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Summary of the responses to the public consultation of 26 February 2018 on the revision of the corporate governance code of listed corporations

This summary as well as the procedures it required were conducted independently of the two business representative organisations responsible for drafting the code and of the respondents to the consultation. Its author acted exclusively in his capacity as an academic, without representing the particular interests of specific stakeholders.

For the second time when revising the corporate governance code, which they are responsible for drafting[1], Afep and Medef launched a public consultation concerning a certain number of specific proposals, enabling respondents to make comments.

This public consultation was facilitated by having a dedicated website featuring the consultable and downloadable version of the version of the revised code submitted for consultation, as well as a table comparing it with the previous version[2].

It was open for a reasonable and appropriate period of several weeks, which could be extended for whichever respondents requested it. There were no constraints regarding the format or the language of the responses. Respondents were free to choose whether or not they wanted their name to appear as having responded to the consultation.

A large number of respondents representing the entire range of corporate governance actors and stakeholders contributed to the consultation.

- Contributions were made by:
- investor or shareholder associations: Association de défense des actionnaires minoritaires [association for the defence of minority shareholders] (ADAM), Association Française de la Gestion financière [French asset management association] (AFG), Fédération française des associations d'actionnaires salariés et anciens salariés [French federation of employee and former employee shareholder associations] (FAS), International Corporate Governance Network;
- and investors themselves: Aviva Investors, BlackRock, Caisse des Dépôts et des Consignations [deposit and consignment office] (CDC), Fidelity International, Hermes Investment Management, Legal & General Investment Management;
- the High Committee on corporate governance (HCGE);
- issuers and companies: BioMérieux, CNP Assurances, Groupe SEB, Keynolt Inc., Natixis, Sanofi;
- various professional associations or organisations: AFNOR Certification, Association française de gouvernement d'entreprise [French corporate governance association], Association nationale des sociétés par actions [national association of joint-stock companies] (ANSA), Chamber of Commerce and Industry (CCI) of Paris Ile-de-France, Compagnie nationale des commissaires aux comptes [national institute of auditors], Institut français des administrateurs [French institute of directors] (IFA), Institut français de l'audit et du contrôle interne [French institute of internal auditors] (IFACI);
- proxy advisors: Institutional Shareholder Services Inc. (ISS), Proxinvest;
- CSR consultants: GES International AB, Principles for Responsible Investment, Vigeo Eiris;
- one professional association representing investor relations managers: Cliff;
- various other consultancy firms (B&L Evolution, Institut du Capitalisme Responsable [institute for responsible capitalism], PMT Conseil, Sipac SA) and one expert in company management (Hubert Landier);
- law firms: Bredin Prat, CMS Francis Lefebvre, Davis Polk & Wardwell, Dechert, Herbert Smith Freehills;
- professors or researchers (Viviane de Beaufort, Konstantinos Sergakis);

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1 Art. L. 225-37 and L. 225-68 of the Commercial Code.

2 www.consultation.codeafepmedef.fr

- members of the Conseil supérieur de l'égalité professionnelle [high council on professional equality] (Armelle Carminati, Laurent Depond, Carol Lambert);
- gender equality associations: group of 25 associations, Jump.

Alongside the public consultation phase, Afep and Medef held discussions with the Financial Markets Authority (AMF) and the Ministry of the Economy and Finance through the General Directorate of the Treasury, which underlined that the quality of the governance framework for large French listed companies should be considered as a common asset for the Paris financial centre.

Moreover, the legal departments of these two organisations proposed holding individual meetings with the various stakeholders that wished to do so, enabling their comments to be collected and their questions to be answered.

The methodology adopted for dealing with the responses to the public consultation was as follows:

- the responses were dealt with under the different questions asked in the consultation. They were also brought together in a single working document and arranged under the corresponding paragraphs of the code, so that both Afep and Medef and the author of this summary had a clear, ordered and comprehensive view of the various reactions and proposals;
- the governing bodies of the two organisations met on several occasions as the code evolved, before definitely approving the published version.

The responses to the public consultation show extremely wide support among the respondents for the corporate governance process and methodology, of which the legitimacy, effectiveness and broad guidelines continue to be the subject of clear consensus. During this revision, which took place during the government's preparation phase for the "Pacte" Bill and following the work of the "Value sharing and societal commitment of companies" working group headed by Mrs Agnès Touraine and Mr Stanislas Guérini, matters outside the scope of the actual substantive content of the corporate governance code were put to Afep and Medef, notably regarding the process of drafting the code and the composition of the HCGE.

This general observation having been made, this report will address in turn the amendments submitted for public consultation (Part One) and the other amendments made during the public consultation phase (Part Two).

Contents

Part One – The proposals submitted for public consultation

I. - Highlighting the tasks of the Board of Directors (§ 1.1)

Reminder of the proposal: place the paragraph relating to the tasks of the Board at the beginning of the code; specify the role of the Board in improving the long-term value creation of the company, notably by taking into account the social, societal and environmental dimensions of its activities; allow the Board to propose to the shareholders' meeting any statutory change to the corporate purpose that it deems appropriate.

1. Whereas the code traditionally placed the collegiality of the Board of Directors at the beginning of the topics addressed, the revision carried out in 2018 alters the structure and highlights the tasks of the Board of Directors, previously described in § 3. The Board of Directors no longer carries out the "missions", as in the previous versions, but the "tasks" laid down by the law. This change of position and term was well received.

2. The code now opens with a § 1.1 stating that "the Board of Directors performs the tasks conferred by the law and acts at all times in the corporate interest". Two comments can be made on this subject: 1/ "acts" at all times is more general and prescriptive than "to act" at all times, which appeared in the previous versions; 2/ the expression "corporate interest" is maintained in the code. Afep and Medef are aware that it is hardly orthodox from a legal viewpoint (as pointed out by Paris Ile-de-France CCI and one law firm). However, they continue to consider that it covers more than the expression "company's interest", which only concerns the interest of the company, and that it is therefore more protective of the business as such.

3. One of the major innovations of this revision is the addition, in § 1.1, of a new paragraph indicating that the Board of Directors "should endeavour to promote long-term value creation by the company by considering the social and environmental aspects of its activities. If applicable, it proposes any statutory change that it considers appropriate".

4. Even though the position of this provision was brought forward to § 1.1 during the procedure of revising the code, this final wording is not far off the wording that was submitted for public consultation. Practically all of the respondents, first and foremost investor associations and investors themselves, warmly welcomed it across all three dimensions, namely value creation, the long term, and social and environmental aspects. However, one proxy advisor regretted the use of the expression "endeavours to promote" and asserted that the code should provide greater clarity regarding the Board of Directors' involvement in defining the company’s purpose.

5. The actual sentence indicating that the Board may propose any statutory change that it considers appropriate was considered superfluous and attracted several criticisms, mainly from law firms. The organisations responsible for drafting the code nevertheless chose to leave it as it stands in order to demonstrate their commitment to certain possible legislative developments. They did not consider it necessary, however, to make express mention of amending the corporate purpose, since this is in any event included in the broader expression "statutory change".

6. With this new paragraph inserted in § 1.1, the code reflects the recommendations of the report "Business and the common good" submitted to the government by Nicole Notat and Jean-Dominique Senard. It also anticipates the future "Pacte" Law by immediately transposing the provisions expected in the area of the tasks of the Board of Directors, which, on account of its general nature, Article 1833 of the Civil Code as amended by the legislator cannot do.

7. This is a significant change to the code. Indeed, the new § 1.1 now expressly connects value creation by the company to the long-term perspective, which the respondents who answered in English naturally understood and welcomed as promoting "sustainable long-term value". Furthermore, the new §1.1 takes social and environmental aspects out of the area of non-financial communication to which they were previously confined. While the previous revision of the code had already made the Board of Directors an essential cog of CSR[3], this revision therefore goes one step further by stipulating that the value creation which the Board is responsible for improving should incorporate the twin parameter of the long term and the social and environmental aspects of the company's activities.

8. This consideration of social and environmental aspects is expected of the Board of Directors as a whole. However, companies may set up a CSR committee or identify a dedicated director. One French investor defended these two practices in the context of the consultation. For its part, the General Directorate of the Treasury suggested that, alongside the Board of Directors, large corporations should have a committee of stakeholders. This suggestion was not made by any of the respondents to the public consultation. Incidentally, the practicability of such a committee appears relatively risky from a legal viewpoint[4].

9. Finally, one law firm suggested that the code should expressly indicate that the new frame of reference of § 1.1 is necessary when reviewing any significant transaction, and notably for any planned public offering, merger, demerger, link-up, disposal or acquisition of significant assets. However, an indication of this kind was not considered necessary insofar as these transactions naturally fall within the scope of § 1.1 already.

II. - Tasks of the Board and review of the opportunities and main risks (§ 1.5 to § 1.8)

Reminder of the proposal: to underline the necessity of a review of the opportunities and main risks by the Board of Directors. This risk review shall go hand in hand with closely monitoring the quality of the information delivered publicly.

10. The principal task of the Board of Directors is to define the strategic orientation, which the code now asserts as early as § 1.2 (and no longer in § 3.1 as before). This bringing forward of the principal task of the Board is a significant move. It means ever-increasing involvement by the Boards of Directors of listed French corporations in determining the company's strategy (which incidentally

[3] B. Fages, Summary of the responses to the public consultation of 24 May 2016 on the revision of the corporate governance code of listed corporations, 2016, p. 25.

[4] In fact, such a committee of stakeholders can neither be a corporate body duplicating the Board of Directors (the responsibilities of which are reserved by the law) nor a true Board committee (in which case it would be made up entirely of directors). Surely this makes it just a panel? To be worthy of the name, it would consequently have to arrange for all stakeholders to be represented alongside the existing legal mechanisms – which is problematic – particularly in the case of employees, for whom the law wanted to ensure a presence on the body where decisions are made (the Board of Directors) and not just on a panel with uncertain tasks.

prompted one law firm responding to the public consultation to suggest that the code should recognise the strategic committee that exists within certain companies).

11. However, the code does specify additional tasks of the Board of Directors. It now expressly mentions reviewing the opportunities and risks (A), monitoring the plan to prevent and detect corruption and influence peddling (B), monitoring the specific procedures regarding non-discrimination and diversity (C) and reporting on the Board's activity (D).

A. Regular review of the opportunities and risks (§ 1.5)

12. § 1.5 states that the Board "regularly reviews, in relation to the strategy it has defined, the opportunities and risks, such as financial, legal, operational, social and environmental risks, as well as the measures taken accordingly". This addition was greeted extremely favourably by all of the respondents to the public consultation. This approval related to both the review of the opportunities and risks, and the regularity thereof – one law firm pointing out that the Board should engage with these issues regularly and not simply on the sidelines or for projects or transactions presented to it by the general management.

13. The review of the opportunities and risks follows on from the principal task of the Board of Directors, which is to define the strategic orientation, and is its accompanying measure. This is why it was added during the revision phase that this review is "in relation to the strategy it has defined". This implies follow-up and also concerns the "measures taken accordingly".

An illustrative list is provided of the types of risk to be taken into account: financial, legal, operational, social and environmental risks. Given the wide diversity of companies concerned, it was not considered appropriate, as one respondent wanted, for the code to provide a longer list of the opportunities and risks to be analysed, as each company must in fact tailor its overall approach to the relevant opportunities and risks to its own business sector. However, at the suggestion of one respondent to the public consultation, it is no longer stated that the review by the Board concerns the "main" risks. This does not mean that comprehensiveness is required but rather that it should be assessed whether or not the various risks identified are significant.

14. One professional association was concerned about the coordination between the tasks of the Board of Directors and those of the audit committee. However, as the committee intervenes on behalf of the Board of Directors, its work does not relieve the directors of their duty to review the opportunities and risks carefully: the code itself states that its duties "are inseparable from those of the Board of Directors" (§ 15; see also Art. L. 823-19 of the Commercial Code). Moreover, the role of the audit committee is to monitor the preparation and auditing of accounting and financial information, while the opportunities and risks pursuant to § 1.5 are of any nature, notably financial, legal, operational, social and environmental.

15. Along with other respondents, one law firm highlighted the importance of the Board of Directors having at its disposal all of the information needed for this regular review of the opportunities and risks. Following on from this observation, the final wording of § 1.5 now specifies that "to this end, the Board of Directors receives all of the information needed to carry out its task, notably from the executive officers". This addition is not redundant with generally informing the Board of Directors as laid down in § 1.4 insofar as it calls for detailed information about the aspects under § 1.5, enabling the Board to form its own assessment of the opportunities and risks.

16. However, the sentence that appeared at the end of § 1.5 in the version submitted for consultation, which indicated that the Board of Directors "monitors the quality of the information

delivered publicly", was redundant. In fact, it overlapped with the sentence in § 1.3 that states that the Board "monitors the quality of the information provided to shareholders and to the markets". It goes without saying that the information pursuant to this § 1.3 – maintained in the final version – also concerns reviewing the opportunities and risks (which, incidentally, is one of the elements that should appear in the management report laid down in Article L. 225-100-1, I of the Commercial Code).

17. Like any task detailed by § 1, information about the review of the opportunities and risks must be provided by the Board of Directors, which must report on its activity in the report on corporate governance, in accordance with § 1.8.

B. Monitoring the plan to prevent and detect corruption and influence peddling (§ 1.6)

18. The consultation enabled an additional task of the Board of Directors to be specified, supplementing the new duty of vigilance with regard to anti-corruption and influence peddling laid down by Article 17 of the Sapin 2 Law[5].

19. Paragraph 1.6 adds that, if applicable, the Board "ensures the implementation of a mechanism to prevent and detect corruption and influence peddling. It receives all of the information needed for this purpose. "

20. This paragraph does not duplicate the law. The Sapin 2 Law places the duty of vigilance solely on the executive officers, without considering the role of the Board of Directors. However, it exposes the company to sanctions (Article 17, II, final paragraph), besides the reputational risk related to incidents of corruption and influence peddling. The code therefore calls on the Board of Directors to verify the proper application of vigilance within the company, both in the interests of the effectiveness of the Sapin 2 Law and in order to prevent risks. However, the fact that Article L. 225-102-4 of the Commercial Code makes no mention of vigilance should not be seen as an omission: the law already requires its inclusion in the management report, which comes precisely within the competence of the Board of Directors: the code is simply avoiding duplication with the law.

C. Non-discrimination and diversity (§ 1.7)

Reminder of the proposal: specify that among its tasks, the Board should carry out specific verifications regarding non-discrimination and diversity, ensuring that the executive officers implement a policy in these areas, notably with regard to the balanced representation of men and women on the governing bodies beyond the Board of Directors.

21. The High Committee on corporate governance recently highlighted the low presence of women on executive or management committees[6]. Due to the fact that it goes beyond the single matter of parity and the single scope of the governing bodies in favour of combating discrimination and promoting diversity, the proposed revision was given a favourable and enthusiastic endorsement by the large majority of respondents, insofar as it broadens the concern for diversity already expressed

[5] Law no. 2016-1691 of 9 December 2016 on transparency, anti-corruption and the modernisation of business practice.

[6] High Committee on corporate governance, Annual activity report, 2017, p. 22.

in previous versions of the code regarding membership of the Board of Directors and of the Board committees[7] (§ 6.2).

22. According to § 1.7, the Board ensures "that the executive officers implement a policy of non-discrimination and diversity, notably with regard to the balanced representation of men and women on the governing bodies".

23. In the same way as for preventing and detecting corruption and influence peddling, the code limits itself to the Board of Directors monitoring the policy specified by the executive officers. It does not make the Board of Directors responsible for drafting this policy, although the monitoring may lead to substantial elements being suggested.

24. The adverb "notably" highlights gender equality, but this indication in no way excludes the other areas of discrimination, just as representation on the governing bodies is not the only aspect of this policy, which intends to cover the scope of the company extensively, in relation to taking into account the social and environmental aspects of its activities, which is an innovation of § 1.1.

25. However, one law firm nevertheless highlighted the ambiguity of the expression "governing bodies" which, in truth, is not recognised in company law. Does it include the Board of Directors itself? Given the existence of special provisions on diversity within the Board of Directors (§ 6.2), the Board seems to be excluded from this more general purpose paragraph – hence the use of this precise expression. Moreover, the executive officers are responsible for drafting and implementing this policy, whereas appointing directors falls within the competence of the shareholders' meeting, without the intervention of the executive officers. Naturally, there is nothing preventing the company from issuing a consistent general purpose policy which would include the membership of the Board of Directors.

26. According to another contribution, the expression "governing bodies" risks narrowing the provision to the company bodies alone. However, this is not the understanding of Afep and Medef, which chose this expression over that of company bodies precisely in order to refer to the diverse range of executive or management committees and even the senior management (top 100).

27. In this regard, one professional association proposed distinguishing the bodies that permanently and regularly assist the general management with its overall task, such as the executive committee, from the committees which may be set up on an ad hoc basis in relation to a particular matter or with a view to a specific project but which do not embrace all of the tasks of the general management, in order to reserve the application of § 1.7 for the permanent bodies alone. While this distinction seems sound, there is nothing preventing a company from adopting it in connection with its implementation of the code. It did not appear necessary to specify this fair analysis in the actual wording of § 1.7.

28. One respondent to the consultation was surprised that § 1.7 does not feature among the tasks of the nominations committee or of an ad hoc committee. However, besides the fact that this would hardly change things insofar as the committees never remove matters from the purview of the Board of Directors (§ 14.2), this would have diluted this new task. The importance of diversity and anti-discrimination means that it is necessary to involve the entire Board of Directors directly, and the policy

[7] Regarding the removal of the specific numerical recommendation for the balanced representation of men and women on Boards and the addition of diversity criteria: B. Fages, Summary of the responses to the public consultation of 24 May 2016 on the revision of the corporate governance code of listed corporations, 2016, pp. 7-8.

which the latter must implement concerns all of the governing bodies, which goes beyond the tasks of the nominations committee (§ 1.1).

29. One association and one investor proposed setting targets for the company officers and making these diversity targets one element of the variable compensation. A Board of Directors may adopt this technique, but this is not necessary in the light of the spirit of the rule laid down by the code: a serious and credible non-discrimination and diversity policy does not have to include thresholds to be met.

30. These same respondents also proposed highlighting effectiveness and verifiability, having the implementation of the non-discrimination policy "certified" and involving the nominations committee and the compensation committee in this. A Board of Directors may adopt these ideas. The code involves the Board in monitoring the proposed policy, this monitoring providing the opportunity for dialogue enabling the specific characteristics of the company to be identified in order to adapt the policy. The "certification" may be obtained on the basis of Article L. 225-102-1, V of the Commercial Code.

31. One specialist CSR organisation suggested widely disseminating the policy developed, within the company and among recruitment firms, suppliers and clients. This wide dissemination is not the objective of the code.

32. Some investors proposed drafting a specific communication on this topic, taking its inspiration from practices in other countries, such as indicating the gender pay gap and the solutions envisaged to rectify this. This proposal is already a substantive rule of law pursuant to Article R. 225-105 of the Commercial Code, in relation to the non-financial performance statement.

D. **Information about the Board's activity (§ 1.8)**

33. § 1.8 specifies that "The Board's activity is reported in the report on corporate governance". One professional association regretted the fact that this paragraph merely quotes the law. However, the law specifies a list of information that should be communicated in the management report and the report on corporate governance, in particular the membership as well as the manner in which the work of the Board is prepared and organised (Article L. 225-37-4(5) of the Commercial Code) but does not tackle the Board's activity in a comprehensive manner. This provision has the merit of highlighting the need for the Board of Directors to report on its activity and, in particular, to communicate about all of its choices with regard to this code as well as regarding its actual implementation. Consequently, this provision corresponds to all of the suggestions made during the consultation to impose here and there that the Board of Directors should report on its decision. § 1.8 incorporates all of these decisions, and it is not necessary to quote it in every paragraph, otherwise the code could become too cumbersome.

III. - **Lead Director (§ 3.2)**

Reminder of the proposal: in the event of the combination of the offices of Chairman and Chief Executive Officer, it is indicated that the Board may appoint a Lead Director from among the independent directors.

34. Created for practical reasons, the Lead Director's positive and indeed key role is unanimously recognised as a guarantee of the independence of the Board of Directors and of the quality of its work.

35. § 3.2 states that the "Board may appoint a Lead Director from among the independent directors, particularly when it has been decided to combine such offices".

36. The term "may" seems to make an obvious point by expressing an option afforded where the law is silent. However, the code is more innovative than the 2016 version, which merely alluded to the director's independence. This paragraph dedicated to the appointment is more encouraging, and clearly recognises the possibility of appointing a Lead Director in any company, regardless of the type of management, as desired by the contributions. The adverb "particularly" specifically highlights the event of the combination of the offices to encourage the appointment of a Lead Director in this case.

37. Some institutional investors and professional associations wanted the enhanced tasks and powers of the Lead Director to be clearly explained, either in the code or in the internal rules, echoing the AMF's recommendation[8]. However, this is already laid down in § 3.3 (formerly § 6.3).

38. By specifying that the Lead Director is appointed from among the independent directors, the code tightens up the recommendation in the previous version of the code: it is not prohibited to appoint a non-independent director, but as independence appears to be inherent in the office of Lead Director, any non-compliance should be specifically explained.

39. Some respondents preferred the title "Vice President". For the sake of clarity, a single term has been adopted in § 3.2 in relation to the Lead Director. This does not prevent the Vice President, if applicable, and the Lead Director both being covered by § 20.2 on directors' compensation on account of special tasks.

40. More broadly, the various forms of management gave rise to several contributions. One consultant and one institutional investor wanted the code to state its preference for the separation of the offices. Several institutional investors argued in favour of a regular review of the choice in the event of the combination of the offices. As the law gives the option, the code takes a neutral stance, both with regard to the choice between the unitary model and the dual model, and with regard to the choice, within the unitary model, between the combination or separation of the offices. However, § 3.2 contains an increased requirement to state reasons, since it now says that "it is up to the Board to decide and explain its decision" (while § 2.2 of the November 2016 version merely stated that "it is up to the Board to decide on the basis of its own specific constraints").

41. The High Committee on corporate governance and one professional association proposed introducing a reasonable waiting period stating, in the event of the separation of the offices, that the Chairman of the Board of Directors should not have served as Chief Executive Officer within the same company in the five years prior to the date of their appointment. In the same spirit, one law firm and one proxy advisor wanted a Lead Director to be appointed when the Chairman is not independent. These scenarios show the usefulness of extending the Lead Director to all forms of management, including when the offices are separate.

42. Finally, the public consultation enabled it to be stated that organising one meeting of the Board of Directors each year not attended by the executive officers, which appeared in the previous version of the code, is a minimum (§ 10.3).

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[8] AMF recommendation 2012-02, prev., p. 9.

IV. - **The Board and communication with the shareholders (§ 4.4)**

Reminder of the proposal: to respond to demand from institutional investors, it is proposed that shareholders' access to the Board of Directors on corporate governance matters should be entrusted to the Chairman of the Board of Directors or, if applicable, the Lead Director, the latter having to report to the Board on this task.

43. The respondents proved to be broadly in favour of this proposal, recognising this as a matter that the HCGE[9] and a Club des juristes committee[10] had identified as being central with regard to an already extremely widespread practice and with regard to expanded shareholder engagement in the investment world and in the work of large international institutions. Dialogue with shareholders is thus encouraged in the context of the transposition of the revised Shareholders' Rights Directive[11]. Furthermore, the fact that the code itself recommends it, albeit in a prudent manner, is liable to render obsolete those legal arguments which, in the past, might have been put forward to reject this practice. This is therefore a real step forward. It goes in the direction desired by the General Directorate of the Treasury.

44. Following this consultation phase, § 4.4 states that "shareholder relations with the Board of Directors, particularly with regard to corporate governance aspects, may be entrusted to the Chairman of the Board of Directors or, if applicable, to the Lead Director. He or she shall report on this task to the Board of Directors". As can be seen, the word "dialogue" is not used. However, the word "relations" encompasses it, and this term is more satisfactory in any event than that of "access" to the Board of Directors, which appeared in the version submitted for consultation. The general heading of § 4 now refers to "communication with shareholders and the markets".

45. In its revised version, the code therefore suggests organising relations between the Board and the shareholders by making it a special task entrusted to the Chairman or the Lead Director. One law firm regretted the code's timidity on a matter this strategic, wanting it to be more prescriptive and detailed. It asserted that regular, calm and permanent dialogue builds the loyalty of the shareholder base, which is conducive to stabilising the capital of large listed corporations and limiting the risks of opportunistic activist campaigns. The author of this paper cannot disagree with this[12]. Nevertheless, the recognition of dialogue within the code is a significant innovation. Those companies that wish to do so may, of course, augment it and will undoubtedly be encouraged to do so by calls from some of their shareholders.

46. Numerous respondents from all backgrounds found it regrettable that this dialogue should only be entrusted to the Chairman of the Board or, if applicable, to the Lead Director. They asserted that, in the absence of a Lead Director, dialogue only giving access to the Chairman of the Board does not necessarily correspond to what investors are looking for. Furthermore, they wanted the code to state that: (i) subject to compliance with the legal provisions, directors are free to hold a dialogue with any shareholder that indicates their desire to do so; (ii) depending on the subject at hand, the shareholder can turn to any particular director, and particularly the chairman of a committee when appropriate.

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9 High Committee on corporate governance, Annual activity report, 2017, p. 23.

10 Club des juristes, Committee on dialogue between directors and shareholders, Dec. 2017.

11 Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement.

12 See final report of the Club des juristes, Committee on dialogue between directors and shareholders, Dec. 2017.

As the authors of the code understand it, these are matters regarding which each company is responsible for adopting its own position, notably in view of the demands expressed by its various shareholders.

47. The code does not determine the topics addressed in the framework of the dialogue and merely indicates, with the use of the adverb "particularly", the theme of corporate governance, which does not exclude discussions on strategic matters. The High Committee on corporate governance, some institutional investors and some law firms wanted to broaden the dialogue, subject to privileged information, to the areas of competence of the Board of Directors, particularly the strategy and company officers' compensation as well as an explanation of the positions adopted by the Board previously communicated, and indeed value creation including the social and environmental aspects of the company's activities. Just one law firm insisted on confining the dialogue to corporate governance alone, defined specifically. However, the Board is free to determine the topics of the dialogue, with corporate governance appearing to be a minimum basis.

48. With regard to the arrangements for dialogue, the High Committee on corporate governance is of the opinion that this dialogue should be approved beforehand by the Board and involve close coordination with the Chief Executive Officer and his or her colleagues responsible for investor relations. One professional association suggested that a framework should specifically determine all the arrangements for dialogue. A large number of respondents wanted precautions to be in place so as not to undermine the principle of equality between shareholders and the collegiality of the Board of Directors. These may be provided for in the internal rules (§ 3.3).

49. § 4.4 states that the director responsible for shareholder relations should report on this task to the Board of Directors. This detail serves to pass on the learnings from the exchanges that have taken place to each director, thus enabling them to participate in dialogue indirectly. One law firm observed that, in more general terms, the company officers should regularly report any exchanges with shareholders, particularly at road shows, to the Board of Directors.

V. - **Directors representing employees (§ 7.1)**

Reminder of the proposal: to ensure the presence of directors representing employees precisely where the strategic decisions are made, it is proposed that they should be appointed within the company that applies the code. When several listed companies from the same group apply the provisions of the code, it is up to the Boards to determine the company or companies eligible for this recommendation.

50. Most responses were in favour of the proposal. However, its initial wording gave rise to a number of comments that allowed the organisations responsible for drafting the code to undertake significant rewriting during the consultation phase.

51. In its final version, the revised code contains a new § 7.1 according to which: "Within a group, the directors representing employees elected or appointed in accordance with the legal requirements sit on the Board of the company that declares that it refers to the provisions of this code in its report on corporate governance. When several group companies apply these provisions, the Boards shall determine the corporation(s) eligible for this recommendation."

52. The code thus tightens up the provisions stemming from the Law on social dialogue and employment of 17 August 2015[13]. In fact, the law only imposes the presence of employee shareholders within the company above certain thresholds and allows the group to reduce the Board of Directors in which the employee directors are appointed to the level of a subsidiary in the case of a holding or, on the contrary, to raise it to the level of a parent company. The new § 7.1 takes into account the report by Nicole Notat and Jean-Dominique Senard, which encouraged the practice of addressing itself certain situations contrary to the spirit of the law which could arise in the case of a group of companies[14]. The revised code addresses this requirement.

VI. - Clarity and transparency of information (§§ 10.1; 13.4)

Reminder of the proposal: the annual report should mention the attendance level of each director at meetings of the Board and at Board committees; and the company should state the reasons for proposing his or her appointment to the shareholders' meeting.

53. Most of the responses were in favour of this proposal for enhancing shareholder information, both with regard to the individual attendance level of directors (A) and with regard to the justification for appointments to the Board of Directors (B).

A. Regarding the attendance level of each director at meetings of the Board and at Board committees (§ 10.1)

54. § 10.1 now states that the report on corporate governance, in its description of the Board of Directors' work, should provide information relating to the directors' individual attendance, and no longer the overall attendance, as suggested by the AMF[15].

55. Two issuers nevertheless observed that a director's effectiveness cannot be measured by his or her attendance and that individual attendance is not consistent with the principle of collegiality. The provision, which one proxy advisor described as a "must have" and which was strongly supported by the investors, was nevertheless maintained. It serves to ensure transparency regarding directors' regular attendance, which is just one sign of their commitment. Furthermore, this is basic information for reporting on their activity to the shareholders' meeting that appointed them.

56. One institutional investor suggested going further by wanting the company itself to provide individual justification for low attendance levels. While such information may be possible, it does not correspond to the objective of this provision, which is for the directors themselves to report on their activity, especially since the report on corporate governance is drafted by the Board of Directors.

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[13] Within the legal mechanism, the representation of employees on the Board of Directors takes two forms. On the one hand, directors representing employee shareholders are elected by all the French and foreign staff who are shareholders of the company, then elected by the shareholders' meeting. On the other hand, directors representing employees are proposed by each representative union, without having to be elected in the shareholders' meeting, and have the right to vote at the Board of Directors (Art. L. 225-27-1 and L. 225-79-2 of the Commercial Code).

[14] N. Notat and J.-D. Senard, Business and the common good, p. 58.

[15] AMF, Report on corporate governance, executive compensation, internal control and risk management, 2017, p. 24.

B. Regarding the reasons for proposing the appointment of a director to the shareholders' meeting (§ 13.4)

57. Furthermore, to enable informed voting by shareholders when a director is appointed or reappointed, § 13.4 states that the booklet or the notice calling the shareholders' meeting should, besides biographical information outlining the director's curriculum vitae, also include "the reasons for proposing his or her appointment to the shareholders' meeting". As it stands, this wording takes into account the reaction of several respondents, who criticised the fact that, in the version initially submitted for consultation, the need to outline the reasons for the appointment were limited to the scenario of a first appointment. These criticisms were listened to. Following the consultation, this new recommendation concerns both appointment and reappointment.

58. This addition did not receive unanimous support, either for appointment or reappointment. Some issuers preferred to stick to the biographical information alone and were worried about the additional work generated, and indeed about a possible lack of sincerity in the reasons put forward. Most of the respondents, first and foremost the investors, nevertheless regarded it as a useful step forward.

VII. - Conflicts of interest (§ 19)

Reminder of the proposal: to strengthen the recommendations regarding ethical rules for directors by adding that, in the event of a conflict of interests, the director, who must already abstain from voting on the related resolution, should abstain from attending the debate.

59. The revised code tightens up § 19 in connection with ethical rules for directors and recommendations relating to conflicts of interest. In addition to having to report to the Board any conflict of interests, whether actual or potential, and abstain from taking part in voting on the related resolution, the director concerned must now abstain from attending the debate.

60. The proposal, which enshrines a recommendation by the AMF[16], was unanimously well received, especially since it corresponds to an already widespread practice[17].

61. The latitude of the Chairman of the Board was nevertheless discussed. One law firm and one company wanted the Chairman to be expressly granted the power to modulate the rule on abstention, notably in order to be able to deviate from it when the conflict of interests is only potential and not actual. This approach was not adopted.

62. One professional association wanted the Chairman to be asked to verify that there was no conflict of interests at the start of each Board meeting, based on the agenda. Once again, the suggestion was not pursued. The merit of § 19 is that it highlights the director's individual responsibility in reporting his or her own conflicts of interest. The idea is not to shift its detection to the Chairman alone.

63. The General Directorate of the Treasury suggested supplementing this provision with the disclosure of directors' annual conflicts of interest statements, as well as for each significant capital

[16] AMF recommendation 2012-05 on general meetings of shareholders of listed companies, updated on 24 October 2017, proposal 27.

[17] AMF, Report on corporate governance, executive compensation, internal control and risk management, 2017, p. 39.

transaction. Having looked into this suggestion, the organisations responsible for drafting the code were of the opinion that such disclosure was already required by – self-executing – European prospectus legislation, applied by the companies in their registration documents.

VIII. - Executive officers' compensation (§ 24.1.1)

Reminder of the proposal: take CSR considerations into account in determining executive compensation.

64. Following on from the highlighting of the social and environmental aspects in respect of value creation (§ 1.1), § 24.1.1 includes among the objectives taken into account in assessing the compensation of executive officers "one or more criteria related to social and environmental responsibility". The consultation enabled the adoption of the requirement of "criteria", which is more specific and verifiable than straightforward "considerations". This amendment was unanimously well received. Incidentally, it corresponds to a desire expressed by the General Directorate of the Treasury.

65. One law firm was concerned about the possibility of applying such criteria to an element of compensation other than medium or long term, such as annual variable compensation. However, taking CSR into account is indicated as a general principle in determining executive compensation and is therefore intended to apply to all forms of compensation. This general principle status enables these requirements to apply to the variable compensation too, in which respect it is therefore unnecessary to repeat that it should favour the medium term and long term, in consideration of CSR aspects.

66. One contribution highlighted the relative opacity of certain variable compensation calculation methods and suggested requiring that the performance criteria should be objective, a notion already included in the requirement of understandability. In fact, the code specifies that "the rules should be simple, stable and transparent" and that "the performance criteria used must correspond to the company's objectives, and be demanding, explicit, and, to the greatest extent possible, long-lasting" (§ 24.1.2).

IX. - Composition and tasks of the High Committee on corporate governance (§ 27.2)

Reminder of the proposal: to specify and enhance the composition and tasks of the High Committee.

67. The composition of the High Committee on corporate governance was significantly revised when the code was revised. Given the diverse range of respondents to the public consultation, this sensitive point could not of course result in identical viewpoints, but lines of convergence emerged which the authors of the code took full advantage of.

68. The HCGE, a body seen as essential by the large majority of respondents to the consultation, is becoming more diverse and greater in size, increasing from seven to nine members, through the addition of:

- a fifth member from among individuals who either hold or have held directorships within companies that refer to this code (and no longer "executive positions in international groups" as before);

– a fourth member from among individuals representing the investors and/or chosen for their legal or ethical expertise (and no longer legal "and" ethical as before).

69. This increase in the number of members of the HCGE is intended to open it up to a diverse range of profiles and expertise – a desire notably expressed by the General Directorate of the Treasury. Until now, however, experience has shown how difficult it is to identify individuals "representing" the "investors", due notably to the huge disparity between investors and the lack of representative organisations uniting them. However, the situation might evolve, and it is in order to encourage this that Afep and Medef are showing their willingness here to involve these individuals more extensively in the work of the HCGE.

70. It is now expressly specified that the members of the HCGE are appointed by Afep and Medef. They must declare their directorships in listed companies and, from now on, their participation in professional associations.

71. The consultation and reflection phase also enabled § 27.2 to be supplemented with a rule enhancing the HCGE's authority to investigate. The letter whereby the HCGE addresses a company that does not comply with the code without sufficient explanation allows the latter a two-month period in which to respond. If it does not respond within this period, the company runs the risk of the investigation being made public, thus codifying a practice that has recently demonstrated its value.

72. Its tasks having been enhanced, the HGCE is consequently in a better position to "propose to Afep and Medef updates to the code in the light of changing practices and recommendations that it may have made to companies in the course of its task of monitoring the implementation of the code".

X. - **Procedure for revising the code (§ 28)**

Reminder of the proposal: to enshrine the public nature of the procedure for revising the code.

73. The consultation enabled the wording of this new § 28 to be amended. In its final version, it states that the code is revised at the initiative of Afep and Medef, which regularly review the appropriateness of updating the code, notably in line with proposals from market participants. These participants naturally include French or foreign investors and the many associations representing certain categories of investor.

74. It is furthermore added that the proposed revisions are submitted for public consultation, which, in actual fact, has already been the case since the previous revision in November 2016, showing the involvement of a number of stakeholders in drafting the code.

75. Overall, the respondents delivered an extremely positive appraisal of these advances, even though certain investors or proxy advisors, while not denying that the French corporate governance code is one of the strictest in Europe, seem not to be reconciled to the fact that the legislator, 10 years ago now (L. 2008-649, 3 July 2008), entrusted the business representative organisations with drafting it (see today Art. L. 225-37-4(8) of the Commercial Code). However, this is a common criticism. It does not prevent Afep and Medef from carrying out their task of drafting the code in a serious, demanding and open-minded manner. Nor does it prevent these investors or proxy advisors from making an effective contribution to improving practices. The recent changes concerning social and environmental aspects or concerning dialogue between directors and shareholders are just two examples among many.

Part Two – The other amendments made during the public consultation phase

76. The public consultation phase allowed the emergence and handling of subjects other than those initially anticipated by the organisations responsible for drafting the code.

I. - Conclusion of a non-competition agreement with a company officer (§ 23)

77. The matter of non-competition agreements did not feature in the consultation, which did not prevent one proxy advisor from observing that any appointment of a company officer should unhesitatingly, from the beginning of the term of office, entail strict confidentiality and non-competition clauses, and that the indemnity received should follow the procedure for differed compensation. Mindful of the need for a stricter framework, the organisations responsible for drafting the code did not pursue this idea of systematically generalising the non-competition clause, which would incidentally be impractical from the point of view of contractual freedom. Instead, they tightened their recommendation to ensure that concluding a non-competition agreement is not used as a roundabout means to evade other rules.

78. Under the terms of § 23.4, when the agreement is concluded, the Board must make provision for "no non-competition benefit to be paid once the officer claims his or her pension rights". Furthermore, it is specified that "in any event, no benefit can be paid over the age of 65".

79. § 23.5 rules out any possibility of concluding a non-competition agreement at the time when the company officer leaves, whereas the previous version of the code permitted it subject to giving reasons. The code is therefore laying down a formal prohibition here which, due to its firm stance, is not subject to the "comply or explain" principle. In so doing, the code appears to be particularly prescriptive for a soft law instrument.

80. Finally, § 23.6 specifies that "the non-competition benefit must be paid in instalments during its term". This new recommendation, although more discreet than the previous prohibition, is bound to bring about interesting changes in the negotiation and execution of non-competition agreements.

II. - Greater consideration of diversity on the Board of Directors (§ 6.2)

81. In connection with the amendment submitted for public consultation on the topic of the diversity policy (see supra nos. 21 to 32), the consultation enabled, in § 6.2, among the criteria for diversity in the membership of the Board of Directors, the addition of age, qualifications and professional experience, in order to ensure its consistency with the new Article L. 225-37-4(6) of the Commercial Code. For the same reasons, the content of the report on corporate governance on this topic is more precisely clarified: it must present "a description of the diversity policy applied to members of the Board of Directors as well as a description of the objectives of this policy, its implementation measures and the results achieved in the past financial year"[18].

III. - Greater consideration of conflicts of interest (§ 8.5.3)

82. Although the criteria for directors' independence were not among the topics on the revision programme, the public consultation prompted the authors of the code, at the request of the AMF, to

[18] Cf. AMF recommendation 2012-02, prev., p. 4.

include consulting on the list of activities in § 8.5.3 liable to give rise to risks of conflict of interests not compatible with a director qualifying as independent.

83. Generally speaking, although it was not part of the debate, the topic of directors' independence gave rise to several spontaneous opinion statements from respondents to the public consultation. These notably concerned the procedure for appointing these directors (considered by one institutional investor as inferior to the British model), the proportion of these directors within controlled companies (considered too low by one institutional investor and one proxy advisor) and the 12-year period after which a director is assumed to no longer be independent (considered too long by one institutional investor).

IV. - Greater consideration of social and environmental aspects

84. Following on from the proposed amendment on this topic from the start of the public consultation, the contributions from the respondents prompted Afep and Medef to make two further amendments.

85. The first takes into account the observation by one specialist CSR organisation, which stressed the importance of the expertise required by directors in order to understand opportunities and risks relating to social and environmental responsibility. § 12.1 has been amended accordingly to include CSR aspects in the scope of the supplementary training with which each director can be provided if he or she considers it to be necessary.

86. The second concerns the audit committee. Following on from the consideration of the social and environmental aspects of the company's activities (§ 1.1) and the review of the opportunities and risks, notably social and environmental risks (§ 1.5), the consultation resulted in non-financial information being added in § 15.2 to the elements monitored by the audit committee, and the management presentation of the exposure to risks provided to the audit committee being extended to risks of a social and environmental nature. This addition is in response to the transposition into French law of the Non-Financial Reporting Directive[19] (Article L. 225-102-1 of the Commercial Code).

87. With regard to committees in general, it should be pointed out that one shareholder association wanted sufficiently detailed agendas and minutes for each committee to be sent to all directors in order for them to be fully informed about all matters.

[19] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.

V. - Supplementary pension schemes of company officers (§ 24.6.1)

88. At the request of the AMF, § 24.6.1 makes the granting of a supplementary pension subject to the company officer's performance: it is specified that "Except where its purpose is to offset the loss of potential entitlements in respect of which the benefit has already been subject to performance conditions, the award of entitlements or compensation intended to constitute a supplementary pension scheme is subject to such conditions. This recommendation applies to the schemes set up as from the publication of the revised code in June 2018. It does not apply to the schemes pursuant to the sixth paragraph of Article L. 225-42-1 of the Commercial Code".

VI. - Technical amendments

89. During the public consultation phase, often thanks to the responses provided by the respondents, several minor amendments were made of an essentially technical nature.

90. Occurrences of the expression "annual report" have been replaced by "report on corporate governance" to take into account the new wording of Article L. 225-37 of the Commercial Code, established by Order 2017-1162 of 12 July 2017 containing various measures for simplifying and clarifying companies' disclosure requirements. Consequently, §§ 1.8, 2.2, 6.2, 7.1, 8.5.3, 9.3, 10.1, 13.3, 14.2, 19, 20.4, 22, 24.3.2, 25, 25.2, 27.1 and 27.2 have been amended, and the wording of § 25 has been adapted.

91. Tables for presenting information about the Board are now appended to the code.

92. Insofar as the mechanism relating to say on pay has now entered into law (Art. L. 225-37-2, L. 225-82-2 and L. 225-100 of the Commercial Code) and it is not the intention of the corporate governance code to duplicate this, a footnote now states that § 26 only applies to companies not affected by the legal rules. However, and contrary to what one respondent to the public consultation suggested, § 24.3.4 on extraordinary compensation remains relevant and continues to apply to all companies. In fact, the recommendation it contains does not affect the competence of the shareholders' meeting to decide such compensation but aims to introduce a requirement of a substantive nature which the Board and the compensation committee must take into account.