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## 2015 President's Foreword



2015 was a particularly difficult year for our country, hit by deadly attacks. Thanks to the strength of its values, its citizens and its businesses, our country has however resisted.

The economic situation is slowly improving. However, whilst macroeconomic indicators are on a

positive trend in Europe, global financial markets are still very nervous as shown by corrections on the stock markets, sharp decline in oil prices, growing uncertainty about Chinese growth, widespread negative interest rates. Low inflation in the advanced countries is also a concern.

In this context, it is essential that France pursues its efforts to increase its competitiveness and attractiveness.

I am convinced that progress on employment and investment results from improved business conditions. While the government's policy has allowed a recovery in corporate margins, which is welcome after a particularly harsh fiscal shock for all economic players, it is still insufficient to put French companies back in the race, especially those facing the most international competition. The restoration of public accounts, which is key to sustainable tax reductions, remains too limited and additional expenses may incur with the next elections approaching.

Further steps must be taken to promote employment, including the reform of the labour market, UNEDIC or pensions. The world today is moving even faster than yesterday. To be able to sustainably finance our social model, we must support companies in their adaptations.

We also need to build a resolute attractiveness policy. In an open world, France cannot single out or it risks as now to lose ground. Responses were made but they remain insufficient.

Stimulate activity and reduce unemployment cannot stem from a few measures but from a comprehensive strategy pursued with determination and without fail.

For this purpose simplification should not be a mere word but a strategy. The complexity of our environment permanently diverts companies from their purpose. It is very expensive and makes them waste time and opportunities. We must legislate on the core issues only, while avoiding stratification of regulations or gold-plating of European texts in particular.

We must also trust entrepreneurs and companies and abandon the penalty logic to replace it by support. Too many new constraints (drudgery, due diligence on the value chain, transparency...) are still imposed on economic actors, running contrary to business development and putting at risk the keeping of decision centres on our territory. Whereas a number of new measures are guided by good intentions, they do not take sufficiently into account the feasibility,

existing measures or benchmark. Often other routes exist but they are not acknowledged.

The competitiveness of our companies also involves choices in terms of energy. The international community meeting on climate change (COP21) in Paris in December 2015 was an opportunity for companies to make their voices heard in favour of an effective transition in terms of costs, allowing to keep and develop industrial activities and to stimulate the development of innovative solutions. During the year, AFEP also worked on the promotion of French companies' expertise in sustainable cities or circular economy.

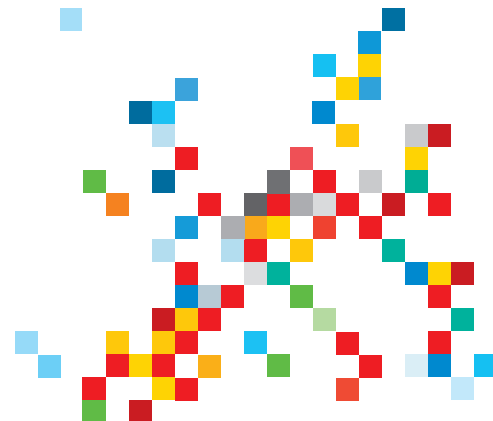
We need a level-playing field with our partners. To this end we must refrain from imposing to French companies heavier constraints than those of their main competitors. In this regard, we are calling for European policies that allow our companies to grow in a regulated internal market and that do not handicap them internationally. The defence of the euro, the strengthening of financial markets, a common economic and industrial policy requiring relevant choices in terms of regulation and competition or the defence of our intellectual property are major issues for companies. Unfortunately, the recent proposals on tax matters concern us.

The mobilisation of the leaders of AFEP's member companies, the companies' best specialists as well as the permanent staff of the Association allows to include these elements in the public debate. I thank them warmly.

Finally I would like to emphasise the role of large companies in our economy. For historical reasons, for reasons related to its positioning in Europe but also as the result of a proactive economic policy for many years, France has seen the development of many large companies, global leaders in their diversified sectors. Their direct and indirect weight in the French economy is particularly significant. It gives them special responsibility but also implies that they are supported and encouraged by the authorities.

AFEP and its member companies are open to dialogue. They are proud of their French identity and have only one objective: contributing to the development of our country, even if their markets and their growth are also found outside our borders.

Pierre Pringuet  
President of Afep





# About us

The Association française des entreprises privées (Afep - French Association of Large Companies), founded in 1982, represents large private companies in France with global business reach. The Association is based in Paris and Brussels.

Its objective is to help create an environment favourable to the development of economic activity and to represent the views of its member companies vis-à-vis the French authorities, European institutions and international organisations.

Restoring business competitiveness to achieve growth and sustainable employment in Europe and tackle the challenges of globalisation is Afep's core priority.

Afep contributes to the development of French and European regulations in the following fields: **economics, taxation, company law and corporate governance, corporate financing and financial markets, competition, intellectual property and consumer affairs, labour law and social security, environment and energy, corporate social responsibility.**

Afep's work relies on:

- the direct participation of business leaders and their teams in defining economic and social policy directions, as well as in determining the actions to be taken for growth and employment;
- direct and sound exchanges with public authorities, which are based on analyses and well-founded proposals;
- active and constructive contributions to French and European public consultations.

AFEP has 112 members. More than 8.5 million people are employed by AFEP companies worldwide, and 2 million in France.

The Association's website ( [www.afep.com](http://www.afep.com)) provides more information on how it operates and its recent work, as well as on the role of the large companies in the French economy.



# List of Members 2016

ACCORHOTELS	FAURECIA	ORANGE
ADECCO FRANCE	FFP	PERNOD RICARD
AIRBUS GROUP	FIVES	PEUGEOT SA
AIR FRANCE KLM	FONCIERE DES REGIONS	PUBLICIS GROUPE SA
AIR LIQUIDE	GALERIES LAFAYETTE	RAMSAY GENERALE DE SANTE
ALSTOM	GE FRANCE	REMY COINTREAU
ARCELORMITTAL FRANCE	GENERALI FRANCE	RENAULT SAS
ARKEMA	GROUPAMA	REVEVOL
ARTEMIS	GROUPE ELIOR	REXEL
AVIVA FRANCE	GROUPE EUROTUNNEL SE	RIO TINTO FRANCE SAS
AXA	GROUPE FNAC	ROBERT BOSCH FRANCE SAS
BNP PARIBAS	GROUPE INDUSTRIEL MARCEL DASSAULT	ROTHSCHILD & COMPAGNIE BANQUE
BOUYGUES	GROUPE SEB	SAFRAN
CAPGEMINI	HERMES INTERNATIONAL	SANOFI
CARREFOUR SA	HSBC FRANCE	SCHLUMBERGER SA
CASINO GUICHARD PERRACHON	ILIAD	SCHNEIDER ELECTRIC SA
CGG	IMERYS	SCOR
CIMENTS FRANCAIS	INGENICO	SEQUANA
COMPAGNIE DE SAINT-GOBAIN	INTERNATIONAL SOS	SIEMENS FRANCE SAS
COMPAGNIE IBM FRANCE SAS	JC DECAUX	SOCIETE DES PETROLES SHELL
COMPAGNIE PLASTIC OMNIUM	KERING	SOCIETE GENERALE
COMPASS GROUP FRANCE	KINGFISHER FRANCE	SOLOCAL GROUP
CONSOLIS GROUP	KLEPIERRE	SOLVAY
CONSTELLUM	LAFARGEHOLCIM	STMICROELECTRONICS NV
CREDIT AGRICOLE SA	LAGARDERE SCA	SUEZ
DANONE	LAZARD FRERES	TECHNICOLOR
DELPHI FRANCE SAS	LEGRAND SA	TECHNIP
DOMUSVI	L'OREAL	THALES
EDENRED	LVMH - MOET HENNESSY LOUIS VUITTON	TOTAL
EIFFAGE	MANPOWER	UNIBAIL-RODAMCO
ELIS	MERSEN	VALEO
ENGIE	MICHELIN	VALLOUREC
ERAMET	NATIXIS	VEOLIA
ESSO SAF	NESTLE FRANCE	VINCI
EURAZEO	NEUFLIZE OBC	VIVENDI
EURONEXT	NEXANS	WENDEL
EUTELSAT SA	NEXITY	ZODIAC AEROSPACE
	NOKIA	

# Competitiveness & attractiveness

In 2015 Afep continued its campaign to promote **business competitiveness** and the **attractiveness of France** as a place to do business. Far from mere theoretical concepts, competitiveness and attractiveness are very much a reality: for a company, being competitive means offering quality products and services at the best price; for a country, being an attractive business location reflects its capacity to welcome productive investments from both national and international players. In both cases, long-term policies are required where success rests on one main factor: consistent implementation, without exception. Improving competitiveness and the attractiveness of a business location requires simple, coherent measures in order to convince economic players.

Since the electoral campaign in 2012 with the conference on *"The challenges of competitiveness: the competitiveness of France, the competitiveness of Europe"* Afep has been to the fore in stressing the urgent need to adopt fast and ambitious measures to revitalise the competitiveness of French companies and the attractiveness of France as a country to do business. It has presented proposals to public authorities in a range of key fields: competitiveness, creativity, innovation and research, corporate governance, employment and training, energy and environment. Thereafter, Afep has continued to contribute to public debate on important matters regarding the future of the country (pension and unemployment reforms, taxation, social dialogue, labour market, etc.).

Although the boundary between them is a matter of convention, traditionally a distinction is made between "cost-competitiveness" and "non-cost competitiveness". In order to restore **cost-competitiveness**, several positive actions have been taken in recent years (*"competitiveness and employment tax credit"*, *"responsibility and solidarity pact"*). Coming after the massive hikes in taxes on the economy between 2011 and 2014 (+ €70 bn), these measures have allowed **French companies to recover their margin**, while also benefitting from the significant drop in the price of crude since the second half of 2014. Until now reserved for low and average wages (less than 2.5 x the minimum wage), the reduction in social insurance contributions for wages up to 3.5 x the minimum wage will take effect from 1 April 2016. Supported by Afep, this measure is intended to bring about a greater decrease in contributions (particularly

high in absolute terms and in international terms) imposed on senior managers, engineers, etc. In a context of particularly keen international competition which large companies are faced with every day, in order to improve its **non-cost competitiveness** in the long-term, France must draw on these higher positions: research and development, innovation (technological as well as non-technological: marketing, process, etc.) and more generally, the capacity to predict trends and produce ideas today and turn them into products tomorrow. In this respect, it is essential to continue to break down the divide between publicly and privately funded research, between the education system and business, etc.

In terms of **attractiveness**, France enjoys certain undeniable advantages (geographical location, quality of infrastructure and human capital, for example) which make it a country of interest for investors. Certain factors (in particular the R&D tax credit) are especially valued, translating into specific results in real terms. However, there are two reasons to qualify this picture: firstly, a number of factors put France at a disadvantage (high rate of taxation, insufficient flexibility in the labour market, unstable regulatory environment, etc.); secondly, competing countries (also within the European Union) long ago took a clear decision to promote their attractiveness as a business location, giving them a certain level of visibility and high credibility. Without prejudice to the substantive reforms needed and which impact knowledge, developing the attractiveness of this country is **also an exercise in “getting the message out”** since perceptions can influence the choice of decision-makers.

Hence all the above speaks for the resolute implementation of a **global strategy to promote competitiveness and attractiveness**, far from the traditional rifts that still all too often prevail (for example “economic” versus “social”, large companies versus SMEs). This requires constant and consistent action, which means that the practical consequences of a new law must be considered each time reform is introduced. Hence, projects that are sometimes presented as symbolic or largely voluntary can have a decidedly negative impact on companies and qualify or even cancel out the effect of positive measures.

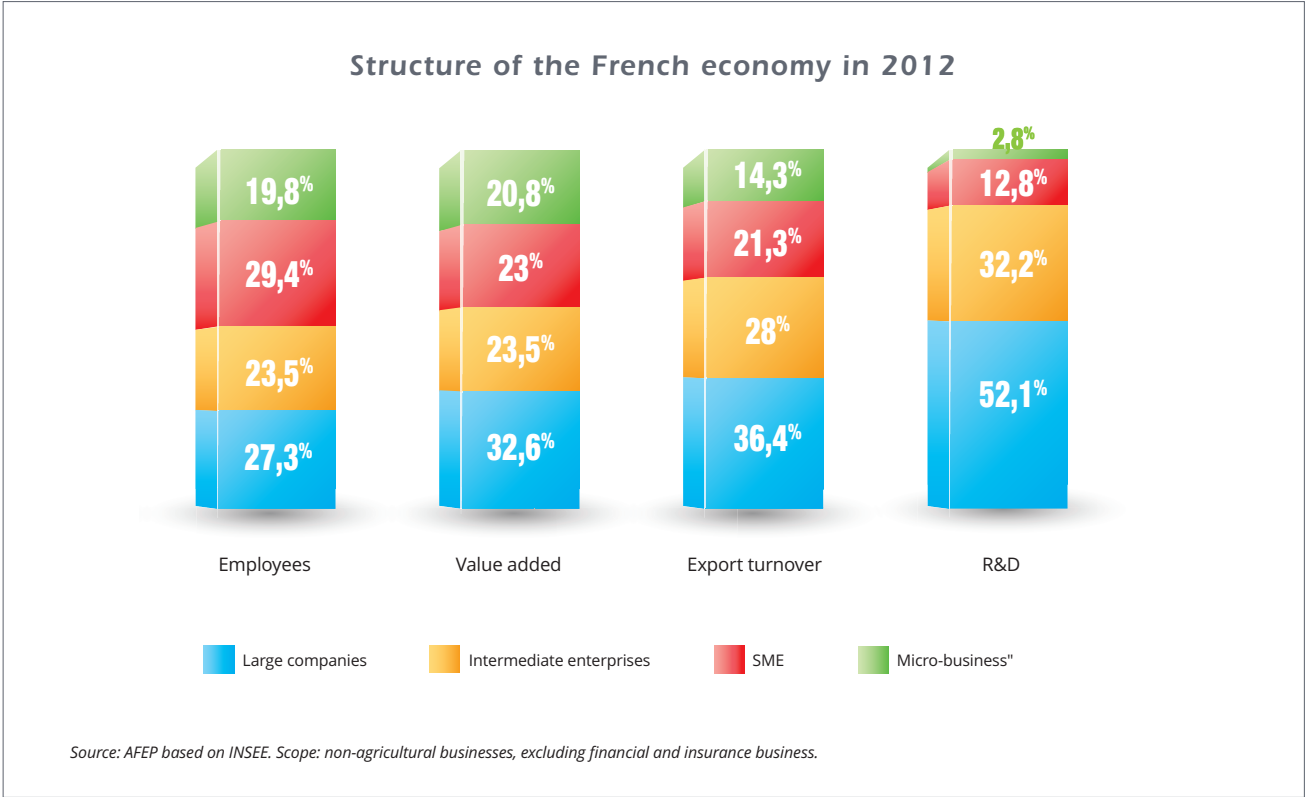
Given their importance in domestic production, both in terms of direct and indirect jobs, and their influence internationally, large companies are a valuable asset to value creation in France (see below). It is therefore essential that public authorities stop opposing these companies based on their size and introducing measures that prove to be counterproductive for the economy in France as a whole.



## Large companies and the French economy

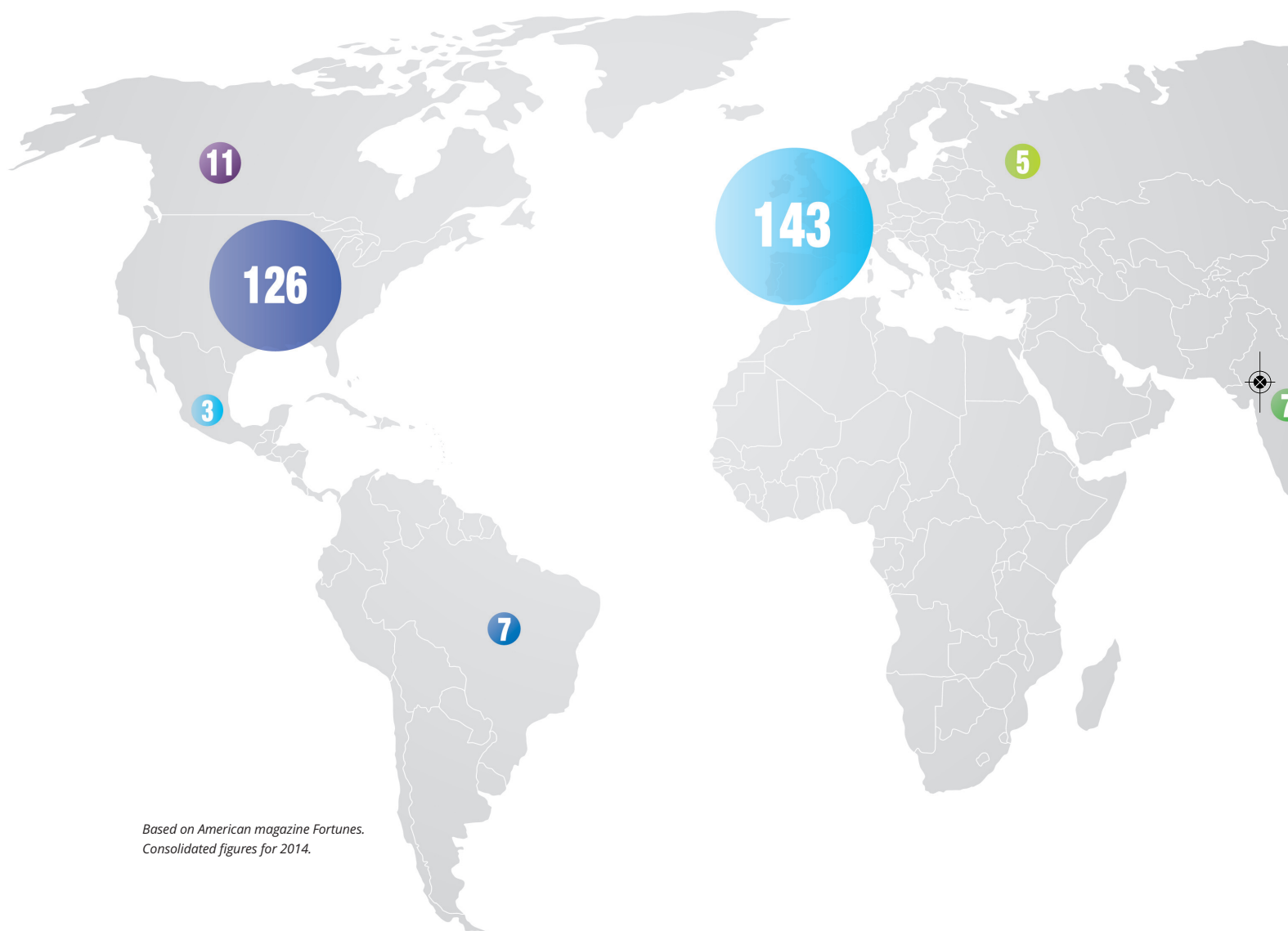
With 2 million employees in France, and 8.5 million worldwide, AFEP businesses have an important role in the French and world economy. Although all of the companies are international, they have a **major role in French production**, which benefits jobs, innovation and tax revenue.

According to INSEE, large businesses (243 in 2012 out of a total of 3.5 million businesses) are those with more than 5,000 employees in France or with a turnover greater than or equal to €1.5 billion.

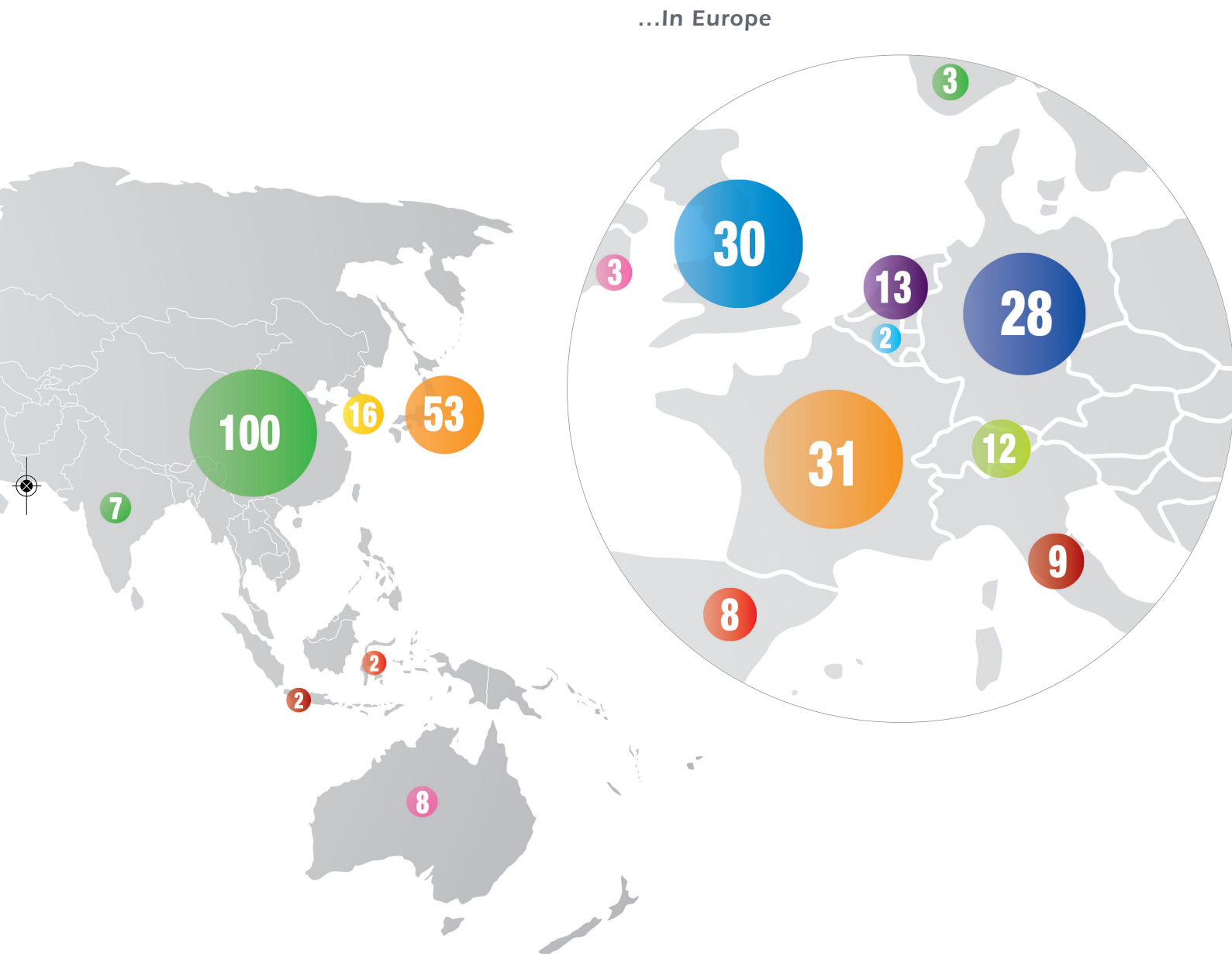


## Place of location of MNE worldwide... (number of headquarters)

UE as a first place of location of MNE



*Based on American magazine Fortunes.  
Consolidated figures for 2014.*



# Taxation

## 1. Background and issues for companies

From a tax standpoint, 2015 will have seen a remarkable change: **that of a new primacy of international tax law over national law**. Traditionally limited to structuring bilateral relations between two countries with the sole aim of avoiding double taxation of companies, the international tax system has adopted an approach of global standardisation, beyond the borders of the European Union, of rules for the taxable basis of companies by adopting the OECD “Base erosion and profit shifting” plan (BEPS).

The adoption of this plan was immediately followed by the introduction of certain recommendations into national legislation in several States. So France has “transposed”

**country-by-country reporting** into the Finance Act 2016, as a direct result of Action 13 in the BEPS plan: this reporting requires from large French companies - and in certain situations the French subsidiaries of foreign groups - to disclose information about their operations in all countries of the world to the tax authorities of other countries.

This is a major change, since States are traditionally not inclined to delegate their fiscal jurisdiction. The multiple unsuccessful attempts by the EU regarding CCCTB (the Common Consolidated Corporate Tax Base) are a good example of this.

**The influence of international tax legislation has also revealed itself in the surge in European litigation on the “cornerstones” of corporate taxation:** in a case law of the European Court of Justice (CJEU 2 September 2015, case C-386/14), the French tax integration system was considered to be in part contrary to the freedom of establishment. Austrian tax regime was also be criticized e by a decision of the Court of Justice (CJEU 6 October 2015, case C-66/14), issued at nearly the same time. The European Commission has also instructed France to provide reasons regarding the compatibility of the **surtax of 3%** on dividends.

Of course, this is nothing new but the number of cases and their significance have been particularly marked this year.

## 2. Achievements and developments in 2015

In this complex situation, Afep is endeavouring to summarise these various proceedings and decisions in order to analyse the effects on large companies in France.

Throughout the year Afep stated its case to national, European and international authorities that what is at stake for French companies, and more generally for France, is of very special importance in view of its specific characteristics.

Indeed France is the first place of location of headquarters of large companies in the European Union. It was ahead of the United Kingdom and Germany. France is the only country, with Germany, which has global credentials in all business sectors: automotive, luxury goods, food-processing, banks and insurance, energy, transport, media, engineering, healthcare and more. On an international level, France is in 4<sup>th</sup> place, after the United States, China and Japan (see graphics).

This flattering ranking is no accident but the **result of legal and fiscal rules developed and thought out over a long period with the objective that French companies be in position to expand beyond their national market while retaining their core focus in France**: France also has a legal system which requires companies - contrary to the US law - to distribute the results of their foreign subsidiaries to their parent company in France before they can be redistributed by the French parent company. This method of reporting results is also facilitated by the principle of a strict territorial tax system based on the parent-subsidiary regime, under which dividends are exempt and which allows companies not being taxed in France on the profits they make abroad.

Robust intellectual property law combined with a competitive tax system for R&D (R&D tax credit, a corporate

tax rate of 15% on patent royalties) have also put IP at the heart of large companies in France. Deductibility of the interest on loans and the "*participation-exemption*" regime on capital gains on equity securities accompanied their growth abroad.

This national legislation created with a view to the expansion of France companies throughout the world has been accompanied to date by the traditional concept of the OECD in terms of value assignment. Historically, value was assigned to the presence of decisive human functions, to the presence of the person who decides, takes the risk and finances ("the entrepreneur" as designated by the term attributed by the field of transfer pricing). This concept of value is in line with supporting the headquarters of companies in France.

In view of this assessment, Afep has argued that this balance, a major advantage for France, **should not be turned upside down without careful consideration of the consequences**. Regarding the BEPS plan, Afep alerted national and European authorities to the risks attached to the disclosing by French MNE **of strategic information about their various branches throughout the world** (transmission to tax authorities abroad and/or to the public); Afep was also concerned about BEPS plan impact on **taxation of royalties** as it tends to censure the French system on the grounds that it is prejudicial even though the tax rate is comparable to the normal corporate rate applied in many countries (the ordinary tax rate for companies now 20% in the United Kingdom will be reduced to 17 % in 2020, ); it has called out the risks inherent in defending **modification of the methods to determine**

<sup>1</sup> Subject to a percentage of 5% for costs and expenses.

**transfer pricing which aim to mitigate the effect of the arm's length principle** in favour of methods to share profits between States according to a definition of the value chain which takes greater account of actions that do not generate added value in the exploitation of an intangible or the size of the consumer market.

The question that has occupied Afep throughout the year in its analysis of BEPS is, in a nutshell, the following: while it may be legitimate to take into account of the new balances in the world linked to the growth of newly industrialised countries or emerging economies on the global stage, **will this development have positive or negative effects on large French companies that are internationally active and, in a wider sense, on the French market?**

As regards domestic legislation, Afep's activities have essentially focussed on the difficulties created by **adaptation of French law necessitated by EU legal disputes**. In consultation with public authorities, the association has concentrated on ensuring that the choices made preserve the competitiveness of French companies and the attractiveness of France as a business location while meeting the difficult challenge of balancing the budget. In this regard, the association is pleased with the measures that have been adopted under the corrective finance act for 2015 regarding the development of the group regime.

Of course, there has been a hike in taxation of dividends between French companies that are members of the same group as of 2016 (changing from no taxation to taxation of a part of expenses and charges of 1%, i.e. a tax rate of

0.34%), but the low rate for dividends is rising in other European countries, thus enhancing the attractiveness of France (the level of taxation is changing from a proportion of expenses and charges of 5% to a proportion for expenses and charges of 1%).

A balance has also been achieved regarding green taxation with the reform of the contribution to the public service of electricity (CSPE).

Other achievements in 2015 were the effective abolition of the corporate tax surcharge of 10.7% from 2016 (however, the corporate tax rate in France remains the highest in Europe: 34.43% after Malta at 35%).

The second drop in the corporate social solidarity contribution (C3S) was also approved. However, the modalities chosen (the reduction came in the form of a new tax basis allowance) tend to concentrate the contribution on large companies, making the total abolition promised for 2016 more sensitive.

### 3. Outlook for 2016

The shift observed in 2015 on the importance of international taxation will accelerate in 2016 with an intensification of the European Union projects. Parallel to the roll-out of the BEPS action plan adopted last year, the European Commission published an **anti tax avoidance package** on 28 January 2016 impacting all major aspects of taxation such as deductibility of financial charges or the principle of territoriality of tax.

The country-by-country reporting mentioned above has also been introduced as well as a mechanism to exchange

it between Member States. A draft directive introducing country-by-country reporting to be disclosed by large companies was published on April 12<sup>th</sup>.

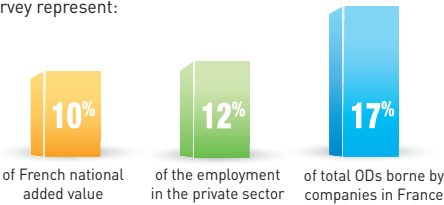
Likewise, an investigation according to the European code of conduct of the damaging nature of the different tax systems on industrial property is planned for this year; the survival of the French system is at stake (Art. 39 terdecies of the General Tax Code).

These various initiatives affect the very essence of the French tax system as it has stood for over 30 years. In this context, the role of Afep will be, again, to call for caution regarding the effect of these changes on French companies and the French economy.

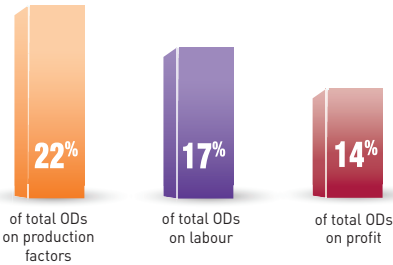
In any case, in a context where European corporate tax bases can be standardised and where this standardisation can succeed in calling into question the traditional factors in the attractiveness of France as a business location, **the debate about the corporate tax rate in France**, the highest in Europe today and more than 10 points higher than the European average, **must finally begin without the constraints of ideology**. If France wishes to preserve its attractiveness as a business location, it is more urgent than ever to consider a massive reduction in the corporate tax rate to create a level playing field with the countries surrounding it. This point will again be discussed with the removal of the last round of the C3S.

### The amount of obligatory deductions (OD) paid by large companies<sup>1</sup>

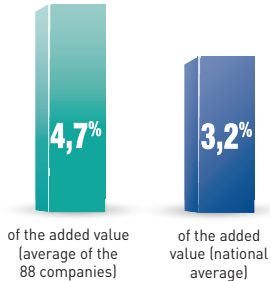
The 91 Afep companies that responded to the survey represent:



The tax contribution of the 91 companies by taxable asset is distributed as follows:



Corporate tax paid by the 91 companies in relation to their added value is higher than the national average:



<sup>1</sup> 2014 financial year data.

# Company law & corporate governance

## 1. Background and issues for companies

The year 2015 was marked by numerous developments related to **company law** and **corporate governance** as well as the preparation of **critical reforms**, especially the one regarding contract law. Much of the year was also spent to work on the corruption prevention issue, especially while preparing the draft law on economic transparency.

The High Committee for Corporate Governance took action in several sensitive issues regarding remuneration of top management. It has proved itself to be an indispensable player in governance. These cases have also shown that the French code is demanding and that professional regulation is effective.

At a European level, the Shareholder Rights Directive took

a political turn after the decision of the European Parliament, despite the views expressed by most Member States, to introduce tax provisions on country-by-country reporting.

## 2. Achievements and developments in 2015

Anticipating the **AGMs**, Afep has published several documents to help companies with their preparation. The comparative table of **voting policies of the main proxy advisors** as well as the one on attendance-related fees granted to non-executive directors of the SBF 120 companies have been updated. Afep has also published a study on the performance conditions applicable to the various components of remuneration of executive directors as well as a **study on "say on pay"**, showing the rate of agreement depending on whether companies are controlled or not. After the AGM period, Afep issued a summary of this data, giving an **insight into the main trends specifically about votes on the resolutions**, the topics of written and oral questions and the use of Votaccess. Finally, it assists the High Committee every year in the elaboration of its statistical study on the application of the principles of corporate governance by the SBF 120 companies.

Noting that company law has been subjected to two contradictory trends, namely heavier constraints (especially resulting into the multiplication of reporting obligations) and the desire to ease corporate life, Afep, together with Medef and Ansa, has undertaken to update the 2003 report on **modernisation and simplification of company law**. These documents, presented in the autumn



of 2015 to the Ministry of Justice and to the Ministry of the Economy, Finance and Industry aim specifically at allowing for the possibility to hold the AGMs of non-listed companies solely on a computerised basis, to adjust the stock options regime as well as the performance shares regime, to improve the efficiency of decision-making by giving votes of abstention their real weight, or even to rationalise the provision of information specifically through better sharing of the information that are to be included in the chairman's report or the management report.

Afep has also been involved in four important pieces of legislation. The first one is the **Economic Growth and Activity Bill** (Macron Bill) which in particular contributed to a clear improvement in the legal and tax system regarding **bonus shares allotment**, provided a legal framework for supplementary defined benefits pension plans and for the rules on the number of positions held by corporate officers. The second one, known as the **Bill on Social Dialogue** (Rebsamen Bill), extends the range of companies involved in the **representation of employees at board level**. If Afep showed support to the target of establishing a level playing field between companies of comparable sizes, it was nonetheless necessary that the final version of the text allowed a representation of employees within operational structures. The third one deals with the law on modernisation and simplification of legislation and procedures in the legal system and home affairs. It had authorised the government to take measures by order in order to **modernise and simplify contract law**. A consultation was opened in the first quarter on a draft order, in which Afep actively took part. Although certain

provisions are an improvement in some respects (consolidation of case law, acceptance of debt transfer, better effectiveness of unilateral agreements), the wording provoked serious questions regarding, for example, the pre-contractual obligation to disclose information, the "abuse of weakness", unfair contractual terms, the approval of the refusal to renegotiate in the case of unforeseen circumstances, the price determination in framework contracts and successive performance contracts. Likewise, at different points of the text, the relation between general law and special laws as well as whether certain provisions in the text are binding or not remain uncertain. The adjustments that were introduced back then are consistent with the expectations of companies, following numerous exchanges between the Ministry of Justice and companies. The order should be published in February 2016.

Finally, Afep was consulted by the Central Service for the Prevention of Corruption (SCPC) regarding a **draft on guidelines for the prevention of corruption** in commercial transactions intended for French companies; and then by the government on **corruption prevention** measures which should be included in a **draft bill on economic transparency** to be discussed throughout 2016. Afep shares the interest of the authorities in strengthening the means to fight corruption but considers that the text should include a supportive approach to the companies in the introduction of effective means of prevention instead of a solely repressive approach. Moreover, Afep is concerned about the powers which could be given to the Anti-Corruption Agency, which come close to those of a

court. Finally, Afep is hoping for a transactional package regarding criminal matters, that would be optional and assigned to the Public Prosecutor, and which would have the advantage of speeding up procedures while avoiding the disastrous consequences of a guilty plea (resulting in the exclusion from public contracts, the withdrawal of authorisation to practise in a third country and so on). This package could include provisions to make the suspension of prosecution conditional upon the implementation of a compliance and remediation plan (monitoring).

**At a European level**, ongoing work was completed on the draft directive amending the **Shareholder Rights Directive**, which contains several important matters for companies: the obligation for intermediaries to offer the possibility of identifying their shareholders, arrangements regarding “say on pay”, approval by shareholders of transactions with related parties and monitoring of the activity of proxy advisors. Generally, the draft from the Council takes the direction that companies are hoping for, in particular on the question regarding relations with related parties and remuneration. Progress made in the trilogue meetings was significantly slowed because of the highly political subject of “country-by-country reporting” (see Taxation).

On the subject of **proxy advisors**, Afep continues to emphasise to the authorities, at least regarding certain advisors, the potential conflicts of interest resulting from their additional business consultancy activities. It participated in a round table organised by Esma and responded to a request by the latter regarding the assessment of the code of conduct “Best Practice Principles” implemented by the proxy advisors.

**Since it was a question of corporate governance**, the High Committee - which has published its second status report - responded to numerous interpretation questions on the Afep-Medef code and approached companies to inform them of its comments where it considered the information or explanations given in their annual reports to be insufficient. In a limited number of cases, specifically upon publication of the reports on remuneration, it took it on itself to convince companies to better justify or correct deviation from the code. It measured the application by SBF 120 companies of the principles of corporate governance based on the Afep-Medef code within a statistical analysis and showed the progress that was made by companies in the last two financial years.

Preceding a more in-depth revision in 2016, the corporate governance code was partly amended in 2015 in order to integrate the work of the financial regulator on the role of the AGM regarding the transfer of significant assets as well as developments in the Macron Law on supplementary pensions. A new version of the guide to implementation was also published in December 2015, especially in order to clarify the information to be included regarding remuneration, also in respect of “say on pay” and the criteria which are used to determine, in the case of the transfer of significant assets, if the threshold of 50% has been reached.

### 3. Outlook for 2016

**At a national level**, the discussion on the **Law of Economic Transparency** is likely to be of key importance in 2016. This should comprise, apart from anti-corruption measures,

application of the *non bis in idem* rule (following the censure of French rules by the Constitutional Court) and the necessary adaptations resulting from the transposition of laws on market abuse. Finally the government must add a section on simplification of company law which could take up the work done by Afep together with Ansa and Medef on simplification and modernisation of company law.

Following approval of the European legislation, particularly on market abuse, the regulator should undertake an adaptation of its General Regulations.

Regarding **corporate governance**, Afep together with Medef will undertake an in-depth review of the code of corporate governance; a new version should be published towards mid-2016, following consultations with stakeholders.

**At a European level**, Afep will continue to monitor progress on the adoption of the Shareholder Rights Directive as well as approval of the women-on-boards directive (which hitherto has been blocked in Council).

## ***A strict code of corporate governance widely applied by large companies***

### ***Self-regulation, an efficient system***

*The law cannot and should not step into all cases; the system of self-regulation created by companies and professionals has numerous advantages:*

- *in many cases, it is more ambitious than the law;*
- *ethical issues are integrated and take the form of ethics codes, corporate governance codes and the integration of environmental and social risks;*
- *it can also have cross-border application and is therefore perfectly adapted to the scope of multinational groups;*
- *it is inherently capable of change, adaptable and responsive (the Afep-Medef code is generally amended on a four year basis); the code is currently under revision, particularly on remuneration matters, and should be concluded between now and mid-2016;*
- *they encourage the relevant actors to take greater responsibility;*
- *the “comply or explain” principle underpinning corporate governance allows an adaptation to diverse situations.*

### ***Self-regulation, a significantly enforced system that has proved its worth***

*Self-regulation has proved itself to be effective: the very large majority of companies that subscribe to the code observe all of its principles. .*

- *the percentage of recommendations observed is constantly increasing and stands at 90%, or even 100% for many recommendations..*
- *Almost all businesses are applying the recommendations on:*
  - *Board members;*
  - *the number of positions which may be held;*
  - *the levels of directors’ fees and their allocation;*
  - *the Board meetings and the inclusion of the participation rate;*
  - *the establishment of committees (audit, pay and appointments);*
  - *the individual pay for each Executive Board member, with the use of standardised tables, and the criteria for determining variable pay;*
  - *the valuation of options and bonus shares;*
  - *the cap on severance and non-compete compensation.*

*As for the financial regulator, as highlighted in its annual report 2015, it “has noted again this year improvements in terms of the information provided and the development of practices, some of which have become general standards”.*

***The High Committee for Corporate Governance: an indispensable player in governance***

*The High Committee for Corporate Governance, established with the revision of the Code in 2013, is now one of the indispensable players in governance. Its mission is to monitor the application of recommendations:*

- answers to interpretation questions (asked by boards of directors);*
- contacting the SBF 120 companies to inform them of its comments on their annual reports;*
- investigations on its own initiative, either on the foot of current affairs or on the initiative of the Committee itself, particularly upon reading reference documents or notices of AGMs.*

*Companies that decide not to follow the opinion of the Committee must report and give reasons for this in their annual report. Shareholders shall be fully informed of the investigation and the response of the company. Moreover, the High Committee publishes a guide on application of the Code to help companies compile their annual report/reference document ("document de référence"); the last update was in December 2015. It also publishes a progress report which gives it the opportunity to expound its position on particular points where it is required to take a decision. It can also propose changes to the code.*

***A "say on pay" package which allows investors to get an overview of all remunerations paid.***

*As of 2014, shareholders have been consulted on directors' remuneration (say on pay) and are therefore invited every year to give their opinion about the remuneration to be paid according to the last financial year for each corporate officer. Voting is on an advisory basis and, if the result is negative, the board will consider and publish immediately an announcement on how it intends to follow up on the expectations of shareholders. The votes cast by shareholders are generally favourable, even though a slight downward trend was observed between 2014 and 2015 (resolutions having been adopted with an average of 92% in favour in 2014 compared with 87.5% in 2015).*

*The rules of transparency set by the code are demanding: although very few countries have implemented it, the Afep-Medef code has generalised the use of standardised tables and required an accurate report on the remuneration policy and its components. French Directors are not among the best paid in Europe (let alone the USA): ranks six in Europe, behind Germany, United Kingdom, Italy, Spain and Switzerland.*

*In its report for 2015, the financial regulator underlines "the efforts made by companies who generally choose a reporting format that allows investors to get the full picture of remuneration to be paid and usually provide all information required".*

# Financial Affairs

## 1. Background and issues for companies

In a post-financial crisis world, characterised by heterogeneous economic recovery within the European Union and low growth in France, the European Commission and the French authorities are searching for the best way to create an environment that is beneficial to investment and corporate financing.

This task is made more difficult by the persistence of low interest rates which, although advantageous for non-financial players, is putting the economic models of the banks and insurance companies under pressure, accentuating certain risks (profitability risk due to a drop in the interest margin, for example) and creating new weaknesses in certain markets linked to a deterioration in liquidity and the behaviour of certain investors prompted by their search for yield.

In this situation, the challenge for any regulator is to understand the overall impact of the regulations in force in order to find a balance between investor protection and preservation of the stability of financial systems on the one hand and flexibility and proportionality of the rules imposed on companies and financial players on the other. On this point, one cannot but welcome the consultation launched by the European Commission in the summer of 2015 in order to evaluate the impact on financing the economy of new prudential rules deriving from the European Directive on prudential supervision of credit institutions (CDR IV) and translating the Basle III framework and its implementing regulation. In the same vein the European Central Bank also initiated a consultation on the impact of preferential prudential treatment given to the banks' exposure on SMEs.

For companies, the challenge remains, as in previous years, the constant adaptation to new rules which is not without consequences in terms of costs and competitiveness. The increasing complexity of these rules requires greater efforts to comply with new requirements. Nevertheless, it would seem that a certain awareness has emerged on European level, as apparent in the one-year postponement of application of the provisions of the Directive on Markets in Financial Instruments (MiFID 2).

## 2. Achievements and developments in 2015

In 2015 discussions on the **proposal for a European tax on financial transactions** continued at European level before experiencing a setback in December with withdrawal of Estonia. With their number reduced to 10<sup>2</sup>, raising legal issues about the enhanced cooperation

process according to some observers, the remaining Member States nevertheless published an agreement on the main characteristics of the tax on transactions in shares and in derivatives instruments at the close of the meeting of the ministers of finance on 8 December 2015. The central concern of this agreement was to minimise the impact of a possible tax on real economy and pension funds, a late but salutary wake-up call. Afep has pursued its action with the objective of obtaining, at the least, the exclusion of corporate bonds and intragroup transactions from the scope of the tax.

The proposal for an European regulation on **banking structural reform** returned to centre stage at the end of the summer in 2015 with the publication by the European Council of its position on the proposal. At the European Parliament, after difficult negotiations, the rapporteurs of the proposal managed to come to a compromise which remains subject to political agreement. The uncertain scheduling for this reform should not mask the ever present risk that French banks will be the main banks impacted, subject to the separation measures and eventually excluded from certain financing and risk management activities, to the benefit of banks from third countries.

The European Commission was at the source of the two key initiatives in EU affairs, with the publication of its **plan for a Capital Markets Union (CMU)** on 30 September 2015, accompanied by a call for evidence regarding the effects of European legislation on financial services attempting to identify the excessive constraints on corporate financing as well as inconsistencies, contradictions and redundancies in regulations. Afep had encouraged companies earlier in the

year to respond to the consultations of the Commission on the CMU.

Companies responded favourably to the objectives of the action plan. They are particularly supportive of the actions intended to help them obtain investment in the best possible conditions or aiming to develop investments in innovative projects and infrastructure projects. Structured around six objectives, implementation of the plan will run until 2018 (helping companies to raise capital via markets, expanding investments in innovative projects and infrastructure projects, creating attractive investment opportunities for investors, removing barriers to cross-border investments, etc.).

Companies also focused on one of the measures in the CMU action plan: **the revision of the Prospectus Directive**. The first review in 2010 of this key directive for raising capital through offers to the public or on markets was disappointing because it brought about little progress. In this second review, the European Commission published a proposal for a regulation at the end of 2015 intended to replace the said directive and which must still be adopted by the European Parliament and Council. While the proposal for a regulation may allow for some relief, it is difficult at this stage to assess its scope as the contents of prospectuses will be defined by means of delegated technical measures to be elaborated at a later stage.

Regarding the **call for evidence issued by the European Commission**, all players swept into action in order to draw the attention of the Commission to the difficulties linked to disproportionate regulations. In its contribution, Afep emphasized the excessive constraints imposed on

companies in their financing and reporting activities as well as certain inconsistencies between the various pieces of legislation (reporting of hedging operations specifically). This call for evidence was an excellent opportunity for companies to illustrate the difficulties they are faced with on a daily basis in applying these regulations and Afep will on follow-up measures adopted by the Commission.

2015 also saw the **transposition of the transparency directive being finalised**, defining the reporting obligations of listed companies. The latter are no longer required to publish a quarterly report and are allowed to publish their half-yearly financial report at the latest 3 months after the end of the first six-month period. Companies active in exploration, prospecting, mining or the exploitation of raw materials must draw up and publish a statement on payments made to governments. In response to a consultation held by EMSA, Afep also opposed the Commission's and the European financial markets regulator's objective regarding the implementation from 2020 of a structured electronic format for the filing of consolidated financial statements of listed companies. As a matter of fact, companies have not identified any particular demand from investors on this subject and are especially concerned by the costs that are likely to be generated by this measure as well as the impact on their information and IT systems.

Afep has, moreover, responded to the **consultations of IASB and the IFRS Foundation** focusing respectively on IASB's work programme 2016-2020 and the review of the structure and effectiveness of the foundation's organisation. Regarding the former, companies have expressed the need

for a pause in issuing new standards, with the exception of finalising standards currently under development and without actually excluding the possibility of improving current standards. Companies are not in favour of extending the scope of IASB's activities to standardisation of indicators not defined by accounting principles either. Regarding the organisation of the IFRS Foundation, Afep has emphasised that appointment of members in IFRS' structure should take into account the participation of the different jurisdictions in the financing of the Foundation and their commitment to require or authorise application of the IFRS by certain domestic companies.

Finally, at national level, Afep participated in **several consultations organised by the Financial Markets Authority (AMF)** regarding amendments to its guidance as well as on proposals aiming to simplify the **information given in the chairman's report of listed companies** regarding internal control procedures and risk management. On this occasion, Afep called to mind its long-standing position against any requirement to prioritise risks. Afep was also consulted by public authorities on the draft decree defining the information companies have to provide on compliance with **payment deadlines** and verification procedures employed by external auditors as well as **intercompany credit**.

### 3. Outlook for 2016

#### - At European level...

The year 2016 opens under the auspices of the Dutch Presidency. The Netherlands will take over presidency of the Council of the European Union up to the end of the first six months of 2016 and, according to the contacts



established by Afep, simplification **of the regulatory framework and corporate financing**, especially of SMEs, are set to be among their objectives.

Finalisation of the review of the Prospectus Directive will also be a priority on the Council's agenda, with the Dutch presidency having indicated it wishes to close the dossier during the first six months of the year. This schedule is ambitious but Afep will take action to keep pace with developments and obtain lighter reporting obligations, in particular for listed companies who intend to issue secondary offerings, while maintaining the current flexibility, specifically for debt issuances, and opposing the Commission's proposals for measures that are not pertinent and likely to increase liability of companies (limitation of the summary prospectus or prioritising risk factors, for example). In this regard, Afep works closely with the European association of publicly quoted companies, EuropeanIssuers.

The end of the first half-year 2016 has been set as the final date by the 10 remaining members of the proposed **European tax on financial transactions** to come to an agreement on the outstanding points. Their position published on 8 December 2015 is an opportunity to have corporate bonds and intracompany transactions excluded from the scope of taxation. Likewise, Afep will continue to focus on the proposed European regulation on EU structural banking reform.

In collaboration with companies, Afep will also continue to reflect on the Capital Markets Union by focusing on the measures identified by the Commission for 2016, specifically aiming at maintaining equity financing and

developing the capacities of capital markets. Afep will keep a watchful eye to ensure that the specific expectations expressed by companies are voiced at European level, especially regarding the need to make investment conditions more attractive for investors and companies.

#### - In France...

One of the challenges of 2016 is the **transposition of the European Directive on statutory audits** and the implementation of the European regulation regarding statutory audits of public interest entities; the whole package is to come into force in June 2016. Afep also responded in January 2016 to the consultations led by the Ministry of Justice and, on this occasion, reminded the Minister of the concerns of the companies on, namely, the need to safeguard the national regime regarding the organisation and responsibilities of audit committees. Furthermore, Afep will be involved in this reform, working with the Compagnie Nationale des Commissaires aux Comptes (the French National Association of Auditors) on the implementation of an authorisation procedure for non-audit services which will enable the current system of "services directly linked" to audits to be integrated and preserved.

The package resulting from the latest European regulation regarding market abuse will come into force as of July 2016. With this in mind, Afep will keep a watchful eye on preserving French practices regarding buy-back programmes, and liquidity contracts in particular, in order to allow companies to continue to ensure secondary market liquidity for their securities.

<sup>2</sup> Germany, Austria, Belgium, Spain, France, Greece, Italy, Portugal, Slovakia and Slovenia.

# Work, jobs & social protection

## 1. Background and issues for companies

2015 was characterised by the continued downtrend in employment: in one year the number of jobseekers rose by 2.5 % to 3.57 million. The same applies to the unemployment rate as defined by the ILO, rising in one year by 0.2% to 10.2% in the 3rd quarter of 2015 and 24.6% for youth unemployment. The slight increase in the number of jobs created in Q3 (+14,900) was not sufficient to reduce the number of those looking for work.

These disappointing results prompted the government to introduce a series of measures in June intended to promote employment, including increasing the number of times temporary contracts can be renewed as well as the implementation of a specific subsidy for VSBs hiring young apprentices.

Regarding labour relations, the failure at the start of the year of intersectoral negotiations on social dialogue, which focused on the question of the future of CHSCTs (health, safety & working conditions committees), required the government to deal with this situation and find a method other than negotiations to reform the labour legislation. Thus, Jean-Denis Combrexelle, an expert of labour legislation, was appointed to head a commission charged with drawing up a report. Nevertheless, despite this difficult situation, the social partners managed to come to an agreement in October on **supplementary pensions**, signed by the CFDT (French Democratic Confederation of Labour), CFE-CGC (French Confederation of Management – General Confederation of Executives) and CFTC (French Confederation of the Christian Workers). This agreement will introduce a “no-claims bonus” system as of 2019, taking age into account when calculating pensions as well as the number of years contributions were paid.

## 2. Achievements and developments in 2015

Published on 17 August, the **Social dialogue and employment Act, or so called “Rebsamen Law”**, follows on from the failure of intersectoral negotiations (see above). Afep acted in order to include into the text some positive measures for companies. However, the draft bill was already less ambitious than the initial negotiations; moreover, its scope was reduced during the parliamentary debates (for example, regarding participation of alternate delegates in works council meetings). Regarding progress, the rationalisation of mandatory consultations/negotiations can be pointed out, with the extension of the scope of the ‘délégation unique du personnel’ (combined works council and staff representatives) (up to 300 employees), the possibility of holding joint CE-CHSCT meetings, a greater

use of video-conferencing. For large companies, the possibility of merging existing employee representative bodies into a single body still requires a collective agreement majority vote, which could prove difficult in certain cases. Furthermore, the provisions to clarify the different levels of consultation, if they are a mark of progress, are left midstream and the lack of any provisions to rationalise expert assessments (and limit their costs) is regrettable.

Also published in August, the **Activity and equal economic opportunity Act, so called "Macron Law"**, contains numerous provisions in the field of labour law and employee savings plans. Regarding employee savings plans, it is regrettable that the changes are essentially of a technical nature for large companies : reduction from 20 to 16% for the corporate contribution when the PERCO (Corporate Collective Retirement Savings Plan) is invested in PME-ETI (SME-middle market company) stocks; harmonisation of rules between profit sharing and incentive plans; abolition of the specific contribution due on the sums paid by employers as contributions to PERCO above €2,300 p.a. per employee). The modifications will not allow these mechanisms to be revived, although they are indispensable. Regarding Sunday trading, the law opens up new opportunities with creation of "international tourist zones" where evening and Sunday trading will be allowed and the increase from 5 to 12 of the number of "dimanches du maire" (number of Sundays where trading is allowed by decision of the local mayor). However, for all businesses with more than 11 employees, a collective agreement (signed either at the level of the sector, the whole or the specific facility) company) will be required from now on, which could prove a hindrance in certain situations.

Regarding labour legislation, the Act has relaxed the conditions for job retention agreements, abolished custodial sentences for interference in the functioning of employee representatives bodies and increased penalties against companies that circumvent the rules on posted workers. Furthermore, the Act modifies certain elements of the 2013 Securing employment Act, specifically regarding the obligation to redeployment, the extent of redundancies and the consequences of cancelling approval for a PSE (employment preservation plan) for lack of cause. However, the introduction of a compensation cap in case of unfair dismissal, supported by Afep, has been declared unconstitutional on the grounds that the size of company cannot constitute a pertinent criterion for varying the level of the compensation cap. The government has announced it would reinstate the measure while modifying the criteria applied.

Regarding labour cost, the 2<sup>nd</sup> part of the **"responsibility deal" between government and companies**, which is supported by Afep, was voted in the Social Security Funding Act for 2016: as of 1 April 2016 this will see family contributions for remuneration between 1.6 and 3.5 times the minimum wage reduced by 1.8 points as well as a reduction in the tax base for C3S (corporate social solidarity contribution).

The **"compte personnel de prévention de la pénibilité"** (work hardship prevention personal account) remains controversial, with companies complaining about the complexity of its handling and the risks of litigation. Faced with these difficulties, the government asked Member of parliament Christophe Sirugue and businessman Gérard Huot to come up with suggestions to simplify and make

the scheme legally watertight. Following their report, to which Afep contributed, several modifications were voted in the “Social dialogue and employment Act”, in particular: the abolition of individual prevention of exposure documents, the implementation of a specific sectoral approach to evaluate the different jobs; the shortening of the time needed to resolve legal disputes. Furthermore, the last 6 exposure factors will not come into force until 1 July 2016.

Regarding health, the year saw preparations for extending **additional healthcare cover** from 1 January 2016 in accordance with the National Interprofessional Agreement (ANI) of 2013. This additional healthcare cover must comply with new criteria for “contrats responsables” (responsible contracts) which has forced many large companies to modify their collective agreements. New modifications were introduced by the government with the “Social Security Funding Act” for 2016, in particular regarding the funding by employers (which should cover all the guarantees offered and not only the sole guarantees in the minimum package) and the dispensation of membership. These modifications have been introduced at a very late stage, which has been criticised by Afep.

Regarding **supplementary retirement schemes**, Afep continued its discussions with the Directorate of Social Security on the instruments to be implemented to preserve the rights of retired persons in case of business failure. This work led to the order dated 9 July 2015 guaranteeing pensions paid into a supplementary pension scheme managed in-house, which is the subject of a draft bill submitted to Parliament for ratification. The text includes most of Afep’s proposals, namely: an implementation period for the directive of 15 years, the

introduction of a minimum guarantee threshold of 50% of pension rights; a cap equal to 1.5 x PASS (annual social contributions threshold) per claimant as well as a package of wide-ranging offers (apart from outsourcing to an insurer, with or without transfer of life annuity risk: trust, guaranteed through securities, insurance for personal accounts).

### 3. Outlook for 2016

Regarding employment, Unédic (organisation responsible for managing unemployment benefits) forecast an increase in job creation in the commercial sector, which would compensate for the slowing pace of non-commercial government sponsored work contracts. In this situation, the unemployment rate as defined by the ILO would drop to 9.7% by the end of 2016. Regarding registered jobseekers, their number would drop, but only slightly (-51,000).

In terms of **legislation**, the year will see the discussion of the **reform of the labour code**; it is to be presented in March to the Council of Ministers and should be passed before the summer. Based on the recommendations of the report by Jean-Denis Combrexelle, the bill should hand the radical reform of rewriting the labour code in 3 divisions (compulsory provisions, provisions for negotiation and auxiliary provisions should an agreement not be found) to a group of experts who will have 2 years to rewrite the code. first stage of transposition of this approach should however be submitted, but it would only tackle the working time provisions, excluding the issue of the statutory working time (35 hours week) which should not be modified. Furthermore, the bill should include

modifications of the rules on collective bargaining, among which the terms and conditions to review/terminate agreements, the concept of ‘avantages individuels acquis’ (individual acquired rights) and the methods to conclude collective bargaining agreements. Afep has already presented its proposals to the Government and particularly hopes that the text will clearly favour company agreements and establish the primacy of collective bargaining over individual contracts.

Regarding **regulatory matters**, publication of implementing decrees following the “Social dialogue and employment Act” is eagerly awaited by companies, in particular those fixing the number of representatives and representation time for single representative bodies as well as rationalisation of compulsory consultations. This will allow companies to enter into negotiations for merging, where necessary, several employee representative bodies into a single one.

Apart from continuing **interprofessional negotiations regarding the “compte personnel d’activité”** (personal activity account, regrouping all employee benefits on a single online portal), the social partners are scheduled to start difficult talks at the beginning of 2016 on the **unemployment benefits system**. With a deficit of €3.8 bn forecast for 2016, the debt for the unemployment benefits system will be close to €35 bn in 2018, or the equivalent of one year of contributions. In view of this situation, a return to growth is not likely in itself to suffice to balance the books, considering the large number of long-term unemployed. That is why Afep wishes the scope of negotiations to be as ambitious as possible, giving priority to measures that encourage people back into employment.

## Young people and businesses

**Launched by Afep in March 2013, the aim of the initiative “Jeunes et Entreprises” (Young People and Businesses) is to support actions that promote training and employment for young people.**

Large companies in particular wanted to invest in the professional future of the young people they trained in apprenticeship schemes, with the launch of the **“alternance vers l’emploi”** (from training to employment) portal, accessible at [“www.engagement-jeunes.com”](http://www.engagement-jeunes.com). This allows young people who have completed a apprenticeship training in a large company to post their CV in a database accessible to other recruiters, especially SMEs. After 18 months of implementation, around forty large companies and 213 SMEs and middle market companies are now using the site to exchange the profiles of their former trainees. More than 11,000 young people have been invited to create an account on Engagement-Jeunes and 8,000 of them have activated them and so have access to 35,000 job offers (permanent contracts, temporary contracts, internships, apprenticeship contracts).

An initiative has been launched in parallel aimed at young university graduates with a Masters qualification to help them find their first job and also encourage diversification of recruitment within companies. This **“Booster”** programme offers students the opportunity to enrol in a program aimed at helping their start in professional life, specifically by helping them understand companies’ expectations: **9 Afep companies are associated with this initiative, launched in March 2014, in partnership with 7 prestige universities in France.**



# Commercial affairs & intellectual property

## 1. Background and issues for companies

Regarding commercial affairs and intellectual property, the elaboration of numerous bills in 2015 was determined more by consumer protection than by helping businesses faced with economic difficulties.

This has resulted in a **constant rise in class actions** at a national level where, following the fields of consumption and competition in 2014, **new economic sectors are now feeling the impact** (healthcare law, “draft bill on class action and the judiciary system”). The **Digital Republic Bill**, introduced by the Secretary of State on digital technology and adopted by the National Assembly in January 2016, takes the same approach to the benefit of consumers. This can also be found in various texts such as the European General **Data Protection regulation**, the prime aim of which is to ensure greater respect for the privacy of citizens

without always considering the new rigidities for businesses. The judgement handed down by the CJEU on 6 October 2015 (Schrems case) invalidating “**safe harbour**” is also based on the necessity of better protection for citizens’ personal data.

Without denying the importance of taking due consideration of consumer-citizen protection, companies are attempting to highlight their own constraints. At a European level this process was related to the proposal directive on the protection of **trade secrets**, the wording of which will be finalised shortly and will ensure companies better legal certainty in fighting against infringement. During the national process to draft the **Economic Growth and Activity Bill (Macron Bill)**, companies have underlined the risk that **structural injunctions** could undo years of work to establish commercial presences, even without any abuse. Consulted during the draft stages on the **digital technology Bill**, Afep also wanted data held by companies to be better protected. Opening data held by public administration can generate innovation and new practices. But companies, and in particular those with public service contracts, should not be the only ones in Europe that have to open their data.

The alleged opposition between large companies and SMEs, used as justification for numerous public policies, does not reflect reality and too often leads to the adoption of measures that are detrimental to the economy. A joint working group of Afep and Medef has drawn up a document on **Business-to-Business relations**. The cooperation between VSBs, SMEs, middle market companies and large groups, a key factor for the economy and hence for employment, is beneficial for all parties and brings about long-term improvement in economic and financial performance. Thus, companies wanted to spread good

practices already implemented in some of them or in the process of being adopted in others (see below).

## 2. Achievements and developments in 2015

**At European level**, the adoption of the General data **protection regulation** at the end of 2015 was important for businesses. They have supported this initiative since 2012, defending a pragmatic and balanced approach partially included in the final wording. Businesses face numerous new constraints: unclear definition of the respective responsibilities of the controller and the processor, approach based on risks requiring from the controller to carry out an impact assessment in many cases, the amount of penalties that can be imposed if the data security system fails can rise up to 4% of total worldwide turnover, etc. However, certain provisions take account of the needs of businesses. The mechanism of a **one-stop-shop** is sufficiently flexible to be implemented, while guaranteeing natural persons access to justice in their own country. **Explicit consent** of persons to their data being processed is limited to the most sensitive cases.

Regarding intellectual property, the **Trade Secrets Directive**, also adopted in 2015, confirmed the provisions which Afep was focussing on. The definition of a trade secret complies with the TRIPS Agreement, also providing companies legal consistency in the case of possible litigations, concerning infringement in particular. The elimination of the criterion of intentionality or gross negligence to characterise unlawful behaviour (unlawful acquisition, use and disclosure of a trade secret) has been confirmed, thus ensuring better protection for companies. The **European Patent Office** consulted Afep in May 2015 on a structural reform of its **Boards of appeal** to increase their autonomy. Companies consider important to have more transparency

in the procedure of appointment and reappointment of Boards of Appeal members. They also pointed out the necessity to foresee seats for users (Businesses, intellectual property counsel or lawyers. The need to reduce the backlog and harmonise the practices of each Boards of appeal was also emphasised. This reform will probably be introduced in the course of 2016.

**At national level, the Economic Growth and Activity Act (Macron Act, was published on August 2015) including numerous provisions relating to competition. Companies were especially concerned about the structural Orders.** They would have been invoked where a company owning more than 50% market share with one or more retail outlets is deemed to hold a dominant market position. In line with the arguments put forward by Afep throughout preparations, the Constitutional Council criticised this particular provision for two reasons. It excessively infringed the property rights and freedom of Businesses by allowing the Autorité de la concurrence (Competition Authority - ADLC) to call into question legally economic situations without any abuse of a dominant position. It is disproportionate because of its general scope.

Adopted in October 2015 by the Senate, the **bill regarding class action and the judiciary system** is now at the office of the National Assembly. It introduces transversal **class action called a "socle commun" (common platform)** to be applied in matters to be dealt with at a later stage by the law and applies in the battle against **discrimination**. This tool is intended for use by a large number of players. Any association of some years' standing (5 years maximum) may bring a legal action without any national agreement, which vouched for these associations' professionalism and independence. However, the proposed scope is enormous: in the healthcare section, it covers medicines as well as



medical devices, blood products, cosmetic products; the discrimination concerned relates to any form of discrimination such as in the field of labour relations. Finally, class action can retroactively refer.

The close collaboration throughout 2015 with the public authorities on the draft decree regarding payment **times and verification of information by statutory auditors** led to a balanced text. Published in November, this text intends to document with more detailed the compliance of each company with contractually agreed payment times. It also aims to promote self-regulation regarding the legal requirements as well as the improved control of clients/suppliers relationships and or the cash flow. It prioritises information given in the management discussion and analysis and based on a “balance” approach commonly found in companies, while keeping the possibility of taking a “flow” based approach for companies which have adopted this method. A reasonable period has been set for its implementation, this information being applied to accounts for the current financial year starting from 1 July 2016.

Throughout 2015 ADLC held various **consultation sessions**. In particular, it published a revised version of its procedural notice relating to the French **leniency** programme. Apart from adaptation of the French report to the European model leniency programme, this document clarifies implementation of this procedure (roles of the leniency officer and the “markers”) and invites “Type 2” requests. The inclusion of concerted practices arising “through players in a vertical relationship with the authors of the practices” (hub and spoke) in the field of anti-competition behaviour was of concern to Afep. However, this provision was not amended in the final version. On the other hand, the procedural notice now provides for various levels of reductions in fines for companies who are not the first to approach the

Autorité and reveal the cartel (so-called type 2 applicants). There is a 25% to 50% reduction level for the first type 2 applicant, 15% to 40% for the second, and a maximum of 25% for the third and later applicants.

### 3. Outlook for 2016

Regarding **competition**, the consultations held at the end of 2015/beginning of 2016 by the European Commission on **increasing the powers of national competition authorities** could be transposed before the end of the year into a review of Regulation 1/2003 on the implementation of rules on competition or, more likely, by a proposed directive intended to harmonise the conditions for applying tools available to these authorities (leniency, inquiry procedures, sanctions, etc.).

**Transposition of the 2014 directive** on certain rules governing actions for damages under national law for infringements of the competition law provisions required before December 2016 is underway at the Chancellery. Since this directive contains the minimum of harmonisation, companies hope that its transposition will not entail any gold plating and that the fullest possible harmonisation between Member States is promoted in order to limit the risks from forum shopping. The civil liability system should be retained and will serve as the basis for any case for compensation on foot of anti-competition practices.

Deriving from the Macron Act, the **settlement procedure**, which can be submitted by the ADLC to companies that have decided not to challenge the objectives specified, include financial penalty amounts (and not a percentage reduction on an as-yet unknown fine ). After several months of implementation, the ADLC could define the ways of application at the end of 2016 or beginning of 2017 by guidelines or a report on procedures.



As part of the government's fight against **payments terms failures**, various measures on the powers of the DGCCRF (Direction générale de la concurrence, de la consommation et de la répression des fraudes - French General Direction for Competition Policy, Consumer Affairs and Fraud Control) could be introduced by law in 2016. The **inquiries held by the DGCCRF** could be published in a "name and shame" process. The **finances** imposed could be raised significantly and applied to several violations identified within the same company. By sharing good practices, the document drawn up jointly by Afep and Medef in 2015 is intended to improve **relations Businesses to Businesses** and could help specifically to make partners aware of the problems associated with payments terms.

The general **data** protection regulation will come into force two years after its publication in OJEU. CNIL (French Data

protection Authority) will build on this period to work with stakeholders, including companies, on the key concepts in the text (profiling, purpose of data processing). The results will be shared throughout the network of European data protection authorities ("G29") in order to create efficient European governance. Furthermore, the CJEU's decision of in Schrems case/Data Protection Commissioner invalidated the transfer of companies' personal data to the United States under the "**safe harbour**" concept. The data transfer of (customers, employees, etc.) must be revised, both with regard to data flows and data stocks (data already transferred) during the ongoing negotiations between the European Commission and the United States. In the meantime, companies are at risk in legal terms. That is why they are seeking a moratorium so that real alternative technical solutions can be found combined with legal certainty.

### Improving Business to Business relations "Strength in unity"

Released officially on 18 February 2016 in the presence of the Ministry of the Economy, Finance and Industry, this document elaborated jointly by Afep and Medef in collaboration with Pacte PME (SME pact) proposes sharing current or new good practices. Every company will be able to find examples that match its strategy or priorities and/or refer to the commitments undertaken by certain companies in different industries, divided into four themes:

- **Emphasise the value of shared good practices:** improve relations between companies; make all management bodies party to a contractual relationship aware of their responsibilities; promote transparency and good faith in the supplier selection procedure; maintain industrial property rights and confidentiality, etc.
- **Work together better:** purchasing policies (training buyers, boost purchasing policy which is a strategic policy at top management level or the choice of corporate boards); payment times, financing, means of payment, billing; developing skills and training to the benefit of industries and specifically of SMEs.
- **Innovate together:** propose training modules for open innovation within company training programmes; better understanding of intellectual property management; improve collaboration between companies and build trust; invest in innovative companies, etc.
- **Export together:** structure export ecosystems, sharing collaborative actions and tools for export; boosting international presence, expertise and training in entrepreneurial ecosystems (professional groups, sectoral ecosystems, industries); support strategies to support SMEs with exports, help them to explore markets, etc.

# Environment & energy

## 1. Background and issues for companies

In the field of energy and climate, 2015 will have been characterised by two major topics: at an international level, the **UN Climate Change Conference, or COP 21, held in Paris** in December, which resulted in an international agreement starting 2020; at a national level, the adoption of the **Energy Transition for Green Growth Act**.

These two processes confirmed the inclusion at a **high level of the political agenda** of “upstream” issues on the type of energy and the development of energy efficiency and renewable energies, and “downstream” challenges on climate change, essentially related to CO<sub>2</sub> emissions. **Each of these processes was carried out in France** to a high political level respectively by Laurent Fabius,

Minister for Foreign Affairs and President of COP 21, and by Ségolène Royal, Minister for Ecology, Sustainable Development and Energy for the Energy Transition Act.

**Europe appeared to hang back in the political debate on climate change.** Nevertheless, in July, the European Commission adopted two important measures: a new proposal for review of the directive on the emissions trading scheme (ETS) for 2021-2030 and the implementation of a market stability reserve. However, these two steps **took a technical approach, without a genuine in-depth debate** on the relevancy pertinence of European policy to combat climate change.

The more traditional environmental subjects also saw progress during 2015. **Circular economy** was the subject of a new European package in December and was also integrated in the French Energy Transition Act. The directives on the conditions for approval of **medium combustion plants (MCP)** were adopted in November and supplemented the requirements regarding emissions in the Industrial Emissions Directive (IED). On a national level, the taskforce on the modernization of environmental law helped to develop ideas which will probably result in the publication of orders in 2016. The instruction of the **biodiversity bill** at the Parliament was conducted in “fits and starts”; the process of **legislative and regulatory simplification** also introduced a certain dynamics into environmental law.

## 2. Issues for businesses

One of the main issues for businesses in the legislative and regulatory field with a rich tapestry of international,

European and national regulations, has been to **avoid piecemeal regulation lacking in consistency**, the risk being that economic activity in France could be hindered as well as innovative projects beneficial to the environment. Therefore Afep has stressed the need for **simplification** and economic efficiency. However, it must be said that the creeds of simplification and coherence are **not yet integral to the behaviour** of the legislative and administrative bodies when compiling such texts: the **evaluation of the cumulative impact of legislation and regulations on the party concerned or the project owner is not yet a matter of instinct** for legislators, despite repeated promises. In view of the differing effects of major “top-down” legislation and regulations, **the members of Afep hope that a “bottom-up” approach will take hold, arising from their projects**, in order to help public authorities understand the exact needs of players who have the capacity to invest and bring about change.

The association asks that public authorities not only play their role of regulators and guarantors of the application of laws but also become **co-initiators and supporters of innovative projects** that are resource-efficient and generate business. Hence Afep is encouraging representatives of public authorities to make greater use of their skills in order to provide project owners with **administrative solutions drawn up by the departments of the same ministry and/or between ministries**, which is essential for bringing projects to a successful conclusion.

### 3. Achievements and developments in 2015

The Paris Agreement adopted at COP 21 had a major positive effect. This agreement heralds the prospect of a progressive re-balancing of efforts between large CO<sub>2</sub>

emitting countries, thus ensuring that the European Union will not be the only region in the world with strict rules on the emissions of its industrial companies. **The agreement also encourages investment** in the low carbon transition process.

The association, together with the Cercle de l'industrie, initiated the launch of a *World Business Dialogue* on climate change, chaired by France and gathering international businesses and delegations from the major countries emitting greenhouse gases to prepare the COP 21 agreement. It also encouraged large French companies to get together and draw up a **joint commitment to combat climate change** and to potential investment in low carbon technologies. Afep also participated actively in the public debate between businesses and public authorities by helping to organise the *Business Climate Summit* held in Paris in May 2015.

European public policies on climate change had a tendency to **focus on setting carbon constraints**, starting with the European ETS system, implying that low-carbon industrial and energy solutions **would come of their own accord**. With regard to application of the Paris agreement, companies consider that European efforts should be **more balanced towards greater stimulation of research/development/innovation to find new low-carbon solutions** until the roll-out stage. To this end Europe should promote calls for tender and mobilise the new resources generated by the CO<sub>2</sub> quota auctions, meant to grow each year in order to finance such projects.

The new proposal to review the ETS directive and the draft based on the market stability reserve **are unfortunately lost in the essential question of survival and/or progressive adaptation in Europe for industries**

**heavily exposed to international competition.** These companies are not in fact able to pass on the excess costs linked to carbon constraints in the price of their products, since these prices are set at an international level, without taking the carbon constraint into account. Therefore greater political priority should be given to these texts by underlining that the companies affected must continue to be given special treatment and that the income from carbon credit auctions must finance research for low-carbon technologies for these fields of business. The new European Commissioner responsible for the Energy Union, Maroš Šefčovič, has sounded out all Member States and has set the **first milestone towards an Energy Union.** However, maintaining the principle of national sovereignty over the choice of energy mix leaves little flexibility to bring about significant changes with the European Union.

The French Energy Transition Act itself confers **significant visibility on France's major energy and climate objectives** and stimulates innovative projects; however, its great fault lies in the vagueness of the economic costs associated with its implementation. It allowed a **reduction in the sales rate of electricity** and the grid utilisation rate for transporting electricity (TURPE) for companies with a high consumption of electricity. It also enabled the system for the sales rate of electricity from renewable sources to be modified by a bonus system better adapted and required by the new European guidelines on state aid. Although the law introduced a reform by order on a **carbon assessment** for companies, which is applied **solely** to direct emissions and emissions linked to the consumption of electricity and heat (Scopes 1 and 2) without extension to emissions of suppliers and

customers (Scope 3) considering the complexity of its implementation, **it has created reporting obligations for companies** regarding the consequences on climate change of the use of their products and services to be included in the annual report (**Scope 3 downstream**). The law also introduced new reporting obligations for **investors regarding indirect emissions associated with their assets.** The implementation order for investors appears suitable enough for testing but great watchfulness will be needed regarding the future order on the impact of products and services.

In addition to the Energy Transition Act, the finance laws issued at the end of 2015 brought **two clarifications:** confirmation of the progression of the rate of the climate change contribution and integration of the contribution to the public electricity service (**CSPE**) as part of the domestic duty on final electricity consumption (**TICFE**), while maintaining the tariff adjustments for companies consuming large amounts of electricity with a view to achieving compliance with European guidelines on state aid.

The **biodiversity bill** was not fast-tracked through Parliament. Work in 2015 culminated in the first reading in the Senate, which resulted specifically in the adoption of an amendment which **introduced compensation for environmental damage into the Civil Code**, despite the existence of the concept of environmental responsibility in administrative law. Afep has underlined the problems posed by such an instrument for bearing risks without coordination of all means of compensation already in place under French law (administrative, civil and penal). In 2015 Afep called together a **working group of companies on the circular economy** in order to

formulate proactive recommendations. The **report on the circular economy which resulted from its work** - adopted by the chairmen of all member companies and published in December 2015 (available at [www.afep.com](http://www.afep.com)) - came to the conclusion that a European strategy with far-reaching aims is needed: European harmonisation of methods to measure flows, development of eco-design, a heightened role of the state as a facilitator of projects and acceleration of the fight against illegal waste management. Afep organised **two events** within COP 21 where it was able to underline the contribution of circular economy to combat climate change.

Afep's report recommends that the state develop its role as **project facilitator**, taking the form of concerted action between businesses and the state within the circular economy, similar to the Green Deals of the Netherlands.

Afep also promoted this role of the state as project facilitator in order to **support the creation of major pilot projects of sustainable cities**. Regarding the matter of **sustainable cities**, promoted by Afep for several years now with an eye to developing an **offering by French companies**, the ministers of ecology and housing finally launched a call for tenders in France for pioneers of sustainable cities and selected 11 winners who will be given the support of public authorities for their projects.

#### 4. Outlook for 2016

At the international level, a watchful eye should be kept that the range of the Paris agreement on climate change **stimulates concerted efforts to reduce greenhouse gases** among the main CO2 emitting states. Voluntary action by companies should be tracked closely. The association also wishes for the **Business Dialogue to continue** in

2016 with increased responsibility of the next Moroccan presidency of COP 22 in November 2016 in Marrakesh.

At a European level, the main difficulty will consist in **addressing the issues of competitiveness** of countries exposed to international competition **not only in technical terms** - as with the proposals of the European Commission - **but also at a political level** so that a balanced decision can be taken for the future of the industrial enterprises affected, both in the European Council and Parliament. **The relationship** between regulation on ETS, renewable energies and energy efficiency **must be improved** by 2030, which requires genuine mobilisation on this point in order to raise awareness within the Commission.

Regarding notification of the new CSPE scheme for France to the European Commission, companies are demanding that agreement is **given rapidly by the Commission** in view of the economic issues associated with it.

Regarding activities to bring **environmental legislation up to date**, activities which focussed primarily on **environmental assessment, public participation and single authorisation** in 2015, and current trends, which are fairly well-balanced, must be confirmed by orders to be specified in 2016.

Regarding the **biodiversity bill**, a solution is needed for precise regulation of environmental damage in the Civil Code and to **ensure coherence** with current administrative law in the application of the Environmental Liability Directive.

Finally, Afep's initiatives on **circular economy and sustainable cities** will be continued in 2016 in order to **put experience in project facilitation** with public authorities **into practice**.

### ***Afep members working towards a circular economy***

*The “Companies commit to the circular economy” report was published during COP 21 at the beginning of December 2015. This is the result of a working group of the association chaired by Jean Louis Chaussade (director general of SUEZ).*

*Two conferences at Paris-Le Bourget were organised on the “contribution of processes of the circular economy to combatting climate change in the context of the 2°C target” attended by the European Commissioner for the Environment, the French Minister for Ecology and numerous stakeholders involved in the circular economy in France and abroad.*

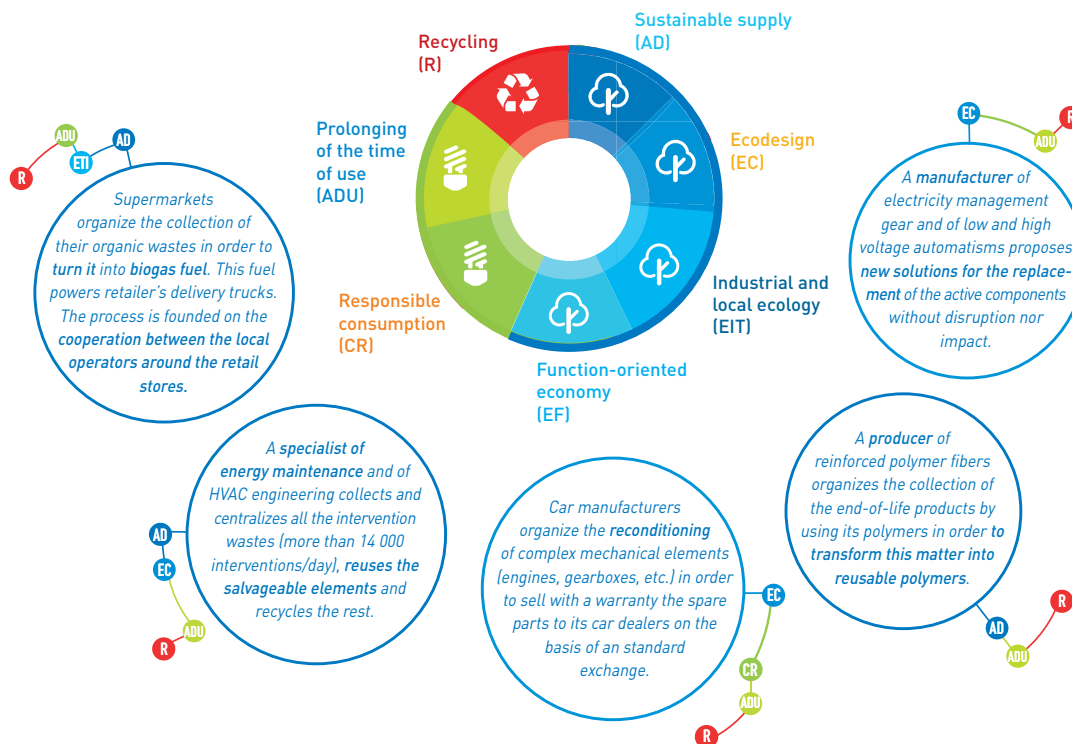
#### ***In order to develop the circular economy, we recommend***

- 1. Adopting a European strategy regarding the circular economy, guaranteeing a level playing field in terms of competition between countries. The proposals of the European Commission should be based on a harmonised approach to the circular economy throughout the value chain and lead to the adoption and sharing of major objectives, specifically in the optimisation of the use of products and of recycling.*
- 2. Harmonising at European level the methods to measure flows of resources and waste as well as tools to analyse life cycles so that the environmental and energy impacts of products can be assessed, from upstream to downstream in the production process. This is to facilitate the application of international procedures and exchanges.*
- 3. Promote the extension of the service life of products and replace the linear waste management approach with repurposing resources through eco-design, reuse and recycling and then using non-recyclable waste in energy production. To this end, harmonise the ways to launch waste legislation of the EU.*
- 4. Involve the State as a project facilitator in the circular economy in order to achieve joint objectives between business-government-local communities, similar to the agreements implemented in the Netherlands (Green Deals). This recommendation assumes the right to testing is extended widely, especially in a national framework.*
- 5. More effective action against practices of illegal waste management and heavier penalties as a deterrent. Regulatory and fiscal provision should be strengthened in order to promote best European practices. In addition, trust between players in the processes of the circular economy must also be based on the guarantee of their performance, by developing certification and approval methods.*

#### ***Companies are calling on everyone to accelerate this transformation***

*Companies are convinced that by linking their activities to the circular economy, they will help to make new economic models viable. They call on all players (economic, local authorities, associations, etc.) to take action to show that innovative solutions on a grand scale are within easy reach. Such cooperation will facilitate and accelerate this transformation!*

## Applications in different economic sectors



### Launch of the initiative of Afep members for sustainable cities!

For several years now, Afep and many of its members have been working with public authorities in order to raise the profile of what French companies have to offer in the field of sustainable cities in France and abroad. A communication of the Council of Ministers was finally made public in December 2015:

- the creation of a multi-stakeholder network (state authorities, local authorities, businesses, experts) with the title “Vivapolis/Institute for Sustainable Cities”
- and the selection of eleven winners of a call for tenders from pioneers of sustainable cities in France, each one representing a varied consortium of companies.

The network must be able to ensure four missions: supporting innovative projects and primarily pioneers in their shared challenges; helping to develop French companies on the international stage; research; training. The aim is to stimulate dialogue between local authorities and economic players as well as the world of research and training through practical

projects and forward-looking approaches. Developed initially for the global market and later extended to projects in France, the umbrella brand Vivapolis is intended to present the most promising initiatives and approaches.

The eleven winners will be given joint ministerial support at local and national level and might be eligible for the Investments for the Future Programme. Many of Afep's members are leaders or are participating in these programmes which include: GE/ALSTOM, BOUYGUES, CAPGEMINI, EIFFAGE, ORANGE, SCHNEIDER, SUEZ, VEOLIA, VINCI...

Each pioneer will be given support from their own advisor assigned from the Ministries of Ecology and Housing at local and national level on a project basis. The reason for these pioneers is to showcase on the international stage the ability of French companies to implement integrated solutions for sustainable cities, saving physical and financial resources and providing services for users.



# Corporate social responsibility

## 1. Background and issues for companies

For many years now corporate social responsibility (CSR) has been a key part of the strategy of Afep members. They implement numerous policies and actions to limit the negative impact of their business activities and to develop more positive effects. Through social and environmental innovation and interaction with their environment, businesses are developing in order to find a sustainable response to the needs of society.

Without doubt the French legal system is one of the most ambitious in the world. While recognising its advantages, businesses want to be able to apply their CSR measures in a manner that is suited to their business activities, in a

stable regulatory environment and with a level of constraint that does not put French companies at a disadvantage.

In this context, Afep followed with interest the discussions on “**due diligence**” of large multinationals throughout 2015 and the implementation of the guiding principles of the United Nations on “**business and human rights**”, at French, European and international level.

Two documents examined in 2015 reflected these concerns. Firstly, the **bill on the duty of care of parent companies and contracting companies**, adopted by the National Assembly at its first reading in March, but rejected by the Senate in November, with the aim of penalising large companies based in France for damage to the environment or health or violations of fundamental rights - occurring in France or abroad - caused by their subsidiaries or subcontractors. Secondly, the draft **national action plan for the application of the guiding principles of the United Nations on Business and Human Rights**, presented for consultation on the national platform for CSR, in which Afep is an active member.

On the question of reporting, the transposition of the **European Directive 2014/95/EU on non-financial reporting**, published on 15 November 2014, has been the subject of controversial discussions on the national platform for CSR regarding its impact on reporting obligations of companies and will result in an evaluation report by State inspectorates on current legislative and regulatory measures with a view to their possible adaptation before the end of 2016.



Hence the main issues for businesses during the course of this year have been to ensure European and international consistency and to encourage application of the materiality principle.

Afep members, who are active in France and around the globe, emphasise the need for French regulation to be consistent with European and international regulatory frameworks. Overregulation of CSR runs the risk of becoming an exercise in compliance whereas the spirit of CSR is quite the opposite, namely to provide a specific and suitable response of each company to its main challenges.

In this respect companies wish to see the principle of materiality applied, as established by the European directive of 22 October 2014 and the G4 version of the reporting guidelines published by the GRI. This principle means that each company selects the most relevant issues in sustainable development that are of priority for its business activities by questioning its internal stakeholders (employees, employee representatives) and external stakeholders (associations, suppliers, professional organisations, local residents, etc.). This enables companies to prioritise tasks and focus their efforts with greater efficiency in mind.

Current French legislation on non-financial reporting (implemented with the law on new economic relations of 2001) prescribes a more compliance-oriented approach with a catalogue of 42 items rather than seeking to adapt business activities to the company's environment as closely as possible. Transposition of the European directive is an opportunity to introduce the principle of materiality for a

more appropriate non-financial reporting system in France. It must be emphasised here that the European directive is much more stringent in certain respects than the French legal framework because the non-financial reporting it demands is oriented more to the risks associated with material issues and to the results of policies implemented in order to minimise or manage such risks. Afep members are also of the opinion that synergies and cooperation with public authorities is of special relevance in the field of CSR.

Similar to the initiatives launched by Afep to develop sustainable cities and a circular economy, businesses and public authorities will be required more and more in future to take a cooperative approach in order to develop systematic or joint solutions in response to the challenges facing society: compliance with working conditions and human rights, including in countries with a low level of governance, combatting climate change, water protection and management as well as waste management and reutilisation. These issues require **concerted and effective action plans to be implemented by both State and business**. The approach, defended by some, of introducing new penalties, combined with imprecise legal texts and sources of great legal uncertainty, would lead to a situation of litigiousness between stakeholders without helping to improve the problems identified.

## 2. Achievements and developments in 2015

In France, Afep participated actively in activities on the **CSR platform** which formulated a certain number of recommendations intended for public authorities, particularly regarding **non-financial reporting and the**

**responsibility of parent companies and contracting companies throughout the supply chain.** Although different stakeholders have different points of view, the dialogue between members of the platform is contributing to a better understanding by the various players of the difficulties faced by businesses in their daily business activities.

Regarding the **bill on the duty of care of parent companies and contracting companies**, Afep continued with its analysis of the impact of such an approach. Although companies are convinced of the need to demonstrate vigilance along their value chain, the approach taken in this draft must be rejected: only on French companies that exceed certain thresholds does the text impose a duty of care that is far-reaching and ill-defined, without a frame of reference having been defined, thus placing them in situation of great legal uncertainty. If companies' obligations are not clearly defined, this type of penalty system would prove a serious handicap to the fabric of the French economy as a whole (including small and medium-sized enterprises as subcontractors of companies subject to such duty of care) but without achieving the objectives set.

During the year Afep also contributed to the compilation by the Central Service for the Prevention of Corruption (SCPC) of **guidelines for the prevention of corruption in commercial transactions** intended for French companies. It welcomed the approach of encouraging companies to implement strict procedures to prevent such behaviour.

At **international level**, several round-table discussions

were organised to allow companies to put forward their position on the following topics:

- elaboration of sectoral guides by the OECD with the aim of helping companies to implement due diligence based on risk analysis, in accordance with the guiding principles of the OECD; the guide for the agricultural sector proposes a corporate policy model as well as a framework comprising five stages determining due diligence throughout agricultural supply chains which is particularly interesting for all companies, irrespective of their field of business;
- the future international standard on sustainable procurement ISO 20400, which received a favourable response from companies who wish to have a **reference document on sustainable procurement for their international operations** and which they can apply *vis-à-vis* their commercial partners; ISO 20400, the result of an international agreement among a large number of countries, is a more effective tool than a merely national standard or reference document; ISO 20400 **helpfully clarifies concepts** whose implementation by the players concerned is indispensable for sustainable procurement and, more generally, for sustainable management of business activities; companies particularly welcome the introduction of concepts of **vigilance** and **risk management** as well as **mapping fields of action and suppliers according to issues at stake**; companies hope that ISO 20400 will be recognised as an appropriate response to the difficulties connected with managing social and environmental risks in their supply chains.

### 3. Outlook for 2016

In 2016 Afep will participate in the following activities:

- **transposition of European Directive 2014/95/EU** on non-financial reporting which needs the French law to be amended considerably. The principle of materiality of the directive means a global approach to reporting (in contrast to the subject-by-subject approach to compliance); it requires companies to make choices, to focus their efforts on the relevant issues identified with their stakeholders; it requires more in-depth reporting on the issues identified (including communication of results and key performance indicators). This approach cannot be combined with the requirement for companies in French law of having to respond to a predefined list of numerous topics ;
- implementation of the national priority action plan for **CSR development** in partnership with stakeholders in the CSR platform;
- compilation of the **national action plan** for application of the guiding principles of the United Nations on **Business and Human Rights**: these principles represent a major task for companies that must comply with them and promote their observance wherever they operate; however, companies have pointed out the **complexity of the matter which requires in particular the need to coordinate their activity with that of countries** as well as to deal with the relatively abstract terms employed by international treaties, raising numerous questions among companies. Where companies operate in countries with weak governance or where respect for human rights is

not guaranteed by the state, companies try, while complying with local legislation, to remain faithful to the spirit of international treaties designed for states they cannot replace, as well as to their own values; in such situations, **companies need assistance and support by all public and private players**. A series of actions by the State, employers' organisations and stakeholders has been proposed by companies to help them put the UNGP into practice. The creation of a **government resource centre for economic players**, which would give access to risk assessment tools and resources for companies is a key proposal based on the tools provided to companies by other European countries;

- contribution to the **definition and elaboration of the content of due diligence measures** in accordance with the European and French legal frameworks (transposition of European Directive 2014/95/EU on non-financial reporting and the mission assigned by the Prime Minister to the CSR platform);
- **revision of the Afnor guide FD X30-024** on performing verifications by an independent third party of the social, environmental and corporate information published by companies.

Finally, Afep will focus on the exchange of good practices implemented by companies with regard to due diligence and on possible cooperation and synergies between businesses, especially in relation to social audits in order to maximise the effectiveness of these measures.

## Companies' duty to conduct due diligence in accordance with international reference documents

### ■ Why is it important?

International reference documents on CSR, such as the United Nations' Guiding Principles on Business and Human Rights and the OECD's Guidelines for Multinational Enterprises which require companies to **have implemented policies and procedures according to their size and characteristics, including a procedure for due diligence.**

European Directive 2014/94/EU requires large listed companies to publish **non-financial information** comprising a description of their CSR policies (social and personnel matters, questions of the environment and human rights, anti-corruption activities), including **due diligence procedures** that have been implemented.

It is essential to refer to international reference works in this respect so as to be able to understand what exactly the concept of due diligence comprises.

### ■ What does "due diligence" mean?

The OECD guidelines for multinational enterprises give a clear definition: "due diligence" is understood as the **process** through which enterprises, as an integral part of their decision-making and risk management systems, are able to **identify, prevent, mitigate and account for** how they address their actual and potential adverse impact".

### ■ What are the essential stages in a due diligence process?

As regards the actual implementation of a due diligence process, there are several documents of broad international consensus which provide clarification. According to these documents, the following stages can be identified as essential for implementation of a due diligence process:

#### 1. Establishing a reliable system for sustainable supply chain management

- **adoption of a policy** at the highest corporate level
- **appointment of an officer**
- supply chain monitoring and transparency system
- **incorporation of expectations in contracts with commercial partners**
- implementation of a **complaints mechanism at the operations level**

#### 2. Identifying and evaluating risks throughout the supply chain

- **mapping** supply chains
- **assessment** of minor, average or major **risks** associated with the company's activities and those of its commercial partners.

#### 3. Defining and implementing a management strategy for risks identified

- **adoption of a risk management plan**
- **implementation of a risk management plan**

#### 4. Carrying out audits of the supply chain

- identification of the links in the supply chain requiring special attention, where there is a possibility of applying a leverage effect
- concentration of audits on these links.

#### 5. Reporting on due diligence carried out for supply chains

These reference works do not provide for civil or criminal liability of the parent or contracting company being taken into account in the case of damages occurring in the supply chain, in contrast to the texts currently before the French Parliament.

# Afep & Europe

## 1. Background and issues for companies"

The year 2015 was a difficult year for Europe. It was characterised by a series of crises, primarily by the migrant crisis which wrought havoc with European plans. Then the shock of the Paris attacks put the fight against terrorism (and against Islamic State) at the centre of concerns. The economic crisis remains a major concern, despite an incipient recovery. The Brexit question is behind many worries since the number of voters in favour of exiting the EU has exceeded for the first time the number of voters who want to remain. The victory of the Law and Justice party (PiS) in Poland in the presidential election and then in the general election is also a source of instability and tension within the European Union. Finally, the crisis in Ukraine, although de-escalated, continues to feed a real state of tension with Russia.

This series of crises has put the unity of the European Union in jeopardy as well as calling some of its principles into question. Member States appear highly divided on the migration question and are not able to find a European solution. Some of them have reinstated unilateral border controls. A split has appeared between countries accepting migrants and those refusing them. Likewise, the split between Member States that adhere to their budgetary constraints and those less inclined to do so has worsened, creating tension between Germany and Italy in particular.

## 2. Achievements and developments in 2015

Although these crises, and in particular the migrant crisis, have occupied centre stage of the European political scene, they should not obscure the numerous European projects that have progressed throughout 2015. This has been the first full year of activity of the new Parliament and the new European Commission appointed in 2014. There has been more intense legislative activity than in 2014, but less than in the last years of the Barroso II Commission. The legislators (European Parliament and Council) have focussed on bringing to a close legislative files that had been launched in the previous years, in particular air quality, trade secrets, banking structural reform, shareholder rights, financial transaction tax, reform of pension funds.

Few new proposals have been submitted, with the new Commission adhering to its objective of better regulation. Nevertheless, it has been able to present its first major political projects (capital markets union, digital single market, energy union, deepening the economic and monetary union, fight against tax fraud and tax evasion)

and several proposals (reform of ETS, prospectus, securitisation, automatic exchange of information on tax rulings, circular economy). It has also been able to progress international negotiations at varying speeds (specifically COP 21, TTIP, bilateral investment agreement with China).

*In 2015, corporate taxation became a European issue. While the EU direct taxation policy was extremely limited because of the very sensitive nature of the question for Member States, the Luxleaks case changed everything. The European Parliament has taken charge of the corporate taxation topic by creating a special parliamentary committee and demanding specifically "country-by-country" reporting from multinational companies and the end of provisions allowing aggressive tax planning. Under the political pressure from the European Parliament and NGOs, the Commission has also become involved. After compiling an ambitious action plan in June 2015, it succeeded in bringing the automatic exchange of fiscal rulings to a successful conclusion in just a few months. The proposals it tabled at the beginning of 2016 confirm this trend (see Section 3). The Commission is also interested, based on its powers to monitor state aid, in attacking a number of rulings on multinationals and by launching a broad investigation in member states. The position of Member States could also change under pressure from civil society.*

Throughout 2015 Afep focussed on promoting the development of a regulatory environment that encourage

the competitiveness of companies. Few of the files followed by Afep were brought to a conclusion in 2015, but those which were secured **progress in line with companies' expectations**: the trade secrets directive offers better protection of know-how, conclusion of the data protection reform brought about progress in terms of a one-stop-shop, even though this will entail new constraints for companies, while the negative effects of the market stability reserve in the ETS market and of the directive on medium combustion plants were limited. Afep supported initiatives of the Commission that could **alleviate the constraints on companies** (capital markets union) or create new opportunities for businesses (COP 21, circular economy). It also **mobilised itself to fight or amend legislative texts that could potentially prove counterproductive and worsen regulatory constraints**: this applies in particular to corporate financing (financial transaction tax, banking structural reform), their competitive environment (country-by-country reporting), their production and investment activities (ETS reform), or their obligations in terms of corporate governance (shareholder rights).

Afep also worked on strengthening its links with new institutional players in Europe. Many meetings took place, in order to enlarge AFEP's European network and to contribute to informing decision-makers of all political backgrounds and all nationalities of the association's priorities.

### 3. Outlook for 2016

The main task for the European executive in 2016 will be to contain the splits that have appeared between Member States; this will be an extremely difficult task, especially since the United Kingdom could vote as early as 2016 on whether to remain within the European Union. The Commission will also be judged on the progress it manages to make on migration policy and in terms of the economy.

After launching its major political projects in 2015, the Commission must bring new proposals derived from them to a **successful conclusion**. Among the most significant working topics of Afep, taxation **issues** will be high on the EU agenda, with the publication in January 2016 of the **anti-tax avoidance package** implementing the OECD BEPS action plan, especially the country-by-country reporting between tax authorities. A proposal on public country-by-country reporting is also expected for 2016, a new proposal for a common consolidated

corporate tax base (CCCTB) and perhaps in 2017 a proposal on transfer prices and the patents boxes. Case law of the Court of Justice of the European Union could also have a major impact on these matters in 2016. In the field of **energy and climate**, the year is also likely to be intense with the start of negotiations on the ETS reform and the circular economy package, proposals on non-ETS sectors, energy efficiency and renewable energy. An extended series of proposals is expected for the **digital single market**, some proposals and the start of negotiations on the **Prospectus Directive** within the framework of the **Capital Markets Union**, preparations to **review the antitrust regulation** and rules for enforcement of **intellectual property fights**, proposals on **labour mobility** and a **European platform for social rights**.

In 2016 Afep will continue to support the competitiveness of large companies vis-à-vis European institutions in order to ensure long-lasting economic recovery in Europe.



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