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2020 REPORT ON CORPORATE GOVERNANCE AND EXECUTIVE COMPENSATION IN LISTED COMPANIES

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EXECUTIVE SUMMARY

☐ RECENT DEVELOPMENTS IN GOVERNANCE

The first part of this report is devoted to topical news and recent developments regarding governance. This year, due to the exceptional context and difficulties related to the Covid-19 pandemic, the main topical issue concerns the functioning of general meetings. This part mainly deals with the holding of general meetings under the restrictions imposed by exceptional legislative measures.

In substance, a contrasting evaluation can be made of the general meetings held in 2020. Within tight deadlines, issuers made considerable efforts to ensure the holding of their general meetings in a context marked by an unprecedented health crisis, an unstable normative framework and an uncertain and weakened economic situation.

The very great majority of issuers decided to hold their general meeting "in camera", this possibility having been offered by the exceptional conditions established by Order 2020-321 of 25 March 2020. The impossibility of attending these general meetings undermined certain shareholder rights. However, it should be noted that the average quorum in 2020 remained stable by comparison with that for general meetings held in 2019 and that the rate of opposition to the resolutions submitted for voting by the shareholders increased sharply this year, reflecting the persisting vigour of shareholder involvement in this exceptional context.

More than 80% of the 118 companies in the sample offered their shareholders a live and/or recorded retransmission of the AGM. Conversely, some companies provided no retransmission, even though it was impossible for shareholders to attend the AGM. Just over one-quarter of the sample granted extra time to enable the shareholders to ask questions in writing ahead of the AGM. Some companies experimented with internet platforms to receive live questions and comments from shareholders during the meeting. A large number of companies allowed their shareholders to vote over the internet before the general meeting, via a secure platform. However, unlike certain European issuers, no French issuer offered the possibility of carrying out electronic voting live during the AGM. For slightly less than about twenty companies, only voting by correspondence or proxy voting was possible this year.

The AMF reiterates its commitment to the effective exercise of all shareholders' rights in general meetings. In the digital era, it is important that, apart from the right to attend meetings physically, the shareholders of listed companies may be offered procedures for voting and taking part in the general meeting which enable them to exercise their prerogatives - remotely and live - in similar conditions to those available to them, during the session, in general meetings. Such progress requires joint work on a long-term basis by the various stakeholders, including the centralising institutions, regarding technical conditions but also costs. It is therefore desirable that the experience accumulated on the occasion of this general meeting season with the means developed or activated to hold them in camera should fuel more general thinking on their organisation from a perspective of pertinent and effective shareholder dialogue.

☐ INFORMATION PROVIDED IN THE CORPORATE GOVERNANCE REPORT

The second part discusses the information provided by companies in the corporate governance report with, like each year, a study on the information provided by companies concerning executive compensation. The aim is both to check that the information published by listed companies complies with their obligations in this respect and, where appropriate, to recommend changes in corporate governance practices. The study covers a sample of 58 companies of the SBF 120, including 36 companies of the CAC 40.

1. CONDITIONS FOR THE AWARD OF COMPENSATION

Pursuant to Article L. 225-37-2.I. of the Commercial Code[1] "*in companies whose shares are admitted to trading on a regulated market, the board of directors shall establish a compensation policy for company officers. […]"*. The practical procedures were amended by Order 2019-1234 of 27 November 2019.

The companies in the sample, and especially the CAC 40 companies, clearly include in their information on compensation the new information required by Articles L. 225-37-3[2] and R. 225-29-1[3] of the Commercial Code. In particular, they indicate in their compensation policy the levels of the fixed, variable and exceptional components respectively, and the criteria for determining them.

However, the information concerning the level of achievement of the performance criteria is not always provided in detail or, for long-term cash compensation, is provided only at the time of payment (i.e. subsequent to the final award). But the law now requires that companies explain how the performance criteria were applied by the Board.[4]

Moreover, contrary to the recommendation of the AFEP-MEDEF Code, about thirty companies have no employee director on the Compensation Committee. Given this large number, the AMF asks the HCGE to keep watch on this issue. Following the reform provided by the PACTE Law, cases of non-compliance with the recommendation of the AFEP-MEDEF Code on this aspect should become increasingly rare.

The exceptional health crisis context in 2020 may lead some issuers to alter certain components of compensation or change pre-set performance criteria. Now, although no component of compensation may be determined, awarded or paid by the company if it does not comply with the approved compensation policy,[5] the law provides that "*in exceptional circumstances, the board of directors may depart from application of the compensation policy if this deviation is temporary, consistent with the corporate interest and necessary to ensure the company's survival or viability".*[6] 29 companies, out of the 58 in the sample, thus plan explicitly, in their compensation policy, to make use of this possibility for 2020, notably to change the performance criteria. Although the current health crisis is an exceptional circumstance, the other three legal conditions, which are cumulative and binding, must be met in order to depart from the compensation policy as approved by the shareholders.

Some companies have planned, in their compensation policy, to grant a certain discretionary power to the Board. The AMF stresses that a fair balance must be found between the transparency of the compensation policy and the room for initiative kept by the Board. It is incumbent on companies to define precisely, in the compensation policy, this leeway left to the Board, and to substantiate the need for it.

The company must also submit any major change in compensation policy to the general meeting for approval.[7]

Those companies that refer to the AFEP-MEDEF Code and that make changes in compensation must also provide evidence that they have applied the following provisions of said code. For example, for annual variable compensation

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1 *Article L. 225-37-2 of the Commercial Code concerns public limited companies and European companies with a board of directors, but similar provisions apply to public limited companies and European companies with a supervisory board and management board (Article L. 225-82-2 of the Commercial Code), and to partnerships limited by shares (Article L. 226-8-1 of the Commercial Code).*

2 *Article L. 225-37-3 of the Commercial Code concerns public limited companies and European companies with a board of directors, but its provisions also apply to public limited companies and European companies with a supervisory board and management board (referenced by Article L. 225-68 of the Commercial Code), and to partnerships limited by shares (referenced by Article L. 226-10-1 of the Commercial Code).*

3 *Article R. 225-29-1 of the Commercial Code concerns public limited companies and European companies with a board of directors, but similar provisions apply to public limited companies and European companies with a supervisory board and management board (Article L. 225-56-1 of the Commercial Code), and to partnerships limited by shares (Article L. 226-1-1 of the Commercial Code).*

4 *Article L. 225-37-3 8° of the Commercial Code.*

5 *Article L. 225-37-2, III, paragraph 1, of the Commercial Code.*

6 *Article L. 225-37-2, III, paragraph 2, of the Commercial Code.*

7 *Article L. 225-37-2, paragraph 2, of the Commercial Code.*

companies must provide evidence that they have established pre-set criteria,[8] and companies may change the performance conditions relating to long-term variable compensation only in case of particular circumstances which maintain the alignment of interests of the shareholders and the beneficiaries.[9]

2. COMPLIANCE OF COMPENSATION WITH THE AFEP-MEDEF CODE

In their corporate governance report, companies show the compensation awarded for or during the previous financial year. The AMF reiterates that it recommends that all compensation be set out in the summary table of compensation[10], even when it results from a proposal for a change in the compensation policy or when it is exceptional (including signing bonuses and/or severance pay).

The main observations are as follows:

- Only a few companies actually paid in 2019 or plan, in their 2020 compensation policy, to pay one of their executives a larger fixed compensation or total compensation this year than last year, notably in the context of a merger with other companies. However, fixed compensation should, in principle, be revised only after a relatively long time interval; in the event of an increase in the fixed (or total) compensation substantiated by comparative studies, the AMF recommends that the company provide detailed explanations, e.g. by giving the characteristics of the sample group of comparable companies chosen, to provide evidence of the compliance of this increase with Article 25.3.1 of the AFEP-MEDEF Code;[11]
- In the sample of 58 companies, long-term variable compensation[12] represented on average 33% of the total 2019 compensation of chairmen and chief executive officers, and chief executive officers. The AMF reiterates that it "*recommends […] that the corporate governance report and the registration document shall include, in addition to the compensation policy and the compensation for the last financial year, an overall view of the application [of this policy] over several years"*[13] and urges issuers to present a summary table showing all current plans on a nominal basis (including plans in the vesting period);
- Five companies in the sample awarded or paid exceptional compensation to their executive corporate officers in 2019, for an often significant amount. Many other companies plan to do so through their 2020 compensation policy. The AMF observes that, from reading the universal registration documents it is sometimes hard to distinguish between what is paid as annual variable compensation and what is paid as exceptional compensation.
- Nine companies in the sample say they are not in compliance with the AFEP-MEDEF Code for compensation that could be due on the occasion of, or subsequent to, departures (severance pay, non-competition agreement and pension). When executives leave, most of the companies in the sample decided, in 2019, to maintain the unvested performance shares. While it is understandable that the departure of an executive corporate officer in case of retirement should not systematically entail the loss of all the multi-annual variable compensation, the AMF recommends, as it had specified before in 2014 and 2018, establishing a mechanism for vesting on a prorated basis. However, in the case of removal from office, non-reappointment or resignation (unless the reason for the non-reappointment or resignation is retirement or disability), it recommends eliminating any payment of multi-annual variable compensation.

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8 *Article 25.3.2 of the AFEP-MEDEF Code: "The board defines the criteria that make it possible to determine the annual variable compensation as well as the objectives to be achieved. These must be precise and, of course, predetermined."*

9 *Article 25.3.3 of the AFEP-MEDEF Code: "Only under exceptional circumstances (substantial change to scope, unexpected change in the competitive context, loss of relevance of a reference index or a comparison group, etc.) is it permissible to modify the performance conditions during the period in question. In this case, these changes are made public following the Board meeting at which they were decided on. In the event of a change to the performance conditions, the alignment of the interests of the shareholders with those of the beneficiaries must be maintained."*

10 *Table 2 of AMF Recommendation DOC-2012-02 and appendix to the AFEP-MEDEF Code.*

11 *Article 25.3.1 of the AFEP-MEDEF Code: "In principle, fixed compensation may only be reviewed at relatively long intervals. If, however, the company opts for an annual increase in the fixed compensation, this increase must be modest and must respect the principle of consistency set out in § 25.1.2. In the event of any significant increase in compensation, the reasons for this increase must be clearly indicated.*

12 *This long-term compensation is usually in the form of performance shares."*

13 *AMF Recommendation DOC-2012-02.*

- 10 companies indicate that they suspended, but maintained, the employment contract of one of their executive corporate officers.[14] Two came into compliance in 2019 and 2020 and two specify that the situation is temporary.[15] The AMF reiterates that it recommends showing in the universal registration document the stipulations of executives' employment contracts which may impact executive compensation, and in particular those relating to severance pay.[16]

3. THE PAY RATIO OR MULTIPLE OF COMPENSATION

The pay ratio was introduced in 2019 by the transposition into the PACTE Law of the new directive on shareholder rights (hereinafter, the "Shareholder Rights Directive II" or "SRD II"). This is new information provided in the corporate governance report, designed to place the compensation of executive corporate officers in perspective with that of the employees over the five most recent financial years.

The AMF finds a great disparity in the results of the ratios, which can be explained not only by differences regarding the amount of compensation but also by differences regarding the employee scope taken for comparison and, more generally, the methodology adopted.

As a reminder, the publication of ratios between the compensation of each of the executives concerned and the average and median compensation of the employees is required by the law concerning employees of a listed company.[17] Accordingly, those companies which do not present such a ratio at the corporate level must provide justification.

40 companies present a pay ratio covering a more extensive scope[18] than the mere scope of the listed company concerned, on the basis of a scope that they themselves consider representative. The regulator recommends that companies specify this scope and explain how the chosen scope is representative and why, possibly, representativeness is not assessed at the group level. Those companies that refer to the AFEP-MEDEF Code must also explain how they are in compliance with this code which stipulates that: "*those companies that have no or few employees in France relative to their total workforce shall take into consideration a more representative scope*[19] *relative to the payroll or workforce in France of the companies which they control fully within the meaning of Article L.233-16 II of the Commercial Code*" and specifies that 80% of the workforce in France can be considered a significant scope.

The AMF observes that, from reading the corporate governance report, it is difficult to understand the procedures for calculating the ratios. The AMF recommends that companies recap the components of the executive compensation taken into consideration in the calculation and link it to the total compensation, presented elsewhere in the compensation report. Insofar as the law requires, without more details, taking into consideration "*executive compensation*" in calculating the ratio, the AMF recommends that those companies which might have taken into consideration a more restricted compensation than the executive's total compensation prove their transparency by

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14 *This recommendation applies to the chairman, the chairman and chief executive officer, or the chief executive officer in companies with a board of directors, to the chairman of the management board, to the sole chief executive officer in companies with a management board and a supervisory board, and to the statutory managers of partnerships limited by shares.*

15 *Article 22 of the AFEP-MEDEF Code: "When an employee becomes a company officer, it is recommended to terminate his or her employment contract with the company or with a group company, whether through contractual termination or resignation (when the employment contract is maintained, it is suspended in accordance with established legal precedents.) This recommendation applies to the Chairman and Chief Executive Officer or Chief Executive Officer in corporations with Boards of Directors, to the Chairman of the Management Board, to the sole Managing Director in companies with a Management Board and a Supervisory Board and to the statutory managers of partnerships limited by shares. It does not apply to employees of a group of companies who are company officers of a subsidiary of the group, whether listed or not."*

16 *Including benefits related solely to the premature termination of the employment contract and unrelated to the corporate office (AMF Position-Recommendation DOC-2009-16).*

17 *Article L. 225-37-3 6° of the Commercial Code: "For the chairman of the board of directors, the chief executive officer and each deputy chief executive officer, the ratios between the level of compensation of each of these executives and, on the one hand, the average compensation on a full-time equivalent basis for company employees other than company officers, and on the other hand the median compensation on a full-time equivalent basis for company employees other than company officers.*

18 *The AMF considers that an "enlarged" or "extended" scope, or a scope "considered more representative", is one which goes beyond the scope of the listed company without necessarily representing 80% of the workforce in France.*

19 *80% of the workforce in France can be considered a significant scope.*

specifying what are the components taken into consideration, explaining why the other components of compensation were not, and recalling the amounts of those other components.

The way in which long-term compensation is taken into consideration also has a major impact on calculation of the ratio. This compensation is not negligible (because for the sample group it accounted for one-third of compensation in 2019), so companies should describe in detail the methodology adopted to include it in the calculation, and its practical application.

4. VOTING AT GENERAL MEETINGS

The system governing the compensation of executive corporate officers is organised around a triple vote at the ordinary general meeting: an *ex ante* vote, on the compensation policy for company officers and on any major change in it, an *ex post* vote, on the content of the corporate governance report presenting details of the compensation paid or awarded to company officers in the past financial year, and a third vote of approval on which depends the effective payment of the variable and exceptional components of compensation awarded in a given financial year.

Regarding the *ex ante* vote, the AMF notes that companies which have planned a change in compensation policy will have to consider whether such a vote will or will not be necessary regarding the adjustments made in the context of the pandemic, especially in the event of a change in the variable compensation criteria. Companies will have to describe the impact of the proposed change in order to justify the magnitude of the change and the choice of submitting it to the shareholders or not for voting. The AMF will remain attentive to ensure that issuers maintain consistency between waivers and reductions in compensation announced in 2020 in the context of the pandemic, and the changes presented to the 2021 General Meeting.

Regarding the third vote, as a reminder: "*The variable or exceptional components of compensation awarded for the past financial year to the chairman of the board of directors or the supervisory board, to the chief executive officer, to deputy chief executive officers, to the chairman of the management board, to other members of the management board or to the sole chief executive officer, can be paid only following approval by the general meeting of the compensation components for the person concerned […]*".[20] Some issuers adopt a restrictive interpretation of the word "*paid*" and consider that only cash compensation is concerned. The practice of excluding from the penalty for non-payment – in the event of disapproval by the general meeting of the compensation components of an executive corporate officer for the past financial year (*ex-post say on pay*) – the compensation in shares awarded for the past financial year raises questions with regard to the letter of Article L. 225-100, III, para. 2 of the Commercial Code and in any case with regard to the legislator's intention.

5. OTHER NOTABLE FINDINGS REGARDING CORPORATE GOVERNANCE

As part of the notable findings regarding governance, the AMF notes an insufficient proportion of independent directors on the Board and/or committees. The AMF reiterates the importance of avoiding a large number of representatives of specific interests on the Board, which is deemed to act in the corporate interest of the company. More generally, the AMF recommends that companies justify precisely deviations from the AFEP-MEDEF Code for failure to comply with the rate of independence, even when pacts have been signed. It also invites the AFEP and MEDEF to try to determine the minimum periods of time and the conditions to be complied with to be able to consider that a non-independent director has become independent as a result of changes in their personal situation.

Another notable finding concerns the small amount of information provided by companies on the tendering procedure for the reappointment of the statutory auditors. The AMF reminds the companies concerned that they must provide this information and invites them to present it in the Board's report to the general meeting.

20 Article L. 225-100 III of the Commercial Code.

Regarding compliance with previous AMF recommendations and suggested avenues for thought, the AMF observes that companies mentioned by name in the previous report have clearly taken into consideration the comments expressed and have changed their practices in the right direction.

☐ INFORMATION PROVIDED BY PROXY ADVISERS

In accordance with Article L 621-18-4 of the COMOFI introduced by the PACTE Law, the third part of the report concerns the information provided by proxy advisers, which institutional investors frequently use to obtain an analysis of listed companies' draft resolutions, and voting recommendations. The three actors whose practice was studied by the AMF, ISS, PROXINVEST and GLASS LEWIS, complied with the code of conduct of the organisation called the *Best Practice Principles Group* ("BPPG"). A supervisory body tasked with monitoring and supervising the application of the principles of this code was established in 2020.

In addition to these "soft law" rules, legislative measures were adopted in the framework of the PACTE Law to govern the practices of proxy advisory firms.

For example, the advisers are now obliged to disclose information relating to potential conflicts of interest and commercial relationships that could influence the production of their research, advice and voting recommendations. In this regard, all the proxy advisers consider that none of their current commercial relationships is liable to influence their research, advice and voting recommendations. According to the proxy advisers' websites, transparency regarding conflicts of interest has been established in research reports.

In accordance with Articles L. 544-4 and R. 544-1 of the Monetary and Financial Code, proxy advisers must also now publicly disclose information in relation to the preparation of their research, advice and voting recommendations. This publication must take place each year, so the AMF invites the advisers to present all this information in an annual document, in addition to the information provided on their website. The process of working out the voting policy involves a more or less significant number of stakeholders depending on the proxy adviser. The AMF invites proxy advisers to publish and comment on the proposed changes. It observes that information concerning the preparation of research, advice and voting recommendations ought to better identify whether, and where applicable how, specific national features (in terms of market, legislation and regulations) are taken into consideration.

The AMF continues to recommend dialogue between proxy advisers and issuers. In this regard, the regulator notes that from now on, pursuant to Article R. 544-1 of the Monetary and Financial Code, proxy advisers must indicate each year whether or not dialogue has taken place with the companies that were the subject of their research, advice or voting recommendations. The AMF reiterates that it is important that issuers be able to have access to the data concerning them in order to be able to report any factual errors or omissions. The decision-making process of proxy advisers should also be clarified by each of them.

PART 1 - RECENT DEVELOPMENTS IN GOVERNANCE

1. THE FUNCTIONING OF GENERAL MEETINGS

This first part discusses topical issues concerning general meetings, namely the holding of general meetings in the context of the pandemic (1.1.), shareholder activism (1.2.), the methodological guide to processing votes at general meetings (1.3.), and the identification of shareholders and confirmation of votes (1.4.).

1.1. The holding of general meetings in France in the context of the pandemic

A key moment for information of the shareholders, exercising their policy prerogatives and interacting with the company officers, the general meeting is a fundamental component of shareholder democracy. As part of its legal duties and responsibilities, which include the protection of savings and investor information, the stock exchange regulator has always shown concern, from the first months of the COB's existence,[21] for the effectiveness of shareholders' rights in general meetings, and in particular the right to information.

In 2020, the general meetings of listed companies took place in the exceptional context of the Covid-19 pandemic which profoundly affected their proceedings. A contrasting evaluation[22] can be made of the general meetings held in 2020. Within tight deadlines, issuers made considerable efforts to ensure the holding of their general meetings in a context marked by an unprecedented health crisis, an unstable normative framework and an uncertain and weakened economic situation. The great majority of these meetings were held "in camera", de facto undermining certain shareholders' rights. Although it was impossible for shareholders to attend these general meetings, it should be noted that the average quorum in 2020 remained stable by comparison with that for general meetings held in 2019 and that the rate of opposition to the resolutions submitted for voting by the shareholders increased sharply this year.

To enable general meetings to be held in this unprecedented context, prohibiting or restricting gatherings, exceptional legislation was passed resulting in a temporary amendment of certain provisions of the Commercial Code. Taken on the basis of Law No. 2020-290 of 23 March 2020 urgently in response to the Covid-19 pandemic, Order 2020-321 of 25 March 2020 concerning the adaptation of the rules for gathering and the proceedings of meetings and governing bodies of private legal persons and entities deprived of legal personality due to the Covid-19 pandemic adapted, temporarily, the convening, information, participation and proceeding rules applicable to general meetings, to allow companies to hold their general meeting without their shareholders being convened physically.

This order was supplemented by Decree 2020-418 of 10 April 2020 concerning the adaptation of the rules for gathering and the proceedings of meetings and governing bodies of private legal persons and entities deprived of legal personality due to the Covid-19 pandemic.

The application of this order and this Decree 2020-418, which was originally supposed to be terminated on 31 July 2020, was extended until 30 November 2020 by Decree 2020-925 of 29 July 2020.[23]

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21 *See: Commission des Opérations de Bourse, Report to the President of the Republic, 1968, pp. 24 et seq. The first COB report devotes several pages to the holding of general meetings and "the new legislation on general meetings". It is noted in particular that "the supervision performed by the Commission des Opérations de Bourse concerns not only mandatory periodic publications, but also the information given to general meetings and that provided spontaneously regarding the corporate life. […] The convening of all the shareholders in an ordinary general meeting is an ideal opportunity for companies to present their activity. Having to request approval of the accounts for the past financial year, the Board of Directors must explain them and justify the changes that have taken place compared with prior years. It is the perfect time to present an overall view of a company's structure and functioning, to outline prospects and express intentions."*

22 *See also: Report of the High Committee on Corporate Governance, November 2020, p. 12: "The health situation meant that nearly all companies held their 2020 meeting in camera. Most of them made real efforts to facilitate expression by the shareholders (relaxation of the rules on receiving questions in writing, online chats during the meeting, replies to "oral" questions received before or during the meeting, etc.) and shareholder information (more comprehensive pre- and post-meeting documentation published online, retransmission of the meeting by live videoconferencing, and immediate reporting of voting results). In contrast with these good practices, the High Committee noted that some companies limited the information disseminated, did not offer a retransmission of the meeting or reported voting results only after a time lag."*

23 *Decree No. 2020-925 of 29 July 2020 extending the period of application of Order 2020-321 of 25 March 2020, Decree No. 2020-418 of 10 April 2020 and Decree No. 2020-629 of 25 May 2020.*

The most emblematic measure of this regime is the possibility given to issuers, by derogation, to hold their meeting "in camera". A meeting "in camera" is a meeting held without the shareholders being able to attend the session by being present physically. The exceptional regime resulting from Order 2020-321 requires that a condition be met in order to be able to hold a meeting "in camera": the place where it was planned for the meeting to be held must be assigned, on the date of convocation (in the broadest sense, which includes, for listed companies, the date of the notice of meeting) or the date of gathering, by an administrative measure restricting or prohibiting collective gatherings for health reasons. It is incumbent on each issuer to assess the existence of this condition in light of changes in the administrative measures taken in response to the health crisis.

These provisions made it possible to "*organise the suspension of a right which is nevertheless fundamental for the shareholder: that of being able to "take part", literally, in a general meeting*."[24] In the context of the health crisis, and given the timetable for general meetings, nearly all listed companies took advantage of these measures to organise their meeting "in camera". As a consequence, this year the shareholders of these companies were only able to exercise their voting right remotely – and in practice before the meeting: vote by correspondence (via a voting form), voting proxy (or mandate) or, where applicable, vote online via a secure platform.

Although this arrangement enabled general meetings to be held in the exceptional context of the health crisis, the result was to undermine shareholders' rights,[25] e.g. the right to take part in the discussion,[26] and in particular the right to ask oral questions[27] or the right to submit new resolutions during the session.[28]

There has been criticism, notably by savers' representatives, of the derogations to shareholders' rights created by these exceptional conditions.[29] Many writers have also expressed concern at the undermining of shareholders' rights, regretting in particular the special powers given to management.[30] Others fear a possible perpetuation of the derogatory measures limiting shareholders' rights to take part actively in important decisions for the company and be informed

24 *H. Le Nabasque, "Le droit des sociétés face au covid-19", Bull. Joly Sociétés, April 2020, No. 04, p. 50.*

25 *"Article 4 of the Order of 25 March 2020 thus, from the legal viewpoint, seriously undermines the functioning of companies, because it is the prerogatives of the shareholders exercised in the sovereign corporate body empowered to take the most important collective decisions for the company's activity and its development - the general meetings of shareholders - that are affected. Note that this undermining of the functioning of the statutory corporate bodies entails an undermining of shareholders' status, because they are deprived of some of their rights. (Th. Bonneau, "L'article 4 de l'ordonnance n° 2020-321 du 25 mars 2020 suspend-il temporairement les droits attachés à la qualité d'actionnaire ?", JCP E, No. 41, 8 October 2020, act. 674).*

26 *The French Civil Code consecrates this fundamental right by stipulating that "all shareholders are entitled to take part in collective decisions" (Art. 1844). As has been noted, "all shareholders, and all partners, must be able to take part in the meeting (Article 1844 of the French Code of Civil Law), and hence in the discussion, and the violation of this principle is liable to penal sanction (Article L. 242-9 1° of the Commercial Code). Therefore, it would not be wise to stipulate, in the articles of association or internal regulations, excessively rigid rules on this point, consisting for example in limiting beforehand the speaking time assigned to everyone or granting the chairman the permanent sole power to declare the discussion closed when he or she might consider it useful whereas shareholders might want to prolong the discussion." (AFEP, Vade-mecum à l'attention des membres du bureau des assemblées générales, produced in cooperation with the ANSA, March 2011, updated in November 2015, p. 25).*

27 *"In theory all shareholders' questions must be answered." (AFEP, Vade-mecum à l'attention des membres du bureau des assemblées générales, produced in cooperation with the ANSA, March 2011, updated in November 2015, p. 35).*

28 *Article R. 225-78 3° of the Commercial Code.*

29 *In a press release of 25 September 2020 relating to meetings in camera, for example, the Société Française des Analystes Financiers (SFAF) stated that it "was concerned about meetings held electronically, especially in camera" (SFAF, "Assemblées générales, où en est le dialogue actionnarial ?", Press release, 25 September 2020). The SFAF stressed that "recent work by Jerusalem University highlighted a form of impoverishment of shareholder dialogue and its hollowing out by the transition, for a given company, from a meeting convened physically to a meeting held virtually." It specifies that the "governance" working group of the SFAF "is concerned about a possible renewal of these orders as is, whereas the demand for shareholder dialogue is becoming significantly more intense". It also notes that the aforementioned measures "de facto ruled out shareholder discussion of the measures of public policy such as the dismissal of directors during the meeting, which is a fundamental point of balance in the Law of 1966 between the power of the shareholders and that of the management". The SFAF also asks "the marketplace authorities to guarantee the fully deliberative nature of the general meeting so as to protect the vote of each shareholder".*

30 *"While the new text facilitates the use of remote consultation techniques, it nevertheless hands over control to management alone: it is upon their decision that meetings will be able to be held without the physical presence of their partners or shareholders. In other words, the decision to hold a meeting remotely, which until now depended solely on the will of the shareholders expressed in the articles of association, has been temporarily transferred to the management bodies. Some regret a temporary reversal of the principle of the hierarchy of the statutory corporate bodies enjoyed by public limited companies, and which is in fact a principle of separation of the statutory corporate bodies, each being sovereign in its own sphere" (A. Couret, J.-J. Daigre, C. Barrillon, "Les assemblées et les conseils dans la crise", D. 2020, p. 723).*

appropriately.[31]

Concerned about the possible consequences of the health crisis for the effectiveness of shareholder democracy, as of 6 March 2020 the AMF published a press release reminding the shareholders of listed companies that they can vote at general meetings without being physically present there, and encouraging remote voting in the context of the health crisis.[32] On 27 March 2020, the AMF published a second press release[33] informing shareholders and listed companies of the exceptional measures taken for the organisation of general meetings in this context. In this press release, the AMF also encouraged issuers to comply with certain good practice rules, notably to ensure appropriate information for shareholders in this exceptional context. In order to facilitate shareholder information, some issuers published all or part of the AMF's press releases on the pages of their website dedicated to their general meeting.

In its press release, the AMF also reminded issuers that, if they considered it advisable in this context, they could postpone the date of their general meeting, notably under the conditions provided for by Order 2020-318 of 25 March 2020.[34] The AMF specified that those listed companies that wished to postpone holding their general meeting had to inform their shareholders of this as soon as possible by a press release with effective and full dissemination.

In principle, the general meeting should be held within six months following closing of the accounts. Since most issuers close their financial year on 31 December, these companies therefore had until 30 June to bring the shareholders together in a general meeting and proceed with approval of the accounts and the allocation of earnings. In light of the health crisis, Order 2020-321 of 25 March 2020 exceptionally adapted this deadline. Subject to certain conditions, the deadline of six months imposed on trading companies to approve their annual financial statements was extended by three months. For this legal deadline for approval of the accounts to be extended by three months, certain conditions must be complied with:

- (i) The accounts were closed between 30 September 2019 and the date of expiry of a period of one month following the date of termination of the health state of emergency;
- (ii) The accounts were not yet approved on 12 March 2020;
- (iii) If a statutory auditor was appointed (voluntarily or to comply with legal obligations), it has not yet issued its report on the accounts at 12 March 2020.

It should be noted that European Companies (SEs) and European Cooperative Societies (SCEs) cannot benefit from this derogatory measure because the holding of their general meetings is governed by Regulations (EC) No. 2157/2001 and 1435/2003, under the terms of which general meetings must in principle take place within six months from the end of the financial year. Published in the Official Journal of the European Union of 27 May 2020 (OJEU, L165/25), Regulation (EU) 2020/699 of 25 May 2020 establishing temporary measures concerning the general meetings of European Companies (SEs) and European Cooperative Societies (SECs) authorised these companies to hold their general meeting within twelve months from the end of the financial year, provided that it take place no later than 31 December 2020. This regulation has been applicable since 28 May 2020, noting that it is an exceptional and derogatory measure applying only for general meetings that are to be held in 2020.

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31 *"Due to the seriousness of the harm caused by the Order of 25 March 2020, it may not be extended beyond the period indicated by the order itself (see, however, Amdt No. 1112, after Art. 43 ter, draft law for the acceleration and simplification of public action, AN, 24 Sept. 2020), without profoundly altering the functioning of companies and the status of the shareholder, even though companies are, from an economic viewpoint, the driving forces of the country and it is the shareholders who take risks, which gives them the right to take part actively in important decisions of the company and to be informed appropriately, the right to be informed being obviously dependent on the right to ask questions and propose amendments to resolutions." (Th. Bonneau, "L'article 4 de l'ordonnance n° 2020-321 du 25 mars 2020 suspend-il temporairement les droits attachés à la qualité d'actionnaire ?", JCP E, No. 41, 8 October 2020, act. 674).*

32 *AMF, Press release relating to the general meetings of listed companies, 6 March 2020.*

33 *AMF, Covid-19: The AMF informs shareholders and listed companies of the exceptional measures taken for the organisation of general meetings, press release, 27 March 2020. An update of this press release was published on 17 April 2020, following the publication of Decree No. 2020-418 of 10 April 2020 concerning the adaptation of the rules for gathering and the proceedings of meetings and governing bodies of private legal persons and entities deprived of legal personality due to the Covid-19 epidemic.*

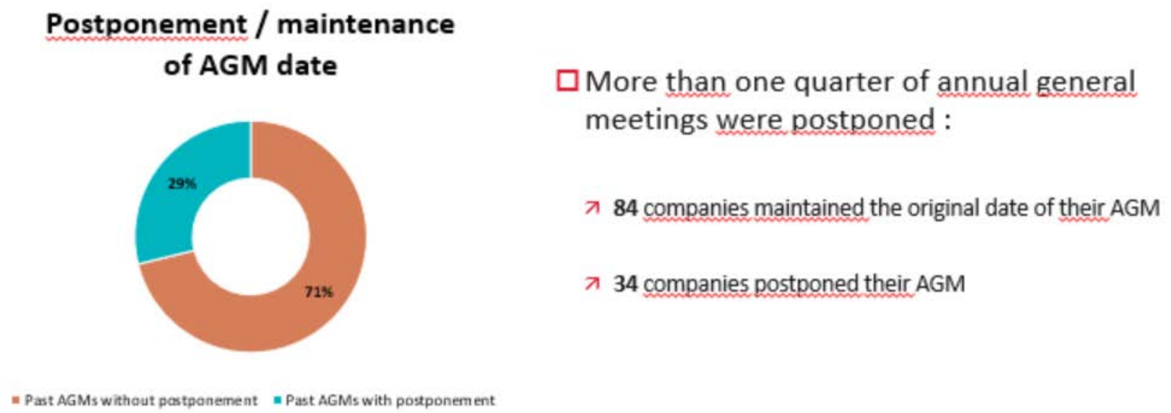
34 *Order 2020-318 of 25 March 2020 concerning the adaptation of the rules relating to the establishment, closing, auditing, review, approval and publication of the accounts and other documents and information that private legal persons and entities deprived of legal personality are required to submit or publish in the context of the Covid-19 epidemic.*

Taking as sample the 118 companies of the SBF 120 (index as established on 31 March 2020) whose general meeting was held between the months of January and September 2020, several findings and observations (expanded on below) can be presented regarding this general meeting season. It is specified that two companies[35] in the sample held their meeting in January, i.e. before the health crisis. The two SBF 120 companies[36] whose annual general meeting will be held in November do not form part of the sample.

☐ Procedures for holding and retransmission of the general meeting

The first significant fact, directly related to the health crisis, is that the number of general meetings that were postponed this year represents 29% of the companies in the sample. The average length of these postponements is 47 days relative to the date originally announced. Usually, the general meetings were postponed until June. The issuers concerned took the decision to postpone their general meeting in the highly commendable hope of a future improvement in the health conditions and a corresponding alleviation of the measures restricting gatherings. This number of postponements is significant by comparison with previous years. However, it should be viewed in the perspective of the context which led to these postponements: in the exceptional circumstances of the health crisis, the companies in the sample did not massively make use of the potential for postponement offered by the aforementioned legal measures.

With the exception of one company,[37] all the companies in the sample which postponed their general meeting informed their shareholders of the new procedures for holding the general meeting, notably by publishing in the Bulletin des Annonces Légales Obligatoires (BALO), in accordance with the regulations in force, a notice of convocation indicating the date, the time, and the procedures for taking part in the postponed meeting.



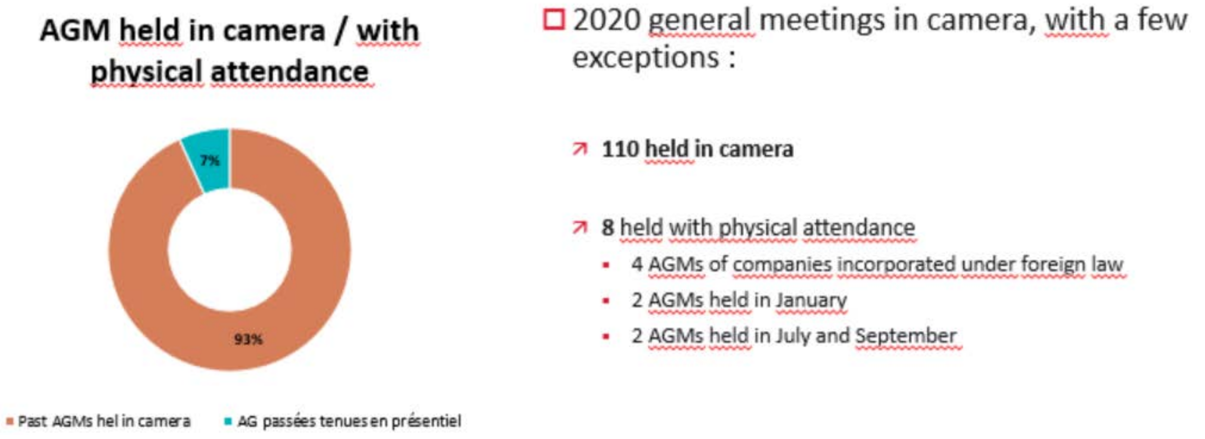
In 2020, the great majority of general meetings were held in camera. With the exception of four general meetings of companies under foreign law, two general meetings which were held in January and two general meetings which were held in the presence of the shareholders, in July and September, after a relaxation of the measures restricting

35 *Sodexo and Trigano.*

36 *Companies therefore excluded from the sample: Eutelsat (general meeting on 5 November 2020) and Pernod Ricard (general meeting on 27 November 2020).*

37 *Sartorius Stedim Biotech, for which only the notice of convocation relating to the meeting that was initially to be held on 24 March 2020 was published on 9 March 2020 in the BALO (whereas the general meeting was postponed to 24 June) and whose corporate documentation appearing on the website indicated – and still indicates – the old date of the meeting.*

gatherings,[38] all the other companies in the sample, i.e. 110 out of 118 companies, held their 2020 annual general meeting without the physical presence of the shareholders.[39]



In order to inform shareholders as well as possible, especially in the exceptional context of general meetings held "in camera", the AMF encouraged issuers to "*retransmit the general meeting live, in audio or video format, by streaming or by any retransmission process available to the shareholders*".[40]

It appears that the companies in the sample mostly (73 %) disseminated their general meeting - both live and recorded - using audio or video retransmission facilities, thus allowing their shareholders to have extensive virtual access to their meeting.

A few companies carried out dissemination exclusively live (eight companies) or exclusively in recorded form (three companies).

Lastly, 20 companies in the sample did not propose any retransmission - either live or in recorded form - of their meeting, which may be regretted, especially in a context in which shareholders are deprived of the possibility of attending the general meeting.

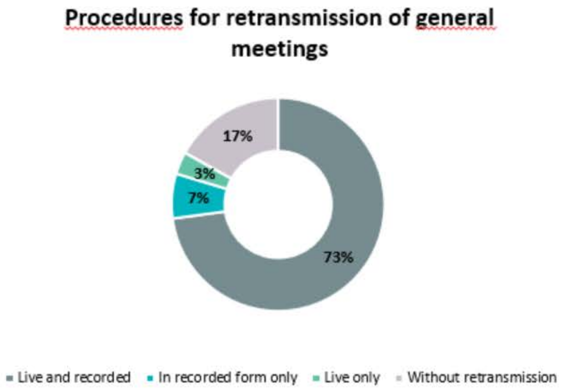
Note, moreover, that a few rare companies disseminated a pre-recorded video several days before the date of their general meeting.[41]

38 *This concerns the company Iliad, whose notice of convocation specified that the general meeting of 21 July would be held "in the presence of the shareholders and of those persons entitled to attend, in conditions that would allow compliance with the hygiene and social distancing measures stipulated by the regulations in force". It also concerns the company Soitec, although the notice of meeting indicated that "moreover, in view of the circulation of the Covid-19 virus and the government's recommendations aimed at avoiding public gatherings, the Board of Directors invites you to be very cautious in this context, and recommends that each shareholder preferably choose voting by correspondence or a proxy for the chairman rather than a physical presence."*

39 *Note that some general meetings not concerning approval of the annual financial statements for financial year 2019 were not taken into consideration in the sample. This is the case, for example, of the ordinary general meeting of Bouygues, which was held on 4 September 2020, four months after the combined general meeting of said issuer for the 2019 financial year, which was held on 23 April 2020. It is noteworthy that the Bouygues general meeting of 4 September 2020 was not held in camera. However, the issuer indicated to the shareholders that "in view of the circulation of the SARS-CoV-2 virus and the government's recommendations aimed at avoiding public gatherings, the Board of Directors invites you to be very cautious in this context, and recommends that each shareholder preferably choose voting by correspondence or a proxy for the chairman rather than a physical presence".*

40 *AMF, Covid-19: The AMF informs shareholders and listed companies of the exceptional measures taken for the organisation of general meetings, press release, 27 March 2020.*

41 *See notably L. Boisseau, "La curieuse assemblée générale d'Elior, première à se tenir à huis clos", 23 March 2020, p. 32. Note that Elior was the first company to hold its general meeting, on 20 March 2020, just after the start of the lockdown and before the publication of Order 2020-321 of 25 March 2020, which it was therefore unable to apply.*



☐ Most companies proposed a retransmission of their annual general meeting:

- Retransmission live and recorded (86 companies)
- Live retransmission only (8 sociétés)
- Recorded retransmission only (4 companies)
- Without retransmission (20 companies)
  - Including 8 AGMs of companies incorporated under foreign law
  - Including 1 AGM held in January
  - Including 2 AGMs held with physical attendance in July and September

Although they are useful and promote good information for the absent shareholders and for the market, these retransmissions, live or in recorded form, do not replace the "physical" holding of a general meeting, which remains "a highlight in the life of the company".[42]

Because they enable all shareholders, wherever they live, to be informed of the proceedings and discussions of the general meeting, the AMF encourages listed companies - apart from the "physical" holding of their general meetings - to retransmit their general meeting live and in recorded form on their website, in audio or video format, by any retransmission process.[43] The topics presented in a general meeting are of definite interest for any investor, beyond the actual moment of the meeting.

Regarding issuers' communications concerning the retransmission of their meeting, some issuers stated that they held their meeting by "videoconference" or by a "conference call", whereas the system adopted resembled rather a mere audio or video transmission process, without any possibility of interaction. To avoid creating confusion, it is important to disseminate unambiguous information to enable shareholders to understand in practical terms the retransmission and interaction procedures that are provided for within the framework of the general meeting.

☐ Composition of the meeting officers

Regarding the composition of the meeting officers, Article 8 of Decree No. 2020-418 of 10 April 2020 provided, in the case of a meeting "in camera", for the following procedures:

- The meeting shall be chaired by the Chairman of the Board of Directors or the Supervisory Board, depending on the case, or, in their absence, by the person provided for by the articles of association, as is normally the case. In the absence of this person, or if the articles of association are silent on the matter, the meeting shall be chaired by the person appointed for this purpose by the Board of Directors or the Supervisory Board from among the members of the latter or, in the event of unavailability, from the company officers (for example, the chief executive officer or the deputy chief executive officer, a member of the Management Board);
- Two scrutineers shall be appointed by the body competent to convene the meeting or its delegatee. The latter must "*endeavour to*" choose scrutineers from among the shareholders. Article 8, I, 2° of the decree of 10 April 2020 provides therefore that "*the body competent to convene the meeting or its delegatee shall appoint two scrutineers, that it shall endeavour to choose from among the shareholders. Failing that, scrutineers may be chosen from outside the shareholders*". As a result, it is only by "default" that scrutineers can be chosen "from outside the shareholders".

42 *ANSA, Note Pratique, Quelques suggestions à l'intention de MM. les Présidents pour la conduite des assemblées générales d'actionnaires, March-April 1997, No. 2 883, p. 1.*

43 *As a reminder, the AMF also recommends that issuers make available on their website, at least for the past three years, " the audio or video recordings of all or part of the general meeting (if the issuer has produced such recordings), with the understanding that in the case of partial recordings, the issuer must indicate that sections have been omitted" (AMF Recommendation No. 2012-05, General meetings of shareholders of listed companies, 2 July 2012, updated in October 2018).*

Furthermore, Decree 2020-418 of 10 April 2020 stipulated that shareholders must be informed of the identity and capacity of the persons appointed, as soon as possible and by all means[44] (for example, in the convocation documents or in a press release). Some issuers published a specific press release devoted to the "appointment of scrutineers", ahead of their general meeting. Others specified the identity of the scrutineers in their notice of meeting or convocation inserted in the BALO. However, it appears that despite the requirements of Decree No. 2020-418 of 10 April 2020, numerous companies in the sample did not inform their shareholders "*as soon as possible and by all means, of the identity and capacity of the persons appointed*".

The issue of the composition of the meeting officers, for meetings that were held "in camera", was the subject of questions and criticisms. In normal times, "*the scrutineers for the meeting are the two meeting members having the largest number of votes and accepting this office*".[45] Article 8, I, 2° of Decree No. 2020-418 of 10 April 2020, that applies on a derogatory basis, requires merely of the competent body "*that it endeavour to choose* [the scrutineers] *from among the shareholders*". This is no longer an absolute obligation but merely a "*"best endeavour" obligation*".[46] The result of this seems to be not only that the two main shareholders could not be called on to form the meeting officers, but also that the scrutineers could even not be shareholders of the company. As has been observed, "*there are question marks regarding the discretionary nature or not of such choices. It might, indeed, seem peculiar that the two main shareholders not be asked first before appointing another person. This seems hardly conceivable in a listed company, unless one accredit the argument of those who suspect the incumbent management of wanting to pervert the workings of shareholder democracy*".[47]

The derogation to the common law introduced by Article 8, I, 2° of Decree No. 2020-418 of 10 April 2020 appears disputable in that it ultimately gives considerable latitude to the Board of Directors (or the Management Board) to appoint the meeting officers. Such latitude does not seem justified, even in the peculiar context of the health crisis. If exceptional conditions were to persist due to a prolongation of the health crisis, it would be advisable, in accordance with common law principles, that the Board of Directors or the Management Board, depending on the case, be required to call on the two main shareholders taking part in the general meeting, while retaining the possibility, if those shareholders refuse or do not reply, of appointing the scrutineers from among the other shareholders.

In practice, it appears that many companies in the sample did not appoint scrutineers from among their main shareholders without giving information regarding this. It also appears that some companies did not call on their main shareholders to perform the duties of scrutineer, even though this was a significant issue in the context of general meetings held, by derogation, without the presence of shareholders, and especially in the case of general meetings giving rise to shareholder disputes.

☐ Voting procedures

In order to ensure appropriate information for the shareholders, the AMF encouraged issuers to allow their shareholders to vote online via a secure voting platform, provided that there was enough time before holding the general meeting for the issuer to organise such a voting procedure.[48]

The adoption by issuers of technological tools allowing shareholders to vote electronically, not only in exceptional circumstances but also in ordinary cases, has taken place very gradually in recent years. However, it appears that

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44 *The words of Article 8, III of said decree are, indeed, unambiguous: "The meeting members shall be informed, as soon as possible and by all means, of the identity and capacity of the persons appointed".*

45 *Article R. 225-101, para. 1 of the Commercial Code.*

46 *R. Mortier, "Covid-19 - Organes collégiaux et confinement (Ord. No. 202-321, 25 March 2020. – Et D. No. 2020-418, 10 April 2020)", Droit des sociétés, No. 5, May 2020, comm. 59.*

47 *A. Couret, "Décret du 10 avril 2020 : précisions sur les assemblées à huis clos », Bull. Joly Sociétés, May 2020, No. 5, p. 7*

48 *AMF, Covid-19: The AMF informs shareholders and listed companies of the exceptional measures taken for the organisation of general meetings, press release, 27 March 2020, updated on 17 April 2020.*

research is currently being carried out by some issuers and service providers to develop new electronic voting platforms notably based on the blockchain technology.[49]

Although nearly all general meetings were held "in camera", de facto depriving shareholders of their right to vote at the meeting, a significant number of companies in the sample (slightly less than about twenty, including six companies incorporated under foreign law) did not propose remote electronic voting to their shareholders. For the shareholders of those companies, only voting by correspondence or proxy voting was possible this year.

For those issuers that allowed remote electronic voting by their shareholders, it is important to note that none of them allowed this electronic vote to take place "live", i.e. during the general meeting, which would, in particular, have enabled shareholders to express their views after having been informed of the latest developments concerning the issuer and having heard the speeches of the company officers, retransmitted by audio or video facilities, during the meeting.

As a reminder regarding this, "live" remote voting has been legal in France for around 20 years. Within the framework of Law No. 2001-420 of 15 May 2001 relating to the New Economic Regulations, the legislator took care to amend the Commercial Code to allow the use of such a voting procedure. In 2005, the "Mansion" Report observed in this regard that "*electronic voting during a meeting may be either a remote electronic vote via the internet or an electronic vote in situ using electronic control units. Regarding "live" remote electronic voting, the possibility of which is legally available and regulated, it is observed in practice that no company uses it, because the current available technology does not offer every guarantee of reliability*".[50] Despite the major technological progress made during the last decade,[51] no issuer in the sample has offered its shareholders such a "live" voting opportunity.

Outside France, leading issuers, notably in Europe, already allow remote electronic voting by their shareholders, "live" during the general meeting. Shareholders can thus vote during the general meeting, in real time, from their

49 *This is the case, in particular, of Atos, a company which experimented a technology based on the blockchain at its last general meeting. "Atos SE has tested its voting platform developed in-house, "Atos Vote"©, using the blockchain technology, available on Android and iOS smartphones, and made available to employees who are direct shareholders of Atos SE, who were invited within the framework of this pilot experiment to vote ahead of the General Meeting. Atos will perform new tests on this voting tool in partnership with large market participants in the context of coming events." (Atos, Atos Annual General Meeting, press release, 16 June 2020).*

50 *AMF, Pour l'amélioration de l'exercice des droits de vote des actionnaires en France, Report of the working group chaired by Yves Mansion, 15 September 2005, p. 36*

51 *See notably J. Granotier, "Vers un véritable vote électronique en assemblée générale ?", Droit des sociétés, No. 8-9, August 2020, ref. 8: "To conclude, although there is no legal obstacle (one could even consider that the trend is, on the contrary, towards the promotion of electronic voting, at the instigation of Directive No. 2017-828 of 17 May 2017 with a view to promoting the long-term involvement of shareholders and the AMF Recommendation 2012-05, amended in October 2018), nor any technological obstacle (provided that the reliability and security of the voting systems can be ensured), in the end apparently all that is missing is a real will, on the part of the professional associations, to put in place this live electronic voting by shareholders."*

smartphones, their tablets or their personal computers connected to the internet. This voting procedure is now ermitted by European large caps listed on Euronext, such as, for example, Akzo Nobel,[52] KPN,[53] Randstad[54] and ABN AMRO.[55]

The AMF reiterates its commitment to the effective exercise of all shareholders' rights in general meetings: shareholders' right to vote at meetings, to take part, to ask questions and, in some cases, submit resolutions at general meetings. These rights, established for a very long time by the Commercial Code, are essential to the effectiveness of shareholder democracy.

In the digital era, it is important moreover that, apart from the right to attend meetings physically, the shareholders of listed companies may be offered procedures for voting and taking part in the general meeting which enable them to exercise their prerogatives - remotely and live - in similar conditions to those available to them, during the session, in general meetings. Such progress requires joint work on a long-term basis by the various stakeholders, and notably by the centralising institutions, in particular regarding the technical conditions and related costs.

☐ Remote proxy voting

In a context of general meetings held "in camera", the possibility for shareholders to vote remotely via a voting proxy (or mandate) is especially significant. The possibility for proxies to vote remotely was provided for explicitly by the exceptional regime introduced by the Order of 25 March 2020 and the decree of 10 April 2020. Under the terms of Article 6 of this decree:

> *"When the provisions of paragraph 1, Article 4 of the aforementioned Order of 25 March 2020 are applied and a shareholder gives a proxy to one of the persons mentioned in I of Article L. 225-106 of the Commercial Code:*
> *1° Proxies with an indication of the proxy holder, including, by derogation to the first sentence of Article R. 225-80 of the Commercial Code, those given electronically under the conditions defined in Article R. 225-61 of said code may validly reach the company up to the fourth day preceding the date of the general meeting;*
> *2° The proxy holder shall send their instructions for the exercise of the proxies at their disposal, to the company or the intermediary authorised by it, via an email to the email address indicated by the company or the intermediary, on the form referred to in Article R. 225-76 of said code, no later than the fourth day preceding the date of the meeting."*

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52 *"Q: How can I submit a vote and know that I virtually voted?*
A: During the meeting, you will be able to vote. Click on the voting button to submit your votes. When selecting the button of your choice your vote will be cast automatically. Please submit your vote on all resolutions. The application will confirm that your vote(s) has/have been received.
Q: Can I change my vote during the AGM if I virtually participate?
A: Yes, you will be able to amend your votes during the AGM until the Chairman declares that the voting will be closed after the last voting item." (Akzo Nobel, Manual and FAQ - Hybrid Annual General Meeting, 2020, p. 20).

53 *"Virtual voting - KPN wishes to assist its Shareholders to attend its Annual General Meeting of Shareholders virtually by providing an adequate opportunity to follow the proceedings of the meeting and to vote electronically and real time during the meeting. Shareholders can attend and vote at the meeting on all Shareholders' resolutions via the internet, therefore online and remote with their own smartphone, tablet or personal computer, unless the Shareholder's Intermediary does not accommodate online voting." (KPN, Invitation to attend the KPN Annual General Meeting of Shareholders 2020, 4 March 2020, p. 3).*

54 *"Randstad aims to assist its Shareholders who wish to attend the Virtual Meeting virtually by providing an adequate opportunity to vote electronically and real time during the Virtual Meeting. […] Each Shareholder may follow the proceedings of the Virtual Meeting virtually, deliberate and vote in real time electronically, provided that he timely selects these options via the Third Party Agent in accordance with the instructions provided in the convocation of the Virtual Meeting. […] The Company enables all Shareholders to pose questions during the Virtual Meeting. The Chairman will at his own discretion, alternate among in-person attendees (if any), questions submitted in advance, and those Shareholders online who may be submitting questions in real time" (Randstad, Policy regarding the Virtual General Meeting of Shareholders, 2020, pp. 1 et seq.).*

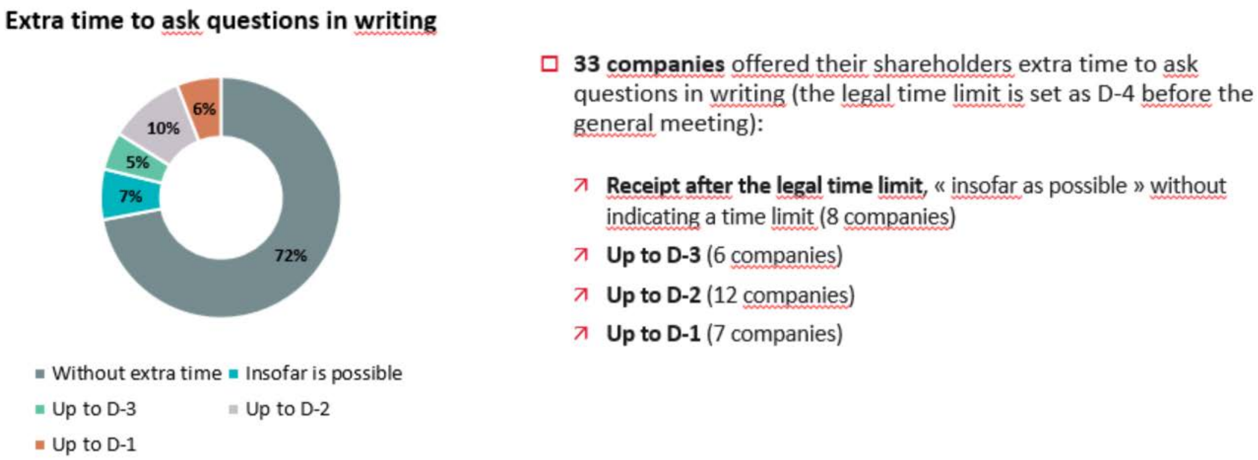
55 *"Shareholders and Depositary Receipt Holders will be provided with the opportunity to follow (watch, listen or otherwise) the Hybrid General Meeting and vote electronically during the Hybrid General Meeting. The Hybrid General Meeting shall be treated as having commenced if it has commenced at the physical place specified in the convocation. Shareholders and Depositary Receipt Holders may participate in the Hybrid General Meeting via the Online Platform. The Online Platform will be provided by the Online Platform Providers. Shareholders and Depositary Receipt Holders must identify themselves electronically through a secured access on the Online Platform to enter the virtual part of the Hybrid General Meeting." (ABN AMRO, Terms and Conditions for Hybrid General Meetings, 2020, p. 2).*

In order to ensure appropriate information for the shareholders in the exceptional context of the health crisis, the AMF has encouraged issuers to "*establish as early as possible, prior to the shareholders meeting, clear, precise and accessible information for all shareholders*" concerning in particular "*the various voting procedures available, specifying, on their website and in their press releases relating to the general meeting, how voting proxies will be treated in this context*".[56]

Two factual observations can be made in this respect. Firstly, although "*the decree explicitly authorises proxy holders to themselves vote remotely, contrary to the practice existing previously*",[57] many issuers did not enable proxy holders to express their vote remotely,[58] which was not without consequences, because this year these proxy holders could not vote at the general meeting either. Secondly, many issuers did not provide information, as the AMF prompted them to do, regarding "*how voting proxies will be treated in this context*".

☐ Shareholders' questions

Given that general meetings in camera do not allow shareholders to ask questions orally during the meeting, the AMF has also encouraged issuers to agree to receive and process, insofar as possible, shareholders' written questions that are sent to the issuer after the deadline (i.e. the fourth working day preceding the date of the general meeting)[59] stipulated by the regulatory provisions.[60] In this regard it appears that slightly more than one-quarter of the companies in the sample granted their shareholders extra time, going beyond the legal requirements. The extra time granted by these companies is variable, ranging from three working days to one working day before the meeting.



The website of several companies in the sample (fifteen, including four companies incorporated under foreign law) mentions no shareholder questions, and *a fortiori* no reply from the issuers concerned. These companies give no information in this regard either.

It is not compulsory for issuers to publish on their website the answers to shareholders' questions, once the answer has been given at the general meeting. Such publication is a way available to issuers to answer shareholders' questions without having to do so during the general meeting. Article L. 225-108, para. 3 and 4 of the Commercial Code stipulates,

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56 *AMF, Covid-19: The AMF informs shareholders and listed companies of the exceptional measures taken for the organisation of general meetings, press release, 27 March 2020.*

57 *A. Couret, Décret du 10 avril 2020 : précisions sur les assemblées à "huis clos", Bull. Joly Sociétés, May 2020, p. 7*

58 *At the start of the annual general meeting season, moreover, it was noted that "for the time being it seems that several companies have chosen not to take into account third-party proxies, given that there is no possibility of physical representation" (M. de Szilberezky, Des assemblées sans rassemblement ?, Droit des sociétés No. 5, May 2020, study 7, p. 21).*

59 *Under the terms of Article R. 225-84, para. 1 of the Commercial Code, "the written questions referred to in paragraph 3 of Article L. 225-108 shall be sent to the head office by registered letter with request for acknowledgement of receipt for the attention of the Chairman of the Board of Directors or the Management Board, or by electronic mail to the address shown in the notice of meeting, at the latest on the fourth working day before the date of the general meeting".*

60 *AMF, Covid-19: The AMF informs shareholders and listed companies of the exceptional measures taken for the organisation of general meetings, press release, 27 March 2020, updated on 17 April 2020.*

for example, that: *"Following the disclosure provided for in paragraph 1, every shareholder may ask in writing questions to which the Board of Directors or the Management Board, as the case may be, is required to reply at the meeting. A joint answer may be given to such questions when they present the same content. The answer to a written question is deemed to have been given once it appears on the company's website in a Questions and Answers section."*

The existence, on issuers' websites, of a section dedicated to shareholders' questions and the answers given is the only way to enable shareholders and investors to know, unambiguously and immediately (by viewing the retransmission of the AGM, when available), whether questions have been asked, and to find out the answers that were given to them. For satisfactory information of the shareholders and with a concern for promoting shareholder dialogue, the AMF encourages companies to publish all the answers to the written questions received in the context of the general meeting. Comprehensive information appears especially necessary in the context of general meetings that are held without the presence of the shareholders, and which in some cases are not retransmitted.

☐ Shareholder dialogue

Shareholder dialogue is a fundamental part of shareholder democracy and has long been encouraged by the regulator.[61] Although the exceptional arrangement resulting from Order 2020-321 of 25 March 2020 enabled general meetings to be held in the exceptional context of the health crisis, the result was nevertheless a deterioration of interactions between the issuers and shareholders at general meetings, due in particular to the fact that these meetings were held without the presence of shareholders.

It should be remembered, however, that shareholder dialogue does not consist merely of discussions between issuers and their shareholders at general meetings. Shareholder dialogue, to which most issuers devote significant resources, is the result of discussions in various forms taking place all year long. From this viewpoint, and except for the absence of oral questions asked during the general meetings held in camera, there is no tangible evidence to assert that 2020 was marked by a particular deterioration in shareholder dialogue.

The exceptional circumstances resulting from the health crisis led certain companies in the sample[62] to establish an internet platform designed to receive questions and comments by the shareholders - live - during the general meeting. These initiatives aimed to compensate for the absence of shareholders, de facto prevented from asking questions at the meeting and from taking part in the discussions.

The establishment of such platforms can be welcomed in that it was able to partly compensate for the absence of interactivity at the general meetings in camera. It nevertheless raises questions regarding its practical conditions and its effectiveness. In particular, there are question marks concerning selection of the questions asked since, given the number of questions asked, some issuers sorted the shareholders' questions, and ultimately only answered some of them. The criteria adopted to carry out such sorting, and especially the absence of transparency in this respect, raise questions, as does the fate reserved for the questions which were not answered at the meeting. There is also the question of shareholders' access to such a platform. Several issuers in the sample said that they were unable to make sure that the persons accessing this type of interface were shareholders. However, some issuers mentioned the establishment of systems making it possible to perform certain checks beforehand to ensure that participants were shareholders.

It is recommended that those issuers planning to implement such interactive platforms for their general meeting provide information, sufficiently in advance of the meeting, on the conditions of access to these platforms, on the procedures for selection and grouping of questions and on the fate reserved for the questions not answered at the meeting. In any case, such a system may not replace the legal system stipulated by the Commercial Code to allow shareholders to ask questions before and during the meeting. Shareholders should therefore be informed of the absence of a legal framework surrounding the questions which may possibly be asked on this type of platform.

61 *See AMF Recommendation No. 2012-05, General meetings of shareholders of listed companies, 2 July 2012, updated in October 2018.*
62 *Accor, Air Liquide, Cap Gemini, EDF, Elis, Renault, Total, Vallourec.*

AUTORITÉ DES MARCHÉS FINANCIERS AMF

☐ Stability of quorums

While meetings in camera led to a certain limiting of shareholder dialogue during the meeting, they did not discourage shareholders from voting. The average quorum for general meetings in 2020 remained stable compared with the general meetings held in 2019. According to "L'Hebdo des AG", the figure for CAC 40 companies was 69% in 2019, and was stable in 2020. For the Next 80, the figure was 75% in 2019, and 76% in 2020.[63] The calculations made by AMF staff based on publicly available information lead to the same observation of the stability of quorums between 2019 and 2020 for the sample concerned. Shareholders therefore appear to have made extensive use of the various remote voting procedures available to them (correspondence voting, voting proxy or, where applicable, voting on the internet via a secure platform).

According to a study performed by Proxinvest, based on the general meetings for which the number of shareholders present or represented is disclosed, a relative decline in the number of shareholders voting was noted in 2020. According to this study, which to the AMF's knowledge is the only one available on this subject, 81 companies saw the number of their shareholders voting decline, versus an increase for 70, with a median trend of -3.55%, and an average trend of -3.9%.[64] This relative decline in the number of voters (and not in the number of votes expressed) appears not very significant. In particular, the cause of this phenomenon has not been established. It could result either from a higher concentration of the shareholders of the companies in question or from a lower rate of participation of individual shareholders in the context of the health crisis.

☐ Opposition to resolutions put to the shareholders' vote

Another noteworthy fact is that the rate of opposition to resolutions put to the shareholders' vote increased sharply in 2020. This observation attenuates, or even contradicts, the idea that the 2020 general meeting season was marked by self-effacing shareholders. In July 2020, for example, it was noted that "*contested resolutions (receiving less than 80% of votes in favour) increased from 79 to 141. Leaving out majority shareholders, the number of resolutions rejected this year was apparently 144 (versus 78 in 2019).*"[65] In October 2020, the number of resolutions adopted by less than 80% of votes was 61 for the CAC 40, versus 41 in 2019. For the Next 80, this number was 80, versus 38 in 2019.[66]

Resolutions aimed at amending issuers' articles of association[67] in order to insert a "corporate mission" were relatively undisputed[68] for their part, and were adopted with very high scores, generally exceeding 99%.

☐ Changes in the proposed dividend

About two-thirds of the companies in the sample changed their initial dividend proposal at the general meeting convened to consider and approve the accounts for 2019. Usually, these companies reduced or cancelled it, with a very high rate of shareholder approval (more than 98% of votes cast, according to "L'Hebdo des AG"). The companies in the sample sometimes pushed back the date of payment of the dividend, or even the decision to pay a dividend or not (generally in the second half of 2020). Note that, in the context of meetings in camera, the shareholders were, de facto, unable to amend the draft resolutions (in particular regarding the allocation of earnings) during the meeting.

Given these findings, the spirit of responsibility of the issuers and their shareholders in this exceptional period may be emphasised, even though the payment of dividends is an important criterion for investors.

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63 *L'Hebdo des AG, Bilan des AG 2020, 10 July 2020, No. 270, p. 7.*

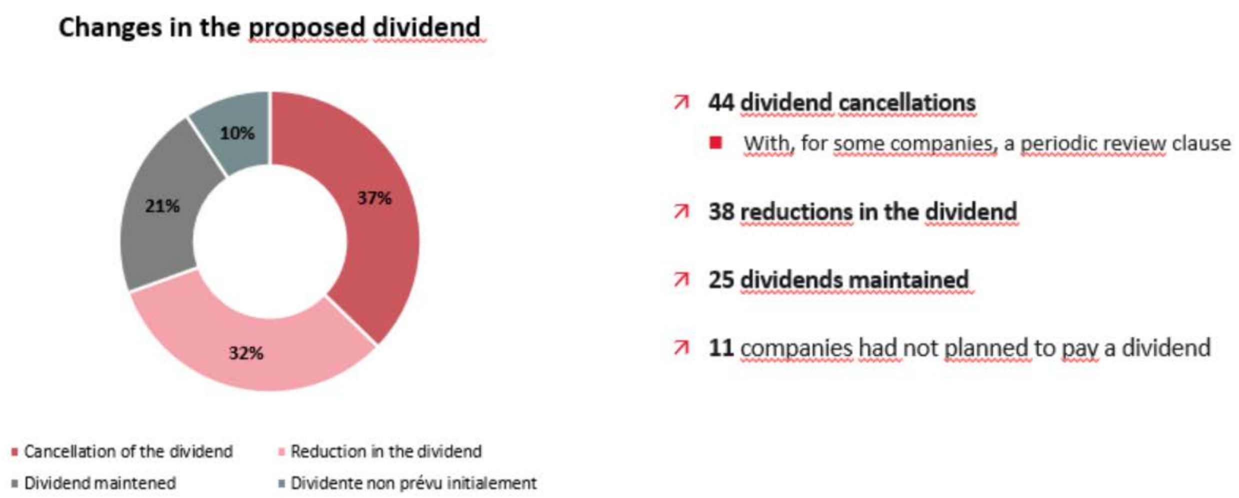
64 *Proxinvest, Report on 2020 general meetings, forthcoming.*

65 *L. Boisseau, AG : les actionnaires de plus en plus contestataires, Les Echos, 8 July 2020, p. 27.*

66 *L'Hebdo des AG, Tableau de bord, 5 October 2020, n°278, p. 6. The combined general meeting of Unibail-Rodamco-Westfield SE, held on 10 November 2020 and not taken into account in these statistics, gave rise to massive shareholder opposition and the adoption of three resolutions "proposed by minority shareholders". See Unibail-Rodamco-Westfield SE, Results of the Combined General Meeting of 10 November 2020, Press release, 10 November 2010.*

67 *Several SBF 120 companies inserted a "corporate mission" in their articles of association in 2020, in particular Icade, EDF, Engie, ADP, Orange, GTT, Worldline and FDJ.*

68 *See notably A. Viandier, La raison d'être d'une société (C. civ., 1835), BRDA, October 2019, inf. No. 30.*



The 25 companies in the sample that decided to maintain the payment of their dividend stated that they did not call on a government aid scheme in the form of deferred payment of tax and social security charges or a state-guaranteed loan in accordance with the "*responsibility commitment for large companies benefiting from cash support measures*".[69]

☐ "Climate" resolutions

Shareholders of two CAC 40 companies (Total and Vinci) asked for draft "climate" resolutions to be included on the agenda of those issuers' meetings. The submission of these draft resolutions, their treatment by the Board of Directors of the issuers concerned and the fate reserved for them at the meeting received extensive media coverage.[70]

In the case of Total, a "*group of eleven European investors coordinated by Miescher AM*"[71] asked to see included on the agenda of the meeting of 29 May 2020 a draft resolution aiming to *"amend Total's bylaws in order to enhance the capacity of the oil group's business model to work towards achieving the objectives of the Paris Agreement*".[72] The authors of this draft resolution stated that, "*as long-term shareholders, we have an obligation to factor climate risk into the management of our portfolios. We therefore consider that the oil industry must play a decisive role in the energy transition*". They therefore asked Total to "*define a medium and long-term action plan with interim milestones, and to specify how it intends to reduce its absolute greenhouse gas emissions. This plan must also include indirect emissions, since the use of products sold by Total represents 85% of its greenhouse gas emissions*".[73]

The draft resolution aimed to amend Article 19 of Total's articles of association by adding a third paragraph specifying the content of the management report produced by the Board of Directors for the attention of the general meeting, with the first two paragraphs remaining unchanged. It was proposed that this third paragraph be expressed as follows:

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69 *See notably Ministry of the Economy and Finance, FAQ on the "Responsibility commitment for large companies benefiting from cash support measures", 5 May 2020. Large companies which requested deferred payment of tax and social security charges or a state-guaranteed loan agreed in particular to "pay no dividends in 2020 to their shareholders in France or abroad (except those entities having a legal obligation to distribute a fraction in 2020)".*

70 *G. Nedelec, "Total visé par la première résolution climatique déposée par des investisseurs en France", Les Echos, 16 April 2020, p. 31; L. Boisseau, G. Nedelec, "La résolution climatique chez Total divise les agences de conseil en vote", Les Echos, 19 May 2020, p. 28; G. Nedelec, "Les actionnaires transforment de l'intérieur les géants pétroliers européens", Les Echos, 3 June 2020, p. 8.*

71 *"A group of investors asks Total to go further in its efforts to tackle climate change", Press release, 15 April 2020. This "group", consisting of eleven European investors, stated that it represented "more than €764.5 billion in assets under management (as of December 31, 2019), and approximately 1.35% of Total's share capital (as of April 14, 2020),"* and that it included: Actiam, Candriam, Crédit Mutuel Asset Management and Assurances du Crédit Mutuel, Ecofi Investissements, Friends Provident Foundation, Federal Finance Gestion, La Banque Postale Asset Management, the Edmond de Rothschild group, Meeschaert Asset Management and Sycomore Asset Management.

72 *"A group of investors asks Total to go further in its efforts to tackle climate change", Press release, 15 April 2020.*

73 *"A group of investors asks Total to go further in its efforts to tackle climate change", Press release, 15 April2020*

"*The management report will contain, in addition to information on the situation of the Company and its operations during the past financial year, and the other elements required by the provisions of the laws and regulations in force, the strategy of the Company as defined by the Board of Directors to align its operations with the objectives of the Paris Agreement, and in particular with Articles 2.1 (a) and 4.1 thereof, specifying (i) an action plan with interim milestones to set absolute reduction targets for the medium and long term that incorporate direct or indirect greenhouse gas (GHG) emissions from the Company's operations relating to the production, processing and purchase of energy products (Scopes 1 and 2), and the end use by customers of products sold (Scope 3) and (ii) how the Company intends to achieve these objectives*."

On 5 May 2020, the Board of Directors of Total said that it had "*decided to include this proposed resolution, which respects forms required by law, in the Agenda of the Combined Shareholders' Meeting to be held on May 29,2020, but not to recommend the approval of this resolution*".[74] However, it was stated that the Board of Directors "*considers that by seeking to specify the content of the management report in the by-laws, the proposed resolution undermines the prerogatives of the Board of Directors and results in interference by the Shareholders' Meeting in the remit of the Board of Directors, in violation of the principle of division of powers between corporate bodies*."

At the Total General Meeting of 29 May 2020, this draft resolution was widely rejected (16.80% of votes for and 83.20% of votes against).

In the case of Vinci, a shareholder[75] requested that two draft resolutions be included on the agenda of the general meeting.

The first draft resolution aimed to obtain "*the disclosure by the Company, on an annual basis and for the three years following the present General Meeting, at reasonable cost and without disclosing proprietary information, of annual sustainability information, including a description of its climate change transition plan, consistent with the goals of Articles 2.1(a) and 4.1 of the Paris Agreement and the goals of Article L. 100-4 of the French Energy Code, and consistent with the Task Force on Climate-related Financial Disclosures (TCFD)*".

The second draft resolution aimed to obtain "*for the three years following the present General Meeting, the inclusion by the Board of Directors of a specific resolution on the agenda of each Annual General Meeting, by which it submits to the vote of the shareholders on an advisory basis, and not to diminish the role and responsibilities of the Board of Directors, the approval of its approach to climate matters as disclosed in the annual sustainability information described in shareholder resolution n°1*".

In a letter of reply dated 17 March 2020, published by the issuer on its website, the Chairman and CEO of Vinci said that the Board of Directors had decided not to accede to this request for inclusion of resolutions on the meeting agenda, noting in particular that: *"The first proposed resolution provides for mechanisms that result in the AGM interfering in the functions and role of the Board and thus an encroachment of its powers. Indeed, only the Board is empowered to decide*

74 Total, Convening of the Shareholders Meeting of the of 29 May 2020, Press release, 5 May 2020. The press release states in particular that "The Board of Directors emphasizes that it is fully aware of its responsibilities on environmental matters by proposing at the Shareholders' meeting to amend the by-laws to enshrine consideration of the social and environmental challenges involved in the Company's activities in the duties of the Board of Directors. In this context, the Board of Directors adopted, after a productive dialogue with institutional investors – as participants in the global investor initiative Climate Action 100+, the new climate ambition to achieve carbon neutrality by 2050. This climate ambition was the subject of a press release issued on May 5, 2020. The board considers that it is responding largely to the objectives of the authors of the resolution and that the Group's strategy incorporates this ambition. There is therefore no need to compel the strategic framework of the Company's activity in the by-laws, beyond what the Board of Directors has already proposed to the Shareholders Meeting. In addition, by targeting indirect greenhouse gas emissions related to the use of Total's energy products by its customers, the resolution as drafted leads the Group to assume responsibility for these emissions, although the use of its products results from its clients' choices, and the Company does not have the direct capacity to act on the demand. Total does not manufacture aircrafts, cars or cement, but it supplies the energy products that are used or processed by other industries to provide services or products. While Total can act on the mix of its energy products, only public policies and technical and technological changes in energy consumption – that Total supports and facilitates as part of its Climate Ambition - are able to steer energy demand."

75 Namely, according to its letter, made public, "TCI Fund Management Limited, acting in the name and on behalf of The Children's Investment Master Fund and Talos Capital Designated Activity Company, shareholders owning collectively 2.37% of the share capital of Vinci SA".

the strategy and conduct the communication of the Company especially in the areas of social, societal and environmental responsibility. The second resolution which you are proposing, which aims to impose on the Board an agenda for future general meetings, is also an infringement on the powers of the Board to set the agenda for the general meetings. In these circumstances, the Board of Directors, which has carefully considered your request and deliberated on the issues it raises, has decided not to act favourably on them".

As a consequence, these draft resolutions were not included on the agenda of Vinci's general meeting.

It is noteworthy that the two issuers concerned, despite differences between the draft resolutions that they received, each denounced an undermining of the prerogatives of the Board of Directors and interference by the general meeting in the Board of Directors' sphere of competence. However, while Total agreed to include on the agenda the contested draft resolution, Vinci, on the other hand, refused to submit the two contentious draft resolutions to the meeting.

The state of the law on this matter is based on established legal precedents, and in particular a ruling[76] of the Court of Cassation which laid down the principle of independence of the statutory corporate bodies.[77] Insofar as these climate resolutions, which raise "*important questions relating to the breakdown of powers among the statutory corporate bodies*",[78] seem likely to become more frequent, a clarification of the state of the law, possibly by legislative process, could provide greater legal security in this area, for both issuers and shareholders, who should be able to put forward their views on these "ESG" issues.

The French Forum for Responsible Investment (FIR) appealed, in April 2020, for easier submission by shareholders of draft resolutions on environmental and social issues.[79] The submission of a resolution to a general meeting is, in the case of large caps, contingent on the obligation of owning 0.5% of the capital.[80] Regarding shareholders' right to submit draft resolutions, the AMF gives a reminder that, as of October 2018, it added to its Recommendation No. 2012-05 on "*General meetings of shareholders of listed companies*" the following recommendation: "*Change the legislative and regulatory provisions of the Commercial Code so as to […] update the shareholding threshold required in order to submit items and draft resolutions at a general meeting, dividing it by two*".

76 Cass. civ., 4 June 1946: JCP 1947, II, 3518, note D. Bastian; S. 1947, 1, p. 153, note P. Barbry.

77 As has been noted, "all law students have been instructed of the content of the famous Motte ruling, handed down in 1946, which had laid down this principle of the hierarchy of statutory corporate bodies in a public limited company. Each body received by law a defined scope of competence and none may encroach upon the scope of competence of any other. The general meeting on which primary legitimacy is based may not deal with matters intended for the Board or senior management, even though it is directly the originator of the appointment of the Board members and indirectly of senior management. Constantly referred to and paid respect in legal theory, this veritable totem has been somewhat shaken under the pressure of numerous phenomena." (A. Couret, "L'état du droit des sociétés, 50 ans après la loi du 24 juillet 1966", Bull. Joly Sociétés, No. 07-08, July-August 2016, p. 433).

78 E. Schlumberger, "Les résolutions climatiques à l'épreuve du droit des sociétés", Bull. Joly Sociétés, June 2020, No. 06, p. 1.

79 Forum for Responsible Investment, Proposals of the Forum for Responsible Investment (FIR), Facilitating active shareholder participation on environmental and social issues, April 2020.

80 Article R. 225-71 of the Commercial Code.

☐ Fully registered securities and financial securities in retention before the annual general meeting: the case of Lagardère

Ahead of the annual general meeting of Lagardère SCA on 5 May 2020, the AMF was informed that certain shareholders found it impossible to exercise their voting rights.[81] It appeared, in particular, that the shares that these shareholders had acquired several days before the record date to take part in the general meeting were still not recorded in the registers of transactions in the company's securities, which prevented these shareholders from voting at this general meeting.

Lagardère is one of the rare French listed securities whose shares are in fully registered form (VEN). For these securities, the recording of transactions in the issuer's register of transactions requires that, for each operational day, the entries resulting from acquisitions be offset by exits concerning an identical total number of shares. It also requires that any further recording in the register be deferred until this offsetting has been performed. This deferment of any further recording is called "placing in retention".[82]

As regards the delays in recording the securities acquired by these shareholders in the registers of transactions in shares of the company, Lagardère and its agent, BNP Paribas Securities Services, stated that they were dependent on the intermediary custody account keepers sending, via the Central Securities Depository Euroclear France, within the time limits stipulated by the regulations,[83] transaction instructions corresponding to the transactions performed by their customers (registration or deregistration).

In this exceptional context, given these delays and so as not to deprive of their voting rights the shareholders who had become owners of their shares following transactions giving rise to settlement and delivery, and for which the company had received the corresponding "Bordereaux de Références Nominatives" (BRN: schedules of registered shares), the AMF asked this issuer to proceed with a settlement of account as at 30 April 2020 at zero hour, so as to enable the shareholders concerned to receive fair treatment and be recorded on the register for the purposes of the aforementioned general meeting and exercise their voting rights as shareholders of the company in question.

On 2 May 2020, Lagardère published a press release indicating in particular that:

> *"On 30 April 2020 at zero hours, the deadline set in accordance with Article R.225-85 of the French Commercial Code for the registration of shares eligible to participate in the General Meeting of 5 May 2020, a significant number of shares whose acquisition and settlement-delivery occurred before that date were still detained in application of the abovementioned rules and were not therefore recorded in the share register.*
>
> *At the request of the French financial markets authority (Autorité des marchés financiers), these shares detained on 30 April 2020 at zero hours, and the corresponding voting rights, will nonetheless be taken into account in the context of the General Meeting of 5 May 2020".*[84]

The AMF will make proposals in order to improve the processing times, in the context of general meetings, for shares in fully registered form

81 *In Article R. 225-85, I of the Commercial Code, "the right to take part in the annual meetings of companies whose shares are admitted to trading on a regulated market or in the operations of a central depository is substantiated by registering the securities on an account in the name of the shareholder or the intermediary recorded on their behalf in accordance with paragraph seven of Article L. 228-1, on the second trading day before the meeting at zero hour, Paris time, or in the registers of registered securities kept by the company, or in the registers of bearer securities kept by an intermediary as indicated in Article L. 211-3 of the Monetary and Financial Code".*

82 *On this subject, see A. Gaudemet, "Comptabilité des titres financiers en rétention et droit de participer aux assemblées générales d'actionnaires", Bull. Joly Sociétés, June 2020, No. 6, p. 7*

83 *Articles 322-55 et seq. of the AMF General Regulation.*

84 *Lagardère, combined ordinary annual general meeting and extraordinary meeting of 5 May 2020, press release, 2 May 2020.*

☐ Allowance for abstention

Law No. 2019-744 of 19 July 2019 for the simplification, clarification and updating of company law made several noteworthy changes to company law. One of them is especially important, namely the recording of votes for the adoption of joint resolutions in public limited companies, whether listed or not. Article 16 of the aforementioned Law amended Articles L. 225-96 and L. 225-98 of the Commercial Code in order to change the calculation base to be considered for measuring attainment of the required majority for the adoption of joint resolutions.

From now on, votes cast do not include those attached to shares for which the shareholder did not take part in the vote, abstained or cast a blank or invalid vote.

The new rules for vote counting may facilitate the adoption of resolutions in cases of significant abstentions, because these votes are now no longer counted as votes "against" the resolution put to the vote. They may also have consequences for voting at meetings, but also:

- ✓ **in the case of voting by correspondence**: Article L. 225-107 of the Commercial Code was amended to specify that correspondence voting forms that provide no voting indications or that express an abstention "*shall not be deemed votes cast.*"[85] The voting forms were modified in order to add a box allowing shareholders to cast a vote of abstention as distinct from a vote against;[86]
- ✓ **in the case of new resolutions presented during the meeting**: Article R. 225-78 of the Commercial Code now provides that "*if new resolutions were presented at the meeting, the signatory can express in this document either their desire to abstain, or a vote against their adoption, or else give a proxy to the chairman of the general meeting or to a proxy holder appointed under the conditions of Article L. 225-106*".[87] Thus, if the choice is made to abstain, it is no longer counted as a vote "against" adoption of the new resolutions presented at the meeting, which may have a certain attraction for shareholders, activists in particular, looking for an effect of surprise by submitting draft resolutions during the meeting. Here again, the voting forms were changed in order to allow shareholders to choose between the various possibilities available to them following this legislative and regulatory change.

One should also note the implications, regarding abstention, of Decree No. 2019-1486[88] of 27 December 2019 which stipulates the duration of and the starting point of the time offered, in certain cases, to shareholders together holding at least 5% of the share capital in order to apply to the courts for the appointment of a representative in order to convene an extraordinary general meeting of their company so that it may give a decision on approval of the transaction. The cases concerned are, on the one hand, the situations of delegation of powers and competency referred to in Article L. 236-9 of the Commercial Code, and on the other hand the situations of simplified mergers of a fully-owned or 90% owned subsidiary, referred to in Articles L. 236-11 and L. 236-11-1, and, finally, simplified partial mergers with a fully

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85 *Article L. 225-107, I, para. 2, provides now that "forms that provide no voting indications or that express an abstention **shall not be deemed votes cast**". Before Law No. 2019-744 of 19 July 2019, it provided that "forms that provide no voting indications or that express an abstention **shall be deemed votes against**". Moreover, Article R. 225-76 of the Commercial Code now provides that the voting form "shall inform the shareholder very clearly that any abstention expressed in the form or resulting from the absence of voting indications **shall not be deemed a vote cast**." Before Decree No. 2019-1486 of 27 December 2019, it provided that the voting form "shall inform the shareholder very clearly that any abstention expressed in the form or resulting from the absence of voting indications **will be treated as a vote against adoption of the resolution**".*

86 *As a reminder, the report of the working group chaired by Olivier Poupart-Lafarge on the general meetings of shareholders of listed companies stated regarding this that "The clarity of a system, which treats abstaining in the same way as voting against, has been criticised, especially by US and UK investors, who do not understand it". The report considered that "reforming the way abstentions are taken into account will require redesigning the mail-in voting form to clarify the intent of the vote cast – abstention would then be equivalent to a "neutral" vote, unlike a proxy form with no name in the box, which will result in a Yes or No vote depending on the position taken by the board" (AMF, Final report on the general meetings of shareholders of listed companies, Report of the working group chaired by Olivier Poupart-Lafarge, 2 July 2012, p. 21).*

87 *Before Decree No. 2019-1486 of 27 December 2019, Article R. 225-78 of the Commercial Code provided that "if new resolutions were presented at the meeting, the signatory can either express in this document their desire to abstain, or else give a proxy to the chairman of the general meeting or to a proxy holder appointed under the conditions of Article L. 225-106".*

88 *Decree No. 2019-1486 of 27 December 2019 relating to the time during which minority shareholders can request the convocation of a general meeting to approve certain merger, spin-off or partial merger operations, and to voting in general meetings of shareholders.*

owned company, referred to in Article L. 236-22. The starting point of the time frame is set on the day of the last insertion or publication of the draft on the website of each of the companies and its duration is set at twenty days. Regarding the exclusion of abstentions from the count of votes cast, the decree adapts the provisions relating to voting by correspondence, to allow the casting of a negative vote in the case of new resolutions presented at the general meeting.

1.2. The methodological guide to the processing of votes at general meetings

In 2019 the investment managers' society AFTI (Association Française des Professionnels des Titres) undertook work on the drafting of a guide to understand the whole voting chain and describe the procedures implemented for each of the events leading to the shareholders' vote (transmission of information relating to the general meeting, processing of voting instructions, their transmission, etc.).

This guide, published on 30 January 2020, under the responsibility of the AFTI,[89] is intended for securities professionals, issuers and shareholders. It describes the main operational processes contributing to exercise of the voting right at meetings in order to identify and disseminate the best marketplace practices and the solutions recommended by all the market participants. Recommendations on good practices to be complied with are given notably in order to:

- ✓ ensure communication within reasonable deadlines between the centralising agent of an AGM and the specialised intermediary or intermediaries;
- ✓ improve the information of institutional investors for improved identification of bank-managed registered share accounts;
- ✓ ensure fluidity of transmission between financial intermediaries and operational processing of the updating of short and long positions, etc.

Lastly, the guide includes a new version of the meeting voting form taking into consideration the changes resulting from Law No. 2019-744 of 19 July 2019 for the simplification, clarification and updating of company law.

Following on from the publication of this guide, the AFEP, ANSA and MEDEF published, on 13 February 2020, a press release[90] in which they "*rejoice at the publication of the methodological guide on the processing of votes at general meetings published by the AFTI on 30 January last, since the three associations took part in the preparatory work*". The AFEP, ANSA and MEDEF specify that they "*are convinced that the use of an electronic voting platform, in addition to permitting the secure and efficient processing of votes, can increase the fluidity of information intended for all the shareholders, especially those whose shares are registered bearer shares and those residing outside France. In particular, time frames are shortened by the elimination of constraints involved in manual processing and postal transport times, both for sending documentation relating to the general meeting and for collecting the votes cast. Lastly, electronic voting platforms should facilitate implementation of the provisions of the revised "Shareholder Rights" directive, and in particular the provision regarding confirmation of the acceptance of votes*".

1.3. The identification of shareholders and confirmation of votes

Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 (hereafter, the Shareholder Rights Directive II or "SRD II"), amending Directive (EU) 2007/36/EC of the European Parliament and of the Council of 11 July 2007 concerning the exercise of certain rights of shareholders of listed companies, reiterated the importance of the identification of shareholders for listed companies:

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89 *For example, the AFTI took the initiative of setting up a dedicated working group bringing together the custody account-keepers and centralising agents of the Paris marketplace in order to draft this methodological guide ("the Guide"). The Guide was written following a public consultation supervised by the Association Française des Professionnels des Titres (AFTI).*

90 *AFEP, ANSA, MEDEF, Note on drafting and publication of the methodological guide on the processing of votes at general meetings and the need to use electronic voting platforms for voting at the general meetings of listed companies, 13 February 2020.*

"Shares of listed companies are often held through complex chains of intermediaries which render the exercise of shareholder rights more difficult and may act as an obstacle to shareholder engagement. […]. The identification of shareholders is a prerequisite to direct communication between the shareholders and the company and therefore essential to facilitating the exercise of shareholder rights and shareholder engagement. This is particularly relevant in cross-border situations and when using electronic means. Listed companies should therefore have the right to identify their shareholders in order to be able to communicate with them directly. Intermediaries should be required, upon the request of the company, to communicate to the company the information regarding shareholder identity." [91]

The Shareholder Rights Directive II was transposed in France by Law No. 2019-486 of 22 May 2019 (the "PACTE Law"), which reorganised the procedure for identification of shareholders coded in Articles L. 228-2 et seq. of the Commercial Code. Pending the entry into force of an Implementing Regulation, this law was supplemented by Decree No. 2019-1235 of 27 November 2019 which specifies, in Articles R. 228-3 to R. 228-5 of the Commercial Code, the information and the deadlines applicable to the procedure for identification of security owners.[92]

The Commission Implementing Regulation (EU) 2018/1212 of 3 September 2018 stipulating the minimum requirements for implementation of the provisions of the directive (hereafter, the "Implementing Regulation"), came into force on 3 September 2020. It is, by nature, directly applicable in internal law.

Legal and regulatory measures are expected to be taken soon in order to clarify and supplement the internal law provisions, and in particular to specify the links between French law and the aforementioned Implementing Regulation with regard to the general obligations of issuers to inform intermediaries, of intermediaries to inform shareholders and of intermediaries to inform issuers, laid down by Articles 3 *ter*[93] and 3 *quater*[94] of the Shareholder Rights Directive II and designed to allow shareholders to exercise the rights resulting from their shares (in particular the right to take part in and vote at the general meeting).

- **Identification of shareholders**

In companies having shares admitted to trading on a regulated market, the issuer company or their representative is entitled to demand, at any time and in return for remuneration payable by it, either from the Central Securities Depository, or directly from one or more intermediary(-ies) referred to in Article L. 211-3 of the Monetary and Financial Code, information concerning the owners of their shares and securities conferring, immediately or eventually, a right to vote at its own shareholders' meetings.

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91 Recital 4 of Shareholder Rights Directive II.

92 As a reminder, the French legislation (Articles L. 228-2 to L. 228-3-6 and R. 228-3 to R. 228-5 of the Commercial Code) applies to the identification of the owners of shares, securities conferring a voting right immediately or eventually, bonds and negotiable debt instruments of any joint-stock company, whether or not it has shares listed on a regulated market, whereas the European legislation (Article 3 bis of SRD II and Articles 3 and 9 §6 of the Implementing Regulation) applies only to identification of the owners of shares in companies whose head office is situated in the European Union and whose shares are admitted to trading on a regulated market, located in or operating in a Member State (cf. Article 1 §1 of the Implementing Regulation).
See also, in particular: F. Gilbert, "Le nouveau régime d'identification des propriétaires de titres financiers", Questions d'actualité, Editions Francis Lefebvre, BRDA 20/20.

93 Companies whose shares are admitted to trading on a regulated market must forward to the intermediaries (which in their turn are required to forward this immediately to the shareholders) the necessary information to enable the shareholders or their proxy holder to exercise the rights resulting from the shares, unless it can be sent directly to the shareholder or to a third party nominated by them.
The intermediaries send to the company the information given by the shareholders regarding the exercise of the rights resulting from their shares, in accordance with their instructions. In the case of a chain of intermediaries, the information shall be sent immediately between intermediaries, unless it can be sent directly to the company.

94 In order to facilitate the exercise of the shareholder's rights at a general meeting, including the right to take part and vote, the intermediaries shall in particular, when votes are cast electronically, send to the shareholder or the third party nominated by them, at their request, the authorised position appearing in its registers, the notice of participation, and confirmation of the receipt, recording and counting of the votes by the issuer.

The Commercial Code now specifies that the issuer company may demand disclosure of the following information;[95]

- ✓ depending on the case, the name or company name;
- ✓ nationality;
- ✓ as the case may be, the year of birth or year of incorporation;
- ✓ the postal address and, where applicable, email address;
- ✓ the number of securities held;
- ✓ where applicable, any restrictions possibly applying to the securities.

The issuer company or its representative may also ask for certain additional information to contribute to a good knowledge of the owners of the securities, which will be disclosed by the person questioned only if they have the information requested.[96] The information concerned is:

- ✓ when the owner is a legal entity, the registration number, or, failing such a number, the Legal Entity Identifier (LEI) referred to in the Commission Implementing Regulation (EU) No. 1247/2012, or, when the owner is a natural person, the national identifier (within the meaning of Article 6 of Commission Delegated Regulation (EU) 2017/590);
- ✓ the date since when the securities have been held;
- ✓ the code indicating the core business performed with reference to the trade sector code (NAF: nomenclature d'activités française) or its European equivalent within the meaning of Regulation (EC) No. 1893/2006 of 20 December 2006 establishing the statistical classification of economic activities (NACE);
- ✓ whether or not the security owners are professionals within the meaning of Article L. 533-16 of the Monetary and Financial Code;
- ✓ when the security is a unit or share of a CIU, the name and registration number of the distributor who sold it to the owner.

The Implementing Regulation specifies the format of the request for disclosure of information concerning the identity of the shareholders and the reply.[97]

The new provisions introduced into the Commercial Code also state that:

- ✓ in companies having shares admitted to trading on a regulated market, the possibility of asking for information concerning the owners of the securities is a right, and any provision to the contrary in the articles of association is deemed void;[98]
- ✓ likewise, any contractual stipulation with a view to or having the effect of limiting the disclosure of information enabling the company to identify the owners of its securities shall be deemed void;[99]
- ✓ any fees related to each type of service for the identification of security owners should be non-discriminatory, proportional to the cost incurred and published on the website of the person who provides the service;[100]
- ✓ the time frames granted to the various intermediaries in the chain to forward the request of the issuer company or its representative and to reply to it.[101]

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95 *Article R. 228-3, 1° to 6° of the Commercial Code.*
96 *Article R. 228-3, 7° to 11° of the Commercial Code.*
97 *According to Article 3 of the Implementing Regulation, the minimum information and data in this request and this reply are specified in Tables 1 and 2 of the Annex to the Implementing Regulation.*
98 *New paragraph in I. of Article L. 228-2 of the Commercial Code.*
99 *New Article L. 228-3-5 of the Commercial Code.*
100 *New V of Article L. 228-2 of the Commercial Code; New Article R. 228-5 of the Commercial Code.*
101 *Article R. 228-4, as amended, of the Commercial Code (superseding former Articles R. 228-4 and R. 228-5):*
- *Time frames granted for forwarding the request of the issuer or their representative:*
  - o *from the Central Securities Depository to the affiliated account-keepers: 1 trading day;*
  - o *from the account-keepers to the listed intermediaries on behalf of one or more third-party owners: 1 trading day.*
- *Time frames granted for forwarding the reply to the issuer or their representative:*
  - o *from listed intermediaries to account-keepers: 10 trading days;*
  - o *from account-keepers to the depository: 1 trading day;*
  - o *from the depository to the issuer company: 5 trading days.*

However, it should be emphasised that in the case of securities coming within the scope of application of the Implementing Regulation,[102] the time frames for implementing the shareholder identification procedure provided for by this Implementing Regulation[103] supersede those provided for by the French regulatory provisions,[104] given that the provisions of the Implementing Regulation are directly applicable and replace the provisions of internal law.

A decree could be enacted soon to amend the provisions of Articles R. 228-1 et seq. of the Commercial Code in light of the Implementing Regulation, in particular with regard to the content of the information for which disclosure may be requested and the deadlines for sending that information.

☐ Shareholder information

The Implementing Regulation specifies:

- ✓ the minimum information and data that the issuer must disclose when convening the general meeting. This includes, for example, the procedures for taking part in the general meeting, the voting options available to shareholders regarding each item on the agenda, and the deadlines stipulated for exercising the right to submit draft resolutions or the right to enter items on the agenda;[105]
- ✓ the information that the issuer must provide for intermediaries on the occasion of other corporate events. This "shall comprise all key information […] necessary for the intermediary to complete its obligations […] toward the shareholder or for the shareholder to exercise shareholders rights", and notably the key dates applicable to the corporate event and the various options available to the shareholder.[106]

☐ Confirmation of positions and votes

The Implementing Regulation, which, it will be remembered, is by nature directly applicable in internal law:

- ✓ enables the shareholder or a third party nominated by them to obtain, on request, confirmation of the entitled position appearing in its registers, and specifies that (i) Such confirmation by the last intermediary to the shareholder shall not be required, if the entitled position is known by or will be transmitted to the issuer or the first intermediary, as applicable, and that (ii) where there is more than one intermediary in the chain of intermediaries, the last intermediary shall ensure that the entitled positions in its records are reconciled with those of the first intermediary;[107]
  - ✓ enables an issuer who so requires, at the request of the shareholder, to obtain from the intermediary the notice of attendance, either to enable the shareholder to exercise the rights themselves or to enable the shareholder to nominate a third party to exercise those rights upon explicit authorisation and instruction by the shareholder for the shareholder's benefit;[108]
  - ✓ specifies the information to be provided to the shareholder or to the third party nominated by him to answer his request for confirmation of the receipt, recording and counting of votes by the issuer.[109] Regarding the deadlines to be complied with, it specifies that the confirmation of receipt of the votes "*shall be indicated to the person who voted immediately after casting the votes*", while confirmation of the

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102 Cf. Article 1 §1 of the Implementing Regulation: companies which have their registered office in a Member State and the shares of which are admitted to trading on a regulated market situated or operating within a Member State.

103 Article 9 §6 of the Implementing Regulation: The request of the issuer or of the third party nominated by it shall be sent immediately by the intermediaries (at the latest at the close of the trading day on which the request is received, or at the latest at 10.00 am on the following trading day if the request was received after 4.00 pm); the reply to the request shall be sent immediately by each intermediary (at the latest during the trading day following the recording or receipt of the request).

104 Article R. 228-4 of the Commercial Code (see above).

105 Article 4 of the Implementing Regulation, supplemented by Table 3 of the Annex to the Implementing Regulation.

106 Article 8 of the Implementing Regulation, supplemented by Table 8 of the Annex to the Implementing Regulation.

107 Article 5 of the Implementing Regulation, supplemented by Table 4 of the Annex to the Implementing Regulation.

108 Article 6 of the Implementing Regulation, supplemented by Table 5 of the Annex to the Implementing Regulation.

109 Article 7 of the Implementing Regulation, supplemented by Tables 6 and 7 of the Annex to the Implementing Regulation.

recording and counting of votes "*shall be provided by the issuer in a timely manner and no later than 15 days after the request or general meeting, whichever occurs later, unless the information is already available*".[110]

Moreover, it should be remembered that the custody account keeper, an entity regulated by the AMF,[111], must in all circumstances fulfil the following obligations: it "*safeguards the rights of account holders to the financial securities which are recorded therein*"[112] and "*takes every care to facilitate the exercise of the rights attached* [to the] *financial securities*".[113]

The AMF will be attentive to the satisfactory fulfilment of these new obligations by all the market participants concerned, as of the next annual general meeting season.

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The preceding discussion highlights the need to adapt the holding of general meetings to changing lifestyles and technologies. In this context, the AMF stresses the efforts that will have to be made to ensure, at all stages, complete information for the shareholders and to allow them to take part in the discussions - in person or by any interactive communication process, to cast their vote by any means, in particular electronically, and finally to exercise all the rights which are recognised for them. These adaptation efforts entail joint work on a long-term basis by the various stakeholders, and notably by the centralising institutions, in particular regarding the technical conditions and related costs.

2. NEW DEVELOPMENTS IN CORPORATE GOVERNANCE

This second section discusses the main new developments in France and Europe with regard to corporate governance and in particular changes in governance codes and the new initiatives of the European Commission.

2.1 Shareholder activism

Shareholder activism has been a focus of news and discussion in the Paris marketplace in recent years. Worldwide, 2018 was called a "record" year for activism. The trend was confirmed in 2019 and 2020. The growing clout of activist shareholders, in Europe and in France, has become a marketplace issue that has been seized on by professional associations and the authorities.

In reaction to this growing clout of shareholder activism and due to issuers' heightened perception of the risks it entails, several working groups started thinking, in 2019, about the reality of this phenomenon and adaptations of the regulations that could be advisable. Thus, several contributions have been published expressing proposals aimed at better supervising certain activist practices considered excessive (with diverse assessments depending on the reports):

- ✓ A MEDEF contribution of September 2019 entitled "Shareholder activism - the MEDEF's contribution to the debate". This was presented by the MEDEF during its hearing in the French Parliament by the task force chaired by Eric Woerth, on 25 June 2019, and before the working group chaired by Michel Prada on the same subject in the "Club des Juristes", on 17 September 2019;
- ✓ A report of 2 October 2019, commonly called the "Woerth report", published as the conclusion of the work of a "task force on information relating to shareholder activism" which had as co-rapporteurs Eric Woerth and

110 *Article 9 (5) of the Implementing Regulation.*
111 *Article L. 621-9, II, 2° of the Monetary and Financial Code.*
112 *Article L. 211-9 of the Monetary and Financial Code.*
113 *Article 322-7, 2° of the AMF General Regulation*

Benjamin Dirx. This report, which is due to a parliamentary initiative, contains thirteen proposals on shareholder activism;

- ✓ A report of 7 November 2019 entitled "shareholder activism", published by the "Club des Juristes". This report was written by a working group chaired by Michel Prada, for which Me Benjamin Kanovitch was rapporteur. This working group was set up in the form of an "ad hoc commission" of the "Club des Juristes". The resulting report contains ten proposals on shareholder activism;
- ✓ A report of 10 December 2019 entitled "shareholder activism" published by the French private enterprise organisation "Association française des entreprises privées" (AFEP). This report "*aims to determine possible actions to be taken to combat the negative effects of a certain short-termist shareholder activism*". It contains ten proposals on shareholder activism;
- ✓ A report issued by a Europlace working group made public on 9 January 2020. This report consists of two documents: a 9-page report entitled "Shareholder governance and market practices", which contains eight proposals, and a 24-page presentation entitled "Responsible shareholders", which defines the various proposals in greater detail.

In addition to these five reports published by professional associations and think tanks, on 3 December 2019 the activist fund Muddy Waters published its "*observations on the informative report of the parliamentary task force on activism*", namely the "Woerth Report". Muddy Waters' observations include long discussions (29 pages) on the difference between "long activism" and "short activism", and present methodological criticisms and various proposals "with a view to improving the functioning of financial markets in France".[114]

In light of the implications for the Paris marketplace, the AMF made its contribution to the debate in a paper dated 28 April 2020. As regulator, and following on from the public reports written on the subject, the AMF proposed targeted measures aimed at improving transparency with regard to the market and the dialogue between issuers and shareholders.

The active involvement of shareholders in the life of listed companies is a requirement for their satisfactory functioning and sound governance. In this respect, the AMF considers that it should be encouraged. For the regulator, the challenge is therefore not to prevent activism but to determine its limits and to acquire the capability to control its excesses. In the current state of the regulations, the AMF considers that it is not necessary to make substantial changes in the applicable legal framework.

The AMF's proposals aim to:

- ✓ improve information on stake-building and knowledge of the share ownership structure by lowering the first legal threshold for disclosure and making public the statements made to the company regarding the major holding notifications stipulated in its articles of association;
- ✓ ensure improved market information on investors' economic exposure, by supplementing the reporting of short positions with information on the debt instruments also held (e.g., bonds and credit default swaps). The AMF will support these proposals on the European level;
- ✓ promote open and loyal dialogue between listed companies and their shareholders: the AMF will supplement its Guide on ongoing information and the management of inside information by adding a discussion of shareholder dialogue. It will also supplement its policy to specify that issuers may provide the market with any necessary information in reply to public statements concerning them, even during quiet periods, subject to the Market Abuse Regulation. It will also recommend to any shareholder who initiates a public campaign to forward immediately to the issuer concerned the important information that they might send to the other shareholders;
- ✓ increase the AMF's capacity for analysis and reaction to enable it to respond swiftly and appropriately when circumstances require: e.g., by establishing a power to impose fines regarding administrative injunctions and a

114 See L. Boisseau, "L'activiste Muddy Waters défend les vertus du "short selling", Les Echos, 3 Dec. 2019, p. 29.

right to order every investor, and no longer merely an issuer, to produce revised or additional publications in the event of inaccuracies or omissions in their public statements.

The AMF intends to make changes in its policy and its General Regulation in accordance with these proposals by the end of 2020.

2.2 Gender diversity in corporate governance bodies

☐ On the national level

Promoting gender diversity in corporate governance is one of the pillars of the government's action in favour of job equality. A balance in the representation of men and women in statutory corporate bodies has been the target of numerous initiatives supported by the state since the Copé Zimmerman Law of 27 January 2011 which introduced an obligation of balanced representation of men and women on the boards of directors[115] and supervisory boards[116] in listed companies and those having more than 500 permanent employees and revenues exceeding €50m. This objective translated into obligations of a minimum proportion (first 20% and then 40%) of members of each gender, with rules on a maximum difference depending on the total number of members of the Board. Since 1 January 2020, this obligation has been extended to companies with more than 250 employees.

Law No. 2018-771 of 5 September 2018 for the freedom to choose one's occupational future (the "Avenir" Law) and the PACTE Law increased the obligations regarding gender equality, in particular i) by introducing measures designed to eliminate wage gaps between men and women in the company[117] and ii) by requiring companies to introduce more gender equality in the process of selection of deputy chief executive officers and members of the management board.[118] The selection process must guarantee through to the end the presence of at least one person of each gender among the candidates.

Since the entry into force of the PACTE Law, a failure to comply with the rules of balanced representation of men and women on the board of directors may entail invalidity of the proceedings in which the irregularly appointed board member took part. Before this law, the consequences in cases of failure to comply with this obligation were stipulated as follows: "*Any appointment taking place in violation of paragraph 1 and not having the effect of remediating the irregularity of the board's composition shall be invalid. This invalidity does not entail invalidity of the proceedings in which the irregularly appointed board member took part*". Article 189 of the PACTE Law removes the second sentence from paragraph 2 of Articles L. 225-18-1, L. 225-69-1 and L. 226-4-1 of the Commercial Code.[119] As a result of this removal, issuers are now exposed[120] to invalidity of the decisions taken by a board of directors' meeting in which the irregularly appointed board member took part.

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115 Article L. 225-18-1 of the Commercial Code.

116 Article L 225-69-1 of the Commercial Code.

117 Article D. 1142-2 of the French Labour Code.

118 Article L. 225-53 of the Commercial Code, as amended by Order 2019-1234 of 27 November 2019.

119 See on this subject amendment No. 2525 to the draft PACTE Law filed by Coralie Dubost and Roland Lescure and adopted by the French Parliament, according to which: "At present, when the law is fully effective, it should be ensured that boards of directors and supervisory boards, in public limited companies or in partnerships limited by shares (in 2020), apply it with the necessary diligence. For this purpose, the elimination of the clause of non-invalidity of proceedings seems an appropriate tool to ensure this diligence."

120 The nature of the invalidity incurred gives rise to discussion. On this subject, see H. Le Nabasque, "La composition des organes de direction et de contrôle de la gestion des sociétés par actions après la loi PACTE", Bull. Joly Sociétés, June 2019, No. 06, p. 51: "Now rid of this salutary little expression, these three articles therefore invite us to return to the common law on invalidities, namely that the infringement of a binding provision of the law (and those relating to "gender equality" are of this nature) may (should?) now entail the invalidity of the proceedings or resolutions that might be contrary to this. Although one can understand that the rules relating to gender equality are essential, one can equally hesitate to accept that they might be so essential that a lack of regard for them should (could?) entail the invalidity of the decisions adopted by an irregularly formed board. The fact that the law does not explicitly decree invalidity should logically entail an invalidity that is optional (for the judge) and not mandatory."

Following these legislative amendments, in March 2019 the AFEP published a "vade mecum on the feminisation of statutory corporate bodies" proposing a range of good practices to increase gender diversity in management teams. Two findings were highlighted:

- ✓ The promotion of women requires a proactive policy, and
- ✓ The possibility of intervention by the legislator should not be ruled out.

A preliminary draft of a gender equality law was announced at the end of 2019[121] and a public consultation was launched on various proposals, relating for example to a balanced representation in management teams, gender equality for employee directors appointed to corporate boards of directors and availability of the results of calculations of wage gaps between men and women.[122] On 12 December 2019, at the request of the Secretary of State for Gender Equality, the High Council for Gender Equality (HCE: Haut Conseil à l'Égalité entre les femmes et les hommes) published a report on *"women's access to positions of responsibility and the leveraging role of public financing"*. This report recommends legally defining statutory corporate bodies so as to be able to set legal quotas, like for the board of directors or the supervisory board (for committees of more than eight members: 20% in 2022, 40% in 2024 and for committees of eight members and fewer: one woman in 2022 and a maximum difference of two in 2024). It also recommends including this quota in the "gender equality" index[123] known as the "Pénicaud" index in France, and adding an indicator 6, which would only concern the companies affected by these quotas and which would be taken into account in the overall point score, triggering an obligation to take corrective action and, after three years, a financial penalty.[124] For information's sake, all the CAC 40 companies obtained a score of more than 75 points in 2019,[125] and three of them obtained a score of 99 out of 100 in 2019.

In its 2019 report, the High Committee on Corporate Governance (HCGE) stated that "*the question of the gender balance in boards of directors has led to appropriate responses, placing French boards at the head of the global ranking on this issue; however, a lot remains to be done to increase the diversity of executive committees. The HCGE, vigilant on this matter, will not hesitate to notify companies which have an unsatisfactory policy in this area*".

On 30 January last, the AFEP and MEDEF published a revised version of their governance code containing a new section entitled "Gender diversity policy on the governing bodies" consisting of two articles which should also be placed in parallel with the AFEP vade mecum mentioned above.

Article 7.1 of the AFEP-MEDEF Code recommends that the board of directors determine, upon the proposal of executive management, "*gender diversity objectives for governing bodies*": "*at the proposal of the executive management, the Board shall determine gender diversity objectives for governing bodies. The executive management shall present measures for implementing the objectives to the Board, with an action plan and the time horizon within which these actions will be carried out. The executive management shall inform the Board each year of the results achieved*". This recommendation is applicable starting from the general meetings convened to consider and approve the accounts for financial years beginning from 1 January 2020, but it is recommended that boards should make their best efforts to publish feminisation targets as of 2020.[126]

In its new version of the guide to application of the AFEP-MEDEF Code of January 2020, the HCGE recommends that listed companies make their best efforts to publish feminisation targets as of this year 2020, and gave details concerning the concept of "governing bodies". They include the executive committee, for example, but also the management board, the management committee and any other similar committee as well as senior management.

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121 https://www.economie.gouv.fr/agir-ensemble-egalite-femmes-hommes-economie

122 https://www.vie-publique.fr/consultations/272154-consultation-citoyenne-pour-legalite-femmes-hommes-dans-leconomie

123 Decree No. 2019-15 of 8 January 2019 enacting the measures designed to eliminate wage gaps between men and women in the company and relating to the combat against sexual violence and sexist behaviour in the workplace.

124 https://www.haut-conseil-egalite.gouv.fr/IMG/pdf/rapport_parite_gouvernance-20191217.pdf

125 Ministry for Labour, Employment and Integration, a male/female job equality index published by companies with more than 1000 employees. Note that for some companies this score is "consolidated" at the group level.

126 AFEP-MEDEF, Gouvernement d'entreprise, L'Afep et le Medef publient une version révisée du code de gouvernance des sociétés cotées, Press release, 30 January 2020.

The AMF notes that some listed companies already comply with these requirements, as the gender mix targets of statutory corporate bodies generally form part of the non-financial objectives. In the CAC 40 sample, these gender mix targets for statutory corporate bodies often concern a large number of people beyond the executive committee. For example, it was noted, in the universal registration documents, that these targets applied to the following populations:

- ✓ The 10% of positions of highest responsibility;
- ✓ Senior executives;
- ✓ Key populations;
- ✓ Managers' positions;
- ✓ Strategic positions beyond the Executive Committee/Management Committee;
- ✓ Management bodies/teams;
- ✓ Senior management;
- ✓ Key positions.

The AMF thus notes that the precise definitions adopted for the scope of the statutory corporate bodies are highly variable, and sometimes vague. Greater convergence, and greater precision in definition of the scope to be considered, would be desirable in order to have better transparency regarding the effective application of these new provisions.

Article 7.2 of the code states that "*In the report on corporate governance, the Board shall describe the gender diversity policy applied to the governing bodies as well as the objectives of this policy, the implementation measures and the results achieved in the past financial year including, where applicable, the reasons why the objectives have not been achieved and the measures taken to remedy this".*

The AMF notes, in the 2019 universal registration documents of CAC 40 companies, that:

- ✓ 10 observe that they have in 2019, or will have in 2020, between 15% and 35% of women on the Executive Committee;
- ✓ Three make a commitment to have between 25% and 30% of women on the Executive Committee by 2025 and one says that it wants to achieve in the Executive Committee, by 2025, the same percentage as that relating to the total proportion of women in the group's personnel;
- ✓ Regarding the gender mix targets in the other "statutory corporate bodies", the objectives are very different from one company to another: 20 companies have targets of 16% to 55% within the next 5 to 10 years.

☐ On the European level

On 5 March 2020 the European Commission published its five-year strategy (2020-2025) for gender equality in Europe which defines key measures for the next five years and undertakes to ensure that the Commission include an equality perspective in all the European Union's fields of action.

Accordingly, the Commission proposes adopting the draft directive of 2012 concerning a better gender balance on corporate boards of directors. This directive sets a target of at least 40% of non-executive members of the under-represented gender on corporate boards of directors, in line with the French law already in force.

Finally, the EU Platform of Diversity Charters will be used to share experience and good practices regarding gender balance in boards of directors and management positions, as well as examples of national and regional projects carried out by governments, civil society or the private sector.[127]

127 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0152

2.3 The "corporate mission"

The introduction of the concept of a "corporate mission" into the French Code of Civil Law is one of the most emblematic reforms of the PACTE Law. According to the explanatory statement in this text, "*this concept of the corporate mission aims to reconcile company managers and companies with their long-term environment. The report entitled "L'entreprise, objet d'intérêt collectif" produced by Jean-Dominique Senard and Nicole Notat states that the concept of the corporate mission can be defined "as the expression of what is essential to fulfil the corporate purpose". The corporate mission can therefore "have a strategic use, by providing a framework for the most important decisions". Like "a currency for a state, the corporate mission for a company is an indication, which deserves to be clarified, without necessarily having precise legal effects attached to it". This draft article therefore urges, in the form of a stimulating effect, that companies be no longer guided solely by a profit motive ("raison d'avoir"), but also by a corporate mission ("raison d'être"), a form of fertile existential doubt that can make it focus on long-term considerations*".[128]

Under the terms of Article 1835 of the French Code of Civil Law, as amended by the PACTE Law, the articles of incorporation may specify a corporate purpose, which "*consists of the principles that the company has adopted and the resources it intends to allocate in carrying out its activities, in order to comply with those principles*". Note that under the terms of the PACTE Law, the inclusion of a corporate mission in the articles of association is merely a possibility and not an obligation for issuers.

The Notat-Senard report, which inspired certain provisions of the PACTE Law, defined "*the corporate mission as the expression of what is "essential to fulfil the corporate purpose". Since the corporate purpose mentioned in a company's articles of association has become an inventory of potential activities, often far broader than the field of actual activities, the corporate mission is a search for consistency. It is often stated to strengthen employee engagement, by giving meaning to their work. Expressed by the board of directors, the corporate mission can also have a strategic use, by providing a framework for the most important decisions, in order to embody the specific interest of society and the company as well as social and environmental considerations, and thus serve as a useful counterweight to short-term financial criteria. […] The concept of the corporate mission involves giving substance to the legal fiction represented by the company*".[129]

The same report had identified the risk that some issuers might use the corporate mission for "marketing" purposes, noting that "*while some could be tempted to make it a marketing object, the corporate mission will serve for most boards of directors as a guide for important decisions, a useful counterweight to short-term financial criteria, which cannot act as a compass*".[130]

Although issuers are not required to express a formal corporate mission, still less insert it in their articles of association, it would be false to consider that the inclusion of a corporate mission in the articles of association has no normative significance. As the Conseil d'Etat noted in its opinion on the PACTE Law, "*however, this provision is not without normative significance insofar as, for those companies that make this choice, the insertion in the articles of association will oblige them to comply with this. Likewise, the new wording of Articles L. 225-35 and L. 225-64 of the Commercial Code invites the board of directors or the management board to "also take into consideration the company's corporate mission" and, where applicable therefore, to draw consequences from this in their management decisions*".[131]

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128 French Parliament, draft law relating to business growth and transformation, No. 1088, registered with the Presidency of the French Parliament on 19 June 2018, Explanatory statement.

129 N. Notat, J.-D. Senard, "L'entreprise, objet d'intérêt collectif", report to the Ministers of the Ecological and Solidarity Transition, Justice, the Economy and Finance, and Labour, 9 March 2018, p. 49.

130 N. Notat, J.-D. Senard, "L'entreprise, objet d'intérêt collectif", report to the Ministers of the Ecological and Solidarity Transition, Justice, the Economy and Finance, and Labour, 9 March 2018, p. 4.

131 Conseil d'Etat, Opinion on a draft law relating to business growth and transformation, Session of Thursday 14 June 2018, No. 394.599 and 395.021, p. 39. The Conseil d'Etat also notes that "contrary to the corporate interest, the "corporate mission" concept is unprecedented both in the legislation and in case law. It emphasises that, if impact analysis cannot clarify it, it is designed to be clarified gradually by practice and by legal decisions".

Over half of the CAC 40 companies say they have adopted a "corporate mission", sometimes even before the adoption of the PACTE Law, and some explain the commitments that result from it. Moreover, several companies indicate that a corporate mission is in the process of formal definition.[132]

Thus, in the CAC 40, only six companies have chosen to insert the corporate mission in their articles of association, and more specifically:

- ✓ in the introduction of the articles of association in one case;
- ✓ in the article relating to the "corporate purpose" in four cases;
- ✓ in the article relating to the powers of the board of directors in one case. It is therefore the principle of a corporate mission that is approved and not the corporate mission itself. Regarding this, the AMF notes that one CAC 40 company nevertheless provides explicitly in its articles of association for the principle of such a corporate mission and the resulting implications for the board of directors.

The other companies have not inserted the corporate mission - its content or its principle - in their articles of association but on various media. These media are usually their universal registration document and/or a page on their website. In two cases, the corporate mission appears in a code of ethics or of good conduct.

The description of the corporate mission and of the commitments arising from it is more or less detailed. Usually, companies summarise their corporate mission in one sentence, such as: "*Creating beauty which makes the world move forward*"; "*Acting every day in the interest of our customers and society*"; "*Offering everyone a better way to move forward*"; "*Bringing health to the greatest number through food*", before specifying what these expressions cover. Following the first expression quoted, for example, the company says that it *acts to invent the future of beauty using the best in technology and science, increasingly inspired by nature, […] acts to advance social innovation by offering [its] employees the best in terms of working conditions, training and social protection, […] acts to build an increasingly inclusive firm which reflects consumer diversity […], acts to forge lasting partnerships with [its] customers and suppliers, based on mutual trust and development, […] acts to create value for all [its] shareholders, based on a robust business model, […] acts to advance the cause of women and community development everywhere […], acts to protect the beauty of the planet by combating climate change, respecting biodiversity and protecting natural resources*."

When it is described, the process which led to the adoption of the corporate mission (whether or not it is inserted in the articles of association) follows relatively uniform patterns:

- ✓ Two companies state that the board of directors is tasked with implementing the process. Three companies underscore the existence of discussions in the Board concerning this corporate mission. One of them says: "The Board especially appreciated the fact of deliberating on the text of the corporate mission several times and having had the opportunity to amend it insofar as necessary. It wants to be able in future to have a thorough analysis of the impact of the adoption of this corporate mission by the firm, and close monitoring of the firm's commitments regarding non-financial performance and energy transition;
- ✓ In two cases, it is a sub-committee of the Board, or a Steering Committee, which conducts the deliberations. In one case, for example, the Steering Committee "*endeavoured to identify and analyse the existing practices, define the specifications to be complied with by the content of the corporate mission, conduct consultations with the various stakeholders and produce proposals for the corporate mission in conjunction with senior management*";
- ✓ Some companies emphasise the importance of dialogue with the stakeholders in working out the corporate mission: for one of these companies, for example, "*a text was produced at the instigation of the Executive*

132 Apart from the issue of the insertion of a corporate mission in the articles of association, it may be noted that, since the entry into force of the PACTE Law, 14 CAC 40 companies (including three of the six companies that have inserted a corporate mission in their articles of association) have updated their articles of association to include the consideration, in their management, of the social and environmental implications of their business (with reference to the new provisions of Article 1833 of the French Code of Civil Law). Furthermore, it appears that most of the companies that have not included a corporate mission in their articles of association devote a page on their website to the social and environmental implications of their business.

Committee […], based on three texts that had undergone work carried out with numerous colleagues in recent years: the shared Convictions (Mission and Vision), the Code of Conduct and the Engagement Manifesto."; for another, "*The Steering Committee was able to capitalise on the numerous consultations of stakeholders.*" In addition to customers, "*the following outside stakeholders were consulted: about fifteen investors out of the thirty or so called on, proxy advisers, non-financial rating agencies and more than about twenty actors from civil society via personal interviews (development NGOs, human rights NGOs, environmental NGOs, social NGOs, universities, think tanks, development banks, and local and national politicians).*" One company says that it had its employees take part in "co-construction" of the corporate mission: "*more than 15,000 interactions and proposals, and 130,000 votes*".

The AMF considers that it is good practice to define tangible commitments, specifying the practical implementation of this corporate mission and detailing its key stages. For example, some companies provide for:

- ✓ a regular review by the board of directors and monitoring of the commitments made as part of the corporate mission. One company describes in particular the internal organisation designed to ensure satisfactory implementation of the corporate mission: in this case there is "a multi-purpose organisation coordinated by the Secretary General, under the supervision of the Chief Executive Officer who reports to the Board of Directors. This organisation is based on a task force of about twenty Atos employees, coming from various operational and support functions, and holding positions as managers, project managers or experts. Each contributor is responsible in their area of activity for both the deployment and promotion of the corporate mission. The Board of Directors regularly examines progress in the firm's work on this subject. The sole Company with a Mission, for its part, has been provided with an independent Mission Committee, consisting of about ten eminent qualified experts, and will examine our roadmap and progress on all these issues.";
- ✓ regular dialogue with the stakeholders, internal (one company "promotes, especially in the staff representative bodies, social dialogue, which contributes to employees' assimilation of our collective project") or external ("enriched by a series of qualitative interviews conducted with the external stakeholders, this exercise enabled Carrefour to better understand their aspirations with regard to its corporate mission, identify emerging issues and examine in detail certain weak signals");
- ✓ training or even certification of employees concerning the corporate mission: "approximately 60% of employees receiving certification relating to our corporate mission and our values; approximately 75% of People Managers certified by pursuing our support approach";
- ✓ long-term strategic objectives:[133] "strategic plan 2021-2025 breaking down the Group's corporate mission into *strategic choices concerning customers, businesses and regions with the objective of an enduring improvement in the Group's profitability*"; "*It is on this basis, with a desire to anchor its societal utility in all its activities, business units and processes that the Group's new project, "Ambitions 2022", has been built. It reflects, via major objectives, a will to contribute even more to the UN Sustainable Development Goals (SDGs).*";
- ✓ inclusion of the corporate mission in the performance criteria for the variable compensation of executives (or, in one case, of managers);
- ✓ miscellaneous CSR programmes or responses to non-financial incentives: as an illustration, one company has established a "global programme of tangible actions for eating better at an affordable price, which, in France, "takes the form of *thirteen commitments*" such as: "*excluding 100 controversial substances from all the branded products [of the company]" or "ensuring transparency regarding the traceability of its products via the blockchain"*. Another company has established a "*Vigilance Plan 2020*", which "*is in line with the Vigilance Plan 2019, while taking into consideration the Group's new guidelines expressed through its strategic plan covering the period 2020-2025, as well as the corporate mission [of the company]. In particular, [the company] has specifically identified exposure to transient physical risks related to climate disorder, and has made a new*

133 *As a reminder, the "corporate mission" concept is distinct from the status of company with a mission introduced by the PACTE Law. Defined in Article L. 210-10 of the Commercial Code, the company with a mission is, in substance, a commercial company having a corporate mission and whose "articles of incorporation 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 fulfilment of these social and environmental objectives must be verified by an independent third-party organisation.*

commitment to be net zero carbon in 2040. [The company] has also made new commitments in favour of digital inclusion, to consolidate the freedoms and security of the everyday digital experience of people and organisations. With a view to transparency and openness, particularly towards investors and shareholders, the Group regularly responds to requests concerning its non-financial performance.".

More generally, as noted by the Conseil d'État, the corporate mission concept "*is designed to be clarified gradually by practice and by legal decisions*".[134] While certain trends are taking form, it is still too soon to draw conclusions regarding the significance of this reform introduced by the PACTE Law. This is also the case for the rewriting of Article 1833 of the French Code of Civil Law, by which the legislator explicitly introduced the concept of corporate interest in said code, and which provides that "*the company shall be managed in its corporate interest, taking into consideration the social and environmental implications of its activity*". The significance of the introduction of this new article has given rise to diverging interpretations[135] that should be clarified by legal decisions.

2.4 Consideration of the long term

On 30 July 2020 the European Commission launched a legislative initiative entitled "*Sustainable corporate governance*".[136] A legislative proposal is announced for the second quarter of 2021. A public consultation is in progress, open from end-October 2020 until February 2021, in order to receive data and the opinion of the stakeholders regarding the content of this proposal.

The initiative aims to increase allowance for sustainability issues in corporate governance structures and better align the long-term interests of executives, shareholders, stakeholders and society in general. It takes the form of two main approaches:

- ✓ Encourage boards of directors to better take into consideration the interests of the stakeholders and the risks, opportunities and negative impacts related to sustainability factors, in particular by taking them into account in companies' decisions and strategy;
- ✓ Invite the decision-making bodies to expand the time horizon based on which decisions are taken, and to consider the resilience and long-term performance of their companies throughout their value chains (duty of vigilance).

This legislative proposal could combine several measures, binding (e.g. via a directive - to be transposed by the Member States) and/or non-binding (e.g. via guidelines) such as:[137]

- ✓ The establishment of reasonable due diligence in order to identify, prevent, manage and attenuate negative impacts with regard to sustainability concerning the environment, social issues, human rights and corruption;
- ✓ Consideration of the interests of all the company's stakeholders and their inclusion in the company's strategy;
- ✓ Establishment of a mechanism for supervision and monitoring of compliance with these obligations, providing for appropriate penalties if necessary;
- ✓ Obligations concerning executive compensation structures.

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134 *Conseil d'Etat, Opinion on a draft law relating to business growth and transformation, Session of Thursday 14 June 2018, No. 394.599 and 395.021, p. 39.*

135 *Some authors consider that the PACTE Law is merely the formalisation in established law of legal decisions on the concept of corporate interest (see in particular D. Schmidt, "La loi PACTE et l'intérêt social", D. 2019, p. 633) while others consider that this law has consecrated a broader concept of the corporate interest (see in particular P.-H. Conac, "L'article 1833 et l'intégration de l'intérêt social et de la responsabilité sociale d'entreprise", Rev. Soc. 2019, p. 570; M. Tirel, "La réforme de l'intérêt social et la "ponctuation signifiante"", D. 2019, p. 2317). On the question as a whole, see Legal High Committee for Paris Financial Markets (HCJP), Report on the social and environmental responsibility of companies and their managers, 19 June 2020.*

136 *https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance*

137 *Impact Assessment.*

The other main news concerns the changes made in voting on compensation by the Shareholder Rights Directive. The changes in France are outlined in Part Two.

PART 2 – STUDY OF THE INFORMATION PROVIDED BY COMPANIES IN THE CORPORATE GOVERNANCE REPORT

The findings below are expressed in the context of (i) the first year of application of Articles L. 225-37-2 and L.225-37-3 of the Commercial Code, as amended, and (ii) the health crisis related to the Covid-19 pandemic.

1. REMINDER OF THE METHODOLOGY

1.1 Objective of the report

Pursuant to Article L. 621-18-3 of the Monetary and Financial Code, every year the AMF establishes a report on corporate governance and executive compensation based on the information published by companies that have their registered head office in France and are listed on a regulated market. The objective is to verify the information published by these listed companies (1.1.1.) and, where appropriate, to recommend changes in their practices (1.1.2.).

1.1.1 Verifying the information published by listed companies

The AMF checks the transparency of the information published by listed companies regarding corporate governance and executive compensation. It thus checks the information that the companies publish in the corporate governance report, in the Board's report to the general meeting and on their website, notably at the time of the annual general meeting.

Article L. 225-37-4 8° of the Commercial Code stipulates, in particular, that the corporate governance report shall specify "*when a company voluntarily refers to a corporate governance code produced by companies' representative organisations, the provisions which it has rejected and the reasons for this rejection, as well as the place where this code may be consulted […]*". If it does not refer to a code, the company must specify the reasons why it did not refer to it and give a description of the rules that it chooses to put in place to supplement those required by law, where appropriate.

To date, two codes have been produced by companies' representative organisations: the AFEP-MEDEF Code and the MIDDLENEXT Code. For information, as at 31 December 2019, in the SBF 120 index, 105 companies refer to the AFEP-MEDEF Code, 4 companies to the MIDDLENEXT Code and 10 companies to a foreign governance code. One company refers to no code. The AMF therefore examines how companies apply the recommendations which appear in the corporate governance codes established by the AFEP and the MEDEF or MIDDLENEXT.

1.1.2 Recommending changes in corporate governance practices

The AMF may approve "*any recommendation that it considers useful*".[138] It issues recommendations for companies referring to the aforementioned codes and suggested avenues for thought intended for the AFEP and MEDEF, or even for the High Committee on Corporate Governance (HCGE),[139] in order to bring about changes in the AFEP-MEDEF Code.

- AMF Recommendation DOC-2012-02: Corporate governance and executive compensation in listed companies referring to the AFEP-MEDEF Code – Consolidated presentation of the recommendations contained in the AMF annual reports.

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138 Article L. 621-18-3 of the Monetary and Financial Code.

139 According to the AFEP-MEDEF Code, the missions of the HCGE are:

- *monitoring the application of the principles contained in this code. To this end, it may firstly receive questions from Boards on any provision or interpretation connected with the code; it may decide to investigate at its own initiative if it establishes that a company has failed to implement one of the code's recommendations without sufficient explanations; its power of persuasion is due to transparency. Indeed, companies that might decide not to comply with the recommendations of the High Committee will have to mention this in their annual report, explaining the reasons. The shareholders will therefore be fully informed of the case referral and the reply given by the company;*
- *proposing to Afep and Medef updates to the code in the light of changing practices and recommendations that it may have made to companies in the course of its task of monitoring the implementation of the code.*

- AMF Recommendation DOC-2013-20: 2013 report by the AMF on corporate governance and executive compensation in mid and small caps.

1.2 Sample selected

The sample consists of 58 French companies of the SBF 120[140] (1) whose shares are admitted to trading on the Euronext Paris regulated market and (2) whose annual general meeting was held between the start of January and the end of July 2020. It includes all the CAC 40 companies meeting these two conditions, and companies of the SBF 120 that have also not been reviewed in the AMF corporate governance report during the past three years. Companies incorporated under foreign law were excluded from this sample. The list of companies in the sample is shown in Annex 2.

1.3 Theme and method of analysis of the 2020 report

The information used to prepare this report is the information published by companies in their registration document or their annual report published in 2020 for financial year 2019, and in press releases published in the first half of 2020 and/or on their website, primarily in the section dedicated to the annual general meeting.

The AMF indicated in its strategic plan for 2018-2022 that it wanted to "*adapt the AMF report on corporate governance and executive compensation, taking account of the progress made by issuers in recent years*". To increase the visibility of the most important messages, the AMF proposes in-depth examinations of certain issues regarded as topical or for which there is still room for progress.

In the context of the entry into force of the new Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC with a view to promoting long-term shareholder commitment, the so-called "Shareholder Rights II Directive", the theme selected for this report is the compensation of executive corporate officers. This thematic study was supplemented by an examination of non-compliance with the AFEP-MEDEF Code by companies on all the issues.

As in previous years, certain issuers are named for best practices. For practices deemed to have room for improvement, companies are named if they do not apply the law, a recommendation of the AMF or 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 “apply or explain” principle".

To summarise, within the sample:

- One SBF 120 company refers to no code;
- 3 companies of the SBF 120 refer to the MIDDLENEXT Code and say they comply with it strictly; and
- 54 companies in the sample refer to the AFEP-MEDEF Code. Of these, 12 CAC 40 companies state that they comply with all the provisions of the AFEP-MEDEF Code and 42 companies mention a failure to comply with one or more provisions of this code.

In all, therefore, 117 cases of non-compliance with the AFEP-MEDEF Code were reported by these companies (or on average about 2 non-compliance reports by each company). This figure should be put into perspective, because the indication of a failure to comply is a way for companies to explain how they comply with the AFEP-MEDEF Code by applying it to their particular situation[141] (this is the so-called "comply or explain" approach). Moreover, in 8 cases, the

140 *As at 31 March 2020.*
141 *Article 27.1 of the AFEP-MEDEF Code specifies that: "Listed corporations referring to this Corporate Governance Code should report in detail, in their report on corporate governance, on the implementation of these recommendations and, where applicable, provide an explanation when they deviate from any of them. The explanation to be provided when a recommendation has not been applied must be comprehensible, relevant and detailed. It must be substantiated and adapted to the company's particular situation and must convincingly indicate why this specific aspect*

companies have since established compliance. Lastly, 15 companies state that these are derogations to the AFEP-MEDEF Code that are temporary. All these failures to comply with the AFEP-MEDEF Code are described below whenever they relate to the selected theme or concern more than 10 companies.

2. COMPENSATION AWARDS FOR COMPANY OFFICERS

2.1 Determination of compensation by the Board

Under the terms of Article L. 225-37-2.-I.[142] of the Commercial Code, "*in companies whose shares are admitted to trading on a regulated market, the board of directors shall establish a compensation policy for company officers. […].*"

The law thus gives an important role to the board of directors, tasked with determining compensation and assessing the level of achievement of the various criteria and targets on which this depends. **SARTORIUS STEDIM BIOTECH** states in its universal registration document that this role is performed by the Board of the holding company,[143] which pays the listed company's chairman and chief executive officer directly and cross-charges to the company part of this compensation, via a service agreement. The AMF therefore reminded the company that, in addition, it had to specify the role of its own Board regarding compensation policy and the compensation received for their terms of office in this company. In a context in which the cross-charging agreement was rejected by the last three general meetings, the AMF also drew this company's attention to its recommendation DOC-2012-02, according to which: "*In the event of a contested vote at a general meeting, [the AMF] […] recommends that companies consider whether it would be appropriate to disclose any positions adopted by the board following this vote*."

Moreover, we emphasise the special situation of partnerships limited by shares, in which establishing the managers' compensation policy is the responsibility of the managing partner and not the supervisory board. However, one partnership limited by shares out of the four in the sample, **MICHELIN**, says that the supervisory board, assisted by a compensation committee, gives its opinion on the managers' compensation. More specifically, the compensation committee proposes to the supervisory board the factors determining their compensation components so that the latter may recommend to the non-manager partner the various criteria determining the variable compensation awarded to the managers. Another partnership limited by shares, **HERMÈS INTERNATIONAL**, has, since 2020, submitted the managers' compensation policy for the consultative opinion of the supervisory board. The managers' effective compensation is the subject of a resolution of the supervisory board. The AMF considers that these are good practices.

☐ Information concerning the assessment of performance conditions

Article L. 225-37-3 I 4° of the Commercial Code, in its new wording, provides for information in the corporate governance report on "*the evaluation methods to be applied to company officers to determine the extent to which they have met the stipulated performance criteria for variable compensation and compensation in shares*." Article L. 225-37-3 I 8° of the Commercial Code also provides for information on the way in which the performance criteria have been applied,

justifies an exemption. It must state the alternative measures that have been taken, if applicable, and must describe the actions that allow the company to comply with the aims of the relevant provision of the code."

142 *It should be noted that Article L. 225-37-2 of the Commercial Code concerns public limited companies and European companies with a board of directors, but similar provisions apply to public limited companies and European companies with a supervisory board and management board (L. 225-82-2 of the Commercial Code), and to partnerships limited by shares (L. 226-8-1 of the Commercial Code). For sake of simplicity, these last two legal references are no longer mentioned in the remainder of this report, but it should be considered that the observations concerning Article L. 225-37-2 of the Commercial Code relate to them in the same way. Moreover, the provisions of Article L. 225-37-3 of the Commercial Code concern public limited companies and European companies with a board of directors, but also apply to public limited companies and European companies with a supervisory board and management board, referenced by Article L. 225-68 of the Commercial Code, and to partnerships limited by shares, referenced by Article L. 226-10-1 of the Commercial Code.*

143 *In particular, page 85 of the 2019 universal registration document.*

with an "*explanation of how the total compensation complies with the adopted compensation policy, including how it contributes to the company's long-term performance, and how the performance criteria have been applied*".[144]

In the sample, the AMF notes that, while the performance criteria used are clearly presented for the annual variable compensation and long-term compensation, the companies do not always give details concerning the level of achievement of the objectives in year N-1.[145] For example, the company which awards the largest variable compensation as a percentage of the fixed compensation gives little information concerning the rate of achievement of the objectives. Likewise, information concerning a possible change in the criterion's weighting is sometimes lacking.

For those companies that award long-term cash plans, information on the Board's assessment of performance is often provided only at the time of payment (i.e. after the final award). Of the 23 CAC 40 companies having a share compensation plan which indicate that the vesting period expires in 2019, a single company, **SCHNEIDER ELECTRIC SE**, presents this compensation in the summary table of compensation. The others specify the number of securities vested in the tables of shares that have become available, or do not give any information.

In order to improve the presentation of the assessment of performance conditions, the AMF invites issuers to use a new model table, based on best practices observed in the sample:

Relative weight of each performance indicator (quantitative and qualitative) (1)	Minimum	Target objective	Maximum (2)	Level of achievement (3)	Amount in cash or number of shares corresponding to the level of achievement (3)	Assessment
Indicator 1						
Indicator 2						
Indicator 3 [etc.]						
Overall rate of achievement of N objectives						

(1) For qualitative criteria, some of these columns may be inapplicable.

(2) Or indicate any change in weighting of the criterion.

(3) To be filled in when the performance condition has been established.

This table is designed to apply to annual variable compensation and the numerous components of compensation subject to compliance with performance conditions. This concerns, in particular, long-term compensation, the acquired pension fraction, severance pay and certain exceptional compensation. It can also be used, taking only the first four columns, to present the compensation policy.

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144 *Article R. 225-29-1, II of the Commercial Code also provides for comprehensive information on performance criteria in the compensation policy, specifying, for each company officer, the following aspects:*
- *"When the company awards variable compensation components, the clear, detailed and varied criteria, of a financial and non-financial nature, including, where applicable, those relating to Corporate Social and Environmental Responsibility, on which depends their award, and how these criteria contribute to the compensation policy objectives."*
- *"When the company awards conditional obligations and rights, the clear, detailed and varied criteria, of a financial and, where applicable, non-financial nature, including those relating to Corporate Social and Environmental Responsibility, on which depends their award, and how these criteria contribute to the compensation policy objectives […]."*

145 *I.e., the last completed financial year.*

2.2 Compensation Committees in which the employees are not always represented

In addition to the Board, a committee is, pursuant to Article 18.2 of the AFEP-MEDEF Code,[146] "*responsible for reviewing and proposing to the Board all of the elements determining the compensation and entitlements accruing to the company officers. The Board of Directors in its entirety is responsible for making the corresponding decisions. It also issues recommendations concerning the global amount of and methods used for the distribution of the compensation awarded to directors*". Pursuant to Article 18.1 of said Code, it must not "*must not include any executive officer and must mostly consist of independent directors. It is recommended that the chairman of the committee should be independent and that one of its members should be an employee director*".

About thirty companies have no employee director in this committee. Of these, only 17 companies state that they are non-compliant and provide justifications.

This situation is temporary in a number of cases.

To explain this non-compliance, some companies stress the derogation applicable to holding companies from which they benefited, until the entry into force of the PACTE Law.[147] They were therefore not subject to the recommendation of the code that directors representing the employees should be appointed as members of the compensation committee. The AMF considers that the companies concerned should immediately bring themselves inro compliance with the AFEP-MEDEF Code.

Other companies stress the importance of a period for integration of the future employee directors so that they may adapt to the functioning of corporate governance, including its special features, and become familiar with the new requirements incumbent on the Board's mission. In this regard, one company states that "*the internal rules stipulate that the employee director may be invited to attend meetings of the Compensation Committee*" and another that *the director representing the employees, if he (she) does not sit on the Committee as a member, has been appointed by the Board to take part with a view to acting as secretariat. The discussions relating to the components of compensation and benefits of the executive corporate officers are therefore completely transparent and shared with the director representing the employees*". In its guide to application of the AFEP-MEDEF Code,[148] the HCGE indicates that the recommendation of the AFEP-MEDEF Code is applicable in the year in which the employee director(s) take up their position.

In other companies, non-compliance seems likely to persist. These companies state that the experience and knowledge of these employees are assets for other committees of the Board such as that dedicated to environmental and corporate issues, or the audit committee, but do not refer to the compensation committee. For example, one company says that an employee director is, at his request, a member of the Risks and Strategies Committee and that the Board supported this request, considering that his significant experience in the Group and his operational knowledge are assets for this

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146 *In credit institutions (and financing companies), such a committee, and its role, are provided for in Article L. 511-102 of the Monetary and Financial Code: "The compensation committee prepares the decisions that the board of directors, the supervisory board or any other body performing equivalent supervisory functions determines concerning compensation, notably those decisions which have an impact on risk and risk management in the credit institution or the financing company."*

147 *The derogation relating to holding companies was revised by the PACTE Law and no longer applies to companies whose shares are listed on a regulated market. More specifically, a company "whose core business is to acquire and manage subsidiaries and equity investments" is exempted from the obligation of appointing employee representatives to the board if it now meets the following three conditions (L. 225-27-1, I, para. 2 and L. 225-79-2, I, para. 2 of the Commercial Code):*
- *if it owns indirectly (and no longer merely directly) one or more subsidiaries meeting the conditions and applying the obligation of employee representation;*
- *if it is not subject to the obligation to set up a Social and Economic Committee (by virtue of Art. L. 2311-2, Labour Code);*
- *if its shares are not listed on a regulated market or at least four-fifth of its shares are held, directly or indirectly, by a natural person or a legal entity, acting alone or jointly with others.*

Likewise, by virtue of the PACTE Law, the number of directors representing the employees shall be at least equal to two in companies in which the number of directors is greater than eight, instead of twelve according to the prior legislation, and at least equal to one in companies in which the number of directors is equal to or less than eight instead of twelve (L. 225-27-1 II and L. 225-79-2, II).

148 *Version of January 2020.*

committee. Such explanations, although they reflect a reality, are not sufficient to justify non-compliance with the AFEP-MEDEF Code in the composition of the compensation committee.

Finally, several companies, which have no employee director in the compensation committee, state to justify themselves that an employee director takes part in meetings of the board of directors in which compensation is reviewed and discussed on the basis of the very complete minutes produced by the compensation committee. This explanation is not sufficient either, insofar as it calls into question the importance of discussions in the committee.

Due to the large number of companies whose practice is not in compliance with the AFEP-MEDEF Code on this point, and the growing importance of the various stakeholders, including the employees, the AMF asks the HCGE to keep watch on this issue.

2.3 Compliance with the compensation policy

As a reminder, companies whose shares are listed on a regulated market must put to the vote a compensation policy in accordance with the corporate interest of the company, which contributes to its sustainability and is in line with its commercial strategy. This compensation policy commits the company because "*no component of compensation, of whatsoever kind, may be determined, awarded or paid by the company, and no commitment corresponding to components of compensation, indemnities or benefits owed or likely to be owed as a result of the assumption of, termination of or change in their duties, or subsequent to the performance thereof, may be made by the company if it is not in compliance with the approved compensation policy or, failing such a policy, with the compensation or practices referred to in the last paragraph of II*".[149]

☐ Information on the components of compensation which may be awarded

The compensation policy describes all the components of fixed and variable compensation and explains the decision-making process followed to determine, revise and implement it.[150] With regard to the 30 CAC 40 companies of the sample having a chairman and chief executive officer and/or a chief executive officer in office in 2020:

- All the companies show the amount of fixed compensation in 2020 and the cap on variable compensation;
- 29 companies state that they will award a long-term compensation plan ("RVLT") to their chairmen and chief executive officers or chief executive officers in 2020. Most set the cap on the "RVLT" as a percentage of fixed compensation, a percentage of total compensation (sometimes defined as the addition of fixed compensation and annual variable compensation) and/or as a cash amount. 6 companies express the cap as a number of shares that can be awarded. At least 1 company mentions a cap as a percentage of the share capital, and applies this maximum not to a particular executive but to the overall long-term compensation of a group of executives. 5 companies combine two or even three caps. 4 companies mention none.
- 21 companies provide for the possibility of awarding exceptional compensation to executive corporate officers. 3 companies have explicitly planned not to resort to this. Of the companies which plan to award exceptional compensation, some companies cap the amount at, for example, 100% or 150% of fixed compensation.

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149 *Article L. 225-37-2 I of the Commercial Code.*

150 *Article R. 225-29-1, II of the Commercial Code provides that: "The compensation policy shall specify, for each company officer, the following aspects: 1° The fixed, variable and exceptional components of the total compensation and the benefits of all kinds that may be awarded to them for the office in question, and their respective weights; 2° When the company awards compensation in shares, the share vesting periods and, where applicable, holding periods applicable after acquisition and how the compensation in shares contributes to the compensation policy objectives; […] 4° When the company awards variable compensation components, the clear, detailed and varied criteria, of a financial and, where applicable, non-financial nature, including those relating to Corporate Social and Environmental Responsibility, on which depends their award, and how these criteria contribute to the compensation policy objectives; […]." The article describes in detail other factors which must appear in the company's compensation policy, notably relating to terms of office, employment or service contracts, commitments made by the company, non-competition agreements and the publication of the compensation policy.*

- The companies present the performance criteria related to the compensation for 2020, including for long-term compensation award plans. However, the level of information provided is more or less significant.

In general, the CAC 40 companies of the sample provide comprehensive information concerning their 2020 compensation policy. The AMF notes that Article R. 225-29-1[151] of the Commercial Code requires that the "respective size" of each compensation package be specified, which implies specifying its amount, for compensation in cash and in shares, including for exceptional compensation. A failure to present an item of information in the compensation policy due to the confidentiality of that information should therefore be justified precisely, notably with regard to the corporate interest of the company.

☐ Use of the concept of exceptional circumstances to depart from the compensation policy

The compensation policy approved by the shareholders is binding. "*No component of compensation, of whatsoever kind, may be determined, awarded or paid by the company […] if it is not in compliance with the approved compensation policy […]*" according to Article L. 225-37-2 of the Commercial Code.

The Board may depart from it only in the strict conditions provided for by law:

- The compensation policy describes the cases in which the application of this compensation policy may be departed from, and the procedural conditions by virtue of which they may be applied and the aspects of the policy which may be departed from;[152]
- During the financial year in which the Board's decision to depart from the compensation policy is made, the Board must, on the one hand, observe the existence of "exceptional circumstances" and, on the other hand, the combination of three conditions for the derogation: (i) the temporary nature of the derogation to application of the compensation policy; (ii) the compliance of this derogation with the corporate interest; and (iii) the need of this derogation to ensure the sustainability or viability of the company.[153]

Numerous issuers, who had elsewhere announced cutbacks in compensation for 2019 and 2020, accordingly referred to these exceptional circumstances in their compensation policy. For example, one issuer specifies that "*in these very exceptional circumstances of an expected drastic recession already forecast by the experts and leading institutions, in assessing the performance of each member of the management board whose overall variable fraction remains unchanged as a percentage of the fixed component, the Board will take into consideration the way in which the crisis has been managed with regard to the following fundamental aspects:*

- *ensuring the health and safety of the Group's employees;*
- *ensuring trouble-free operation;*
- *protecting customers' income and portfolio;*
- *strictly controlling costs;*
- *taking appropriate measures for strict management of resource and protection of the Group's assets*".

Thus, 29 companies out of the 58 in the sample consider explicitly, in their compensation policy, the possibility of applying, in 2020, the concept of "*exceptional circumstances*" in order to derogate from application of the compensation policy.

Of these companies, 16 specify the definition that they plan to give to the concept of exceptional circumstances:

- 5 companies adopt a broad interpretation: "*unforeseeable circumstances not reflected in the objectives*", "*unpredictability of the context*", "*in case of serious events*", "*particular significant circumstances or events,*

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151 *It should be noted that Article R. 225-29-1 of the Commercial Code concerns public limited companies and European companies with a board of directors, but that similar provisions apply to public limited companies and European companies with a supervisory board and management board (Article L. 225-56-1 of the Commercial Code), and to partnerships limited by shares (Article L. 226-1-1 of the Commercial Code).*

152 *Article R. 225-29-1 8° of the Commercial Code.*

153 *Article L. 225-37-2, III, para. 2 of the Commercial Code.*

which are extraordinary or of origin external to the Company, not taken into consideration or reflected in the factors, criteria or benchmarks provided for initially and in the present policy for compensation";

- The 11 others give examples of exceptional circumstances: a significant change in the group's consolidation scope, the acquisition, creation or termination of a significant new business, or a major event affecting the group's markets and/or sector of activity, the materialisation of a deal transforming the group, a substantial change in market conditions or an unexpected development in the competitive environment, an exceptional contribution by the company officer to the company's expansion, impacts - unexpected at the time of the report - of the systemic health crisis related to Covid-19, or a significant change in the Group's consolidation scope.

The AMF notes that, of the situations described as exceptional, a certain number, such as a significant change in the group's consolidation scope or the materialisation of a transformational deal, may, with some exceptions, be merely the result of implementation of the group's strategy. These situations could therefore be anticipated without requiring any change in compensation policy.

In the context of 2020, six companies call the current health situation an "*exceptional circumstance*".

However, many issuers do not specify the procedural conditions under which these derogations may be applied and the aspects of the policy which may be departed from, contrary to the requirements of Article R. 225-29-1 of the Commercial Code to be able to depart from the compensation policy.

To summarise, the AMF notes that the legal criteria are very demanding and that a mere reference to exceptional circumstances is not sufficient. Accordingly, while the current health crisis is undoubtedly an exceptional circumstance, it does not, by itself, justify departing from the compensation policy as approved by the shareholders.

Companies which may depart from application of the compensation policy due to exceptional circumstances must provide the information, stipulated in Article L. 225-37-3 10° of the Commercial Code, concerning "*any departure from the procedure for implementation of the compensation policy and any derogation applied in accordance with paragraph 2 of III of Article L. 225-37-2, including an explanation of the nature of the exceptional circumstances and an indication of the specific aspects which are departed from*". The justification for the derogation must be precise, because companies will only be able to depart from the compensation policy by complying with the combined three conditions stipulated in Article L.225-37-2, III of the Commercial Code (recapped above). The explanation that companies give must cover not only derogations with regard to the company's situation, but also the reasons why such departures from application of the compensation policy for the executive concerned, as adopted at the general meeting, are necessary.

Those companies that have not provided for derogations to application of the compensation policy and the "*procedural conditions by virtue of which these derogations may be applied*" will be able to award compensation different from that provided for in their compensation policy only after obtaining another vote on their compensation policy. A mere reference to the decision-making process that the companies apply for determining, revising and implementing the compensation policy[154] does not necessarily seem sufficient to justify a departure from the voting policy.

☐ Board discretionary power restricted by the compensation policy

In the context of the pandemic and uncertainty regarding issuers' strategic objectives, a new practice is developing: some companies indicate, in their compensation policy, that their Board retains a certain discretionary power that they define in their compensation policy.

Accordingly, several companies plan to award extra compensation in certain specific circumstances:

- One company allows its board of directors to award a capped extra bonus share issue: "*In the case of a special event justifying it, the Board of Directors reserves the right to approve an extra bonus issue. This possible bonus*

154 Article R. 225-29-1, I, 3 and 8° of the Commercial Code.

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issue for the executive corporate officer, duly substantiated by the Board of Directors, would take place in compliance with a total annual cap (for all bonus issues combined) of 5% of the total number of free shares awarded during the same financial year."

- One company states that "*the use of a long-term compensation mechanism with cash payment could be envisaged again in the future if regulatory changes or any other circumstance were to make the company's use of a system of performance shares restrictive or impossible. Likewise, if the General Meeting of the Shareholders of […] did not approve the […] resolution, the Board of Directors could decide on the cash compensation of the LTIP 2020-2022.*"

In other companies, the Board has been allowed to adjust or correct the variable compensation objectives and criteria:

- One company allows the board of directors to "*use with discretion its sense of judgment in determining the variable compensation components for the chairman and chief executive officer if unforeseeable circumstances not reflected in the objectives have a significant positive or negative impact on the level of achievement of one or more performance criteria. This provision allows the board of directors to ensure consistency between application of the compensation policy, the performance of the chairman and chief executive officer and the performance achieved by the Group.*";
- Another stipulates an individual performance criterion which represents at most 15%, this criterion corresponding to "*the desire of the Board of Directors to retain a right of assessment over part of the variable component in order to make allowance for the unpredictability of the situation. This could benefit the executive if the Company faces an unfavourable situation not foreseen when setting the objectives, and could be unfavourable to them if the context ultimately proves more favourable than expected.*";
- One company leaves total discretion to the board of directors to reduce or eliminate completely the application of non-financial criteria (at most 30% of the annual variable compensation criteria) in the case of a "*serious event during the financial year*";
- A fourth company leaves the Board a "*discretionary power*" to adjust the variable compensation criteria up or down if "*special circumstances*" occur;
- Two companies allow the possibility of adjusting the annual variable compensation or long-term compensation to correct for the impact of acquisitions and divestitures and/or exchange rates: "*The objectives indicated were set on a like-for-like consolidation and exchange rate basis. Accordingly, the Board of Directors can make adjustments in order to neutralise the consequences of any events such as changes in the consolidation scope or accounting method, or exchange-rate effects*";
- One company, while leaving vague the quantifiable proportion of the qualitative fraction, provides for the possibility of correcting, i.e. "*adjusting downward*", "*the rate of achievement of the variable component due based on quantitative criteria irrespective of the performance achieved so as to be able to make better allowance for the level of achievement of the qualitative criteria; this flexibility can only apply on the downside and cannot act as a factor compensating for weaker performance regarding quantitative aspects.*";
- Still another specifies that: "*The board of directors reserves the right, where appropriate and alongside the fraction reserved for "standard" performance conditions, to stipulate demanding and quantifiable additional performance conditions for which it would define the parameters, in order to take into consideration the Group's medium-term priorities and goals. In such a case, these additional performance conditions and their parameters would be disclosed and their weight would reduce the weight of the "standard" in-house conditions*";
- Finally, one company states: "*If particular significant circumstances or events occur, which are extraordinary or of origin external to the Company, not taken into consideration or reflected in the factors, criteria or benchmarks provided for initially and in the present policy for annual variable compensation or long-term incentive schemes, the Board of Directors, upon the recommendation of the Appointments and Compensation Committee, may decide to adapt and adjust these factors, criteria or benchmarks, notably upward or downward, precisely to make allowance for the impact of those circumstances or events. In such a case, the Board of Directors shall ensure that these adaptations (i) aim to reasonably restore the balance or the objective initially sought, adjusted for the expected impact of the event over the period concerned, and (ii) make it possible to remain consistent*

with the interest, strategy and prospects of the Company; the justification for and explanation of the adaptations decided on shall be disclosed."

In some companies, the power left to the board of directors to change an executive's compensation may also concern the assessment of the condition of presence, in the case of long-term variable compensation.

In other companies, the exercise of a certain discretionary power is also foreseen in the case of a management change. One company specifies, for example, that "*the fixed component is defined according to the role, experience and benchmark market of the Chief Executive Officer, notably with regard to the fixed compensation awarded to executive corporate officers of groups of similar size and scale* [...] *and more generally on the basis of the aforementioned benchmark*".

The AMF considers that a fair balance must be found between the transparency of the compensation policy and a certain freedom of initiative which may be retained by the Board. It is incumbent on companies to define precisely, in the compensation policy, the leeway left to the Board, in accordance with the applicable legal provisions. This choice must not prevent a coherent and rigorous definition of the compensation policy framework, nor result in a failure to comply with the provisions of Article R. 225-29-1 of the Commercial Code. It also seems important that the companies concerned should explain in their compensation policy the need for such flexibility.

Conclusion:

The exceptional health crisis context in 2020 could lead some issuers to alter certain components of compensation or change pre-set performance criteria.

However, the compensation awarded and paid should remain in line with the compensation policy. It cannot be departed from except in the aforementioned conditions.

If it is changed, the compensation policy must, in accordance with the law,[155] remain in compliance with the corporate interest of the company, contribute to its sustainability and be in line with its commercial strategy. Any major change shall be submitted for another vote by the annual general meeting and, in its application, subject to Article 225-37-3 10° of the Commercial Code : "*any departure from the procedure for implementation of the compensation policy and any derogation applied in accordance with paragraph 2 of III of Article L. 225-37-2, including an explanation of the nature of the exceptional circumstances and an indication of the specific aspects which are departed from*" shall be described in the corporate governance report.

Those companies that refer to the AFEP-MEDEF Code will have to provide evidence of compliance with the provisions of the AFEP-MEDEF Code, e.g.:

- In case of a change in the variable compensation, they shall have maintained pre-established criteria: Article 25.3.2 of the AFEP-MEDEF Code provides that "*The board defines the criteria that make it possible to determine the annual variable compensation as well as the objectives to be achieved. These must be precise and, of course, predetermined".* The AMF mentions that another provision of the code stipulates that *"all of the company officers' compensation components, whether potential or vested, must be publicly disclosed, immediately after the meeting of the Board approving them*";
- The performance conditions relating to long-term variable compensation should not be changed except in case of very particular circumstances.[156] In a context in which the variable compensation targets could, in some cases, not be achieved due to the health crisis, some companies may have been led to change the performance criteria for plans awarded to all the managers and executive corporate officers. For the latter, the company will have to provide evidence that the changes comply with the AFEP-MEDEF Code. In any case, if a change involved eliminating any performance criterion, it would not be in compliance with the AFEP-MEDEF Code insofar as, for the executive corporate officer, there would no longer be any link between compensation and performance.

155 Article L. 225-37-2 I of the Commercial Code.
156 AFEP-MEDEF Code, revision of January 2020, p. 28.

2.4 The repayment clause

Article L. 225-37-3-3° of the Commercial Code requires that listed companies indicate in the corporate governance report whether they have used or, possibly, plan to use the possibility of requesting repayment of variable compensation: "*Companies whose shares are admitted to trading on a regulated market shall present, in a clear and understandable manner, in the corporate governance report referred to in the last paragraph of Article L. 225-37, where applicable, for each company officer, including company officers whose term of office has been terminated and those newly appointed during the past financial year, the following information: […] 3° Use of the possibility of requesting repayment of variable compensation;[…]*"

7 companies out of the 58 in the sample state, for the 2020 compensation policy, that they have inserted a so-called "*repayment*" or "*recouping*" clause, which makes it possible to request the repayment of compensation paid to the executive corporate officers. Of these companies, 6 companies also have so-called penalty clauses which enable the Board to reduce or cancel sums not yet acquired by the executives, in certain circumstances.

The spread of this type of practice seems therefore, from reading the universal registration documents, relatively limited. Of the 7 companies, a repayment clause already existed in 2018 for 6 of them, 3 of which are financial institutions subject to special legal provisions. The last company inserted this clause this year. Although not explicitly linked to it, this new feature was introduced after the company was a victim of fraud in the group in 2019.

Some companies explicitly rule out the use of a repayment clause on the grounds that the payment of variable and exceptional components awarded to executives is subject to the approval of the General Meeting of the Shareholders. However, most of the companies remain silent on this subject.

The clauses described concern the annual or deferred variable compensation but also, in 2 cases, long-term compensation and, in one case, *"any bonus"*.

The companies concerned reserve the right to apply them in cases of misconduct, behaviour not in conformance with business ethics or in the case of application of a banking resolution in accordance with the Monetary and Financial Code. They mention "*exceptional and serious circumstances*", for example, explained as follows: *"it has been established that: the financial, accounting or quantitative data used to measure performance were clearly and intentionally distorted*;" or: "*the executive committed a serious and deliberate offence.*" They also mention "*intriguing*" and "*behaviour considered excessive with regard to risk taking.*", "*responsib[ility] for or [contribution] to significant losses to the detriment of the Group or […] particularly serious risky behaviour*", the observation of "*a decision taken by the executive corporate officers [having] very significant consequences for the firm's earnings or its image*", the case of "*gross negligence or fraud having a significant negative impact on the Group, giving rise, in particular, to a financial adjustment*", and cases where: "*(i) [compensation] has been awarded on the basis of incorrect information concerning the achievement of certain objectives and infringements that entailed a restatement of the financial results; (ii) […] the beneficiary does not comply with the standards concerning the adoption of appropriate behaviour; (iii) […] the beneficiary has been convicted by a final legal decision and is liable for conduct/behaviour that caused a deterioration of the Group's financial position*" or else "*the possible case in which the beneficiary were to adopt behaviour or be guilty of acts not complying with the expectations of [the company], as they are defined in particular with regard to compliance with the applicable Code of Conduct, internal rules and regulations and risk assessment and management, applicable to the Group's employees*".

The AMF considers that the repayment clauses can be an effective means for aligning the interests of management and shareholders. As such, they may be a good practice, for which transparency is recommended.[157]

157 The Law and the Decree provide only for mentioning the possibility for the company of requesting the repayment of variable compensation and the use of this possibility.

2.5 Executive waivers of part of their compensation

Most of the companies issued one or more press releases after the publication of their corporate governance report to announce executive waivers of all or part of their compensation. 62 SBF 120 companies announced a reduction in the 2019 compensation or, more frequently, part of the 2020 compensation of one or more executives and company officers.[158]

The companies in the sample have therefore made a real effort of disclosure concerning the compensation for 2019 and 2020 which has been waived by executives in the context of the pandemic. The AMF notes that certain good practices have facilitated investors' access to information concerning these waivers and changes in the compensation policy:

- performing disclosure as far as possible ahead of the general meeting;
- making the press release relating to this waiver of compensation available in the section of the company's website dedicated to general meetings;
- being precise regarding the components of compensation concerned and their amounts, and regarding the conditions of waiver (abandonment, deferment, gift, etc.);
- specifying in the press release whether the Board took formal note of the executive's decision and, where applicable, whether the compensation policy was changed;
- publishing an update, by way of an amendment, to the registration document containing the corporate governance report.

Within the sample:

- 3 companies, which proposed a change in the compensation for 2019, also published an updated version of the notice of meeting and/or an amendment to the universal registration document;[159]
- Moreover, 2 companies changed their 2020 compensation policy ahead of the general meeting, to reduce the amount of fixed compensation and to eliminate or reduce the annual variable compensation of the executive corporate officers and other company officers. In this context, these companies published an amendment to their universal registration document.

3. FINDINGS REGARDING THE VARIOUS COMPENSATION AWARDED FOR AND/OR PAID DURING THE PAST FINANCIAL YEAR TO EXECUTIVE CORPORATE OFFICERS

Complementing the compensation policy, the companies show in their corporate governance report the compensation awarded for or during the previous financial year. Three categories of compensation are presented in the corporate governance report:

- Compensation paid during the past financial year or awarded for said financial year for the office;[160]

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158 Source: AMF.

159 One of the 3 companies updated its corporate governance report included in its universal registration document in a context in which its chief executive officer and its deputy chief executive officer had decided to waive half of their variable compensation due for 2019, to contribute to the solidarity action undertaken by the group, "which will pay the corresponding amount to the new Group Solidarity Fund for the elderly." Another of these 3 companies updated its notice of meeting for the annual general meeting, in a context in which the managers had decided to waive the increase in their fixed compensation paid in 2020 and part of the variable compensation which had been awarded to them in 2020 for 2019. In 2020 the latter will receive a total amount of compensation identical to that which was paid to them in 2019. The last company, in contrast, stated in the notice of meeting that the managers' waiver of part of the variable compensation for 2019 which is paid to them in 2020, would only be effective once it had been submitted to the shareholders for voting at the general meeting; the notice of meeting was not modified.

160 Article L. 225-37-31° of the Commercial Code provides for presentation of "the total compensation and benefits of all kinds, distinguishing between the fixed, variable and exceptional components, including in the form of equity securities, debt securities or securities giving access to

- Compensation paid or awarded in the consolidation scope;[161]
- Components likely to be owed as a result of the assumption of, termination of or change in duties, or subsequent to the performance thereof.[162]

This section presents the main findings relating to the various types of compensation awarded and/or paid in the companies in the sample by those companies referring to the AFEP-MEDEF Code. **First of all, the AMF reiterates that it recommends that all compensation be set out in the summary table of compensation (Table 2), even when it results from a proposal for a change in the compensation policy, and that all exceptional compensation be shown there (including signing bonuses and/or severance pay).**

3.1 Increases in compensation

While the majority of companies foresee a decline in fixed or total compensation, a few rare companies still foresee increases. Some justify the increase in fixed or total compensation based on comparative studies, particularly in the context of a merger with other companies. Article 25.3.1 of the AFEP-MEDEF Code stipulates that "*in the event of any significant increase in compensation, the reasons for this increase must be clearly indicated*."

As an example, one company explains the increase in fixed compensation between 2019 and 2020 by the will "*to ensure a competitive level of compensation in light of the compensation levels practised in [comparable] groups, and consistent with increasingly complex responsibilities". It is indicated that "the comparison sample consists of […] European and American groups.*"

Recommendation

Pursuant to Article 25.3.*1 of the AFEP-MEDEF Code, "fixed compensation may only be reviewed at relatively long intervals […] In the event of any significant increase in compensation, the reasons for this increase must be clearly indicated".* When a company justifies an increase in fixed compensation (or total compensation) by comparative studies, the AMF recommends that the company give detailed explanations, e.g. by giving the characteristics of the sample group of comparable companies selected.

3.2 Long-term compensation

In the sample, long-term variable compensation represented on average 33% of the total 2019 compensation of chairmen and chief executive officers, and chief executive officers. The objectives pursued when such compensation is awarded are, for example:

- to involve the executive corporate officer in the company's long-term performance;
- to reward the executive for a mission of an exceptional kind; and,
- in one case, to award the executive a retirement plan dependent on the accomplishment of performance targets.

capital or entitling holders to the award of debt securities of the company or companies mentioned in Articles L. 228-13 and L. 228-93, paid for the office during the past financial year, or awarded for the office for said financial year, indicating the main conditions of exercise of the rights, and in particular the price and date of exercise and any change in those conditions."

161 *Article L. 225-37-3 5° of the Commercial Code: "Any compensation paid or awarded by a firm included in the scope of consolidation within the meaning of Article L. 233-16."*

162 *Article L. 225-37-3- 4° of the Commercial Code: "Commitments of any kind made by the company and corresponding to components of compensation, indemnities or benefits owed or likely to be owed as a result of the assumption of, termination of or change in their duties, or subsequent to the performance thereof, in particular pension commitments and other lifetime benefits, mentioning, in conditions and according to procedures stipulated by decree, the precise methods for determining these commitments and an estimate of the amount of money that could be paid for this purpose; […]."*

In 2020, discontinuation of long-term cash compensation plans

The companies in the sample have gradually discontinued long-term cash compensation plans, replaced by share awards. In 2020, only 2 CAC 40 companies still have a long-term cash plan in their 2020 compensation policy. This change can probably be explained by two factors:

- when amounts are paid in cash, they directly affect the company's cash position; and
- this system aligns the interests of the beneficiaries with those of the shareholders less directly than an equity interest system.

In the sample, a certain heterogeneity is noted in the information provided concerning long-term compensation. The information to be provided is rather detailed, because this compensation is vested gradually: after the initial award, the fulfilment (or not) of performance conditions must be ascertained, and then the securities and/or cash are handed over following a vesting period (and often subject to a condition of presence).

☐ Information on initial awards

As an example, in 2019, 35 CAC 40 companies have made an initial award of a long-term variable compensation plan for the benefit of their executives. 31 companies awarded long-term compensation in shares and four in cash.

The information relating to this initial award (maximum number of shares awarded, valuation or amount of this award, relevant performance conditions) is presented clearly by all the companies concerned in Table 1 summarising the compensation and options and shares awarded to each executive corporate officer (for shares) or Table 2 recapping the compensation of each executive corporate officer (for cash) recommended by the AFEP-MEDEF Code. **The valuation of this long-term compensation depends on the assumptions adopted, so the AMF encourages companies to give a reminder of the assumptions adopted for the valuation of this compensation and/or refer to the financial statements for the details.**

☐ Information on the payment of long-term compensation in cash

In 2019, 9 CAC 40 companies made a long-term compensation payment in cash. Of these, 6 companies present this information in Table 2 as recommended by the AMF. One company shows this data in Table 1.

2 others show it in the table of compensation components put to the vote pursuant to Article L. 225-100, III of the Commercial Code, without giving a recap in a summary table of compensation awarded and paid.

Despite the heterogeneity of the presentations, the AMF considers that the information on the payment of long-term compensation in cash is well presented by most of the companies, which, in accordance with the AMF's recommendations, give more comprehensive information than that provided for by the table recommended by the AFEP-MEDEF Code.

Avenue for thought

The AMF therefore urges the AFEP and MEDEF to alter Table 2 summarising the compensation of each executive corporate officer in order to include the payment of multi-annual variable compensation in cash.

☐ Information on the *stock* of securities awarded nominally to company officers

In 2018, the AMF had expressed the following recommendation: "*The AMF recommends […] that the corporate governance report and registration document include a comprehensive view of implementation of the compensation policy over several years, in addition to the policy itself. For options, performance shares and long-term variable* *compensation, this may be done by referring to tables 8, 9 or 10 of the AFEP-MEDEF Code. These tables, which describe past awards, should set out the previously established performance conditions*".[163]

In the sample, the information on nominal awards of shares and options to executive corporate officers is both very detailed, with issuers clearly presenting Tables 4 to 10 of the AMF Recommendations and the AFEP-MEDEF Code, and incomplete for plans in the vesting period and/or those which are not yet available. **Issuers are invited to present a summary table showing nominally all the current plans (including plans in course of being awarded). In its draft *guidelines* on the presentation of compensation,[164] the European Commission provides an example of a summary table.**

3.3 Exceptional compensation

Five companies in the sample awarded or paid exceptional compensation to their executive corporate officers in 2019, for an often significant amount. Many other companies plan to do so through their 2020 compensation policy (see section 1).

This exceptional compensation is awarded or paid in two very different cases: (i) either payment of this compensation is planned for the financial year in question as of the start of year, or (ii) this compensation is determined by the Board upon observing the performance for the past year.

The first case concerns companies that, in addition to the annual variable compensation, want to set additional objectives for their executive in the context of a strategic deal. This compensation in that case often comes with performance conditions and a cap.

Through certain examples, the AMF observes that, on reading the universal registration documents, it is sometimes hard to distinguish between what is paid as annual compensation and what is paid as exceptional compensation. As an illustration, one company in the sample justified an increase in the fixed compensation of its executive to be "*consistent with the increasing complexity of the responsibilities held, notably related to negotiations on the planned merger*" on the one hand and exceptional compensation in order to "*retain employees' loyalty in a merger context on the other hand*", specifying that: "*The implementation of this employee loyalty plan would be subject to a condition of presence and to performance conditions specific to the merger deal.*"

The second case concerns companies which observe, in retrospect, that the performance criteria that they set for their executive(s) were not sufficient to remunerate their performance for the past year.

The AMF considers that this second case should remain extremely rare, and that it should be duly justified. It could entail another vote at the general meeting on the change in compensation policy.

One example raises questions. In the case in question, the board of directors of a company noted that the executive had achieved only part of their variable compensation targets. At the same time, it proposed to award additional compensation "*to take into account the [executive's] decisive contribution*" and the materialisation "*of the strategic operations of Group transformation and debt reduction linked to the asset disposal plan*". The company justifies this decision by the fact that: "*the procedures for determining (nature of the quantitative targets and related financial and non-financial criteria) the variable compensation [of the executive] as defined for the annual variable and LTI compensation […], do not measure the [executive's] performance in conceiving and carrying out such operations."* Moreover, *"this award would be in line with the complementary compensation policy established for members of the Executive Committee in order to recognise a decisive contribution to the success of strategic and/or complex deals."* Said contribution is presented as an *"important contribution to the operations carried out in 2019",* and in particular*: "asset disposals, […] consolidation of the capital structure.* "

163 AMF Recommendation DOC-2012-02.

164 https://ec.europa.eu/info/consultations/public-consultation-remuneration-report-guidelines-implementing-shareholders-rights-directive_fr

The AMF notes that these contributions could possibly have been, at least partially, anticipated by criteria and targets - financial in particular - set for the variable compensation for financial year 2019, which, moreover, the Board of Directors noted were partially achieved. Furthermore, the justification for awarding the compensation concerns aspects which represent the rationale for the executive's mandate, forming part of the Group's long-term strategy.

The AMF reiterates that, if the pre-established variable compensation criteria, targets and caps are to be meaningful, it is essential that companies award exceptional compensation in a manner consistent with the conditions surrounding variable compensation (originating fact not covered by the pre-established criteria, particularly outperformance).

Recommendation

The AMF recommends that companies distinguish precisely between the reasons for awarding the fixed and variable compensation and those for exceptional compensation.

3.4 Signing bonuses

Article 25.4 of the AFEP-MEDEF Code provides that "*benefits for taking up a position may only be granted to a new executive officer who has come from a company outside the group. The payment of this benefit, which may take a number of different forms, is intended to compensate the director for the loss of the entitlements from which he or she previously benefited. It must be explicitly indicated and the amount must be made public at the time it is determined, including in the event of periodic or deferred payment*".

Only one company in the sample awarded a significant signing bonus in the form of an award of performance units. This award compensated for about 50% of the awards not yet vested which this executive had sacrificed by changing company.

Originally, these signing bonuses were provided for in a context in which the vesting of special supplemental pension plans for top company officers[165] was contingent on the presence of the company officer in the company. Any departure before retirement, for example due to resignation or dismissal, would result in the loss of all benefits vested.

Now, Article 1 of Order 2019-697 of 3 July 2019, transposing Directive 2014/50/EU, provides 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 order is that the sum of the two periods provided for by a single scheme may not exceed three years*".[166]

The elimination of the random nature of the vesting of pension benefits as provided for historically under Article L. 137-11 of the Social Security Code is likely to lead to a reduction in certain benefits.

3.5 Compensation components that could be due in the event of departure

Nine companies in the sample say they are not in conformance with the AFEP-MEDEF Code for compensation that could be due on the occasion of, or subsequent to, departures (severance pay, non-competition agreement and pension). These nonconformities are not recent and were mainly designed to ensure a pension for executives.

165 *Defined-benefits supplemental pension plan, known as "retraites chapeau" in France and governed by Article L. 137-11 of the French Social Security Code.*

166 *See 2019 corporate governance report page 20.*

One failure to comply with the AFEP-MEDEF Code deserves to be mentioned. Article 25.5.1 of the AFEP-MEDEF Code mentions that "*it is not acceptable that directors whose company has failed or who have personally failed may receive benefits upon departure [..]. The performance conditions set out by the Board for these benefits must be assessed over at least two financial years. They must be demanding and may not allow for the indemnification of a director, unless his or her departure is imposed, regardless of the form of this departure.*" The same article stipulates that the severance pay and non-competition agreement combined must not exceed, where applicable, two years of compensation (fixed and annual variable).

One SBF 120 company, VIRBAC, measures the fulfilment of the performance conditions over a period of two half-years (instead of four as recommended by Article 25.5.1 of the AFEP-MEDEF Code) with a cap exceeding two years of fixed and variable compensation. It is therefore doubly non-compliant with the AFEP-MEDEF Code. If, in accordance with AMF Recommendation DOC-2012-02, the length of service of the executive in question in the group (14 years in this instance), and his personal situation could have justified maintaining the employment contract, this cannot justify the failure to comply with the provisions relating to severance pay.

When executives leave, most of the companies in the sample decided, in 2019, to maintain the right to payment of unvested performance shares, i.e. those for which the period for assessment of the performance criteria has not expired. Although the AFEP-MEDEF Code does not specify in what circumstances, nor in what conditions, it is acceptable to maintain the benefit of the payment of multi-annual variable compensation, simply stating that "*this shall be assessed by the Board and shall be substantiated*", the AMF had stated, in its 2014 annual report on corporate governance, that it is "*understandable that the retirement of a director or corporate officer should not entail the systematic loss of all deferred or multi-annual variable remuneration. In such cases, companies may wish to consider a pro-rata vesting mechanism. However, in the case of removal from office, non-reappointment or resignation (unless the reason for the non-reappointment or resignation is retirement or disability), any payment of deferred or multi-annual variable compensation should in principle be ruled out unless it can be shown that there are exceptional circumstances that are justified by the board and publicly disclosed.*"

Recommendation

While it is understandable that the retirement of a director or corporate officer should not entail the systematic loss of all deferred or multi-annual variable remuneration, the AMF recommends the establishment of a pro-rata vesting mechanism. However, in the case of removal from office, non-reappointment or resignation (unless the reason for the non-reappointment or resignation is retirement or disability), it recommends eliminating any payment of multi-annual variable compensation, unless there is a special justification for this.

3.6 Continuation of the employment contract

Pursuant to Article 22.1 of the AFEP-MEDEF Code, it is recommended that, "*when an employee becomes a company officer, it is recommended to terminate his or her employment contract with the company or with a group company, whether through contractual termination or resignation*".

This recommendation applies to the chairman, the chairman and chief executive officer, or the chief executive officer in companies with a board of directors, to the chairman of the management board, to the sole chief executive officer in companies with a management board and a supervisory board, and to the statutory managers of partnerships limited by shares.

10 companies indicate that they suspended, but maintained, the employment contract of one of their executive corporate officers. These were not recent appointments. Moreover, while all the situations are justified by the executive's length of service, the companies provide detailed explanations. AMF Recommendation DOC-2012-02 is therefore suitably complied with: *"The seniority of the executive as an employee of the company and his personal circumstances may justify maintaining his employment contract. However, the AMF believes that a generic reference to seniority and personal circumstances is not a sufficient explanation under the "comply or explain" principle. It is*

recommended that the company provide substantiated explanations of the personal circumstances of the executive in question. In that case, the AMF recommends that the company provide justifications suited to the specific situation of each executive (length of service, description of benefits associated with the employment contract).”

Of these 10 companies, two came into compliance in 2019 and 2020 and two specify that the situation is temporary. The AMF reiterates that it is always necessary, in this situation, to present the provisions of executives' employment contracts which may impact executive compensation, and in particular those relating to severance pay.[167] It also emphasises that compensation for premature termination of the employment contract is not subject to the fulfilment of performance conditions.

4. THE PAY RATIO OR MULTIPLE OF COMPENSATION

The pay ratio was introduced by the transposition in 2019 into the PACTE Law of the Shareholder Rights Directive II. This is new information in the corporate governance report.

Article L. 225-37-3 of the Commercial Code provides for a comparison between executive compensation, presented on an individual basis, and the mean compensation of employees: *"6° For the chairman of the board of directors, the chief executive officer and each deputy chief executive officer, the ratios between the level of compensation of each of these executives and, on the one hand, the average compensation on a full-time equivalent basis for company employees other than company officers, and on the other hand the median compensation on a full-time equivalent basis for company employees other than company officers"* (hereafter the "pay ratio").

The presentation of the pay ratio is accompanied by the trend over five financial years for various indicators, in accordance with Article L. 225-37-3 7° of the Commercial Code: *"The annual change in compensation, the company's performance, average compensation on a full-time equivalent basis for the company's employees other than executives, and the ratios mentioned in 6°, during at least the five most recent financial years, presented together and in a manner which allows comparison."*

The purpose of presenting this information in companies' corporate governance report is to place the compensation of executive corporate officers in perspective with that of the employees, with a view to increased transparency of compensation policies. In this regard, it should be reiterated that Article R. 225-29-2, 3° of the Commercial Code also stipulates that companies should describe, in the decision-making process followed for determining and reviewing the compensation policy for company officers, "*how the compensation and employment conditions of the company's employees are taken into consideration.*"[168]

Although nearly all the companies indeed published at least one ratio this year, two companies presented none (one company whose financial year was lagged and one which had no employee at the level of the listed company).

☐ Disparity of the ratios

The ratios of the companies in the sample show a great diversity of results.

For example, for the 13 companies in the sample which presented a ratio comparing executive compensation with that of the employees in "France" or "Europe", the dispersion of ratios obtained for the Chairman and CEO is as follows:

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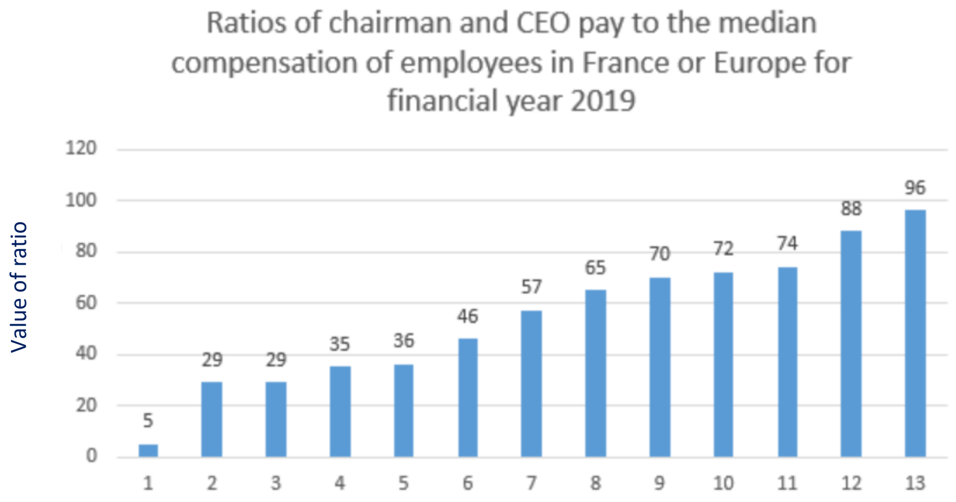
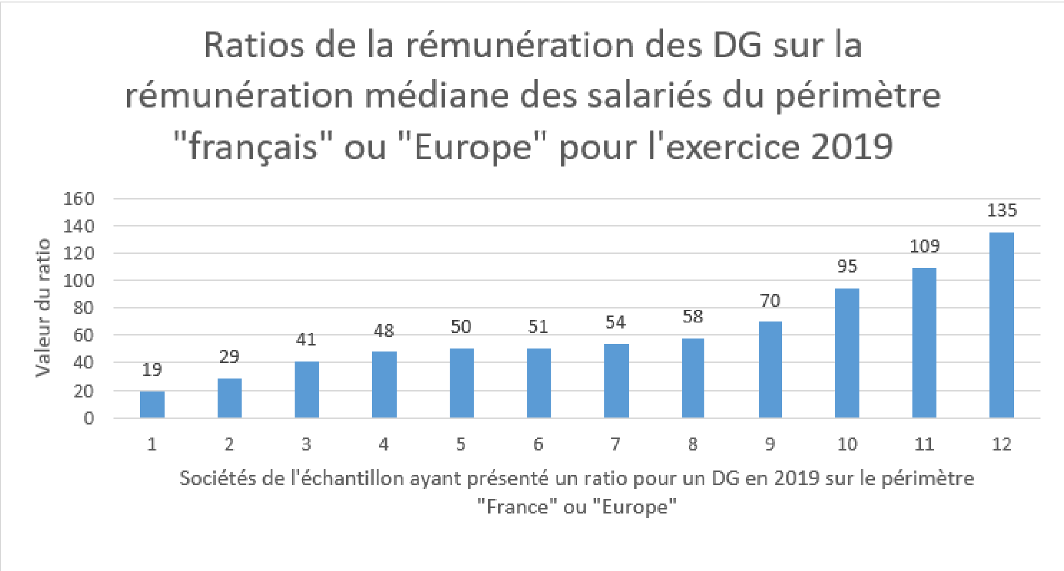
167 Including benefits related solely to the premature termination of the employment contract and unrelated to the corporate office (AMF Position-Recommendation DOC-2009-16).

168 Article R. 225-29-1, I, 3° of the Commercial Code.



Companies in the sample having presented a ratio for a Chairman and CEO in 2019 for the "France" or "Europe" scope

For the 12 companies in the sample which presented a ratio comparing executive compensation with that of the employees in "France" or "Europe", the dispersion of ratios obtained for the Chief Executive Officer is as follows:



This disparity is found in other countries. A report by AON, a company specialised in risk management,[169] concerning pay ratio practices in British companies shows that the ratio for the median compensation of corporate executives ranges from 6 to 813 with a median of 77 for the FTSE 100, 30 for the FTSE 250, and 27 for the FTSE SmallCap.

The disparity of ratios can be explained not only by pay differences but also by methodological differences, and in particular whether or not long-term compensation is taken into consideration. For example, one company states that

169 *"The highest CEO pay ratios are among the largest companies where CEO remuneration is often higher than at smaller organisations along with headcount. The median ratio ranges from 6 to 813 with a median of 77 for the FTSE 100, 30 for the FTSE 250 and 27 for the FTSE SmallCap", in Sian Halcrow-Wilson, Marina Gostanian, AON, How U.K. Companies are Calculating the CEO Pay Ratio in First Year of Disclosure, September 2019.*

the CEO ratios for 2019 are 32 and 38.3 respectively before taking into consideration long-term compensation, and 268 and 320.9 respectively after taking this compensation into account.

☐ Scope of employees taken for comparison

The law refers to a comparison of executive compensation with the compensation of the company's employees. The AFEP-MEDEF Code recommends, in addition, in its new Article 26.2 as amended in January 2020, that companies provide information concerning a more significant scope when they have no or few employees relative to the total headcount in France: "*Corporations which have no or not many employees in relation to the global workforce in France must take into account a more significant perimeter in relation to the wage bill or the workforce in France of the corporations over which they have exclusive control within the meaning of Article L.233-16 II of the Commercial Code."* Note that, according to this code, *"80% of the headcount in France can be considered a significant scope.*"

Within the sample:

- 26 companies present a pay ratio explicitly taking into account the employees of the listed company, of which 16 exclusively, while 10 companies also present a ratio calculated over a more extensive scope;
- 30 companies present a pay ratio only over a scope which seems more extensive.

Few explanations are given by the 30 companies which do not explicitly present a ratio at the level of the listed company. The companies which justify their non-observance of the law state that they have no or few employees at the level of the listed company. Of these 30 companies, however, 17 have more than 5 employees, 13 more than 10, 10 more than 100, 8 more than 400, 4 more than 1,000 and 1 more than 10,000.

The AMF gives a reminder that the publication at the listed company level of ratios between the compensation of each of the executives concerned and the average and median compensation of the employees (on a full-time equivalent basis) is compulsory.

Considering the 40 companies in the sample that presented a ratio over a broader perimeter than that of the listed company, exclusively or not:

- 38 companies apply the new recommendation of the AFEP-MEDEF Code and have chosen a " *more significant perimeter in relation to the wage bill or the workforce in France of the corporations over which they have exclusive control within the meaning of Article L.233-16 II of the Commercial Code*."
- 2 companies select a scope going beyond the French scope: 1 company has opted for a European scope and the other for an even broader scope representing 70% of the group's headcount.

The AFEP-MEDEF Code specifies that "*80% of the workforce in France can be considered a significant perimeter*". Of the 38 companies that presented the ratios on a French scope:

- 16 companies chose a scope representing 80% or more of the headcount in France;
- 4 selected a scope representing 40% to 80% of the headcount in France;
- 3 companies selected a scope including less than 13% of the headcount in France;
- The percentages were unable to be calculated for the 15 other companies.

The perimeter chosen is often not very precise. Some companies indicate that it concerns a Social and Economic Unit (UES) or the main subsidiary.

Some companies provide interesting explanations concerning the choice of perimeter:

- 3 companies explain that, in the selected perimeter, the typology of the employees and/or activities concerned is representative of the group's various businesses;

➢ Another says that, on the basis of the information available via the group's workforce reporting tool, the group's median and mean wages are estimated to be similar to the median and mean wages in the selected sample;

➢ Another specifies, on the contrary, that given the wage diversity between the various geographic regions in which the group is active, it seems to it appropriate to narrow the scope considered to Europe.

Recommendation

The AMF reiterates that companies must present the ratios provided for in Article L. 225-37-3 6° of the Commercial Code for the scope of the "company's employees". It urges them, in addition, to select a pay ratio on the basis of a scope regarded as representative by the company. This scope should be precisely defined and the company should explain in what way it is representative.

It also notes that the European Commission's draft guidelines recommend the presentation of two ratios: one, mandatory, at the level of the listed company, and the other, at the company's discretion, at the group level: companies must therefore provide quantified information on employee pay "*including all the employees of the 'company' (i.e. the reporting company). Additionally, where companies consider it appropriate or more meaningful or informative, they may also provide numeric information including the employees of the entire group of companies, on a consolidated basis. This information could be relevant when the performance of the company is also presented by metrics that take into account the performance of the entire group.*"

☐ Compensation taken into consideration for calculating the ratio

Article L. 225-37-3 of the Commercial Code mentioned above refers to the level of compensation of executives and employees without giving many details concerning the factors to be taken into consideration.

The AFEP guidelines dated 28 January 2020 were published to specify the methodology for establishing this ratio.[170] These guidelines "*are designed to offer a universal analysis of the components of compensation to be taken into consideration for both the numerator and the denominator*". They note that: "*In the numerator, it is recommended to show the compensation and benefits of all kinds of each executive corporate officer due or awarded for the financial year or paid or awarded during the financial year, depending on the information which appears most relevant for the company.*"

The level of detail given by the companies concerning the methodology used is highly variable (between one and three pages) and does not make it possible, in most cases, to understand, and still less compare the indicated amounts with peers.

The AMF recommends that companies give a more transparent presentation that can provide useful information for investors and foster dialogue with the stakeholders.

➢ *A ratio including all components of compensation?*

26 companies, of which 18 CAC 40 and 8 SBF 120, indicate the amount of the executive compensation taken into account to calculate the ratio's numerator. Of these companies, in 10 cases a reconciliation is possible with the executive compensation as presented elsewhere in the corporate governance report.

47 companies provide information concerning the components of compensation of the executive corporate officers taken into consideration in the numerator. Of these:

➢ 2 companies state explicitly that they do not take into account possible or actual exceptional compensation;

170 *AFEP, Lignes Directrices sur les Multiples de Rémunération, 28 January 2020, https://afep.com/wp-content/uploads/2020/01/Guidelines-sur-les-multiples-de-r%C3%A9mun%C3%A9ration-VF.pdf*

- 5 companies state explicitly that they take this into account;
- Signing bonuses and severance pay are explicitly excluded by 3 companies; no company states explicitly that it takes into account pension components, but 5 say they exclude these components.

These companies apparently apply the AFEP guidelines which consider that certain components of exceptional compensation do not have to be included in calculation of the ratio: "*regarding signing bonuses, severance pay and non-competition agreements, these do not constitute a recurring compensation and should be excluded from the calculation of compensation, at the risk of distorting the comparability of the ratios. The same holds for supplemental pension plans which constitute a benefit subsequent to the term of office. Moreover, it does not seem possible to evaluate defined-benefit supplemental pension plans whose payment is contingent on completion of the career in the company.*" These are non-recurring components or components that are more difficult to consolidate for all the employees.

The AMF notes that the law requires specifying "*the level of compensation of each of these executives*", without providing that only part of this compensation should be taken into consideration.

Thus, from reading the companies' corporate governance report, it is hard to understand the compensation taken into consideration by them to calculate the pay ratio. It is incumbent on companies to explain why they do not take into consideration the total compensation, presented, moreover, in the compensation report. Lastly, it seems relatively unjustified to exclude exceptional compensation components from the calculation of the ratio since these are significant components of compensation related to the group's strategy (see section 4.3).

- ***A calculation based on compensation awarded and paid for or during the financial year?***

The guidelines provide that "*in the numerator, it is recommended to show the compensation and benefits of all kinds […] due or awarded for the financial year or paid or awarded during the financial year, depending on the information which appears most relevant for the company.*"

It is therefore possible to take either: (i) the compensation due or awarded for the financial year (option 1) or (ii) the compensation paid or awarded during the financial year (option 2).

Of the 26 companies which specify the amount of executive compensation, 20 companies chose option 2 and take into account the components of compensation paid or awarded during the financial year in question, while 6 companies selected option 1 and take into account the components of compensation due or awarded for the financial year.

It is, indeed, simpler for companies to perform the calculation based on compensation already paid, whereas in option 1 the company has to make estimates concerning the amount of variable compensation that will be awarded to employees.

However, several arguments plead in favour of option 1:

- A comparison between this amount and the amount announced for the executive elsewhere in the corporate governance report is made more often, and is easier to make, in option 1;
- In option 2, the compensation paid includes the IFRS value of stock options, performance shares, other long-term compensation instruments and multi-annual variable compensation awarded or paid during financial year N.

Those companies that include long-term compensation therefore add to the compensation paid the fair value of the multi-annual variable compensation as calculated at the time of the award in accordance with the method adopted for establishing the consolidated accounts. They apparently do not add the fair value at the time of vesting. These observations converge with those made in section 3.1 concerning long-term compensation. However, the valuation at the time of award is not necessarily representative of the value at the time of payment, especially if the performance conditions are not fulfilled.

Only 5 companies mention the consideration of compensation paid during the financial year, including variable compensation in shares, valued at their "*actual amount*". However, it is hard to understand how the methodology was applied.

The AMF thus notes that it is hard to understand the methodology used by the companies.

Recommendation

In order to ensure intelligibility of the information presented, the AMF recommends that companies specify whether the compensation adopted for calculating the ratio corresponds to the total compensation due or awarded for the financial year or paid or awarded during the financial year. It also recommends that they indicate the amount of compensation that they take as a reference. **Insofar as the law requires taking into consideration executive compensation in calculating the ratio, if the compensation taken into consideration were not the total compensation the AMF recommends that companies specify what are the components taken into consideration and explain why the other components of compensation are not, giving a reminder of the amounts.** **If a company chooses not to take into consideration all or part of these components, the AMF recommends that it justify this choice and explain which compensation components have not been taken into consideration, giving a reminder of the amounts.** **Lastly, since long-term compensation is especially important, companies should present in detail the methodology adopted and its concrete application.**

☐ Executives for whom a ratio is presented

In companies with a board of directors, Article L. 225-37-3 I 6° of the Commercial Code stipulates that the following must be presented in the corporate governance report: *"For the chairman of the board of directors, the chief executive officer and each deputy chief executive officer, the ratios between the level of compensation of each of these executives and, on the one hand, the average compensation on a full-time equivalent basis for company employees other than company officers, and on the other hand the median compensation on a full-time equivalent basis for company employees other than company officers."*

Within the sample:

- The companies present the ratios for the job positions mentioned in the Commercial Code or in the AFEP guidelines when they exist at 31 December of the financial year in question or have existed during the financial year. Only 8 companies do not present the ratio and its trend for chief executive officers or deputy chief executive officers whose term of office was terminated during the financial year;
- 2 companies exclude presentation of the ratio for certain job positions due to the "*short-term nature*" of those positions.

Companies with a management board and a supervisory board are subject to the provisions of Article L. 225-37-3 of the Commercial Code referenced by Article L. 225-68 of the Commercial Code.

Of the 7 public limited companies in the sample with a management board and supervisory board, 5 present ratios for all the executive corporate officers, i.e. the members of the management board, the chairman of the management board, the chief executive officer and the chairman of the supervisory board.[171] Only 2 companies do not present a ratio

171 *The AFEP guidelines are along these lines, recommending that companies present not only a ratio for the aforementioned positions, but also, where applicable, for the chairman and chief executive officer, the chairman of the management board, the chairman of the supervisory board, and the statutory managers of partnerships limited by shares: "Executive corporate officers concerned: This concerns the chairman of the board*

for the members of the management board and the chairman of the supervisory board. Another company, transformed from a public limited company with a management board into a public limited company with a board of directors during the financial year, presented no ratio for the members of the management board who were in office before the transformation. **By analogy with the executive corporate officers referred to by Article L. 225-37-3 of the Commercial Code for public limited companies with a board of directors, and in accordance with the AFEP guidelines, the AMF considers that, in public limited companies with a management board and supervisory body, the pay ratios should be presented for the chairman of the management board, each member of the management board, the Chair of the supervisory board and the chief executive officer.**

Likewise, partnerships limited by shares are subject to the new provisions of Article L. 225-37-3 of the Commercial Code referenced by Article L. 226-10-1 of the Commercial Code.

In practice, in partnerships limited by shares, the pay ratios are presented for each of the statutory managers.[172]

☐ **Presentation by job position**

In terms of presentation, the AFEP guidelines propose presenting ratios not for each person but for each job position: "*The wording of 6° of Article L. 225-37-3 suggests that the information concerns the person performing the duties of executive corporate officer, which would imply calculating the ratios for prior periods whenever this involved the same executive. However, it seems more consistent to attach the information to the job position itself. The change of executive could then be indicated in a footnote, without interfering with the presentation of the information. In the event of separation of the positions of chief executive officer (CEO) and chairman of the board of directors during the past five years, the CEO's compensation would not be presented in line with that of the chairman and CEO because this concerns a different job position. The same holds for the position of chairman of the board of directors, which would be presented separately. Moreover, it is recommended to start from the governance formula for the financial year in question at N-1 and go back five years. For example, take a company which in N-3 had one CEO and two deputy chief executive officers, and then the deputy CEO positions were eliminated in N-1. In that case the company does not have to calculate ratios over five years for the deputy CEOs, only for the CEO.*"

In practice, a minority of companies present the ratios for each person: 30 companies present the ratios for each job position and 17 companies for each person. For 8 companies, the job positions and persons are merged over the 5 financial years, making it impossible to determine with any certainty the choice made by the company. Out of 3 companies concerned by a change of person in a given position in 2019, 2 present a single ratio, and do not indicate the ratio for each person. Out of 20 companies which experienced this situation in the course of the 4 years preceding 2019, 15 present a single ratio for the job position in question.

Under the good practices, we may mention **PUBLICIS,** which saw several people follow one another in the same position, and presents this change clearly, accompanied by an explanatory text:

of directors, chairman and chief executive officer, chief executive officer, deputy chief executive officers (companies with a one-tier board structure), chairman of the management board, sole chief executive officer, members of the management board, chairman of the supervisory board (companies with a two-tier board structure), and statutory managers of partnerships limited by shares."

172 *Likewise, partnerships limited by shares are subject to the new provisions of Article L. 225-37-3 of the Commercial Code referenced by Article L. 226-10-1 of the Commercial Code.*

	2015	2016	2017	2018	2019
Performance de la société					
Résultat net de la Société (millions d'EUR)	992	1 015	1 037	1 082	1 188
(Evolution par rapport à l'exercice précédent)	*N/A*	*+ 2,32 %*	*+ 2,17 %*	*+ 4,34 %*	*+ 9,80 %*
Rémunération des salariés					
Rémunération moyenne des salariés (base équivalent temps plein autres que les mandataires sociaux)	80 915	81 816	80 290	79 961	82 835
(Evolution par rapport à l'exercice précédent)	*N/A*	*+1,11 %*	*-1,86 %*	*-0,41 %*	*+3,59 %*
Rémunération médiane des salariés (base équivalent temps plein autres que les mandataires sociaux)	60 896	62 358	61 602	62 222	64 335
(Evolution par rapport à l'exercice précédent)	*N/A*	*+2,40 %*	*-1,21 %*	*+1,01 %*	*+3,40 %*
Président du Conseil de surveillance[1]					
Rémunération de Mme Elisabeth Badinter	310 000	295 000	300 000[2]	-	-
Rémunération de M. Maurice Lévy	-	-	-	2 845 000	2 885 000
(Evolution par rapport à l'exercice précédent)	*N/A*	*-4,84 %*	*+1,69 %*	*N/A*	*+1,41 %*
Ratio par rapport à la rémunération moyenne des salariés	4	4	4 [3]	36	35
(Evolution par rapport à l'exercice précédent)	*N/A*	*-5,89 %*	*+3,63 %*	*N/A*	*-2,11 %*
Ratio par rapport à la rémunération médiane des salariés	5	5	5 [3]	46	45
(Evolution par rapport à l'exercice précédent)	N/A	-7,07 %	+2,94 %	N/A	-1,93 %
Président du Directoire[4]					
Rémunération de M. Maurice Lévy	2 833 333	3 917 500	3 541 667	-	-
Rémunération de M. Arthur Sadoun	-	-	2 276 106	2 749 511	2 400 000
(Evolution par rapport à l'exercice précédent)	*N/A*	*+38,26 %*	*-15,31 % [5]*	*-17,13 % [5]*	*-12,71 %*
Ratio par rapport à la rémunération moyenne des salariés	35	48	41 [5]	34	29
(Evolution par rapport à l'exercice précédent)	*N/A*	*+36,74 %*	*-13,70 %*	*-16,79 %*	*-15,74 %*
Ratio par rapport à la rémunération médiane des salariés	47	63	54 [5]	44	37
(Evolution par rapport à l'exercice précédent)	*N/A*	*+35,02 %*	*-14,27 %*	*-17,95 %*	*-16 %*

Regarding the positions held by several people (members of the management board or deputy chief executive officers), the predominant practice is a presentation by job position, and then for each person. This practice ensures good clarity of information.

One corporate governance change deserves special attention. This is the separation or merging of the positions of chairman of the board of directors and chief executive officer in a company. For this case, the AMF considers the practice of **ATOS** to be clear and transparent. The ratios for all the job positions that existed in 2019 are presented on separate lines: chief executive officer, chairman and chief executive officer, chairman of the board of directors, and deputy chief executive officer.

Conversely, the AMF regrets that some companies merge the ratios for the positions of chairman and chief executive officer/chief executive officer despite the governance change, which adversely affects the clarity of information.

Recommendation

> **The AMF recommends presenting the compensation multiple by job position, then for each person, and commenting on governance changes, mentioning the dates of creation, elimination and occupancy of the positions and the names of the persons who held or hold these positions.**

For consistency with the scope of the compensation report, information should be provided concerning executives whose "*term of office has been terminated*" or who were "*newly appointed during the past financial year*". A single ratio can in no case be presented for a group of members holding the same position, or for several positions held by several different persons.

☐ Observations concerning the presentation of changes in the various indicators

Article L. 225-37-3 7° of the Commercial Code requires that the companies concerned present *"the annual change in compensation, the company's performance, average compensation on a full-time equivalent basis for the company's* *employees other than executives, and the ratios mentioned in 6°, during at least the five most recent financial years, presented together and in a manner which allows comparison."*

➢ *Compliance with the requirement of presentation of indicators by comparison with the ratios and presentation over five financial years*

The law requires that companies accompany the presentation of the pay ratios with a presentation of the change in three indicators (executive compensation, the company's performance, average employee compensation) in a manner that makes it possible to make comparisons.

While a large majority of the companies in the sample complied with the legal requirements, the AMF regrets that certain companies did not present figures for the required three indicators, and even, in one case, for none.

Regarding the presentation over 5 financial years of the change in the three indicators and the change in the ratios, the companies mostly presented the changes in four columns:

- ➢ 34 companies presented the changes from 2015 to 2019, i.e. 4 changes;
- ➢ 8 companies presented the changes from 2014 to 2019, i.e. 5 changes;
- ➢ 7 companies presented the changes over a shorter lapse of time.

Of the 7 companies that did not present the change in the indicators over at least 5 financial years, 3 justify this by the non-availability of data for some years, and 2 others explain it by a recent stock exchange flotation.

➢ *Change of consolidation scope in the course of the last 5 years*

7 companies (including 5 CAC 40 companies) report a change of consolidation scope (acquisitions/disposals) during the last 5 financial years, which could affect the value of the ratios.

The AFEP guidelines recommend that *"in the case of a significant change of scope (acquisitions/disposals), the issuer should specify the procedures and timing for incorporation of this change."* However, none of these companies provides precise details, which could ultimately jeopardise the comparability of the ratios over time. 2 companies from this sub-sample explicitly exclude the acquired entity to avoid such an impact.

The AFEP guidelines recommend that the company specify the procedures for incorporation of this change, and the timetable for incorporation. It must be wondered whether the few indications provided by the companies listed above are sufficient to enable the reader to obtain a pertinent view of the change in the ratios.

Recommendation

To enable an understanding of the change in the pay multiple over the years, the AMF recommends that companies present changes of consolidation scope.

➢ *Performance criteria presented by companies*

Lastly, companies must present changes in performance by comparison with the ratio. In the sample as a whole, 32 companies present 2 performance criteria or more.

Within the CAC 40 companies in the sample, the performance indicator most used is net earnings, adjusted or not (14 companies). Then come revenues (9 companies), current operating income or COI (5 companies), earnings per share (4 companies), operating profit (4 companies) and the operating margin (4 companies), earnings before interest, tax, depreciation and amortisation or EBITDA (4 companies), the share price (3 companies), pre-tax profit (2 companies), operating margin before depreciation and amortisation or OMDA before IFRS 16 (2 companies), ROCE (2 companies), and finally the net operating cash flow, operating cash flow after taxes and duties, operating earnings per share, ROS, fully-loaded CET1 capital adequacy ratio, underlying C/I ratio, underlying return on tangible equity or ROTE, tangible net assets per share, free cash flow, annual change in the 3-year moving average of enterprise value, rate of achievement of CSR objectives, and the CDP rating, each used by one company.

In the companies in the SBF120 sample, these findings are confirmed. The performance indicators most used are the net profit (8 companies) and the operating profit or operating earnings (8 companies). Then come revenues (6 companies), EBITDA (4 companies), COI before amortisation of assets resulting from acquisitions, the net debt/EBITDA ratio, shareholders' equity, operating revenues, current net cash flow (CNCF), operating cash flows, non-IFRS net bookings, and non-IFRS EBIT, each used by one company. Note, however, that no SBF 120 company uses a CSR criterion, whereas 2 CAC 40 companies choose this (rate of achievement of CSR objectives and CDP rating), in addition to one or more other (financial) criteria.

All the companies presenting the performance trend do so at the Group level. One company also presents the change in the company's performance.

Recommendation

The AMF recommends that companies present, for the annual change in the company's performance, the performance indicators that they use customarily in their earnings report.

5. VOTING AT GENERAL MEETINGS

Order 2019-1234 of 27 November 2019 created a new arrangement governing executive compensation. This arrangement hinges on a triple vote by the ordinary general meeting.

5.1 Changes in compensation policy in 2020

The first annual vote, *ex ante*, concerns the compensation policy for company officers. In the event of disapproval, the latest approved compensation policy continues to apply and a revised compensation policy is submitted to the company's next Ordinary General Meeting.

This first vote concerns the compensation policy and any major change therein. Pursuant to Article L. 225-37-2 of the Commercial Code, "*the compensation policy is the subject of a draft resolution submitted for approval to the General Meeting of the Shareholders* […] *for each major change in the compensation policy.*"

In the previous wording of the law, any change was submitted to the general meeting. According to the new wording, only major changes are submitted for voting. The question therefore is what are major changes and those that are not.

The following were considered significant by the companies in the sample:

- ✓ The addition of a new non-financial criterion of health crisis management;
- ✓ The award of an unplanned exceptional compensation.

Those companies which have planned a change in compensation policy will have to consider whether a vote is necessary for the adjustments which are made in the context of the pandemic, especially in the event of a change in the variable compensation criteria. It will be incumbent on companies to describe the impact of the proposed change in order to justify the magnitude of the amendment.

The AMF notes that, even in case of waivers by executives, the Board must continue to evaluate them. In the case of personal waivers by executives, which are different from a decision of the Board, the AMF recommends that issuers mention them in the 2021 corporate governance report (see section 2.5 above) and link them with the announcements made previously on this subject. Finally, in all cases, Article R. 225-29-1 6° of the Commercial Code stipulates that the corporate governance report should present, "*when the compensation policy is modified, the description and explanation of all material changes, and how they take into consideration the most recent*

shareholder votes on compensation policy and on the information mentioned in I of Article L. 225-37-3 and, where applicable, the opinions expressed at the last general meeting."

5.2 Consequences of a negative vote by the general meeting on the ex-post say on pay

The first part of the ex-post say on pay, provided for by Article L. 225-100, II of the Commercial Code, concerns the content of the corporate governance report presenting details of the compensation paid or awarded to the company officers during the past financial year. In the event of disapproval, a revised compensation policy shall be submitted to the company's next ordinary general meeting. Payment of the remuneration of the members of the board (board of directors or supervisory board) shall be suspended until the approval of a revised compensation policy. In the event of disapproval of the revised compensation policy, the amounts suspended shall not be paid and the remuneration of the members of the Board for the current financial year shall be suspended.

The second part of the ex-post say on pay, provided for by Article L. 225-100, III of the Commercial Code, stipulates that the general meeting gives a decision, by a separate resolution for each executive corporate officer, on the compensation components paid during or awarded for the past financial year, and that the payment of the variable and exceptional components of compensation awarded during the past financial year is contingent on the approval, by the shareholders, of said specific resolution. More specifically, the lack of approval by the shareholders is sanctioned by the non-payment of variable and exceptional components of compensation: "*III.- In companies whose shares are admitted to trading on a regulated market, the general meeting gives a decision on the fixed, variable and exceptional component of the total compensation and benefits of all kinds paid during the past financial year or awarded for said financial year by separate resolutions for the chairman of the board of directors or the supervisory board, the chief executive officer, the deputy chief executive officers, or for the chairman of the management board and the other members of the management board or the sole chief executive officer. The variable or exceptional components of compensation awarded for the past financial year to the chairman of the board of directors or the supervisory board, to the chief executive officer, to deputy chief executive officers, to the chairman of the management board, to other members of the management board or to the sole chief executive officer, can be paid only following approval by the general meeting of the compensation components for the person concerned under the conditions provided for in the preceding paragraph*".

Regarding this second part of the ex-post say on pay, the practice followed by certain issuers leads one to wonder what is covered, within the meaning of Article L. 225-100, III, para. 2 of the Commercial Code, by the variable or exceptional compensation components awarded to executive corporate officers for the financial year, "payment" of which is contingent on the approval of the next general meeting. The issuers concerned proposed a restrictive interpretation of the word "paid" (applying it only to a certain category of compensation, i.e. cash compensation), whereas an extensive interpretation of this word (which would be applicable to all forms of compensation, including shares) could be required.

In this regard, two cases of rejection by the shareholders of an ex-post say on pay resolution may be mentioned.

In the first case, the issuer took formal note of the rejection by the shareholders, at the meeting held in 2019, of the ex-post say on pay relating to the compensation of its former chief executive officer, depriving him of his exceptional compensation components awarded in 2018. At the same time, no question was raised concerning payments relating to the (maintained) long-term compensation plans (performance units and stock options subject to performance conditions) of this chief executive officer, whose initial award had been decided on in financial years prior to the 2018 financial year by the Board of Directors, and which were still outstanding at the time of the 2019 AGM.

In the second case, the rejection by the general meeting held in 2020 of the resolution relating to the ex-post say on pay on the compensation of the former chief executive officer led the issuer to announce (i) the waiver of the variable compensation awarded to him in 2019, on the one hand, and (ii) on the other hand, the maintenance of his awards of shares subject to performance conditions (stock options and bonus shares) for 2019. This issuer considered that these share awards were not subject to Article L. 225-100, III, para. 2 of the Commercial Code, on the grounds that the only variable components whose payment is contingent on the approval of the next general meeting are those to be "*paid*" in cash – as opposed to variable components in the form of shares. Note, however, that this issuer's Board of Directors and Compensation Committee are examining the consequences to be drawn from the rejection of the ex-post 2019 resolution, in order to adapt the chief executive officer's compensation policy.

However, (i) parliamentary work[173] relating to the Sapin 2 Law (which introduced this binding ex-post say on pay scheme) and (ii) the provisions of the Monetary and Financial Code relating to the compensation policies and practices of credit institutions – and the terms of the 2013/36/EU directive of the European Parliament and of the Council of 26 June 2013 (the "CRD IV Directive") on which they are based – would give grounds for considering that the word "payment" applies to all forms of variable compensation, therefore including compensation in shares. The idea that the legislator, by using the verb "pay", would have implicitly chosen - as opposed to its asserted intention of including the various components of compensation - to exclude awards of "*shares*" is not convincing. In positive law texts, the legislator has already used the verb "*pay*" regarding "*shares*",[174] like the Court of Cassation in recent rulings.[175]

The practice of excluding from the penalty for non-payment – in the event of disapproval by the general meeting of the compensation components of an executive corporate officer for the past financial year (ex-post say on pay) – the compensation in shares awarded for the past financial year raises questions with regard to the letter of Article L. 225-100, III, para. 2 of the Commercial Code and in any case with regard to the legislator's intention.

173 *See the parliamentary work on Law No. 2016-1691 of 9 December 2016 on transparency, anti-corruption and economic modernisation (the "Sapin 2 Act"). See, notably, Report No. 712 by Mr François Pillet, on behalf of the legislative committee on the government bill relating to transparency, anti-corruption and economic modernisation, French Senate, submitted on 22 June 2016, t. 1, Report: "Whereas the initial text contained no measure on this subject, the French Parliament introduced in the committee a scheme, thoroughly revised during the session, aimed at submitting for a vote by the shareholders the individual compensation of executives of listed companies (ARTICLE 54 bis). **This initiative is intended as a response to the recent controversy following the rejection by the shareholders, without further action, of the compensation of Carlos Ghosn, Renault chairman, which would demonstrate the inadequacy of companies' self-regulation**. […] The ordinary general meeting would vote each year on the compensation of the executives, and **no** component of compensation could be paid without a vote in favour by the shareholders, **except for fixed compensation**." See, also, Report No. 79 by Mr François Pillet, on behalf of the legislative committee on the government bill relating to transparency, anti-corruption and economic modernisation, French Senate, submitted on 26 October 2016, t. 1, Report: "Introduced in first reading by the French Parliament, […] Article 54 bis of the government bill aims to submit to the vote of the ordinary general meeting, each year, all the compensation components allocated to the executives of listed companies, and to **prohibit the payment of any compensation component that has not been thus approved beforehand, except for the fixed component, which could be paid upon the executive's appointment**. […] The French Parliament therefore fully adopted the approach of its initial text. In other words, every year, **the company officers concerned could only receive their variable and exceptional components of compensation after the general meeting in the event of a vote in favour, or else not at all, so that they would receive only their fixed compensation in this second case**. […] Moreover, whereas the current trend is to increase the variable component of executive compensation, so as to make better allowance for performance in their compensation, this scheme will inevitably increase the fixed component of compensation, to limit the risk ".*

174 *See, for example, Article 1 of Law No. 2006-1770 of 30 December 2006 for the development of profit sharing and employee share ownership and containing various provisions of an economic and social nature, which mentions "awards of **bonus shares to be paid**".*

175 *See, for example, Cass. Soc. 21 May 2014, No. 13-12.567: "Annuls and voids, but only in that it said the dismissal was based on real and serious grounds and rejected the employee's claims relating to the premature termination and in that it rejected the employee's claim for damages for the **payment of bonus shares**, the ruling handed down on 20 December 2012". Moreover, in its ruling No. 82-152 DC of 14 January 1983, the Law containing various measures relating to social security, the Constitutional Council used the verb "pay" with regard to "bonds", referring to the "**bonds paid** by way of compensation to the shareholders".*

6. OTHER MAIN FINDINGS REGARDING CORPORATE GOVERNANCE

This part describes the other main findings regarding corporate governance.

6.1 An insufficient proportion of independent directors in committees

The AFEP-MEDEF Code contains a number of provisions relating to the independence of directors on the Board and/or on committees. In particular, it provides for a minimum proportion of independent directors on the Board and on committees:

- ✓ "*The independent directors should account for half the members of the Board in widely held corporations without controlling shareholders. In controlled companies, independent directors should account for at least a third of Board members. Directors representing the employee shareholders and directors representing employees are not taken into account when determining these percentages* " (Article 9.3);
- ✓ *"The proportion of independent directors on the audit committee should be at least equal to two-thirds, and the committee should not include any executive officer*" (Article 16.1);
- ✓ The appointments committee should "*mostly consist of independent directors*" (Article 17.1);
- ✓ The compensation committee should " *mostly consist of independent directors*" (Article 18.1).

17 departures from these provisions of the AFEP-MEDEF Code are mentioned by 11 companies. The proportion of independent directors is not complied with on 3 boards, 7 audit committees, 4 compensation committees and 3 appointment committees. The AMF reiterates that compliance with the rules of independence and the recommendations of the code in this respect are a decisive factor, even if it is not the only one, to ensure that the board of directors complies with the corporate interest of the company.

The finding reflects the trend which had been reported by the HCGE in its 2014 report that "*experience proves that it is more difficult to achieve the planned proportions for committees (two-thirds for the audit committee, over half for the committees in charge of selection or appointments and compensation), if independent directors having the required specific expertise are not very numerous."*

5 companies state that this is a temporary situation, in particular regarding the proportion of independent directors on the Board.

The other companies refer to the positions of the HCGE to justify non-compliance with the AFEP-MEDEF Code. Thus, in 9 cases, the companies refer directly or indirectly to the HCGE position which allows a certain flexibility: *"The High Committee considers that an audit committee containing, for example, three independent members out of five, or a compensation committee containing two out of four, remains in compliance with the spirit of the Code provided that it is chaired by an independent director.*" The High Committee "*reiterates that it prefers that the proportions be not reached completely rather than see the criteria of independence interpreted too freely (for example by eliminating the criterion of 12 years' presence on the Board), and that it considers that 60% of independent members on the audit committee or 50% on the other two committees does not represent a serious deviation.*"[176]

In 7 cases, the companies indicate that the non-compliance with the AFEP-MEDEF Code reflects the shareholder situation or agreements signed with the shareholders, the shareholder structure (and the presence of the main shareholder) being reflected in the composition of this board and/or this committee. 4 companies specify, in addition, that they do not want to increase the size of this board and/or the committees in order to maintain a small number of members conducive to the efficiency of work.

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176 Report of October 2017, page 14.

The goal of adapting the group's governance to reflect its shareholder structure seems understandable, and the HCGE had indeed, in 2014, indicated that such a situation could result from the signature of a shareholder pact. It had stated, for example, that "*certain companies not controlled strictly speaking justify non-compliance with the proportions of independent directors by the presence of one or more main shareholders. This explanation does not seem satisfactory, especially since Article 8 of the Code specifies that "it is not advisable to increase the number of representatives of such or such a category of interests on the Board. If the insufficient number of independent directors results from a published shareholder pact or entente, the situation is different because investors are duly notified of this particular situation and have acquired or held their stake on an informed basis. In this case, and also, moreover, in the case of a majority shareholder, these shareholders have a specific responsibility with regard to the others, as also recalled by Article 8 of the Code.*"[177] However, as the HCGE had also specified in 2017, "*the presence of a main shareholder is not sufficient to account for the deviation*(…)*, because on the contrary it increases the usefulness of independent directors in the supervisory roles that are facilitated by the committees* (…)*. Companies must nevertheless continue their efforts, particularly on the occasion of reappointments, to restore the required proportions.*"[178]

The AMF gives a reminder that pursuant to Article 2.3 of the AFEP-MEDEF Code, "*Since the Board acts in the corporate interest, having large numbers of special interests represented within it should be avoided, except in cases provided for by law*".

It is also stressed that different rules are provided for by the AFEP-MEDEF Code when the company is controlled*.*
Pursuant to Article L. 225-37-4, 8° of the Commercial Code, when a company does not refer to a corporate governance code, it should specify the reasons why the company has decided not to refer thereto and, where applicable, the rules adopted in addition to the requirements stipulated by the law. **DASSAULT AVIATION** cannot justify the fact that the AFEP-MEDEF Code does not constitute its corporate governance reference framework because of "*the structure of its share ownership (majority ownership by GIMD, a company belonging to the Dassault family)*", especially since numerous "*controlled*" companies apply the provisions of the AFEP-MEDEF Code. The company must also present "*the rules adopted in addition to the requirements stipulated by the law*". The AMF recommends that these clarifications appear in a specific section making it possible to identify clearly their nature, whether they be rules concerning the organisation, functioning and composition of the Board, the independence of its members or, where applicable, the evaluation of its work.[179]

Regarding failure to comply with the rate of independence, the AMF invites companies to give more precise details of departures from the AFEP-MEDEF Code, even when pacts have been signed.

The AMF also notes several observations regarding the independent director classification:

- ✓ The number of independent directors whose term of office is more than 12 years but who are termed independent seems to be decreasing. Although 9 companies state that they do not comply with the provisions of the AFEP-MEDEF Code which stipulates that the loss of independent director status occurs on the anniversary date of twelve years, in 6 cases companies mention that this is a temporary situation or on the verge of being resolved;
- ✓ The question that arises is in what time frame and in what conditions a non-independent director can become independent. In this regard, the AMF notes that certain companies establish stricter rules of independence than the AFEP-MEDEF Code. For example, the board of directors of 2 companies considers that former employees or executives of the company cannot be considered independent, even if their positions were terminated more than five years ago. Conversely, the AMF notes that, in the context of its initial public offering, **FRANÇAISE DES JEUX** considered as an independent director a person who had previously been a director appointed by the general meeting upon a motion of the state. The AMF considers that this classification is debatable in light of the office previously held by this person on the Board of Française des Jeux, especially

177 *Page 14 of the HCGE report of October 2014. The new Article 2.3 stipulates: "Since the Board acts in the corporate interest of the company, except in the cases provided for by law, one should avoid increasing the representation of specific interests therein."*
178 *HCGE activity report, November 2017.*
179 *AMF Position-Recommendation 2009-16.*

since the state retained a substantial fraction of the capital and voting rights, and hence close control over the group following the IPO.

Recommendation

The AMF recommends that companies establish a qualifying period before considering that a director who had previously been non-independent becomes independent as a result of a change in their personal situation, notably in light of the decisions or positions that they had to take or support within the framework of their prior duties.

Avenue for thought

The AMF asks the AFEP and MEDEF to think about the minimum time frames and any other conditions which, if complied with, would make it possible to consider that a non-independent director becomes independent as a result of a change in their personal situation, notably in light of the decisions or positions that they had to take or support within the framework of their prior duties.

6.2 Information on the procedure for inviting tenders for reappointment of the statutory auditors

Article L. 823-3-1 of the Commercial Code stipulates that the maximum period during which a given statutory auditor may certify the accounts of a listed company is 24 years whenever the company has two auditors who establish a joint report. In this context, a number of companies have reappointed or will soon reappoint their auditor(s).

The statutory auditors of listed companies are appointed in accordance with the procedures provided for in Article 16 of Regulation (EU) No. 537/2014. The company must therefore launch an invitation to tender. The AMF and H3C recommend taking into consideration any time frames which could represent risks of non-independence, conflicts of interest or prohibited prior service (Articles 5 and 22 of the Code of Ethics of the auditors profession), notably in the case of groups formed of several entities.

According to Article 16 of the aforementioned Regulation, the tender documents should allow candidates to "*understand the business of the audited entity and the type of statutory audit that is to be carried out*" (paragraph 3, subparagraph b), they should be "*transparent and non-discriminatory*" (paragraph 3, subparagraph b) and they should provide a basis for selection (paragraph 3, subparagraph e). Paragraph 3, subparagraph f) of the Regulation also reiterates that each entity should be "*able to demonstrate, upon request, to the competent authority, that the selection procedure was conducted in a fair manner.*"

The audit committee shall then submit a recommendation to the Board. This recommendation shall be justified and contain at least two choices for the audit engagement and the audit committee shall express a duly justified preference for one of them.[180] All this information is then presented to the general meeting called to give a decision on the choice of statutory auditors. If the proposal departs from the preference of the audit committee,[181] the company shall justify the reasons for not following the recommendation of the audit committee.

Little information is provided by the companies on this subject. The AMF urges companies to present this information in the Board's report to the general meeting. The AMF also gives a reminder that, in its last report on supervision of

180 Article 16 paragraph 2 of Regulation (EU) No. 537/2014.

181 Article 16 paragraph 5 of Regulation (EU) No. 537/2014 : "The proposal to the general meeting of shareholders or members of the audited entity for the appointment of statutory auditors or audit firms shall include the recommendation and preference referred to in paragraph 2 made by the audit committee or the body performing equivalent functions.
If the proposal departs from the preference of the audit committee, the proposal shall justify the reasons for not following the recommendation of the audit committee. However, the statutory auditor or audit firm recommended by the administrative or supervisory body must have participated in the selection procedure described in paragraph 3. This subparagraph shall not apply where the audit committee's functions are performed by the administrative or supervisory body."

the statutory auditing market,[182] the H3C specifies that while the price may be "*mentioned as a selection criterion*" (which is already the case for certain public-interest entities) and while some committees want to "*obtain the best price*", this criterion should not, however, be placed before the possibility of "*consolidating the quality and depth of the proposed audit work*". Moreover, the entity may have inspection reports of the applicant statutory auditors or audit firms (Article 16 paragraph 3 subparagraph e) of Regulation (EU) 537/2014) to assess the submitted tenders.

It is these decision-making criteria that audit committees must take into consideration "*in priority*", because the statutory auditors contribute to companies' financial security.

6.3 Compliance with prior AMF recommendations and suggested avenues for thought

The AMF referred to several companies nominally in its 2019 corporate governance report. It notes that the companies have taken into account the comments made and changed their practices:

- ✓ The AMF had noted that in real or potential conflict of interest situations, the directors concerned must abstain from taking part in voting but must now also (and this is new) abstain from attending the debate preceding the vote. 8 companies in the sample have thus brought their internal rules into compliance with the revised version of the AFEP-MEDEF Code. It reiterates that, apart from the internal rules, it remains attentive to the satisfactory management of potential conflicts of interest. It also notes that Article L. 225-37-2, IV of the Commercial Code[183] now stipulates that: "*When the board of directors gives its decision on an aspect or a commitment benefiting its chairman, a chief executive officer or a deputy chief executive officer, the persons concerned may not take part in either the deliberations or the vote on the aspect or the commitment concerned.*" The compensation policy presents: "*the decision-making process followed to determine, revise and implement it, including the measures making it possible to prevent or manage conflicts of interest and, where applicable, the role of the compensation committee or other committees concerned*."[184]
- ✓ One last company which had been named for failure to comply with the number of independent directors on the board in the course of the past three years saw its rate of independent directors increase, although without achieving the majority required by the AFEP-MEDEF Code. The company says it is pursuing its objective of increasing the independence ratio of its Board.

182 *"Supervision of the statutory auditing market – Report of the Haut Conseil du Commissariat aux Comptes", 17 August 2019.*
183 *Or Article L. 226-8-1 of the Commercial Code for partnerships limited by shares.*
184 *Article R. 225-29-1 I 2° of the Commercial Code.*

Lastly, as a reminder, the AMF has suggested a number of avenues for thought with a view to making changes in the AFEP-MEDEF Code. They are intended for the AFEP and MEDEF or even the High Committee on Corporate Governance.[185]

The AMF therefore reiterates its invitation to the AFEP and MEDEF to:

- ✓ consider what information it would be useful to make public regarding the process for selecting directors.[186] In its 2020 report, the HCGE observed that although many companies have provided for the establishment of a procedure for selection of directors in the duties of the appointments committee or mention its existence, it notes that few companies describe this procedure or its implementation in their corporate governance report or their internal rules. In response to the legitimate desire of the shareholders and stakeholders to have more comprehensive information on this point, the High Committee invites companies to communicate concerning the content of this procedure for selection of future directors (without being confined to independent directors) by describing it in their internal rules and reporting each year on its practical application in their corporate governance report;
- ✓ clarify the concepts of independence of the directors (particularly in the case of business relationships, regarding justification of independence after more than 12 years, for directors owning more than 10% of the capital or voting rights but not taking part in control of the company).[187] Regarding business relationships, the HCGE recognised in its activity reports of November 2016 and November 2017 and again in the report of October 2018 that this is "*an important and sensitive subject on which there is still a margin for progress*". The AFEP and MEDEF should therefore think about the degree of detail and relevance of the information that should be provided, and notably the legitimacy of invoking confidentiality in order not to disclose materiality thresholds;
- ✓ raise questions concerning the evolution and consistency of companies' governance mode and the quality of the explanation given for it, particularly in cases where a company returns to the governance structure that it recently abandoned.[188] In July 2020, the ACPR published a report on establishment of the new governance rules in the insurance sector. In it the ACPR recommends the separation of the duties of chairman of the supervisory body and those of chief executive officer in all the organisations that it supervises, and expects that it will be the norm in listed companies and large insurance groups;
- ✓ specify that the chairman of the board should not receive variable compensation in cash or shares, unless there is an especially appropriate justification due to specific duties, exceeding those bestowed by law.[189] In any case, the AMF considers that the definition of an independent director implies the absence of such compensation;[190]
- ✓ specify what is expected of companies in practice during evaluation of the Board's work, the AFEP-MEDEF Code specifying that this evaluation should aim in particular to "*measure the actual contribution of each director to the Board's work*";[191]

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185 According to the AFEP-MEDEF Code, the missions of the HCGE are:
- *monitoring the application of the principles contained in this code. To this end, it may firstly receive questions from Boards on any provision or interpretation connected with the code; it may decide to investigate at its own initiative if it establishes that a company has failed to implement one of the code's recommendations without sufficient explanations; its power of persuasion is due to transparency. Indeed, companies that might decide not to comply with the recommendations of the High Committee will have to mention this in their annual report, explaining the reasons. The shareholders will therefore be fully informed of the case referral and the reply given by the company;*
- *proposing to Afep and Medef updates to the code in the light of changing practices and recommendations that it may have made to companies in the course of its task of monitoring the implementation of the code.*

186 2019 AMF corporate governance report.

187 In particular, 2012, 2013, 2015 and 2017 AMF corporate governance reports.

188 2009 AMF corporate governance report.

189 The code stipulates that the award of variable compensation, stock options or performance shares is not recommended. If, however, such awards are granted, the Board shall explain the justification for them and the executive may not be considered independent.

190 In its 2015 report, the AMF therefore invites professional associations to undertake a review process to make changes in the AFEP-MEDEF code on this subject and clarify its interpretation. This change could be made notably by submitting this term of independence for the chairman of the board to stricter criteria than the "common law" for the other directors – in particular, the lack of any variable compensation – and by specifying the incompatibility between independence, performance of extended management duties, and receiving variable compensation.

191 Article 10.2 of the AFEP-MEDEF Code.

- ✓ (i) 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 be considered as outside advisers whose advice would be sought on a case-by-case basis and under what conditions they could then operate, and (ii) reflect upon the role of censors.[192] Although the censor is called on relatively frequently, the AFEP-MEDEF Code does not mention their existence;
- ✓ specify the rules on non-cumulation of an employment contract and corporate office. Unlike the AFEP-MEDEF Code;[193] the AMF considers that the rule on not concurrently holding a corporate office and an employment contract should also apply to employees who perform executive corporate officer duties in a listed subsidiary and who have an employment contract with that subsidiary's parent company. It seems reasonable that the director of the listed subsidiary should also be subject to the AFEP-MEDEF Code and that the issuer should explain, where applicable, the reasons behind its decision to maintain the employment contract with the parent company, in accordance with the “comply or explain” principle. In this case, it seems appropriate for the director holding an employment contract not to be granted termination benefits if he remains an employee of the group;
- ✓ clarify the concept of forced departure, since Article 25.5.3 of the AFEP-MEDEF Code authorises compensation of an executive only in cases of forced departure. In a context in which the gradual exit of an executive may help ensure a management transition, the AMF invites the AFEP-MEDEF Code and/or the HCGE to clarify the concepts of forced departure and of “*assignment to another position within the same group”*, by specifying the circumstances under which payment of a termination benefit could be justified when the executive continues to play a non-executive role within the group;[194]
- ✓ examine international practices on executive compensation by a shareholder upon the sale of securities by the shareholder, and consider the 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.[195]

Finally, the AMF consulted the Legal High Committee for Paris Financial Markets (HCJP) to undertake a review to specify the extent of the obligations of discretion by which the permanent representative of a legal entity director is bound when performing his 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. In its 2019 report, the AMF reiterated the obligation provided for in Article L. 225-37, paragraph 5 of the Commercial Code, under the terms of which "*directors, and anyone called on to attend meetings of the board of 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*" and replicated by the AFEP-MEDEF code, under the terms of which "*With regard to any non-public information obtained in the discharge of his or her duties, the director should consider that he or she is bound by a strict duty of confidentiality that goes beyond the mere duty of discretion provided for by law*". Lastly, it was reiterated that a director may not unlawfully disclose inside information within the meaning of the Market Abuse Regulation. The AMF invited thinking on the extent of the obligation of discretion to which the permanent representative of a legal entity director is bound in the performance of his duties, and proposed referring the matter to the Legal High Committee for Paris Financial Markets (HCJP).

The High Committee on Corporate Governance (HCGE) states in its 2020 report: "*Although the permanent representative, who plays a personal role within the board of directors, is at the same time a representative of the shareholder, and in this capacity may wish to pass on some of the information disclosed to the Board when performing his duties, it appeared to the High Committee that the obligation of discretion of directors provided for in Article L.225-37 of the Commercial Code […] must be binding on each director, without distinction. The High Committee considers that there is no reason to apply this obligation differently to the permanent representative of a legal entity insofar as the law has taken care to specify that the permanent representative is "subject to the same conditions and obligations and incurs the same civil and criminal liabilities as if he or she were a director in his or her own name, without prejudice to the joint*

192 2019 AMF corporate governance report.

193 Article 22.3 of the AFEP-MEDEF Code does not apply to the employees of a group of companies who, within the group, hold a position as executive corporate officer in a group subsidiary, whether listed or unlisted.

194 2019 AMF corporate governance report.

195 2019 AMF corporate governance report.

and several liability of the legal entity that they represent" (Article L.225-20 of the Commercial Code). It gives a reminder that the AFEP-MEDEF Code stipulates that, regarding non-public information, the director is bound by a real obligation of confidentiality that goes beyond the mere obligation of discretion provided for by the legislation (Article 20). For the High Committee, in accordance with the rules governing the disclosure and use of inside information, it is incumbent on every board of directors, if it considers it necessary, to specify the practical conditions of the obligation of confidentiality expected of its members, particularly in the Board's internal rules".[196]

The AMF takes formal note of this comment by the HCGE. It also reiterates its invitation to the Legal High Committee for Paris Financial Markets (HCJP) to specify the extent of the obligations of discretion by which the permanent representative of a legal entity director is bound when performing his duties, considering in particular the practical implications (e.g., whether or not the permanent representative can send minutes following a Board meeting, whether or not he can share, in order to receive his instructions, certain information disclosed on a preparatory basis to the directors ahead of the Board meeting) in light of company law and the Market Abuse Regulation.

196 *Report of the High Committee on Corporate Governance, November 2020, p. 13.*

PART 3 – INFORMATION PROVIDED BY PROXY ADVISERS

Institutional investors frequently use the services of voting advisory firms, better known as proxy advisers. These proxy advisers are appointed to analyse the draft resolutions of listed companies and make voting recommendations. If, as stated by Directive (EU) 2017/828 of 17 May 2017, or "Shareholder Rights Directive II", "*while proxy advisors play an important role in corporate governance by contributing to reducing the costs of the analysis related to company information, they may also have an important influence on the voting behaviour of investors. In particular, investors with highly diversified portfolios and many foreign shareholdings rely more on proxy recommendations*" .[197]

Given their importance, proxy advisers have been subjected to transparency requirements. The AMF is competent to report, in this report, on the information published by proxy advisers and, more specifically, *"on the application of Articles L. 544-3 to L. 544-6 of the Monetary and Financial Code and may approve any recommendation that it considers useful*". [198]

1. REMINDER OF THE METHODOLOGY

The proxy adviser is defined by Article L. 544-3 of the Monetary and Financial Code and by the Shareholder Rights Directive II as a legal entity:

- ✓ which, on a professional and commercial basis,
- ✓ analyses corporate documents or any other information concerning companies whose shares are admitted to trading on a regulated market,
- ✓ in order to shed light on the voting decisions of the shareholders of these companies by providing research and advice or by expressing voting recommendations.

Pursuant to Article L. 544-6[199] of the Monetary and Financial Code, the following are subject to these French provisions:

- ✓ proxy advisers whose registered office is located in France;
- ✓ proxy advisers whose registered office is not located in a European Union Member State but whose head office is located in France;
- ✓ proxy advisers whose registered office and head office are not located in a European Union Member State but who operate through a branch in France.

Accordingly, the proxy advisers coming within the scope of application of Article L. 544-6 of the Monetary and Financial Code, and accordingly within the scope of the present AMF report pursuant to Article L. 621-18-4 of said code, are ISS and PROXINVEST. This report therefore analyses the information published by these proxy advisers. This is not the case for GLASS LEWIS, for which neither the registered office nor the head office, nor any branch is located in France. This report nevertheless examines the public information published by this proxy adviser, solely for the purpose of comparison.

It is specified that in addition to the information that they have published, the three proxy advisory firms replied to an AMF questionnaire.

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197 Recital 25 of Directive (EU) 2017/828 of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement.

198 Article L.621-18-4 of the Monetary and Financial Code, appearing in subsection 7 "Other competences [of the AMF]".
As a reminder, the PACTE Law introduced in parallel into the Monetary and Financial Code Articles L. 544-3 to L. 544-6 and L. 621-18-4, which are devoted to proxy advisers and transpose the provisions of SRD II.

199 Articles L. 544-3 to L. 544-5 apply to proxy advisers 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 advisory 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".

The AMF has also opened an email address[200] enabling the reporting of significant conflicts of interest which might not have been mentioned in the voting recommendations and/or obvious factual errors that the proxy advisers might not have corrected.

2. THE ACTIVITY OF PROXY ADVISERS

The main activity of proxy advisers is to analyse the resolutions presented at the general meetings of listed companies in order to issue for their institutional investor clients voting recommendations, for or against, on these resolutions. This advice does not relieve their clients of their responsibility.

The activities and business models of proxy advisers are extremely varied. However, it may be considered that they mainly provide two categories of services:

- ✓ Analysis, research and voting recommendations for shareholders: the proxy advisers analyse the resolutions presented at the general meetings of listed companies in order to issue for their institutional investor clients voting recommendations, for or against, on these resolutions. These services are designed to help institutional investors take voting decisions on an informed basis. As part of these services, proxy advisers may either apply the voting policy of the investor, or propose voting recommendations by applying one of their personalised voting policies;
- ✓ Engagement and governance services: in addition to the services of analysis, research and voting recommendations, proxy advisers can also provide other services, such as voting execution and/or shareholder engagement services.

Number of AGMs followed in 2019 and 2020:

Number of AGMs of French listed companies followed	ISS	Proxinvest	Glass Lewis
In 2020	561[201]	295[202]	NA
In 2019	406[203]	321[204]	NA

In addition to these two categories of services, PROXINVEST and ISS propose additional governance analysis services such as the analysis of data on ESG[205] issues and the provision of ESG research and rating services.

PROXINVEST stands out from the other two proxy advisers by providing, on demand, additional services such as advice for funds specialised in shareholder dialogue and activism, such as the *Proxy Active Investors* SICAV managed by Phitrust. Via the local experts of the ECGS network, PROXINVEST can coordinate the development and deployment of an engagement campaign with European issuers with a variety of cultures and languages. It also publishes a report on the compensation of executives and directors, and occasionally reports on miscellaneous subjects.

ISS stands out by providing services for issuers.

Note, moreover, that ISS and PROXINVEST are members of the "Forum for Responsible Investment" (FIR). The purpose of this Forum is to promote Socially Responsible Investment (SRI) and to ensure that more investments take into account social cohesion and sustainable development issues. The FIR recently published a study on the fiscal responsibility of the CAC 40 and produced proposals to facilitate the submission of resolutions on environmental and social issues. It also asked numerous questions at the general meetings of CAC 40 companies in 2020.

200 *The address is as follows: conseillersenvote@amf-france.org.*
201 *At end-July. It is specified that these 561 general meetings concern 481 different French listed companies.*
202 *At end-August. It is specified that these 295 general meetings concern 288 different French listed companies.*
203 *At end-July. It is specified that these 406 general meetings concern 378 different French listed companies.*
204 *At end-August. It is specified that these 321 general meetings concern 301 different French listed companies.*
205 *Environmental, Social and Governance.*

3. OBSERVANCE OF THE CODE OF GOOD CONDUCT

In addition to conflict of interest management, the Best Practice Principles Group (hereafter the "BPPG"), an organisation set up in 2013 at the instigation of ESMA bringing together the actors in this industry, produced a code of good conduct in 2014. This code was revised in July 2019 and takes into consideration the changes introduced by the Shareholder Rights Directive II, the comments expressed by ESMA during its 2015 review on governance of the code, and the inputs resulting from a public consultation conducted in 2017.

The code is organised around three general principles concerning:

- ✓ Quality of service: the signatories to the code provide services in accordance with the specifications agreed with the client. They must establish and publish a research methodology and, where applicable, an "in-house" voting policy;
- ✓ Conflict of interest prevention and management: the signatories to the code should establish and publish a policy for prevention and management of conflicts of interest that could arise in the course of the provision of services, which will be implemented by an internal procedure;
- ✓ Communication policies: the signatories shall establish and publish a policy of communication with issuers, significant shareholders, other stakeholders, the media and the public.

The three proxy advisers have adhered to the code of good conduct of the Best Practice Principle Group. They updated their statement of compliance with the code in June 2019, October 2019 and May 2020[206] respectively, and the situation has not changed since that statement. These statements are available on the proxy advisers' websites.

In 2020, the BPPG set up a supervisory body tasked with monitoring and supervising the application of the principles laid down by the code.

This *soft law* scheme supplements the law, particularly on the issue of conflict of interest management.

4. CONFLICT OF INTEREST MANAGEMENT

☐ Reminder of the applicable rules

Since the coming into force of the new Shareholder Rights Directive II ("SRD II "), proxy advisers must disclose not only information relating to actual conflicts of interest, but also information relating to potential conflicts of interest and commercial relationships that could influence the production of their research, advice and voting recommendations. Thus, pursuant to Article L. 544-4 paragraph 3 of the Monetary and Financial Code: "*Proxy advisers shall take care to prevent and manage any conflict of interest and any commercial relationship that could influence the preparation of their research, advice or voting recommendations. They shall immediately inform their clients of such conflicts and relationships. They shall publish and inform their clients of the measures taken with regard to the prevention and management of those conflicts and relationships*."

In its Recommendation No. 2011-06, the AMF recommends that "*the proxy adviser define and publish on its website the reasonable and appropriate measures designed to prevent any conflicts of interest that could affect the firm, its managers or the members of its teams in charge of analysing resolutions and, if they are proven, to manage them, notably in cases of multiple activities (advice to issuers, provision of a voting platform, soliciting management positions, etc.). The AMF invites the proxy adviser to show these measures in an ethics charter or a code of conduct, and their*

206 *(i) ISS has placed online the following compliance statements: ISS Compliance Statement to Shareholder Rights Directive (June 2019) and ISS Compliance Statement for Best Practice Principles for Providers of Shareholder Voting Research & Analysis (April 2017);*
(ii) PROXINVEST has placed online the following statement: http://www.proxinvest.fr/?page_id=2821; and
(iii) GLASS LEWIS the following: https://www.glasslewis.com/wp-content/uploads/2016/08/Glass-Lewis-BPP-Statement.pdf

implementation and supervision could be performed by a person appointed for this purpose. More specifically, the AMF recommends that the proxy adviser mention explicitly in any analysis report its possible relations of interest with:

- ✓ *the company for which it analyses the draft resolutions;*
- ✓ *one or more shareholder(s) who have submitted items on the agenda or draft resolutions for the general meeting for which it will issue this analysis report;*
- ✓ *the persons who control the company directly or indirectly, or the shareholders referred to in the preceding paragraphs. Where applicable, the proxy adviser shall indicate in its report how the existence of these relations has been managed in accordance with the measures defined in the charter or the code of conduct*".

The AMF notes that the BPPG code to which the proxy advisers refer goes further. It requires the latter to publish a policy with regard to conflict of interest prevention and management. It also requires them to have a process making it possible to identify and disclose to their clients immediately, on a case-by-case basis, not only the actual or potential conflicts of interest or business relationships that could influence the preparation of their research, advice and voting recommendations, but also the measures they have undertaken to eliminate, attenuate and manage such conflicts of interest.[207]

☐ Measures adopted

Both ISS and GLASS LEWIS have published on their website their code of conduct with regard to conflict of interest management. PROXINVEST provides more general information.

Conflicts of interest (potential or proven) can arise in the course of the production of voting recommendations or as a result of the other services rendered by proxy advisers to investors or issuers. They may result from:

- ✓ commercial relationships with listed companies or their subsidiaries (generally subsidiaries of financial institutions);
- ✓ provision of advisory services to companies (e.g. providing advice or data making it possible to establish a compensation benchmark). In March 2020, for example, ISS, which renders services to issuers, updated its code of conduct on this point. It considers it has no relationship that could influence the production of research, advice and voting recommendations;
- ✓ relationships with investors using their shareholder's right to submit resolutions to the general meeting;
- ✓ other services rendered, such as ESG or governance rating activities. ISS considers that there are no conflicts of interest between this activity and making voting recommendations because the underlying data are common: the voting analyses and results can be used as a rating factor and E&S analysis can be used for the analysis of general meetings (as a context element in the case of resolutions of an environmental or social nature). PROXINVEST also stresses that the methodology for its governance rating is based on the same governance principles as its voting policy.

All the proxy advisers consider that none of their current commercial relationships is liable to influence their research, advice and voting recommendations.

Regarding potential conflicts of interest with the main shareholder, ISS states in its code of conduct that conflict of interest risks are covered by a policy by virtue of which the shareholder (i) does not become involved in the day-to-day activities of ISS and (ii) has no role or influence either in determining voting policies or in preparing research reports or voting recommendations. PROXINVEST notes that its leading shareholder[208] is neither a listed company, nor an

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207 *According to this code: "BPP Signatories' primary mission is to serve investors. BPP Signatories should have and publicly disclose a conflicts-of-interest policy that details their procedures for avoiding or addressing potential or actual conflicts of interest that may arise in connection with the provision of services. In addition to disclosing their general policy, BPP Signatories should also have a process in place to identify and disclose without delay to their clients, on a case-by-case basis, actual or potential conflicts of interest or business relationships that may influence the preparation of their research, advice and voting recommendations and the actions they have undertaken to eliminate, mitigate and manage actual or potential conflicts of interest."*

208 *In June 2020, PROXINVEST experienced a change of controlling shareholder.*

investment fund, nor a company making public calls for funds, and that such circumstances result in a significant attenuation of conflict of interest risks and risks of undermining PROXINVEST's independence. However, risks of conflict are prevented as follows: (i) publication of a newsletter in the event of taking a management position or making a significant investment in the capital of companies analysed by PROXINVEST, (ii) application of the public voting policy, (iii) signature of the policy for prevention of insider trading and conflicts of interest; and (iv) devolution of day-to-day management of the firm to an incumbent employee - and minority shareholder - of PROXINVEST.

☐ Information on potential conflicts of interest

According to the proxy advisers' websites, transparency regarding these conflicts of interest has been provided in research reports:

- ✓ ISS states that some of this information is contained directly in the research reports.[209] However, it specifies that, because of a "Chinese wall" between businesses, the information relating to transparency of the commercial relationships of its ICS subsidiary is available outside the research reports. This information is disseminated notably via the *ProxyExchange* platform, and the research report indicates to clients where and how to obtain this information;
- ✓ PROXINVEST informs its clients by providing an alert on the first page of the general meeting study, in accordance with its statement of compliance with the BPPG code of good conduct;[210]
- ✓ GLASS LEWIS also highlights conflicts of interest in its report.[211]

5. INFORMATION CONCERNING THE PREPARATION OF THEIR RESEARCH, ADVICE AND VOTING RECOMMENDATIONS

Proxy advisers provide information concerning the preparation of research, advice and voting recommendations. In accordance with Article L. 544-4 of the Monetary and Financial Code, paragraph 2, "*in order to inform their clients regarding the precise content and the reliability of their activities, the proxy advisers publish, at least once a year, information concerning the preparation of their research, advice and voting recommendations*".

☐ Methodology for establishing the voting policy

Article R. 544-1 of the Monetary and Financial Code stipulates that "*the annual information concerning the preparation of research, advice and voting recommendations shall comprise the following information: […]*
4° The fact that specific national features in terms of the market, legislation and regulations, and specific features of the company itself, are taken into consideration or not and, if so, how they are taken into consideration;
5° The essential characteristics of the voting policies applied for each market".

The voting policies and their production process are described in detail on the proxy advisers' websites.

ISS and GLASS LEWIS consult investors for the annual updating of their voting policy. The changes proposed by ISS result from taking into consideration: (i) questionnaires on the policy regarding global, regional or local trends; (ii) proposals for changes by the teams dedicated to research; and (iii) roundtable discussions with clients on voting policies. They take into consideration specific French features related to national regulations, the AFEP-MEDEF and MIDDLENEXT codes, and the recommendations of the AFG. A policy partly adapted to France was published by both firms.

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209 https://www.issgovernance.com/file/duediligence/Disclosure-of-Significant-Relationships.pdf
210 PROXINVEST Compliance Statement with the BPP (Conflict Disclosure, p 13)
211 GLASS LEWIS Statement of Compliance with the BPP (Possible Conflicts for Consideration, p 18) ; https://www.glasslewis.com/conflict-of-interest/

In addition to the annual updates, also note that, in the context of the Covid-19 pandemic, GLASS LEWIS[212] and ISS[213] updated their voting policy to make it more flexible in March and April 2020, particularly on the issue of voting in camera and "anti-takeover" measures. Publications dedicated to the impact of Covid-19 were also produced.[214]

PROXINVEST does not launch a public consultation but every year it organises private discussions with the stakeholders (i.e. investors and companies) regarding its whole voting policy. Changes are proposed after: (i) dialogue with investor clients; (ii) dialogue with issuers and research by analysts; and (iii) debates and a consultative opinion of its policy committee. PROXINVEST reports on the main changes only to its clients and the companies analysed, which it considers as the sole stakeholders. The voting policy is then made public and accessible on the PROXINVEST website.

The AMF notes that:

- ✓ **Pursuant to Article L. 544-1 of the Monetary and Financial Code, proxy advisers must also now publicly disclose, at least once a year, information in relation to the preparation of their research, advice and voting recommendations. This publication must take place each year, so the AMF invites proxy advisers to present all this information in an annual document, in addition to the information provided on their website;**
- ✓ **Since the process of working out the voting policy involves a more or less significant number of stakeholders depending on the proxy adviser, it invites proxy advisers to publish and comment on the proposed changes;**
- ✓ **The annual information concerning the preparation of research, advice and voting recommendations ought to better identify which specific national features in terms of market, legislation and regulations are taken into consideration, and how.**

☐ Implementation of the voting policy

Article R. 544-1 of the Monetary and Financial Code specifies that: "*The annual information […] comprises the following information:*

"1° The essential aspects of the methods and models applied;
2° The main sources of information used;
3° The procedures established to ensure the quality of the research, advice and voting recommendations, and the professional qualifications of the personnel concerned".

In AMF Recommendation No. 2011-06, it is recommended that proxy advisers "*have the appropriate expertise and resources for performing their activity and, in particular, for analysing draft resolutions. The persons tasked with analysing draft resolutions should have appropriate expertise and experience for conducting this type of analysis. The AMF recommends that proxy advisers define methodological rules on the basis of which their personnel will produce their analyses, and ensure that they are complied with. Proxy advisers shall present on their website the policy that they adopt for all these aspects. Proxy advisers shall justify in their analysis report the sense of the voting recommendations that they issue resolution by resolution, particularly in relation to the published general voting policy*".

The AMF also recommends that proxy advisers "*justify in their analysis report the sense of the voting recommendations that they issue resolution by resolution, particularly in relation to the published general voting policy*".

Little information is provided on the websites regarding the expertise and resources employed for each market concerned. ISS, GLASS LEWIS and PROXINVEST state in their statement of compliance with the BPPG Code that they have not adopted outsourcing of research. More precisely:

- ✓ ISS and GLASS LEWIS state that they outsource no part of their research process;

212 https://www.glasslewis.com/poison-pills-and-coronavirus-understanding-glass-lewis-contextual-policy-approach/ et
213 https://www.issgovernance.com/file/policy/active/updates/EMEA-Policy-Updates.pdf
214 https://www.glasslewis.com/everything-in-governance-is-affected-by-the-coronavirus-pandemic/ et https://www.glasslewis.com/remuneration-and-covid-glass-lewis-approach-to-pay-in-the-australianand-other-upcoming-proxy-seasons/

- ✓ PROXINVEST states that it does not outsource data collection. To follow the general meetings of non-French companies, clients are invited to subscribe to ECGS for the supply of reports issued by local experts.

A major data collection effort had to be made in 2020, in a context of postponement of general meetings and in monitoring information such as dividend changes (reduction in or cancellation of the dividend payment), changes in compensation policy and the search for information on aid schemes (short-time working, "PGE" state-guaranteed loans, etc.). This resulted in a greater workload for these firms in 2020.

The management of new published information varies depending on the proxy adviser:

- ✓ PROXINVEST[215] does not update its report after its circulation. However, clients may enter into a dialogue with the companies concerned;
- ✓ ISS[216] may possibly issue an alert supplementing the published report if the information forwarded directly by the issuer alters the analysis in the report. These alerts are disseminated to all the clients who received the initial report. If the information is published after the voting deadlines for clients, ISS may publish an information alert;
- ✓ GLASS LEWIS can possibly update its report to reflect new published information or the correction of an error or omission. Alerts are disseminated to clients who have accessed the report or have relevant voting slips, whether or not the update has an impact on the recommendations. [217]

☐ Consequences of failure to comply with the voting policy

Voting policies are made public by the proxy advisers.[218] They generally indicate in what conditions it is proposed to recommend that shareholders support a proposal.

However, a failure to comply with the voting policy does not systematically entail a negative recommendation. For example, PROXINVEST[219] notes that with regard to executive compensation, the analysis criteria are too numerous to be all complied with; it therefore groups them into four categories: transparency, structure, alignment with performance and amount. ISS[220] and GLASS LEWIS[221] specify that failure to comply with the voting policy entails a negative voting recommendation in the absence of valid justifications or particular situations.

In all cases, the research report shall present the voting principles used and their application with regard to the company's practices (which are explained for each resolution). Clients therefore have access to the materials needed to establish a link between the voting policy and the voting recommendation.

Recommendations issued on the French market in 2019 and 2020:

In 2020, on the French market, ISS issued 28% of negative recommendations (versus 35% in 2019). PROXIVEST issued 39.3% of negative recommendations (versus 42.3% in 2019). The research reports were issued on average 18 days before the general meeting, for both ISS and PROXINVEST. No information is available on this aspect for GLASS LEWIS.

215 *PROXINVEST Compliance Statement with the BPP (Quality of Research and Research Methodology, p 8) and (Timeliness, p 11)*
216 *ISS Compliance Statement (Quality of Research, p 5)*
217 *GLASS LEWIS Statement of Compliance with the BPP (Complaints & Feedback Management, p 14) and (Errors or Omissions, p 23-24)*
218 *Example of voting policy: https://www.glasslewis.com/guidelines/*
219 *PROXINVEST Compliance Statement with the BPP (Quality of Research and Research Methodology, p 8) ; http://www.proxinvest.fr/wp-content/uploads/2020/01/Politique_de_vote_Proxinvest_2020_version-finale.pdf*
220 *ISS Compliance Statement (Signatory Policies, p 10)*
221 *GLASS LEWIS Statement of Compliance with the BPP (Voting Policies, pp 9-11) ; https://www.glasslewis.com/wp-content/uploads/2016/11/Guidelines_Continental_Europe.pdf ; https://www.glasslewis.com/wp-content/uploads/2017/01/Guidelines_France.pdf*

6. DIALOGUE WITH LISTED COMPANIES

☐ The dialogue framework

Article R. 544-1 of the Monetary and Financial Code stipulates that: "*The annual information […] comprises the following information: 6° Whether or not dialogue has taken place with the companies that were the subject of their research, advice or voting recommendations, and with the stakeholders of those companies and, where applicable, the scope and nature of those dialogues*".

The AMF also provides, in its Recommendation 2011-06, for dialogue ahead of publication of the analysis report. It "*recommends that the proxy adviser send to the company concerned its draft report for any comments and, when it has not sent it, that it indicate this clearly in the analysis report and explain the reasons why*".

The BPPG Code stipulates that: "*BPP Signatories should disclose a policy (or policies) for dialogue with issuers, shareholder proponents and other stakeholders. BPP Signatories should inform clients about the nature of any dialogue with relevant parties in their research reports, which may also include informing clients of the outcome of that dialogue*."[222]

On the international level, note that the US regulator, the Securities and Exchange Commission (SEC), recently abandoned a similar proposal which would have obliged proxy advisers to submit their voting recommendations to companies for verification before distributing them to investors for shareholders' meetings.

☐ Dialogue implementation

ISS,[223] PROXINVEST,[224] and more recently GLASS LEWIS[225] have published on their website their policy of dialogue with issuers.

The procedure for discussion with issuers ahead of the general meeting differs depending on each proxy adviser:

- ✓ ISS sends a draft report to issuers offering them a period of 24 or 48 hours to correct any factual errors and, in the event of a negative voting recommendation, to put forward their observations via "companies' quotes". These are included in the report in the form of quotations following ISS's comments on the resolution in question. The research report contains a summary table of discussions with issuers. In 2020 (at end-July), ISS has had about 144 dialogues (versus 204 in 2019) with French issuers, representing 70 different companies (versus 105 in 2019), 68 of which (versus 93 in 2019) were pre-report reviews. In addition, GLASS LEWIS places online the relevant data on which the voting recommendations are based, and the issuer may point out factual errors and omissions. However, the issuer has access to the voting recommendations only by buying the analysis report. It can then put forward its position in a Report Feedback Statement, which is included in the analysis report sent to the investor client;
- ✓ PROXINVEST does not give the issuer prior access to the draft report, considering, in particular, that this would undermine their intellectual property rights and their independence, and would make it less interesting for the issuer to provide full public information. The issuer is informed of the voting recommendations and priority points for attention by email, and may purchase the report. Two days before the general meeting, the public can access PROXINVEST's voting recommendations on its website.

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222 *BPP Signatories should disclose a policy (or policies) for dialogue with issuers, shareholder proponents and other stakeholders. BPP Signatories should inform clients about the nature of any dialogue with relevant parties in their research reports, which may also include informing clients of the outcome of that dialogue.*

223 *https://www.issgovernance.com/policy-gateway/policy-formulation-application/*

224 *PROXINVEST Compliance Statement with the BPP (Dialogue Policy, pp 15-17); http://www.proxinvest.fr/nos-politiques-a/dialogue-avec-les-emetteurs/*

225 *GLASS LEWIS Statement of Compliance with the BPP (Dialogue with Corporate Issuers, Shareholder Proponents & Other Stakeholders, p 25)*

The AMF continues to recommend dialogue between proxy advisers and issuers and reiterates that it is important that issuers be able to have access to the data so that they may be able to point out any factual errors or omissions. The AMF notes that pursuant to Article R. 544-1 of the Monetary and Financial Code, proxy advisers must now indicate each year whether or not dialogue has taken place with the companies that were the subject of their research, advice or voting recommendations. The decision-making process of proxy advisers should also be clarified by each proxy adviser.

AUTORITÉ DES MARCHÉS FINANCIERS

Annex 1: Rules applicable to the various components of compensation

☐ Reminder of the rules applicable to fixed compensation

Law
Article R. 225-29-1, II of the Commercial Code now provides for information in the compensation policy which should, in particular, specify the following aspects for each company officer: "1º The fixed, variable and exceptional components of the total compensation and the benefits of all kinds that may be awarded to them for the office in question, and their respective weights".
AFEP-MEDEF Code
Article 25.3.1 of the Code: "In principle, fixed compensation may only be reviewed at relatively long intervals. If, however, the company opts for an annual increase in the fixed compensation, this increase must be modest and must respect the principle of consistency set out in § 25.1.2. In the event of any significant increase in compensation, the reasons for this increase must be clearly indicated."
Guide to application of the AFEP-MEDEF Code published by the HCGE
This section of the AFEP-MEDEF Code governs the fixed compensation of executive corporate officers. The information presented on this subject must indicate either the date since when the fixed compensation has not changed, or the policy followed by the Board in this respect, especially if there has been a significant variation during the financial year.

☐ Reminder of the rules applicable to variable compensation

Law
Article R. 225-29-1, II of the Commercial Code now provides for full information on the performance criteria, and the compensation policy should, in particular, specify the following aspects for each company officer: - "***When the company awards variable compensation components, the clear, detailed and varied criteria, of a financial and non-financial nature, including, where applicable, those relating to Corporate Social and Environmental Responsibility, on which depends their award, and how these criteria contribute to the compensation policy objectives.***" - "***When the company awards conditional obligations and rights, the clear, detailed and varied criteria, of a financial and, where applicable, non-financial nature, including those relating to Corporate Social and Environmental Responsibility, on which depends their award, and how these criteria contribute to the compensation policy objectives. […]***". In addition, Article L. 237-3-3 8° of the Commercial Code provides for the inclusion of "***an explanation of how the total compensation complies with the adopted compensation policy, including how it contributes to the company's long-term performance, and how the performance criteria have been applied***".

AFEP-MEDEF Code
Article 25.3.2 Annual variable compensation of executive corporate officers The Board may decide to award annual variable compensation, the payment of which may be deferred if appropriate. The rules for fixing this compensation must be consistent with the annual review of the performances of the executive officers and the corporate strategy. They depend on the director's performance and the progress made by the company. The terms of the annual variable compensation must be understandable to shareholders, and clear and comprehensive information must be provided each year in the report on corporate governance. The board defines the criteria that make it possible to determine the annual variable compensation as well as the objectives to be achieved. These must be precise and, of course, predetermined. These criteria must be reviewed regularly, while avoiding overly frequent revisions. The quantifiable criteria are not necessarily financial and must be simple, relevant and suited to the corporate strategy. They must account for the largest share of this compensation. If used, the stock exchange price must not constitute the only quantifiable criterion and may be assessed on a relative basis (comparison with similar companies or indexes). The qualitative criteria must be defined precisely. When qualitative criteria are used within the annual variable compensation, a limit must be set for the qualitative part. The maximum amount of annual variable compensation must be defined as a percentage of the fixed compensation and must be of a magnitude that is proportionate to this fixed part. Except in justified cases, the award of annual variable compensation may not be restricted solely to executive officers.
Guide to application of the AFEP-MEDEF Code published by the HCGE
Rules for award of the annual variable component, and indication of the criteria for determining this variable component: qualitative and quantifiable criteria (subject to the confidentiality of certain components) - limits set for the qualitative part when used; - relation between the annual variable component and the fixed component (maximum percentage of the fixed component); - indication of application of the criteria by comparison with what had been planned during the financial year and mention of the achievement of personal objectives; - detailed individual compensation of each executive corporate officer according to the standardised presentation tables for executives appearing in appendix to the AFEP-MEDEF Code (Tables 1 and 2).

AMF Recommendation DOC-2012-02
The AMF recommends[226] that companies which refer to the AFEP-MEDEF Code should: - distinguish between each of the criteria used, indicating whether it is a quantifiable or qualitative criterion; - indicate precisely the qualitative criteria used to determine the variable component of compensation or **at least** indicate that certain qualitative criteria were pre-established and defined precisely but have not been made public for reasons of confidentiality; - indicate the expected level of achievement of the quantifiable objectives used to determine the variable component of compensation or at least indicate that the level of achievement of these quantifiable criteria was established precisely but is not made public for reasons of confidentiality provided that the nature of the quantifiable criteria is described; - present clearly and precisely the breakdown of the criteria adopted for determining the variable component of compensation; - indicate the cap on variable compensation either as a percentage of the fixed compensation, or as a maximum cash amount for those which do not pay fixed compensation; - give clear and precise information on the implementation of adjustment provisions affecting the calculation or payment of certain components of compensation and ensure that the pre-established nature of the criteria making it possible to determine these components is not called into question. The AMF recommends, moreover, when calculating the annual variable compensation which is to be paid, that:

226 *AMF Position-Recommendation DOC-2012-02*

- companies specify clearly, at least for each quantifiable objective, the level of achievement attained;

- the board of directors or supervisory board should justify its decision when the proportion of annual variable compensation awarded on the basis of the observed performance of qualitative criteria deviates significantly from the ratio initially set and becomes preponderant by comparison with the proportion based on the performance of quantifiable criteria. This situation should remain exceptional and the justification provided should make it possible to understand the reasons for it.

☐ Reminder of the rules applicable to long-term compensation

Law

Article L. 237-3-3, 8° of the Commercial Code and Article R. 225-29-1, II of the aforementioned Commercial Code which specifies: "***When the company awards compensation in shares, the share vesting periods and, where applicable, holding periods applicable after vesting and how the compensation in shares contributes to the compensation policy objectives.***"

AFEP-MEDEF Code

Article 25.3.3 Long-term compensation of executive corporate officers

• **General principles**: The aim of the long-term compensation mechanisms is not only to encourage directors to adopt a long-term approach but also to secure their loyalty and harmonise their own interests with the corporate interest and the interests of the shareholders.

These mechanisms may consist of the award of instruments such as stock options or performance shares or may take the form of the award of securities or cash payments within the framework of multi-annual variable compensation plans. Such plans are not restricted solely to executive officers, and all or a part of the company's employees may benefit from them. They must be simple and comprehensible, both for the interested parties themselves and for the shareholders.

When awarding them, the Board may include a provision authorising it to rule on the maintenance or otherwise of long-term compensation plans not yet acquired, options not yet exercised or shares not yet vested at the time of departure of the beneficiary. These plans, the award of which must be proportionate to the annual fixed and variable compensation components, must provide for demanding performance conditions to be fulfilled over a period of several consecutive years. These conditions may be performance conditions that are internal to the company or relative conditions, that is to say linked to the performances of other corporations, a reference sector, etc. If chosen as a criterion, the stock exchange price may be assessed on a relative basis (comparison with similar companies or indexes). Whenever possible and relevant, these internal and relative performance conditions should be combined. Only under exceptional circumstances (substantial change to scope, unexpected change in the competitive context, loss of relevance of a reference index or a comparison group, etc.) is it permissible to modify the performance conditions during the period in question. In this case, these changes are made public following the Board meeting at which they were decided on. In the event of a change to the performance conditions, the alignment of the interests of the shareholders with those of the beneficiaries must be maintained. In the event of the departure of a director, please refer to § 25.5.1.

• **Provisions specific to stock options and performance shares**: The award of stock options and/or performance shares must correspond to a policy of involvement in the capital, i.e. a policy that aligns the interests of beneficiaries with those of the shareholders along with the associated uncertainty. The Board must ensure that awards are made at the same calendar periods, e.g. after the publication of the financial statements for the previous financial year, and should preferably do so each year. It is necessary to specify periods preceding the publication of the annual and interim financial statements during which the exercise of the stock options is not possible. The Board of Directors or Supervisory Board must specify these periods and, where applicable, specify the procedure to be followed by the beneficiaries prior to any exercise of the stock options in order to ensure that they do not hold any information likely to prevent them from exercising these options. With regard to executive officers, it is necessary: − to ensure that the stock options and performance shares valued in accordance with the method chosen for the consolidated financial statements represent a proportionate percentage of the aggregate of all compensation, options and shares awarded to them. The Board must specify the percentage of the compensation not to be exceeded by such awards; − to avoid awards from being overly concentrated on them. According to the situation of each company (size, industry, broad or narrow scope of the award, number of officers, etc.), the Board must define the maximum percentage of options and performance shares that may be awarded to company officers, as compared with the aggregate award approved by the shareholders. The resolution authorising the award plan submitted to a vote at the shareholders' meeting must mention this maximum percentage in the form of an award sub-ceiling for company officer; − to remain consistent with the corporation's prior practices for the valuation of the awarded options and performance shares. No discount should be applied upon the award of stock options to company officers. Company officers who are beneficiaries of stock options and/or performance shares must make a formal commitment not to engage in any hedging transactions in respect of their own risks with regard to options, shares resulting from the exercise of options or performance shares, and to respect this commitment until the end of the share retention period determined by the Board of Directors.

Guide to application of the AFEP-MEDEF Code published by the HCGE
Rules for award of the multi-annual variable component • indication of the criteria for determining this variable component: qualitative and quantifiable criteria (subject to the confidentiality of certain components) and their respective weights • indication of the group of beneficiaries from the multi-annual variable compensation arrangement • upon payment of the multi-annual variable component, indication of application of the criteria • detailed individual compensation of each executive corporate officer according to the standardised presentation table for executives appearing in appendix to the code (Table 10).
AMF Recommendation DOC-2012-02 applicable to companies referring to the AFEP-MEDEF Code
The AFEP-MEDEF Code recommends that long-term compensation should be related to demanding performance conditions to be met over a period of several consecutive years. These conditions may be performance conditions within the company or relative, i.e. related to the performance of other companies or a benchmark sector. When it is possible and appropriate, these in-house and relative performance conditions shall be combined. Within this framework, the AMF recommends that the presence of the beneficiary at the time of exercising stock options or the final award of free shares not be considered a demanding performance criterion. The AMF recommends that: - companies specify that to their knowledge no hedging instrument has been put in place on either the options or the shares resulting from the exercise of options or on performance shares, until the end of the share holding period stipulated by the board of directors; - the obligations concerning the holding of securities resulting from the exercise of stock options or from free share issues, provided for by Articles L. 225-185 and L. 225-197-1 of the Commercial Code, (i) be set out and (ii) be sufficiently constraining to allow real consideration of the company's long-term performance; - when the board of directors or supervisory board decides, upon the departure of an executive, to exempt him from the continued presence condition provided for in a bonus share plan or stock option plan, the exact number of options or shares to which the executives are entitled under these plans should be noted and the amount of the benefit thus awarded should be evaluated. The AMF therefore recommends that the corporate governance report and the universal registration document include a comprehensive view of implementation of the compensation policy over several years, in addition to the policy itself. For options, performance shares and long-term variable compensation, this may be done by referencing tables 8, 9 or 10 of the AFEP-MEDEF code. These tables, which describe past awards, should set out the previously established performance conditions.

Law and decree
Article L. 225-37-3, I of the Commercial Code specifies that: "Companies whose shares are admitted to trading on a regulated market shall present, in a clear and understandable manner, in the corporate governance report referred to in the last paragraph of Article *L. 225-37, where applicable, for each company officer, including company officers whose term of office has been terminated and those newly appointed during the past financial year, the following information: 1° The total compensation and benefits of all kinds, distinguishing between the fixed, variable and exceptional components, including in the form of equity securities, debt securities or securities giving access to capital or entitling holders to the award of debt securities of the company or companies mentioned in Articles L. 228-13 and L. 228-93, paid for the office during the past financial year, or awarded for the office for said financial year, indicating the main conditions of exercise of the rights, and in particular the price and date of exercise and any change in those conditions.*" Article R. 225-29-1, II of the Commercial Code stipulates that: "*The compensation policy shall specify, for each company officer, the following aspects: 1° The fixed, variable and exceptional components of the total compensation and the benefits of all kinds that may be awarded to them for the office in question, and their respective weights.*"

AFEP-MEDEF Code
Article 25.3.4 of the AFEP-MEDEF Code relating to the extraordinary compensation of executive corporate officers provides that: *"Only highly specific circumstances may warrant the award of extraordinary compensation (for example, due to their importance for the corporation, the involvement they demand and the difficulties they present). Justified reasons for the payment of this compensation must be given, and the realisation of the event that gave rise to the payment must be explained."*
Guide to application of the AFEP-MEDEF Code published by the HCGE
"*It is therefore incumbent on the company to justify very precisely the use of this form of extraordinary compensation which may not be used to pay for tasks inherent in the duties of executives such as, for example, ensuring the transition with a successor. In cases where this compensation is of a fragmented nature due, for example, to a transformative acquisition involving integration issues spread out over time and in particular when it substitutes for variable compensation, it is incumbent on the company to describe each year the stages passed through in this operation and the results achieved justifying the payment of this exceptional compensation.*"

Annex 2: List of companies in the sample of part 2 of this report[227]

36 CAC 40 companies

Company	Index membership
ACCOR	CAC 40
ATOS SE	CAC 40
AXA	CAC 40
BNP PARIBAS	CAC 40
BOUYGUES	CAC 40
CAPGEMINI	CAC 40
CARREFOUR	CAC 40
COMPAGNIE DE SAINT-GOBAIN	CAC 40
COMPAGNIE GÉNÉRALE DES ÉTABLISSEMENTS MICHELIN	CAC 40
CRÉDIT AGRICOLE S.A.	CAC 40
DANONE	CAC 40
DASSAULT SYSTEMES	CAC 40
ENGIE	CAC 40
ESSILORLUXOTTICA	CAC 40
HERMÈS INTERNATIONAL	CAC 40
KERING	CAC 40
L'AIR LIQUIDE	CAC 40
LEGRAND	CAC 40
L'ORÉAL	CAC 40
LVMH MOET HENNESSY-LOUIS VUITTON	CAC 40
ORANGE	CAC 40
PEUGEOT S.A.	CAC 40
PUBLICIS GROUPE SA	CAC 40
RENAULT	CAC 40
SAFRAN	CAC 40
SANOFI	CAC 40
SCHNEIDER ELECTRIC SE	CAC 40
SOCIÉTE GÉNÉRALE	CAC 40
SODEXO	CAC 40
THALES	CAC 40
TOTAL S.A.	CAC 40
UNIBAIL-RODAMCO-WESTFIELD SE	CAC 40
VÉOLIA ENVIRONNEMENT	CAC 40
VINCI	CAC 40
VIVENDI	CAC 40
WORLDLINE	CAC 40

227 *It is specified that the sample presented in this Annex was analysed in Part 2 of this report ("Study of the information provided by companies in the corporate governance report"). It does not correspond to the sample analysed in Part 1 ("Recent developments in governance"), which, for its part, concerns 118 SBF 120 issuers – for the index as established at 31 March 2020.*

22 SBF 120 companies

Company	Index membership
AIR FRANCE-KLM	SBF 120
ALD	SBF 120
ALTEN	SBF 120
CASINO GUICHARD-PERRACHON	SBF 120
COFACE SA	SBF 120
DASSAULT AVIATION	SBF 120
ELIS	SBF 120
FAURECIA	SBF 120
GENFIT	SBF 120
ICADE	SBF 120
INGENICO GROUP	SBF 120
KORIAN	SBF 120
LA FRANÇAISE DES JEUX	SBF 120
LAGARDÈRE SCA	SBF 120
ORPEA	SBF 120
REXEL	SBF 120
RUBIS	SBF 120
SARTORIUS STEDIM BIOTECH	SBF 120
TRIGANO	SBF 120
UBISOFT ENTERTAINMENT	SBF 120
VERALLIA	SBF 120
VIRBAC	SBF 120