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2019 REPORT ON CORPORATE GOVERNANCE AND EXECUTIVE COMPENSATION IN LISTED COMPANIES

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EXECUTIVE SUMMARY

This report was prepared in accordance with Article L. 621-18-3 of the Monetary and Financial Code, resulting from the Financial Security Act of 1 August 2003, which requires the Autorité des Marchés Financiers (AMF) to draw up an annual report based on the information on corporate governance and executive compensation published by companies that have their registered office in France and are listed on a regulated market. This is the sixteenth such report written by the AMF.

It first describes developments in governance and compensation and then takes an in-depth look at one particular topical issue: shareholder dialogue. Finally, it includes a section on the highlights and findings of non-compliance resulting from the annual review of registration documents of companies listed on a regulated market.

☐ STUDY ON SHAREHOLDER DIALOGUE

The AMF notes the increasing expectations placed on the governing bodies of listed companies by stakeholders, foremost among which are investors. These expectations are reflected in particular in the objection to certain resolutions at general meetings. Furthermore, the rise in shareholder activism has brought the issue of dialogue between issuers and shareholders to the fore.

Even though the term "dialogue" implies reciprocity on the part of investors, this study focuses on the organisational framework set up for this purpose within listed companies and does not examine the shareholder engagement policies that institutional investors and asset managers are required to develop and make public.[1] In the future, under the Directive aimed at promoting long-term shareholder engagement,[2] these institutional investors will also be required to disclose how the main elements of their equity investment strategy are consistent with the profile and duration of their commitments, in particular their long-term commitments. These disclosures will allow issuers to better understand investor concerns. This issue is not addressed in this report.[3]

The sample consists of 40 companies whose securities are listed on the Euronext Paris regulated market. Of these 40 companies, the first twenty represent the twenty largest companies in the Euronext Paris CAC 40 index on 31 December 2018. The last twenty companies in the sample represent the twenty smallest capitalisations in the Euronext Paris SBF 120 index on the same date. Companies under foreign law and companies not referring to the AFEP-MEDEF code were excluded from this sample.

It should also be noted that this analysis was based solely on the information published by these companies.

1. DIALOGUE WITHIN THE BOARD

The membership of the board of directors is a factor in determining the quality of the dialogue between the company and its shareholders. Within the board, in accordance with the AFEP-MEDEF code, the direct influence of the principal shareholders is balanced by a high proportion of independent directors. In a context where the selection process for these

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[1] For example, investment management companies are required to adopt a voting policy pursuant to Article L. 533-22 of the Monetary and Financial Code, AIFs pursuant to Articles 319-21 to 319-25 of the AMF General Regulation and UCITS pursuant to Articles 321-132 to 321-134 of the AMF General Regulation.

[2] Directive 2017/828 of 17 May 2017 amending Directive 2007/36/CE to encourage long-term shareholder engagement, known as the Shareholder Rights Directive II (SRD 2).

[3] The above-mentioned Directive requires institutional investors and asset managers to develop and make public an engagement policy describing how they integrate shareholder engagement into their investment strategy. This policy describes how they monitor the companies in which they invest with respect to certain relevant topics (including strategy, financial and non-financial performance, and corporate governance); and also how they "conduct dialogues with investee companies" and "communicate with relevant stakeholders of the investee companies".
This is promoted by the Directive by requiring such advisors to disclose certain key information relating to the preparation of their research, advice and voting recommendations and any actual or potential conflicts of interest or business relationships that may influence the preparation of research, advice and voting recommendations.

directors is not always clearly described in the information provided by issuers in the sample, the AMF urges the High Committee on Corporate Governance (HCGE) to carry out a study on the selection, proposal and appointment processes for these directors. The AMF urges the Association of French Private-sector Companies (AFEP) and the Movement of French Businesses (MEDEF) to consider what information it would be useful to make public regarding the process for selecting directors.

A number of rules govern discussions within the board, with the aim of maintaining the quality of internal dialogue while avoiding its being hijacked to benefit individual interests. These include the rules governing the management of conflicts of interest and the independence of directors. The AMF urges the AFEP and MEDEF or the HCGE to clarify certain provisions of the AFEP-MEDEF code, in particular those relating to assessing the independence of shareholders holding more than 10% of the share capital or voting rights, and notes that the explanations provided to justify the independence of a director who has sat on the board for more than 12 years remain highly subjective.

The AMF also notes that, in its sample, there are many censors on the boards in addition to directors. The AMF is concerned about the increase in this practice and renews its appeal to the AFEP and MEDEF to consider whether it would be appropriate to extend to censors some of the rules to which directors are subject or to analyse under what conditions they could be classified as external censors whose opinion would be sought on a case-by-case basis and under what conditions they could then intervene. The role of censors could be the subject of a marketplace discussion. The AMF recommends that companies that use or plan to use one or more censors consider whether this practice is appropriate and, if they do, ensure that they are aware of the regulations relating to market abuse[4] and more specifically the rules on withholding the disclosure of inside information and on abstaining from trading in securities in the event that they hold inside information.

2. ONGOING DIALOGUE WITH SHAREHOLDERS

With regard to ongoing dialogue, the AMF notes that 26 out of 40 companies report that they have set up a dialogue between the board and investors. This practice is growing rapidly and is helping to strengthen the dialogue between companies and investors. The scope of this dialogue with a board member appointed for this purpose is often limited to governance issues. It is management's responsibility to engage in discussions with shareholders on other topics of shareholder interest such as strategy and performance. In any event, this dialogue must not involve inside information.

Understanding investors' concerns allows companies to anticipate the demands of activists and have answers ready for them.

Issuers are increasingly being challenged by shareholders and must be able to respond quickly. The AMF notes that, particularly in the event of a shareholder dispute, companies must have appropriate financial disclosure, particularly regarding inside information that must be made public *"as soon as possible"* (Article 17 of the Market Abuse Regulation[5]). Article 223-1 of the AMF General Regulation (*"information provided to the public by the issuer must be accurate, precise and fairly presented"*) is very important in this context. The AMF pays particular attention to the quality of this disclosure.[6]

The AMF recommends that the presentation materials prepared for *"governance roadshows"* be posted on the company's website. In the event of a contested vote at a general meeting, it also recommends that companies consider whether it would be appropriate to disclose any positions adopted by the board following this vote.

3. DIALOGUE AT GENERAL MEETINGS

General meetings are an essential forum for discussion with shareholders. The questions raised by shareholders during this meeting cover a wide range of topics and mainly reflect the concerns of those present in the room. For this reason, the study focused on voting results that are more representative of the position of all shareholders.

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4 Regulation (EU) 596/2014 of the European Parliament and of the Council of 16 June 2014 on market abuse.
5 Ibid.
6 Robert Ophèle's Contribution to the Discussion on Stock Market Activism (July 2019), see the following link.

The general observation reveals a high average approval rate for resolutions and a low number of resolutions submitted by shareholders.

Some categories of resolutions appear to be more contentious than others. The study presents the results obtained for the main categories of resolutions. A great deal of educational information is provided by companies in their notice of meeting brochures to provide information to shareholders on the most contested resolutions. The AMF applauds these best practices, which it has encouraged since 2012. Nevertheless, there is still room for improvement with regard to the clarity of the information provided on the executive compensation policy and regulated agreements.

◻ OTHER OBSERVATIONS

In several cases, the AMF noted the existence of agreements, some of them confidential, entered into between certain corporate officers and one of their shareholders. The agreements generally give entitlement to the payment of a remuneration, the amount of which is determined at the time the shareholder withdraws his or her capital contribution and based on the value of the holding transferred. The AMF encourages the AFEP, MEDEF and HCGE to review international practices in this area and consider measures to be taken in such situations, to ensure that the board of directors and all shareholders are aware of them and that any conflicts of interest that may arise are managed appropriately.

The AMF also reports a number of observations on service agreements, the independence of directors and the valuation of long-term compensation indexed either in whole or in part to the share price.

PART 1 – DEVELOPMENTS IN GOVERNANCE AND COMPENSATION

As in previous years, the purpose of this chapter is to provide an overview of the developments in corporate governance and executive compensation in Europe and France. In this area, it must be noted that the consideration of environmental and social issues and of the concerns of stakeholders other than shareholders is becoming more important.

1. RECENT EUROPEAN TRENDS CHANGING THE SHAPE OF FRENCH CORPORATE GOVERNANCE

1.1. Integration of CSR issues into governance

Discussions have been engaged on how to integrate sustainable development issues not only into corporate strategy but also into corporate governance structures. Accordingly, the field of corporate governance is likely to change to better reflect the consideration of environmental and social issues.

☐ A European political will for sustainable governance

With the publication of its action plan for sustainable finance[7] on 8 March 2018, the European Commission set out its ambition to support European financial markets in their transition to a more low-carbon economy. This roadmap, based largely on a report prepared by the High-Level Expert Group on Sustainable Finance (HLEG) established by the Commission,[8] is structured around ten cross-sector actions aimed at redirecting capital flows towards a more sustainable economy and strengthening transparency and sustainable investment. Action 10 of this plan deserves particular attention as it highlights the need to (**1**) mitigate short-termism in capital markets on the one hand and (**2**) promote more sustainable corporate governance on the other, both of which require a change in corporate governance practices.

With regard to the first objective, HLEG had already identified that a tendency to short-termism had increased in recent years. According to John Kay, commissioned by the UK government to prepare a report[9] on the subject in 2012, short-term pressures are leading to under-investment in tangible and intangible assets, such as product development, employee skills, customer reputation, and to hyperactive behaviour by corporate officers who place excessive importance on restructuring, financial engineering and mergers and acquisitions. The main recommendations to address short-term pressures include measures to align executive compensation with long-term value creation, membership of the board of directors or supervisory board that allows stakeholders' objectives to be reflected in the strategy, and medium- to long-term indicators to measure the benefits of the long-term strategy (customer satisfaction, reputation and investment projects).

In order to address this issue, the European Commission intends to first engage in a dialogue with the various stakeholders with a view to improving the identification of short-term capital market pressures. A conference[10] organised by the European Commission's Directorate-General for Justice and Consumers (DG JUST) in January 2019 on this subject confirmed the overemphasis on shareholder return, which leads to under-investment in innovation and human capital, both of which are essential for ensuring the ecological transition. The DG JUST also mentioned the need to modify corporate governance rules in order to promote long-term value creation and the inclusion of stakeholders' concerns and societal and environmental considerations in the company's strategy.

In February 2019, the European Commission launched a call for advice[11] in which it invited European supervisory authorities to address Action 10 of the action plan by (i) collecting factual data on short-termism, (ii) identifying the different sources of short-termism and the regulatory areas that can affect short-termism and (iii) making recommendations. Following this call, ESMA launched a public consultation on 24 June 2019 among investors, issuers, UCITS investment companies, AIFMs and trade associations of financial market participants to gather evidence on undue short-term pressures. Based on this information, ESMA is expected to provide a technical opinion in December 2019, which will be forwarded to the European Commission. In this consultation, ESMA identified six areas that could mitigate short-termism: investment strategies and

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7 DG for Financial Stability, Financial Services and Capital Markets Union. (2018). *Commission action plan on financing sustainable growth*. Available at the following link.

8 *Final Report of the High-Level Expert Group on Sustainable Finance: Financing a Sustainable European Economy*, January 2018. This report is available at the following link.

9 *The Kay Review of UK Equity Markets and Long-Term Decision Making*, John Kay, 2012

10 DG for Justice and Consumers. (2019). *Conference on 'Sustainable Corporate Governance'*. The conference webcast is available at the following link.

11 DG for Financial Stability, Financial Services and Capital Markets Union. (2019). *Call for advice to the European Supervisory Authorities to collect evidence of undue short-term pressure from the financial sector on corporations*. This document is available at the following link.

horizons, the disclosure of non-financial information (in line with the requirements of Directive 2014/EU/95) and its contribution to long-term investment strategies, the importance of fair value in investment decision-making, the commitments of institutional investors, the compensation of fund managers and corporate officers, and the use of credit risk swap agreements by investment funds.

With regard to the second objective, the HLEG report recommends that boards of directors and supervisory boards adopt a longer-term vision insofar as they must no longer only consider the creation of shareholder value but must also consider environmental and social sustainability issues. According to the HLEG, this transition to more sustainable governance could be achieved through several levers.[12] One of the recommendations of the expert group is to strengthen the accountability of directors with regard to sustainability by asking them to:

- act in the long-term interests of the company, its owners and stakeholders;
- discharge their duties with care, diligence and competence, which requires a good knowledge of the company and its environment as well as an adequate level of training;
- systematically seek candidates that demonstrate expertise on sustainable development issues;
- publish regular reports on the sustainable development strategy, including the monitoring of the objectives set by the company, for use by the company's various stakeholders.

Taking this observation into account, Action 10 of the European Commission's plan aims to establish governance within companies that is "more conducive to sustainable investments" and proposes a number of avenues of discussion, such as the obligation for boards of directors to develop a "sustainability strategy" or a clarification of the rules according to which directors are expected to act over the long term.

It appears that implementing better long-term governance mechanisms must be encouraged by institutional investors, which prompted the HLEG to make several recommendations of interest to them. In particular, the report recommended extending the principle of fiduciary duty to institutional investors, through developing long-term responsible management policies (known as stewardship) or exercising their voting rights, for example. Lastly, it called for more systematic consideration of environmental and social risks in investment policies. These recommendations were taken up by the Commission in particular in Action 7, which aims to clarify the duties and responsibilities of investors and asset managers.[13]

☐ Evolutions in corporate governance codes around CSR issues

In recent years, there have been changes in governance structures in Europe through the gradual integration of corporate social responsibility issues. Revisions of governance codes to include or consolidate the place of CSR issues in good governance practices have increased over the past few years, as evidenced by recent changes in the drafting of governance codes in the United Kingdom (2018), Italy (2018) and Germany (2019). In some cases, such as Luxembourg in 2017, the changes to the provisions of the governance code concerned only subjects related to corporate social responsibility. These changes are more than just a trend; they reflect a real paradigm shift in corporate governance. Since the 1970s, corporate governance mechanisms had been largely influenced by the dominant culture, as theorised by Milton Friedman, whereby a corporation's only objective was to increase its profits and the compensation of those who own it.[14] This led to an aspiration to give greater consideration to all the company's stakeholders, the benefits of which Edward Freeman demonstrated in his Stakeholder Theory.

In addition to the consideration given to stakeholders in terms of the corporate strategy, these also redefine the roles and responsibilities of governance bodies, compensation structures and even the company's corporate purpose. Depending on the country, the integration of CSR issues into governance codes can take different forms, sometimes resulting in a paragraph dedicated to CSR, as in the governance code drawn up by Luxembourg, or in multiple references inserted in the

[12] III, 7. *"Governance & Leadership", Financing a Sustainable European Economy*, January 2018.

[13] For more information on this subject, see the document published by the AMF in July 2019 entitled *European Regulatory Update: Progress on Sustainable Finance Work (Disclosure and Benchmark)*.

[14] Friedman M, The Social Responsibility of Business is to Increase its Profits, The New York Times Magazine, 13 September 1970.

body of the text, which is the case for most of the governance codes reviewed. Some codes also highlight, as early as in their introduction, the importance of environmental and social issues; the German governance code is one example.

Integration of CSR criteria into European governance codes
Consideration of environmental and social issues in the company's strategy
• **Germany**: Updated in May 2019, the code points out in its introduction that the supervisory board must be aware of the company's role in society and of its own social and environmental responsibility; • **Belgium**: The board of directors must strive for the creation of sustainable value by the company, by setting the company's strategy, establishing effective, responsible and ethical leadership and overseeing the company's performance (paragraph 2.1); • **Spain**: The company should take the time to analyse how its business activity impacts society and vice versa (paragraph 3.5); • **France**: The board of directors shall endeavour to promote long-term value creation by considering the social and environmental aspects of its activities. It shall propose, where appropriate, any changes to the articles of incorporation that it deems necessary (paragraph 1.1); • **Luxembourg**: Since 2017, the code has required companies to integrate corporate social responsibility considerations into their strategy to optimise long-term value creation (principle 9); • **Netherlands**: The executive board must develop a strategy aimed at creating long-term value, paying particular attention to the interests of the company's various stakeholders and any other matters related to environmental, social, human rights and corruption issues (paragraph 1.1.1); • **United Kingdom**: The role of governance bodies is to promote the long-term success of the company, creating value for shareholders and contributing to society more generally.
Consideration given to stakeholders by the board of directors
• **Germany**: In its new version of May 2019, the code insists in its introduction that both the supervisory board and the executive board must consider the interests of all the company's stakeholders; • **Belgium**: In striving for the creation of sustainable value, the board shall develop an inclusive approach that balances the legitimate interests and expectations of shareholders and those of other stakeholders (paragraph 2.2); • **Spain**: As part of its corporate social responsibility policy, the company should indicate how it engages in dialogue with its stakeholders (recommendation 54); • **Luxembourg**: Since 2017, the code has stated that the board must consider issues relating to the company's corporate social responsibility and the interests of all its stakeholders (principle 2); • **Netherlands**: The board of directors and the executive board must ensure that the interests of the company's various stakeholders are taken into account (principle 2.4).
Involvement of employees in governance structures
• **France**: The code refers to the French provisions regarding the presence of employee representatives on the board; • **Netherlands**: Where the company has set up an employee consultation body, discussions should take place between this body, the board of directors and the executive board about the company's culture (principle 2.5); • **United Kingdom**: The code suggests several ways in which the board can consult employees in the course of its work: the appointment of a director elected from among employees, the formation of an employee advisory committee or the appointment of a director on the board responsible for representing employees' interests (§5); where the company has not implemented one of the above measures, it must explain the alternative methods it has adopted to take into account the expectations of its employees.

Diversity within governance bodies
• **Germany**: Management shall indicate the diversity objectives it has set for the two levels below it (I, 3); • **Spain**: One or more committees within the board should review the company's corporate social responsibility policy to ensure that it is a factor in long-term value creation and ensure its proper implementation (recommendation 53); • **France**: The board *"also ensures that the executive officers implement a policy of non-discrimination and diversity, notably with regard to the balanced representation of men and women on the governing bodies"* (§1.7) and *"considers what the desirable balance of its membership and that of the board committees should be, particularly in terms of diversity"* (§6.2); • **Finland**: Companies shall publish diversity objectives within the board of directors (recommendation 9); • **Italy**: Since July 2018, at least one third of the board must be composed of members of each gender (paragraph 2.C.3); • **Netherlands**: The board shall develop a diversity policy applicable to management, the board of directors itself and the executive committee (section 2.1.5). This policy shall include concrete objectives.
Compensation structures
• **Germany**: The new version of the code published in May 2019 states that the Supervisory Board shall take into account the level of compensation for employees in order to set the level of compensation for executive officers; • **Belgium**: According to principle 7, the company shall compensate the members of the board and executive officers in a fair and responsible way, and the board shall adopt a compensation policy designed in particular to promote the creation of sustainable value; • **Spain**: Variable compensation paid to executive officers should be based on predetermined and measurable performance criteria, including long-term non-financial performance criteria (paragraph III.6); • **France**: Executive compensation shall be competitive, aligned with the company's strategy and environment and shall have as its main objective to promote its performance and competitiveness in the medium and long term by integrating one or more criteria related to corporate social responsibility (recommendation 24.1); • **Sweden**: Similarly, the variable compensation structure shall include performance criteria that promote long-term value creation (§9.4).

Lastly, some codes now refer to the obligation to disclose non-financial reporting information and call for greater accountability on the part of companies to inform their stakeholders in this regard. This is the case with the Luxembourg, Swedish, Dutch and German governance codes. The convergence of governance and corporate social responsibility issues therefore continues to progress and clearly reflects their close dependence. In France, for example, the recent amendment of Article L. 225-37-3 of the Commercial Code confirms this trend, insofar as the corporate governance report "describes, where applicable, the variable elements of compensation determined on the basis of the application of non-financial performance criteria".

1.2. Impact and influence of SRD2 Directive on the French market

The European agenda has also influenced the French market through the transposition into French law of Directive (EU) 2017/828 of 17 May 2017 amending Directive 2007/36/EC to encourage long-term shareholder engagement (hereinafter referred to as the "SRD2 Directive"). These new provisions cover a wide range of corporate governance topics.

☐ Investor engagement

Article 198 of the PACTE Law amends Article L. 533-22 of the Monetary and Financial Code to require that portfolio management companies develop and publish a shareholder engagement policy that *"describes how they integrate their role as shareholder in their investment strategy"*.

Proxy advisors

The SRD2 Directive defines a "proxy advisor" as *"a legal person that analyses, on a professional and commercial basis, the corporate disclosure and, where relevant, other information of listed companies with a view to informing investors' voting decisions by providing research, advice or voting recommendations that relate to the exercise of voting rights"*.

The PACTE Law inserts Articles L. 544-3 to L. 544-6 and L. 621-18-4 into the Monetary and Financial Code, which relate to proxy advisors and transpose the provisions of the SRD2 Directive.

With regard to the concept of a "proxy advisor service", Article L. 544-3 of the Monetary and Financial Code adopts the definition proposed by the SRD2 Directive and transposes the transparency obligations from the SRD2 Directive.

Article L. 544-4 of the Monetary and Financial Code states that proxy advisors must, firstly, make public the code of conduct to which they refer and, secondly, report on how they apply it. To promote transparency in relation to the exact nature and reliability of their activities, proxy advisors are required to make public information on their analysis and research procedures. Lastly, this article addresses the issue of potential conflicts of interest that proxy advisors must prevent and manage.

The scope of the French regulations applicable to proxy advisors is defined in Article L. 544-6 of the Monetary and Financial Code, which states that: *"Articles L. 544-3 to L. 544-5* ***apply to proxy advisors*** *whose registered office is located in France, to those whose registered office is not located in a European Union Member State but whose head office is located in France, and to those whose registered office or head office is not located in a European Union Member State but who have a branch in France,* ***if they provide proxy advisor services*** *to shareholders of companies that have their registered office in a European Union Member State and whose shares are admitted for trading on a regulated market established or operating in a European Union Member State."*

Under the impetus of ESMA, an association called *Best Practice Principles for Shareholder Voting Research Providers* (BPP) was founded in 2013 and brings together stakeholders in this industry. A code of good conduct was drawn up in 2014 by the association, the three general principles of which relate to the quality of the service provided, the prevention of conflicts of interest and communication policies. This code is the only code of conduct in Europe for this industry. Its recent revision in July 2019 takes into account the changes introduced by the SRD2 Directive, the comments made by ESMA during its 2015 review on the governance of the code, and the contributions resulting from a public consultation conducted in 2017.

The main changes introduced by the code concern:

The most significant development of the code is the formation of an independent supervisory body (the BPP Oversight Committee). This supervisory body, the chair of which must be entrusted to an independent member with a two-year term of office, must be composed of 11 members, of whom six represent institutional investors, three represent issuers and two are independent members (academics) whose one- or two-year terms may only be renewed on a limited number of occasions.

The main tasks of this independent committee, whose formation must address some of the comments made by ESMA in 2015 with regard to the governance of the association, include: (i) reviewing the annual compliance statements of signatory members to identify whether such statements require action or clarification by the signatory member; (ii) reviewing membership applications of proxy advisors wishing to become signatory members of the association; and (iii) penalising members deemed to have failed to comply (this penalty may be as severe as exclusion). The results of these procedures will be summarised annually by the committee as part of its annual report. This committee is also responsible for organising an annual discussion forum for investors, issuers and other stakeholders.

Conflict of interest management: The section of the code on managing conflicts of interest (Principle II) has been strengthened in the revised version. This principle has been expanded to stipulate that these conflicts must first and foremost be avoided and, failing that, managed. The Guidance section of the principle has also been expanded to specify how signatory members must report a conflict of interest situation and how it should be managed from a practical perspective.

Format and frequency of compliance statements: While the first version of the code required compliance statements to follow the "comply or explain" principle, the revised principles now include the "comply or explain" principle as an analytical rule. This means that applying the principles is assumed to be effective and that the explanation must focus on their implementation in cases where there is a possibility that the "comply or explain" principle may not be applied, provided that it is justified. This change must accompany the explanatory requirements introduced by the Directive for proxy advisors who deviate from some of the provisions of the code of conduct to which it refers. The change also addresses a comment made by ESMA in 2015 which considered that the "comply or explain" principle allowed signatory members to choose to comply only with certain provisions of the code. The compliance statement is now updated on an annual basis (in line with the provisions of the SRD2 Directive).

Among other changes, the code has been expanded to highlight the fact that the delivery of analyses to institutional investors must occur in a timely manner to allow them sufficient time for review before casting their vote. This principle is particularly important with regard to managing stakeholder communications.

The transposition of the provisions of the SRD2 Directive was accompanied at the national level by the adoption by Parliament of a provision, not provided for in the SRD2 Directive, requiring the AMF to "report", in its report on Corporate Governance and Executive Compensation, on the implementation of the new provisions concerning proxy advisors. The practical aspects of implementing some of these provisions must be specified by a decree of the Conseil d'État.

In this area, the AMF published a recommendation in 2011 for individuals providing voting advice, which focused on developing and implementing voting policies, issuing voting recommendations, interacting with listed companies and preventing conflicts of interest.

At the date of issue of this report, the two proxy advisory firms governed by French regulations on proxy advisors (ISS and Proxinvest), which are both members of BPP, publish their statement of compliance with the association's code of conduct on their websites, as well as documentation presenting their organisation and voting policy.

Furthermore, the AMF met with these firms to discuss their activities as proxy advisors and their implementation of the new provisions of the PACTE Law.

As part of the updates to the code in July 2019, these proxy advisory firms will now have to publish their compliance statements on an annual basis.

The AMF will only be able to report on the implementation of the new provisions for proxy advisors in its 2020 corporate governance report, after the decree of the Conseil d'État clarifying certain details of the new provisions has been published. The AMF also encourages proxy advisors governed by French regulations to register with it on a voluntary basis.

The debate on the influence of proxy advisors and the question of their supervision is also not new in the United States. At the end of 2017, the draft Corporate Governance Reform and Transparency Act (H.R. 4015) proposed, in particular, the registration of proxy advisors with the U.S. Securities and Exchange Commission (SEC), the ability for issuers to comment on recommendations made and the identification of potential or actual conflicts of interest. This bill, which enjoys broad support from listed issuers,[15] has not yet been approved by the US Senate. Contrary to the perspective of issuers, the investment community and industry representatives believe that this bill would have negative consequences on the current voting process at general meetings.

In **November 2018**, the SEC organised a **Staff Roundtable** on topics related to shareholder identification and the voting process at general meetings, including the role of proxy advisors and their use by investment advisors. The day before this event, a bill was presented to the Senate by six senators with the objective of providing a more direct framework for the activities of proxy advisory firms.[16]

In **August 2019**, following this event, the SEC published two guidance documents[17] to clarify the applicability of certain federal proxy rules to the recommendations and advice provided by proxy advisors.

On **5 November 2019**, the SEC voted to publish the proposed rules governing proxy advisors. These proposals will in particular allow companies to better verify the reports of proxy advisors before they are published, in order to highlight significant errors or omissions. If these rules are accepted, they will have a significant impact on proxy advisory firms.

☐ Shareholder vote on compensation and the introduction of the equity ratio

The SRD2 Directive introduces a link between executive compensation and employee compensation. The PACTE Law amended Article L. 225-37-3 of the French Commercial Code to introduce several new requirements, including:

- a comparison between executive compensation, presented on an individual basis, and the mean compensation of employees;
- a comparison between executive compensation, presented on an individual basis, and the median compensation of employees in the company.

However, Article L. 225-37-3 of the Commercial Code needs to be amended to ensure that the provisions of the SRD2 Directive are transposed into national law.

Draft guidelines are also being developed by the European Commission to assist Member States with the presentation of the compensation report, including the equity ratio.

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15 *"97% of companies support the Corporate Governance Reform and Transparency Act of 2017, which passed the House of Representatives in December 2017 and would require proxy advisory firms to register with the SEC"* – 2018 Proxy Season Survey presented by Nasdaq and the Center for Capital Markets Competitiveness (CCMC); 165 companies took part in this consultation.

16 *"Given the importance that investors have placed on continued access to proxy advisory firms, it is critical that proxy advisory firms are appropriately regulated and held accountable to investors, and this is the purpose of the bipartisan Corporate Governance Fairness Act," said Senator Reed. "Under our legislation, all major proxy advisory firms would be required to register as investment advisers under the IAA, and therefore have a fiduciary duty to their clients. So as to not discourage new entrants into the proxy advisory business, our bill provides smaller proxy advisory firms the choice to voluntarily register under the IAA but does not require them to do so. The Congressional intent of this legislation is to preserve the critical role played by proxy advisory firms and to hold them accountable to investors": https://www.reed.senate.gov/news/releases/as-sec-evaluates-proxy-process-us-senators-introduce-corporate-governance-fairness-actI.* This bill also proposes periodic inspections of these firms by the SEC, part of which would include the review of policies for managing conflicts of interest.

17 These documents constitute a position clarifying the responsibility of investment advisors in terms of voting (Guidance – "Proxy Voting Responsibilities of Investment Advisers") and a recommendation on the applicability of the rules governing voting recommendations (Interpretation and Guidance – "Applicability of the Proxy Rules to Proxy Voting Advice"). These documents will enter into force on the date they are published in the Federal Register. Extract from the press release: *"The Securities and Exchange Commission today provided guidance to assist investment advisers in fulfilling their proxy voting responsibilities. The guidance discusses, among other matters, the ability of investment advisers to establish a variety of different voting arrangements with their clients and matters they should consider when they use the services of a proxy advisory firm. In addition, the Commission issued an interpretation that proxy voting advice provided by proxy advisory firms generally constitutes a 'solicitation' under the federal proxy rules and provided related guidance about the application of the proxy antifraud rule to proxy voting advice."*

Related-party agreements

As part of the transposition of certain provisions of the SRD2 Directive, the PACTE Law makes several changes to the related-party agreement regime. The main changes concern the scope of related-party agreements, the situation of persons indirectly involved, and the introduction of an internal procedure for evaluating bargaining agreements and strengthening the disclosure of these agreements in companies whose securities are admitted for trading on a regulated market.

The first change concerns Article L. 225-37-4 of the Commercial Code, which describes the content of the corporate governance report provided for in the last paragraph of Article L. 225-37 of the Commercial Code. The PACTE Law extends the scope of agreements concluded between an executive or a significant shareholder of the parent company and a subsidiary, which must be mentioned in this report. Whereas until now the text described the subsidiary concerned as *"another company the first of which directly or indirectly owns more than half the capital"*, it now refers to the company *"controlled by the first within the meaning of Article L. 233-3"*.[18] The effect of this amendment is to expand the content of the corporate governance report insofar as the definition of control in Article L. 233-3 of the Commercial Code is much broader than the criterion of majority shareholding alone. The result will be greater transparency regarding the agreements entered into within a group.

The PACTE Law also provides clarification regarding *"indirectly interested parties"*. Accordingly, Articles L. 225-40 and L. 225-88 of the Commercial Code have now been amended to specify that the interested party, who must inform the board as soon as he or she is aware of such an agreement and who must abstain from voting, is either the "directly or indirectly" interested party. The legislation in force before the PACTE Law was enacted referred only to the "interested party". The PACTE Law here reflects the scope of Article L. 225-38, paragraph 2, which already applied the procedure for related-party agreements to any person indirectly interested in the agreement. In this respect, the AMF points out that, in its recommendation DOC-2012-05 on general meetings of shareholders of listed companies, it recommends the following definition for applying the concept of "indirectly interested party": *"A person is considered to be indirectly interested in an agreement to which he/she is not a party if he/she derives or is likely to derive benefit from that agreement because of his/her ties with the parties and the powers he/she has to influence their conduct."* The AMF also points out that, in this same recommendation DOC-2012-05, it considers that *"accordingly, a shareholder company controlled by the shareholder who is ultimately the beneficiary of the agreement should not influence the vote on the agreement in the same way as the shareholder controlling the company that is the beneficiary of the agreement. Finally, shareholders acting in concert, particularly when this alliance provides for a common voting policy, should not influence the vote on an agreement concluded with one of those also in the alliance".*

Another important change is that Articles L. 225-40 and L. 225-88 of the Commercial Code are amended by the PACTE Law to specify that the party directly or indirectly interested must not only abstain from voting – which was already the case – but must also abstain from *"taking part in the deliberations"* of the board on the requested authorisation. In terms of the scope of this abstention, the question may arise as to whether attending debates without taking part in them would be sufficient to satisfy this legal prohibition. One interpretation that is consistent with the spirit of this provision and the principles set out in the AFEP-MEDEF code[19] regarding conflicts of interest leads to the conclusion that the director concerned must abstain from attending debates in such a case. Moreover, as noted, *"it is true that the mere physical presence of an influential director, even if he or she remains silent, can have an impact on how the deliberations are conducted and can even influence the outcome of the vote. However, the idea here seems to be to avoid any influence, direct or indirect, from the interested party on the vote"*.[20]

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[18] Article L. 225-37-4, 2° of the Commercial Code.

[19] Article 19 of this code stipulates that any director of a listed company in a conflict of interest situation shall *"abstain from attending the debate and taking part in voting on the related resolution"*.

[20] J. Heinich, The PACTE Law and Regulated Agreements, Droit des Sociétés no. 6, June 2019, comm. 105.

In the specific case of companies whose securities are admitted for trading on a regulated market, Article L. 225-39 of the Commercial Code is supplemented by a paragraph 2 which stipulates that the Board of Directors must set up a procedure to regularly assess whether agreements relating to current operations and concluded under normal conditions do actually meet these conditions. Those directly or indirectly interested in any of these agreements do not take part in their assessment.

Lastly with regard to companies whose shares are admitted for trading on a regulated market, two new articles are created by the PACTE Law: Articles L. 225-40-2 and 225-88-2 of the Commercial Code. Under these new provisions, companies whose shares are admitted for trading on a regulated market must publish information on related-party agreements on their website at the latest at the time they are entered into. Failing this, any interested party may ask the presiding judge ruling in summary proceedings to order, where applicable under penalty, the board of directors or supervisory board to publish this information.

Transposing the SRD2 Directive, this disclosure prior to the approval of related-party agreements is likely to increase transparency. This is new in French law. The resulting public information will undoubtedly be closely examined by shareholders.

1.3. Other governance changes provided for by the PACTE Law

In addition to the transposition of the SRD2 Directive, the PACTE Law also contains provisions on the role of the company, compensation issues and the membership of the board of directors and supervisory board. A series of measures also aims to encourage employee share ownership in publicly and privately owned companies.

☐ Corporate interest and corporate mission

Announced by the government in October 2017, consideration of the role of the company became a reality on 11 April 2019 with the final adoption of the PACTE Law.[21] The aim of the action plan for business growth and transformation (PACTE) is to *"empower businesses to innovate, grow and create jobs"*.[22] Among its provisions, Article 169 of the PACTE Law is intended to provide companies with a corporate mission in their articles of incorporation, described as *"the mission that the company intends to pursue in the conduct of its business"*.[23] Another measure provided for by Article 176 of the PACTE Law allows companies to *"publicly state the status of a company with a mission"* subject to compliance with certain conditions, including the monitoring of the execution of the mission by a mission committee.[24] Based on the recommendations of the report entitled *The Company as a Source of Collective Interest*[25] issued on 9 March 2018 by Nicole Notat and Jean-Dominique Senard, these measures reflect the government's desire to go beyond an *"outdated vision of the company"* in order to *"redefine its place in our economy"*.

Consideration of environmental and social issues

According to Article 1832 of the Civil Code, *"the company shall be formed by two or more persons who agree by contract to appropriate their assets or industry to a common undertaking with a view to sharing in the profits or benefiting from any savings that may arise"*. Article 1833 of the Civil Code also specifies that *"every company must have a lawful corporate purpose and be constituted in the common interest of its shareholders"*. The purpose of the company therefore lies in the common interest of its shareholders, which has often been interpreted as being of an exclusively pecuniary nature.

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21 Act No. 2019-486 of 22 May 2019 on business growth and transformation, known as the PACTE Law.

22 The Economy, Finance, Action and Public Accounts Portal. (2019). *The PACTE Law adopted by Parliament.*

23 Article 1835 of the Civil Code.

24 Article 176 (I.) of the PACTE Law provides for the monitoring of the performance of the company's mission by a "mission committee, separate from the corporate bodies provided for by this law, which must include at least one employee and which is exclusively responsible for this monitoring and presents an annual report attached to the management report to the General Meeting responsible for approving the company's accounts".

25 Nicole Notat and Jean-Dominique Senard, *The Company as a Source of Collective Interest*, 2018. This report is available at this link (French version only).

Accordingly, *"the Civil Code assigns to the company the objective of sharing the profit or savings achieved by the company and that this sharing constitutes the common interest of the shareholders"*.[26]

This approach may have given rise to various criticisms, in particular concerning *"the lack of reference to the corporate interest, the lack of reference to the company, the lack of consideration of stakeholders and the exclusively financial vision of the company"*.[27] Some consider that *"the excessive pursuit of an exclusive purpose – maximising profits for shareholders – has isolated the company and fuelled suspicion towards it"*.[28] They add that *"the company (public limited, limited liability, simplified joint-stock, etc.) is a legal vehicle that allows the business plan to be implemented. This, carried out over the long-term, requires attention to be paid to the company's various stakeholders: shareholders, employees, creditors, suppliers, customers, communities affected by its activity and even future generations. This is the real interest of the shareholder"*.[29] The Court of Cassation had been working for many decades to determine the scope of this concept, with the courts of first instance and courts of appeal assessing on a case-by-case basis whether a violation of the corporate interest should be found in the cases submitted to them. However, several proposals have been put forward in recent years to define corporate interest.[30]

In addition to these definitions, Article 169 of the PACTE Law specifically introduces the concept of corporate interest into the law by adding a second paragraph to Article 1833 of the Civil Code: *"The company's corporate interest shall be managed, taking the social and environmental aspects of its activity into consideration."* The law does not provide a more precise definition of corporate interest. The concepts of corporate interest and corporate purpose should not be confused: *"the corporate purpose is binding on third parties, who may rely on it, which means that, as soon as an act falls within the statutory definition of the corporate purpose, the company is validly bound by the act recorded in its name, whereas the corporate interest is a concept that can be used internally to assess whether an act by the manager is in the company's interest. It follows that an act by the manager, even if it is formally compatible with the corporate purpose, may give rise to the manager's liability towards the shareholders if it is not in the company's interest"*.[31] The Senard-Notat report pointed out, with regard to the corporate interest, that it *"is not necessarily confused with the interest of shareholders, whether they are a majority or a minority"* and that it refers *"more to its own collective interest, that is, to the overriding of self-interest within the company and its business"*.[32]

Corporate Mission

Article 1835 of the Civil Code is also amended by the PACTE Law to provide for the option of introducing a "corporate mission" in the articles of association,[33] which is *"the mission that the company intends to pursue in the conduct of its business"*.

While the provision is intended for all French companies, the government has nevertheless chosen an optional adoption of the measure by companies, not wishing it to be perceived as a constraint.

Company with a mission

Article 176 of the PACTE Law provides companies with the right to formalise their "corporate mission" using the new status of "company with a mission", which involves adopting a "corporate mission" within the meaning of Article 1835 of the Civil Code, accompanied by one or more social and environmental objectives to be pursued in the conduct of their business.

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26 Philippe Bissara, *Corporate Interest*, Revue des Sociétés, 1999, p. 5.

27 Alain Couret, *Should Articles 1832 and 1833 of the Civil Code be rewritten?*, D., 2017, p. 222.

28 *Idem.*

29 *Idib.*

30 In 2015, during the debates on the Bill for Growth, Business and Equal Opportunities, an amendment was tabled to add to Article 1833 of the Civil Code according to which the company *"must be managed in the best interests of the company, while respecting the general economic, social and environmental interest"*. The amendment did not pass. In November 2016, an appeal "For a Responsible Market Economy" signed by various personalities was published in *Le Monde*, proposing amendments to Articles 1832 and 1833 of the Civil Code. The issue of value sharing and corporate social engagement was finally the subject of the consultation launched by the Government in October 2017 as part of the Action Plan for Business Growth and Transformation ("PACTE").

31 Sylvaine Porcheron, *Is the corporate interest the same as the corporate purpose?*, AJDI, 2015, p.217.

32 Introduction, *The Company as a Source of Collective Interest*, Nicole Notat and Jean-Dominique Senard, March 2019.

33 *"The articles of incorporation may specify the mission that the company intends to pursue in the conduct of its business"*, Article 1835 of the Civil Code.

Pursuant to Article L. 210-10 of the Commercial Code, "a company may publicly state its status as a company with a mission" provided that five conditions are met:

- the articles of incorporation must specify a corporate mission;
- the articles of incorporation must specify *"one or more social and environmental objectives that the company sets itself as a mission to be pursued in the conduct of its business"*;
- the articles of incorporation specify the procedures for monitoring the implementation of the mission, i.e. the establishment of a mission committee, separate from the corporate bodies, which must include at least one employee and which is solely responsible for this monitoring and presents an annual report as an annex to the management report;
- the achievement of the social and environmental objectives specified by the company must be verified by an independent third-party body;
- the company must lastly declare its status as a company with a mission to the clerk of the commercial court.

This status provides companies with a more restrictive alternative in terms of the assigned mission, since the commitments made are monitored by a *"mission committee, separate from the corporate bodies provided for by this code and which must include at least one employee"* and are the subject of a report annexed to the management report presented annually, prepared by the same committee. Another condition to be met is verification by an independent third-party body, which gives rise to a publicly available opinion annexed to the report mentioned above. Article L. 110-1-2 of the Mutual Society Code provides for repercussions in the event of a breach of one of the conditions or an unfavourable opinion from the independent third-party body on one or more of the objectives that the company has set itself. If necessary, the company may have its status as a "company with a mission" removed, which may directly affect its reputation.[34] Although this status is new in France, it is inspired by the American model of "Benefit Corporations" or "Social Purpose Corporations", which provides a reference framework for companies that include general interest objectives alongside financial performance objectives.

A few companies amended their articles of incorporation in 2019 to introduce a corporate mission

Only a handful of French listed companies have, at their 2019 annual general meetings, chosen to adopt a corporate mission through an amendment to the articles of incorporation submitted for approval by shareholders. However, Atos did propose an *"amendment to Article 2 of the Company's articles of incorporation in order to provide for the Company's corporate mission"*, which was approved by 99.3% of shareholders.

> *"At Atos, our mission is to help design the future of the information technology space. Our services and expertise, multiculturally delivered, support the advance of knowledge, education and science and contribute to the development of scientific and technological excellence. Across the world, we enable our customers, employees and as many people as possible to live, work and develop sustainably and confidently in the information technology space."*

[34] *"Where one of the conditions referred to in Article L. 110-1-1 is not met, or where the opinion of the independent third-party body concludes that one or more of the social and environmental objectives that the mutual or union has set itself pursuant to 2° of the same Article L. 110-1-1 have not been achieved, the public prosecutor's office or any interested party may refer the matter to the presiding judge ruling in summary proceedings to order, where applicable under penalty, the legal representative of the mutual or union to delete the words 'mutual with a mission' or 'union with a mission' from all deeds, documents or electronic media issued by the mutual or union"*, Article 176 of the PACTE Law.

Similarly, Carrefour proposed the insertion of a corporate mission into its articles of incorporation at its general meeting on 14 June 2019. Resolution 17 therefore sought to add a preamble before Article 1 of the articles of incorporation in order to adopt a corporate mission for the Company. The resolution was also overwhelmingly approved by shareholders (99.72%). Accordingly, Carrefour has set itself the mission of *"provid(ing) (its) customers with quality services, products and food accessible to all across all distribution channels"*.

Moreover, the Chairman and Chief Executive Officer of Orange announced at its general meeting on 21 May 2019 that *"Orange will adopt a corporate mission that will give concrete expression to an approach that the company has already been pursuing for several years"* and *"will become the common thread of our future strategic plan up to 2025"*.[35]

It is expected that the number of companies with a corporate mission will increase in 2020, particularly as the Minister for the Economy and Finance, at the *Positive IMPACT for All* conference on 12 September 2019, told the Commissioner for State Investments *"that all companies in which the State is a shareholder should have a corporate mission in 2020"*. The Public Investment Bank is also required to take the same approach *"with the companies in which it invests"*.[36]

The number of companies that have undertaken to adopt a status of "company with a mission" within the meaning of Article 176 of the PACTE Law is still very limited at this point. This is the case, for example, with the mutual insurer MAIF, which on 3 June 2019 expressed its desire to become *"the first company with a mission"*. With this in mind, it has also announced that it wishes to make clear its corporate mission through an amendment to the articles of incorporation at its next general meeting.[37]

According to the study entitled *Are companies with a mission the companies of tomorrow?*[38] carried out by Prophil, Viavoice and HEC, the interest shown by company managers in this corporate status is real since 73% of managers consider that its adoption could contribute to improving the "employer brand". According to the same study, 69% of the senior managers surveyed consider that the status of "company with a mission" can work as a means of placing sustainable development at the heart of the company's strategy.

Other companies have adopted a corporate mission in 2019 without including it in the articles of incorporation

Other companies have chosen to adopt a corporate mission without including it in their articles of incorporation. The annual general meeting has generally provided the opportunity to discuss this subject, as at Veolia, which included a brochure on its corporate mission in the documentation relating to its general meeting on 18 April 2019. The four-page document describes the company's corporate mission (which includes *"contributing to human progress and enforcing the United Nations' Sustainable Development Goals to achieve a better and more sustainable future for all"*) and provides details on how it will be implemented. In particular, it states that the board of directors will take account of the corporate mission and *"assess its implementation"*. A "Stakeholder Committee" will also be set up to provide *"advice to the company's management on the successful fulfilment of its corporate mission"*.

Lastly, the Crédit Agricole Group announced the formalisation of its corporate mission in a press release dated 6 June 2019. With the aspiration of *"Working every day in the interest of our customers and society"*, the group sees its corporate mission as a guide to *"transforming and developing the Group"*.[39]

It is important for these companies that have a corporate mission to clarify whether they wish to amend their articles of incorporation.

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35 Minutes of the Orange Combined General Meeting of 21 May 2019.

36 *"Positive IMPACT for All", Review of the Implementation of the Provisions of the PACTE Law*, Speech by Bruno Le Maire, 12 September 2019.

37 MAIF press release of 3 June 2019 entitled *"MAIF Determined to Become a Company with a Mission"*.

38 Prophil, in collaboration with HEC and Viavoice, *Are companies with a mission the companies of tomorrow?*, 2018.

39 Crédit Agricole Group press release of 6 June 2019 entitled GROUP PROJECT & 2022 MEDIUM-TERM PLAN.

☐ Compensation

In order to provide companies with the means to innovate, the PACTE Law has made significant changes in terms of compensation.

BSPCEs open to members of the board of directors and supervisory board

Article 103 of the PACTE Law provides for the possibility of allocating founders' share subscription warrants (BSPCEs) *"to members of the board of directors, the supervisory board or, in the case of simplified joint-stock companies, any equivalent statutory body"*.[40] Up until this point, directors were not entitled to receive any compensation other than "attendance fees" (paid in cash), exceptional compensation, if any, and compensation payable in respect of an employment contract. They may now also be allocated BSPCEs if the issuer concerned meets the conditions set out in Article 163a G of the General Tax Code (in particular, at least 25% of the capital must be held directly and continuously by natural persons or by legal entities that themselves have at least 75% of their capital held directly by natural persons; the company must have been registered in the Corporate and Trade Register for less than 15 years; and, for listed companies, their market capitalisation must be less than €150 million).

By increasing the ways in which directors can be compensated, the PACTE Law aims to allow the issuers concerned to *"attract sufficiently motivated and qualified directors to young companies while they do not, in the short term, have the means to offer them compensation in the form of sufficiently attractive attendance fees"*, as outlined in the explanatory statement to the amendment underlying this reform.[41] As noted, *"the changes introduced are intended to meet a need highlighted by certain 'medtech' and 'biotech' companies, which are keen to attract high-profile directors, but which do not often manage to generate sufficient profits to offer attractive compensation until several years later"*.[42] The advantage of BSPCEs is precisely that they do not cost the company issuing them anything. However, for innovative companies, they do offer those holding them an earning potential.

Prior to the legislative reform introduced by the PACTE Law, the AMF had observed a growing practice among some issuers of issuing share subscription warrants (BSAs) that were allocated to directors as bonus shares or under pricing conditions that did not reflect their market value. In its press release of 5 June 2018, the AMF reminded the audience of the legal framework applicable to the director compensation and proposed that consideration be given to *"whether it would be appropriate to change the existing legal framework, particularly for new or emerging companies in the biotechnology sector"*.[43] The AMF indicated that it had referred the issue to the Legal High Committee for Financial Markets of Paris (*Haut Comité Juridique de la Place Financière de Paris*, or HCJP) to begin discussions on this subject. The change to the legal framework introduced by the PACTE Law is based directly on the reform proposal formalised by the HCJP report[44] published in November 2018.

Supplementary pension schemes

Pursuant to the PACTE Law, Order no. 2019-697 of 3 July 2019 on supplementary occupational pension schemes transposed into law Directive 2014/50/EU of 16 April 2014 on the minimum requirements for enhancing worker mobility between Member States by improving the acquisition and preservation of supplementary pension benefits.

This transposition modifies the characteristics of the supplementary defined-benefit pension scheme, known as the "top-up pension scheme", which is governed by Article L. 137-11 of the Social Security Code.

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40 See Articles L. 225-44 and L. 225-85 of the Commercial Code and Article 163a G, II of the General Tax Code.

41 http://www.assemblee-nationale.fr/dyn/15/amendements/1237/AN/2854 (in French only)

42 C. Coupet, *The PACTE Law as the Framework for Executive Compensation – Between Liberalisation and Strengthening*, JCPE E, no. 26, 27 June 2019, 1319.

43 AMF, The AMF Draws the Attention of Issuers to the Allocation of Share Subscription Warrants (BSAs) to Directors, 5 June 2018.

44 HCJP, Progress Report and Conclusions on "Director BSAs", 30 November 2018.

Under this scheme, which was funded exclusively by the employer, the vesting of pension benefits required the employee or corporate officer to be employed by the company at the time of retirement. Any departure before retirement, for example due to resignation or dismissal, would result in the loss of all benefits vested.

However, Directive 2014/50/EU provides that supplementary pension benefits will be considered as vested beyond a maximum period of three years. The transposition of the Directive therefore leads to the removal of the random nature of the vesting of pension benefits as provided for historically under Article L. 137-11 of the Social Security Code.

Article 1 of Order No. 2019-697 of 3 July 2019 specifies that *"in the event of the beneficiary's departure from the company, the pension rights remain vested in the beneficiary"*. However, *"membership of a pension scheme [...] may be subject to a minimum period of employment of the beneficiary by the company"* while *"the vesting of pension benefits may also be subject to a condition relating to the period over which contributions are made"*. The only mandatory condition specified by the executive order is that the sum of the two periods provided for by a single scheme may not exceed three years.

The benefits must be paid in the form of an annuity, after deducting annuities paid by legally binding pension schemes. The supplementary benefits vested each year, expressed as a percentage of the beneficiary's compensation for the year in question, must not exceed 3% per year (5% previously) nor exceed 30% (45% previously) when the percentages used by all employers for the same beneficiary are combined. Where the beneficiary receives compensation in excess of eight times the annual social security ceiling, the vesting of the additional benefits is subject to the fulfilment of conditions relating to his or her professional performance.

Since the publication of the executive order in the Official Journal of 4 July 2019, no new beneficiaries can be registered under this scheme. If the current schemes are not discontinued and remain subject to the condition of being employed by the company, no conditional supplementary pension benefit may be vested within the scheme for periods of employment after 1 January 2020. However, an exception is made for beneficiaries who joined such a scheme before 20 May 2014, insofar as the scheme can continue to generate supplementary benefits. The executive order also provides that companies that so wish may transfer the supplementary defined-benefit pension scheme's liabilities to a supplementary defined-contribution pension scheme.[45]

Allocation of free shares

The PACTE Law relaxes the conditions for the allocation of free shares. In principle, the total number of free shares that may be allocated to employees is capped at 10% of the company's share capital. The law now specifies that shares that have not yet been definitively allocated at the end of the vesting period, and those that are no longer subject to the retention obligation, will no longer be taken into account in this percentage.

Article 162 of the PACTE Law also specifies that in a company whose shares are admitted for trading on a regulated market, shares may be allocated if, in particular, all eligible employees of the company and at least 90% of all eligible employees of its subsidiaries benefit from an employer contribution made to a PEE employee savings scheme (Article L. 225-197-6 of the Commercial Code).

Lastly, Article 164 provides for the possibility of removing the restriction on free shares whose allocation was authorised before 8 August 2015. Companies may stipulate in their articles of incorporation that registered shares held directly by employees whose allocation was authorised by extraordinary general meetings prior to the publication of the law of 6 August 2015 shall also be taken into account in determining the proportion of share capital held by employees.

[45] Article 5, II, Order No. 2019-697.

☐ Governance structures

Increasing the number of employee representatives on boards

It should be noted that public limited companies and limited partnerships with share capital employing, at the end of two consecutive financial years, at least 1,000 people across the company and its French subsidiaries or at least 5,000 people across the company and its French and foreign subsidiaries must provide, in their articles of incorporation, for the appointment of at least two employee representatives to the board of directors or supervisory board if the board has more than twelve members and at least one employee representative if the number of members is equal to or fewer than twelve.[46]

The PACTE Law strengthens these provisions by increasing the number of employee directors who must sit on boards of directors or supervisory boards and extends this obligation to mutual societies, unions and federations.

Specifically, Article 184 of the PACTE Law, through amendments to Articles L. 225-27-1, L. 225-79-2 and L. 226-5-1 of the Commercial Code, now requires the appointment of at least two employee directors to the board of directors or supervisory board if the board has eight or more non-employee directors (compared with 12 previously) and of at least one employee director if the board of directors or supervisory board has at most eight or fewer members. The law specifies that *"employee representative directors and members of the supervisory board shall take office no later than six months after the general meeting that approved the amendments to the articles of incorporation necessary for their nomination or appointment"*. Furthermore, *"these amendments to the articles of incorporation shall be proposed at the Ordinary General Meeting to be held in 2020"*. With regard to the applicable scope, the PACTE Law extends these obligations to mutual societies, unions and federations that comply with certain thresholds.

The government is required to published, within three years of the law entering into force, a report *"assessing the economic and managerial effects of directors representing employees being members of the boards of directors or supervisory boards of companies affected"* in order to assess, firstly, the advisability of increasing the number of employee directors to be appointed to three where the board of directors or supervisory board has more than twelve members and, secondly, the advisability of appointing an employee representative for subsidiaries located outside France in cases where the company in question carries out a significant part of its business abroad.

Lastly, Article 186 of the PACTE Law provides that directors or members of the supervisory board shall receive *"at their request" "training appropriate to the performance of their duties"*, the cost of which shall be borne by the company. The Article also specifies that *"the time allocated to this training may not be less than forty hours per year"*. Articles L. 225-53, L. 225-30-2, L. 225-71, L. 225-80 of the Commercial Code have been amended accordingly.

Measures to promote gender equality

The PACTE Law includes several measures aimed at improving equality between men and women and promoting the feminisation of senior positions. Among the main topics addressed by the PACTE Law are gender balance within corporate governance bodies and the protection of business leaders' spouses. The penalties provided for in the event of a breach of the gender balance rules for boards of directors and supervisory boards have also been strengthened.

- ✓ *Ensuring greater gender balance in the process of selecting deputy chief executive officers and members of the management board.*

The PACTE Law requires issuers to introduce greater gender balance in the process of selecting deputy chief executive officers and members of the management board.

[46] Article L. 225-27-1 of the Commercial Code for the board of directors, Article L. 225-79-2 of the Commercial Code for the supervisory board of public limited companies and Article L. 226-5-1 for the supervisory board of limited partnership with share capital.

For example, with regard to proposals made by the chief executive officer to appoint one or more deputy chief executive officers, Article L. 225-53 of the Commercial Code stipulates that the board of directors must now establish *"a selection process that guarantees that, until its completion, there shall be at least one person of each gender among the candidates. These proposals for appointment shall seek to achieve a balanced representation of men and women"*.

With regard to public limited companies with a two-tier board structure, Article L. 225-58 of the Commercial Code stipulates that *"membership of the management board shall strive to achieve a balanced representation of men and women"*.[47] Moreover, the supervisory board[48] must establish, for recruiting members of the management board, *"a selection process that guarantees that, until its completion, there shall be at least one person of each gender among the candidates"*.

The law does not go so far as to guarantee the appointment of persons of each gender, but the selection process must include at least one candidate of each gender until that process has completed. As a result, the recruitment process for these functions will no longer be able to involve only one candidate, even in the final stages of that process. It should be noted that while these provisions do apply to the recruitment of members of the management board and deputy chief executive officers, they do not apply to the recruitment process to select the chief executive officer.

- ✓ *Enhanced penalties for non-compliance with the rules on gender balance on boards of directors and supervisory boards*

With regard to gender balance on boards of directors and supervisory boards, Law 2011-103 of 27 January 2011 on gender balance on boards of directors and supervisory boards and on workplace equality (the Copé-Zimmermann Law) stipulates that, for public limited companies and limited partnerships with share capital, the proportion of directors or supervisory board members of each gender may not be less than 40% of all directors. This stipulation concerns listed companies and companies exceeding the threshold of 250 permanent employees and €50 million in net turnover or balance sheet total for three consecutive years. Articles L. 225-18-1, L. 225-69-1 and L. 226-4-1 of the Commercial Code provide that any appointment made in breach of these provisions that does not have the effect of remedying the irregularity in the membership of the board of directors or supervisory board is void.

The PACTE Law repealed the second sentence of the second paragraph of Articles L. 225-18-1 (applicable to boards of directors), L. 225-69-1 (applicable to supervisory boards of public limited companies) and L. 226-4-1 (applicable to supervisory boards of limited partnerships with share capital), which specified that declaring invalid an appointment made in breach of the rules relating to gender balance *"[did] not invalidate the deliberations involving the director [or member of the supervisory board] who [had not been] properly appointed"*. The repeal of these sentences opens up the possibility of requesting that a deliberation of the board, one of whose members has been appointed in breach of the rules on gender balance, be declared invalid.

- ✓ *Measures to promote employee share ownership*

The PACTE Law includes several measures to make companies "*fairer*". The first series of measures aims to *"reward employees for their work"* through the strengthening of employee share ownership in publicly and privately owned companies.[49] The government has set itself the target of achieving 10% of the share capital of French companies held by their employees by 2030 and consequently wishes to accelerate the trend towards employee share ownership, which has

[47] Article L. 225-58 paragraph 1 of the French Commercial Code. This requirement already existed following the entry into force of Law 2011-103 of 27 January 2011 on gender balance on boards of directors and supervisory boards and on workplace equality (the Copé-Zimmerman Law), for both the board of directors (Article L. 225-17 of the Commercial Code) and for the supervisory board (Article L. 225-69 of the Commercial Code).

[48] The wording of paragraph 3 of Article 225-38 of the Commercial Code is ambiguous in this respect. As noted, *"it is not clear which body referred to as 'It' is expected to decide on this fair selection process: the management board itself or the supervisory board? If we remember that members of the management board are appointed by the supervisory board, and given the location of this new requirement (at the end of the very last paragraph of Article L. 225-58 where, really, it should not appear), it seems, but it is not certain, that it is the supervisory board that will now be responsible for this difficult task."* (H. Le Nabasque, Membership of the Management and Control Bodies for Managing Joint-Stock Companies after the PACTE Law, Bull. Joly Sociétés, June 2019, no. 06, p. 51).

[49] The Economy, Finance, Action and Public Accounts Portal. (2019). The PACTE Law: The 3 Measures that will Reward Employees for their Work.

seen the doubling of the amounts of collective investment transactions in the SBF 120 since 2012 according to the Eres Group.[50]

The provisions of the PACTE Law promoting employee share ownership concern both publicly owned companies and private companies.

With regard to the development of employee share ownership in companies with public participation, the PACTE Law, firstly, extends the scope of transactions subject to the employee offering requirement and, secondly, clarifies the implementation rules and the possibility for the State to cover part of the costs of organising the employee offering. This expansion is reflected in particular in the extension of the scope of transactions subject to the employee offering requirement beyond the sole case of sell-offs by the State of holdings in companies listed on the financial markets. Employee offerings will now also be mandatory in relation to sell-offs by the State of holdings in unlisted companies, and sell-offs by the State of holdings in listed companies by private agreement. Article 168 of the PACTE Law specifies that only "significant" sell-offs will be affected by this requirement, in order to ensure proportionality between the sell-off and the procedures for making an employee offering.

With regard to private companies, the measures to promote employee share ownership are based primarily on three aspects: a reduction in the corporate lump sum for the employer contribution to employee share ownership (from 20% to 10%), the possibility of unilateral contributions by the employer, and the simplification of employee share ownership in simplified joint-stock companies with more than 149 employees.

2. NATIONAL CHANGES THAT HAVE BEEN UNDER WAY FOR A LONG TIME AND ARE BEING MONITORED BY THE AMF

In parallel with these regulatory changes, the AMF focused on monitoring certain particularly important topical issues during 2019. The topic of general meetings has aroused great interest due to the work carried out by the French Association of Securities Professionals (AFTI) on processing votes at general meetings and the expected changes to the status of the abstentions. Activism has also been an area of discussion, particularly with the AMF Chairman, who published an article on the subject last July ("Robert Ophèle's Contribution to the Discussion on Stock Market Activism").

2.1. General meetings

☐ AFTI work and methodological guide to processing votes at general meetings

The idea of a methodological market guide to processing votes at general meetings came from the report of the AMF's Retail Investors Consultative Commission entitled *"For a Transparent and Effective Vote at General Meetings in the Digital Era"*, published in March 2017.[51] The proposals made by this working group, including those on creating a *"methodological guide to processing votes at general meetings"*, were subsequently developed further by a small AMF working group comprising members of the Retail Investors Consultative Commission and the Disclosures and Corporate Finance Consultative Commission. This recommendation was ultimately incorporated into the AMF's recommendations on the general meetings of shareholders of listed companies.[52]

This recommendation called for *"a methodological guide to processing votes at general meetings to be prepared as soon as possible, as part of a joint effort by representatives of all relevant professionals, issuers and shareholders for use by the transfer agents, custody account-keepers and issuers that handle some or all of this processing"*.[53]

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[50] Eres Group. (2019). Historical Record of the Total Collective Employee Shareholding Transactions in the SBF120 in 2018.

[51] The report is available at the following link (French version): https://www.amf-france.org/magnoliaPublic/dam/jcr:947c63fc-5fa7-4e42-80a5-df9070bc82dd/Rapport%20de%20la%20Commission%20consultative%20Epargnants.pdf

[52] AMF Recommendation DOC-2012-05.

[53] Idem.

Consequently, a working group was created under the guidance of the AFTI to draft a guide to processing votes at general meetings.

The first version of this methodological guide was submitted for consultation to certain professional associations (AFEP, MEDEF and ANSA) and stakeholders in early September. A public consultation was held in November 2019. The guide is expected to be available for the next general meeting season in 2020.

☐ Abstention

Law 2019-744 of 19 July 2019 on simplifying, clarifying and updating company law (the Soilihi Law) amended Articles L. 225-96 and L. 225-98 of the Commercial Code, relating respectively to the extraordinary general meeting and the ordinary general meeting, to change the rules for counting the majority required for adopting decisions at the ordinary and extraordinary general meetings of listed or unlisted public limited companies. Whereas previously the votes *"available to shareholders present or represented"* were taken into account, from now on, it is the votes *"cast by shareholders present or represented"* that are decisive, the law specifying that *"votes cast shall not include the votes attaching to shares for which the shareholder did not take part in the vote or has abstained or has returned a blank or invalid vote"*. As a result, abstention is no longer considered a negative vote.

Article L. 225-107 of the Commercial Code has also been amended. Paragraph 2 of this article now provides that *"forms that provide no voting indications or that express an abstention shall not be deemed votes cast"*. These votes were previously deemed votes against. More specifically, this change in the way votes are counted may have a significant impact on the resolutions filed on the day of the general meeting, in accordance with the provisions of paragraph 3 of Article L. 225-105 of the Commercial Code.

These legislative changes are applicable as of the general meetings held to approve the financial statements for the first financial year ending after the Soilihi Law was enacted, which was published in the Official Journal on 20 July 2019. For the purpose of calculating a quorum, only forms that have been received by the company before the general meeting shall be taken into account, within the time limits to be set by decree of the Conseil d'État.

2.2. Activism, a highly topical matter

According to Lazard's annual report on shareholder activism,[54] 2018 was a record year with more than 226 companies targeted by activist campaigns (188 in 2017) and a total of $65 billion deployed by activist funds around the world ($63.4 billion in 2017). Shareholder activism, which initially developed in English-speaking countries, has now firmly established itself in the European financial landscape. Between 2010 and 2015, the European market experienced a 126% increase in activist campaigns.[55] The French market has seen several activist interventions since 2015.[56]

During a hearing by the Fact-finding Mission on Shareholder Activism set up by the National Assembly's Finance Committee, whose co-rapporteurs are Deputies Éric Woerth and Benjamin Dirx, the AMF Chairman, Robert Ophèle, spoke about stock market activism and suggested some areas of discussion on the current regulatory framework.[57]

Shareholder activism is a tricky concept to define since, from a legal perspective, there is nothing to differentiate the activists from other shareholders. The term is therefore used to refer to various practices and strategies.

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[54] 2018 Review of Shareholder Activism, Lazard (2019).

[55] Assessment of Stakeholder Activism in France, Skadden (2017).

[56] Pernod Ricard – Elliott Management (December **2018**), **Suez Environmental Company** – Amber Capital (July **2018**), **Scor** – Charity Investment Asset Management (September **2018**), **Latecoère** – Sterling Strategic Value / Financière de l'Echiquier (March **2018**), **Danone** – Corvex Management (October **2017**), **Lagardère** – Amber Capital (April **2017**), **SoLocal Group** – Amber Capital (March **2017**), **Safran** – TCI (February **2017**), **Zodiac Aerospace** – Ciam (January **2017**), **Rexel** – Cevian Capital AB (**2016-2017**), **Euro Disney SCA** – Ciam (**2015** – **2017**).

[57] Robert Ophèle's Contribution to the Discussion on Stock Market Activism (July 2019), available at this link (French version).

As the AMF Chairman points out, activism can *"contribute to proper price formation on the markets and to improving the governance and management of issuers"*. However, it can also be a force that is *"abnormally destabilising, both for issuers and for the orderly operation of the market"*.[58] Activism can take two main forms:

- Recognising that the company is undervalued, the activist becomes a shareholder in order to demand strategic changes or request a "withdrawal premium";
- Recognising that the company is overvalued, the activist may short sell the shares in order to reduce the share price to its "true" value, which leads to the company redefining its strategy.

In order to ensure the orderly operation of the market, the AMF Chairman has identified three regulatory areas that, without specifically targeting activism, may contribute to a better regulation of the market.[59]

Regarding the first area, the AMF Chairman raised the idea of a stronger system of mandatory declarations when investors cross certain thresholds. The possible options mentioned include, firstly, the addition of a declaration threshold set at 3% (compared with 5% today) of the capital or voting rights for large caps to provide earlier access to information on increases in activist shareholders' holdings and, secondly, the introduction of a declaration of intent when the 5% threshold is crossed (compared with 10% today). However, the scope of these measures seems limited to the extent that, since the strategy of activist funds is largely based on communication, any tightening of the regulations may not have a decisive effect. Regarding short sellers, Robert Ophèle proposes *"supplementing the current information with a declaration on debt instruments, particularly credit default swaps"*.

The second area aimed at improving the orderly operation of the market highlighted by the AMF Chairman is the regulation of public disclosures of information. This would involve clarifying, through the regulators' policy, the level of detail provided in the public disclosure of conflicts of interest of the various stakeholders (European context) and issuers' ability to disclose information in response to attacks by activists in the periods preceding the publication of their results (national context).

According to the AMF Chairman, two improvements are desirable in this area: firstly, making the various conflict of interest declarations,[60] which are often very generic, more precise and, secondly, clarifying the ability of issuers to respond to sometimes critical statements from activists, particularly during periods when they are recommended to abstain from making any recommendations. Concerning the first point, this would not require an amendment of the Delegated Regulation (EU) 2016/958 itself but could be done by ESMA through its "Questions and Answers" tool.

Lastly, the third area deals with regulatory breach or insider trading. On this point, Robert Ophèle reiterated the role of the AMF, in particular in its market surveillance functions.

Generally speaking, many issuers in France pay attention to this subject, foremost among them, the State. On 5 May 2019, the Minister for the Economy and Finance announced that the government was preparing measures to prevent the destabilisation of French companies by activist investors.

On 2 October 2019, a fact-finding report was published by the National Assembly's Committee on Finance, the General Economy and Budgetary Control, concluding the work of a fact-finding mission on shareholder activism chaired by Éric Woerth and Benjamin Dirx.

This report contains 13 recommendations.

1) Four recommendations relate to the issuer's knowledge of its shareholder base:

   – *Reduce the level for threshold-crossing declarations to 3% of the capital or voting rights;*

[58] Ibid.
[59] Ibid.
[60] These are governed by Commission Delegated Regulation (EU) 2016/958 of 9 March 2016 supplementing Regulation (EU) 596/2014 of the European Parliament and of the Council with regard to regulatory technical standards defining the technical conditions for the objective presentation of investment recommendations or other information recommending or suggesting an investment strategy and the disclosure of particular interests or the existence of conflicts of interest.

- *Threshold-crossing declarations of any kind must be made for crossing thresholds, whether upwards or downwards;*
- *Make penalties for failure to declare that thresholds have been crossed (whether upwards or downwards) systematic and more dissuasive, including in the case of securities lending and borrowing;*
- *Encourage private innovation – market initiatives, development of technological solutions, etc. – intended ultimately to enable any listed company to determine simply, quickly and at low cost the composition of its shareholder base. Accurately assess the impact of the measures of the PACTE Law on improving the effectiveness of the TPI (identifiable bearer share) procedure. Consider, where appropriate, the appropriateness of France's implementation of the option, allowed under European law, to limit the ability of intermediaries to charge fees for shareholder identification services.*

2) Three recommendations aim to strengthen shareholder dialogue:

- *Allow a company that is the target of a public campaign against it to be a recipient of the substantial information being made available to its shareholders on this subject by the activist who initiated the campaign;*
- *Allow listed companies to respond flexibly and quickly to public campaigns against them, in particular through the press. In particular, allow them to communicate during the "quiet period" preceding publication of their results;*
- *Encourage the writing of a guide to shareholder dialogue shared between the community of issuers, investors, regulators and other market participants. The adversarial principle should feature prominently in it.*

3) Four recommendations relate to securities lending and borrowing:

- *Introduce, in order to combat excessive short selling, a presumption of abnormal operation of the market in cases where the extent of the short selling of a financial security exceeds a certain limit (volume traded, percentage of market capitalisation, percentage of free float, etc.);*
- *Include in the calculation of a short position subject to a threshold-crossing declaration all financial instruments and securities of any kind that contribute to a market participant's net economic exposure to a listed company;*
- *Encourage financial markets to develop, ideally in a coordinated manner, transparency tools for securities lending and borrowing transactions to be carried out on the market. The emergence of a centralised securities lending and borrowing marketplace would be a private initiative that public authorities could, if necessary, support;*
- *For securities subject to a loan, separate the voting rights so that they are not systematically transferred at the time of the transaction.*

4) Lastly, two recommendations aim to strengthen the AMF's power and resources:

- *Introduce proceedings for "interim relief" before the AMF, allowing listed companies to refer an urgent situation directly to the regulator, so that the regulator can take immediate action to investigate the situation, intervene if necessary and, where appropriate, take interim measures, without prejudging the merits of the case;*
- *Strengthen the AMF's human and financial resources in order to align them with its major European counterparts and enable it to be fully effective in regulating activism, which is set to grow in France and Europe.*

Other market participants such as the AFEP, Paris Europlace and le Club des Juristes have also announced their willingness to contribute to the discussion on the supervision of shareholder activism by setting up working groups. Le Club des Juristes' report on shareholder activism was published on 7 November 2019.

PART 2 – STUDY ON SHAREHOLDER DIALOGUE

An increasing number of investors, asset managers and proxy advisory firms are seeking to engage in dialogue with the management of listed companies, or even with a member of the board of directors of such companies who is outside the management team, to better understand how their strategy is developed and how performance is measured, and to evaluate the way the board operates, the corporate culture and governance practices.

This dialogue is essential for listed companies, as it enables them to understand shareholders' expectations and resolve any disagreements, which will ultimately be expressed during the voting on resolutions at the general meeting or even through investment or disinvestment decisions.

In 2012, following the report of the working group chaired by Olivier Poupart-Lafarge on the general meetings of listed companies,[61] the AMF issued recommendations to improve the ongoing dialogue between issuers and investors. In this regard, the AMF recommends in particular that *"a permanent dialogue be established between issuers and investors, together with those who advise them, prior to the publication by companies of their draft resolutions and subsequent to the general meeting in order to resolve any areas of disagreement regarding the voting policies of the various categories of shareholders. In this regard, the AMF reminds issuers of its recommendation of March 2011 on proxy advisory firms"*. The AMF also recommends that issuers *"wherever possible, meet shareholders who so wish after the general meeting to discuss any disagreements on important points discussed at that meeting in order to learn lessons from them, if necessary, in preparation for the next meeting"*.[62]

By engaging in this dialogue, companies can more easily identify and respond to shareholders' questions and concerns, explaining, if necessary, their specific characteristics, the actions implemented and the board's work in developing the company's strategy. These types of discussions help issuers to gain a better understanding of their strengths and vulnerabilities, to understand more specifically the expectations, questions, reservations or mistrust of their shareholders, and to "defuse" some of their criticisms early on. These are all essential factors given the increasing numbers of activist shareholders.[63]

The aim of this second part of the report is to study the information provided by companies on the discussions they engage in with their shareholders, after providing a brief reminder of the methodology used.

By focusing on dialogue with institutional investors and proxy advisors, this study complements the study conducted by the AMF in 2015 on programmes set up by listed companies to communicate with individual shareholders.[64]

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[61] Working group chaired by Olivier Poupart-Lafarge, Report on General Meetings of Listed Companies, 7 February 2012. Most of the recommendations resulting from this report have been included in AMF policy (AMF Recommendation 2012-05, General Meetings of Shareholders of Listed Companies, updated in October 2018).

[62] AMF Recommendation 2012-05, General Meetings of Shareholders of Listed Companies, updated in October 2018, Proposal 1.1.

[63] See Robert Ophèle's Contribution to the Discussion on Stock Market Activism, published on 11 July 2019 on the AMF's website.

[64] 2015 study on programmes set up by listed companies to communicate with individual shareholders, available on the AMF website.

PURPOSE AND METHODOLOGY

1. APPROACH

This report was prepared in accordance with Article L. 621-18-3 of the Monetary and Financial Code, which requires the AMF to draw up an annual report based on certain information included in the corporate governance report and published by companies that have their registered office in France and are listed on a regulated market. The information used to prepare this report was therefore publicly disclosed by companies in their registration document or their annual report published in 2019 for financial year 2018, in press releases published in first-half 2019 and/or on their website, primarily in the section dedicated to the annual general meeting.

The "comply or explain" principle, required under the Commercial Code[65] (for public limited companies with either a one-tier or two-tier board structure and for limited partnerships with share capital) is central to the framework of corporate governance norms.

As in previous years, certain issuers are named for best and poor practices. For practices deemed to have room for improvement, companies are also named if they do not apply a recommendation of the AFEP-MEDEF code and do not justify this deviation from the code or provide sufficiently detailed or appropriate explanations, in accordance with the "comply or explain" principle.

2. FOCUS

In order to highlight its most important messages, the AMF decided, from 2016, to change the presentation of the report by taking an in-depth look at only a few issues considered topical or where further progress is still expected from listed companies. The AMF has also set as one of its key priorities in its strategic plan for 2018-2022 to *"adapt the AMF's report on governance and executive compensation, taking account of the progress made by issuers in recent years"*.[66]

The programmes set up by listed companies to communicate with individual shareholders, which were the focus on an AMF study in 2015,[67] are not specifically mentioned below.

3. SAMPLE

The sample consists of 40 companies whose securities are listed on the Euronext Paris regulated market. Of these 40 companies, the first twenty represent the twenty largest companies in the Euronext Paris CAC 40 index on 31 December 2018. The last twenty companies in the sample represent the twenty smallest capitalisations in the Euronext Paris SBF 120 index on the same date. Companies under foreign law and companies not referring to the AFEP-MEDEF code. The full list of companies is provided in Annex 1.

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[65] Subparagraph 8 of Article L. 225-37-4 of the Commercial Code (and by referral, Article L. 225-68, paragraph 6 for public limited companies with a supervisory board and Article L. 226-10-1, paragraph 1 for limited partnerships with share capital), pursuant to Order no. 2017-1162 of 12 July 2017 establishing various measures for simplifying and clarifying companies' disclosure requirements, requires that the corporate governance report specify, *"when a company voluntarily refers to a code of corporate governance drawn up by organisations representing companies, the provisions from which it has departed and the reasons for this departure, as well as the place where this code may be consulted or, if the company does not refer to such a code, the reasons the company decided not to refer to it, as well as, where applicable, the rules that it applies in addition to legal requirements"*. The wording has changed somewhat relative to the former Article L. 225-37 (but the substance of the scope has not been significantly modified), which did not contain the words *"where applicable"*, such that a broad interpretation of the second part of the sentence may have led to the conclusion that companies not referring to a code should *systematically* apply rules in addition to legal requirements.

[66] AMF's Strategic Plan for 2018-2022.

[67] 2015 AMF study on programmes set up by listed companies to communicate with individual shareholders (link).

For information, within the SBF 120 index and as at 31 December 2018, 106 companies refer to the AFEP-MEDEF code, 5 companies refer to the MIDDLENEXT code and 9 companies refer to a foreign governance code.

4. ANALYTICAL METHOD

The analysis of the information published by the sampled companies was based on both quantitative and qualitative criteria, in particular through the use of a grid comprising most of the recommendations of the AFEP-MEDEF code and the best practices for corporate governance and executive compensation.

In the report, findings of non-compliance,[68] potentially resulting in the naming of a company, were made on the basis of the recommendations of the AFEP-MEDEF code and, where applicable, the application guide for the code. The findings of non-compliance referred to in this report are based on the topics addressed in this report and are not intended to be exhaustive.

The AMF informed the relevant issuers of the observations and facts likely to result in their being named in the report. These companies were given an opportunity to submit their comments to the AMF before the report was finalised. However, only public information (press releases, excerpts from registration documents, etc.) was used for the quotations included in this report, it being understood that the AMF takes into consideration the information provided by issuers in their responses. Information published before mid-October is also taken into account in the non-compliance information quoted to clarify the compliance actions observed.

5. STRUCTURE OF THE STUDY

Each section includes:

- a summary of the applicable legal provisions, the provisions of the AFEP-MEDEF code and the recommendations formulated by the AMF in previous years on the themes developed by the report;
- general observations based on statistics and incorporating an in-depth study of certain topics;
- an overview of practices observed in relation to the themes selected for the report, the most significant of which resulted in the naming of the relevant companies;
- where applicable, the inclusion of the AMF's latest recommendations for companies and avenues of discussion that may lead to updates of the AFEP-MEDEF code.

6. LEGISLATIVE AND REGULATORY FRAMEWORK

The applicable legislative and regulatory framework consists of European and national texts.

At the European level, a number of texts are applicable with respect to corporate governance and executive compensation, in particular Directive 2006/46/EC (the "Accounting" directive) of 14 June 2006, amended by Directive 2013/34/EU of 26 June 2013,[69] and Directive 2014/95/EU of 22 October 2014,[70] whose Article 20 forms the basis of European law for implementation of the "comply or explain" principle.

[68] Established in accordance with the above methodology.
[69] Directive 2013/34/EU of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings.
[70] Directive 2014/95/EU of 22 October 2014 as regards disclosure of non-financial and diversity information by certain large undertakings and groups.

A European Commission recommendation, published in 2014, also addresses the "comply or explain" approach[71].

At the national level, based on Article L. 621-18-3 of the Monetary and Financial Code, this report presents the changes in the governance practices of certain listed companies in relation to three frameworks:

- legislative provisions, in particular those related to the board's report on corporate governance, the "comply or explain" principle, gender balance, multiple directorships, the appointment of directors representing employees, the audit committee, and references in the corporate governance report;
- self-regulation, through the recommendations in the AFEP-MEDEF and Middlenext codes applicable as at 31 December 2018;
- AMF Recommendation DOC-2012-02,[72] updated each year and most recently on 30 November 2018, which aggregates the recommendations that were made in the previous reports and are applicable to listed companies that have stated that they follow the AFEP-MEDEF code.

7. LIMITATIONS OF THE ANALYSIS

This analysis was based solely on the information published by the 40 companies in the sample.

The figures presented below are provided for illustrative purposes only to provide an indication of the information provided by these companies and an overview of the shareholder vote.

[71] European Commission recommendation of 9 April 2014 on the quality of corporate governance reporting ("comply or explain"). According to the commission, companies should clearly state which specific recommendations they have departed from and, for each departure from an individual recommendation:

- explain in what manner the company has departed from a recommendation;
- describe the reasons for the departure;
- describe how the decision to depart from the recommendation was taken within the company;
- where the departure is limited in time, explain when the company envisages complying with a particular recommendation;
- where applicable, describe the measure taken instead of compliance and explain how that measure achieves the underlying objective of the specific recommendation or of the code as a whole, or clarify how it contributes to good corporate governance by the company.

[72] AMF Recommendation, DOC-2012-02, Corporate governance and executive compensation in companies referring to the AFEP-MEDEF code – Consolidated presentation of the recommendations contained in the AMF annual reports, updated on 30 November 2018.

RESULTS OF THE STUDY

The study firstly discusses the dialogue within the board of directors or supervisory board (section 1), then the ongoing dialogue outside the board and particularly in preparation for general meetings (section 2), and finally the dialogue in general meetings (section 3).

1. DIALOGUE WITHIN THE BOARD[73]

The board of directors represents all shareholders and must act, in all circumstances, in the company's corporate interest, beyond the individual interests of its members and the various stakeholders.

This first part of the study takes stock of the current situation regarding shareholder dialogue within the board in a context in which the law and the AFEP-MEDEF code now provide for criteria for selecting directors that have little to do with holdings of capital or voting rights. For example, pursuant to Article L. 225-17 of the Commercial Code,[74] the board must be composed with a view to achieving gender balance and must adopt a diversity policy.[75] Similarly, according to Article 6.1 of the AFEP-MEDEF code, the *"quality of a board of directors can be seen in the balance of its membership as well as in the skills and ethics of its members"*.

In the first subsection below (1.1), the overall composition of the board is analysed in order to assess the extent to which the dialogue with shareholders takes place within the board and how it is facilitated. The second subsection (1.2) addresses the issue of managing conflicts of interest, including potential conflicts of interest, within the board.

1.1. The presence of shareholders on the board

The companies in the sample had a very diverse shareholder base as at 31 December 2018:

- 31 of the 40 companies have one or more major shareholders holding more than 10% of their capital. Of these 31 companies, 14 have a shareholder, acting alone or in concert, who holds 30% or more of the company's capital or voting rights;
- The average percentage of the capital of the sampled companies held by the public and unidentified shareholders is significant, at around 52%. But this covers a wide range of situations. Ten companies have a widely dispersed shareholder base in which the proportion of undifferentiated shareholders represents more than 70% of the capital or voting rights;
- In some companies, employees may hold up to 9% of the capital or voting rights. In the sample, 32 companies have one or more directors representing employees. Nine companies have one or more directors representing employee shareholders.

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[73] "Board" in this study refers to the boards of directors and supervisory boards of listed companies. Public limited companies can choose between three forms of organising their management and control powers: a public limited company with a supervisory board and a management board, a public limited company with a single-tier board of directors (i.e. with combined offices) and a public limited company with a two-tier board of directors (with separate offices).

[74] Article L. 225-69 of the Commercial Code for public limited companies with a supervisory board and Article L. 226-4 of the same code for limited partnerships with share capital.

[75] Article L. 225-37-4, 6° of the Commercial Code states that the corporate governance report must describe the diversity policy applied to members of the board of directors with regard to criteria such as age, gender or qualifications and professional experience, and provide a description of the objectives of this policy, the procedures for implementing it and the results obtained during the past financial year. This article applies to public limited companies with a supervisory board (by referral from Article L. 225-68, paragraph 6) and to limited partnerships with share capital (by referral from Article L. 226-10-1, paragraph 1). The companies affected are those that exceed two of the following three thresholds: a balance sheet total of €20 million, net turnover of €40 million and an average of 250 permanent employees.

It should also be noted that 24 of the 40 companies in the sample have retained double voting rights for shareholders, thereby fostering a long-term commitment by shareholders who have held (registered) shares in the company for at least two years. Only one company has set the length of time shares are held at more than two years.

1.1.1. How representative are the principal shareholders[76] on the board?

- As the principal shareholders are represented on the board very heterogeneously, in terms of the distribution of capital, their positioning and burden of history in particular, it is not possible, within the sample, to establish a correlation between the percentage of capital or voting rights held by a shareholder and his/her representation on the board. This lack of direct correlation between the percentage of capital held and participation on the board is evidence that a balanced and diverse membership of the board has been sought. By contrast, shareholders who have a controlling interest in the company are always represented on the board.

- The direct influence of the principal shareholders is limited because, in the sample studied, the average percentage of independent directors is 49% in controlled companies and 68% in non-controlled companies.

This percentage is much higher than that provided for in Article 8.3 of the AFEP MEDEF code. The code stipulates that it should account for half the members of the board of directors in widely held corporations without controlling shareholders. In controlled companies,[77] independent directors should account for at least a third of board members.

- There has also been some reduction in the number of directors on the board. While the board of directors must have enough members to include a diversity of experience, skills and achieve a gender balance, the number of directors must remain at a reasonable level to ensure the effectiveness of the board and avoid dilution of responsibilities. According to some companies, this reduction helps to facilitate discussion and improve the involvement of directors.

  In the sampled companies, the average board size is 13.9 people for CAC 40 companies and 11 people for SBF 120 companies. Of the seven companies with boards of more than 15 members, two have reduced their size this year. For example, one CAC 40 company states in its registration document that reducing the size of its board from 19 to 14 members is an expectation regularly expressed by shareholders: *"the effects of the resizing will then be assessed in order to ensure that the main diversity balances are maintained"*. Two companies in the sample also reduced the size of the board after the principal shareholder sold his/her shares.

  This reduction in the number of directors has had the effect of increasing the percentage of independent directors. However, this reduction may also result in accretion for the principal shareholder(s).

[76] Principal shareholders are defined for the purposes of this paragraph as any significant shareholder, including those who have no controlling interest in the company.

[77] For the purposes of this study, companies were considered as controlled where a shareholder acting alone or in concert holds 30% or more of the voting rights. In the sample, 14 companies are considered as controlled.

- If the direct influence of the principal shareholders decreases due to the high number of independent directors on the board and the appointments committee, a certain indirect influence remains when they participate in the appointment of independent directors.

  The shareholder vote on the appointment of a director is requested at the general meeting.

  In such a case, Article 13.4 of the AFEP-MEDEF code requires that the brochure or notice of meeting sent to shareholders include, *"in addition to the legal requirements, a biographical note describing the main features of [the director's] curriculum vitae, his/her skills, other directorships and activities, and the reasons why he/she is being proposed to the general meeting"*. The AMF observes that this information is provided and that this provision of the code is being complied with (see section 3 of this study, §3).

  However, little information is provided on the selection and appointment process of this director by the appointments committee, which, pursuant to Article 16.1.2 of the AFEP-MEDEF code: *"organises a procedure for selecting future independent directors and carries out its own research on potential candidates before making any contact with them"*.

  Given that the appointment of directors is still relatively contested (see section 3), the AMF wonders whether providing additional information on the process for selecting, proposing and appointing directors, whether independent or not, would not reassure shareholders about the choice of director and ultimately improve voting results.

  For example, and particularly in a context in which the director has ties to a principal shareholder, companies could be asked to specify whether there were several candidates and to detail how the new director's skills are consistent with those identified as necessary by the board's latest assessments.

  In a context where the selection process for directors is not always clearly described in the information provided by issuers in the sample, the AMF urges the High Committee on Corporate Governance (HCGE) to carry out a study on the effective application by companies of Article 16.1.2 of the AFEP-MEDEF code and to verify to what extent this helps to identify competent directors with a diverse profile.

  The AMF also notes that such a selection process is provided for in other European corporate governance codes.

European Comparison

By way of comparison, the UK Corporate Governance Code[78] is more specific regarding the director recruitment process. Companies' annual reports must include the process followed by the appointments committee to recruit directors. In its 2019 recommendations on board effectiveness, the Financial Reporting Council (FRC) states that, to increase the diversity of candidates, the appointments committee may make the search for candidates public or even work with recruitment firms.[79]

[78] UK Corporate Governance Code 2018, page 8: *"18. All directors should be subject to annual re-election. The board should set out in the papers accompanying the resolutions to elect each director the specific reasons why their contribution is, and continues to be, important to the company's long-term sustainable success. […] 20. Open advertising and/or an external search consultancy should generally be used for the appointment of the chair and non-executive directors. If an external search consultancy is engaged, it should be identified in the annual report alongside a statement about any other connection it has with the company or individual directors".*

[79] FRC Guidance on Board Effectiveness: §92 et s., July 2018.

Avenue of discussion

The AMF urges the Association of French Private-sector Companies (AFEP) and the Movement of French Businesses (MEDEF) to consider what information it would be useful to make public regarding the process for selecting directors.

- With regard to the procedures for representation, the AMF notes that, in the sample, shareholders set up as legal entities are rarely appointed as directors. They are more often indirectly "represented" by a natural person who sits in his/her own name (and who is therefore not legally the permanent representative of the shareholder-legal entity). In the 40 companies in the sample, and of the 517 directors, 37 permanent representatives were identified based on the companies' registration documents.

  Directors are reminded that they must respect the confidentiality of the information provided to them and that they are subject to a legal obligation of discretion. Article L. 225-37, paragraph 4 of the Commercial Code thus states that directors are *"bound by discretion"* with regard to information of a confidential nature and given as such by the chairman of the board of directors. The same obligation applies, according to this code, to any person called upon to attend board meetings (for example, works council delegates). The AFEP-MEDEF code stipulates that *"regarding non-public information acquired in the course of his or her office, any director is bound by a genuine obligation of confidentiality that goes beyond the mere obligation of discretion provided for by law"*. In addition, the director may not unlawfully disclose inside information within the meaning of the regulations on market abuse.

  The question as to the extent of the obligation of "discretion" of a legal entity director does not provide a consensus on the interpretation of the legal doctrine. In addition, there is no authoritative case law on this issue. Two recently published articles testify to the uncertainties surrounding this issue and the questions raised in the literature on this subject.[80]

Avenue of discussion

Consideration could be given to specifying the extent of the obligation of discretion to which the permanent representative of a legal entity director is bound in the performance of his or her duties. As the legal framework for permanent representatives is both a matter of company and stock market law because of the possible disclosure of inside information, the AMF proposes to refer the matter to the Legal High Committee for Financial Markets of Paris (HCJP) in order to begin discussions on this subject.

[80] In the first ("The Director's Duty of Discretion", Bulletin Joly Sociétés, April 2019), Bertrand Fages writes: *"It is therefore inconceivable, under penalty of breach of market standards, that a director should take advantage of his or her position on the board to acquire and then exploit for his or her benefit, or the benefit of a company of which he or she is a corporate officer or shareholder, information of a strategic nature, whether inside information or not, of which he or she would not otherwise have had knowledge. As the AFEP-MEDEF code states, this duty is inherent in the 'ethics' and 'professional conduct' of 'any' director. And 'of course', according to this code, it is as much the duty of the director in his own name as that of the permanent representative of a legal person director – both of whom are subject by law to the same obligations. In other words, it is not because he or she represents a legal entity that has been appointed director – and in particular a shareholder – that the natural person taking part in the deliberations of the board is in principle exempted from his or her duty of discretion. He or she may be able to share with the legal entity he or she represents, in order to obtain its instructions, certain information provided to the directors prior to and in preparation for the board meeting. But he or she is subject to the same discretion as all others when the chairperson, in a meeting, designates a particular piece of information as strictly reserved for members of the board."* In a second article (Confidentiality Obligations of Directors of Listed Companies, Décideurs Juridiques, September 2019), Armand Grumberg and François Barrière write: *"No justification for deviating from this confidentiality exists when a natural person has been elected as a director, even if that position is held by a principal shareholder that is a legal entity. In other words, the natural person director may not share the information obtained with "his or her" shareholder that is a legal entity. This is perfectly logical: the purpose of the discretion rule is to protect the company to which a person is attached from disclosures of information about it. There are therefore no exceptions. Would it be different for a natural person representing a legal entity appointed as a director? Can that person pass the information received to the legal entity? The answer is not clear. Does the obligation of discretion apply to this representative in an absolute manner? Should the legal entity still be able to receive a report from its representative, a natural person who is an agent of the legal entity that is a member of the board of directors? This problem applies both to shareholders who are commercial companies and to the State (as such, the "Governance Rules Governing the Relations between the State Participation Agency and Companies with State Participation" would benefit from a confidentiality commitment regarding the information collected)".*

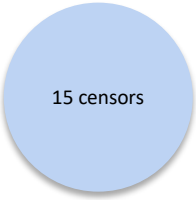
1.1.2. Measures taken by companies to facilitate dialogue within the board

The AMF notes that 17 of the 40 companies in the sample have appointed a lead director (11 CAC 40 companies and six SBF 120 companies). One of the roles of this director is to contribute to the smooth running of the board and in particular to facilitate dialogue within the board between the directors, or even with the directors representing shareholders within the board. For example, one company states that *"the lead director may be approached by other directors for individual meetings as often as they deem necessary, and directors are regularly asked about their level of dialogue with the lead director. In order to further strengthen dialogue with the principal shareholders, they have the opportunity, on request, to meet with the lead director".*

As a secondary point, it should be noted that all directors are very involved in the work of the board. The AMF notes that, within the sample, the average attendance rate at board meetings is 94% and the average attendance rate at committee meetings is 95%.

1.1.3. Appointment of censors

By reviewing the membership of the boards, the AMF notes that 11 companies in the sample have one or more censors and that the boards in the sample had a total of 15 censors as at 31 December 2018:



The reasons given by companies to explain the appointment of a censor vary:

- One company appointed two censors with family ties to the majority shareholder, stating that: *"accordingly, subject to a vote in favour at the General Meeting of 26 April 2019 for this appointment, 44% of the members of the Supervisory Board will be independent (censors are not included in the calculation of this percentage) at the end of this Meeting"*;
- Some companies mention the additional knowledge and relevant skills that advisors bring to the board. For example, one company states that: *"Censors are appointed by the Board of Directors and their main task is to take part, as necessary, in board meetings in order to provide the necessary information, expertise and knowledge regarding the Group's various businesses"*;
- One company argues that is has a need for censors on the board to better represent the geographical coverage of the French market available to it: *"Their participation reflects both the desire to strengthen the geographical representation of the Regional Banks on the Board [...]"*;
- Finally, three companies in the sample, two of which are CAC 40 companies, seem to use the position of censor as a springboard or preliminary step to the position of director, even if this is explained in different ways: *"[...] it provides a source of potential directors from the perspective of succession planning for directors in office"*.

The AMF notes that this practice is increasing in the context of the above-mentioned reduction in the number of directors. It also makes it easier for certain companies to ensure that certain individuals (who are not counted as directors) are present on the board, while complying more easily with the criteria of the AFEP-MEDEF code on the percentage of independent

members and the requirements of the Copé-Zimmerman Law on gender balance on the board. For example, one company mentions that a director who no longer met the criteria for independent director status resigned from his position in order to be appointed as a censor: *"In January 2017, one of the Committee's independent members resigned from his position as a director and the rejoined the Committee after he was appointed as a censor by the General Meeting held on 13 June 2017"*. Some might consider that the recent increase in the number of censors could, in some cases, be due to a desire, in the composition of boards of directors in the broad sense, to free themselves from, not to mention circumvent, certain mandatory legal provisions. Whatever the intention of the issuers concerned, it should at least be noted that the recent increase in the number of censors on boards of directors does, in practice, have this effect, i.e. the effect of increasing the number of board of director participants not subject to the constraints of certain legal provisions relating to directors while at the same time introducing the disadvantages inherent in an excessively large board of directors (risk of ineffectiveness and dilution of responsibilities).

Not all investors have the same approach to censors. Some investors or proxy advisors only accept them in specific transitional situations as described in the voting policies of three of them.[81]

The increase in this practice raises questions, for different reasons:

- These censors who attend the board meeting are not necessarily bound by the same rules of confidentiality and discretion as directors. Although their voice is only advisory, it may be useful to apply the abstention rules to them in the event of a conflict of interest.

  Among the companies in the sample that have a censor as at 31 December 2018, only two provide details on the framework for the role of censors in their registration document.

  In an approach that could be described as prudent, one company, more than others in the same situation, insists on the obligations and constraints to which its censors are subject. The same company excludes censors from being members of the audit committee. Furthermore, it treats censors as directors and points out that they are regulated under Regulation (EU) 596/2014 relating to market abuse: *"They receive the same information as the other members of the board of directors. They may be appointed members of committees, with the exception of the Audit and Risks Committee. They must at all times act in the company's corporate interest. They are bound by the same general obligation of confidentiality as directors and by the limitations on their trading in the company's shares".*

- Some companies seem to appoint censors so that principal shareholders can be assured of a presence on the board without obtaining the approval of the general meeting. For example, one SBF 120 company points to an agreement with one of its principal shareholders as justification for the presence of a censor on the board. This shareholder is represented on the board by a director and a censor: *"The censor was appointed to the board of directors in accordance with the agreement between the Company and Caisse de Dépôt et Placement du Québec described in paragraph 6.1.2.1 of the Registration Document. This appointment is intended to reconcile the need to provide access to information for Caisse de Dépôt et Placement du Québec, the Company's largest shareholder, while maintaining a balanced representation of directors on the board, a significant number of whom are independent directors".*

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[81] 1**. ISS, Continental Europe – Proxy Voting Guidelines**: *"Election of Censors (France) – For widely held companies, ISS will generally recommend a vote against proposals seeking shareholder approval to elect a censor, to amend bylaws to authorize the appointment of censors, or to extend the maximum number of censors to the board. However, ISS will recommend a vote on a case-by-case basis when the company provides assurance that the censor would serve on a short-term basis (maximum one year) with the intent to retain the nominee before his/her election as director. In this case, consideration shall also be given to the nominee's situation (notably overboarding or other factors of concern).*
In consideration of the principle that censors should be appointed on a short-term basis, vote against any proposal to renew the term of a censor or to extend the statutory term of censors."
2. **BlackRock, Proxy voting guidelines for European, Middle Eastern, and African securities, January 2019**: *"Censors: BlackRock recognises that there are circumstances under which companies might want to appoint censors and that censors are appointed for transitional/interim periods. However, we may vote against censor appointment if the appointment is not twined with sufficient levels of disclosure that would allow BlackRock to assess the reasons for the appointment, terms of the appointment, and any links that the censor might have with the company."*
3. **AFG, Recommendations on Corporate Governance, January 2019, Title II – The Board of Directors or Supervisory Board, D. Organising and Empowering the Board, 4. Board Meetings**: *"The presence of censors on the board must be exceptional and must be clearly justified to shareholders before the general meeting."*

More generally, the AMF notes that, of the 11 companies with censors, seven have chosen to appoint them to the board of directors and four have chosen to have their appointment approved by the general meeting. This appointment of a censor is put to the vote at the general meeting to determine the opinion of the company's shareholders on this approach[82] and to confer a certain legitimacy on such an appointment. A censor whose appointment was proposed to the 2019 general meeting obtained an approval rate of only 66.1%.

- Equating censors with directors can sometimes go further. For example, one company reports that it is carrying out a review of the profile of its censors to determine whether or not they can be qualified as independent members: *"On 13 February 2019 and 19 March 2019, the Board of Directors also reviewed the situation of the two censors with regard to the same independence criteria"*. It points out that it is committed to maintaining a balance in terms of independence, diversity and gender among its members: *"The Board of Directors aims to strengthen the diversity and complementarity of skills, to maintain a diversity of ages, nationalities, international experience and a balanced representation of men and women"*.

  One company questioned the advisability of appointing a censor to the board and abandoned the idea, arguing that this function overlaps with the tasks already assigned to the directors.

- The AMF also notes that several companies in the sample compensate their censors. In this regard, the AMF points out and reiterates the developments presented by the Commission des Opérations de Bourse (the French stock market operations commission) back in 1978, which state that the compensation of censors, who do not represent the legal bodies, can only be paid directly by the company if that compensation relates to actual services provided to the company and for which proof can be provided.[83]

Recommendation

The AMF has already issued a recommendation to companies that have appointed one or more censors, asking them to describe precisely how they are appointed, their duties and prerogatives, in developments relating to the activity and assessment of the board, for example.[84] The AMF also recommends that companies that use one or more censors or are planning on using them should consider whether this practice is appropriate and, if they do, companies should ensure that:
- these censors are familiar with the regulations on market abuse, and more specifically with the rules on the non-disclosure of inside information;
- measures to manage conflicts of interest are put in place to prevent censors from attending debates when they are in a conflict of interest situation, including a potential conflict of interest situation.

Avenue of discussion

The AMF notes that there is ambiguity about the role and status of censors. It renews it appeal to the AFEP and MEDEF (i) to consider where it would be appropriate to extend to censors some of the rules to which directors are subject or analyse under what conditions they could classified as external censors whose opinion would be sought on a case-by-case basis and under what conditions they could then intervene, and (ii) to reflect upon the role of censors.

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[82] There is, however, one proxy advisory firm (Proxinvest) that opposes the appointment of censors through general meetings. It is not, however, opposed to the appointment of a censor if he or she is appointed by the board and can be dismissed at the request of a director without having to wait until the next general meeting. Proxinvest Corporate Governance Principles and Voting Policies 2019: *"2.3. Election or re-election of a censor: Against the proposal (Proxinvest is not, however, opposed to the appointment by the board of a censor who could be dismissed at the request of a single member of the board and who would not benefit from the term of office protection afforded by the appointment process through the general meeting)".*

[83] Monthly bulletin of the Commission des Opérations de Bourse, March 1978, no. 102, p. 14.

[84] AMF Recommendation, DOC-2012-02, Corporate governance and executive compensation in companies referring to the AFEP-MEDEF code – Consolidated presentation of the recommendations contained in the AMF annual reports, updated on 30 November 2018.

1.2. Preventing conflicts of interest

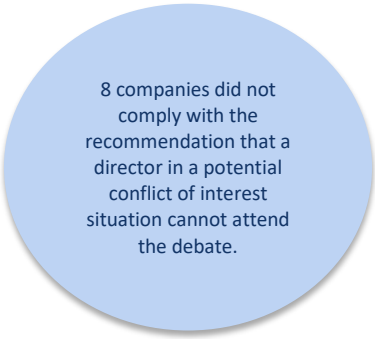
A number of rules govern discussions within the board, with the aim of maintaining the quality of internal dialogue while avoiding its being hijacked to benefit individual interests.

The more likely a director is to find him or herself in a conflict of interest situation (a participating interest in the company, business relationships or the risk of competition with the company, a close working relationship with management, etc.), the more important it is for companies to put in place a series of measures to manage conflicts of interest, including potential ones. For example, for a controlled company, Article 2.4 of the AFEP-MEDEF code specifies that *"when a company is controlled by a majority shareholder (or a group of shareholders acting in concert), the majority shareholder assumes a specific responsibility with regard to the other shareholders, which is direct and separate from that of the Board of Directors. They take particular care to prevent conflicts of interest and to take account of all interests"*. The issue of conflicts of interest is divided into several areas, which are presented below.

☐ Managing conflicts of interest through the board's internal rules

Article 19 of the AFEP-MEDEF code, relating to the professional conduct of directors and updated in June 2018, specifies that, in real or potential conflict of interest situations, the directors concerned must abstain from taking part in voting but must now also (which is new) abstain from attending the debate preceding the vote: *"the director is obliged to inform the board of any real or potential conflict of interest and to abstain from taking part in the debate and voting on the corresponding deliberations"*. By abstaining from the debate and vote, the person in a conflict of interest situation (potential or real) ensures that the decisions of the board of directors are not taken by directors who have interests distinct from those of the company that could influence them in their decision making. The mere presence of the interested party during the deliberations is likely to influence the debates and the decision taken by the board. For this reason, a director in a real or potential conflict of interest situation must abstain from taking part not only in voting but also in the deliberations preceding the voting.

The AMF notes that eight companies in the sample had not brought their internal rules into line with the revised code by 30 June 2019.



In four companies, their internal rules did not prohibit a director in a potential conflict of interest situation from taking part in the debates (**ALTRAN,**[85] **SPIE, PERNOD RICARD** and **MAISON DU MONDE**). However, following the AMF's observations, **MAISON DU MONDE** and **PERNOD RICARD** amended their boards' internal rules in July 2019 and August 2019 respectively. **ALTRAN** and **SPIE** have undertaken to do so before the end of 2019.

[85] It should be noted that, in the context of a public offer, directors in potential conflict of interest situations did not attend the debates or take part in voting when the board made its decision on the benefits of the offer for shareholders.

In four other companies, their internal rules do not prohibit a director in a conflict of interest situation from attending the debates (**DANONE, MERCIALYS, SOPRA STERIA** and **TF1**). This attendance during the deliberations is also likely to have an influence on the resulting vote. Following the AMF's observations, **DANONE** amended its internal rules of procedure. **MERCIALYS, SOPRA STERIA** and **TF1** did not provide satisfactory explanations on this subject.

Some explanations provided by companies to justify non-compliance with this recommendation do not seem acceptable. For example, justifications based on a duty of loyalty or a requirement for directors to be properly informed are not likely to entitle a director in a real or potential conflict of interest situation to attend the deliberations in question. The limited influence of the director concerned or the fact that the information to which he or she would have access would not directly benefit him or her are also not admissible. These explanations are in no way related to the objective of preventing and managing conflicts of interest.

☐ Managing conflicts of interest through the presence of a lead director

The company may also prescribe, in its board's internal rules, the appointment of a lead director from among the independent directors. One of his or her duties may be to prevent and manage conflicts of interest so that they can be reviewed by the board.

While the conflict of interest declaration must first be made by the director him/herself, 17 companies have appointed a lead director responsible for helping to identify and analyse possible conflict of interest situations within the board.

Article 3.2 of the AFEP-MEDEF code specifies that: *"Companies with a Board of Directors have the choice between separating or combining the offices of Chairman and Chief Executive Officer. The law does not favour any particular approach and gives the Board of Directors the power to choose between the two methods for general management. It is up to the Board to decide and explain its decision. The Board may appoint a Lead Director from among the independent directors, particularly when it has been decided to combine such offices. In the event of the separation of the offices of Chairman and Chief Executive Officer, any tasks entrusted to the Chairman of the Board in addition to those conferred upon him or her by law are described"*. The AMF notes that two companies in the sample that have decided to combine the two offices have not appointed a lead director. In the first company, the entire board is responsible for managing conflicts of interest; in the second, the Chairman and CEO is responsible.

☐ Managing conflicts of interest through the regulated agreement regime

To prevent and avoid conflict of interest situations, agreements entered into with directors, senior managers or a shareholder holding more than 10% of the voting rights are subject to the related-party agreements procedure, unless they are ordinary agreements entered into under normal conditions: *"Any agreement entered into directly or through an intermediary between the company and its Chief Executive Officer, one of its Deputy Chief Executive Officers, one of its directors, one of its shareholders with more than 10% of the voting rights or, in the case of a shareholder company, the company controlling it within the meaning of Article L. 233-3, must be subject to prior authorisation by the Board of Directors. The same shall apply to agreements in which one of the persons referred to in the preceding paragraph is indirectly involved [...]"*.[86]

In this respect, the prior authorisation of the board of directors must be substantiated by justifying the relevance of the agreement for the company, in particular by specifying the financial conditions attached to it.

The AMF notes that **VIVENDI** states that the business relationships *"between the Havas Group, of which Mr Yannick Bolloré is Chairman and Chief Executive Officer, the Bolloré Group, of which Mr Vincent Bolloré is Chairman and Chief Executive Officer, and certain Vivendi subsidiaries [...] are part of the ongoing commercial relations entered into under normal market conditions and are unlikely to generate any real or potential conflicts of interest between Vivendi and Messrs Yannick and*

[86] Article L. 225-38 of the Commercial Code (Article L. 225-86 for public limited companies with a supervisory board and Article L. 226-10 for limited partnerships with share capital).

Vincent Bolloré". The assertion that there is no conflict of interest should be supplemented by the publication of the objective evidence used by the company to qualify these commercial relations as ongoing and entered into under normal conditions. Furthermore, the AMF would like to point out that even business relationships entered into under normal conditions are likely to generate conflicts of interest, particularly if those relationships are significant for one or other of the parties, and that it is therefore necessary for companies to explain the reasons for stating that there is no conflict of interest.

In one company in the sample, the general meeting did not approve, in 2018, the service agreement between the company and one of its directors. Having been entered into under the condition precedent of its approval by the general meeting, which was not obtained, the agreement was declared null and void by the board, and the director had to return the sums unduly received.

Lastly, the AMF reminds issuers that it recommends that they submit a specific resolution for shareholder approval to decide on the entering into of an agreement where, because of its value or other characteristics, it is significant for the issuer concerned (see section 3 of this study).

☐ Managing conflicts of interest using the measure of independence

In accordance with the Commercial Code, one of the board's functions is to *"determine the company's business strategy and ensure their implementation, in accordance with the [company's] corporate interest"*.[87] In a board meeting, the directors must act collectively in the company's corporate interest and not in their self-interest. The *"board [must be able to] carry out such controls and audits as it deems appropriate"*.[88]

For the board to be able to carry out its audit role, it is therefore essential that it is free of conflicts of interest and independent of management, shareholders and other stakeholders.

Article 8.2 of the AFEP-MEDEF code states that *"a director is independent when he or she has no relationship of any kind whatsoever with the company, its group or its management that could compromise the freedom of his or her judgement [...]"*.

This freedom of judgement can be difficult to assess in practice. For example, it is difficult to know whether or not the recurring absence of opposition or criticism on the part of a director to management decisions reflects a freedom of judgement.

To facilitate this assessment of the director's independence, Article 8.3 of the code states that *"directors representing significant shareholders of the company or its parent company may be considered independent provided that these shareholders do not participate in the control of the company. However, when above a threshold of 10% of the capital or voting rights, the board, upon a report from the appointments committee, should systematically review the qualification of a director as independent, taking into account the share ownership structure of the company and the existence of a potential conflict of interest".*

Accordingly, a director representing a shareholder with a controlling interest cannot be qualified as independent. By contrast, a director representing a shareholder holding less than 10% of the capital and voting rights is presumed to be independent. However, the issue of whether or not a director representing a non-controlling shareholder who exceeds 10% in capital or voting rights is independent is not governed by the provisions of the AFEP-MEDEF code.

Companies must therefore disclose how they assessed the independence of directors. In this respect, one company in the sample states that, after analysis, it considered as independent the directors representing a group that had passively exceeded a 10% holding in the company's voting rights. The AMF considers as insufficient the explanation referring to the absence of a controlling interest and of links with other shareholders and to the fact that a board member is not a chairman

[87] Article L. 225-35 paragraph 1 of the Commercial Code.
[88] Article L. 225-35 paragraph 3 of the Commercial Code.

of any committee and does not sit on the appointments committee. The AFEP-MEDEF code does refer to an assessment of the share ownership structure and the existence of a potential conflict of interest.

The AMF also considers as unacceptable the argument that a shareholder on the board is independent because other shareholders not represented on the board hold a similar percentage of capital or voting rights to that shareholder.

The AMF notes that companies may encounter difficulties in assessing the independence of directors representing shareholders holding more than 10% of the capital or voting rights. It is worth noting in this respect that a different approach is taken in other countries, where a shareholder with more than 10% of the voting rights could not be considered an independent director.

European Comparison

By way of comparison, the governance codes of the Netherlands and Germany are stricter than the AFEP-MEDEF code with regard to the independence criterion. To be qualified as independent, a director cannot represent a shareholder holding more than 10% of the capital in the Netherlands[89] or a shareholder holding more than 10% of the voting rights in Germany.[90]

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[89] The Dutch Corporate Governance Code of 1 January 2018, established by the Corporate Governance Code Monitoring Committee in the Netherlands specifies that: *"The composition of the supervisory board is such that the members are able to operate independently and critically vis-à-vis one another, the management board, and any particular interests involved.*
In order to safeguard its independence, the supervisory board is composed in accordance with the following criteria:
i. any one of the criteria referred to in best practice provision 2.1.8, sections i. to v. inclusive should be applicable to at most one supervisory board member;
ii. the total number of supervisory board members to whom the criteria referred to in best practice provision 2.1.8 are applicable should account for less than half of the total number of supervisory board members; and
iii. for each shareholder, or group of affiliated shareholders, who directly or indirectly hold more than ten percent of the shares in the company, there is at most one supervisory board member who can be considered to be affiliated with or representing them as stipulated in best practice provision 2.1.8, sections vi. and vii.
2.1.8 Independence of supervisory board members
A supervisory board member is not independent if they or their spouse, registered partner or life companion,
foster child or relative by blood or marriage up to the second degree: […] vi. has a shareholding in the company of at least ten percent, taking into account the shareholding of natural persons or legal entities cooperating with him or her on the basis of an express or tacit, verbal or written agreement;
vii. is a member of the management board or supervisory board – or is a representative in some other way – of a legal entity which holds at least ten percent of the shares in the company, unless the entity is a group company" (pages 20-21).

[90] Germany publishes through the Government Commission on the German Corporate Governance Code a corporate governance code, which was updated in May 2019. This commission was established by the German Federal Ministry of Justice in 2001. It is composed of directors and managers of German listed companies and their stakeholders (professional investors and small retail investors, academics, auditors and representatives of trade unions). This code specifies that: *"C.6 The Supervisory Board shall include what it considers to be an appropriate number of independent members from the group of shareholder representatives, thereby taking into account the shareholder structure.*
Within the meaning of this recommendation, a Supervisory Board member is considered independent if he/she is independent from the company and its Management Board, and independent from any controlling shareholder. C.7 More than half of the shareholder representatives shall be independent from the company and the Management Board. […].
C.9 If the company has a controlling shareholder, and the Supervisory Board comprises more than six members, at least two shareholder representatives shall be independent from the controlling shareholder. If the Supervisory Board comprises six members or less, at least one shareholder representative shall be independent from the controlling shareholder. A Supervisory Board member is considered independent from the controlling shareholder if he/she, or a close family member, is neither a controlling shareholder nor a member of the executive governing body of the control-ling shareholder, and does not have a personal or business relationship with the controlling shareholder that may cause a substantial – and not merely temporary – conflict of interest.
III. Elections to the Supervisory Board
Recommendations:
C.13
In its election proposals to the General Meeting, the Supervisory Board shall disclose the personal and business relationships of every candidate with the company, the governing bodies of the company, and any shareholders with a material interest in the company. The disclosure recommendation is limited to information and circumstances that, in the opinion of the Supervisory Board, an objectively judging shareholder would consider decisive for their election decision. A material interest in the meaning of this recommendation refers to shareholders who directly or indirectly hold more than 10% of the voting shares of the company."

Avenue of discussion

The AMF notes that the assessment of the independence of directors holding more than 10% of the capital or voting rights on a case-by-case basis remains challenging.

The AMF considers it advisable for the AFEP and MEDEF to amend the wording of the AFEP-MEDEF code on this point by removing the ability for shareholders to qualify as independent directors if they hold more than 10% of the share capital or voting rights or, at a minimum, for the AFEP, MEDEF or HCGE to clarify the criteria for assessing the independence of a shareholder who holds more than 10% of the company's capital or voting rights.

Lastly, returning to the subject of representatives of shareholders that are legal entities mentioned above, it is important to note that companies must assess not only the independence of the shareholder but also the independence of the permanent representative representing that shareholder. The AMF observed the case of a company in which a legal entity shareholder sitting on the board and holding 9.71% of the capital and voting rights, who could have been qualified as independent, was represented by a permanent representative who had been the company's deputy chief executive officer over the past five years. As this natural person does not meet the criteria of the AFEP-MEDEF code to be considered independent of the company, the legal entity director was therefore rightly considered as not independent by the company.

2. ONGOING DIALOGUE

This second section examines how the company organises the ongoing dialogue with its shareholders (subsection 2.1) and the information provided on the outcome of this dialogue (subsection 2.2). The AMF notes, based on the information provided in the registration documents and press releases of the companies in the sample, that dialogue with shareholders and stakeholders is now at the core of companies' communications.

2.1. The person responsible for the dialogue

The dialogue between investors, listed companies and proxy advisors ("proxies") has evolved significantly in recent years. Up to now, it has been initiated by the company's management team, the investor relations department or even the company secretary.

- **The prominent role of executive management and teams in relations with major investors is always highlighted.** In their registration documents, companies present the briefings and road shows they organise either at the time their results are announced or at theme-based meetings during which management presents the group's strategy. Companies also present the activities of their "investor relations" and "shareholder relations" departments. Similarly, and more generally, they present the dialogue with stakeholders, which is at the core of their approach to corporate social responsibility.

  The AFEP-MEDEF code was amended in June 2018 in order to respond to requests from shareholders for direct dialogue with members of the board of directors, particularly on corporate governance issues, and at the same time to support the growth in this practice. The code now specifies that such dialogue may be assigned to the chairman of the board or, where applicable, to the lead director. In such cases, they must report to the board, as a group, on their work (*"Shareholder relations with the board of directors, particularly on corporate governance matters, may be assigned to the chairman of the board of directors or, where applicable, to the lead director. They report to the board of directors on these duties"*).[91]

[91] Article 4.4 of the AFEP MEDEF code.

- **The establishment of a direct relationship between a board member and shareholders is a rapidly developing practice. In the sample, 26 companies have identified a point of contact between shareholders and the board (14 CAC 40 companies and 12 SBF 120 companies).**

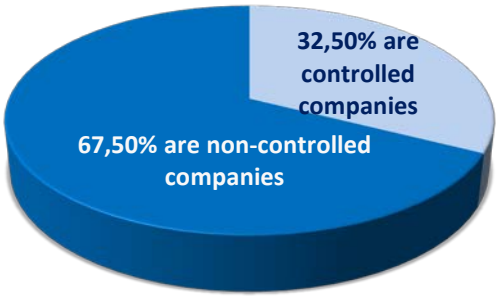
Among these companies, three of them have established this dialogue very recently, at the beginning of 2019. They justify it based on demand from investors. For example, one company states in its registration document that: *"Since 19 February 2019, our internal rules have been amended to allow the Vice-Chairman/Vice-Chairmen or, where applicable, the Lead Director to respond to requests from shareholders for direct dialogue with board members"*. In a situation where an activist fund has increased its holding in a company, the company has strengthened its governance by creating the position of lead director, who is responsible for shareholder dialogue.

However, it appears from the registration documents of the companies in the sample that 14 companies (including 6 CAC 40 companies and 8 SBF 120 companies) continue to assign these duties exclusively to their Chairman or Chief Executive Officer, assisted by their operational teams.

Some companies justify this choice. For example, one CAC 40 company states that *"the directors consider that the current procedure (meetings led by the department responsible for financial disclosure and shareholder relations) is satisfactory. They are satisfied that a detailed report of their expectations is made in committees and to the board by the board secretary, who participates in these meetings"*.

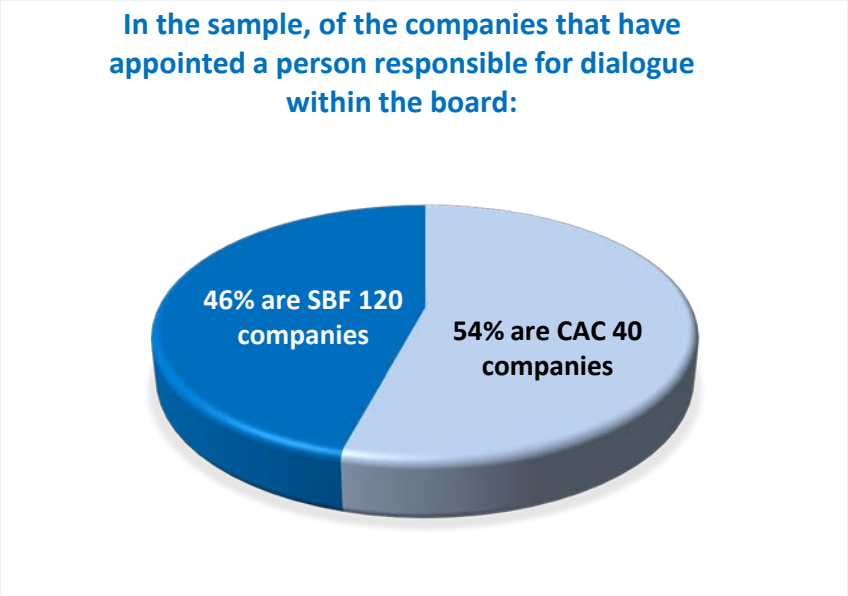
In the sample, it is mostly those companies in which no shareholder holds more than 30% of the capital that have appointed a person to be responsible for dialogue within the board:[92]

Which companies in the sample have appointed a person responsible for dialogue within the board?



[92] For the purposes of this study, companies were considered as controlled where a shareholder acting alone or in concert holds 30% or more of the voting rights. In the sample, 14 companies are considered as controlled.

Among the companies that have appointed a person to be responsible for dialogue within the board, the impact of the size of the company seems to have little influence, even though there are slightly more CAC 40 companies than SBF 120 companies:



- **The AMF notes that, in the 26 companies that have appointed a director responsible for dialogue, this task is often assigned to the lead director, where such a director has been appointed.**

  Of these, 15 (ten CAC 40 companies and five SBF 120 companies) have assigned this role to the lead director.[93] In the other 11 cases, this role is undertaken by the chairman of the board of directors or supervisory board. Lastly, the AMF notes that in four companies, the chairman of the board of directors remains a point of contact for shareholders, even when a lead director has been appointed.

  While the lead director was first appointed in companies in which the functions of chairman and chief executive officer are combined, the company's organisational structure seems to have little impact on the choice made by companies. Of the 14 companies that have not implemented this dialogue with the board, seven of them (including two from the CAC 40) have combined these offices and seven have separated them.

2.2. Content of the dialogue

Some CAC 40 companies specify that discussions with the lead director only concern governance matters.[94]

It is up to the companies to determine, based on shareholders' expectations, who is best able to raise the issues with the various investors. Nevertheless, and provided that no inside information is disclosed, it is still important to engage in discussions with shareholders on all matters of interest to them, such as strategy and performance, and not just on governance matters.

Understanding investors' concerns allows companies to anticipate the demands of shareholders or activists and have answers ready for them.

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[93] In two companies in the sample, the lead director is not responsible for dialogue.

[94] The HCGE notes, moreover, in its 2018 report that *"while the principle of direct communication is clearly stated, which is undoubtedly a significant step, the High Committee believes that the wording of the code remains slightly behind the British code, which encourages the chairman to discuss with key shareholders not only governance but also strategy and performance"*.

The AMF also points out that it recommends that companies *"wherever possible, meet shareholders who so wish after the general meeting to discuss any disagreements on important points discussed at that meeting in order to learn lessons from them, if necessary, in preparation for the next meeting"*.[95]

2.3. Reporting to the board

Article 3.3 of the AFEP-MEDEF code specifies that this director *"shall report to the board of directors on these duties"*. The objective is to inform the board of the expectations and positions of the main investors and proxy advisors expressed during meetings with the company. This allows the board, firstly, to confirm the company's governance choices and, secondly, when the time comes, to decide, in full knowledge of the facts, on the agenda and draft resolutions put to the vote of the general meeting and approve the answers to written questions.

In its October 2017 report, prior to the amendment of the AFEP-MEDEF code, the HCGE recommended that certain precautions be taken when there are a large number of people responsible: *"it is advisable not to spread responsibilities by having multiple points of contact; the person chosen should preferably have experience in institutional communications and receive appropriate training if necessary; the duties should in the first place be to clarify the positions taken by the board in its areas of competence (in particular with regard to strategy, governance and executive compensation), which have previously been outlined in other communications; it involves close coordination with the chairman of the board unless these duties have been assigned to him/her; it involves close coordination with the chief executive officer or his/her employees responsible for shareholder relations, and meetings or telephone conversations must be conducted in their presence unless expressly agreed otherwise by those involved; the director must report to the board on the performance of his/her duties"*.[96]

The version of the AFEP-MEDEF code that was amended in June 2018, in its aforementioned Article 3.2, specifies that these duties are assigned to only one director.

Given the large number of people noted who are responsible for dialogue, the AMF has identified a number of good practices that ultimately enable reporting to the board. The AMF notes, for example, that one company states that procedures have been established to enable the board to be informed of interactions between the Chairman and CEO and major shareholders. Some other companies specify that the director and management attend joint governance meetings. Others indicate that the duties of this lead director are necessarily carried out in consultation with the chairman of the board, or with his or her agreement. In all cases, it seems important that the board be collectively informed of the pace, methods and content of shareholder dialogue.

2.4. Results of ongoing dialogue

- **Improving information on how boards operate**

  Article 3.3 of the AFEP-MEDEF code states that *"when the board decides to assign specific duties to a director, in particular in his or her capacity as lead director, in matters of governance or shareholder relations, these duties and the resources and prerogatives at his or her disposal, shall be described in the internal rules"*.

  This accessibility is useful in promoting shareholder dialogue because it allows investors to better understand how the board operates.

  Article 2.2 of the AFEP-MEDEF code also stipulates that the internal regulations must be accessible: *"The great diversity of listed companies does not allow for the imposition of formalised and identical organisational and operational methods on all boards of directors. The organisation of the board's work and its composition must be appropriate to the composition of the shareholder base, the size and nature of each company's business and the particular circumstances it faces. Each board is the best judge of this, and its main responsibility is to adopt*

[95] AMF Recommendation 2012-05, General Meetings of Shareholders of Listed Companies, updated in October 2018, Proposal 1.1.
[96] Report of the High Committee on Corporate Governance, October 2017, p. 24.

the organisation and operational method that enables it to carry out its duties as effectively as possible. Its organisation and operation are described in the internal rules that it draws up and that are published in whole or in part on the company's website or in the corporate governance report".

Of the 40 companies in the sample, 30 have made their boards' internal rules available.

- **Consideration given to demands from shareholders when evaluating the board**

As a reminder, Article 9.1 of the AFEP-MEDF Code provides that the board periodically evaluates its ability to meet shareholders' expectations: *"The board shall evaluate its ability to meet the expectations of the shareholders who have given it a mandate to manage the company by periodically reviewing its membership, organisation and operation (which also involves a review of the board's committees). Each board shall consider the appropriate balance of its membership and that of the committees it sets up within it and shall periodically consider whether its organisation and operation are appropriate to its tasks"*. Point 1.1.9 of AMF Recommendation 2012-02 states in this respect that: *"The AMF urges companies to disclose in sufficient detail the procedure put in place to evaluate the operation of the board and the results of this evaluation, as well as any follow-up actions and, more specifically, any areas of improvement that the company might consider".*

The AMF notes that only six companies in the sample mention the shareholder's role in the annual evaluation of the board of directors. In five companies, the board simply points out that it takes into account the interests of shareholders, but this does not mean that shareholders were interviewed as part of the evaluation. One other company specifies that institutional investors are formally consulted as part of the evaluation.

2.5. Consideration given to demands from investors

The AMF notes that limited information is provided on the outcome of shareholder dialogue:

- In the companies in the sample, only limited information is also provided on the content of discussions with investors. Only one of the 40 companies has made available online the presentation materials prepared for its *"governance roadshows"*;
- In its recommendation AMF-2012-02, the AMF recommended, in a different context and for the lead director only, that *"the company shall publish a report on the lead director's activities so that, firstly, the nature of the work and tasks carried out in this context and, secondly, the use the lead director has made of the prerogatives conferred on him/her can be assessed"*.[97] Accordingly, six companies publish a report on the activities of their lead director. In five companies, the dialogue between the lead director and shareholders is explicitly mentioned. However, companies only refer to the existence of a dialogue with shareholders or a desire to strengthen it in the future. For instance, one company referred to *"the willingness to continue to foster a good dialogue, particularly between all directors and shareholders"*;
- A number of companies explain, in their notice of meeting or registration document, the amendments that are the result of discussions with shareholders. For example, one company explains that it has taken into account the opinions of its shareholders to improve its governance.

The AMF also notes that while information is provided by companies prior to or at general meetings, companies still provide limited information on how they take investors' concerns into consideration. Unlike other countries, French companies are not required to announce the measures taken following discussions with shareholders, including when shareholders express disagreement at the time of voting in general meetings.[98]

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[97] AMF Recommendation DOC-2012-02, proposal no. 1.2.3.

[98] Such a measure is provided for in the AFEP-MEDEF code only in the case of the advisory vote on compensation and applies only to companies not covered by the provisions of Articles L. 225-37-2, L. 225-82-2 and L. 225-100 of the Commercial Code, namely in 2018 limited partnerships with share capital. This provision of the AFEP-MEDEF code specifies that *"if the ordinary shareholders' meeting issues a negative opinion, the Board must meet within a reasonable period after the shareholders' meeting and examine the reasons for this vote and the expectations expressed by the shareholders. Following this consultation and on the recommendations of the compensation committee, the Board will rule on the modifications to be made to the compensation due or awarded in respect of the closed financial year or the future compensation policy. It must then immediately publish information*

European Comparison

The situation is different in other countries. For example, in the United Kingdom, the UK Corporate Governance Code specifies that the board has a responsibility to ensure that directors are aware of the views and issues raised by majority shareholders.[99] This dialogue then continues at the time of the general meeting. If a resolution is opposed by more than 20% of shareholders, the board must announce the measures it intends to take to ensure that shareholders are consulted and must then inform them, within 6 months, of the action taken.[100]

However, this information may be necessary to obtain or renew investor confidence, or even to explain the company's specific characteristics.

Recommendation on shareholder dialogue:

The AMF recommends that the presentation materials prepared for the *"governance roadshows"* be posted on the company's website.

In the event of a contested vote at a general meeting, it also recommends that companies consider whether it would be appropriate to disclose any positions adopted by the board following this vote.

Furthermore, when these companies are approached by investors, they must be able to communicate quickly. The AMF notes that, particularly in the event of a shareholder dispute, companies must have appropriate financial disclosure, particularly with regard to the regulations on inside information, which must be made public *"as soon as possible"* (Article 17 of Regulation (EU) 596/2014 on market abuse). Article 223-1 of the AMF General Regulation (information provided to the public by the issuer must be accurate, precise and fairly presented) is very important in this context. The AMF pays particular attention to the quality of this disclosure.[101]

3. DIALOGUE WITH SHAREHOLDERS AT GENERAL MEETINGS

At general meetings, companies present the results, strategy, capital allocation policy and the company's long-term vision (for example, the corporate mission and the consideration of ESG criteria or climate risks). They also answer any questions from shareholders and put the resolutions to the vote. The result of this voting is, in part, the conclusion of the dialogue that occurred prior to this meeting, since many shareholders vote by post.

In this third section, the AMF analyses the results of the votes on the 2019 resolutions. While the average approval rate is high (subsection 3.1), a number of resolutions are nevertheless approved with an approval rate of less than 90% (subsection 3.2), reflecting some shareholder opposition. The AMF notes that it is often these resolutions for which companies provide additional information.

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on the company's website indicating how it has responded to the vote at the shareholders' meeting and report on this at the next shareholders' meeting".

[99] Article 1.3 of the UK Corporate Governance Code: *"In addition to formal general meetings, the chair should seek regular engagement with major shareholders in order to understand their views on governance and performance against the strategy. Committee chairs should seek engagement with shareholders on significant matters related to their areas of responsibility. The chair should ensure that the board as a whole has a clear understanding of the views of shareholders".*

[100] Article 1.4 of the UK Corporate Governance Code: *"When 20 per cent or more of votes have been cast against the board recommendation for a resolution, the company should explain, when announcing voting results, what actions it intends to take to consult shareholders in order to understand the reasons behind the result. An update on the views received from shareholders and actions taken should be published no later than six months after the shareholder meeting. The board should then provide a final summary in the annual report and, if applicable, in the explanatory notes to resolutions at the next shareholder meeting, on what impact the feedback has had on the decisions the board has taken and any actions or resolutions now proposed".*

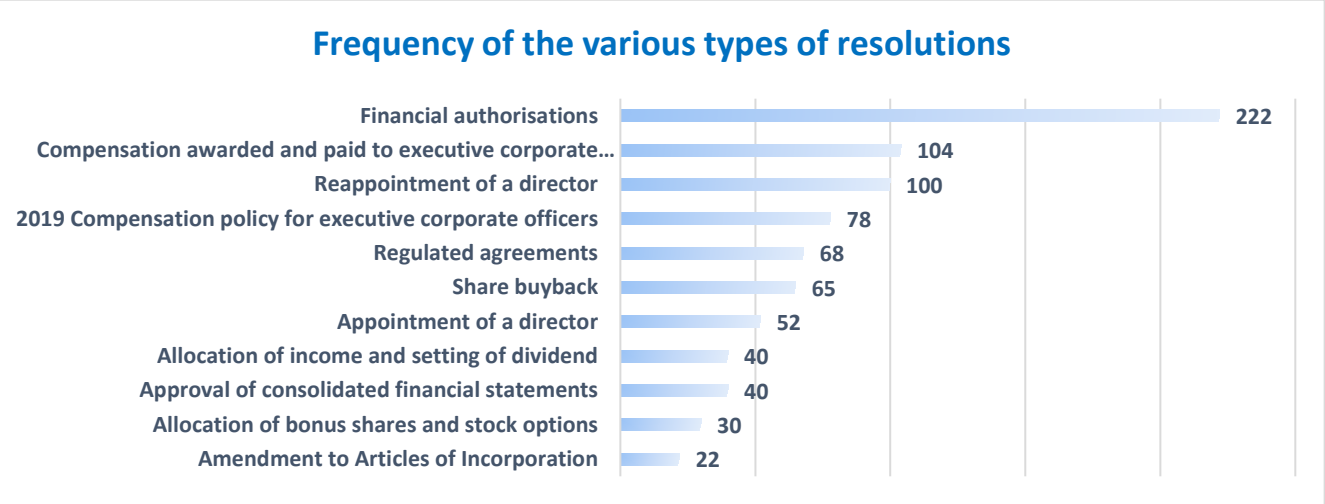
The results presented only reflect those from the 2019 general meetings and are not put into perspective over several years, with some resolutions being adopted only on a multi-year basis. The AMF points out that other studies published in 2019 do put the results in perspective over several years, or even restate the voting results to highlight how the main shareholders voted.

3.1. Limited shareholder opposition at general meetings

The AMF notes that, despite the increase in the activism among some shareholders, the average approval rate is high (subsection 3.1.1) and that draft resolutions submitted by shareholders are often rejected (subsection 3.1.2).

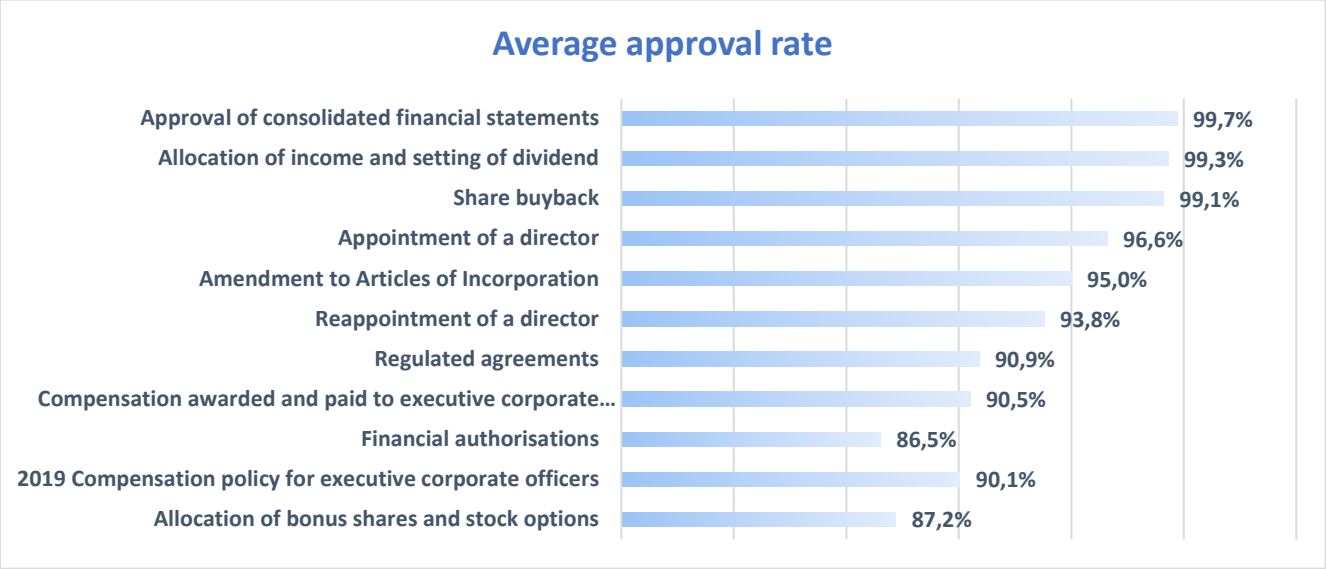
3.1.1. A high average number of resolutions proposed by the board

In the sample, the resolutions **most frequently proposed** by the board are as follows (by number of resolutions):[102]



[102] Financial authorisations are defined as requests for delegation to the board to issue equity securities or securities giving access to the capital. It should be noted, however, that allocations of bonus shares and stock options are presented on a separate line.

The **average approval rate for** resolutions is high:



This second graph shows that the resolutions relating to the approval of the consolidated financial statements,[103] to the allocation of income and setting the dividend, and to share buybacks all have an approval rate of more than 99%. Resolutions with a lower approval rate are detailed in subsection 3.2 below.

With regard to setting the dividend, proxy advisors, for example, always vote in favour, unless the payout ratio is insufficient or not in line with the company's financial situation.[104]

In addition, very few resolutions were not approved.

3.1.2. Resolutions submitted by shareholders

In companies whose shares are admitted for trading on a regulated market, one or more shareholders representing at least 5% of the capital (this percentage is a sliding scale based on the company's capital) or a group of shareholders complying with the conditions set out in Article L. 225-120 of the Commercial Code[105] may request that items or draft resolutions be included on the agenda (Article L. 225-205 of the French Commercial Code). The works council has the right to request the inclusion on the agenda of draft resolutions (Article L. 2323-67 of the Labour Code).

Any request for the inclusion of an item on the agenda must be justified, and requests for the inclusion of draft resolutions must be accompanied by the text of the draft resolutions.

No statistics were provided on the items on the agenda of the general meeting, which are of a diverse nature.

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[103] Similar rates were noted for the approval of the corporate financial statements.

[104] For example, in its 2019 voting policy, ISS states that it votes in favour unless *"the dividend payout ratio has been consistently below 30 percent without adequate explanation; or the payout is excessive given the company's financial position"*. The dividend distribution policy proposed to shareholders must be justified, in line with the company's strategy and prospects and in line with the distribution specific to the business sector. In its 2019 voting policy, Proxinvest states: *"The assessment of the proposed dividend is therefore based on a multi-criteria analysis. The dividend distribution must not put the company's going concern at risk. Long-term shareholders agree not to receive dividends in loss-making financial years. Proxinvest and its ECGS partners also accept that no distribution will be made in loss-making financial years and do not support, unless justified by the board, distributions not covered by the profits for the financial year"*.

[105] According to this article, in companies whose shares are admitted for trading on a regulated market, shareholders who have been registered for at least two years and who together hold at least 5% of the voting rights may form shareholder groups to represent their interests within the company.

With regard to the inclusion of resolutions on the agenda by shareholders, in the sample of 40 companies surveyed, the AMF notes that shareholders rarely submit draft resolutions. Only three companies in the sample had shareholders who submitted draft resolutions.

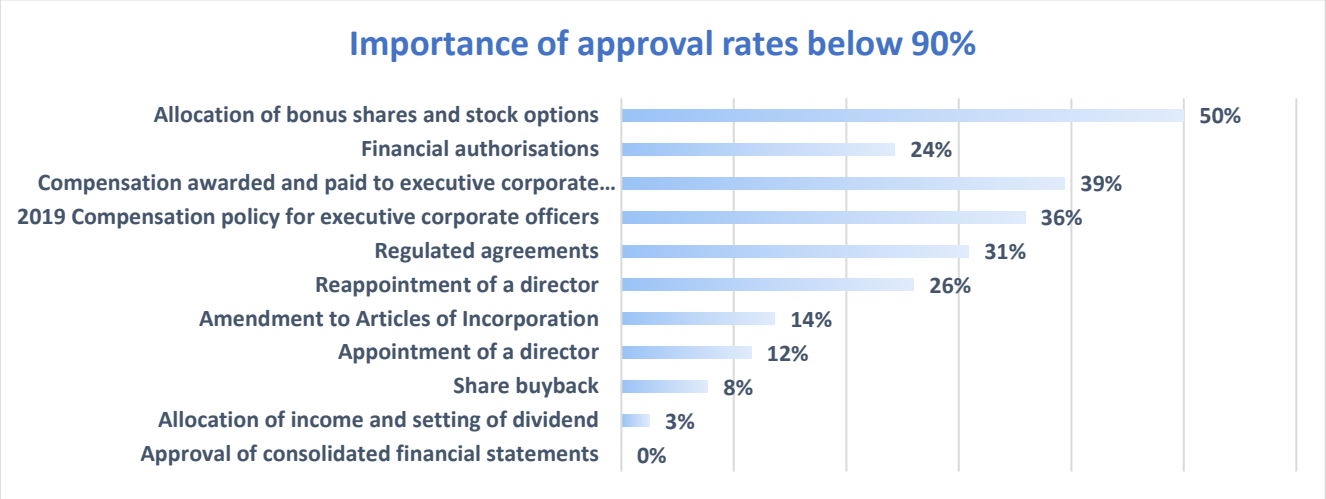
In one company, institutional shareholders, in one case, and a fund representing employee shareholders, in another, requested the appointment of an independent director in a governance crisis situation. In the other two companies with cases of resolutions submitted by shareholders, the concerns reflected were those of employees who requested a capital increase for the benefit of members of the savings plan and the appointment of a director representing employees.

These resolutions were systematically rejected. The first example is interesting because it shows that the pooling of several institutional investors to table a resolution resulted in a significant approval rate (34.5% in this case).

The AMF recommends that *"shareholders who include draft resolutions on the agenda of a general meeting should systematically prepare an explanatory statement"*.[106] It also recommends that companies *"publish the explanatory statement to the draft resolutions on the issuer's website, on the same page as the explanatory statement to the draft resolutions proposed by the board of directors (or the management board, if applicable), and grant any shareholder who has placed a draft resolution on the agenda the right to speak at the general meeting so that they can briefly present it before the vote is held"*.[107] These recommendations seem to be properly observed in the companies in the sample, although it is difficult to know whether, in practice, shareholders experienced difficulties in this regard.

3.2. Different voting results depending on the type of resolution

For a more in-depth analysis, the results were refined to determine which resolutions have an approval rate of less than 90%, representing the most contested resolutions. The result is as follows:



The results of the graph above can be read as follows: "50% of the resolutions to obtain a delegation from the board for the purpose of allocating bonus shares or stock options have an approval rate of less than 90%".

Only the most contested categories of resolutions are discussed below. "OGM" is specified when the decision is based on voting at the Ordinary General Meeting, and "EGM" is specified when the decision is based on voting at the Extraordinary General Meeting.

[106] Proposal 1.7 of AMF Recommendation DOC-2012-05.
[107] Proposal 1.7 of AMF Recommendation DOC-2012-05.

As the approval rate is influenced by the voting policies of shareholders and proxy advisors, the AMF has published on its website a comparative table of the voting policies of PROXINVEST, ISS and GLASS LEWIS along with the recommendations from the French Asset Management Association (AFG) on the main resolutions presented below.

3.2.1. Allocations of bonus shares and share subscription options (EGM)

As a reminder, the subject of performance shares is also presented in §1.2.3 of this section.

The voting of delegations to the board in order to issue allocations of bonus shares and share subscription or purchase options are multi-year resolutions. Their average approval rate is relatively low compared to other types of resolutions:

Frequency	• **30 resolutions**
Average approval rate for resolutions in this category	• **87.2% (91.7% in CAC 40 companies)**
Percentage of resolutions with an approval rate below 90%	• **50%**

The approval rates for resolutions in this category is broken down as follows:

Approval rates for bonus shares and share subscription options				
Approval rate below 70%	Approval rate between 70% and 80%	Approval rate between 80% and 90%	Approval rate between 90% and 95%	Approval rate above 95%
0	7	8	9	6

The reasons for the use of bonus share allocation plans and share subscription options are clearly explained by the companies in their notice of meeting brochures. For example, companies indicate that these plans are part of a policy of involving employees and managers in the capital, encouraging them to take a long-term view of their work. They aim, beyond profit-sharing and incentive schemes, to involve employees and senior managers more closely in the company's performance. They help to align the interests of these employees with the interests of shareholders. Companies also present them as complementary compensation mechanisms that attract and retain talent.

Against a backdrop where long-term compensation is developing to align the interests of shareholders and senior managers, more and more questions are being asked about the value of performance share allocations: what is their fair value? When should this value be assessed? Are the performance conditions demanding?

The AMF notes that, in the explanatory statement to the draft resolutions, the amount of information provided on these plans varies from one company to another, but also that many companies provide detailed information on the conditions under which the delegation will be exercised.

Certain information enables investors to ensure, as soon as the delegation is adopted, that the proposed allocations comply in future with the AFEP-MEDEF code:

- ✓ *the number and type of potential beneficiaries (employees or corporate officers);*
- ✓ *the overall volume of the plan with sub-ceilings for executive corporate officers;*

- ✓ *the existence of performance conditions and the main criteria for assessing performance;*
- ✓ *the condition of being employed by the company;*
- ✓ *the possible unwinding of these commitments in the event of a change of control;*
- ✓ *the impact on options in the event of the departure of executive corporate officers;*
- ✓ *the obligations to hold the acquired shares;*
- ✓ *the commitment required of beneficiaries not to use hedging instruments.*

Other information goes beyond the requirements of the AFEP-MEDEF code, probably to meet the expectations of investors and proxy advisors:

- ✓ *the vesting period;*
- ✓ *the results of previous plans, with a summary of the number of shares allocated and the number of shares cancelled because of failure to meet the performance conditions.*

There is also other information that shows an even greater desire to align with the interests of shareholders. For example, one company indicates that if no dividend is paid by the company for a financial year during the vesting period, the number of shares acquired would be reduced.

Lastly, the AMF notes that there has been a change in the performance evaluation criteria used to definitively allocate these shares and options. The majority of companies no longer evaluate their performance solely in terms of intrinsic economic conditions but also in terms of relative stock market performance ("Total Shareholder Return") or changes in net earnings per share ("EPS"). Two companies go even further by clearly distinguishing performance evaluated for performance shares from performance evaluated for annual compensation. They specify that the performance criteria used for performance share allocations will be different from the performance criteria used to determine annual variable compensation. Three CAC 40 companies refer only to external indices to evaluate this performance.

3.2.2. Compensation awarded and paid to executive corporate officers for the 2018 financial year (OGM)

Shareholders are asked annually to approve the compensation policy set by the board of directors, based on the proposal of the compensation committee, chairman of the board of directors, chief executive officer and deputy chief executive officer in accordance with Article L. 225-37-2 of the Commercial Code. Variable and exceptional compensation items resulting from the implementation of the compensation policy (see paragraph below) are subject to shareholder approval the following year.

The vote on the voting policy, which is annual, is contested:

Frequency	• **78 resolutions**
Average approval rate for resolutions in this category	• **90.1% (89% in the CAC 40) in the sample**
Percentage of resolutions with an approval rate below 90%	• **36%**

However, the vote on the compensation awarded or paid in 2019 is even more contested:

Frequency	• **104 resolutions**
Average approval rate for resolutions in this category	• **90.5% (89.4% in the CAC 40) in the sample**
Percentage of resolutions with an approval rate below 90%	• **39%**

The approval rates for resolutions in this category are broken down as follows:

Approval rates for nominations					
	Approval rate below 70%	Approval rate between 70% and 80%	Approval rate between 80% and 90%	Approval rate between 90% and 95%	Approval rate above 95%
2019 Voting Policy	4	7	17	12	38
2018 Compensation	9	12	20	12	51

❑ Quality of information on the voting policy

The executive compensation policy of the companies in the sample is rarely presented in their notice of meeting brochures, with issuers referring instead to the corporate governance report.

With regard to the information provided by companies on the voting policy in the brochure and the corporate governance report, the AMF makes similar observations to those made last year. As in its previous report, the AMF notes that the companies provided a great deal of information on the compensation structure and the different components of compensation:

- ✓ *Some companies presented their corporate officers' compensation structure very clearly, differentiating between long- and short-term components;*
- ✓ *Some companies provided details on the performance conditions that had to be met;*
- ✓ *38 companies presented the fixed compensation that they decided to award for 2018;*
- ✓ *Some companies specified the ceiling on 2019 variable compensation.*

The AMF notes that when these details, particularly on fixed compensation, are not disclosed, the information given to shareholders on the voting policy is of poor quality. It calls on companies to continue to improve information on the voting policy in order to avoid surprises for shareholders when implementing this policy and voting on compensation actually paid or awarded.

❑ Quality of information on compensation awarded or paid

The AMF notes that 72% of companies include the compensation for 2018 in their notice of meeting brochures. In presenting this compensation, the AMF notes that ten CAC 40 companies have adopted the model table proposed by the HCGE, while only seven SBF 120 companies have done so.

3.2.3. Related-party agreements (OGM)

Related-party agreements are those entered into directly or indirectly between the listed company and another company with which it shares executives, one of its executives or a shareholder holding more than 10% of the capital and voting rights (Articles L. 225-38 and following of the Commercial Code).

In order to prevent the influence of a third party interest in the company, these agreements are subject to authorisation by the board of directors (see §1.2 above for approval by the board) and are approved by the general meeting. Shareholders can only cast an informed vote on the subject if sufficient information is provided in the statutory auditors' special report and the registration document.

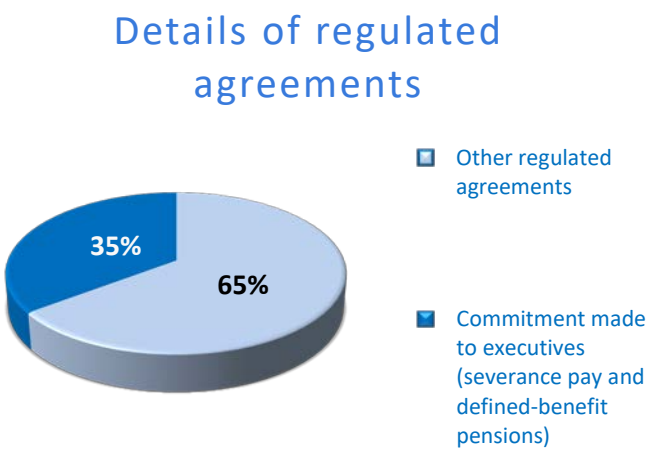
The first observation is that these resolutions, in the companies in the sample and for the 2019 general meetings, are frequent and relatively contested:

Frequency	• **68 resolutions**
Average approval rate for resolutions in this category	• **90.9% (94.8% in the CAC 40) in the sample**
Percentage of resolutions with an approval rate below 90%	• **31%**

The approval rates for resolutions in this category are broken down as follows:

Approval rates for related-party agreements				
Approval rate below 70%	Approval rate between 70% and 80%	Approval rate between 80% and 90%	Approval rate between 90% and 95%	Approval rate above 95%
7	10	4	2	45

In 35% of cases, these related-party agreements relate to commitments made to executives that may be payable at the time of their departure from the company (Articles L. 225-42-1 and L. 225-90-1 of the Commercial Code). In other cases, the nature of the agreements varies (for example, service agreements):



The most contested resolutions concern agreements signed by SBF 120 companies with their executives in order to grant them specific additional compensation: (i) paying additional fixed compensation for the executive to fund directly, year after year, his or her supplementary pension, (ii) entering into a service and severance pay agreement, or (iii) maintaining an employment contract.

These agreements raise several questions: their compliance with the AFEP-MEDEF code,[108] the possible combination of duties carried out under a service agreement and as a corporate officer (§1.3.2), and more generally the link between executive compensation and performance.

Proxy advisory firms and the AFG would like agreements with related parties to be submitted to the shareholders for a vote and companies to provide information to ensure that these agreements are entered into in the interest of all shareholders. They would also like to see a high level of transparency in this area.

The AMF has also issued a number of recommendations on the subject (recommendations DOC-2012-05 on general meetings of shareholders of listed companies). In particular, it points out that it is important that the auditors' report on related-party agreements include a full description of the agreement and the financial conditions.[109]

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[108] Article 21.1 of the AFEP-MEDEF code specifies that: *"It is recommended that, when an employee becomes an executive corporate officer of a company, his or her employment contract with the company or with a group company be terminated, whether through contractual termination or resignation"*.

[109] The AMF recommends that *"the content of the information published in the statutory auditors' special report be improved so as to enable shareholders to better appreciate the implications of the agreements entered into, in particular, any information that might enable shareholders to assess the merits of entering into agreements and commitments should be provided, especially in the case of service agreements with directors. Achieving this objective will be facilitated if the board of directors transmits a clear, precise document explaining why the agreement is in the company's interest; B. Specify the persons concerned by the agreements and state their function, including for ongoing agreements; C. Present clearly within the report the terms and conditions of regulated agreements to provide a better understanding of their implications for the issuer and the executives concerned and, within this framework, structure the report on regulated agreements in three parts:*
a. agreements with shareholders;
b. agreements with companies with common executives, specifying the capital links between companies (percentages of holdings);
c. agreements with other executives;
d. Present the financial details of these agreements, making a distinction between income, expenses and commitments and specifying the amounts involved".
The AFG also recommends that "The auditors' report on regulated agreements should include a complete description of the services provided, the methods for calculating the financial conditions and the conditions for their adjustment over time".

- **The AMF observed some good practices:**

  - Nine of the 32 companies concerned submitted an ad hoc resolution in accordance with the AMF's recommendation that companies are encouraged to submit a separate resolution to shareholder vote whenever the agreement is of a significant nature for one of its parties and directly or indirectly involves an executive or shareholder, as required by law for certain deferred commitments for the benefit of executive corporate officers.[110] In its handbook for members of the Bureau of General Meetings, drawn up in conjunction with ANSA,[111] the AFEP states, in addition, that: *"Where a resolution includes several questions each of which may give rise to a separate vote, splitting it into several separate resolutions may be requested by a shareholder. In the event of the board's refusal to grant this request, the shareholder may request that the meeting decide whether or not to proceed with the requested separation".*

  - In terms of information quality, the AMF also notes that two companies summarise in the explanatory note, in addition to what is indicated in the special report, the benefits of entering into an agreement. More specifically, these companies describe the new agreement, its impact on the company and the benefits to the company and its shareholders of entering into this agreement.

  - The AMF also reiterates its recommendation that the board of directors appoint an independent expert when entering into a regulated agreement that is likely to have a very significant impact on the company's and/or group's balance sheet or results. The AMF recommends that the independent expert report requested by the board of directors be mentioned in the special report and made public, excluding, where necessary, any elements that may compromise business confidentiality.[112] One company in the sample, **M6**, appointed an expert.

- **The AMF also identified some practices that could be improved.** The AMF notes that **M6** had a regulated agreement approved belatedly by the general meeting. Despite **M6** entering into a significant acquisition agreement with its shareholder in 2017 (48.26% of the capital on that date), it did not submit this agreement to a vote until the 2019 general meeting of shareholders. This delayed submission for shareholder approval was not explained in the company's annual registration document.

  More generally, the AMF points out that the law on related-party agreements has changed, and an overview of the main changes is provided in the first part of this report (§1.2. Impact and influence of the SRD2 Directive, Related-party agreements, pp. 13-15).

3.2.4. Appointment and reappointment of directors

- **Appointment resolutions relate to the appointment and/or co-optation of a director. These resolutions are only rarely contested:**

Frequency	**• 52 resolutions**
Average approval rate for resolutions in this category	**• 96.6% (97% in the CAC 40) in the sample**
Percentage of resolutions with an approval rate below 90%	**• 12%**

[110] Proposal 4.14
[111] March 2011, updated in November 2015, p. 23.
[112] Proposal 4.6 of AMF Recommendation DOC-2012-05.

The approval rates for resolutions in this category are broken down as follows:

Approval rates for appointments				
Approval rate below 70%	Approval rate between 70% and 80%	Approval rate between 80% and 90%	Approval rate between 90% and 95%	Approval rate above 95%
2	2	2	5	41

The lowest approval rates are related to appointments of directors linked to a principal shareholder. They also relate to a company whose governance was challenged by activist shareholders.

Proxy advisors pay particular attention to the appointment of directors, and the AFG has also made recommendations in this area.

The AMF notes that, in order to meet these expectations, a great deal of information is provided by companies on:

- ✓ *the term of office, which is generally less than 4 years;*
- ✓ *the biographies and areas of expertise of each of these directors;*
- ✓ *the size of the board following this appointment;*
- ✓ *information on the availability of the person (number of executive and non-executive offices held);*
- ✓ *information on any conflicts of interest and the criteria for assessing the independence of this director.*

With regard to the specific case of resolutions concerning the appointment of directors representing employee shareholders, it is interesting to note that one CAC 40 company left it to shareholders to choose between three candidates, ensuring that there was transparency in the process that led to their appointment.

- ☐ **Reappointment of directors:** Shareholders are more likely, however, to contest requests for reappointment:[113]

Frequency	• **100 resolutions**
Average approval rate for resolutions in this category	• **93.8% (94.5% in the CAC 40) in the sample**
Percentage of resolutions with an approval rate below 90%	• **26%**

The approval rates for resolutions in this category are broken down as follows:

Approval rates for appointments				
Approval rate below 70%	Approval rate between 70% and 80%	Approval rate between 80% and 90%	Approval rate between 90% and 95%	Approval rate above 95%
5	7	14	13	61

[113] Proxy advisors consider that the renewal of a director's term of office should be contested when the explanations are insufficient or when the director has an interest.

By voting against reappointments, some investors express their dissatisfaction with governance choices or even challenge the group's strategy and/or performance.

In the sample, the lowest approval rates relate to the reappointment of independent directors (6) and directors linked to a principal shareholder (3).

There is a genuine concern for the main corporate officers who have to comply with certain investor expectations to be reappointed. For example, in one CAC 40 company, the chairman and CEO announced, prior to the general meeting, that he had terminated his employment contract and agreements related to his non-competition benefit, severance benefit and defined-benefit pension commitment. In a second company, the chairman of the board permanently gave up his employment contract.

The information provided by companies at the time of reappointments is similar to that provided at the time of appointments. Some companies insist on compliance with the AFEP-MEDEF code, or even with all applicable legislative provisions. Others also refer to the committees on which the director will sit.

3.2.5. Financial authorisations (EGM)

3.2.5.1. Information provided by companies on financial authorisations

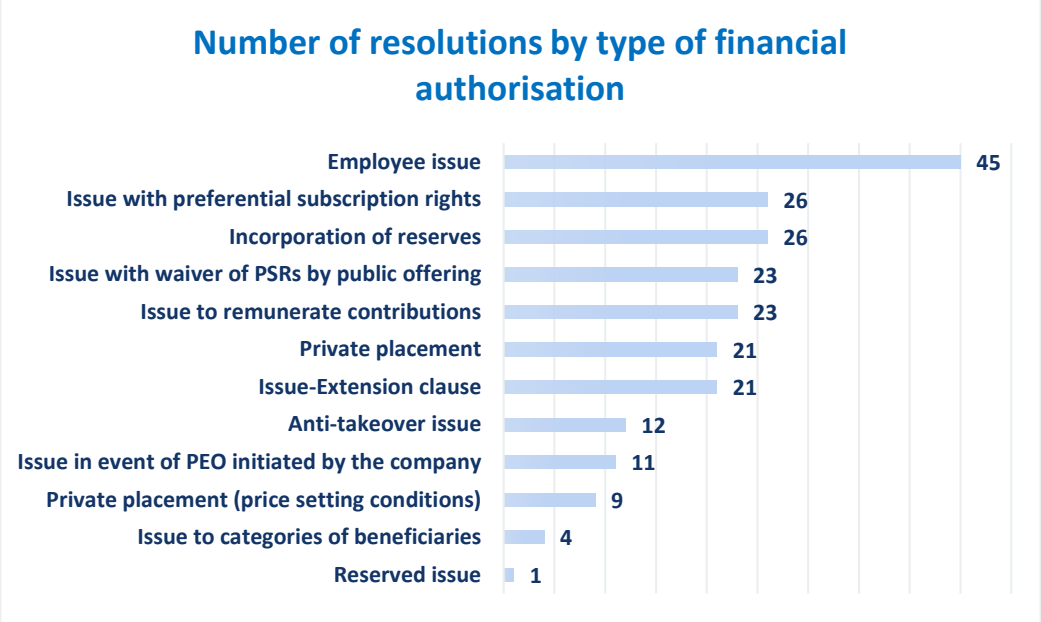
Shareholders are asked to approve the renewal of a number of financial authorisations to issue equity securities and securities giving access to the capital. These delegations allow the board of directors to increase the share capital for different reasons and in different ways.

These authorisations provide companies with the flexibility to react quickly to changing market conditions and thus be able to obtain financing under the best possible conditions from their existing shareholders or other investors.

Issues with cancellation of preferential subscription rights include:

- ✓ delegations of authority granted to the board of directors to increase the share capital by public offering (within the meaning of Article L. 225-136 of the Commercial Code);
- ✓ delegations of authority granted to the board of directors to increase the share capital by private placements as referred to in Article L. 411-2 of the Monetary and Financial Code. These are offers reserved for qualified investors or a limited circle of investors ("Private Placement");
- ✓ delegations of authority granted to the board of directors to increase the share capital by reserving this increase for a category of persons or for a named person (within the meaning of Article L. 225-138 of the Commercial Code);
- ✓ delegations of authority granted to the board of directors to increase the share capital in the event of a public exchange offer initiated by the company;
- ✓ delegations of authority granted to the board of directors to increase the share capital in consideration for contributions in kind up to a maximum of 10% of the share capital;
- ✓ delegations of authority granted to the board of directors to increase the share capital in the event of a public offer initiated on the company ("anti-takeover issue");
- ✓ issues made for the benefit of employees.

The number of resolutions per category is as follows:



In 2012, the AMF working group on general meetings observed that*"'broad-brush' resolutions authorising issuance of securities [had] proliferated and their content [had] inflated"*.[114] As a result of this observation, the AMF recommended, in its recommendation *"DOC-2012-05 - General Meetings of Shareholders of Listed Companies"*, that:

> *"A. New requests for issuance authorisations be justified as part of the company's strategy, while maintaining confidentiality with regard to financial transactions;*
> *B. Immediately on publishing the meeting notice, the summary table relating to the use of the latest financial authorisations be posted on the issuer's website, together with the explanatory notes contained in the board's report on draft resolutions and any useful explanations to make it easier to understand".*[115]

In the sample, the AMF notes that the number of resolutions involving financial authorisations averaged five per company, which is still significant, and that its recommendation has not been widely adopted. While the registration document often provides a good overview of the use of past authorisations, there is little information on the link between new authorisation requests and the company's strategy.

An increasing number of companies are, however, reporting on their objective in terms of employee share ownership, stating, for example, that *"the Group's ambition is to increase employee share ownership in all Group companies so that it represents a significant proportion of both capital and voting rights"* with the aim of *"strengthening employee commitment, increasing their sense of belonging to the company and promoting a co-owner mindset"*.

As financial authorisations result in an increase in the number of shares in circulation, and may lead to shareholder dilution, the companies mainly provide information in the explanatory note, in addition to what is stated in the resolutions, on the issuance ceiling that they request as a percentage of the share capital. This information is often very informative, differentiating between the ceiling for issues with preferential subscription rights and the ceiling for issues without preferential subscription rights. Those authorisations that provide for the issuance of debt securities also make a distinction between sub-ceilings.

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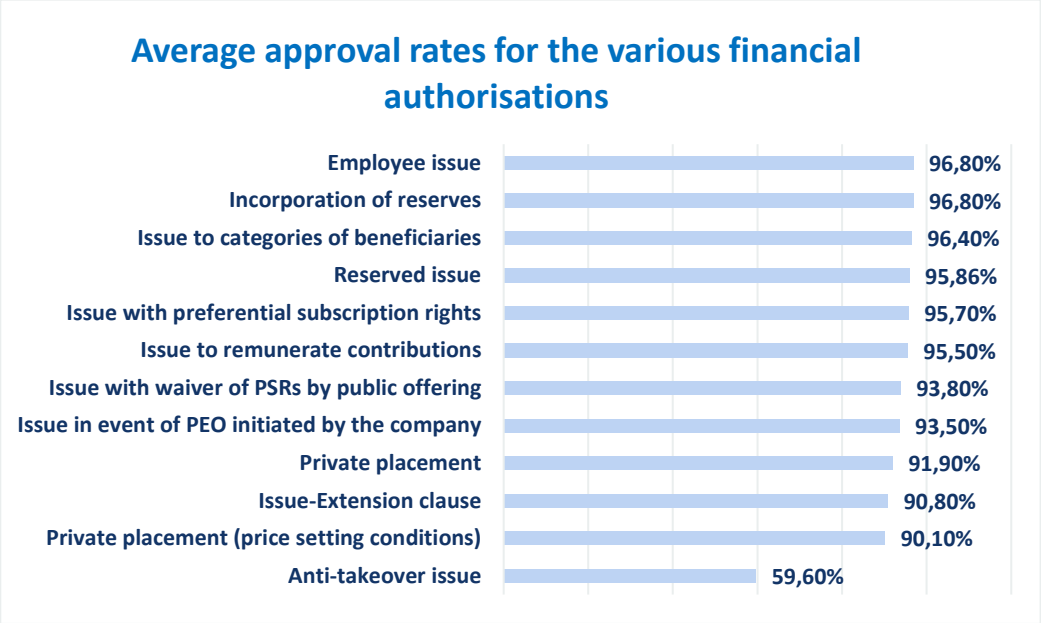
[114] Report of the working group on General Meetings of Shareholders of Listed Companies. It is also worth noting that the AFG states in its January 2019 recommendations on corporate governance that: *"The AFG is opposed to the practice of substantially changing the balance sheet structure without first informing the shareholders. With this in mind, it would like the company's three-year debt policy, including off-balance sheet commitments, to be specifically detailed in the board of directors' report (leverage effect), in addition to the company's three-year distribution policy (payout ratio)."*

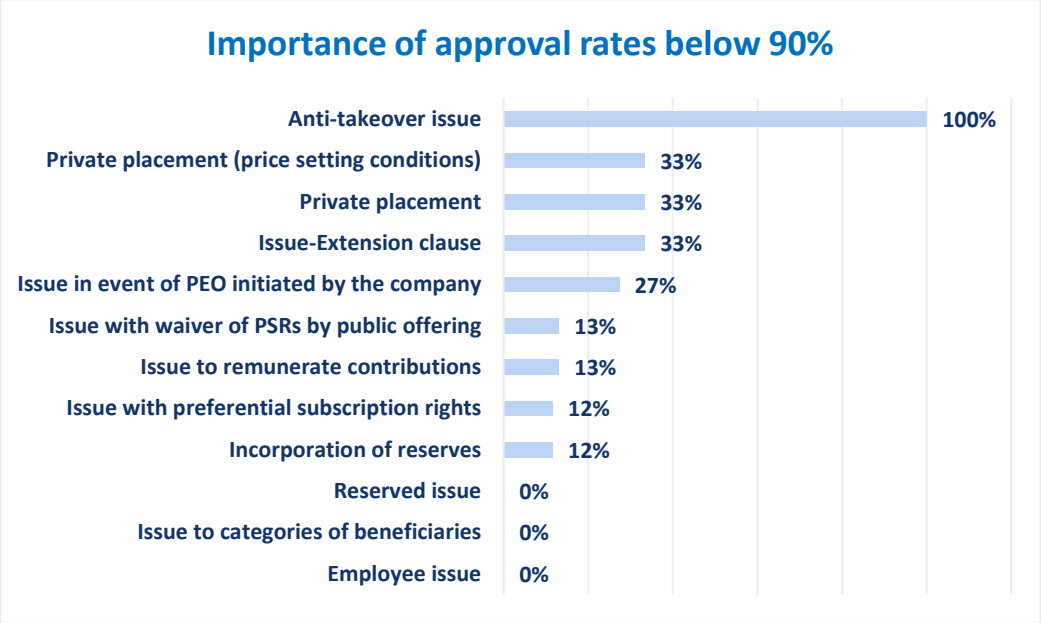
[115] Proposal 1.6 of AMF Recommendation DOC-2012-05.

3.2.5.2. The most contested financial authorisations

The average approval rate by category is as follows:



The percentage of resolutions for which the approval rate is below 90% is as follows:



The results of the graph above can be read as follows: "100% of the resolutions authorising the issue of shares in the event of a takeover bid have an approval rate below 90%". To assess the frequency of resolutions, please refer to the graph presented in §3.2.5.1.

The issues with the highest approval rates are those that do not change the value of the company and do not affect shareholder rights. The most contested are issues with cancellation of preferential subscription rights, and more particularly anti-takeover measures and private placements.

At general meetings, the AMF notes that companies make a genuine commitment to their shareholders, generally going beyond the legal disclosure requirements. The explanatory note and even the draft resolutions are sometimes extremely detailed. For example, companies explain in great detail the conditions under which they plan to use the delegation of authority that shareholders are being asked to approve.

While detailed information is useful to provide shareholders with information to help them vote, it implies that the company then complies with the commitments it makes or the procedures it defines when presenting draft resolutions. This is true even if this information is not included directly in the resolution put to the vote, but only in the explanatory note. The aim is to respect the consent given by the shareholders and not to distort the terms of a corporate authorisation. There is also a need to preserve investor confidence.

PART 3 – OTHER GOVERNANCE AND COMPENSATION FINDINGS

The AMF's review of 2018 registration documents revealed that certain practices raise concerns and that some companies[116] have failed to comply with the provisions of the AFEP-MEDEF corporate governance code. These non-conformities are sufficiently significant to warrant their being highlighted.

1. REFERENCE TO THE AFEP-MEDEF CODE BY A FOREIGN COMPANY

In March 2019, a spokesperson for **TECHNIPFMC** stated publicly[117] that the compensation and severance pay of its chairman complied with the Articles of the AFEP-MEDEF Code.

In response, the High Committee on Corporate Governance (HCGE) explained, in a statement on its website, that *"the conditions referred to do not comply with the recommendations of the AFEP-MEDEF code"* and also pointed out that *"TechnipFMC, a company incorporated under British law, does not refer to this code and, consequently, is outside the HCGE's jurisdiction"*.

The AFEP also indicated, in a press release, that it did not agree with the conditions of departure of the TechnipFMC executive as publicly disclosed, and pointed out *"that in terms of governance, the French professional regulations that are supported by a stringent code and an independent regulatory body no longer apply to TechnipFMC, a foreign company since 2016"*.

The AMF considers it regrettable that a company refers to a code that it does not comply with.

A foreign company could voluntarily refer to the AFEP-MEDEF code provided that it is able to identify the recommendations of that code that it does not comply with and explain the reasons for this. This would then fall within the HCGE's jurisdiction.

European Comparison

As a European comparison, at least three European countries,[118] namely Spain, Luxembourg and the United Kingdom, allow a foreign company to comply with their governance code provided that the company is listed on their regulated market.

2. SERVICE AGREEMENTS

☐ Reminder of the principles

The AMF notes the existence of many service agreements (otherwise known as management agreements) entered into between a company and one of its corporate officers, either directly or through his/her personal holding company. These

[116] These are companies either not included in the sample for the study presented in the second part of this report or included in the sample but concerning matters unrelated to shareholder dialogue.

[117] For example: *https://www.capital.fr/entreprises-marches/les-indemnites-de-depart-du-president-de-technipfmc-herissent-le-gouvernement-1332298*

[118] Spain, Luxembourg and the United Kingdom allow foreign companies to use their governance codes. The United Kingdom requires that all companies listed on the UK regulated market comply with the FRC Code of Governance: *"Application – The Code is applicable to all companies with a premium listing, whether incorporated in the UK or elsewhere. The new Code applies to accounting periods beginning on or after 1 January 2019"*.
Luxembourg explicitly stipulates that foreign companies may apply its code of governance and explains the reason for this choice: *"7. Scope and entry into effect – The X Principles apply to companies incorporated under Luxembourg law, where their shares are listed on a regulated market operated by the Luxembourg Stock Exchange, except for regulated SICAVs and Funds, to which specific regulations apply. However, given their flexibility, the X Principles can easily be used as a reference framework for any company incorporated under Luxembourg law, or under the laws of another country, including any company incorporated under Luxembourg law that has asked for its shares to be admitted to a foreign regulated market. Where Luxembourg companies admitted for trading on various regulated markets in addition to the regulated market operated by the Luxembourg Stock Exchange are faced with several codes of conduct in terms of corporate governance, they are invited to apply the X Principles. Indeed, under most circumstances, the regulatory nature of the X Principles enables these companies to comply with the provisions of the governance codes in effect on other regulated markets as well"*.
Spain's code affects all companies listed on its regulated market: *"I.3.3 Scope of application – The Good Governance Code addresses listed companies, meaning all those firms whose shares are admitted to trading on an official secondary market"*.

agreements sometimes raise questions with regard to the regulations in force and the principles of good governance, either in terms of their compliance or the scope and quality of the information provided to the market about them.

The AMF notes in particular that the description of the purpose of these agreements in the registration document or the statutory auditors' report on related-party agreements does not always provide a clear understanding of the nature of the services provided by the corporate officer (directly or through his/her personal holding company) under the service agreement. By way of illustration, references in the agreement to services such as "strategic consulting" or "assistance to senior management" provided by the corporate officer or his/her personal holding company does not give a precise idea of the scope of his/her duties. In addition, some of these agreements appear to relate to services that overlap, in whole or in part, with the legal duties that the corporate officer concerned is required to perform as part of his/her office. In certain cases, the services referred to may overlap, at least partially, with the legal duties that another corporate officer of the company is required to perform as part of his/her office.

Aside from the need to identify precisely the nature of the services provided, either directly or indirectly, by the corporate officer under a service agreement, the AMF would like to highlight certain principles that must be complied with in this regard.

Firstly, the AMF points out that, under established case law, a service agreement between a company and one of its corporate officers, whereby the former entrusts the latter (in particular through the intermediary of the company he/she has created) with tasks that overlap, in whole or in part, with his/her duties as a corporate officer, is exposed, in civil law, to a risk of being null and void for lack of cause or for lack of real consideration. Furthermore, in the event that such an agreement is contrary to the interests of the company, it could possibly be challenged as an abnormal act of management or an abuse of company assets.

Secondly, it should be noted that, by virtue of the principle of the legal separation of powers between the corporate bodies, the board of directors may not encroach on the powers conferred by law on the chief executive officer or the general meeting of shareholders, and vice versa. Accordingly, the directors do not have the power to legally represent the company vis-à-vis third parties, which is a power conferred by law only on the chief executive officer. Conversely, it is not the responsibility of the chief executive officer to determine the company's business policies and ensure their implementation, which are powers conferred by law on the board of directors. Consequently, the duties entrusted to a corporate officer under a service agreement may not fall within the scope of the powers legally conferred on a corporate body.

☐ Real-world examples

By way of example, the chairman of the supervisory board of **TIKEHAU** entered into a service agreement in 2017 through the intermediary of a company over which he had control. This agreement covered duties that fall within the scope of the board's stewardship. This chairman then found himself in a situation in which, under the terms of a service agreement, he had to assist the stewardship while at the same time, by virtue of his position as chairman of the supervisory board, assuming a monitoring and supervisory role.

In its most recent registration document,[119] the company states that at the beginning of 2019 it sought the opinion of the HCGE on the compatibility of this service agreement with the duties of the chairman of the supervisory board: *"Although the combination of a service agreement and the position of Chairman of the Supervisory Board is authorised by law, the High Committee on Corporate Governance considered that such an agreement was a source of conflicts of interest, as it did not allow him to perform his duties within this body under satisfactory conditions with regard to the recommendations of the AFEP-MEDEF code. Furthermore, the continuation of this agreement did not seem appropriate due to the increased scope of the role of the Supervisory Board and, with it, that of its Chairman."*

Consequently, the company complied with the observations of the AMF and the HCGE and terminated the service agreement, following the meeting of its supervisory board on 20 March 2019.

[119] Page 181 of the 2018 registration document filed in 2019.

Another company, **SMCP**, had also entered into service agreements to compensate its executive corporate officers. These agreements would contribute a portion of the annual variable compensation paid to these corporate officers. The company decided, as of 1 January 2019, to terminate these agreements and to increase the fixed compensation of the two parties concerned by the same amount, thereby eliminating the variable nature of the previous agreements.

Article 24.3.1 of the AFEP-MEDEF code governing the compensation of executive corporate officers states that *"in the event of any significant increase in compensation, the reasons for this increase must be clearly indicated"*. The company thus explained that *"the fixed compensation received in respect of each of these positions has been increased accordingly to bring it into line with the new scope of these offices, in order to take into account bringing in-house previously outsourced services"*.

3. EXECUTIVE COMPENSATION IN THE EVENT OF THE SALE OF SHARES BY A SHAREHOLDER

In several cases, the AMF noted the existence of agreements, some of them confidential, entered into between certain corporate officers and one of their shareholders. The agreements generally give entitlement to the payment of a compensation to the executive, the amount of which is determined at the time the shareholder withdraws his or her capital contribution and based on the value of the holding sold. Such compensation is primarily set up by private equity funds that are company shareholders in order to serve a particular purpose and may be intended to encourage the executive to obtain liquidity for all or part of the holdings of the funds concerned.

As well as the potential conflict of interest that may arise and compliance with the corporate interest by the director concerned, these agreements raise the question of market information. The question becomes even more acute when the sums likely to be due to the executives concerned under these agreements are much higher than the compensation paid by the company for the corporate office.

Avenue of discussion

The AMF encourages the AFEP, MEDEF and HCGE to review international practices in this area and consider measures to be taken in such situations, in order to ensure that the board of directors and all shareholders are aware of them and that any conflicts of interest that may arise are managed appropriately.

4. INDEPENDENT DIRECTORS

☐ Number of independent directors

According to Article 8.3 of the AFEP-MEDEF code: *"The number of independent directors should account for half the members of the board of directors in widely held corporations without controlling shareholders"*.

One non-controlled company in the sample, **SOITEC**, already cited last year by the HCGE regarding non-compliance with the number of independent directors,[120] still does not comply with the aforementioned recommendation of the code. The percentage of independent directors SOITEC has is 33.33% when it should be 50%.

The AMF notes that the percentage has improved from 25% in 2018 to 33% in 2019 and that the board will continue to pursue the objective of increasing its independence ratio so that it exceeds 50% in the future. However, it notes that the situation has changed little over the last three years, whereas the company has continuously stated, year after year, that it wants to see the situation change and that it could have changed because many directorships have been renewed. The AMF notes that no satisfactory explanation is provided to justify non-compliance with the recommendation. In accordance with the "comply or explain" approach (recommendation 27 of the AFEP-MEDEF code), the explanation must, in particular, *"indicate the alternative measures adopted, if any, and describe the actions that ensure continued compliance with the*

[120] HCGE, Report of the High Committee on Corporate Governance, October 2018, pp. 36-37.

objective pursued by the relevant provision of the code". In this case, no action appears to have been taken to ensure continued compliance with the objective pursued by this provision.

The AMF notes that SOITEC explains that the current situation is due in particular to the number of representatives of the three shareholders who have recently acquired a stake in the company. If the situation does not change, SOITEC should declare itself non-compliant with the code on the subject by repeating this explanation.

☐ Term of office as independent director exceeding 12 years

The AMF still observes too many companies that refer to the AFEP-MEDEF code in which directors who have been on the board for more than 12 years still qualify as independent.

To justify independence after twelve years in office, companies put forward the qualifications and skills of directors, their ability to be critical, their benefit of hindsight, the degree of freedom of speech they enjoy or their in-depth knowledge of the group. These explanations are therefore highly subjective and remain unconvincing. For a person who has been in office for more than 12 years, there is an inherent risk that he or she will lose the benefit of hindsight and a critical eye expected of him/her for several reasons, including financial dependence, close ties and find it more difficult to question an earlier decision.

European Comparison

As a European comparison, codes in other countries call into question the independence of directors after an even shorter term of office: nine years in the United Kingdom[121] and Italy.[122]

☐ Independence of the Lead Director

In the case of **CARREFOUR**, the board of directors decided to appoint a lead director from among the non-independent directors, which contravenes Article 3.2 of the AFEP-MEDEF code: *"The Board may appoint a Lead Director from among the independent directors, particularly when it has been decided to combine such offices. In the event of the separation of the offices of Chairman and Chief Executive Officer, any tasks entrusted to the Chairman of the Board in addition to those conferred upon him or her by law are described"*.[123] In the same vein, AMF Recommendation 2012-02[124] repeats the terms of the code, quoting in full from the aforementioned recommendation.

The AMF notes that the company's reasons for choosing this non-independent lead director are that the director has *"experience in the sector and in governance"* and is also *"a representative of one of the company's major shareholders"*.[125] This explanation is not sufficient to justify the departure from the code in view of the potential conflict of interest situation in which this director finds himself and the tasks entrusted to him under the internal rules.

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[121] UK Corporate Governance Code, Provision 10: *"The board should identify in the annual report each non-executive director it considers to be independent. Circumstances which are likely to impair, or could appear to impair, a non-executive director's independence include, but are not limited to, whether a director: […] has served on the board for more than nine years from the date of their first appointment"*.

[122] Italy Corporate Governance Code, July 2018, Article 3 – Independent Directors, 3.C.1.: *"The Board of Directors shall evaluate the independence of its non-executive members having regard more to the substance than to the form and keeping in mind that a director usually does not appear independent in the following events, to be considered merely as an example and not limited to: […] e) if he/she was a director of the issuer for more than nine years in the last twelve years;"*.

[123] It is specified that CARREFOUR has chosen to combine the offices of chairman of the board of directors and chief executive officer.

[124] AMF Recommendation, DOC-2012-02, Corporate governance and executive compensation in companies referring to the AFEP-MEDEF code – Consolidated presentation of the recommendations contained in the AMF annual reports, updated on 30 November 2018.

[125] The director represents Galfa SAS, which at 31 December 2018 held 10.09% of the capital and 15.69% of the voting rights (page 352 of the 2018 registration document).

According to Article 3.2 of the AFEP-MEDEF Code, the lead director should be independent as he/she is *"chosen from among the independent directors"*, and any other *"exceptional case"* of non-independence (description used by the HCGE in its 2017 report, page 13) should be duly justified.

The AMF also notes that CARREFOUR has not changed its explanation surrounding the lead director situation since 2017, even though the AMF referred to it in its 2018 corporate governance report (see pp. 5 and 46), stressing that the explanation given by the company was insufficient.

5. LONG-TERM COMPENSATION

The AMF notes the wide variety of multi-year compensation arrangements introduced by companies. This diversity is reflected primarily in the very different names given to these compensation schemes, including performance shares, deferred compensation, long-term compensation plans, long-term profit-sharing, long-term incentive programmes, performance units, group performance units ("GPUs"), monetary units, value creation bonus units, and future performance units.

According to the AFEP-MEDEF code,[126] the purpose of these long-term compensation arrangements is not only to encourage executives to take a long-term view of their efforts, but also to build loyalty and promote the alignment of their interests with the company's corporate interest and the interests of shareholders. There is a degree of uncertainty associated with this.

What the various criteria used to determine compensation have in common is that the compensation is indexed to the share price. The value of these shares is likely to change significantly between the date they were awarded and the payment date. Consequently, when the share price rises significantly, the amount paid at the end of the vesting period may no longer have any correlation with the value of the award and the importance of the work and duties that led to the award.

European Comparison

The situation is different in the United Kingdom, where the UK Corporate Governance Code provides for the review of long-term compensation.[127]

The AMF considers that it is important to continue discussions on the possible introduction of a mechanism for capping or revising the length of time over which long-term compensation is allocated from the time it is allocated.

[126] Article 24.3.3 of the AFEP-MEDEF code.

[127] Provision 37: "*Remuneration schemes and policies should enable the use of discretion to override formulaic outcomes. They should also include provisions that would enable the company to recover and/or withhold sums or share awards and specify the circumstances in which it would be appropriate to do so.*" The *FRC Guidance on Board Effectiveness* further states: *"§138. The remuneration committee is expected to exercise judgement when determining remuneration awards. It needs to be mindful of the possible monetary outcomes and of external perceptions arising from its decisions. Remuneration schemes should provide or the use of discretion to override formulaic outcomes." "§139. One approach to discretion might be to assess the overall reasonableness of the total rewards and recommend adjusting pay awards, for example, where the outcome would otherwise not be aligned to individual performance and results achieved or would not deliver the policy intention. An active decision on whether to exercise discretion would become a normal part of the annual process to determine remuneration outcomes. It will be important to ensure that the terms of individual contracts and scheme rules do not prevent such adjustments."*

ANNEX 1: LIST OF COMPANIES IN THE SAMPLE

AIR LIQUIDE
ALTRAN TECHNOLOGIES
AXA
BNP PARIBAS
CGG
CREDIT AGRICOLE
DANONE
DASSAULT SYSTEMES
ELIOR
ENGIE
ESSILOR LUXOTTICA
ERAMET
EUROPCAR MOBILITY GROUP
FNAC DARTY
HERMES INTERNATIONAL
IPSOS
KERING
LVMH
L'OREAL
M6-METROPOLE TV
MAISONS DU MONDE
MERCIALYS
NEOPOST (now QUADIENT)
NEXANS
NEXITY
ORANGE
PERNOD RICARD
SAFRAN
SANOFI
SCHNEIDER ELECTRIC
SOITEC
SOPRA STERIA
SPIE
TARKET
TECHNICOLOR
TF1
TOTAL
VALLOUREC
VINCI
VIVENDI