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Corporate Governance

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Contents

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1. Introduction

1.1 Forms of Corporate/Business Organisations

There are two main types of companies in France: civil companies and commercial companies. Given that civil companies are less affected by corporate governance issues due to their simpler and less widely used structure, this article will only focus on commercial companies.

The most common forms of commercial companies are limited liability companies (*sociétés à responsabilité limitée* – "SARL"), simplified companies limited by shares (*sociétés par actions simplifiée* – "SAS") and public limited companies (*sociétés anonymes* – "SA"). In 2018, 36% of new companies created were SARL, 61% were SAS and less than 3% were SA.

Each of these entities (SARL, SA and SAS) provides their shareholders with limited liability, meaning that the liability of the shareholders is limited to their own contributions to the company.

The main characteristics of the SA, SAS and SARL are as follows:

- The SA is subject to a rigid structure governed by the French Commercial Code (*Code de commerce*). It must be incorporated by at least two shareholders (seven if the SA is listed) with a share capital of at least EUR37,000, and can be listed and therefore obtain financing on financial markets.
- The SARL has fewer rules than the SA. It can have a sole shareholder, is not subject to minimum share capital (EUR1 only), cannot be listed or make a public offer of securities (*offre au public*), and has shares that, pursuant to the law, are transferable subject to the prior approval of the shareholders.
- The SAS is a much more flexible structure, given that most of its functioning is ruled by the articles of association (*statuts*). It can have a sole shareholder and is not subject to a minimum share capital (EUR1 only), but cannot have its shares listed or make a public offer of securities.

This article will only deal with SA, SAS and SARL forms as they are the most prominent corporate forms in France, to the exclusion of other existing forms, such as partnerships limited by shares (*société en commandite par actions*), partnerships (*société en nom collectif*) and limited partnerships (*société en commandite simple*).

When used in this article, the term "listed company" refers to companies listed on a regulated market (Euronext in France) and companies listed on multilateral trading facilities (Euronext Growth, the Free Market, etc).

1.2 Sources of Corporate Governance Requirements

Generally speaking, the French Commercial Code and the French Monetary and Financial Code (*Code monétaire et financier*) (ie, hard law) set corporate governance rules for most companies.

In addition, French companies must apply the relevant EU regulations, which are directly applicable – especially, but not exclusively, the Prospectus Regulation (Regulation (EU) No 2017/1129 of 14 June 2017) and the Market Abuse Regulation (Regulation (EU) No 596/2014) for listed companies.

Moreover, in France, the following sources of corporate governance requirements or guidelines apply or can apply to listed SAs:

- the regulations and doctrine established by the French Financial Markets Authority (*Autorité des marches financiers* – "AMF"), including its General Regulations, its positions and its recommendations, along with case law derived from the decisions of its Enforcement Committee (*Commission des Sanctions*);
- the recommendations of the European Securities and Market Authority ("ESMA"); and
- soft law regulations such as the AFEP-MEDEF code, designed for large listed companies, and the MiddleNext code, initially focused on small and medium-sized listed companies.

By definition, soft law regulations are non-binding. However, when a company whose securities are admitted to trading on a regulated market voluntarily applies a corporate governance code, the French Commercial Code requires that company to identify any provisions of that code it has chosen not to apply, and to state the reasons for its non-compliance in its corporate governance report.

Finally, companies can set internal rules (i) in their articles of association, (ii) in internal regulations (regarding the board of directors (*conseil d'administration*) or the supervisory board (*conseil de surveillance*) and their special committees when applicable), (iii) in codes of ethics (codes that define the publicly recognised standards of socially responsible behaviour that the company intends to apply) and (iv) in codes of good conduct.

1.3 Corporate Governance Requirements for Publicly Traded Companies

Companies whose securities are admitted to trading on a regulated market must comply with the following mandatory corporate governance requirements:

- *Gender balance*: each gender must represent at least 40% of directors management board members. As an exception, if the board of directors/supervisory board is made up of eight members or fewer, the gender gap may not be greater than two directors/supervisory board members.
- *Corporate governance report:* each year, the board of directors or the supervisory board must submit a corporate governance report to the shareholders' general meeting providing information regarding, inter alia, the compensation allocated to corporate officers in the last year and their compensation policy for the current year, the composition and conditions surrounding the preparation and organisation of the board's work, whether or not the company refers to a corporate governance code, and factors likely to have an influence in the event of a public tender offer.
- *"Say on pay"*: the shareholders must vote each year on the compensation policy (including the fixed, variable and exceptional compensation) for the corporate officers (excluding the members of the board of directors, if any) for the current financial year (ex ante vote). If such vote is negative, the compensation policy is the same as the one applicable for the previous financial year. In addition, the shareholders must vote each year on the implementation of the compensation policy (including the fixed, variable and exceptional compensation) for the corporate officers (excluding the members of the board of directors and the members of the supervisory board) in respect of the previous financial year (ex post vote). If such vote is negative, variable and exceptional compensation cannot be paid to such persons.
- *Director(s) or supervisory board member(s) representing employees*: the articles of association of an SA must provide for the appointment of a member or members representing the employees to the board of directors or the supervisory board if, over two consecutive financial years, the SA employs (i) at least 1,000 permanent employees together with its direct or indirect subsidiaries having their registered office in France, or (ii) at least 5,000 permanent employees together with its direct or indirect subsidiaries having their registered office in France or abroad. There may be exceptions to this obligation (in particular for the direct or indirect subsidiaries of a company subject to this obligation). The number of directors/supervisory board members representing the employees shall be (i) at least one in companies that have 12 or fewer directors/supervisory board members and (ii) at least two in companies that have more than 12 directors/supervisory board members. This threshold is lowered to eight by the Pacte law (*Loi Pacte*), but

companies will have to comply with this rule within the six months following the ordinary general meeting to be held in 2020.

- *Director(s) or supervisory board member(s) representing employee shareholders*: one or more directors/supervisory board members representing the employee shareholders must be appointed if the employees of the listed company and its affiliates hold more than 3% of that company's share capital.
- *Audit committee*: an audit committee must be established to assist the board of directors or the supervisory board so that the latter has the information and resources needed to ensure the quality of internal controls and the reliability of the financial information provided to shareholders and the financial markets. For example, the audit committee renders a recommendation for the appointment of the company's statutory auditors and monitors the achievement of their mission. Under certain conditions, it is possible for the board of directors or the supervisory board to assume the functions of the audit committee, but the AFEP-MEDEF corporate governance code recommends the creation of a separate body.

2. Corporate Governance Framework

2.1 Key Rules and Requirements

Gender balance: the gender balance obligation mentioned above (**1.3 Corporate Governance Requirements for Companies with Publicly Traded Shares**) is also applicable to companies that, for the third financial year in a row, employ an average of at least 250 permanent employees and have a net turnover (*chiffre d'affaires*) or a total balance sheet (*total de bilan*) of at least EUR50 million.

Anti-corruption: under the Sapin 2 Law (*Loi Sapin 2*) dated 9 December 2016, companies that have a turnover exceeding EUR100 million and at least 500 employees, or that are part of a group whose parent company has its registered office in France and that has at least 500 employees, must implement a programme to prevent and detect corruption.

Duty of care: since 28 March 2017, (i) an SA employing at least 5,000 employees together with its direct or indirect subsidiaries having their registered office located in France and (ii) an SA employing at least 10,000 employees together with its direct or indirect subsidiaries having their registered office located in France or abroad must establish and implement a vigilance plan (*plan de vigilance*). The vigilance plan and the report on its effective implementation must be included in the management report (*rapport de gestion*). The vigilance plan's role is basically to identify, analyse and rank potential risks, and to propose action in order to mitigate or prevent these risks.

Corporate governance report: such obligation, as presented in **1.3 Corporate Governance Requirements for Companies with Publicly Traded Shares**, is also applicable to non-listed SAs, with it being specified that the content of such report is slightly different.

Non-financial performance declaration (déclaration de performance extra-financière): for financial years beginning on or after 1 September 2017, the management report must contain a non-financial performance declaration if the company is (i) an SA with securities admitted to trading on a regulated market that has more than 500 employees and a turnover exceeding EUR40 million or a total balance sheet exceeding EUR20 million, or (ii) an SA with securities not admitted to trading on a regulated market that has more than 500 employees and a turnover or a total balance sheet exceeding EUR100 million. This declaration replaces the former report on corporate social responsibility. The declaration's role is to present the business model of the company (or its group), to identify the main risks in several categories of information (social and environmental consequences of the company's business, respect for human rights and anti-corruption efforts), to describe the policies implemented to prevent or mitigate the risks, and to specify the results of such policies.

Director(s) or supervisory board member(s) representing employees: such obligation, as mentioned in **1.3 Corporate Governance Requirements for Companies with Publicly Traded Shares**, is also applicable to non-listed companies.

The recently enacted Pacte Law (*Loi Pacte*) enacted the following:

- stronger representation of employees and employee shareholders on the board of directors or the supervisory board by lowering the thresholds with respect to their number (please see **1.3 Corporate Governance Requirements for Companies with Publicly Traded Shares**) and eliminating certain exemptions to the representation obligation;
- the introduction of a new penalty for breach of the gender balance requirement mentioned in **1.3 Corporate Governance Requirements for Companies with Publicly Traded Shares**, whereby the breach would result in the invalidation of any deliberations in which the unlawfully appointed director or supervisory board member participates;
- reinforcement of the annual obligation to consult with the economic and social committee (*comité social et économique*) of the management or supervisory body of the company (eg, the board of directors or supervisory board in an SA, the president in an SAS, or the manager (*gérant*) in an SARL) on the strategic orientations of the company;
- direct transposition into legislation of powers granted to the Government to transpose most of the provisions

of the EU Directive 2017/828 dated May 17, 2017 on the encouragement of long-term shareholder engagement, which, inter alia, will have an impact on the French "say on pay" mechanism and on the French regime of regulated agreements (modification of the regime and additional obligations);
- insertion into the French Civil Code of (i) the notion of "corporate interest" (*intérêt social*), as defined by case law (overall interest of all the stakeholders), and (ii) the need for companies to consider the social and environmental issues related to their business; and
- insertion of the notion of "mainspring" (*raison d'être*) into the French Civil Code, which must be understood as the principles that are essential to fulfil the corporate object (*objet social*).

2.2 Current Issues and Developments

Key recent developments in relation to corporate governance in France are as follows:

- the "say on pay" mechanism (see **1.3 Corporate Governance Requirements for Companies with Publicly Traded Shares**);
- removal of the chairman's report on internal control and risk management (*rapport du président sur le contrôle interne et la gestion des risques*) in SA, for financial years beginning on or after 1 January 2017. The content of this report is now split between the management report and a new report called "report on corporate governance" (*rapport sur le gouvernement d'entreprise*);
- mandatory representation of employees on the board of directors or the supervisory board (see **2.1 Key Corporate Governance Issues and Developments**);
- the duty of care (see **2.1 Key Corporate Governance Issues and Developments**); and
- in June 2018, the AFEP-MEDEF code was revised to include, inter alia, the requirement that the board of directors or supervisory board makes sure that the executive officers of the company set up a non-discrimination and diversity policy, including on the representation of women in the company management, and that the executive officer cannot receive any non-competition payment where he/she retires or is older than 65.

The Soilihi Law (*Loi Soilihi*), which is currently under review by the French Parliament, provides the following main forthcoming developments:

- under certain circumstances, and if so provided in the articles of association, the adoption of certain decisions (including the co-optation of a director, the convening of the general shareholders' meeting and the transfer of the registered office in the same department) can be made by written consultation of the directors;
- the deletion of the obligation to submit a draft resolution with respect to a share capital increase reserved to employees every three years; and
- amendment of the rules used to calculate majorities during the shareholders' meeting (in particular, the abstention would not be counted as a negative vote but will not be recorded in the votes cast).

3. Management of the Company

3.1 Bodies or Functions Involved in Governance and Management

SA

In an SA, the articles of association determine whether the company has a one-tier or a two-tier board system:

- *One-tier board system:* the SA is managed by a board of directors, which appoints a chief executive officer (*directeur général*), who is necessarily a natural person, in charge of the daily management of the company, and potentially one or more deputy chief executive officers (*directeur général délégué*). The chairman of the board of directors may combine its functions with those of the chief executive officer. The chief executive officer and the deputy chief executive officer can also be directors.
- *Two-tier board system:* the administration and management of the company is carried out by a management board composed of a natural person or persons (a single member is possible), while a supervisory board, composed of natural or legal persons, appoints the management board members and oversees their management. It is not possible to be a member of the supervisory board and the management board at the same time.

Please refer to **4.3 Board Composition Requirements/Recommendations** for the composition of the board of directors (which is similar to the composition of the supervisory board).

SAS

In an SAS, the shareholders have complete freedom to set the nature and the composition of the management structure and its operating rules in the company's articles of association. However, French law provides for a mandatory corporate body, either a natural or legal person, called "president" in charge of representing the company.

SARL

An SARL is managed by one or more managers (*gérant*). The number of managers is freely chosen and set in the articles of association. Only natural persons can assume the functions of manager in an SARL.

3.2 Types of Decisions Made by Governing Bodies

SA

- *In a one-tier board system*: the board of directors determines the broad lines of the company's business activities and ensures their implementation. Within the limits of the corporate interest (*intérêt social*) and of the powers expressly granted by the law (i) to the shareholders, which are discussed in **5.2 Role of Shareholders in Company Management**, and (ii) to the chief executive officer and deputy chief executive officer(s) (day-to-day management of the company), the board of directors deals with all matters relating to the conduct of the company's business and decides all pertinent issues through its deliberations. Some decisions or acts are exclusively reserved to the board of directors – in particular, the convening of general meetings, the authorisation of related-party agreements, the issuance of bonds, and the granting of endorsements and guarantees.

The chief executive officer and the deputy chief executive officer(s) are in charge of the day-to-day management of the company, within the limits of the corporate object. However, in dealings with third parties, acts of the chief executive officer or the deputy chief executive officer(s) that are beyond the scope of the corporate object are validly binding on the company, unless it can prove that the third party was aware that the act in question was beyond the scope of the corporate object or that, given the circumstances, it could not have been unaware of that fact.

- *In a two-tier board system*: the management board is vested with the most extensive powers to act on the company's behalf in any circumstances. However, these powers must be exercised within the limits of the corporate object, the corporate interest (*intérêt social*) and the powers expressly attributed by the law to the supervisory board and the shareholders. However, in dealings with third parties, acts of the management board that are beyond the scope of the corporate object are validly binding on the company, unless it can prove that the third party was aware that the act in question was beyond the scope of the corporate object or that, given the circumstances, the third party could not have been unaware of that fact. Some decisions or acts are exclusively reserved to the management board – in particular, the issue of bonds.

Unlike the board of directors, the role of the supervisory board is limited to oversight of the mission of the management body, meaning that the supervisory board is not involved in the management of the company. However, some decisions are exclusively reserved to the supervisory board – in particular, the appointment of the management board members, the authorisation of related-party agreements, and the granting of endorsements and guarantees.

SAS

The company is represented in its dealings with third parties by a president appointed under the conditions set out in the articles of association. The president is vested with the most extensive powers to act on behalf of the company in all circumstances, within the limits of the corporate object. However, in dealings with third parties, acts of the president that are beyond the scope of the corporate object are validly binding on the company, unless it can prove that the third party was aware that the act in question was beyond the scope of the corporate object or that, given the circumstances, the third party could not have been unaware of that fact.

The shareholders have complete freedom to allocate the different types of decisions between the existing bodies in the company's articles of association, within the limits of the powers expressly granted by the law to the shareholders.

SARL

The French Commercial Code gives shareholders the option of determining the extent of the manager's powers, within the limits of the powers expressly granted by law to the shareholders. As a result, the articles of association may limit these powers and require an authorisation from shareholders before certain contracts are concluded or "material" transactions are executed (contracting loans exceeding a certain amount, granting a mortgage over corporate buildings or pledging certain assets, etc).

If there are several managers, each manager acts separately, unless otherwise provided in the articles of association.

In dealings with third parties, the manager is vested with the most extensive powers to act on behalf of the company in all circumstances.

3.3 Decision-making Processes

With the exception of decisions made by an SA board of directors and supervisory board, which responds to certain formal rules described below, no specific decision-making process is set out in the French Commercial Code for the other bodies.

An SA's board of directors and supervisory board are collegiate bodies, which means that no decisions can be made individually by a director or a supervisory board member. The convening procedures are freely determined in the articles of association and clarified in the internal regulations, if any. In principle, meetings are convened by the chairman of the board of directors or of the supervisory board but, under certain circumstances, the chief executive officer, a management board member and/or a group of directors or a group of supervisory board members may ask the chairman to convene a meeting of the board with a specific meeting agenda. The statutory auditor must be given notice of each meeting of the board of directors or the supervisory board.

The board of directors or the supervisory board can only validly deliberate if at least half of its members are present, with decisions being made by the majority of the attending or represented members.

4. Directors and Officers

4.1 Board Structure

SA

As mentioned above, the shareholders of an SA can choose between a one-tier board system (single board of directors) or a two-tier board system (management board and supervisory board).

SAs with a single board of directors are largely predominant (in 2018, about 88% of SAs had a single board and directors, and 12% had a management board and a supervisory board).

In SAs whose securities are admitted to trading on a regulated market, the law states that the board of directors and the supervisory board must be assisted by an audit committee. An SA can also decide to create other specialised committees, such as an appointments committee (recommended by the AFEP-MEDEF code), a compensation committee (recommended by the AFEP-MEDEF code), a governance committee, etc. The selection of the members of the specialised committees is made on the basis of their specific skills and experience.

SAS

In principle, the management of an SAS is performed by its president. Nevertheless, the articles of association may freely provide for a board (or several boards), whose structure and composition is freely set by the shareholders.

SARL

There is no board of directors in the SARL, as the management is exclusively performed by its manager(s).

Given the low representativeness of the two-tier board system, sections **4.2 Role of Board Members** to **4.11 Disclosure of Payments to Directors/Officers** will only deal with SAs with a single board.

4.2 Roles of Board Members

The board of directors is a collegial body mandated by all the shareholders, and exercises the authority granted to it by law to act in the corporate interest (*intérêt social*) of the company in all circumstances. Consequently, directors do not have any individual power or right (except with respect to information rights) and so cannot act separately, except when they carry out a specific assignment (*mission exceptionnelle*) on the request of the board of directors.

As a reminder, the board of directors determines the company's business strategy and ensures its implementation. With due respect to the powers expressly given to the shareholders, the chief executive officer and the deputy chief officer (if any), and within the limits of the corporate object, it addresses all questions related to the company's proper functioning and, by its decisions, governs the affairs that concern it.

In addition, the directors who are members of a specialised committee must fulfil the missions granted to such specialised committee.

4.3 Board Composition Requirements/ Recommendations

With respect to SAs, specific composition requirements include the following:

- *Board size:* the board of directors must comprise between three and 18 members. The articles of association can reduce the maximum number of directors. The director representing employees is not taken into account for the appreciation of these limits.
- *Nature of the members:* the board of directors is composed of natural persons or legal persons that must be represented by a permanent representative who is a natural person. The president of the board of directors must be a natural person.
- *Share ownership:* directors are not subject to an obligation to hold company shares, unless the articles of association state otherwise. Regarding listed companies, the AFEP-MEDEF code and the MiddleNext code recommend that the articles of association or the internal regulations of the board of directors provide for such obligation.
- *Age:* no more than one third of members of the board of directors of an SA can be over the age of 70, unless the articles of association provide otherwise.
- *Nationality:* there are no legal requirements on the nationality of directors. The AFEP-MEDEF code recommends that the board of directors of listed companies takes nationality into account when seeking balanced representation.
- *Gender balance:* see **1.3 Corporate Governance Requirements for Companies with Publicly Traded Shares** and **2.1 Key Corporate Governance Rules and Requirements**.
- *Limitation of the number of employee directors:* the board of directors cannot comprise more than one third of directors bound by an employment contract.
- *Limitation of the number of cumulative offices:* an individual cannot concurrently be a director in more than five other French SAs (excluding controlled companies).
- *Independent directors:* see **4.5 Rules/Requirements Concerning Independence of Directors**.
- *Employee representation:* see **1.3 Corporate Governance Requirements for Companies with Publicly Traded**

Shares and **2.1 Key Corporate Governance Rules and Requirements**.

4.4 Appointment and Removal of Directors/Officers

Appointment

Directors are appointed by an ordinary resolution of the shareholders' meeting. Following a vacancy created by the death or resignation of a director, it is possible for the board of directors to provisionally appoint a director, whose appointment must be ratified by ordinary resolution of the next shareholders' general meeting.

The chairman of the board of directors is appointed by the board of directors from amongst the directors, and must be a natural person.

The chief executive officer and the deputy chief executive officers (if any) are appointed by the board of directors (on proposal of the chief executive officer for the deputy chief executive officer).

Removal

Directors can be removed by ordinary resolution of the shareholders' meeting at any time, for any reason.

The chairman of the board of directors can be removed by the board of directors at any time, for any reason.

However, the dismissal of the directors or the chairman of the board of directors may give rise to an award of damages if it is abusive (eg, if there are insulting or vexatious circumstances, if it is impossible for the director or the chairman of the board of directors to present his observations to the general meeting/board of directors, or if he is unaware of the cause of his dismissal).

The chief executive officer and the deputy chief executive officers, if any (on proposal of the chief executive officer), may be dismissed at any time by the board of directors. However, if the dismissal is decided without just cause, the chief executive officer and the deputy chief executive officers may claim damages to compensate the harm suffered.

4.5 Independence of Directors and Conflicts of Interest

For companies listed on a regulated market, the French Commercial Code requires the appointment of at least one independent director in the audit committee. However, it does not define the term "independent".

The AFEP-MEDEF code defines an independent director as a person who has no relationship with the company, its affiliate or its management's members that could compromise her or his judgement. To illustrate this definition, the AFEP-MEDEF code sets out a list of criteria to determine whether or not a director is independent.

The AFEP-MEDEF code recommends that independent directors represent at least half of the directors in listed companies without controlling shareholders and one third of the directors in controlled listed companies.

Regarding conflicts of interest, the AFEP-MEDEF code recommends that the directors disclose every situation that could lead to a conflict of interest, and all conflicts of interest that would occur. It also recommends that the directors do not discuss matters that create a conflict of interest for them.

4.6 Legal Duties of Directors/Officers

Directors

Directors have (i) to comply with the law, (ii) a secrecy obligation (*obligation de discrétion*) to keep secret any information presented as confidential by the chairman of the board of directors, (iii) a duty of loyalty towards the company, (iv) a duty of independence, under which a director must at all times act independently of the shareholder(s) who appointed it because there is no agent-principal relationship, (v) a duty to oppose decisions they believe to be incorrect and to react to the situation, including through resignation, (vi) to act in accordance with the corporate interest (*intérêt social*) and in good faith, (vii) to avoid conflicts of interests, and (viii) to make reasonable effort to inform themselves before making a decision involving the company (duty of diligence).

Officers

The chief executive officer must provide the directors with all the documents and information necessary for the performance of their duties.

In addition, the chief executive officer and the deputy chief executive officer must act in accordance with the corporate interest (*intérêt social*), and comply with the law and the company's articles of association.

4.7 Responsibility/Accountability of Directors

Directors owe their duties to the shareholders and the company. As developed below in **4.8 Consequences and Enforcement of Breach of Directors' Duties**, under certain circumstances, directors can be liable toward third parties in case of a breach of their duties.

Directors must discharge their duties solely in accordance with the corporate interest (*intérêt social*), which corresponds to the interest of all the stakeholders and is distinct from the interest of the shareholders, the employees or creditors.

4.8 Breach of Directors' Duties

A breach of these duties can be enforced by:

- the company, either directly (ie, acting through its legal representative), with such enforcement being called "*ut universi action*", or through a derivative action brought by a shareholder acting on behalf of the company, when the latter is sued for breaches made by its legal representative (*ut singuli action*);
- the shareholder(s) (if the loss suffered by the shareholder(s) is distinct from the company's damage); and/or
- third parties in case of separable fault (*faute séparable des fonctions*). According to case law, a separable fault is defined as (i) a particularly serious fault (ii) committed with intent, (iii) which is incompatible with the normal exercise of a corporate office.

The directors are individually (if the breach can be attributed to a specific director) or jointly civilly liable for such a breach.

4.9 Other Bases for Claims/Enforcement Against Directors/Officers

Directors and officers can be held liable for four kinds of liabilities:

- criminal liability in case of criminal infringement (eg, distribution of fictitious dividends, publication of misleading accounts), which can lead to a jail sentence and/or financial sanctions;
- civil liability in case of (i) breach of laws and regulations applicable to the company (eg, unauthorised transactions such as the grant of a loan to an individual shareholder or an officer; financial irregularities such as the distribution of unauthorised dividends), (ii) breach of the company's articles of association (eg, breach of the restrictions to the powers of the board of directors as provided by the articles of association), or (iii) mis-management (*faute de gestion*). There is no precise definition of mis-management but it ranges from simple negligence to fraud, and consists of acts or omissions that are contrary to the corporate interest;
- administrative liability for breach of a specific regulation, such as securities laws. In this case, the AMF can impose financial sanctions on the directors and officers; and
- tax liability for fraudulent acts or serious and repeated breaches of tax obligations that have made the recovery of any taxes and penalties due from the company impossible, which can lead to financial sanctions.

The liability of a director/officer can be limited or excluded in the following cases:

- the establishment and implementation of appropriate governance, operational policies and monitoring systems (conflict of interest policy, directors code of conduct, etc);
- the appointment of advisers;
- limitation of powers for the officers;
- a legitimate lack of awareness of a wrongful act;
- opposition to the relevant decision; and
- directors & officers insurance that usually covers defence costs (civil and criminal actions), damages (civil action), investigation costs and representation costs incurred in that context.

4.10 Approvals and Restrictions Concerning Payments to Directors/Officers

As mentioned in **1.3 Corporate Governance Requirements for Companies with Publicly Traded Shares**, in companies listed on a regulated market, the "say on pay" mechanism sets the compensation of the corporate officers:

- *Ex ante vote*: the shareholders must vote each year on the principles and criteria for determining, allocating and attributing the fixed, variable and exceptional components of total compensation and benefits of any kind attributable to the chairman of the board of directors, the chief executive officer or the deputy chief officer for the current financial year.
- *Ex post vote*: the shareholders must decide each year on the fixed, variable and exceptional items making up the total remuneration and benefits of any kind paid or granted to the chairman of the board of directors, the chief executive officer or the deputy chief officer.

As mentioned in **2.1 Key Corporate Governance Rules and Requirements**, this mechanism will be amended by the Government when transposing – using the powers granted by the French parliament – some of the provisions of the EU Directive 2017/828 dated May 17, 2017 on the encouragement of long-term shareholder engagement.

In addition, the commitments made by the company or by any controlling company or controlled company (within the meaning of paragraph II and III or Article L. 233-16 of the French Commercial Code), to the benefit of their chairmen, chief executive officers or deputy chief executive officers, and corresponding to elements of compensation, indemnities or advantages owed or likely to be owed following the termination or modification of such corporate office, or subsequent to such office, or benefit pensions (*engagements de retraite à prestations définies*) are subject to the regulated agreement regime (prior authorisation of the commitment by the board of directors, approval by the next annual general meeting on the basis of a report of the statutory auditor, and disclosure on the company's website).

In addition, every year the shareholders set the global amount of compensation to be granted to the directors. The actual allocation of compensation between the directors is decided by the board of directors, it being specified that the AFEP-MEDEF code recommends that the payment of the compensation shall take into account the regular and actual attendance of each director at meetings of the board and

committees, and the amount shall therefore consist primarily of a variable portion.

4.11 Disclosure of Payments to Directors/Officers

The corporate governance report prepared by companies listed on a regulated market must provide the total remuneration and benefits of any kind paid by the company to its directors, chairman of the board, chief executive officer and deputy chief executive officers (if any) during the financial year, including in the form of an allocation of equity securities, debt securities or securities giving access to the capital or giving entitlement to the allocation of debt securities by (i) the company, (ii) the company holding, directly or indirectly, more than 50% of the issuer's share capital, or (iii) the company in which more than 50% of the share capital is held by the company. Companies that are controlled by a company listed on a regulated market must provide the same information for corporate officers who hold at least one mandate in such companies.

The corporate governance report of companies listed on a regulated market is made public (see **6.2 Disclosure of Corporate Governance Arrangements**).

5. Shareholders

5.1 Relationship Between Companies and Shareholders

The main provisions governing the relationship between a company and its shareholders are contained in the French Civil Code, the French Commercial Code, the articles of association and, notably for listed companies, the French Financial and Monetary Code.

Overall, the key document that governs the relationship between the company and its shareholders is the articles of association, which create a legally binding relationship between the shareholders and the company, and govern that relationship as well as the management of the company.

The original articles of association are filed with the court registrar by the initial shareholders as part of the process of registering the company, and may be amended at any time by the shareholders (in respect of the SAS, the articles of association may provide that, for certain specific decisions, the President is entitled to amend the articles of association). In any case, any updated version of the articles of association must be made publicly available through the court registrar.

Applicable laws and possibly the articles of association grant the shareholders specific rights over how the company is managed, in addition to their right to dividends. These specific rights are often exercised in shareholder meetings and include:

- the general right to be informed about the business and management of the company;
- the exclusive right to take certain decisions set out in applicable laws (eg, allocation of dividends, change in the share capital, liquidation of the company) and/or in the articles of association or a shareholders' agreement (matters reserved to shareholder meetings);
- the right to table draft resolutions, which shall be discussed during the general meeting;
- the right to submit written questions to the board of directors or the management board of an SA, the President of an SAS or the manager of an SARL, who are required to answer during the general meeting; and
- the right to ask the court to launch a management expertise (see **5.4 Shareholder Claims**).

In addition to the articles of association, the shareholders may also enter into a shareholders' agreement containing specific provisions related to the governance of the company. The shareholders' agreement may be enforceable against the company if it is signed by or in the presence of the company. In principle, provisions in shareholders' agreements are not public information, unless the agreement involves a public listed company, in which case certain provisions must be publicly disclosed (see **6.2 Disclosure of Corporate Governance Arrangements**).

The shareholders are not responsible for the day-to-day management of the company, which is reserved to the corporate officers.

5.2 Role of Shareholders in Company Management

Under French law, the executive officers of an SA (CEO, deputy CEO, etc), the president of an SAS and the manager(s) of an SARL have very broad powers to manage and represent their company vis-à-vis third parties.

However, the shareholders can play a more or less important role in company management through:

- the appointment and removal of corporate officers, a power that is directly or indirectly (through the board of directors in an SA) reserved to the shareholders; and
- oversight of the powers granted to corporate officers, which (i) cannot include the powers expressly allocated to shareholder meetings under applicable laws (eg, allocation of profit/loss, appointment or removal of directors and statutory auditors, amendment of the articles of association, dissolution of the company) and (ii) may be restricted by the shareholders through specific limitations of power in the articles of association (eg, matters reserved for shareholders' meetings) and the internal rules of the company.

In any case, shareholders must refrain from interfering in company management, or the courts may characterise them

as de facto corporate officers, which could result in them being personally liable under criminal, tax and civil law, in lieu of or together with de jure corporate officers, if the company were to breach applicable laws.

5.3 Shareholder Meetings

Overview

Under applicable French laws, two types of general shareholder meetings – ordinary and extraordinary – are held, depending on what is at stake. Both types of general meetings are governed by a separate set of rules (for quorum, majority voting, etc) in order to ensure that the interests of each shareholder, in particular minority shareholders, are effectively safeguarded. Certain key decisions in the life of a company are reserved for the extraordinary general meetings. Within a company with a sole shareholder, the decisions taken unilaterally by the shareholder (*décisions de l'associé unique*) do not necessarily have to comply with French legal provisions for shareholders' meetings.

The French Commercial Code contains mandatory provisions that apply to shareholder meetings to protect the shareholder rights. Some of these provisions may be adjusted in the articles of association, especially in companies incorporated as an SAS.

As part of shareholders' general oversight of the management and the business of the company, at least one ordinary shareholder meeting must be held annually to handle general matters related to the previous financial year, in particular through votes approving (i) annual financial statements, (ii) executive compensation, (iii) related party agreements between the company and members of management entered into during the financial year, and (iv) the allocation of the financial results (eg, dividend distribution).

For listed companies, the terms, conditions and amount of compensation (including benefits in kind) owed or paid to the corporate officers must be approved at a general meeting (see **1.3 Corporate Governance Requirements for Companies with Publicly Traded Shares**).

Other ordinary general meetings can be held throughout the year, in accordance with applicable laws and the articles of association, to deal with other company management and business issues (eg, the appointment and removal of corporate officers, unless otherwise provided in the articles of association).

Extraordinary general meetings are convened to deal with specific key matters, including the amendment of the articles of association, the launch of a liquidation process, the approval of a merger, or any change to the share capital of the company (eg, share capital increase, capital reduction).

Convening Meetings

Shareholder meetings are convened by the Chairman of the Board, the competent corporate officer of the company, or any person authorised to do so under the company's articles of association. Sufficient notice of the meeting must be given (at least 15 days in an SA and an SARL), by post, e-mail or a press release depending on the corporate form of the company and the provisions of its articles of association. The notice must contain certain mandatory information in order to ensure that shareholders are duly informed of what decisions will be discussed. For a public listed company, the notice must be released in the mandatory legal announcements bulletin (*Bulletin d'Annonces Légales Obligatoires*) within an appropriate timeframe.

Information

Shareholders have a right to the information necessary for them to take the appropriate decisions. They must be provided with or have access to all the requisite supporting documents, including the meeting agenda, draft resolutions, management report, financial statements, articles of association, and minutes of the shareholders' meetings in the last three financial years.

Location

Shareholder meetings may be held physically at the company's registered office (or any other place specified in the notice) or, under certain conditions, (i) remotely using telecommunications (eg, videoconferencing) or (ii) by written consultation.

Quorum and Majority

Quorums and majorities required to attend a general meeting depend on the corporate form of the company, the provisions of the articles of association and the nature of the decision at stake.

Indeed, applicable laws state the minimum number of shareholders that must attend the meeting in order for its decisions to be valid together with the relevant majority.

For example, in an SA (it being understood that the articles of association may always require higher quorums and majorities) the necessary attendees are as follows:

- Ordinary general meetings:
  - (a) on first notice of meeting, attending or represented shareholders must represent at least 20% of voting shares (no quorum required on second call); and
  - (b) a simple majority of the attending or represented shareholders with voting rights is required to adopt an ordinary decision.
- Extraordinary general meetings:
  - (a) on first notice of meeting, attending or represented shareholders must represent at least 25% of voting shares and at least 20% on second call;

(b) a two-thirds majority of the attending or represented shareholders with voting rights is required to adopt an ordinary decision.

Under certain conditions, the shareholders are entitled to be represented at meetings by a proxy, or to vote by correspondence.

Applicable laws provide that certain decisions require a unanimous vote of the shareholders – in particular, changing the nationality of the company or increasing the shareholders' financial commitments requires a unanimous vote of the shareholders.

5.4 Shareholder Claims

Compensation of Shareholder Losses

Corporate officers may be liable for damages to shareholders for breach of the applicable laws or the articles of association, or if they have engaged in misconduct or negligence in the conduct of the management of the company (see **4.9 Other Bases for Claims/Enforcement Against Directors/Officers**).

Compensation of Company Losses

In addition, under certain conditions any shareholder is entitled to bring a lawsuit against the corporate officers on behalf of the company to obtain damages for the company's loss (*action ut singuli*). If the corporate officers are found liable, damages are paid to the company (see **4.9 Other Bases for Claims/Enforcement Against Directors/Officers**).

Management Expertise

In order to protect their right to information, minority shareholders separately or jointly holding more than 10% of the share capital in an SARL and 5% in an SA or SAS are entitled to ask the court to appoint an expert in order to audit one or more specific and suspicious corporate operations carried out by the company. This request can be made after written questions sent to the President or the Chairman of the Board have gone unanswered for one month.

5.5 Disclosure by Shareholders in Publicly Traded Companies

Shareholders of a public listed company are required to notify:

- the AMF and the company that they have crossed any statutory threshold (ie, 5%, 10%, 15%, 20%, 25%, 30%, 33.33%, 50%, 66.66%, 90%, 95%) of share capital and/or voting rights, whether up or down, within four trading days of the occurrence. It is understood that this notification will be publicly disclosed by the AMF; and
- the company in which a statutory shareholding threshold defined in the articles of association has been crossed, under certain conditions set out in the articles of association. The company reserves the right to inform the public and shareholders that the threshold has been crossed.

Shareholders who have entered into an agreement to act in concert by buying, selling or exercising voting rights must disclose this to the AMF.

6. Corporate Reporting and Other Disclosures

6.1 Financial Reporting

All companies must file the following financial documents with the court registrar:

- annual financial statements, together with the annual management report and the auditors' report on the annual accounts, except for "micro-sized" and "small" companies, which are exempted to issue such annual management report;
- if applicable, consolidated financial statements, the annual report on group management and the auditors' report on the consolidated financial statements; and
- the proposed allocation of profits submitted to the general meeting and the allocation resolution approved during the meeting.

These financial documents must be filed in the month following approval of the annual financial statements by the shareholders at the general meeting, or within two months if such filing is done electronically.

These financial documents will, in principle, be made publicly available by the commercial court registrar.

In addition to the above-mentioned financial documents, public listed companies must also file the management report of the company (which must be made publicly available for all companies regardless of whether they are listed or not).

Where company managers have not filed annual financial statements within the time limits provided for in the applicable legal provisions, the presiding judge of the court may order the managers to do so promptly in an injunction accompanied by a regular financial penalty for any further delays.

Public listed companies also have the following additional periodic reporting obligations:

- the annual financial report must be published and filed with the AMF within four months of the closing date of the financial period; and

- the half-year financial report must be published and filed with the AMF within three months of the closing of the first half of the fiscal year.

Although French listed companies are no longer legally required to disclose interim or quarterly financial information, most issuers still voluntarily comply in accordance with a recommendation by the AMF to continue disclosing such information on a regular basis.

6.2 Disclosure of Corporate Governance Arrangements

The board of directors or supervisory board of an SA is required to set up a specific report on the corporate governance of their company with specific mandatory provisions, and append it to the management report (see **1.3 Corporate Governance Requirements for Companies with Publicly Traded Shares**).

6.3 Companies Registry Filings

Companies must file the financial documents mentioned in **6.1 Financial Reporting** with the court registrar.

In addition, companies are required to provide the court registrar with updated constitutional documents and information during the life of the company, including amendments of the articles of association, changes of registered office, changes to the corporate officers, the appointment of new statutory auditors, and changes in the share capital, together with the related corporate documentation implementing these changes (eg, minutes to the general meetings that resolve to amend the articles of association).

This corporate documentation is made available publicly by the court registrar, and the related changes must be published in a journal of legal notices (*Journal d'annonces légales*).

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7. Audit, Risk and Internal Controls

7.1 External Auditors

External auditors are in charge of auditing the company's financial statements and giving the shareholders a fair view of the company's financial situation.

In an SA, an external auditor has to be appointed regardless of the company's results; if the company publishes consolidated results, a second external auditor must be appointed.

To ease the burden of these requirements, the Pacte Law harmonises the thresholds applicable to commercial companies under which the appointment of an auditor is not mandatory.

Taking into account the auditor's specific mandate, applicable laws have clarified that the external auditor should be independent from the company:

- statutory auditors cannot have any personal, professional or financial link, as these constitute incompatibilities; and
- the company is bound by a specific set of rules on the conditions under which a company is entitled to remove its auditor.

7.2 Management Risk and Internal Controls

The management report on an SA (listed or not) must contain details on the procedures the company has implemented for risk management and internal controls.

The shareholders and/or the board of directors are entitled to include a specific set of rules in the articles of association and in the company's internal rules to implement particular provisions on risk management and internal control procedures within the company. It is common for risk committees to be set up to review the conduct of the company's business by the board of directors and corporate officers. In general, risk committees are required to give their opinion on the internal procedures enacted by the company to ensure compliance with applicable laws and regulation, and on the choice of statutory auditor.

In addition, if statutory auditors notice facts that are likely to compromise business continuity in the course of their duties, they must inform the corporate officer(s), who must provide the auditors with an answer about the situation of the company.