

2015 Report by the AMF on Corporate Governance and Executive Remuneration

Reference Texts: Articles L. 225-37, L. 225-68, L. 225-102-1, L. 225-185, L. 225-197-1, L. 823-19, and L. 823-20 of the Commercial Code; Article L. 621-18-3 of the Monetary and Financial Code

SUMMARY

This report was drafted pursuant to Article L. 621-18-3 of the Monetary and Financial Code, which requires that the French Financial Market Authority (AMF) prepare a report each year on corporate governance, executive remuneration and internal control, based on the information published by legal persons whose shares are traded on a regulated market and who have their registered office in France. This is the twelfth such report written by the AMF.

Beyond the legal requirements under corporate law, the corporate governance and executive remuneration practices regulation system is rather broadly based on the implementation of codes developed by organizations representing the companies and the "comply or explain" principle, as per Articles L. 225-37 and L. 225-68 of the Commercial Code¹. This principle occupies a structural place in the current system but can be interpreted in various ways. Thus, an evaluation of its scope and of the relevance of explanations provided by companies is a decisive factor in evaluating governance. The AFEP-MEDEF Code has adopted a strict concept of this principle since 2013, consistent with the AMF's approach.

When this code was revised in June 2013, the High Committee for Corporate Governance (HCGE) was formed to ensure the application of principals set out in the code. The AMF favours the creation of this body and hopes that this new committee shall contribute to the proper application and lawful development of the code. To this end, although it does not mention the company by name, the two first annual reports of the HCGE, published in October 2014 and October 2015, revealed the infringements of certain companies and took a critical stance on the practices and explanations provided by certain issuers, in accordance with to the mission entrusted to it.

The methodology for this report is similar to the one adopted in the 2014 report. Thus, the sample for analysis is made up of 60 companies listed in Euronext's A compartment, referring exclusively to the corporate governance code prepared by the AFEP and the MEDEF. This sample consists of 36 companies governed by the laws of France included in the CAC 40 as at 31 December 2014, and 24 other companies in the SBF 120 with the largest capitalisations.

In order to enhance the visibility of the most important messages, the AMF decided, in 2014, to change the format of this report by limiting developments on several themes to one statistical and compliance analysis, particularly in table form. This change is ongoing because the analysis now focuses on certain themes that are essentially complementary to those that are likely to be addressed by the HCGE and selected with regard to current standards and to recommendations and issues to be addressed that have not yet been considered by the HCGE, in the AFEP-MEDEF Code or its application guide. The following themes were selected: business relations with regard to directors' independence, salaried directors, managing conflicts of interest, evaluating boards, consultative vote on executive remuneration ("say on pay"), multi-annual variable remuneration, and information on service agreements. Special attention was paid to the most iconic cases of the period. In addition, different studies were completed in coordination with this report: a summary panoramic view of French companies referring to a corporate governance code and an ad hoc study on companies not referring to any code.

Again this year, the AMF is finding improvements in terms of information given and changes in practices, some of which have become market standards.

However, in terms of remuneration, the AMF has identified several cases of departure by executives where significant amounts were paid without having to meet the binding terms attached to severance packages (such as performance, very strict payout circumstances, the two-year ceiling, etc.). Thus, the rules afford deviation (e.g. by entering into a settlement agreement or paying several different kinds of remuneration that may amount to maintaining multi-annual variable remuneration or the award of extraordinary remuneration), which raises the

¹ Respectively, for companies with a board of directors and for those with a supervisory board and an executive board.

question of how effective the AFEP-MEDEF Code's rules about termination payment are. Therefore, the AMF is asking the professional associations to conduct an overview of the monies and benefits that may be paid to departing executives, to put an end to the various violations of the spirit of the code that are currently possible. Moreover, communications from these companies have sometimes been ambiguous or disseminated in several documents. And so the AMF is issuing a new recommendation that, when an executive leaves a company, that company should publish a news release that exhaustively details the financial terms of that departure.

As for "say on pay," the AMF stresses on the efforts made by the companies that, generally speaking, choose a method of presentation that gives investors the big picture on remuneration paid out, and present all of the required information.

For yearly and multi-annual variable remuneration, the AMF has made a special effort to review whether companies were disclosing all the information to their shareholders so that they could exercise control over the connection between this remuneration and the company's real performance. Finally, this year the AMF has observed several instances of extraordinary remuneration and is asking the professional associations to review the rules that govern them.

In corporate governance, the AMF identifies an increase in the number of companies that expressly state they do not follow certain provisions of the corporate governance code (75% at 31 December 2014 vs. 68% in 2013). The governance structure of large listed companies is similar to the one identified in the 2014 report, because 85% of companies in the sample have a board of directors, of which 34% have chosen to separate the duties of chairman and chief executive officer. The AMF states that 7% of companies in the sample have "European company" status compared with 2% in 2013. They see ongoing progress in board member diversity, specifically the proportion of women, with women making up 31.5% of boards at 31 December 2014, compared to 28% at 31 December 2013. The other diversity factors remain stable: 90% of companies in the sample appointed at least one foreign director, 30% of companies have an employee shareholder/ director and 17% have at least two directors representing employees, compared with 16% in 2013. In addition, the majority of companies affected by Ordinance 2014-948 on Governance and transactions affecting the share capital of companies with public participation took formal note of the new provisions and named representatives of the government to their board of directors, pursuant to the appointment procedure approved by the general meeting of shareholders. Moreover, the total proportion of independent directors within the boards (59% in 2013 and 58% in 2014) and committees remains high.

The AMF finds that 97% of companies in the sample (vs. 88% in 2013) report that they submit their directors to specific rules in matters of conflicts of interest. All of these rules follow the AFEP-MEDEF Code's recommendation on reporting conflicts of interest and 97% state that their director must abstain from voting in the related deliberation when there is a conflict of interest.

Conversely, unlike what is recommended by the AMF and also by the HCGE in its annual report published in 2014, few companies provide full and substantiated explanations on the way in which they concretely apply the independence criterion to business relationships. The AMF has already advised companies to state who the directors involved in these business relationships are, and to describe in detail the qualitative and/or quantitative criteria for appraising the significance of the relationship with the company or its group, as well as the content of any commitment the relevant directors might have made to preserve the terms of such qualification as independent director, and as the consequences of any breach of these commitments. As such, the AMF notes that, in practice, a percentage of turnover or sales realised by a company is not always relevant nor sufficient to illustrate the non-significance of a business relationship. Thus, the AMF recommends that issuers not appraise this significance solely with quantitative criteria, but that they also perform a qualitative analysis based on various parameters demonstrating that such a relationship is not significant and is exempt from major conflicts of interest.

In addition, more than one-third of companies in the sample (36%) do not disclose, in the registration document or the annual report, what follow-up was given to the evaluation, specifically on the areas for improvement, while 97% of them state they did implement an evaluation for the 2014 financial year. In this sense, the AMF recommends that issuers give sufficiently detailed information on the evaluation and its results. Moreover, though the number of companies having set up a procedure for review authorization by the board prior to senior management's acceptance of company appointments outside the group has increased significantly (30 companies in 2014 vs. 18 in 2013 and three in 2012), half of the sample is still not reporting on this topic. The AMF also recommends that information on corporate governance be centralised in the section of the registration

document or annual financial report dedicated to corporate governance, and that summary tables including the implementation of the corporate governance code's recommendations be used.

Finally, with regard to the findings under the ad hoc study on companies, referring to no code or only a portion of the code, the AMF recommends that these companies report a minimum of corporate governance and executive remuneration information to the markets.

1. CORPORATE GOVERNANCE: FINDINGS, RECOMMENDATIONS AND ISSUES TO BE ADDRESSED

1.1 Findings

1.1.1 Presentation on information about corporate governance

- Fourteen companies, or 23% of the sample, have prepared a summary of the changes made in the board's membership.
- In diagrams or tables, **LAFARGE**, **NATIXIS**, **ESSILOR**, **AXA** and **L'ORÉAL** companies summarise certain information on corporate governance such as board membership and organization, and even the directors' position with regard to independence criteria.

1.1.2 Implementation of the “comply or explain” principle

- There are five companies that do not show all the recommendations that they rejected in a specific heading or table.
- Forty companies in the sample, compared with 28 in 2013, show a table summarising all of the AFEP-MEDEF Code's recommendations that were rejected by the company and the corresponding explanations.
- In terms of best practices, the AMF finds that **ATOS** makes a reference in its registration document to its website, on which it shows a table summarising the entire AFEP-MEDEF Code and the way it is applied by the company.
- In their registration document or annual report, the majority of these companies do not specify whether all of the corporate governance code's recommendations are applied. As such, it is impossible to get a full picture of the company's compliance with that code.

1.1.3 Organisation and activity of the board and its committees

- Seven companies in the sample – **DANONE**, **SAFRAN**, **TOTAL**, **NUMERICABLE-SFR**, **SANOVI**, **AREVA** and **REXEL** – say they made a change in governance during the 2014 financial year and provide full and substantiated explanations for this.
- Of the 17 companies in the sample, compared with 15 in 2013, that have chosen to separate the duties of chairman and chief executive officer, eight dedicate some text to the specific representational role of the board's chairman.
- In terms of best practices, the AMF finds that **DANONE** very specifically itemises the duties entrusted to the chairman of the board in addition to his legal responsibilities.
- Six companies state that the chairman of their board of directors is not remunerated for his duties or only receives director's fees, and nine companies state that they only pay their chairman fixed remuneration.

1.1.4 Membership of the board and its committees

- At 31 December 2014, the average ratio of women directors was **31.5 %**, versus 28% in 2013, for the entire sample. This ratio rose to 32% in 2014 versus 29% in 2013 for companies in the sample belonging to the CAC 40.
- Only one company does not mention its directors' nationalities.
- Eighteen companies or nearly one-third of companies in the sample, had at least one director representing shareholder employees in 2014.
- Thirty companies had directors representing employees in 2014. Of those, 10 had at least two directors representing employees.
- Seventeen companies appointed a director representing employees in one or more committees.
- Five issuers say they have appointed government representatives. **EDF** and **SAFRAN** provide detailed information on the implementation of the Ordinance of August 2014 in their registration document.

1.1.5 Multiple offices

- Thirty companies state that they have set up a procedure for review or authorization by the board before a company executive already holding office agrees to hold another office in a listed company.
- Three companies, **VIVENDI**, **FINANCIÈRE DE L'ODET** and **BOLLORÉ**, do not follow the recommendation on the number of offices for company officers, whether or not they are executives. To this end, the AMF reiterates its desire for the **BOLLORÉ** group to request the opinion of the HCGE in this regard.
- One company expressly states, in its registration document, that its chairman and CEO, who held three other offices in listed companies, will not request the renewal of one of his terms of office at the general meeting of shareholders of one of the companies in question, and has effectively come into compliance in 2015.

1.1.6 Independent director qualification

- One issuer **UNIBAIL-RODAMCO**, qualifies its supervisory board chairman as independent without rejecting the code's recommendation, and does not provide any justification for it.
- Three companies, **BOLLORÉ**, **FINANCIÈRE DE L'ODET** and **CHRISTIAN DIOR**, are disregarding the independence criterion related to another directorship within the group, without providing a satisfactory explanation.
- In terms of best practices, the AMF notes that **AIR LIQUIDE** is stricter in its appraisal of the AFEP-MEDEF code's employee, company officer or executive company officer criterion.
- Thirty companies, or which 50% in the sample, compared to 45% in 2013, have given detailed explanations of the way they concretely apply the independence criterion as it relates to business relationships.
- Two companies, **CARREFOUR** and **SAINT-GOBAIN**, give no information on the criteria used to appraise the significance of business relationships.
- Two companies, **BOUYGUES** and **SCHNEIDER ELECTRIC**, give information that is not clear and detailed enough to ascertain how the company has decided whether or not business relationships are significant.
- One company, **CASINO**, provides an appraisal criterion based on a very high percentage of purchases and sales, suggesting that business relationships with the relevant directors could be significant.

1.1.7 Managing conflicts of interest

- One company, **KLÉPIERRE**, makes no mention of the rules to which the directors would be subject to prevent conflicts of interest. Nonetheless, the company has come into compliance with this recommendation of the AFEP-MEDEF Code, by amending its by-laws on 28 July 2015.
- One company, **THALES**, reports an obligation to disclose conflicts of interest, but provides no details on the rule on abstaining from voting on the deliberation in question, and the board of directors' by-laws are not available on its website.
- In terms of best practices, **HERMÈS**, **SAFRAN** and **VALEO** very clearly set out the rules that directors must follow in terms of managing conflicts of interest on the boards of directors.
- Nineteen companies, of which 56% have a "one-tier" structure, appointed a senior director in 2014 and assigned him duties related to the prevention of conflicts of interest.
- In terms of best practices, the AMF notes that three companies **VINCI**, **ORANGE** and **LAFARGE**, are in compliance with all AFEP-MEDEF and AMF recommendations concerning the senior director.
- AMF notes that **DANONE** has chosen to maintain the duties of the senior director despite the separation of the duties of chairman of the board of directors from the chief executive officer.

1.1.8 Assessing the board's work

- Two companies, **CNP ASSURANCES** and **ZODIAC**, say they have not completed the assessment of their board of directors for 2014. **CNP ASSURANCES** explicitly disregards the code's recommendation but does not provide enough explanation, while the second issuer, **ZODIAC AEROSPACE** does not disregard this recommendation but provides no explanation.
- Eleven companies expressly disregard a portion of the AFEP-MEDEF Code's recommendation on assessment. And **DANONE** disregards the "measure of each director's actual contribution to the board's work," precisely stating the alternative measures adopted to maintain compliance with the target pursued by the relevant provision.
- In terms of best practices, the AMF stresses that **BOUYGUES**, **EDENRED**, **UNIBAIL RODAMCO** and **CRÉDIT AGRICOLE SA** give detailed information on the assessment procedure in place, the results obtained, and the results obtained or issues to be addressed.

1.2 Recommendations and issues to be addressed

As a reminder, the AMF's recommendations are sent to issuers, with the aim of better application of the AFEP-MEDEF Code's existing provisions. Conversely, the issues to be addressed are meant to move the code forward.

The AMF is inviting issuers to continue applying the recommendations previously made in its annual reports on corporate governance, executive remuneration, and internal control, consolidated in Recommendation 2012-02, updated in December 2014, and following the new recommendations made in this report.

In addition, the AMF also reiterates its recommendation on general meetings of shareholders for listed companies, published on 2 July 2012 and amended on 11 February 2015 in response to its report on implementing its 2012 proposals, as well as its Position-Recommendation 2015-05 of 15 June 2015 on major asset acquisitions.

1.2.1 Recommendations

1.2.1.1 *Presenting corporate governance information*

The AMF reiterates the requirement of clarity in presenting the chairman's report on corporate governance and internal control. As a reminder, this report is incorporated into the registration document, where applicable. The AMF recommends that when the content of the chairman's report is presented in different chapters in the registration document, this is specified in the body of the report with references. For companies publishing a registration document in the form of an annual report, the correlation table must be completed to this effect.

To improve the readability and comparability of corporate governance information, the AMF recommends:

- **centralising all corporate governance information** in the corporate governance section of the registration document or annual financial report;
- **using summary tables to demonstrate implementation of the code's corporate governance recommendations.** Such presentation may be preferable to text-only drafting for the purpose of readability and summarization of the information. For example, the AMF proposes that tables be used to show each director's nationality, gender, and whether they are independent, a director representing the government, an employee or employee shareholder if such is the case, whether they are appointed on any committee(s), their rate of attendance at board and committee meetings, their terms' expiration dates, etc. The AMF now recommends the inclusion of a table summarising the changes that have occurred in the board's membership: departures, appointments, and renewals, by stating any changes reflecting greater diversity (the representation of men and women, nationalities or international experience).

1.2.1.2 *Membership of the board*

The AMF recommends that companies that are subject to Ordinance no. 2014-948 of 20 August 2014 on governance and operations on the stock of public shareholding companies **state the measures relating to its implementation in their registration document or annual financial report, clearly distinguishing directors who are government representatives appointed by administrative decision from those named by the competent body.**

1.2.1.3 *Independent director qualification*

In terms of **business relationships**, the AMF recommends that companies provide detailed information each year to explain how their board of directors or supervisory board decide as to whether or not the potential business relationships between members qualified as independent and the company in which they are directors or supervisory board members, are significant. As such, the AMF recommends that companies state who the directors involved in these business relationships are, then describe in detail the qualitative and/or quantitative criteria for appraising the significance of the relationship with the company or its group, as well as the content of any commitment the relevant directors might have made to preserve the terms of such qualification as independent director, as well as the consequences of any breach of these commitments.

In its annual reports, the HCGE stated that it is better for *"the boards to set these criteria according to the characteristics of each company, rather than setting the standards that would necessarily be too general in the Code itself."* However, it did state that investors must be given detailed information on the criteria adopted.

In this regard, the AMF considers that, in practice, a percentage of turnover or sales realised by a company is not always enough to establish the non-significance of a business relationship with any certainty.

Thus, the AMF recommends that issuers **not appraise the significance of business relationships solely with quantitative criteria, but that they also perform as much of a qualitative analysis as possible**, based on various parameters demonstrating that such a relationship is not significant and is exempt from major conflicts of interest, including but not limited to:

- length and continuity (seniority, history, renewals);
- the degree or "intensity" of the relationship (any economic dependency, exclusivity, or dominance in the sector that is the purpose of the business relationship, distribution of negotiating power, etc.);
- the organisation of the relationship (position of the relevant director in the contracting company, direct decision-making power over the contract(s) constituting the business relationship, remuneration of the director related to the contract, any business ties or relationship with companies that other directors are from, amounts of mutual commitments between the companies, etc.).

If, for the purposes of this appraisal, **a company wants to keep only one quantitative criterion, a ceiling on the absolute amount** (such as what certain voting board agencies stipulate²) seems more relevant for appraising the significance of a business relationship. Whatever the case, any quantitative threshold of a percentage of business volume should be appraised **for each of the two contracting companies.**

1.2.1.4 *Assessing the board's work*

The AMF recommends that issuers provide detailed enough information on the procedure for assessing the existing board's operation, results, and areas for improvement.

² Indeed, the AMF notes that certain **voting board agencies adopt a strict concept of the evaluation of these business relationships**, and specify certain criteria to evaluate their significance. Thus, ISS holds that a director cannot be called independent if he, or a person with whom he has close family ties, offers *"professional services"* to the company, one of the companies that is affiliated with it, or a manager of these companies **for an amount in excess of \$10,000 per year**. Proxinvest also calls those who have been directors or former directors of the company or its subsidiaries for fewer than three years, and who collect significant specific remuneration of €100,000 or more for services provided to the group's companies, controlling shareholder, or management.

The AMF considers that the board's collegiality, in and of itself, does not excuse a measurement of the actual contribution of each director to the work of that board, and that such contribution should be backed by substantiated explanations that are suited to the company's particular situation.

Likewise, the AMF considers that the fact that evaluation takes place exclusively when a director's term of office is up for renewal does not justify a failure to measure his actual contribution to the work of the board. Indeed, this assessment cannot respond to the spirit of the AFEP-MEDEF Code's recommendation for ongoing continuous improvement of each director's contribution to the work of the board.

1.2.2 For discussion

1.2.2.1 *The status and role of the non-executive chairman*

The AFEP-MEDEF Code states that "*although he or she may be an executive director, a Chairman of the Board may be considered as independent if the company can justify this based on the criteria set out above.*"³ Nonetheless, the AMF notes that the wording used in the AFEP-MEDEF Code can cause confusion, with the first of the criteria of independence being "*not to be an employee or executive director of the corporation, or an employee or director of its parent or a company that the latter consolidates, and not having been in such a position for the previous five years.*"⁴ "

The AMF considers that, insofar as he does not have management powers, the chairman of the board should not be paid a variable remuneration in cash or shares, except if there is a particularly substantiated reason with regard to specific duties, exceeding those vested under the law⁵. **In any event, it considers that the qualification of independent implies the lack of any such remuneration.** Likewise, in its report published on 2 October 2015, the HCGE does not recommend paying variable remuneration or remuneration by securities for the chairman of the board of directors. It reads, "*[i]n fact, variable remuneration undermines qualification as independent, and entails the disadvantage of giving the chairman a form of short-termist incentive, which is contrary to the mission of the Board. Awards of stock options and free shares (which is prohibited for the chairman of a Supervisory Board) may entail the same disadvantage, depending on the performance conditions to which they are subject (however, it seems legitimate to require chairmen to acquire a significant number of shares in the company).*"

Thus the AMF invites the professional associations to undertake a review process to develop the AFEP-MEDEF Code on this subject and clarify its interpretation. This change could be made by submitting this qualification of independence for the chairman of the board to stricter criteria than the "common law" for the other directors⁶ – in particular, the lack of any variable remuneration – and by specifying the incompatibility among independence, performance of extended management duties, and collection of variable remuneration.

These provisions could also be applied to the supervisory board chairman in "two-tier" companies, recognising the specific features of the duties performed by that officer.

³ Recommendation 9.4 of the AFEP-MEDEF Code.

⁴ Recommendation 9.4 of the AFEP-MEDEF Code.

⁵ AMF Recommendation no. 2012-02 - Corporate governance and executive remuneration in companies referring to the AFEP/MEDEF code – Consolidated presentation of the recommendations contained in the AMF annual reports - § 1.2.5 - The status and the role of the non-executive chairman in companies with a board of directors.

⁶ The code is not without a degree of inconsistency, because the chairman of the board, as a company officer and (as things stand) director, cannot, by definition, meet the first criterion of independence.

2. EXECUTIVE REMUNERATION: FINDINGS, RECOMMENDATIONS AND ISSUES TO BE ADDRESSED

2.1 Findings

2.1.1 Special cases

In this section, the AMF has chosen to study several special cases not mentioned in the report's other sections - since their topics have not been analysed in this report - but that have all been the subject of much debate.

After the AMF took action and the High Committee on Corporate Governance issued an opinion, the board of directors of **ALCATEL-LUCENT** revisited the initial financial terms of its chief executive officer's departure⁷. It decided (i) to uphold the waiver of the attendance requirement for the units already acquired, but to review the final acquisition of the units yet to be acquired (thus the former CEO will be entitled only to those he may have acquired under FY 2015 and only pro-rated to his attendance time, and subject to the achievement of the initial economic performance criteria assessed early in FY 2016), (ii) to pro-rate the allotment of free shares in remuneration for a commitment to pay out stock options based on his attendance at the company (2/3 for 2015) and a gradual acquisition mechanism in force at **ALCATEL-LUCENT** since 2014 for stock option plans, that sets out a performance requirement, (iii) to amend the procedures for paying performance units and shares that, instead of being done in securities over three years, will be done in cash in the spring of 2016, and (iv) to uphold the non-competition clause concluded with the CEO on 29 July 2015, while reducing the fee to €3.1 million, still to be paid out in thirds over a period of three years.

While the High Committee's intervention did improve compliance with the AFEDP-MEDEF Code, the AMF does have questions on compliance with the Code's provisions in terms of "say on pay" for the special case of performance units awarded in 2014, for which the information provided to shareholders was missing. On that occasion, regarding the more specific issue of the multi-annual variable remuneration that can be awarded to a senior manager leaving the company during the period covered by the provision, the High Committee reiterated in its 2015 report that: *"the Code establishes the principle that "in the event that an executive director leaves before completion of the term envisaged for assessment of the performance criteria, the payment of the variable part of the remuneration must be ruled out, unless there are exceptional circumstances which can be justified by the Board". The High Committee is of the opinion that, even in such circumstances, this payment should only correspond to the periods when the executive director is actually present in the company, for which the performance to which he or she has contributed through his or her actions can be measured, excluding any lump sum remuneration or offsetting of the sums laid down in respect of the years after he or she has left.*⁸"

After paying €2.5 million in extraordinary remuneration to its Chairman & CEO in May 2015, **LAFARGE** announced it had paid him "on the order of €5.9 M," and that his rights under long-term remuneration plans would be maintained. By analysing the compliance of these remuneration elements under the AFEP-MEDEF Code, the AMF considered that several of these elements could be disputed.

- The AMF identified a substantial contradiction in the implementation of remuneration components granted by **LAFARGE's** board of directors. Depending on the remuneration component, the Chairman and CEO is indeed treated (i) either as leaving the group which means he can claim termination payment, (ii) or as staying in the group so he can get his supplemental pension plan and keep all of his long-term remuneration (i.e. multi-annual variable remuneration plans, stock option plans, free share plans). The selected approach varies according to each remuneration component, which ends up being the most favourable outcome for the senior manager in either case, while the two approaches are normally irreconcilable.
- Furthermore, there are two points on this termination payment that can be criticised in light of the AFEP-MEDEF Code. The ceiling of "two years of fixed and variable remuneration" set out by the Code would be exceeded if based on the annual fixed and variable remuneration owed to this senior manager for the latest financial years. In this case, the remuneration is, indeed, equal to two years of total gross remuneration paid for the best of the last three years. Thus the company adds any extraordinary remuneration to the annual

⁷ "Conseil d'administration d'Alcatel-Lucent : suivi des recommandations du Haut comité de gouvernement d'entreprise" [Alcatel-Lucent's Board of Directors: Following the recommendations of the High Committee on Corporate Governance], an **ALCATEL-LUCENT** news release dated 11 September 2015.

⁸ 2015 Annual Report of the High Committee on Corporate Governance, p. 15.

fixed and variable remuneration, thereby raising the ceiling, in contradiction to the spirit of the Code. There is also the question of whether the extraordinary remuneration of €2.5 million that was paid to him two months before his departure should be considered to be a termination payment. In its annual report, the High Committee on Corporate Governance indeed *"recommends ensuring that, if the executive officer's departure coincides with or follows soon after the performance of the operation motivating the extraordinary remuneration, it does not deviate from the rules laid down by § 23.2.5 for the termination payment (with which public opinion will certainly equate it), particularly the limit of two years' fixed and variable remuneration."* Extraordinary remuneration paid soon before departure must be analysed as severance pay and be included with the payment of any severance pay and/or non-competition benefit for the determination of the ceiling of two years' remuneration, so that such ceiling is not exceeded.

- Furthermore, as we will see, the fact that a termination payment is provided in an employment contract has no impact on any failure to comply with the code. In its 2015 Annual Report, the High Committee states, in fact, that explanations of the benefits procured by maintaining an employment contract must be provided to *"enable shareholders to be sure that maintaining it does not generate non-compliances with the other provisions of the Code,"* specifically when it comes to termination payment.⁹
- For all the long-term remuneration he receives (i.e. 2013 and 2014 multi-annual variable remuneration plans, 2012 stock option plan, 2013 and 2014 free share plan), the Chairman and CEO has ultimately been released from the attendance requirement, and retains all of his rights. In these remunerations that provide for a vesting period for the remuneration that is spread over several financial years, the total amount of the acquisitions being subject to an attendance requirement as a result of the system, **LAFARGE** has decided to grant its former senior manager both the portion of this remuneration that corresponds to the period prior to his departure and the one that is subsequent to his departure (with vesting lasting until 2018 at the latest). Thus there has been no pro-rating of the long-term remuneration as developed by the HCGE¹⁰ that would have caused the **LAFARGE** executive to lose a portion of the long-term remuneration granted.
- Finally, the former senior manager of **LAFARGE** may benefit from the supplemental pension scheme if he decides to assert his pension entitlement even though he has left the company.

Thus on 30 September 2015, the AMF asked the High Committee on Corporate Governance to take up the issue, under Article 25.2 of the AFEP-MEDEF Code, of remuneration paid to the Chairman and CEO of **LAFARGE** in the context of his departure, and to submit its opinion to Lafarge's board of directors. As of 6 November 2015, no information on this subject has been made public by the High Committee nor by the company.

In **SANOFI's** case, the severance package the CEO was to receive could not be paid out; the required conditions had not been met, as it was not a forced departure due to a change in control or strategy. However, he was paid a settlement benefit of €2,961,000 and a non-competition benefit. Although the amount does fit within the two-year remuneration platform set out in the AFEP-MEDEF Code, the conclusion of this transaction kept the company from having to comply with the Code's other provisions on severance pay, because the Code does not provide guidelines on settlement benefits.

2.1.2 Consultation with shareholders on individual executive remuneration

- Shareholder approval rates on *"say on pay"* resolutions remain high overall, although they are clearly lower than last year's: 86.66% compared to 91.40% in 2014 for the CAC 40, and 86.28% compared to 92.59% in 2014 for the overall sample.
- And 85% of the companies chose to draft a specific paragraph about *"say on pay"* in their annual report or on their invitation to the general meeting. The presentation method used by the majority of companies affords investors a panorama of the types of remuneration paid, because all of these companies used the summary table format proposed by the AFEP-MEDEF Code application guide.
- However, in the text of their resolution or the accompanying foreword, **CARREFOUR**, **CHRISTIAN DIOR**, **LVMH** and **PUBLICIS** provided overly general references to the information contained in their registration document or annual report, without including any specific paragraph in their registration document.
- The AMF finds that the companies in the sample generally did present all of the information they should have.

⁹ 2015 Annual Report of the High Committee on Corporate Governance, p. 20.

¹⁰ 2015 Annual Report of the High Committee on Corporate Governance, p. 15.

- "Say on pay" applies to all remuneration paid by the companies in the listed company's group. Therefore, remuneration owed or paid under service contracts should be presented, including when these contracts have been voted on under regulated agreements.
- **GDF SUEZ** chose not to submit the remuneration of an executive vice president appointed on 12 November 2014 to a vote by its shareholders, on the grounds that in 2014 he would keep his employee remuneration and that remuneration would not be changed until 2015, the year for which it would then be voted on in the general meeting. In this case, non-compliance with the AFEP-MEDEF Code's "say on pay" provision is fully justified by an understandable, relevant and substantiated explanation, in keeping with the "comply or explain" rule.

2.1.3 Transparency of information on remuneration for senior management executives

- The AMF stresses the progress made in terms of transparency by the vast majority of listed companies (e.g. the description of fixed and variable remuneration systems is improving each year). However, there are two companies – **KERING** and **NUMERICABLE-SFR** – that do not comply with legal requirements on transparency in executive remuneration (Article L. 225-102-1 of the French Commercial Code) and do not show all of the remuneration paid to their executives by all of the group's companies for any reason, which has led their auditors to include an observation in their report on annual accounts closed at 31 December 2014.
- The AMF also wants to reiterate the required transparency of remuneration paid under service contracts. Of the companies in the sample, eight (including five in the CAC 40) state that they directly or indirectly entered into such an agreement with at least one of their senior managers. In addition to transparency on funds paid out, shareholders must be able to check whether the principles set out in the AFEP-MEDEF Code are indeed followed if funds are paid out as remuneration. Remuneration must be fully itemised and disclosed. If remuneration is paid by a holding company, it must also be the responsibility of the listed company's board of directors to set the remuneration of its senior manager, in all circumstances.

2.1.4 Signing bonus

- The AMF states that this type of remuneration is seldom given to new senior managers.
- Only one company, **SANOFI**, said it had paid its new CEO a signing bonus in 2015 (€2 million on signing, €2 million in January 2016, subject to an attendance requirement, and 66,000 performance shares as measured over three years). Because the latter actually came from a company outside the group, the principle of a signing bonus is in fact compliant with the AFEP-MEDEF Code. Moreover, the board of directors made sure to explain that these items offset the loss of benefits for leaving the company that previously employed him. In this way they explain why the board found it advisable to award this bonus.

2.1.5 Fixed remuneration

- Virtually all senior managers in the sample were paid fixed remuneration in 2014. Only two senior managers receive no such remuneration.
- 39% of CAC 40 companies, and 30% of companies in the sample, followed AMF Recommendation n° 2012-02 by stating how often their senior managers' fixed remuneration was reviewed.
- In terms of increases in fixed remuneration granted in 2014 compared to FY 2013 (just for senior managers on duty during those two years), the AMF finds that remuneration increased 2.67% on average, and that this applies to 27.5% of senior managers, meaning the figure is virtually unchanged from the previous year.
- More specifically in terms of companies where senior managers' remuneration increased by more than 3%, 37% of them (54% for the CAC 40) explained the reasons for these increases to their shareholders. Of those companies that did not produce any justification, the AMF notes the case of three companies where fixed remuneration of their senior managers increased very substantially, yet the reasons for these increases were not given.

2.1.6 Annual variable remuneration

- Variable remuneration is paid to 77% of senior managers, and 97% of the companies in the sample pay variable remuneration to at least one of their senior managers.
- Only **BOLLORÉ** did not comply with AFEP-MEDEF Code Recommendation 23.2.3, which requires that variable remuneration be capped. And 86% of companies paying variable remuneration directly state the ceiling on variable remuneration as a percentage of fixed remuneration. Other companies indicate a remuneration target, specifying the extent to which it can be changed. Pursuant to the intelligible rule principle¹¹, the AMF encourages companies to systematically state, in direct reading, the ceiling on variable remuneration, either as a percentage of fixed remuneration or as a maximum numerical amount.
- The AMF found certain cases of non-compliance with Recommendation 23.2.3 of the AFEP-MEDEF Code, which states that both quantitative and qualitative criteria applied by companies must be accurate, since such accuracy is required to support the board of directors' discretionary power. The following items were found to be inaccurate: a criterion of the *"Board's overall appraisal"* and the option for the board to *"adjust the results of calculations determining this variable portion within the aforementioned range, according to its overall appraisal of performance achieved."*
- The AMF reiterates that in order to verify that the recommendations specific to each of these two types of criteria, quantitative and qualitative (sub-ceiling, non-disclosure for confidentiality reasons, etc.), it is essential that the companies themselves qualify the criteria they apply by stating whether these are quantitative or qualitative criteria.
- Of the 56 companies in the sample basing the variable share of remuneration on performance criteria, all of them use quantitative criteria, and only one, **BOLLORÉ**, did not describe these criteria, instead stating that *"the criteria for paying the variable portion for 2014 are not made public for reasons of confidentiality."* Yet no reason of confidentiality is really likely to justify the absence of a list of quantitative criteria.
- If the description of the nature of the criteria is reported to the market by virtually all of the companies in the sample, the expected degree of achievement of these criteria, as set at the beginning of the financial year by the boards, is only very rarely reported by the companies.
- Whereas AMF Recommendation no. 2012-02 authorises not disclosing qualitative criteria for confidentiality reasons, the AMF does find that 67% of companies in the sample choose to describe them, which makes it easier for shareholders to understand the link between performance and variable remuneration.
- Three companies are not in compliance with AFEP-MEDEF Code Recommendation 23.2.3, which requires that a limit be set on the qualitative portion: **BOLLORÉ, DANONE, and DASSAULT SYSTÈMES**.
- More and more companies are providing additional information on the performance criteria distribution key (88% for 2014). This information is indispensable to shareholders for checking whether remuneration is appropriate to the company's performance. Conversely, some companies are still not in compliance with this recommendation, and do not state the distribution key applied among the different criteria: **BOLLORÉ, CARREFOUR, CNP ASSURANCES, DANONE, LAFARGE, and L'ORÉAL**.
- The AFEP-MEDEF Code requires that the annual report show the way in which performance criteria have been applied and state whether personal targets have been reached. Of the 86% of companies who supply this information, the AMF observes a widely variable degree of precision, with either a very general approach or extremely precise information. Thus, the AMF has found that at the end of FY 2014, the boards

¹¹ AFEP-MEDEF Code - Recommendation 23.1: Principles for the determination of the remuneration of executive directors and role of the Board of Directors

that met in 2015 were more favourable to the achievement of qualitative criteria than quantitative (on average, senior managers in the sample achieved 64% of their quantitative targets, and 82% of their qualitative targets).

- The AMF also finds the development of a trend among companies to present, in their registration document on FY N, the rules (ceiling, criteria, etc.) that will be applicable to determining the variable remuneration that will be owed under FY N+1 (32% of companies in the sample). This information is very useful for shareholders, who can use it to figure out whether the board has decided to change the rules by comparison with the previous financial year. It also reveals that the "rules of the game" are well entrenched by the start of FY N+1.

2.1.7 Multi-annual variable remuneration

- The increased use of deferred or multi-annual variable remuneration continued in 2014, with 18 companies in the sample involved (in 2013, there were 13, and 7 in 2012).
- The AMF still finds great diversity among these mechanisms. Like last year, the companies do not always legally qualify multi-annual remuneration in the same way. Some consider that they are variable remuneration under AFEP-MEDEF Code Recommendation 23.2.3, while others analyse them with regard to the rules of Recommendation 23.2.4 applicable to free shares and stock options. The question of qualifying such remuneration is important with regard to many special rules on capping such remuneration and the attendance requirement. Thus the AMF reiterates its desire that the professional organizations clarify the scheme applicable to multi-annual remuneration, specifying how such remuneration should be analysed.
- For multi-annual or deferred variable remuneration, quantitative criteria are routinely used. The mechanisms include (i) those whose initial amount awarded to the senior manager is equal to a percentage, determined in advance, of the annual variable remuneration owed, which amounts to submitting the initial amount to the same criteria as the annual variable remuneration (eight mechanisms), and (ii) those that set out the award of an initial amount that is then partially or totally awarded based on the achievement of performance criteria that are appraised either each year, or only when the mechanism expires.
- Unlike traditional variable remuneration, the criteria linked to the company's stock-market price are dominant. Nonetheless, issuers must see to it that such remuneration is subject to performance requirements, not solely the company's share price.
- Of the 20 multi-annual or deferred variable remuneration mechanisms within the companies in the sample, five are likely to result in totally or partially share-based payment. All of the other mechanisms are settled in cash only.
- If we analyse the remuneration with regard to the rules of Recommendation 23.2.3 on variable remuneration, as well as for annual variable remuneration, the multi-annual or deferred variable remuneration must be capped so as to respect the requirements of AFEP-MEDEF Code Recommendation 23.2.3, which states that such remuneration "*is a maximum percentage of the fixed part.*" The AMF observes that among the 20 deferred or multi-annual remuneration mechanisms, 11 companies are in compliance with this rule, stipulating that the remuneration ultimately paid must not exceed a certain predefined ceiling (in absolute value or in percentage of the annual fixed and variable remuneration). Only two companies set out this ceiling in FY 2013.

2.1.8 Extraordinary remuneration

- The AMF finds that several extraordinary remuneration packages were awarded in FY 2014 or early 2015, at **ALSTOM**, **NUMERICABLE-SFR**, **KLÉPIERRE** and **LAFARGE**. Such extraordinary remuneration does comply with the only specific requirement in the matter from the AFEP-MEDEF Code regarding the existence of "highly specific circumstances" warranting such remuneration. In these scenarios, this is a central achievement of the company's strategy in every case.

2.2 Recommendations and issues to be addressed

2.2.1 Recommendation

2.2.1.1 Companies' communication at the departure of a senior manager

The AMF has seen that some companies awarding unusual remuneration have made this information public through documents stored on their website under headings that are sometimes hard to find, labelled e.g. "governance," but that the information is not included in a news release that is effectively distributed in full within the meaning of Article 223-9 of the AMF General Regulation. Moreover, the AMF has found ambiguous communication from companies that parcel out information to shareholders. Sometimes it takes four or five separate documents to get a complete picture of the terms of a senior manager's departure. However, given these assumptions, it is imperative that, pursuant to Article 223-1 of the AMF General Regulation, which states that "*Information provided to the public must be accurate, precise and fairly presented,*" to provide full, clear information on the situation in a single document that is easily accessible for investors.

For these reasons, the AMF thinks that when a senior manager leaves a company, **that company should publish a news release that is effectively distributed in full**, within the meaning of Article 223-9 of the AMF General Regulation, **thoroughly detailing the financial terms of his or her departure**, including each of the following items:

- the fixed remuneration paid to him for the current financial year;
- the way in which annual variable remuneration owed to him for the current financial year will be calculated;
- any extraordinary remuneration;
- what becomes of the deferred or multi-annual remuneration, ongoing and not closed, that he is receiving, reiterating the plan's initial features (removal of any terms of departure, method for appraising performance requirements, amount involved, etc.) and stating the valuation of this remuneration on the departure date;
- what becomes of the stock options and free shares that he is receiving, reiterating the plans' initial features (removal of any terms of departure, evaluation of performance requirements, number of shares involved, etc.) and stating the valuation of this remuneration on the departure date;
- payment of any termination payment or non-competition benefit;
- the benefit of a possible supplementary pension, stating the amount of the annuity that will be paid to him and the amount provisioned for that purpose by the issuer.

2.2.2 For discussion

2.2.2.1 Oversight on funds paid to senior managers for a departure

The different case studies previously mentioned appeared when a senior manager was leaving.

They really raise the issue of how effective the AFEP-MEDEF Code rules on termination payments are. The code limits these payments to two years' remuneration and does not authorise them "*unless his or her departure is imposed, regardless of the form of this departure, and linked to a change in control or strategy.*" Moreover, the law requires them to follow the procedure of regulated agreements and to be subject to performance requirements.

In practice, it appears that **these terms, though quite strict, are likely to be circumvented**. When entering into a settlement agreement after the senior manager's duties end, the board of directors has greater latitude. Likewise, the multiplication, in a complex skein, of several different kinds of remuneration (extraordinary benefit, maintenance of multi-annual variable remuneration, maintenance of free shares and stock options, etc.) makes it possible to exceed the ceiling set for termination payments.

The AMF deems that a comprehensive approach to the amounts paid for the departure of a senior manager must prevail, and that the proposals of the High Committee in its annual report for 2015¹² are not sufficient in that regard.

Moreover, **the AMF revisits its issue to be addressed** whereby it "*wants the AFEP-MEDEF Code to develop in order to provide for the case of the conclusion of a non-competition benefit at the time of the senior manager's departure even though no clause had been previously stipulated.*" In this scenario, where no non-competition clause has been stipulated, it is only on the senior managers' departure that the decision is made. Thus, shareholders cannot resolve on this clause in advance of its implementation under the regulated agreements, contrary to the clauses stipulated before the departure. Their vote is only sought after the fact.

The AMF also revisits its discussion on the conditions for removing the attendance requirement stipulated in the free share and stock option distribution plans. While the AFEP-MEDEF Code states that a senior manager "*may not be awarded stock options or performance shares at the time of his or her departure,*" it does not regulate the option of removing an attendance requirement set out in a free share or stock option plan, although such removal may appear contrary to the spirit of this mechanism, which is to reward senior managers' long-term performance and loyalty by imposing an attendance requirement on them. The AMF wants the AFEP-MEDEF Code to evolve to include the option of removing an attendance requirement set out in a free share plan or stock option plan, with regard to the rule on capping termination payments. Like the principle of pro-rated vesting provided for multi-annual remuneration, such a principle should also apply to free share and stock option plans whose vesting date is not reached as of the departure date. As with multi-annual remuneration plans, performance requirements are not, in fact, generally evaluated until the end of the vesting period; since no share or option is officially vested before then, there is no cause to evaluate the senior manager's performance if he or she no longer works at the company.

In addition, **the two-year limit on fixed and variable remuneration set out by the Code should be specified** to indicate whether this is variable remuneration actually paid for the last financial period or for the last two periods, or target variable remuneration. It would also be best to indicate whether variable remuneration includes, in addition to annual variable remuneration, extraordinary remuneration. In this regard, the 2015 High Committee on Corporate Governance stated that multi-year variable remuneration did not have to be taken into account in calculating the ceiling¹³. We will see that if extraordinary remuneration was recognised in calculating the two year remuneration ceiling, the Code rule whereby "*any artificial increase in remuneration during the period preceding the departure should be prohibited*" would be somewhat devoid of substance.

Finally, the AMF noted the development of a practice where termination payments and non-competition benefits are paid in shares and sometimes deferred. This scenario raises the question of how to value the shares awarded to senior managers to be able to check that the ceiling set out by the code is indeed respected.

The AMF is asking the professional associations to conduct an overview of the monies and benefits that may be paid to outgoing executives, to put an end to the current circumventions and uncertainties. The Code could also specify how the ceiling should be calculated and how the funds paid out in shares in this context should be valued.

2.2.2.2 *Calculating variable remuneration owed at the end of the financial year*

Recommendation 24.2 of the AFEP-MEDEF Code requires annual reports to present "*the criteria on the basis of which this variable part is determined, the manner in which these criteria have been applied during the financial year, as compared with initial expectations, and whether the individual director's personal targets have been attained,*" without specifying what this concept of personal targets includes, particularly whether it applies solely to qualitative criteria or to all criteria. It would be helpful for the AFEP and the MEDEF to provide greater detail on this point. This recommendation implies that companies, at the end of the financial year, give information on how the board of directors or supervisory board, at their meeting setting the amount of the variable remuneration awarded to the directors and corporate officers, has evaluated the total or partial achievement of the targets it had itself determined at the start of the company year.

¹² 2015 Annual Report of the High Committee on Corporate Governance, p. 25. (Severance pay and settlement payments).

¹³ 2015 Annual Report of the High Committee on Corporate Governance, p. 23.

Among those companies that give information on how performance criteria have been applied compared with what was planned, the AMF notes a degree of variation in the detail. Some companies provide only a rather general overall appraisal, while others give very precise information. Some companies provide a table that shows the exact percentage of achievement for each of the initial targets. These descriptive elements are essential for shareholders, to understand how their senior manager's variable remuneration was calculated for the past financial year, and to check that the variable remuneration actually reflects the company's performance.

So that shareholders may more easily check the link between variable remuneration and the company's performance, **the AMF calls on the professional associations to conduct a review of the information that companies should provide for the application and achievement, at the end of the financial period, of each of the performance criteria for annual variable remuneration.**

2.2.2.3 *Performance requirements to be met over a period of several years for multi-annual variable remuneration*

With regard to the free shares and stock options, AFEP-MEDEF Code Recommendation 23.2.4 stipulates that *"the exercise by executive directors of all of the options and the acquisition of the shares must be related to serious and demanding performance conditions that are to be met over a period of several consecutive years. These conditions may be internal and/or external performance requirements, i.e. related to the performance of other companies, a benchmark sector, etc."* This requirement of appraising the performance conditions over several years is in keeping with the spirit of such long-term remuneration, the purpose of which is to reward the company's performance over several years. For instance, an option mechanism cannot set out the conditions to be met solely during the year in which it is awarded.

Because multi-annual variable remuneration is also long-term remuneration, the AMF considers that this serious and demanding performance requirement, to be met over a period of several years, should be expanded to multi-annual variable remuneration, much like what is planned for stock options.

Therefore, the AMF invites the professional associations to complete the Code's Recommendation 23.2.4 such that multi-year variable remuneration is subject to serious and demanding performance criteria that must be met over a period of several years.

2.2.2.4 *Capping multi-annual variable remuneration*

In the same way as for annual variable remuneration, multi-annual or deferred variable remuneration must be capped in such a way as to respect the requirements of AFEP-MEDEF Code Recommendation 23.2.3, which states that such remuneration *"is a maximum percentage of the fixed part."* For annual variable remuneration, this cap ultimately amounts to stating the maximum amount that can be paid to the senior manager if all performance criteria are met.

In this regard, the 2015 Annual Report of the High Committee on Corporate Governance states:

"It appears that the large majority of the mechanisms put in place by the companies choosing this mode of remuneration are correlated to the share price, whether the remuneration is paid in cash (most of the time), shares, or a combination of cash and shares. Generally, the award of "units" (by a variety of names) is dependent on quantitative and possibly qualitative criteria, and it is the value of these units at the time of unwinding that is related to the share price. Correlation to the share price, the increase in which is by its nature not restricted to a ceiling, is sometimes given as a reason for not complying with the rule whereby variable remuneration must be expressed as a maximum percentage of the fixed part. However, it is still possible to set a ceiling, in absolute terms or as a proportion of the fixed part. For options and performance shares, which are also long-term incentive mechanisms, the guide recommends, in the draft advisory shareholders' meeting resolution on remuneration, presenting their "accounting valuation ... according to the method adopted for preparing the consolidated financial statements" (generally the IFRS standard)."¹⁴

¹⁴ 2015 Annual Report of the High Committee on Corporate Governance, p. 15.

In the first part of this paragraph, the High Committee reiterates the need to set a ceiling on multi-year variable remuneration, as is set for annual variable remuneration. This makes it clear that it is a ceiling on the amount actually paid by the company to its senior manager. Investors should be aware, when the plan is put in place, of the maximum amount that the company might have to pay its senior manager as remuneration. Indeed, it is a matter of preventing the mechanisms that, in the event of a strong increase in the stock market price, result in sums that could be seen as having no link to the senior manager's actual performance, since the price could be affected by elements unrelated to that performance. Indeed, the senior manager's performance can only be appraised by comparison to that of the market in general, to measure the difference between the company's price and the average prices in the market on which the company trades.

However, in the paragraph's last sentence, the High Committee mentions stock options, stating that per the terms of the AFEP-MEDEF Code application guide, when options have been awarded during the financial year, the presentation of "say on pay" must state the options' accounting valuation. If such an accounting valuation requirement is not provided under "say on pay" for multi-annual remuneration, this accounting valuation is already included in the remuneration table for multi-annual remuneration awarded during the financial year (see Position/Recommendation no. 2009-16, "*Guide for Compiling Registration Documents.*")

This valuation, done using the *Black & Scholes* method, corresponds to the options' value on their award date. It accounts for the uncertainties in such remuneration (stock market price trend, performance requirement to be achieved) and the fact that it is not immediately available. Therefore the valuation is not necessarily representative of the real value of the remuneration that will actually be paid to the senior manager as a result of the mechanism, since the assumptions applied to the calculation must carry a degree of uncertainty.

This reference to accounting valuation implies that the ceiling on multi-annual variable remuneration should apply to its accounting valuation at the time of payment.

There are in fact two ways to conceive of the cap on variable remuneration:

- The first is to cap the accounting valuation of the multi-annual remuneration awarded. The mechanisms do not provide any ceiling on the sum that will ultimately be paid to the senior manager. This scenario amounts only to putting a percentage value on the valuation of this multi-annual remuneration (which is already shown in the remuneration tables). The lack of a limit could result in situations in which senior managers would be paid multi-annual variable remuneration in amounts that the boards had not necessarily meant to award them, if the stock market price jumps.
- The second possibility is that all multi-year variable remuneration mechanisms, when introduced, determine a maximum cash ceiling on the remuneration that could be paid in any scenario to senior managers as a result of the plans, regardless of the trend in the share's value (a ceiling expressed as an absolute value or as a percentage of fixed remuneration). If the mechanism provides for payment in shares, the ceiling should not just consist of a number of shares to be awarded, but the board should set a cash limit on the countervalue of the shares that the senior manager is likely to be awarded (e.g. a senior manager could be entitled to receive X shares within the limit of a ceiling of €X, where shares are valued at their stock market price on the date of their handover).

Therefore the AMF calls on the professional organizations to discuss caps on multi-annual variable remuneration and clarify their position on this point. In any event, when remuneration is pegged to the stock market price, attention must be paid to the "knock-on effect," i.e. to make sure that the mechanisms do not result in remunerating the market's performance but instead the specific performance of the senior manager and the company.

2.2.2.5 *Amending the criteria chosen for variable remuneration*

The code says nothing about the possibility of amending performance criteria initially determined by boards of directors or supervisory boards. This option, which does not present any problem in corporate law, may turn out to be problematic in terms of governance and transparency. For example, if market conditions change or there is an unexpected development in the competitive environment, it may become indispensable to change or adapt the criteria during the financial year so that the remuneration actually reflects the company's performance; yet a change could also conceal a deliberate choice to award a greater share of the multi-annual variable remuneration than what is owed, without this change being related to the company's performance. In addition, while setting performance criteria with an annual deadline does not raise any difficulty in appraising real performance, setting a short-term target results in questions on the performance being remunerated. In these circumstances, the companies should be especially attentive in justifying the senior manager's actual performance.

The AMF calls on the professional associations to conduct a discussion to oversee the option for boards of directors or supervisory boards to amend the performance criteria for multi-annual variable remuneration during the term of office of their senior manager(s), and to set out the communication procedures.

2.2.2.6 *Oversight of extraordinary remuneration*

The AFEP-MEDEF Code choice to process extraordinary remuneration within the section on variable remuneration may be surprising in some aspects. In one case, for variable remuneration, it is indeed about linking a portion of the senior managers' annual remuneration to the company's performance and the rules aim to ensure that the variable remuneration indeed reflects the performance of the company and the senior manager, whereas, for extraordinary remuneration, it is about remunerating the senior manager for a particular event in the company, without any requirement other than the existence of these particular circumstances. Furthermore, this requirement of "*very particular circumstances*" seems inadequate; companies should have to substantiate the existence of extraordinary, not simply particular, circumstances. Companies should also have to make sure that these extraordinary circumstances are significant and see to it that the completion of this event is not already being remunerated through annual variable remuneration.

This choice to include extraordinary remuneration among the variable remuneration also creates ambiguity on the point of whether the AFEP-MEDEF Code requirements relative to variable remuneration, such as the existence of a ceiling, the submission to performance requirements, etc., should or should not apply to extraordinary remuneration. The very nature of this remuneration, which is unforeseeable, makes it difficult or indeed impossible to apply. The issue may arise of the advisability of a link between extraordinary remuneration and performance, since particular circumstances are not necessarily linked to the company's performance.

The uncertainty of the AFEP-MEDEF Code recommendations on the subject of such remuneration could permit discrepancies compared to stricter provisions such as those applicable to variable remuneration. **Thus, the AMF considers that the professional associations should engage in a broad discussion on extraordinary remuneration.**