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High Committee for Corporate Governance

Annual Report 2015

HCGE

Haut Comité de Gouvernement d'Entreprise

This document is an unofficial English translation of Part One of the 2015 annual report of the Haut Comité de Gouvernement d'Entreprise *(High Committee for Corporate Governance), a body set up by French business associations AFEP and MEDEF to monitor the implementation of the AFEP-MEDEF Corporate Governance Code for Listed Companies. It does not include Part Two of the original report, which is a detailed analysis based on the monitoring of the annual reports/reference documents of SBF 120 index companies. However it does include the annex relating to limited partnerships with shares (*sociétés en commandite par actions*).*

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PREFACE

The High Committee on Corporate Governance has just completed its second year. It notes, as do most observers, that the corporate governance practices of French companies have continued to improve. Compliance with the recommendations of the AFEP-MEDEF Code, for those companies which refer to it, is a key element of these good practices, which attract increasing attention from the stakeholders.

Far from being only an additional burden for the companies, these recommendations help the boards of directors and supervisory boards to fully play their part and to contribute to the creation of value by the company, while respecting the latter's specificities thanks to the flexibility of the "comply or explain" principle.

It is also noteworthy that in this matter there is a convergence of rules and methods in European countries. Attention is now increasingly focusing on the monitoring of governance practices. The High Committee brings an original and efficient response to that concern. Its interventions are most often well received and the corresponding recommendations are generally taken into account. Experience shows that the consultations it renders play a useful preventative role and have helped to avoid "accidents". Incidentally, these interventions and consultations do not relate only to compensation issues, but also to governance issues as such, like directors' independence.

An institution which has no proper equivalent in Europe, the High Committee believes that it brings a useful contribution to the attractiveness of the French marketplace, while respecting the specificities of our economic model.

Denis Ranque

Chairman of the High Committee for Corporate Governance

1. High Committee's Activities in 2014–2015

This report covers the period from September 2014 to August 2015. It follows on from the first High Committee report, published in October 2014.

1.1. Meetings and external contacts

The High Committee met 10 times between September 2014 and August 2015, with a rate of attendance of its members of 87%. E-mails were exchanged between meetings as required, particularly in order to prepare responses to urgent consultations.

At one of these meetings, the High Committee welcomed Mr Emmanuel Macron, Minister for the Economy, Industry and the Digital Sector. This meeting made it possible to have a constructive exchange of thoughts concerning the application of the "comply or explain" rule and the principle of concerted professional regulation. The High Committee also met with consultants specialising in matters relating to executive officers' compensation, who provided useful information about multi-annual variable compensation practices.

The chairman and the general secretary of the High Committee met with the chairmen and executives or general secretaries of the committees responsible for monitoring corporate governance codes in Germany, the United Kingdom, Italy and the Netherlands. These contacts confirmed the convergence of the rules of good governance in the various countries, and the determination of these committees to work with the European and national authorities to promote the "comply or explain" rule. They also met with members of the Board of Directors of AFEP, European representatives of the proxy voting agency ISS, and several representatives from the financial press on the occasion of the publication of the High Committee's 2014 report.

While respecting the confidentiality of their respective interventions with companies, the High Committee and the French Financial Markets Authority (AMF) maintained informal contacts so as to ensure the consistency of their respective positions.

The High Committee was also heard in the context of the Charpin governmental mission on pensions with defined benefits.

1.2. Consultations by companies

The Boards of Directors and Supervisory Boards of several companies consulted the High Committee regarding:

- the compliance of two supplementary pension schemes with the Code;
- the compliance of the extraordinary compensation paid to two executive directors with the Code;
- the compliance of a signing bonus with the Code;
- the conditions applicable to the number of directorships held by executive directors whose main role is as the executive officer of a "portfolio" company.

As has been its practice from the start, the High Committee answers questions submitted on behalf of Boards of Directors or Supervisory Boards, including through external consultants, but not those asked "anonymously", i.e. without the company asking them being identified.

The High Committee only gives its opinion to the company consulting it, and refrains from any outside communication on this subject. In so doing, it is its intention to encourage companies and their governing bodies to make use of such consultations without hesitation.

However, as these have often provided the High Committee with the opportunity to assume a position concerning the interpretation of the Code, it found it useful to publish them anonymously in the framework of this report, so as to enable all of the companies potentially affected to benefit from them.

1.3. High Committee's initiatives

During the year, the High Committee wrote to the chairmen of several companies at its own initiative, particularly:

- upon the publication of information about the compensation awarded to executive directors or their departure;
- to highlight deviations from the Code, or information deficiencies, to non-SBF 120 index companies referring to the AFEP-MEDEF Code (see p. 22 below);
- following the publication of draft advisory shareholders' meeting resolutions on executive officers' compensation, to point out information deficiencies in the explanatory documents attached to these draft resolutions, and request that they supplement the information provided to their shareholders.

Following the publication of annual reports/reference documents, the High Committee wrote to around 30 of the SBF 120 companies to point out deviations from the Code or deficient explanations.

These two latter types of intervention followed on from a systematic review of the shareholders' meeting documents and annual reports for the entire sample, with the choice of recipients and subjects being guided by the major themes decided at the beginning of the financial year (see Section 2 below) and by the need to revisit certain themes selected during the previous financial year (see Section 3 below).

Furthermore, the High Committee revised and supplemented its Application Guide for the AFEP-MEDEF Code in December 2014. The amendments notably related to the paragraphs on multi-annual variable compensation, concurrent executive director and employee status, and supplementary pensions.

1.4. External communication rules governing the High Committee

The High Committee would like to point out that its responses to consultations by companies are sent to the chairmen of the Boards on a confidential basis. Experience has shown that its opinions have generally been well followed and have often prompted the companies to adjust the mechanisms they were planning, then to implement them without creating any problems and without generating any unfavourable public reactions. This method is therefore an important element of the prevention role played by the High Committee, at the same time as allowing Boards to be fully responsible for their decisions.

The High Committee's interventions at its own initiative, particularly following on from the systematic review of shareholders' meeting documents and annual reports, are also confidential.

However, in some extraordinary cases, the High Committee may have cause to disclose its intervention when it considers that this communication is necessary in order for the professional regulation scheme to function properly, which is its purpose, and in order for it to be correctly understood. This was the case this year at the close of the High Committee's intervention in the problem posed by the compensation awarded by Alcatel-Lucent to its executive officer at the time of his resignation, brought about by the proposed merger with Nokia.

Moreover, it is pointed out that, in accordance with § 25.2 of the Code, "*if a company decides not to follow the recommendations of the High Committee, it must mention in its annual report/reference document the latter's opinion and the reasons why it has decided not to act on its recommendations*". Otherwise, the High Committee reserves the right to communicate about this situation.

2. Major themes addressed by the High Committee in 2014–2015

2.1. "Motivations and justifications" for the choice of mode of governance

Article 3.2 of the AFEP-MEDEF Code specifies that the Board *"should report [...] the grounds and justifications for its decisions"* regarding the governance formula, i.e. in the case of a company with a Board of Directors, whether or not the offices of chairman and chief executive officer are separate. This reporting is particularly necessary for companies which assign the two offices to the same person, given the hostility of many investors, particularly abroad, concerning this practice. That is why the AFEP-MEDEF Code, which does not favour either mode of operation over the other, recommends that the Board of Director's decision is explained extremely precisely.

The High Committee therefore asked certain companies where the offices of chairman and chief executive officer are combined, to actually provide these explanations or to expand on them. These expansions should highlight the means implemented by the Board of Directors to ensure the balance of powers, such as the list of decisions subject to the Board, the role and independence of the committees, the appointment of a lead director, holding meetings without executive officers present, etc.

2.2. Employee directors

In 2014, the article of the law on job security of 14 June 2013 providing for the appointment of one or more directors representing employees to the Boards of certain companies (Article L. 225-27-1 of the Commercial Code) was implemented. Just 42 of the SBF 120 index companies (including 24 CAC 40 companies), which the High Committee prioritises in its analysis, were within the scope of the law because the statute only applied to companies meeting certain workforce thresholds (5,000 employees in France and 10,000 worldwide) and which have a works council. However, many SBF 120 companies are either holdings with a workforce below the threshold requiring them to set up a works council, or do not meet the workforce thresholds laid down by the text. The law of 17 August 2015 on social dialogue and employment (the so-called Rebsamen Law) has put an end to this situation by lowering the workforce thresholds and scrapping the condition of having a works council.

The June 2013 version of the AFEP-MEDEF Code states that directors representing employees and directors representing employee shareholders have the same rights and obligations as the other directors (§ 7.3 and 7.4). It further contains two specific provisions: one highlighting the importance of providing them with training adapted to their directorship (§ 13), and the other "advising" that an employee director should be a member of the compensation committee (§ 18.1).

More than half of the SBF 120 (and CAC 40) companies having appointed directors representing employees have implemented this recommendation.

Some indicated that they would do so after newly appointed employee directors had had a period of adjustment to their directorship, which seems legitimate. Others inferred from the wording of the Code that, as it was "advice" and not a recommendation, it was not necessary to point out the non-compliance with this provision and provide an explanation for it. The High Committee is of the opinion, all exegesis aside, that if the company does not intend to follow this advice, it should provide a detailed explanation, in the same way as for the other rules of the Code.

2.3. Number of directorships held by non-executive directors

In 2014, the High Committee only considered the case of the "principal directors" (chairmen of Boards of Directors and Supervisory Boards, chief executive officers and chairmen of Management Boards) to assess compliance with the provisions of § 19 of the Code, reserving the option to review the cases of directors and members of Supervisory Boards at a later time (see 2014 Report, p. 18). The AFEP-MEDEF Code states, on the one hand, that an "*executive director should not hold more than two other directorships in listed companies, including foreign companies, not affiliated with his or her group*" and, on the other hand, that a "*non-executive director should not hold more than four other directorships in listed companies, including foreign companies, not affiliated with his or her group*".

With regard to the first rule, the High Committee had found a very small number of executive directors in this category who did not comply with these provisions, and had contacted those concerned to request that they rectified the situation or provided a satisfactory explanation. The proportion fell further this year, since we found that only three executive directors of SBF 120 companies (including one CAC 40 company) are still in this position.

The High Committee had planned in 2015, as far as possible, to review compliance with the second rule, i.e. the limit of four other directorships for non-executive directors (and members of Supervisory Boards). This would have meant reviewing around 1,350 statements of offices shown in the reference documents of the SBF 120 companies, which would have been out of line with the High Committee's resources. It was therefore decided to rely on a study prepared by the French firm Ethics & Boards, using a database listing the corporate offices held in SBF 120 companies and some major foreign indexes: FTSE 100, DAX 30, Dow Jones Industrial Average and SMI (Switzerland). The panel consequently formed is not comprehensive, but it does show the most noteworthy situations from the point of view of the objective sought by the rule of the Code, i.e. preserving sufficient availability in order for directors to carry out their duties to the full.

However, the study only revealed eight non-compliances with the rule (out of more than a thousand cases), one of which has resolved itself in the meantime due to one directorship not being renewed. The other cases pose the question of the treatment of the subsidiaries of "portfolio" companies, with the individuals identified holding excess directorships in companies of this type which are themselves listed. In fact, the AFEP-MEDEF Code specifies with regard to the first rule mentioned above, i.e. no more than two other directorships for executive directors, that it *"does not apply to directorships held by an executive director in subsidiaries and holdings, held alone or together with others, of companies whose main activity is to acquire and manage such holdings"* (note under § 19, supplemented by the clarifications given in the Code Application Guide). However, this exemption is not provided, as the text currently stands, for the limitation to four other directorships applicable to non-executive directors and members of Supervisory Boards.

It is therefore necessary to endeavour to analyse what the expression "other directorship" means, and the High Committee intends to explore this matter further.

2.4. Practice of holding meetings without executives present

This year, the High Committee would like to draw companies' attention to the fact that it is useful to indicate whether the directors external to the company (neither executive directors nor employees) meet periodically without the executive or "in-house" directors as recommended by § 10.4 of the Code. It observes that just 52% of the SBF 120 companies report that this option is provided by their Board's internal rules. There are undoubtedly some among them which, although they have this facility, do not implement it.

The High Committee is of the opinion that these meetings, usually held to evaluate the executive directors' performance, are also a way of improving companies' governance. It suggests that, while this provision of the Code appears in paragraph on the self-evaluation of the Board and mentions these meetings in the context of the evaluation of executive directors' performance, they should not be limited to compensation matters.

Irrespective of their intrinsic value, these meetings, which are very common in English-speaking countries, where they are referred to as "*executive sessions*", are one of the points to which it is useful for companies to draw the attention of investors, particularly those who have doubts about the governance model not involving the separation of the offices of chairman and chief executive officer. It may also be useful, for "two-tier" companies, to mention that the members of the Supervisory Board hold some of their meetings without the Management Board present.

2.5. Rules governing multi-annual variable compensation

The High Committee has noted that the practice of multi-annual variable compensation, on which it started reflecting last year (see 2014 Report, p. 20), has continued to expand, since, for the financial year 2014, 25 of the SBF 120 companies (including 14 CAC 40 companies) were planning to pay a multi-annual variable part, compared with 14 for the previous financial year.

The High Committee's attention was drawn to the difficulties experienced by some companies in applying the Code's provisions to this type of compensation.

Specific references to multi-annual variable compensation were introduced into the Code when it was revised in 2013, but various general provisions also apply to it.

Firstly, when determining compensation, Boards must take into account the broad principles stated by § 23.1: comprehensiveness, balance (between the different compensation components), benchmark, consistency (with the provisions applicable to other executive officers and employees), "understandability" of the rules (which must be demanding, explainable and long-lasting) and proportionality (taking into account the company's general interest, market practices and performance). In more general terms, the Board *"must monitor the evolution in all components of the compensation over several years, with regard to corporate performance"* (§ 23.2).

The provisions applicable to variable compensation (§ 23.2.3) were designed for annual variable compensation; they were extended to multi-annual compensation in 2013: "*The Board may decide to award executive directors annual or multi-annual variable compensation*". The two forms may be cumulative, provided the aforementioned broad principles are adhered to, "*in particular comprehensiveness and proportionality*". The main rules applicable require:

- objectives that are precise, understandable and regularly reviewed (the share price must not be the only performance criterion);
- a group of beneficiaries broader than the executive directors;
- variable compensation consisting of "a maximum percentage of the fixed part";
- a limit for the qualitative part of the variable remuneration.

Following a consultation meeting with the companies concerned, the High Committee decided to supplement the provisions of the Code Application Guide, in its December 2014 version, by introducing the following sentences: *"It is pointed out that variable compensation must be expressed as a maximum percentage of the fixed part (and not of the "target" amount). With regard to deferred and multi-annual variable compensation in particular, where indicating such a maximum percentage of the fixed compensation is not appropriate, companies shall present another method for determining the maximum entitlements that might be awarded and/or acquired or paid at maturity, in accordance with the 'comply or explain' rule".*

Furthermore, the recommendations for presenting multi-annual variable compensation in advisory shareholders' meeting resolutions on compensation, which have not been amended since the first version, point out that the amount of compensation due in respect of the closed financial year should be submitted to a vote, and that a description of the mechanism and the criteria should be presented (including, where applicable, the limit determined for the qualitative part).

It is specified that if a cap is set when the mechanism is put in place during the closed financial year, companies can submit the maximum amount so decided to a vote and, subsequently, quote the description of the mechanism.

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

Regarding the more specific matter of the multi-annual variable compensation due to an executive director who leaves the company during the period covered by the arrangement, the Code establishes the principle that "*in the event that an executive director leaves before completion of the term envisaged for assessment of the performance criteria, the payment of the variable part of the compensation must be ruled out, unless there are exceptional circumstances which can be justified by the Board*". The High Committee is of the opinion that, even in such circumstances, this payment should only correspond to the periods when the executive director is actually present in the company, for which the performance to which he or she has contributed through his or her actions can be measured, excluding any lump sum compensation or offsetting of the sums laid down in respect of the years after he or she has left.

The High Committee is planning to provide further clarification concerning the matter of multi-annual variable compensation in the Code Application Guide. It intends to consult the companies concerned again before the end of 2015.

2.6. Compensation of non-executive chairmen

As intended, the High Committee considered the compensation of non-executive chairmen (chairmen of Boards of Directors whose offices are separate from those of chief executive officer, and chairmen of Supervisory Boards).

The AFEP-MEDEF Code does not contain any specific stipulations with regard to them, but as these chairmen (at least the non-executive chairmen of Boards of Directors) are deemed executive directors (*dirigeants mandataires sociaux*) for the purposes of the Code (footnote below the preamble), the aforementioned general provisions of § 23.1 relating to compensation apply to them *mutatis mutandis*.

The review of the compensation applied by the SBF 120 companies shows many discrepancies, due to the differing circumstances (chairmen having left general management positions or from outside, chairmen representing the controlling shareholder or themselves indirectly holding a large or majority stake in the capital, etc.).

We note, first of all, that variable compensation and compensation in securities are infrequent. The High Committee does not recommend their use. In fact, variable compensation undermines qualification as independent, and entails the disadvantage of giving the chairman a form of short-termist incentive, which is contrary to the mission of the Board. Awards of stock options and free shares (which is prohibited for the chairman of a Supervisory Board) may entail the same disadvantage, depending on the performance conditions to which they are subject (however, it seems legitimate to require chairmen to acquire a significant number of shares in the company).

Furthermore, there is no consistency regarding the proportion between the compensation of the non-executive chairman and that of the chief executive officer. The High Committee is ruling out proposing any standard whatsoever, and this is not in any way envisaged by the Code. The Code, furthermore, states that "*while the market is a benchmark, it may not be the sole one*" and that "*the compensation of an executive director may also depend on the nature of the tasks entrusted to him or her*". However, the High Committee does recommend that an explanation is given of the tasks entrusted to the non-executive chairman. A high compensation must be in proportion with particularly high and duly justified activity (while bearing in mind that no task can encroach on the responsibilities of the executive or be contrary to the Board's principle of collegiality).

2.7. Compensation of executive officers of limited partnerships with shares (sociétés en commandite par actions – "SCAs")

In its 2014 report on corporate governance, the AMF stated that it *"wants the High Committee for Corporate Governance to launch a reflection process with a view to the AFEP-MEDEF Code specifying the regulation arrangements for the compensation awarded to executive directors in limited partnerships with shares so as to ensure, at the same time as taking into account their specific nature, that they are subject to performance criteria"* (p. 18). The High Committee responded to this invitation as follows: *"While, given the small number of SCAs, it does not consider it urgent to supplement the Code in order to adapt its recommendations concerning compensation, the High Committee is planning to address this issue in a future version of its Code Application Guide" (*p. 23 of the 2014 Activity Report).

The High Committee has therefore carried out a detailed analysis, which is summarised in Annex 3, and from which it draws two conclusions. On the one hand, it is recommending that SCAs endeavour to introduce mechanisms to bring their statutory executive directors' (*gérants*) compensation closer, at least in part, to that of executive directors of "conventional" companies by introducing the customary criteria, at the same time as avoiding (as should also be the case in limited companies) the mechanisms being so complex that shareholders cannot easily understand them. On the other hand, it is recommending that those companies which might not yet have done so, unlike SCAs belonging to the SBF 120 index, put in place an advisory resolution for shareholders at their next shareholders' meetings.

2.8. Supplementary pension schemes

When its 2014 annual report came out, the High Committee had planned, as one of the major themes it would address in 2015, to deal with the pension schemes with defined contributions referred to as "Article 83" pension schemes (after Article 83 of the General Tax Code). The High Committee's intention was simply to recommend that companies communicate about these schemes comprehensively and clearly, which is not always the case, so as to dispel the doubts of investors poorly informed about French pension schemes, which are complex and different from those practised in other countries.

The current situation has prompted a wider consideration, and has focused widespread attention on the pension schemes with defined benefits referred to as "Article 39" pension schemes after Article 39 of the General Tax Code (they are also mentioned by Article L. 137-11 of the Social Security Code). Considering that these are compensation components which should be fully taken into account with respect to its principle of comprehensiveness, the AFEP-MEDEF Code contains arrangements governing these pension schemes, which are shown in § 23.2.6.

It is observed that higher taxation and social security contributions have led to the reduced use of schemes with defined benefits and some existing schemes being closed to new beneficiaries (for example, of the 24 CAC 40 companies which come within the scope of this report and which make provision for a supplementary pension, six companies have closed the scheme from which their executive directors benefited). Nevertheless, 51.4% of the SBF 120 companies and 75.7% of the CAC 40 companies indicate that they are making provision for a supplementary pension commitment with defined benefits for them. Incidentally, executive directors are far from being the only beneficiaries of these schemes, and the Ministry for the Economy points out that they *"concern over a million beneficiaries, most of them applying to all the executives of the companies concerned, or even to all the employees"* and that *"the average pension represented €4,000 per year per beneficiary"* (public presentation memorandum for the law of 6 August 2015 for growth, business and equal economic opportunities).

The publication of figures relating to the provisions made by companies in respect of pension commitments with defined benefits and relating to the corresponding amounts of estimated additional income regularly provokes controversy. This is particularly the case when companies go through difficult periods or are obliged to start reducing headcounts. More specifically, the practice of "reinstatement of seniority", which consists of granting beneficiaries a certain number of years of seniority when they join the scheme, for example if they come from outside, has been much criticised.

The High Committee has been prompted on several occasions to make recommendations about the compliance of the schemes practised by certain companies with the Code. In particular, it has ensured that reinstatements of seniority did not make it possible to benefit retrospectively from rights which, when applied to the number of years in the scheme, would have exceeded the maximum “speed of acquisition” of 5% laid down by the Code. It has also considered that it was natural that, when a company experiences economic difficulties, the advantage represented by the supplementary pension commitment should be reduced accordingly, stating that: *“pension plans, for which the law does not require the inclusion of performance conditions, should therefore specify that the rate of acquisition of new rights should temporarily be reduced (or indeed the acquisition should be suspended) for the duration of the company’s potential difficulties”* (2014 Report, p. 21).

Parliament has decided to address these issues in the law of 6 August 2015 for growth, business and equal economic opportunities (so-called Macron Law). This law makes provision to submit pension commitments to performance conditions and add a stricter limit than the one laid down in the Code, since it stipulates that the conditional rights cannot increase annually by an amount exceeding 3% of the annual compensation used as a reference for calculating the pension, which eliminates any possibility of reinstatement of seniority. The Code shall therefore be amended accordingly.

The High Committee's consultations and interventions have prompted it to review the nature of the reference compensation on which some of the recommendations of § 23.2.6 of the Code are based. This is the case for the rules whereby “*each year, the increase in potential rights shall only account for a limited percentage of the beneficiary's compensation*” and “*it is necessary to exclude any schemes giving a right, immediately or over time, to a high percentage of the total compensation at the end of the career*”. The same applies to the limit on the percentage of the income which the supplementary pension scheme can confer, which “*may not be more than 45% of the reference income (fixed and variable compensation due in the reference period)*”. These rules were originally introduced into the Code at a time when multi-annual variable compensation was still the exception and, in the minds of the authors, the compensation to be taken into account was undoubtedly the fixed part and the annual variable part. Taking multi-annual variable compensation into account would necessarily involve complex calculations, significantly increase the reference income and consequently cause these provisions to lose the “proportionality” effect that they seek.

Incidentally, the High Committee has also considered that the same applies to the rule limiting termination payments to two years of fixed and variable compensation (see § 3.4 below).

3. Follow-up of the main recommendations made by the High Committee in 2014

The High Committee had chosen to review the following in particular in 2014 (see 2014 Report, p. 13):

- issues related to the independence of directors;
- the number of directorships (particularly those affecting executive directors) and concurrent executive director and employee status;
- issues relating to compensation, particularly the implementation conditions for consultation of shareholders about individual executive directors’ compensation (“say on pay”).

It considered these issues once more in 2015, in particular to see to what extent its recommendations, included in letters sent to the companies after reviewing the 2013 annual reports/reference documents, had been put into effect. It is pleased to note that the observations made were largely taken into account by the companies.

Of the 74 letters consequently sent out, 62 (i.e. 84%) responses were received. Most of these responses included a commitment to follow the High Committee's recommendations, or explanations which were quoted in the 2014 annual report. Of the 12 companies which did not respond to the High Committee, most in fact took its comments into account. However, the High

Committee noted that four companies only partially took them into account. The recommendations not followed mainly concern issues related to the quality of the information shown in the reference documents. This notably concerns criteria showing that there are no significant business relationships between the independent directors and the company, the precision of information about the proceedings of the committees, the precision of certain information concerning executive directors' compensation (relationship between the fixed and variable compensation, conclusions of the Board's review of the implementation of variable compensation criteria), the calculation of any non-competition benefit for the executive officer if he or she leaves, and the summary of deviations from the provisions of the Code. The High Committee will make contact with these companies again by the end of the year to invite them to address these points correctly in their next reference document or explain why they do not want to alter their approach, otherwise the High Committee will be obliged to name them in its next annual report.

The main conclusions to be drawn from these exchanges of correspondence are summarised below. The matter of the number of directorships held by executive directors and that of the compensation of executive officers of SCAs have been addressed above (§ 2.3 and 2.7).

3.1. Independence of directors

The High Committee notes that almost all of the companies recognise the importance of the notion of independence, since only one omitted to report on the case-by-case review of the situation of Board members.

Proportions of independent directors

It also noted that the proportions of independent directors recommended by the Code for the Board itself (§ 9.2) and for its committees (§ 16.1, 17.1 and 18.1) are largely compliant, despite a slight drop under the previous year in the percentage of compliance with the proportion of independent directors on the Board of controlled companies and with the proportion of independent members on the nomination committee.

Application of the criteria for independence

With regard to the application of the criteria laid down by § 9.4 of the Code, the High Committee had had cause in 2014 to make specific comments concerning some of them.

It had drawn companies' attention to the need to explain in the reference document the criteria used by the Board of Directors to evaluate whether or not there are any significant business relationships between the directors that qualify as independent and the company, and to the importance, in the event that there are no business relationships at all, of mentioning this information too.

The High Committee finds that the proportion of companies explicitly indicating that the nature of directors' business relationships was reviewed on a case-by-case basis has increased significantly since last year, as has the proportion of companies stating the criteria they adopted to measure *"how significant"* these relationships are. The importance of this latter indication had been pointed out in the 2014 Report (p. 16). Due to the fact that situations vary, it is in fact preferable that the Boards themselves set these criteria in line with each company's specific characteristics, rather than put standards in the Code itself which would, by necessity, be too general. They must also inform shareholders about the criteria adopted. It is therefore desirable that companies do not satisfy themselves with indicating generally that they have applied the criteria proposed by the Code.

There is still room for improvement regarding this point, and the High Committee, which had made it one of the main themes of its correspondence with companies in 2014, also wrote to certain companies this year to remind them about it.

With regard to being on the Board for more than 12 years, which is still the criterion most often explicitly deviated from by companies, the number of companies not complying with this is down significantly. Of these, many indicate that the Board made its decision following a detailed review of the individual situation of the parties concerned, and present the conclusions of this review, which constitutes correct implementation of the "comply or explain" principle.

Furthermore, there are a few companies which deem that directors who hold executive or non-executive management positions in other group companies qualify as independent. Although these cases may be infrequent, the High Committee is keen to point out that this qualification is difficult to justify due to the "structural" risk of conflicts of interest. A director or executive officer of an affiliate has a duty of loyalty towards this affiliate that encourages them to favour its corporate interest, which may differ from that of the parent company. However, the qualification may be maintained in some cases involving a non-executive directorship in an affiliate, provided it is ensured that the opportunities for conflicts of interest are marginal and it is stipulated that the individual in question shall abstain from taking part in discussions of the Board of the parent company that might affect the affiliate's interests.

Chairmanship of the compensation committee by an independent director

Finally, there are also a few companies where the compensation committee is not chaired by an independent director. The High Committee would like to reiterate its observations concerning this provision, which appears in § 18.1 of the Code: it is important due to the sensitive nature of the matter and the often decisive role played by the chairman of the committee, and it is equally applicable in controlled companies and in non-controlled companies.

3.2. Concurrent executive director and employee status

Last year, the High Committee had examined the application of the recommendation featured in § 22 of the Code, which states that when an employee is appointed as an executive director, he or she should terminate his or her employment contract (as opposed to simply "suspending" it, which is common law). Like the AMF, the High Committee is of the opinion that derogating from this rule may be justified for executive officers with a significant length of service with the company.

It notes that the number of executive directors who have maintained their employment contract is continuing to fall. It also notes, with satisfaction, that of the companies which derogated from the rule, a large number provided explanations about the advantages generated by maintaining it, particularly in relation to termination payments. These indications are, in fact, necessary to enable shareholders to be sure that maintaining it does not generate non-compliances with the other provisions of the Code.

3.3. Advisory resolutions on compensation

2014 saw the first application of the provision of the Code introducing the individual advisory resolution on executive officers' compensation due or awarded in respect of financial year 2013 (§ 23.4). The implementation of this "say on pay" in 2015 calls for a number of comments.

Firstly, all of the SBF 120 companies now comply with this recommendation. The limited partnerships with shares which were reporting legal difficulties adapting have agreed with the High Committee's arguments (see § 2.7 above). The High Committee had cause to write to several non-SBF 120 companies (see § 4.5 below) which were not applying the provision.

Furthermore, the High Committee strived to verify that the indications provided by the companies in support of the resolutions were sufficiently clear and gave shareholders a precise idea of what they were voting on. The best way to achieve this is to use the table given as an example in the Code Application Guide. This is reproduced by 80% of the companies, either in the text of the resolution itself as it appears in the notice of meeting published in the Bulletin of Mandatory Legal Announcements (BALO), in the Board's statement of reasons shown in the notice of meeting brochure, or in the reference document to which the text of the resolution refers. Some companies adopt a simplified presentation of the table when justified by their executive officers' compensation structure. However, it is not mandatory to use this table at all. Of the companies which do not use it, some refer to the relevant passages of the reference document. This is totally acceptable, provided the reference is sufficiently precise and the information is not spread across several places in the document, turning the task facing the shareholder wanting to vote in full knowledge of the facts into a "paper chase". The High Committee noted a significant improvement in the precision of the references made by the companies which do not use the table provided in the Code Application Guide, and only considered it necessary to write to two companies on this subject.

The "scores" obtained, i.e. the rate of approval of the resolutions, drew many comments. The average for the SBF 120 companies is 87.6%, whereas it stood at 91.4% in 2014. The observers who had calculated this average at the start of the shareholders' meeting "season" had drawn firm conclusions from this about the end of shareholders' "indulgence", but these conclusions proved to be somewhat hasty. In fact, a greater proportion of companies where executive officers' compensation could pose a problem was concentrated among the first shareholders' meetings. However, given that the final figures were lower than in 2014, we must clearly infer from this that shareholders are more vigilant than the first year regarding the content of the resolutions.

When we seek to analyse what has brought about the relatively low rates (between 50% and 75%) obtained by some companies, it is difficult to find general explanations, for example related to the degree of precision of the information given, the choice of variable compensation criteria or the companies' results. Careful analysis shows that some poorly documented resolutions obtained high percentages, that the criteria favoured by investors (where these are known) differed, and that companies posting good results sometimes recorded disappointing scores. The reality is that each company is different and that the situation depends on the circumstances (change of management, for example) and especially on the nature of the shareholding (controlled or non-controlled companies, presence of the State as a shareholder, etc.). It also depends on the dialogue which might have been established, particularly with large shareholders, proxy advisors and management companies. It would be dangerous to draw general conclusions from this slight dip in the rate of approval.

3.4. Other compensation-related matters

Rules governing changes to the fixed part

In 2014, the High Committee had noted that companies were experiencing some difficulty in providing information about the rules they apply to change the fixed part of the compensation, so as to enable compliance with the recommendations of § 23.2.2 of the Code to be evaluated (see 2014 Report, p. 19). The information about this subject has improved significantly. The High Committee would like to point out that it is necessary to show when the last review took place, since the Code stipulates that these reviews should only occur "*at relatively long intervals*". If a review has taken place during the financial year, explanations need to be provided about the grounds for the Board's decision, particularly if it is *"linked to events affecting the company"* and to enable compliance with the principle of *"consistency"* (with the compensation *"of the other officers and employees of the company")* to be ensured.

Variable compensation criteria

The High Committee had also drawn attention to the degree of precision with which variable compensation criteria are presented, recognising the legitimacy of protecting the confidentiality of certain information which might be improperly used by competitors or mislead investors (see 2014 Report, p. 19). However, it notes that there is wide disparity between the particulars given by the companies. Many of them, which provide satisfactory information, do not seem to be hampered by these considerations. Incidentally, the Code does not permit confidentiality requirements to be mentioned as a reason for fully abstaining from any communication about the criteria: the presentation in the annual report must indicate the criteria on the basis of which the variable compensation is determined "*without jeopardising the confidentiality that may be linked to certain elements of determining the variable part of the compensation*" (§ 24.2). Furthermore, we note that information deficiencies are a reason often given by management companies and proxy advisors when they call for advisory resolutions on compensation to be voted against. However, it is difficult for the High Committee to give specific recommendations about this matter, given the differences in the criteria selected and in the circumstances (shareholder and competitive market structure, strategic choices, etc.).

On the other hand, it is useful to review the recommendation of said § 24.2 whereby, for the payment of the variable part, "*the manner in which these criteria have been applied as compared with initial expectations, and whether the individual director's personal targets have been attained*" must be indicated. This provision applies both for multi-annual and annual variable compensation. We note a significant improvement in the compliance with this recommendation, but there is still room for improvement.

Compensation through service contracts

The High Committee's 2014 annual report (p. 20) had mentioned the matter of compensation through service contracts entered into with a third party, often the parent company or a large shareholder. The Code does not prohibit this process, which is only used by around 10 SBF 120 companies and which is sometimes criticised. The High Committee would like to once more recommend clarity and transparency, which are particularly necessary to alleviate any suspicions of conflicts of interest and to enable shareholders to exercise their advisory vote in full knowledge of the facts.

Sub-ceiling for awarding options or performance shares to executive directors in the resolutions presented to the shareholders' meeting

During its review of shareholders' meeting resolutions, the High Committee looked at compliance with the rule whereby, both for options and performance shares, *"the resolution for authorising the award plan submitted to a vote at the meeting of shareholders must mention this maximum percentage in the form of an award sub-ceiling for executive directors*" (§ 23.2.4). Companies do not present resolutions of this type every year, especially in the case of stock options, which have lost their appeal somewhat.

The statistics concerning compliance with this rule of the Code presented in this report therefore correspond to a relatively small sample of companies, the composition of which differs from previous years. The changes observed are consequently insignificant. Nevertheless, we note that there is room for improvement concerning this matter, and the High Committee calls on Boards of Directors and Management Boards to see to this when they approve the text of draft resolutions.

Definition of “imposed departure” creating an entitlement to the termination payment

The High Committee had drawn attention to the provision of the Code (§ 23.2.5) specifying that termination payments for executive directors (conditional, furthermore, on performance requirements) may not be allowed unless the *“departure is imposed ... and linked to a change in control or strategy*” (see 2014 Report, p. 22). It notes that the SBF 120 companies (and to a lesser extent the CAC 40 companies) seem to have more difficulties adopting this definition than with applying the rule limiting the payment to two years' fixed and variable. It firmly repeats its recommendation to review the wording of the commitments made with regard to executive officers when renewing directorships. Otherwise, it is necessary to explain how the terms of the commitment enable the company to not make payments to *“executive directors whose company has failed or who have personally failed”*.

Compensation taken into account to calculate the ceiling for termination payments and non-competition benefits

§ 23.2.5 of the Code states that “*when applicable, the termination payment should not exceed two years of compensation (fixed and variable)*”, the non-competition benefit, if it exists, being included in this ceiling. In the same way as what it recommends for determining the reference income for supplementary pensions (see § 2.8 above), the High Committee is of the opinion that variable compensation here should only be understood as meaning annual and not multi-annual compensation, in order to comply with the general principle of “proportionality”.

4. Other important matters

4.1. *Proportion of women on Boards*

The High Committee notes with some satisfaction that the number of women on Boards has risen significantly). All but one of the SBF 120 companies achieved the interim proportion of 20% which the law of 27 January 2011 set as an objective by the close of the 2014 shareholders' meetings (the AFEP-MEDEF Code, anticipating the legislative reform, had set this objective for 2013). We can reasonably predict that the final proportion of 40% will be achieved by almost all of the companies in 2017, which is the date set by the law, and by a very large majority in 2016, which is the date set by the Code.

4.2. *Referral to the shareholders' meeting in the event of significant asset disposals*

In 2014, the High Committee ruled on a matter posed by the application of § 5.2 of the AFEP-MEDEF Code in the case of the disposal of an affiliate of a significant proportion of the company's assets (see 2014 Report, p. 25). Following on from the proceedings of the AMF working group on asset disposals, which resulted in the authority publishing a recommendation (DOC-2015-05) dated 17 June 2015, the

AFEP-MEDEF Code is due to be amended in the next few months to make provision for an advisory vote by shareholders when the disposal of at least half of the company's assets is contemplated. The Application Guide will also be supplemented to specify the criteria for determining whether the threshold of half of the assets is met.

4.3. Signing bonuses

The High Committee was consulted about a signing bonus awarded to a newly appointed executive director from outside the group. The provisions of the Code concerning this matter are straightforward: *"Benefits for taking up a position may only be granted to a new executive director who has come from a company outside the group. In this case the amount must be made public when it is determined"* (§ 23.2.5). This consultation provides the High Committee with the opportunity to draw attention to certain points:

- the Board must evaluate the amount of the benefit with regard to all of the compensation components awarded, particularly the fixed compensation and the pension benefits if they include a "reinstatement of seniority" (see § 2.8 above), and this package must comply with the principles of § 23.1 of the Code;
- any "reinstatements of seniority" should not hinder compliance with the Code's rules governing "speed of acquisition" of pension rights and the ceiling placed on them, as well as the two-year period in order to be eligible for these rights[1];
- given that the justification for the signing bonus is to ensure a consideration for the loss of advantages that the party concerned is giving up by leaving his or her position outside of the group, shareholders and the market should be given an explanation including a precise evaluation of these lost advantages, insofar as they may be made public;
- situations leading to the payment of such benefits are the exception (they only concerned one SBF 120 company in 2014), and there is no reason for them not to remain so if Boards and their appointments committees establish succession plans for executive directors as recommended by § 17.2.2 of the Code.

This final recommendation is particularly important, and the High Committee shall endeavour next year to review the information provided by the companies in this regard.

4.4. Severance pay and settlement payments

In addition to the reflection process concerning the definition of *"imposed departure*" as a condition for awarding a termination payment and the point concerning the compensation to be taken into account for calculating the termination payment ceiling (see § 3.4 above), the current situation has prompted the High Committee to question the practice of awarding a *"settlement"* benefit instead of this termination payment. This process should not be a means of circumventing the rules laid down in § 23.2.5 of the Code, enabling a payment to be made to a director who is being parted with and who does not fulfil the conditions relating to *"imposed departure"* as laid down above. The notion of settlement benefit implies that there has been a dispute between the executive officer and the company, and that this dispute entailed a real risk for the company. This should be the subject of a credible explanation in the framework of the ongoing information about the compensation components awarded (§ 24.1 of the Code).

1 Article 229 of the law of 6 August 2015 for growth, business and equal economic opportunities (Macron Law) now prohibits the redemption of years of seniority for new executive officers when they are appointed.

The High Committee has also considered situations where extraordinary compensation was awarded to an executive officer, outside of the provisions relating to the termination payment approved by the shareholders' meeting, in connection with a large-scale operation carried out under his leadership, the circumstances of which led to him leaving the company. Firstly, it is clear that extraordinary compensation is envisaged by the AFEP-MEDEF Code, which states that "*only highly specific circumstances may warrant the award of an extraordinary variable component*" (§ 23.2.3), and by its January 2014 Application Guide, which includes it among the sections to be completed in the presentation of advisory shareholders' meeting resolutions on executive officers' compensation. However, it should be noted that the Code only envisages it as a form of variable compensation, and therefore hypothetically subject to predetermined performance criteria. If the circumstances make it impossible for it to fit within this framework, particular care must be taken to communicate the motivations for the Board's decision. Moreover, the High Committee recommends ensuring that, if the executive officer's departure coincides with or follows soon after the performance of the operation motivating the extraordinary compensation, it does not deviate from the rules laid down by § 23.2.5 for the termination payment (with which public opinion will certainly equate it), particularly the limit of two years' fixed and variable compensation.

In any event, the principles of § 23.1 of the Code shall apply and the communication should show clearly and comprehensively (principle of "understandability"): that the Board has determined the extraordinary compensation taking into account all of the compensation components already determined (principle of comprehensiveness) – in this regard, it shall review whether this compensation replaces or supplements the "normal" annual variable compensation for the current year, this point being particularly important if the executive officer is leaving the company during the financial year, after the performance of the operation - ; that it "*corresponds to the general interest of the company*" (principle of balance); that it is not incompatible with practices in the sector (principle of the "benchmark"); that the situation of the teams of employees involved in the operation has also been taken into consideration (principle of consistency); and, in more general terms, that it complies with the principle of "proportionality".

4.5 Non-competition clauses

The High Committee has had cause to question the scope of the Code's recommendations concerning non-competition benefits. The Code does not prohibit entering into a non-competition agreement at the time that the executive officer leaves. Nevertheless, the entire organisation of Article 23.2.5 is based on the assumption that it is in fact entered into prior to this departure, since *"when the agreement is being concluded, the Board must incorporate a provision that authorises it to waive the application of this agreement when the executive director leaves"* and *"the Board must announce whether or not the non-competition agreement will be upheld at the time that the director leaves"*.

However, it may happen in practice that a company comes to enter into such an agreement at the time that the executive officer leaves, depending on specific circumstances, which it must evaluate thoroughly. The High Committee has had occasion to intervene in a case of this type, by inviting the Board to weigh up carefully the actual risk incurred by the company and the actual harm suffered by the party concerned. It intends to explore this issue, by placing it on the agenda of one of its upcoming meetings.

4.6 Application of the Code by non-SBF 120 companies

The High Committee carried out a brief review of a selection of companies referring to the AFEP-MEDEF Code but not included in the sample covered by the second part of this report, i.e. the SBF

120 index. They are CAC All-Tradable index (formerly SBF 250) companies with a market capitalisation higher than €300 million. Twenty-five of them refer to the AFEP-MEDEF Code. Around the same number of companies of the same size refer to the MiddleNext Code (Corporate governance code for mid-caps and small-caps, December 2009), some having opted for the latter recently (not necessarily at the time when *say on pay* was introduced). Finally, several use the facility allowed by the law not to refer to a corporate reference code, provided the governance rules applied are described: for example, the listed French affiliate of a large US multinational group refers to this group's corporate governance code, which is publicly available, at the same time as stating that it complies with the AFEP-MEDEF Code for compensation.

This brief review concerned four criteria which appeared to be instructive, on the basis of the priorities adopted by the High Committee for 2014:

- does the company present a summary of its deviations from the Code?
- is the proportion of independent directors on the Board complied with?
- does the chief executive officer hold an excessive number of other directorships?
- did the company submit a *say on pay* resolution to the shareholders' meeting with a sufficiently precise presentation of the relevant compensation?

The conclusions that can be drawn from this survey are satisfactory overall. The companies which do not present any summary of the deviations, which may be considered to be an indication of less attention to the Code, are generally companies controlled by family groups. The proportion of independent directors on the Board (1/3 in most cases, being controlled companies) and the maximum number of other directorships held by the chief executive officer are compliant, with a few exceptions. The companies complied with the *say on pay* rule, with just four exceptions, one of which was "explained" by its SCA status (see § 2.5 above).

The relevant compensation is generally presented by more or less precise reference to the reference document, the compensation incidentally being at lower levels than that found in SBF 120 companies (except in two companies).

The High Committee contacted some companies in this sample whose annual report showed significant deviations from the AFEP-MEDEF Code, particularly those which did not submit a *say on pay* resolution to their shareholders' meeting, in order to share its recommendations with them. It asked their Boards of Directors to consider the appropriateness of referring to the MiddleNext Code, indicating that, in its opinion, this appeared to be ideally suited to mid-caps, and commenting that many companies have recently moved from one Code to the other without any apparent difficulties with regard to their shareholders.

Furthermore, the High Committee asked one non-SBF 120 index company nevertheless referring to the AFEP-MEDEF Code to consider the appropriateness of referring to the MiddleNext Code instead. It reacted by abandoning referring to any corporate governance Code whatsoever. This approach is certainly legal, since Article L. 225-37 of the Commercial Code indeed states that a listed company can choose not to refer to a corporate governance Code, provided it indicates *"the rules that they apply in addition to statutory requirements"* and explains *"why the company chose not to apply any provision of this corporate governance Code".* It is down to the shareholders to evaluate whether this requirement is complied with. Nevertheless, the High Committee considers this approach regrettable. Adherence to corporate governance codes is widely recognised as the means of ensuring compliance with best corporate practices; it also sends out a powerful signal, ensuring that French companies continue to be attractive to foreign investors.

Annex
Limited partnerships with shares (*sociétés en commandite par actions*)

By way of reminder, limited partnerships with shares (*sociétés en commandite par actions* or "SCAs") have two categories of partners: one or more general partners with unlimited joint and several liability for the company's liabilities, and limited partners (shareholders whose shares can be freely traded) whose liability is limited to the amount of their contributions). They are managed by one or more executive directors (*gérants*), who may or may not be general partners themselves, who may be individuals or legal entities. The executive directors are appointed by the meeting of shareholders (by a simple or qualified majority) with the unanimous agreement of the general partners, unless the articles of association provide otherwise. Similarly, they may only be dismissed by the meeting with the unanimous agreement of the general partners (unless the articles of association provide otherwise), which gives them maximum security, the counterpart to which is the unlimited liability of the general partners. Their powers *("the most extensive powers to act on behalf of the company in all circumstances")* are defined as those of the chief executive officer or management board of a limited company (*société anonyme*). SCAs must have a Supervisory Board which "*carries out the permanent supervision of the management*" and has *"the same powers as the auditors".*

In this framework, the SCA regime is laid down by the Commercial Code in extremely brief terms, especially with regard to the organisation of governance, which is therefore largely left up to the partners and addressed by the articles of association. With regard to compensation, it is simply stipulated that *"any remuneration other than that specified in the articles of association may be allocated to the executive director only by the ordinary shareholders' meeting. This may only occur with the agreement of the general partners given unanimously, unless otherwise specified"* (Art. L. 226-8). This principle of freedom is the reason for the wide diversity of (sometimes complicated) modes of organisation, despite the fact that there are so few such companies. In fact, there are only a *"few hundred"* SCAs, including four companies listed on the SBF 120 index and a few others which, while not belonging to this index, refer to the AFEP-MEDEF Code.

Executive directors of SCAs are among the executive directors explicitly listed by the AFEP-MEDEF Code to whom the provisions concerning compensation are applicable. However, the Code, which was mainly written with limited companies in mind, relies on the principle that "*Boards of Directors and Supervisory Boards are responsible for determining the compensation of executive directors, based on proposals made by the compensation committee"* (§ 23.1). This is what creates the most troublesome discrepancies.

The same paragraph of the Code lays down the six broad principles mentioned above (comprehensiveness, balance, benchmark, consistency, understandability and proportion) which are not, in themselves, incompatible with determining executive directors' compensation. The Code goes on to detail specific recommendations for each compensation component: fixed, variable, stock options and performance shares, signing bonus, severance pay and non-competition clauses, and pensions. However, it does not state that it is mandatory for all these components to be present, and many companies do not award their executive directors one or several of the components: compensation in securities, severance pay, supplementary pensions, or even fixed compensation. The information requirements (§ 24), like the broad principles, are not incompatible with executive directors' compensation either. Finally, with regard to the requirement to consult shareholders, the High Committee took the position that this was not incompatible with the fact that the compensation was determined by the articles of association, and therefore by the extraordinary general meeting (see its 2014 Activity Report, p. 20). However, the specific regime for SCAs complicates compliance with the Code's recommendations concerning certain points.

Firstly, we note, as the AMF did in its 2014 report on corporate governance, that the compensation of executive directors of SCAs *"may be hybrid by being aggregated with the compensation as general partner"*. In fact, we note that statutory managements often consist of one or more individuals who are general partners and a legal entity which is also a general partner, with the latter paying the remuneration of the individual or individuals who represent it. In some cases, the legal entity alone is the executive director. This poses a dual issue with regard to the application of the Code: the breakdown between the compensation allocated in respect of the statutory management and in respect of the general partner position (compensation for the risk) is not clearly disclosed; the compensation of its representatives by the legal entity general partner is not clearly disclosed.

Furthermore, the executive directors' compensation is either determined by the articles of association in the form of a percentage of the net profit, or determined by the general partner(s) up to a ceiling laid down by the articles of association. Shareholders do have a means of expression, at least in theory, since they approve the appropriation of the result, and therefore the definition of the distributable profit, but this happens after the general partners' compensation has been deducted. One company has established *"annual supplementary compensation"* determined by the ordinary shareholders' meeting with the unanimous agreement of the general partners (as authorised by Article L. 226-8 of the Commercial Code). This enables the shareholders to effectively intervene, but it also enables the executive directors to be awarded minimal compensation if the financial year results in a loss, this supplementary compensation consisting of a fixed part and a variable part index-linked to changes in the turnover.

Thirdly, the Supervisory Board does not intervene in determining the compensation, unless the companies make efforts to bring their articles of association closer to the Code's recommendations, for example by stipulating that the compensation should only be allocated between the general partners "subject to the advice of the Supervisory Board" which includes a compensation committee, or that the Supervisory Board's compensation committee, consisting of independent members, should review the executive directors' compensation.

While, as we have seen, the Code does not stipulate that a variable part is an essential component of the compensation, it is one of its main objectives that it should be in line with the company's performance. We can consider that awarding a percentage of the net profit is a simple form of correlation with performance. Some companies have made efforts to introduce more sophisticated criteria, leading to complex mechanisms. For example, in one company, the compensation of the managing general partner takes a form which is close to the conventional model observed in limited companies: it comprises fixed compensation paid by an affiliate and statutory variable compensation based on the parent company's result, but which is reviewed by the Supervisory Board in the light of various customary criteria (free cash flow, ROCE, operating result, net debt), detailed by the reference document; in another company, the executive officers' compensation is paid to them as employees of an affiliate, and comprises conventional fixed and variable components.

With regard to the advisory resolution on executive officers' compensation (say on pay) , the High Committee noted with satisfaction that the SCAs in the SBF 120, and several others which it had the opportunity to review, decided this year to comply with this provision of the Code. In fact, we can easily disregard the objection that this consultation is unnecessary because the statutory method of compensation has already been approved by the meeting: in limited companies, some of the compensation (severance pay, non-compete compensation, supplementary pensions) is also approved by the shareholders' meeting as a "regulated agreement" (Art. L. 225-42-1 of the Commercial Code) and voted on a second time as a component of the advisory resolution. Moreover, the statutory method of compensation may have been determined a long time ago, and shareholders may legitimately want to ensure that it is still appropriate for the circumstances.

A trickier matter is the consequences to be drawn from any negative vote. The AFEP-MEDEF Code stipulates: "*when the ordinary shareholders' meeting issues a negative opinion, the Board, acting on the advice of the compensation committee, must discuss this matter at another meeting and immediately publish on the company's website a notice detailing how it intends to deal with the opinion expressed by the shareholders at the General Meeting*" (§ 24.3). This rule clearly cannot be applied without adaptation, since by nature the Supervisory Board is not a decision-making body. However, the consequence of any rejection should logically be the amendment of the articles of association, and therefore the calling of an extraordinary general meeting. In fact, the Commercial Code states that the meeting can be called not only by the executive directors, but also by the Supervisory Board (Art. L. 226-9): the Board is therefore well capable of "dealing with" the negative opinion issued by the meeting, even though it should be recognised that this is a particularly cumbersome process.

HCGE

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