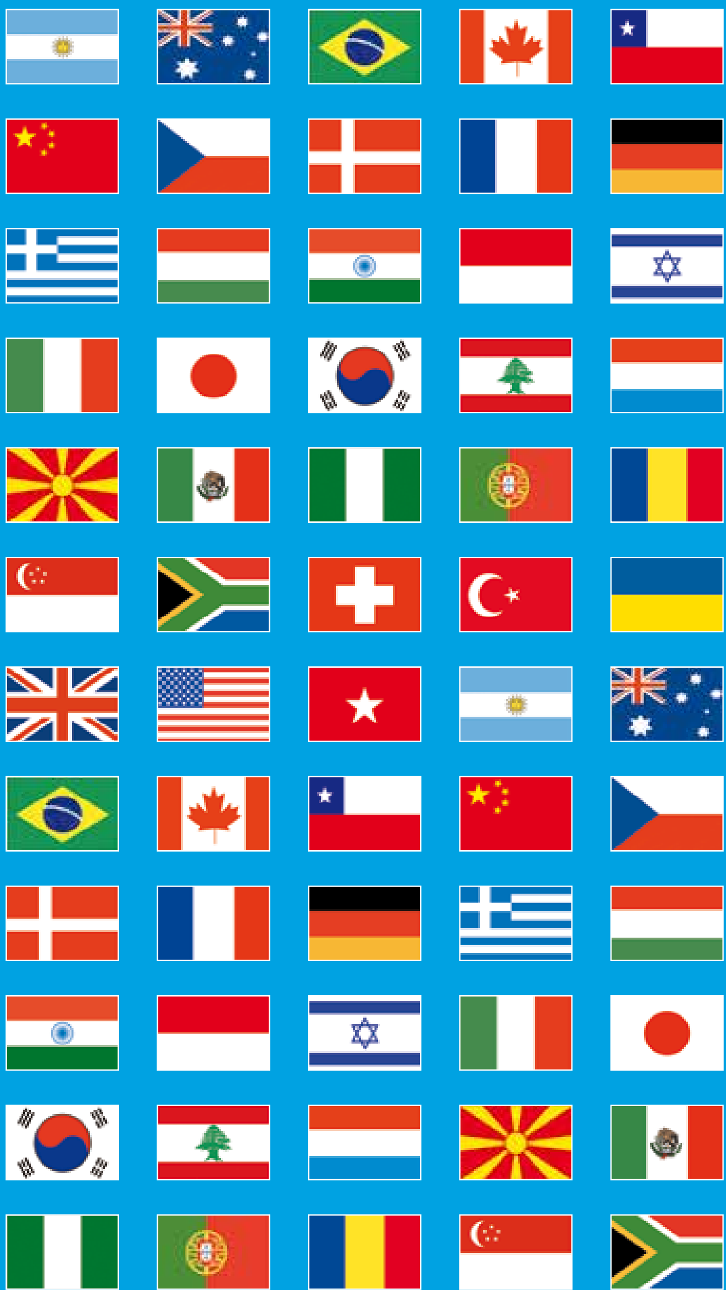
GETTING THE DEAL THROUGH

Corporate Governance

Board structures and directors' duties in 33 jurisdictions worldwide

2014



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Corporate Governance 2014

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Getting the Deal Through is delighted to publish the fully revised and updated thirteenth edition of *Corporate Governance*, a volume in our series of annual special reports providing comparative international analysis in key areas of law and policy for corporate counsel, cross-border legal practitioners and business people.

Corporate Governance 2014 addresses the most important issues facing corporations in relation to all their stakeholders. This publication examines various issues, including the rights of shareholders, corporate disclosure and transparency, responsibilities of the board and corporate control.

In the format adopted throughout the series, the same key questions are answered by leading practitioners in 33 jurisdictions worldwide. New jurisdictions this year include Argentina, China, Indonesia, Korea and South Africa.

Every effort has been made to ensure that matters of concern to readers are covered. However, specific legal advice should always be sought from experienced local advisers. *Getting the Deal Through* publications are updated annually. Please ensure you are referring to the latest print edition or to the online version at www.GettingTheDealThrough.com.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We would like to thank Ira Millstein of Weil, Gotshal & Manges LLP for his stewardship of the title over the past twelve years and to acknowledge Rebecca Grapsas of Weil, Gotshal & Manges LLP for her kind assistance with this year's questionnaire. We would especially like to thank and acknowledge Holly Gregory of Sidley Austin LLP as contributing editor of this and future editions.

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Sources of corporate governance rules and practices

1 Primary sources of law, regulation and practice

What are the primary sources of law, regulation and practice relating to corporate governance?

Rules on corporate governance are primarily provided by French laws and decrees and for the most part are codified in the French Commercial Code and the French Monetary and Financial Code.

Listed companies are further subject to the securities rules set out by the General Regulation of the French stock exchange authority (AMF). In addition, the AMF has issued several recommendations, presented as constructions of general binding rule, as well as other non-binding positions on corporate governance practices, most of which appear henceforward in the AMF's annual report on corporate governance and executive compensation.

Corporate governance practices in France are also more and more strongly shaped by non-binding recommendations stemming from reports produced by private institutes or organisations (see question 2).

2 Responsible entities

What are the primary government agencies or other entities responsible for making such rules and enforcing them? Are there any well-known shareholder activist groups or proxy advisory firms whose views are often considered?

No specific government agency is responsible for the making or enforcement of corporate governance rules in France, even though the AMF's role is more and more significant as regards application of these rules.

Binding corporate governance rules mainly stem from statutes passed by the French parliament following either parliamentary or government initiative. For listed companies, the AMF's General Regulation sets out various binding corporate governance reporting and disclosure obligations. The General Regulation is enacted through a governmental decree and is mandatory.

Non-binding recommendations are also proposed by the AMF (notably through its annual reports on corporate governance) and private institutes or organisations such as the French employers' union (MEDEF), the French Association of Large Companies (AFEP) (a non-affiliated lobby representing large listed companies) and Middlenext (an association representing listed mid-range securities). The AFEP/MEDEF joint report (June 2013) (the AFEP/MEDEF Recommendations) and the Middlenext corporate governance rules (December 2009) (the Middlenext Recommendations) are often cited in France as the most influential corpus of corporate governance recommendations. Although non-binding, the AFEP/MEDEF Recommendations and the Middlenext Recommendations are becoming heavily authoritative. Listed companies are required to, first, select a specific corpus of corporate governance recommendations (the AFEP/MEDEF Recommendations, the Middlenext Recommendations or recommendations from any other private or unaffiliated they are willing to abide by) or, second, explain the reason for which they prefer not to comply with any corpus of corporate governance recommendations.

Other private bodies such as the Montaigne Institute, the National Association of Joint Stock Companies, the French Asset Management Association and the French Private Equity Association play a significant role in issuing non-binding opinions regarding corporate governance issues.

Several shareholders' and investors' groups such as the Association for the Defence of Minority Shareholders, the Association of Small Minority Shareholders, Institutional Shareholder Services (ISS) and the National Association of French Shareholders are also influential.

The rights and equitable treatment of shareholders

3 Shareholder powers

What powers do shareholders have to appoint or remove directors or require the board to pursue a particular course of action? What shareholder vote is required to elect directors?

Note that the following developments essentially apply to the public limited company (SA), by far the most common legal structure used by listed entities and the only entity requiring a board of directors. Other legal forms available under French law include, for non-listed entities, the limited liability company (SARL) or the unlisted public company (SAS), which call for specific governance features. Most newly created non-listed entities are now incorporated under the legal form of SAS, where management or bodies other than the chairman can be freely determined by the articles of association. SASs often include a board structure, the composition and operation of which is contractually (and therefore freely) defined in the articles of association (and not under the law).

Most SAs are one-tier structures, which means that the board of directors is the only management board. Two-tier structures, consisting of a supervisory board and an executive board, also exist among SAs. The other legal forms have specific management structures.

In one-tier structures, directors are appointed and dismissed by the shareholders in an ordinary general meeting, voting by simple majority. Co-optation of a board member by the board itself may occur under limited circumstances in order to replace a dismissed or resigning director.

The chairman of the board is appointed and dismissed by the board itself. The same rule applies for the appointment and dismissal of the CEO.

In two-tier structures, the members of the supervisory board are appointed or revoked by the shareholders in an ordinary general meeting, voting by simple majority. The members of the executive board are appointed by the supervisory board but dismissed by the shareholders also voting by simple majority (or by the supervisory board if the articles of association allow it). Co-opting of a

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supervisory board member may also occur in limited circumstances to replace a dismissed or resigning supervisory board member.

Shareholders generally have no direct authority over the board once it is appointed. Hence, they cannot force the board to pursue any particular course of action except in respect of decisions falling within the scope of the shareholders' mandatory prerogatives (see question 4).

4 Shareholder decisions

What decisions must be reserved to the shareholders? What matters are required to be subject to a non-binding shareholder vote?

In French SAs, several types of decisions are made only by shareholders.

A few decisions are made only by the shareholders' ordinary general meeting deciding by simple majority. These include decisions regarding the approval of the company's annual accounts and allocation of the resulting profits, the appointment or revoking of board members, the appointment of statutory auditors, the setting of the attendance fees of the board and the approval of agreements between the company and its board members or other interested parties (see question 28). It is also envisaged that the shareholders will decide on the remuneration of top management (see 'Update and trends').

Decisions resulting in an amendment of the company's articles of association are reserved for the shareholders' extraordinary general meeting deciding with a two-thirds majority. Those notably encompass decisions to change the company's corporate purpose, increase or reduce the share capital, or decisions relating to, inter alia, mergers and spin-offs.

A unanimous vote of the shareholders is required to adopt decisions relating to the change of the nationality of the company or an increase in the shareholders' liability, such as adopting a legal form including unlimited shareholders' liability.

In French SAs, it is uncommon that a matter be subject to a non-binding shareholder vote, apart from the recent say-on-pay rule, which was implemented on 1 January 2014 (see question 36). However, all transactions entered into between a director and the company (whether directly or indirectly, including if the director holds an indirect interest in the company's co-contractor, and in particular where the director is also a controlling shareholder, a director or a manager of said company's co-contractor) must, after being approved by the board of directors, be submitted to the approval of the shareholders. However, transactions disapproved by the shareholders are still binding on the parties to such transactions. In addition, even if the transaction is not fraudulent, the directors can be held liable for any possible damaging consequences of such non-approved transaction for the company (see question 28).

5 Disproportionate voting rights

To what extent are disproportionate voting rights or limits on the exercise of voting rights allowed?

Under the French Civil Code, all shareholders have a right to participate in collective decision-making. Generally, French law applies the rule 'one share, one vote'. Only statute may allow for the creation of limitations on the voting rights attached to certain categories of shares, on a temporary or permanent basis. On that basis:

- the Commercial Code specifies that shareholders are deprived of their voting rights in certain limited circumstances, for example, rules regarding treasury shares, approval of related-party agreements, and disclosure triggered by a defined threshold level of holding having been exceeded;
- French law allows the articles of association to define a cap on voting rights for all shareholders, either permanently or on a temporary basis, subject to certain conditions. This possibility is specifically regulated for listed companies during takeover periods (the effects of this limitation on voting rights are suspended in the event of a public tender offer permitting the bidder to obtain more than two-thirds of the votes or capital);
- 'preference shares' with or without voting rights may be issued and non-voting or double-voting rights may be attributed, on a temporary or permanent basis, in conjunction with or independently from specific rights over dividends or special information rights;
- preference shares deprived of voting rights are subject to specific limitations: non-voting shares must not represent more than half of the share capital of non-listed companies (one-quarter in listed companies); and
- in addition, it should be noted that since a law dated 29 March 2014, in listed companies double-voting rights are automatically attached to fully paid-up shares held by the same shareholder for more than two years.

6 Shareholders' meetings and voting

Are there any special requirements for shareholders to participate in general meetings of shareholders or to vote? Can shareholders act by written consent without a meeting?

Under the Civil Code, each shareholder is entitled to participate in shareholders' general meetings and take part in the decision-making process.

The capacity as shareholder is established based on the company's registries, kept and updated by the company itself or by a financial institution appointed by the company. The record date used to identify the shareholders of a listed company is the third business day preceding the meeting. The record date used in unlisted companies is either the date of the meeting or, if the articles of association so provide, the third business day preceding the meeting.

Proxy voting and mail voting are possible and regulated. Shareholders can therefore vote by giving their written consent without attending the meeting themselves.

Shareholders may take decisions by writing (with no meeting at all) only if the company is not listed and the by-laws provide for such a possibility.

7 Shareholders and the board

Are shareholders able to require meetings of shareholders to be convened, resolutions to be put to shareholders against the wishes of the board or the board to circulate statements by dissident shareholders?

As a general rule, in French SAs, the board is the body in charge of convening meetings of the shareholders. However, under certain circumstances, a shareholders' meeting can be convened by a court-appointed agent upon the lodging of a petition by any person establishing an interest to do so or the works council, in case of emergency, one or several shareholders representing at least 5 per cent of the capital or a duly registered shareholders' group of the company, if the company is listed.

Moreover, in the context of a public takeover or a transfer of control, and provided that the board refuses to convene a general meeting, the majority shareholders (in voting rights or capital) are entitled to convene such meeting themselves.

Shareholders representing a certain number of shares (generally 5 per cent, but possibly less if the share capital exceeds €750,000) may require that resolutions be submitted to the shareholders. The board of directors cannot oppose this prerogative. A similar right exists in favour of the works council (if any). Minority shareholders are also entitled to require that specific items be added to the agenda of a general meeting.

However, shareholders do not have any legal right to directly impose any management decision of the board. Nor can they require the board to circulate any statements to the other shareholders.

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8 Controlling shareholders' duties

Do controlling shareholders owe duties to the company or to non-controlling shareholders? If so, can an enforcement action against controlling shareholders for breach of these duties be brought?

Controlling shareholders do not owe any specific duties to the company or to the non-controlling shareholders. However, French case law has been known to hold controlling shareholders liable for abuse in relation to the company and the minority shareholders, for voting resolutions considered as going against the company's interests, and exclusively in the controlling shareholders' interests or detrimental to the interest of the minority shareholders.

Legal actions based on abuses of majority positions must be brought by the chairman of the company or by aggrieved shareholders themselves. Where an abuse is recognised, the decision may be annulled. Damages may also be sought against the majority shareholders.

9 Shareholder responsibility

Can shareholders ever be held responsible for the acts or omissions of the company?

In limited liability entities such as SAs, SASs or SARLs, the liability of the shareholders is limited to the amount of their capital contribution. However, in bankruptcy settings, the corporate veil may be pierced in court if a shortfall in the company's assets can be linked to prior mismanagement acts by the de jure or de facto managers (possibly including shareholders), assets of the company and the shareholders have commingled, or the company was essentially fictitious. Case law is rather reluctant to extend the shareholders' liability for acts or omissions of the company.

In situations involving environmental issues, the corporate veil may be pierced and a parent company held liable for environmental damage its subsidiary has caused when the parent company has been found guilty of manifest misconduct (such misconduct having contributed to the judicial liquidation of the subsidiary). In addition, the clean-up obligation of polluted classified sites (which are usually the sole responsibility of the company operating the site) may be extended by administrative courts to the shareholders of such company (such as when the parent company was in fact involved in the operation of the classified facility or when the local operating company is fictitious and was only set up by the shareholders to escape the above-mentioned clean-up obligation).

Corporate control

10 Anti-takeover devices

Are anti-takeover devices permitted?

Anti-takeover devices are permitted provided that they abide by the company's interest. The following examples of anti-takeover mechanisms are allowed and have recently been implemented in certain large companies: disposal of assets, change of control clauses introduced in major commercial or loan agreements, arrangements with an existing shareholder (for instance, share capital increases, put options relating to treasury shares) and free shares distributed to personnel.

Anti-takeover mechanisms must however also comply with the Law of 31 March 2006 (transposing the EU 2004 Anti-takeover Directive), which provides the following:

- resolutions that are voted on by the target's shareholders prior to the launching of the offer that are likely to provoke the offer to be aborted and that have not been implemented prior to the launching of the offer must be confirmed by the shareholders;
- since a law dated 29 March 2014, every decision of the target's management taken during the offer period and likely to provoke the offer being aborted must no longer receive prior shareholder approval;
- warrants can be created by a shareholder resolution with a view to being attributed to existing shareholders for free, enabling such existing shareholders to subscribe to new shares of the target at preferential conditions during the offer period; and
- a rumour mechanism: in the case of takeover rumours, the AMF can ask the potential bidder to reveal its intentions. A negative answer from the bidder to the AMF's queries prevents that bidder from initiating a takeover for a period of six months.

The French parliament chose not to transpose the entirety of the EU 2004 Anti-takeover Directive. As a result:

- shareholder agreements including share transfer restriction clauses (eg, non-transferability provisions, pre-emption rights, drag-along clauses) relating to a listed company may be enforced against a bidder in a public tender offer, however, the shareholders are entitled to provide for the contrary in the articles of the company (ie, that such transfer restrictions cannot be enforced against a bidder during the tender period);
- shareholder agreements restricting voting rights (ie, maximum limit on the number of voting rights each shareholder is entitled to) relating to a listed company cannot be enforced against a bidder who holds more than two-thirds of the target's capital or voting rights as a result of the public tender offer, however, the shareholders are entitled to provide for a lower threshold (ie, that such voting rights restrictions cannot be enforced against a bidder who holds more than 50 per cent of the share capital or voting rights); and
- shareholder agreements giving certain shareholders specific rights to appoint or dismiss a certain number of board members may be enforced against a bidder during the first shareholders' meeting following the closure of a successful tender offer, however, the shareholders are entitled to provide for the contrary in the company articles of association (ie, that such rights of appointment or dismissal cannot be enforced during the first shareholders' meeting following the offer against a bidder who holds more than 50 per cent of the share capital or voting rights).

11 Issuance of new shares

May the board be permitted to issue new shares without shareholder approval? Do shareholders have pre-emptive rights to acquire newly issued shares?

The board is not entitled to issue new shares without prior authorisation from the shareholders. However, the shareholders of an SA may delegate authority to the board to issue new shares within a given limit and a limited period of time (maximum of 26 months). The board of directors, if it decides to utilise this delegation (it remains at liberty not to do so), determines the terms and conditions (especially the issue price). The board is entitled also to subdelegate its capacity to issue new shares to the CEO.

When new shares are issued, shareholders have de jure pre-emptive subscription rights to subscribe these new shares. These pre-emptive rights may be freely bought or sold. However, shareholders may also waive them to permit the arrival of new shareholders.

12 Restrictions on the transfer of fully paid shares

Are restrictions on the transfer of fully paid shares permitted, and if so what restrictions are commonly adopted?

Restrictions on the transfer of shares are frequent in the articles of association or shareholders' agreements of non-listed companies. Standard provisions include prior approval, pre-emption and in certain cases, tag-along and drag-along clauses. In certain companies (SASs), all transfers can be prohibited for a maximum period of 10 years.

As a general rule, these restrictions must comply with the principle under which no shareholder must be 'locked' into his or her shares as a result of these provisions.

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For listed companies, restrictions are subject to strict limitations. All agreements stipulating share transfer restrictions (prior approval, pre-emption, options, etc) must be fully disclosed to the AMF when they apply to (at least) 0.5 per cent of the company's share capital. The AMF arranges the publication of the same.

13 Compulsory repurchase rules

Are compulsory share repurchases allowed? Can they be made mandatory in certain circumstances?

Compulsory repurchase or sale of shares may only be imposed under limited circumstances. If a shareholder (or a group of shareholders acting jointly) of a listed company owns at least 95 per cent of the voting rights, the majority shareholders or the minority shareholders can require the purchase of the minority shareholding, under the AMF's strict control. This procedure can, in certain circumstances, be followed by a complete de-listing of the company.

In non-listed entities, the exclusion of a shareholder and the compulsory repurchase of the related shares are allowed under restrictive conditions. This essentially applies in SASs or European Companies, where the articles of association so allow, and provided certain protections are afforded the excluded shareholder.

14 Dissenters' rights

Do shareholders have appraisal rights?

Shareholders have no such appraisal rights in unlisted companies (except in the case of a put option included in a shareholder agreement).

However, the legal entity controlling a listed company must inform the AMF in those cases where it has decided to absorb this company, to transfer or contribute to a third-party company all or most of its assets, to reorient its corporate purpose or to eliminate, for several fiscal years, all payment of dividends on shares. The AMF assesses the consequence of the planned transaction and decides if a public offer (compulsory for the majority shareholder) to buy back the shares should be implemented. This allows the minority shareholders of the listed company to have their shares bought back should they disagree with the planned transaction.

The responsibilities of the board (supervisory)

15 Board structure

Is the predominant board structure for listed companies best categorised as one-tier or two-tier?

The predominant board structure for listed companies is the one-tier structure.

Approximately 80 per cent of French-listed companies are so structured according to the AMF 2013 report on corporate governance and executive compensation.

16 Board's legal responsibilities

What are the board's primary legal responsibilities?

For French SAs, the Commercial Code provides that the board of directors 'determines and directs the activity of the company and supervises its implementation'. It operates 'subject to the powers expressly attributed to general meetings of the shareholders and within the limits of the corporate purpose clause'. The board further 'rules on any issue relating to the proper running of the company and decides, through its resolutions, on matters concerning the company'. The Code also provides that the board may operate any and all control that it considers appropriate.

The board appoints, removes and decides on the compensation of its chairman and the CEO. It must also authorise guarantees issued by the company and has a specific responsibility to approve agreements with interested parties ahead of their conclusion.

The board, on the other hand, has no responsibility for the day-to-day management of the company, which ultimately vests in the CEO.

17 Board obligees

Whom does the board represent and to whom does it owe legal duties?

The board does not represent the shareholders or any subgroups among them. It does not represent any constituency, including the employees or creditors. It has no representation function. It must act in the interests of the company and its members are collectively accountable to the shareholders and the company for the performance of their managerial and supervisory duties.

18 Enforcement action against directors

Can an enforcement action against directors be brought by, or on behalf, of those to whom duties are owed?

Two kinds of civil law actions can be brought against directors.

The first type of legal action, known as the 'corporate' derivative action, aims at compensating the damage suffered by the company. This is normally brought by the legal representative of the company and on behalf of the latter. It may also, however, be brought by shareholders.

The second type of legal action is individual by nature and based on an individual director's tortious negligence. It is in the hands of any aggrieved party, whether a shareholder or a third party, if that party can establish that it has suffered a loss or damage as a result of one or more directors' negligence, including following a breach of the articles of association, a violation of corporate rules applicable to the company, or deliberate or negligent misconduct on the part of the company's management.

Directors may be held individually or jointly and collectively liable. In addition, the Commercial Code includes several grounds for criminal liability of directors, ranging from misdemeanours to more serious offences, possibly leading to fines – in exceptional cases – or imprisonment.

19 Care and prudence

Do the board's duties include a care or prudence element?

Board members owe a duty of loyalty and care to the company at all times. The extent of these duties is left to the French courts' scrutiny on a case-by-case basis.

Directors may never act in their personal interest, or in the interest of any party other than the company. Although statute does not expand on these duties, most boards of directors of large entities have adopted internal rules with a view to helping define the behavioural standards expected from board members as regards the company.

20 Board member duties

To what extent do the duties of individual members of the board differ?

Skills and personal experience are not relevant in determining the duties of board members (except in listed companies, where an audit committee is compulsory, and where a member of the board has to have special expertise regarding audit matters (see question 25)). Where the board elects to create committees or working groups (audit committee, compensation committee, appointment committee, etc), skills and experience can be called upon, but the board functions do not, per se, encompass distinct duties for its members based on their respective skills or experience.

In practice, however, before a court, prior experience or skills may be an element of assessment of a director's personal liability, either as an excuse or mitigation factor, or the contrary.

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21 Delegation of board responsibilities

To what extent can the board delegate responsibilities to management, a board committee or board members, or other persons?

Specific delegations may be granted to board members or sub-committees within or next to the board, which the board may freely set up. The board defines such committees' missions. The committees, however, only have an advisory or preparatory function. The board's authority to make decisions may not be delegated. The trend towards the creation of specialised committees is growing among large French entities, in particular with regard to matters such as audits, recruitment and compensation, appointments, external growth and strategy, and ethics (see question 25).

22 Non-executive and independent directors

Is there a minimum number of 'non-executive' or 'independent' directors required by law, regulation or listing requirement? If so, what is the definition of 'non-executive' and 'independent' directors and how do their responsibilities differ from executive directors?

There is at present no mandatory rule expressly requiring a minimum number of non-executive or independent directors on the board of French companies and no definition of the same under the law. However, French law provides that the board of directors of a listed company must create an audit committee and that at least one member of this committee must be an independent director. In addition, although the law does not give any definition of the notion of independent directors (see question 25), recommendations and good practices have been issued on this subject and do give rather precise criteria as to what an independent director means. In practice, many large French companies have decided to elect independent directors and publicise such designations. According to the AMF 2013 report on corporate governance and executive compensation procedures, the ratio of independent directors to the total number of directors among CAC 40 French-listed companies is 61 per cent.

23 Board composition

Are there criteria that individual directors or the board as a whole must fulfil? Are there any disclosure requirements relating to board composition? Are there minimum and maximum numbers of seats on the board? How is the size of the board determined? Who is authorised to make appointments to fill vacancies on the board?

There must be at least three – and no more than 18 – board members. Within these legal requirements, the size of the board is freely determined. In case of vacancy, the board may appoint a new member but such appointment will have to be ratified in the next shareholders' meeting. In addition, in companies having at least 10,000 employees, a law dated 14 June 2013 requires that an additional board member representing the employees be appointed (see question 33). By-laws of companies may provide for a maximum age limit for all directors (or for a determinate portion of directors). If no other limit is provided for in the by-laws, then the number of directors over 70 years old cannot exceed one-third of the directors sitting on the board. Unless the by-laws provide for a specific procedure in this respect, the oldest director is deemed to resign on the day the age limitation is reached.

The AFEP/MEDEF Recommendations provide that companies should appoint independent directors and consider expertise to be the first criteria on which to choose directors.

Disclosure relating to the board composition depends on the agenda of the shareholders' meeting.

For shareholders' meetings, the agenda of which is to appoint directors, companies are required to disclose the candidate's surname, first name, professional references and activities for the past five years, as well as their role in the company and the number of shares in the company they personally own or hold. According to the AFEP/MEDEF Recommendations, companies must disclose a small biographic notice of the candidates that sets out the main points of his or her CV. This recommendation is followed by 97 per cent of CAC 40 French-listed companies.

For the other shareholders' meetings, companies are required to disclose the name of the directors and the other companies to which they are linked (as employee or director for example) in order to avoid over-boarding.

As regards gender equality requirements, a recent law aims to promote gender diversity by requiring that, at the first general meeting to be held after 1 January 2014, at least 20 per cent of the board members of listed companies be women, increasing to 40 per cent after 1 January 2017. For the moment, boards without women should trigger mandatory elections in order to have at least one woman appointed as a director. According to the 2013 AFEP/MEDEF annual report, the proportion of women among board members reached 29 per cent in CAC 40 French-listed companies, following the 2013 annual general meetings.

24 Board leadership

Do law, regulation, listing rules or practice require separation of the functions of board chairman and CEO? If flexibility on board leadership is allowed, what is generally recognised as best practice and what is the common practice?

There is no mandatory rule imposing the separation of functions of the chairman of the board and CEO. The decision of separating or joining both functions is taken by the board.

Traditionally, French companies with a one-tier board structure used to have one person exercising the functions of the chairman of the board and CEO and many small SAs still retain that structure today. Since 2001, however, French companies have the option of separating these functions ab initio. Larger companies usually implement this separation, which market practice recognises as preferable, both for control and flexibility reasons. The CEO can, in turn, be assisted by one or more 'delegate CEOs' vested under the law with an authority equivalent to that of the CEO.

However, we have observed in recent months that draft resolutions, proposed to shareholders convened to approve annual accounts, show a tendency to recombine the duties of the board chairman and the CEO (for example, L'Oréal, France Télécom and, more recently, Cap Gemini and Schneider Electric).

25 Board committees

What board committees are mandatory? What board committees are allowed? Are there mandatory requirements for committee composition?

Except for the audit committee (see below), no board committee is mandatory. There is no restriction as to the creation of committees and no mandatory requirement applies as to committee composition. The board of directors can therefore freely decide which committees should be created, if any, and what their composition should be. Committees may include directors and non-directors. The committees only have a guidance and orientation authority. They cannot be vested with decision-making authority.

However, French law provides that, first, the board of directors (or the supervisory board) of a listed company must create an audit committee, second, the members of such committee must be non-executive directors (or non-executive members of the supervisory board), third, at least one member of this committee must be independent and have specific skills and personal experience in accounting, and, fourth, the role of such committee is to issue a recommendation in the event the statutory auditors are to be replaced by the shareholders, supervise the financial information process,

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ensure that the risk management procedures are efficient and follow up on the statutory auditors' audit of the accounts. In addition, the following additional role is given to audit committees of banks and insurance companies: the monitoring of policies, procedures and risk management systems. According to the 2012 AMF report on corporate governance and executive compensation, almost 100 per cent of French-listed companies mention the existence of at least one specialised committee, including audit committees, compensation committees, specific appointment committees and ethical committees.

26 Board meetings

Is a minimum or set number of board meetings per year required by law, regulation or listing requirement?

As the body designated by law to prepare and finalise the company's annual accounts and other related documentation (including the management report) and the annual general meeting of shareholders approving the accounts is convened by the board, the board is thus required to meet at least once a year to settle the annual accounts submitted for approval to the shareholders ordinary general meeting, together with appropriate resolutions.

The articles of association may, however, and often do, require more meetings. If the board has not met for more than two months, directors representing at least one-third of the board members may ask the chairman to call a meeting on any given agenda.

27 Board practices

Is disclosure of board practices required by law, regulation or listing requirement?

No specific disclosure of board practices is required in unlisted companies.

Listed companies are subject to significant disclosure obligations. In particular, the chairman of the board of directors (or the supervisory board) is required to prepare a report on the work of the board and the internal monitoring measures within the company. In his or her report, the chairman must also set out which specific corpus of corporate governance recommendations the company selected (see question 2) and which risk management procedure the company has established. In addition, the chairman of the board has to report on the composition of the board and on how the legal requirements relating to gender equality are met. This report must be presented to the shareholders together with the annual management report. It also indicates any restrictions that the board of directors has placed on the authority of the CEO. The contents of this report are not defined by statute. However, in 2006, the AMF produced a reference guide providing details on suggested contents and format.

The AMF also requires that listed companies include a section on corporate governance in their annual report and provides guidance as to the content thereof.

Most of the public reports produced by the management (annual reports, etc) are available on the internet (on the AMF's or the company's website). They are also sent to any person upon request. In addition, all listed companies must now have a website containing all information required to be disclosed to the shareholders. Each year, the AMF publishes a list of all listed companies that have not made public the chairman's report on board work and internal monitoring measures (referred to above).

In addition to these public reports, boards of large companies often establish and communicate to their members internal regulations aimed at organising, often in a very practical manner, the functioning of the board.

28 Remuneration of directors

How is remuneration of directors determined? Is there any law, regulation, listing requirement or practice that affects the remuneration of directors, the length of directors' service contracts, loans to directors or other transactions between the company and any director?

In French SAs, directors are remunerated with attendance fees that are freely determined by the shareholders. No other form of remuneration is allowed for the carrying out of the functions of director. The allocation between the directors is then decided by the board. The board, on the other hand, is exclusively competent for fixing the chairman's and the CEO's compensation. In addition to the attendance fees earned as a director, the chairman and the CEO can receive a specific compensation not subject to the authorisation procedure regarding 'interested transactions' set out below. The AFEP/MEDEF Recommendations provide that directors participating in subcommittees should receive extra attendance fees. These fees should be proportionate to the responsibilities taken on by directors and should be published in the annual report.

Expenses incurred while discharging a director's mandate in the company's interest may be reimbursed by the company.

Directors are appointed by the shareholders for a maximum period of six years, renewable indefinitely subject to age limits. The articles of association may stipulate shorter terms. Directors may be removed by the shareholders at any time. French corporate law prohibits individual directors from receiving any loans by the company, or to have the company guarantee the directors' undertakings. However, this prohibition does not apply towards non-individual directors.

Other transactions require the prior approval of the board, a special notice to the statutory auditors, and a ratification vote by the shareholders, ruling on said statutory auditor's report at the annual shareholders' meeting. This regime extends to all transactions entered into between a director and the company, whether directly or indirectly, including if the director holds an indirect interest in the company's co-contractor, and in particular where the director is also a controlling shareholder, a director or a manager of said company's co-contractor.

Each director has a duty to inform the board of any such situation. He or she cannot vote on the proposed transaction, whether at the prior board level or at the shareholders' meeting level where the transaction must be ratified.

Failure to comply with this procedure may result in the failing board member being held personally liable for any negative consequences the transaction would have on the company (in the event of a fraud, the transaction may even be annulled).

As an exception to the procedure set out above, no prior authorisation is required if the transaction is entered into in the ordinary course of business and under normal terms and conditions, or is insignificant for both parties.

29 Remuneration of senior management

How is the remuneration of the most senior management determined? Is there any law, regulation, listing requirement or practice that affects the remuneration of senior managers, loans to senior managers or other transactions between the company and senior managers?

In one-tier structures, the board of directors alone has decision-making power over the remuneration of the chairman of the board, the CEO and the delegate CEOs (see question 28). In two-tier structures, the supervisory board alone has this power over the remuneration of all executive board members. However, such authority is subject to the following restrictions:

- disclosure of information relating to the remuneration of senior managers – in listed companies, the annual management report must include information on the compensation paid to

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all corporate officers (ie, the board chairman, the CEO and the delegate CEOs or, as the case may be, executive board members (senior management)), including that paid owing to a status separate from said office (eg, an employment agreement or service contract) or in connection with the allocation of free shares, stock options, or in-kind benefits, and whether these are paid by the company or an affiliate;

- rules or practices for establishing the remuneration – the chairman's report (referred to in question 27) must now also indicate the rules set out by the board of directors (or, as the case may be, the supervisory board) for establishing the remuneration (including in-kind benefits) accorded to senior management. This report is made available to the public. As regards compensation committees, according to the AMF 2013 report on corporate governance and executive compensation and to the 2013 AFEP/MEDEF annual report, 98 per cent of the listed companies and 100 per cent of CAC 40 French listed companies elected to establish a compensation committee, with advisory capacity usually extending to director and top manager compensation. The AFEP/MEDEF Recommendations states that an employee member of the board should have a seat on the compensation committee;
- the recommendations on senior management remuneration included in the AFEP/MEDEF Recommendations, which state that:
  - senior management should not enter into employment contracts with the company (and should therefore not receive any salaries);
  - supplementary retirement schemes benefiting senior management are allowed under certain conditions (eg, the scheme must benefit not only senior management members but also a significant number of other employees, the board must establish a reasonable number of years of seniority for employees to benefit from the scheme and the pension each beneficiary receives (if he or she retires) must represent only a limited portion of his or her total remuneration);
  - the remuneration of each senior management member (including in-kind benefits, rights under supplementary retirement schemes, stock options and any shares allocated at no cost) must be disclosed to the public within five days of the board's decision (and not only in the above-mentioned reports);
  - a welcome or signing bonus may only be awarded to new corporate managers entering the company from outside the group the company belongs to;
  - termination indemnities should be conditional only on the executive manager's forced departure from the group, should not exceed two years of the sum of such manager's fixed and variable compensation and should be subject to performance criteria evaluated over two fiscal years;
  - beneficiaries of executive retirement plans must meet seniority conditions to be set by the board of directors (a minimum of two years with the company) and the annual increase of potential benefits is limited to 5 per cent of the beneficiary's compensation;
  - non-compete indemnities should be approved by the board, after extensive review by the compensation committee and such indemnities should be made public and should not exceed two years' pay (fixed and variable); and
  - the grant of stock options and performance shares should be subject to performance criteria and beneficiaries should be required to hold a substantial amount of stock options and performance shares until the end of their terms of office; and
- specific rules relating to 'golden parachutes' – compensation arrangements or benefits granted or paid to the senior management of listed companies as a result of leaving or changing their functions (golden parachutes) are subject to strict conditions. Rules governing related-party transactions must be complied with (prior approval by the board of directors (or, as the case may be, the supervisory board) and ratification by the shareholders at the annual general meeting). In addition, benefits and payment arrangements must be determined on the basis of contractually established objectives set for the beneficiary and the company. Payment cannot be made until the board has acknowledged that such objectives were indeed satisfied. In addition, the AFEP/MEDEF Recommendations states that golden parachutes shall, first, only benefit senior management members who are dismissed (and not when such members decide to resign), and, second, must be capped at an amount representing two years of remuneration (including any non-compete compensation).

In addition it should be noted that the AFEP/MEDEF Recommendations state that an employment contract should be terminated on appointment of an employee as executive director (that is, chairman of the board of directors, chairman/CEO and CEO in one-tier structure companies, chairman of the management board and sole chief executive in two-tier structure companies and statutory managers in limited stock partnerships).

Rules regarding related-party transactions and applicable to board members (including rules regarding loans and company guarantees) (see question 28) also apply to members of the senior management.

Finally, the AFEP/MEDEF Recommendations state that the board (either the board of directors or the supervisory board) should submit to the shareholders' ordinary general meeting the remuneration of senior corporate managers (see question 36).

30 D&O liability insurance

Is directors' and officers' liability insurance permitted or common practice? Can the company pay the premiums?

Directors' and officers' liability insurance is permitted and has become common practice in large companies or companies exposed to significant management risks. The companies can pay the related premiums.

31 Indemnification of directors and officers

Are there any constraints on the company indemnifying directors and officers in respect of liabilities incurred in their professional capacity? If not, are such indemnities common?

It is not common for a company to indemnify directors in respect of liabilities incurred in their capacity as directors. Such indemnities may even, to some extent, be viewed as a misuse of the company's assets and thus constitute a criminal offence.

32 Exculpation of directors and officers

To what extent may companies or shareholders preclude or limit the liability of directors and officers?

Company directors and officers are only liable in the event of misconduct. It is not, however, possible to limit or preclude their civil liability notably through charter amendments and any other shareholder action.

Moreover, in the event of bankruptcy proceedings against the company, a court may order directors to pay company debts (or a part of them) if such debts have been incurred owing to their mismanagement.

Directors and officers may limit their liability by delegating their powers to an assignee (an employee of the company) through a special delegation of authority. To be valid, the delegation of authority must specify its scope, and French courts require that the assignee be granted the broadest powers and provided with the necessary resources to perform its obligations under such delegation.

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Update and trends

The 2013 version of the AFEP/MEDEF Recommendations provide for a number of changes in corporate governance for French listed companies. In particular:

- a high committee of corporate governance is established to oversee the implementation of the governance provisions contained in the AFEP/MEDEF Recommendations. The committee will be composed of seven members (four members holding or having held high-level positions in international companies and three qualified members (investor, lawyer, deontologist);
- the board of directors of listed companies may submit questions to the committee relating to the interpretation of any provision of the AFEP/MEDEF Recommendations. The committee may also request listed companies to explain with detail any non-compliance with the AFEP/MEDEF Recommendations. If a company decides not to comply with the committee's recommendations, it must report the circumstances in its annual report and explain the reasons for such non-compliance;
- the principle of 'comply or explain' is strengthened. If a listed company chooses not to comply with a specific recommendation of the AFEP/MEDEF Recommendations, it should explain in detail any non-compliance, report any alternative measures taken to stay within the intended objectives of the particular recommendation and mention all this in the company's annual report;
- executive manager board members should not hold more than two other directorships in listed companies outside the group, including foreign companies. All other board members should be limited to holding four directorships in other companies outside the group, including foreign companies;
- following the AMF's suggestions, it is recommended that executive managers formally undertake not to hedge options, shares issued from the exercise of options or performance shares until the end of the holding period for such securities; and
- directors representing employee shareholders or employees should be excluded for purposes of determining the percentage of independent directors.

33 Employees

What role do employees play in corporate governance?

Workers' representatives must be elected in companies with 11 or more employees. A workers' council and a health and safety committee must also be set up in companies employing more than 50 employees. The workers' council must in particular be informed and consulted prior to the adoption of a large number of management or strategic decisions, subject to criminal penalties.

Two to four representatives of the workers' council must be invited to attend board meetings. Although they are not board members per se, they are entitled to receive the same information as the directors. They have a purely consultative role.

The articles of association may provide that employees have a right to appoint full board members, within the limit of one-third of the total board members. In addition, French law includes an obligation to organise elections, in listed companies, of directors among employees if the latter own at least 3 per cent of the share capital.

It should be noted that the French Labour Code entitles employees to disclose (either within the company or to the public authorities) in good faith any information revealing bribery in connection with the company and forbids any sanction or discriminatory measures being taken against such employees.

Mandatory representation of employees is compulsory on certain conditions. This measure applies only to SAs whose total size exceeds 10,000 employees worldwide (or 5,000 employees in France) and that have to set up a workers' council (ie, minimum of 50 employees). At least two board members should be representing employees in companies where board members are more than 12 and at least one board member should be representing employees in companies with boards made up of 12 members or fewer.

Disclosure and transparency

34 Corporate charter and by-laws

Are the corporate charter and by-laws of companies publicly available? If so, where?

The companies' articles of association are publicly available at the secretariat of the relevant trade and companies' registry (RCS). Other public information available includes information regarding the board composition, the legal representatives and the statutory auditors, the company's annual accounts, and minutes of shareholders' meetings as well as reports from the management and the statutory auditors relating to the approval of the accounts or certain other major corporate decisions.

Most documents and information are available on the trade and companies registries' commercial website, Infogreffe, at www.infogreffe.fr. Some of these documents may also be available on the websites of the companies or the AMF, the latter for listed companies only.

35 Company information

What information must companies publicly disclose? How often must disclosure be made?

All companies must file with the local RCS and keep up to date their articles of association, board membership, the identity of their statutory auditors and, on an annual basis, their annual accounts and decisions approving them. All such information is normally available with the RCS. Failure to file is subject to possible injunctions and rather minor fines. Some unlisted companies decide not to file.

Listed companies have a much stricter set of filing obligations, including on a permanent basis in respect of operations (whether through the annual report or specific prospectuses, information memoranda or communiqués), or periodically, in respect of financial results (annual accounts, draft resolutions regarding the approval of the accounts, consolidated accounts, quarterly or half-year results and statement of activities) or prospects (including any and all circumstances or facts having a 'significant impact' on the trading of the company's security and the share price). Failure to comply with filing obligations may give rise to criminal penalties for the chairman, the CEO, the delegate CEOs and the directors.

Hot topics

36 Say-on-pay

Do shareholders have an advisory or other vote regarding executive remuneration? How frequently may they vote?

Shareholders have the power to fix the remuneration of the members of the board of directors or the members of the supervisory board (see questions 28 and 29).

In listed companies, as part of the annual process leading to the approval by the shareholders of the annual accounts, the company also has an obligation to make available to the shareholders, at the company's head office, the global amount, certified by the statutory auditors, of all compensations paid to the five (or 10, if the company has more than 200 employees) best-paid individuals within the company, including in-kind benefits.

The 2013 version of the AFEP/MEDEF Recommendations introduce a say-on-pay requirement in corporate governance practice for French listed companies. As from 2014, shareholders should vote, in an advisory capacity, on the individual compensation of the company's executive managers. The board of directors must submit

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information on all remuneration (paid or payable for the last financial year and for each corporate manager) to the shareholders at the annual general shareholders' meeting.

Following this presentation, the shareholders will have an opportunity to vote. In the event of a negative vote, the board of directors should first consult the compensation committee and then deliberate on the matter at its next meeting to decide on any actions to undertake in response to the shareholders' negative vote.

The board of directors should subsequently issue a press release and publish it on the company's website regarding its intended response to such shareholders' vote.

37 Proxy solicitation

Do shareholders have the ability to nominate directors without incurring the expense of proxy solicitation?

Shareholders have no ability to nominate directors other than through the appointment and renewal process set out in the articles of association and involving the voting of shareholders on simple majority (see question 3).

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