many French listed companies remains concentrated in the hands of a few large French shareholders, including the French state and industrial shareholders. Significant minority shareholders can effectively lock up the management of a company, as is the case of the family-

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controlled companies Auchan, Lagardère, and Michelin. Faced with these intransigent blocs, dissenting minority shareholders often cannot accumulate sufficient votes to force a change in management.

- **Limited shareholder participation.** Traditionally, French shareholders have been indifferent to annual general assemblies, and have either failed to vote altogether or have given unconditional proxies to the management. The rise of organized minority shareholder associations may reduce this tendency, by eliminating the direct costs to shareholders of organizing a proxy contest. Turnout among shareholders at annual meetings is generally quite low. The average for a listed company is approximately 30% participation, and even in the highly controversial Eurotunnel case, the winning dissident shareholders represented only 35% of the company’s capital stock.

In 2003, a law was enacted requiring investment funds holding large blocs of shares to either vote their shares in their own name at annual general assemblies or to justify their abstention. However, the AMF has not yet issued the necessary implementing regulations, and so the rule is currently not in effect. Approximately two-thirds of investment funds currently participate in general assemblies, compared with only 41% in 2000. Their participation has already contributed to increased shareholder activism in France, and a mandatory participation requirement would intensify this trend.

- **Identification of dissident shareholders.** Companies are required to publish a list of their shareholders two weeks prior to the annual general assembly. Professional minority shareholder activists or shareholder associations therefore have limited time in which to collect the necessary proxies. The media can play a determining role in the outcome of a proxy contest. In both the Group André and Eurotunnel cases, the conflict between minority shareholders and the incumbent board was highly publicized for months prior to the general assembly, which served to mobilize support for the dissident shareholders. In France, as in the United States, it is also becoming common for dissident shareholders to communicate amongst themselves over the internet.

- **“Concerted action” among proxy contest organizers.** In France, shareholders are considered to be “acting in concert” if they have agreed to acquire or sell shares, or exercise voting rights to implement a common policy. Shareholders deemed to be acting in concert are required to publish a declaration if they cross certain ownership thresholds, and in certain cases may be required to make a public tender offer for the remaining shares. One commentator has noted that the issues raised by most proxy contests, such as the dismissal of the officers or the board, or the rejection of a merger proposal, are too limited to fall within the scope of concerted action. However, in certain cases, where dissident
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shareholders seek to replace board members in order to shift the strategic orientation of the business in a specific direction, they might be considered to be acting in concert, which would trigger additional reporting obligations or even require a tender offer.

Conclusion

Proxy contests are generally not successful, even in the United States, and they remain relatively rare in France. However, even if unsuccessful, they can pose significant problems for management and result in changes in board policy. The recent legislative reforms supporting additional shareholder involvement and the subsequent success of minority shareholders in replacing the Eurotunnel board may be a watershed in French corporate governance.

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