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**Who is not afraid of being a company director?**

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## WHO IS NOT AFRAID OF BEING A COMPANY DIRECTOR<sup>1</sup>?

Directors of French companies are subject to rules set in the framework of Company law as well as they can also be subject to Employment law regulation.

Managing functions (appointment, powers, financial compensation, revocation and liability) are defined by French law for each commercial form of company together with the articles of incorporation and soft-law in some cases.

Besides, company Directors can benefit from the protection of French employment law under some conditions.

The questionnaire below gives a picture of the position of a company Director under the perspective of both Corporate and Employment laws in the French system that was recently modified in several fields related to this topic.

### **1. The legal position/status of a director and/or managing director in the different jurisdictions?**

- **How to define the mandate of a director / managing director from a legal perspective?**

Basically, the company Director acts in the name and on behalf of the company as a legal representative. Usual restrictions (minors, judicial prohibition to manage...) and incompatibilities (lawyers, Government members...) are applicable in the choice of the company Director. Furthermore, non-European individual entities can manage a company only where in possession of a residence permit, where applicable.

The definition of the company Directors' mandate depends on the company form and is usually provided for by the articles of incorporation (e.g. partner or third person, age limit...) in accordance with the legal provisions for each company form.

The distinctive factors between the different mandates are analyzed hereunder.

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<sup>1</sup> For the purpose of such questionnaire and considering the different terminologies in French law depending on the commercial form of the companies, "company Director" is used hereunder as a general term for Managing Director, CEO...

French employment law is not applicable to the company Directors, except if they also have an employment contract. Therefore:

- ✓ The compensation is not subject to the regulation applicable to salaries;
- ✓ In case of dismissal/resignation of the mandate, the company Director is not protected by Employment law rules such as notice period, dismissal indemnity, fair dismissal...;
- ✓ The execution of the mandate is not subject to Employment law (disciplinary measures, specific liability...).

- **Terminology: difference between director, managing director and CEO...**

***For the purpose of the questionnaire and pursuing an objective of simplification, such study is based on the more frequent companies' forms in France i.e. SA, SARL and SAS.***

Depending on the company form, the managing structure and the mandates can be strictly defined by law (SA, SARL) or freely fixed by the articles of incorporation (SAS):

(i) "Société anonyme" (SA) - Public Limited Companies

Companies are free to choose between two systems: Board of directors + Managing director (78% of the French SA) or Executive board + Supervisory board (German model), which must be fixed by the articles of incorporation.

⇒ **Board of directors + Managing director<sup>2</sup>**

\* Board of directors ("Conseil d'administration"):

- Chairman ("Président du Conseil d'administration"): can be only an individual entity. He administrates the Board's works and checks the operating of the structure of the company and can be as well appointed as Managing Director and therefore cumulate both functions.

- Directors ("Administrateurs"): can be legal or individual entities. They deal with the administration of the company.

\* Managing Director ("Directeur général"): he can be only an individual entity. He is appointed by the Board to manage the company and is involved in the day-to-day management issues. He is invested of the largest powers to act in all circumstances in the name of the company.

The Managing Director and the Chairman can be the same person. In this case, he is referred to as Chief Executive Officer ("Président Directeur Général").

\* Executive managers ("Directeurs généraux délégués"): if applicable, can be only individual entities, appointed by the board to assist the Managing Director.

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<sup>2</sup> Articles L225-17 and following of the French commercial Code

⇒ **Management Board + Supervisory Board**<sup>3</sup>

\* Management Board (“*Directoire*”): the members and the Chairman of the Board are appointed by the Supervisory Board and must be individual entities. They are responsible for the administration and management of the company.

\* Supervisory Board (“*Conseil de surveillance*”): can be legal or individual entities that supervise the management.

(ii) “Société à responsabilité limitée” (SARL) - Limited Liability Company<sup>4</sup>

The company is managed by one or several Managing Directors (“*Gérant*”), all individual entities appointed among the partners or not.

(iii) “Société par actions simplifiée” (SAS) - Simplified Limited Liability Company<sup>5</sup>

The managing system is freely ruled by the articles of incorporation. The only obligation is to have one President who represents the Company towards third persons. The President can be an individual or legal entity.

- **Distinction between aspects of employment law and aspects of company law:**

o **What is the contractual relation with the Company?**

(i) Mandate: the company Director is a legal representative bound to the company with a mandate.

(ii) Optional employment contract: under some conditions developed below, the company Director can also be bound to the company with an employment contract, in addition to the mandate.

o **Under what status does a director / managing director carry out his/her tasks: can a director and/or managing director carry out his/her duties as an employee?**

Except in specific situations provided for by law (particularly regarding company Directors in large companies) company Directors can have an employment contract with the company in addition to their mandate.

However, in order to avoid fraud aiming to benefit from the protection of Employment law as well as to prevent circumvention of the legal provisions regarding the mandate dismissal,

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<sup>3</sup> Articles L225-57 and following of the French commercial Code

<sup>4</sup> Articles L223-1 and following of the French commercial Code

<sup>5</sup> Articles L227-1 and following of the French commercial Code

the duality of statuses (mandate + employment contract) is strictly ruled by French case-law.

- ⇒ The employment contract shall correspond to an “effective job”<sup>6</sup>.  
The notion of “effective job” requires (i) technical functions different from the mandate functions, (ii) with a specific salary, and (iii) a subordination link with the company.

Two points should be mentioned considering the abovementioned criteria:

\* French Courts usually do not recognize the existence of a subordination link for majority shareholders in SARL companies, even in case of an effective job different from the mandate. To the contrary, minority shareholders as well as equal shareholders can benefit from the duality of statutes.

\* In groups of companies, under some conditions it is possible and frequent to have an employee of the parent company whose function is in fact being Director in a subsidiary of the company. In such case, the criterion of the technical functions different from the mandate functions is not required by case-law.

In case of litigation the judges check the reality of the employment contract and control the eventual fraud: if there is no real employment contract the Director will be considered only as a legal representative.

- ⇒ In addition, other conditions can be required in specific companies’ forms (e.g. proceeding of “regulated agreements” in SA and SAS).
- ⇒ AFEP-MEDEF Code recommendation: when an employee is appointed as a Director in a listed company, it is recommended to terminate the employment contract with the company<sup>7</sup>. However, this recommendation does not apply to employees of a parent company who are executive directors of a subsidiary of the group.

- **Are there typical rights / obligations related to the mandate of director / managing director?**

## Rights

\* Company Directors have the right to benefit from the stock option plan under restrictions due to their quality of Director / Managing Director<sup>8</sup>. Particularly, French law 2008-1258 of December 3<sup>rd</sup> 2008 created the obligation for listed companies to also improve the employee’s conditions by granting stock options, free shares or implement a profit-sharing scheme.

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<sup>6</sup> Article L225-22 of the French commercial Code for the Directors of listed companies extended by case-law to all mandates in any company.

<sup>7</sup> Article 22 of the AFEP-MEDEF Code

<sup>8</sup> Articles L225-185 and following of the French commercial Code

Furthermore, the AFEP-MEDEF and MIDDLENEXT codes provide specific recommendations in the implementation of a stock option plan in listed companies.

\* The same applies for a free shares allocation plan<sup>9</sup>.

\* Furthermore, it is not forbidden to have several mandates in companies having their headquarters in France but under limitations precisely defined by law depending on the company form.

### Obligations

\* See question 11 for non-compete obligation and revelation of “corporate opportunities”.

\* The obligation for SA Directors to buy shares of the company was cancelled by Law 2008-776 of August 4<sup>th</sup> 2008. Since then it is only an option to impose it through the articles of incorporation<sup>10</sup>. However it is still recommended by soft law for listed companies.

\* The company Directors are bound by specific rules in case of bankruptcy proceedings (prohibition to sell the shares, financial compensation fixed by the judge, limited powers).

○ **What are the rights in the event of termination/dismissal?**

It is necessary to make a distinction between the situation of a sole mandate (point 1) and the holding of both mandate and employment contract (points 1 + 2).

### **1) Dismissal/resignation of the mandate**

#### Dismissal:

- Dismissal free of restrictions: company Directors can be dismissed “*ad nutum*”, i.e. at any moment without any obligation for the company to invoke a fair reason.
- However, in some cases the company Director can be entitled to indemnities if the dismissal has no fair reason (e.g. in SARL and for SA’s Managing Directors). It is nevertheless possible to circumvent it by mentioning in the articles of incorporation the absence of indemnities in case of unfair dismissal.
- Limit: if the dismissal is vexatious, company Directors can claim for damages<sup>11</sup>.
- The company Director is not entitled to any compensation from the company, neither to unemployment compensation (except if he has an employment contract as well). Therefore, company Directors usually subscribe job-loss insurances.

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<sup>9</sup> Articles L225-197-1 and following of the French commercial Code

<sup>10</sup> Article L225-25 of the French commercial Code

<sup>11</sup> French Supreme Court, January 3<sup>rd</sup> 1996, n°94-10.765

- Golden parachutes: considering the several cases of excessive golden parachutes in the last years in France (CARREFOUR, VINCI, ELF, VIVENDI UNIVERSAL...), it is now subject to tight control and legal regulation: particularly, golden parachutes in listed companies should depend on the director and the company's results<sup>12</sup>. Furthermore, AFEP-MEDEF code also introduces restrictions, e.g. by limiting the amount of golden parachutes that should not exceed two years compensation (fixed and variable)<sup>13</sup>.

#### Resignation<sup>14</sup>:

Directors are free to resign although articles of incorporation can manage a specific resignation procedure. As for the dismissal, the company Director is not entitled to any compensation in that case.

## **2) Termination of the employment contract**

Whenever company Directors also have an employment contract with the company, dismissal and resignation of the mandate do not affect the employment contract (e.g. a wrong management does not justify the termination of the employment contract).

The end of employment contract is subject to the Employment law rules (notice period, dismissal indemnity...).

In the framework of the control of excessive compensations, the Government also strengthened the social security regime of golden parachutes: since law 2012-958 of August 16<sup>th</sup> 2012 the termination indemnity exceeding 10 times the annual social security ceiling (375.480 € in 2014) is considered as a salary and is therefore subject to contributions since the 1<sup>st</sup> euro. Whereas the former limit was much higher (30 times the annual social security ceiling).

## **2. What is the impact of corporate governance legislation or soft-law (such as corporate governance codes) for the position of a director / managing director? Distinction between listed and not listed companies.**

- The regulation in French corporate governance combines legal rules with soft-law:
  - Legal rules: The main reforms took place in 2001 with the French law n° 2001-420 of may 15<sup>th</sup> 2001 « *relative aux nouvelles régulations économiques* » and in 2008 with the French law n°2008-649 of July 3<sup>rd</sup> 2008 « *d'adaptation du droit des sociétés au droit communautaire* » and are codified mostly in the French commercial Code.
  - In addition, soft-law rules were developed in France in the early '90 inspired by the US model and led to corporate governance codes.

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<sup>12</sup> Article L225-42-1 of the French commercial code

<sup>13</sup> Article 23.2.5 of the AFEP-MEDEF Code

<sup>14</sup> This matter is ruled by case-law and is clearly inspired by the dismissal's rules.

The most applied code is the AFEP-MEDEF Code (2003, lastly revised in June 2013), but there is also the MIDDLENEXT Code (December 2009) for small and medium listed companies.

- Distinction between listed and not listed companies:  
The AFEP-MEDEF and the MIDDLENEXT codes have been specially created for listed companies in order to guarantee the optimal management of the company. Nevertheless, even non-listed companies might apply them in order to present themselves as ruled by the highest standards.
- Examples of questions ruled by the Corporate governance codes:
  - \* *Members of the Board*: introduces the obligation of “independent” directors (see question 7 below);
  - \* *Ethical recommendation*: duty of declaring every situation of conflict of interest to the Board<sup>15</sup>;
  - \* *Compensation*: see question 4 below.
  - \* *Objectives*: any variable compensation in listed companies shall be subject to the achievement of precise and predetermined objectives fixed by the Board to be valid<sup>16</sup>.
- Limited effects of corporate governance codes: “comply or explain” rule<sup>17</sup>.

The application of corporate governance code is made on a voluntary basis and companies have the right to choose the rules they want to apply or exclude. Nevertheless, companies should have to provide an explanation of the reasons why they have deviated from any of those rules (French experience shows that companies usually exclude the rules related to the composition of the Board).

Therefore the supervision of the respect of the rules arising from soft-law is a real issue as no sanction is provided for.

Still, the AMF (“*Autorité des marchés financiers*”), i.e. the French regulating authority for listed companies, publishes every year a report on the application of governance codes. By publishing the name of every company that does not comply with governance codes’ rules, the AMF can use of a real power of control and sanction.

Moreover, the AMF contributed to reach a higher standard of justification in application of the “comply or explain” system. E.g., further an AMF report in 2012, the new version of the AFEP-MEDEF Code dated June 2013 now provides the obligation to give a “comprehensible, relevant and detailed” explanation in case of deviation from any rule.

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<sup>15</sup> Article 20 of the AFEP-MEDEF Code

<sup>16</sup> Article 23.2 of the AFEP-MEDEF Code

<sup>17</sup> Article 25.1 AFEP-MEDEF Code



### **3. Liability of a company director / managing director?**

The company Directors' liability is basically contractual towards the company and based on torts towards third parties.

- **Civil liability:**
  - Liability towards company<sup>18</sup>:
    - \* Company Directors can engage their personal liability towards the company for the following reasons:
      - 1) Violation of law and/or articles of incorporation;
      - 2) Wrong management of the company which definition is left to the judges.
    - \* It is an individual liability in case of a personal fault and joint liability in case of a fault arising from a Board's decision. In the latter case, every member of the Board is considered liable except if he proves he disagreed with the inappropriate decision or legitimately did not participate to the vote.  
Moreover, the Director may be exonerated while he proves that he behaved prudently and diligently particularly by disagreeing with the decision provided that his protests were noted in the minutes.
    - \* Company Directors' liability can be engaged by the company itself through its legal representatives provided that the company can prove harm, or by the shareholders in case of personal harm.
  - Liability towards third parties:
    - \* Company Directors' are liable only in case of a personal fault separable from their function<sup>19</sup>. This criterion is appreciated under a subjective point of view: the director's willingness determines whether his liability is engaged or not and the violation of the articles of incorporation is not a condition to engage his liability.
    - \* The French Supreme Court has recently stated that the articles of incorporation can provide that third parties cannot invoke the limitation of powers arising from the articles of incorporation against a company Director's decision or act<sup>20</sup>.
    - \* Liability towards shareholders: shareholders can engage a director's liability, but they must justify of a real damage, different from the company's damage. Most of the time, those actions are rejected because shareholders fail in proving a personal damage (e.g. loss of value of shares).
- **Criminal liability:**
  - \* The most important offences concerning the management of the company are the following: misuse of company assets, misuse of powers, allocation of fictitious

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<sup>18</sup> Articles L223-22 and L225-251 and following of the French commercial Code

<sup>19</sup> Defined by French case law as a gross intentional misconduct incompatible with the functions (French supreme court 20/05/2003, n°99-17.092).

<sup>20</sup> French supreme Court 13/11/2013, n°12-25.675

dividends, presentation or publication of non-conforming financial statements, failure to produce accountability.

\* The sentence can raise 5 years in jail and a fine of Euros 375.000<sup>21</sup>.

\* A delegation of powers can exempt the company Director from liability provided that it was given to a person who is vested of proper powers, competences and authority in order to realize the mission entrusted.

- **Noteworthy specific liabilities:**

- Bankruptcy: a company Director can be liable in case of bankruptcy if the financial difficulties are due to his personal misconduct.
  - Tax liability: such liability can be engaged in specific situations when the non-payment of company taxes is due to the company Director's personal misconduct<sup>22</sup>.
  - Regulated agreements: specific authorization proceedings shall be followed when a company Director enters into an agreement with the company. In case of fraud, the company Director as well as the Directors who authorized the agreement can engage their liability.
- **Are there in your jurisdiction over the last few years more court cases involving company directors or managing directors?**

The well known VIVENDI UNIVERSAL case is one of the most remarkable actions led against a company director over the last years in France.

In the VIVENDI UNIVERSAL case, the former Company director (J.M. MESSIER) was condemned by judgment of January 21<sup>st</sup> 2011 for misuse of company's assets as well as presentation of non-conforming financial statements.

In particular, he was condemned to 150.000 Euros and 3 years of suspended sentence for misuse of company's assets because of his decision to grant himself a 18.6 million Euros golden parachute (he nevertheless had to renounce to it), without the approval neither of the Board of directors, neither of the shareholders.

The decision was appealed and the Court of appeal's judgment is scheduled for April 2014.

It has to be noted that when the fraud was discovered, VIVENDI UNIVERSAL shares radically drop from a 140 Euros quotation, to only 8 Euros.

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<sup>21</sup> Articles L241-3 (SARL), L242-6 (SA) and L244-1 (SAS) of the French commercial Code

<sup>22</sup> Article L267 of the Tax Code

#### **4. Are there any recent changes in remuneration legislation / policies for company directors / managing directors?**

French law only provides that the compensation is fixed by the Board of Directors however this is currently subject to a question in SA companies: should it be by the shareholders at the annual general meeting instead of the Board of directors?

The control of the Company directors' compensation is also a highly topical concern. Such question has been subject to important and recent changes in France. The excessive compensations issue led to several reports from the various players as the Government, AMF, and MEDEF aiming at reviewing the current system in order to regulate it and provide transparency in the total compensation of a Company director (fixed + variable compensation).

In this context, the AFEP-MEDEF Code was revised in June 2013 and introduced the "say on pay" system and a high standard of transparency of every element of company Directors' compensation.

The "say on pay" system implies to submit the company Directors' compensation to the consultative vote of the shareholders *a posteriori*. The final decision however belongs to the Board of directors. Moreover, where the compensation is rejected, the decision is not retroactive. Therefore, it is only a "political sanction".

The "say on pay" system was supposed to be subject to a legislative reform that finally did not take place. Therefore, for the moment only companies complying with the AFEP-MEDEF Code are concerned by the "say on pay" system (the first companies to apply it in France were PUBLICIS and PERNOD RICARD in 2013). However, it is likely that such system will evolve in French law considering the evolution towards regulation of excessive compensations.

The AFEP-MEDEF Code fixes the following principles:

- Fixed compensation: fixed compensation should be fixed by the Board in compliance with some principles<sup>23</sup>:
  - o Comprehensiveness: every element of the compensation must be taken into account when determining the overall compensation level.
  - o Balance: every part of the compensation must be clearly motivated and correspond to the general interest of the company.
  - o Benchmark: compensation must be fixed considering the context of a business sector, in Europe and in the global market.
  - o Consistency: compensation must be fixed considering also other officers compensation and employees' salary of the company.

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<sup>23</sup> Article 23.1 of the AFEP-MEDEF code

- Understandability: the guidelines and rules in compensations' determination must be clear. E.g.: the determination of objectives must be clear, easy and predictable.
  - Proportionality: compensations must be fixed considering the interest of the company, market practices, as well as the performances of the directors.
- Variable compensation<sup>24</sup> (bonus) must be in direct relation with the company Directors' results. Also, AFEP-MEDEF code suggests subordinating variable compensation to long terms' objectives.
  - Stock options: stock options rules have been reformed in December 2008 in order to limit the allocation of stock options by introducing the obligation for the company to grant the employees similar improvements<sup>25</sup>.

#### **5. Has it occurred in your jurisdiction that management decisions were revised after being challenged by stakeholders (e.g. consumers)?**

\* Groups or institutions of shareholders can be organized, particularly for minority shareholders in order to increase their power (E.g. see NATIXIS case: in 2009 730 minority shareholders subpoenaed NATIXIS for presentation of non-conforming financial statements and information on the situation of the company).

\* Since 2003, proxy advisors must participate and vote to shareholders deliberations, otherwise, they must motivate the fact that they did not vote. This new rule led to a more intense participation of proxy advisors in assembly votes.

\* In May 2012 French government, that holds 16% of AIR FRANCE shares, voted against a 400.000 Euros bonus awarded by the Board of Directors to AIR FRANCE's Managing Director. Even though the bonus was rejected, P.H. GOURGEON had no obligation to reimburse it.

\* Trade unions have the right to form opposition to corporate restructuring plans (*plan de sauvegarde de l'emploi*) approved by the Board and can claim the invalidation of the corporate restructuring plan<sup>26</sup>.

Recently, on April 26<sup>th</sup> 2013, the Paris Tribunal had to decide on the claims of the CGT and SUD trade unions concerning the corporate restructuring plan of PEUGEOT. The plan provided for the dismissal of over 11.200 employees of FAURECIA, a company of the group, in order to restructure the company. Trade unions claimed the invalidation of the plan, arguing of a non-respect of the rules concerning preliminary and loyal information of the

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<sup>24</sup> Article 23.2 of the AFEP-MEDEF code

<sup>25</sup> Article L225-186-1 of the French commercial Code

<sup>26</sup> E.g. see French Supreme Court, 8/11/1998, n°96-22.343 for the invalidation claim filed by a local union.

employees' representatives. Finally the Court decided in favor of the PEUGEOT group, considering that the trade unions failed in proving an infringement of the information obligations<sup>27</sup> by PEUGEOT's Board.

**6. Has your jurisdiction issued specific legislation on female presence in the board of directors?**

Recent measures aim to guarantee female presence in the Board of directors.

French law n°2011-103 of January 27<sup>th</sup> 2011 requires a better equity between females and men in the composition of Boards, applicable to companies that fulfill certain conditions. This applies especially to large listed companies (SA) however it also provides a general obligation of pursuing a balanced representation of females and men in the composition of the Board.

The objective is to reach a minimum of 40% female members in the Board of Directors within 2017, with an intermediary step of 20% within 2014.

If those objectives are not reached by the companies, where applicable, the appointments of the members would be null and void and the payment of attendance fees could be suspended where applicable.

Furthermore, the AFEP-MEDEF Code also recommends equity in the Board of Directors<sup>28</sup>.

**7. Is there in your jurisdiction an obligation to have a minimum of independent and/or non-executive directors in the board?**

- Nothing is provided for by law, but AFEP-MEDEF governance Code provides the obligation to have independent directors in the Board. Therefore, it shall be mostly applicable to listed companies.

- The number of independent directors depends on the composition of the capital of the company<sup>29</sup>. E.g. in widely-held companies without controlling shareholders: at least half of the Board must be independent; in controlled companies: 1/3 of the Board should be independent.

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<sup>27</sup> Tribunal de Grande Instance de Paris, 26/04/2013, n°13/52.076

<sup>28</sup> Article 6.4 of the AFEP-MEDEF Code

<sup>29</sup> Article 9.2 of the AFEP-MEDEF Code

- It has to be noted that an independent director cannot<sup>30</sup>:
  - a. Be an employee or executive Director of the company, of the parent company and not having been in such position for the previous 5 years;
  - b. Be an executive Director of a company in which the company holds a directorship.
  - c. Be a customer, a supplier, an investment banker or commercial banker relevant for the company, also in terms of business.

**8. Are there in your jurisdiction certain obligations that are different for private and for publicly owned companies and which are not yet covered by the above topics?**

- *Composition of Board of Directors? Obligation to have certain stakeholders represented in the Board?*

Employees should be represented in the Board in two cases:

- Employees' representation: since Law 2013-504 of June 14<sup>th</sup> 2013, companies with more than 5000 employees permanently employed in the group having their registered office in France, that also have the obligation to create a works council (*Conseil d'entreprise*), must appoint at least one employees' representative in the Board (two if the Board is composed of more than 12 Directors)<sup>31</sup>.
- Shareholders employees' representation: in listed companies, the French commercial Code provides that whenever employees hold at least 3% of the share capital, the Board must appoint at least one shareholder among them<sup>32</sup>. Otherwise, the appointment of an employee to the Board is simply optional.

The Board has to provide a report to the shareholders' assembly every year regarding the employees' representation and the employees' investment in the share capital<sup>33</sup>.

- *Compensation for Directors?*

- It has to be noted that the following points are mostly applicable to listed companies:

- 1) Complementary pension schemes ("Top-hat plan"): 43 companies over 60 studied by the AMF in his last report declared applying top-hat plans. The AFEP-MEDEF code introduces some restrictions, mostly concerning the amount of such plan: compensation granted should not exceed 45% of the total annual compensation (fixed and variable)<sup>34</sup>.

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<sup>30</sup> Article 9.4 of the AFEP-MEDEF Code

<sup>31</sup> Article L225-27-1 of the French commercial Code

<sup>32</sup> Articles L225-23 and L225-71 of French commercial Code

<sup>33</sup> Article L225-102 of the French commercial Code

<sup>34</sup> Article 23.2.6 of the AFEP-MEDEF Code

- 2) Welcome compensations: governance codes limit this sort of compensation only to company Directors coming from a company that is not part of the group<sup>35</sup>.
- Stock-options: specific provisions apply to listed companies.

As variable compensation, awards of stock options must be conditional on the attainment of performance targets<sup>36</sup>. Only the shareholders' assembly can authorize the Board to proceed to a stock options' plan<sup>37</sup>.

Furthermore, listed companies can set up a stock-options plan or a free allocation shares plan only if employees are similarly improved. Also, listed companies must evaluate their stock options considering the real value of its shares on the Stock Market; particularly, stock options' price can't be lower than 80% of the shares' value<sup>38</sup>.

#### **9. Position of directors/ managing directors in the event of disposal and/or merger of the company?**

- *Is it typical to have wording on the position of the management in transfer agreements? If yes, which topics would usually be covered?*
  - In case of merger or disposal of the company, French law authorizes the company to set up an enlarged Board, for a three years period. The new Board shall count no more than 24 directors<sup>39</sup>. The presence of directors from the merged company might be a matter of negotiation.
  - In case of merge, the survival of appointments and delegations is uncertain, so that usually it is subject to negotiation.
  - Where a company Director is also bound to the company with an employment contract, the merger does not affect his employment contract. In fact, French labor law requires the transfer of all employment contracts in case of merger of the company<sup>40</sup>. As a matter of consequence, company Directors can lose their mandate but keep their employment contract.
- *Is it common to have wording on discharge for the services performed prior to the disposal/merger?*

Normally, company Directors' liability for the period before the merger or disposal is not affected by the operation.

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<sup>35</sup> Article 23.2.5 of the AFEP-MEDEF Code

<sup>36</sup> Articles L225-42-1 and L225-90-1 of the French commercial Code and article 23.2.4 of the AFEP-MEDEF Code

<sup>37</sup> Article L225-177 of the French commercial Code

<sup>38</sup> Article L225-177 of the French commercial Code

<sup>39</sup> Article L255-95 of the French commercial Code

<sup>40</sup> Article L1224-1 of the French Labor Code

Moreover, even if a merger/disposal is decided by the shareholders' assembly, the company Directors are responsible for drafting the merger/disposal agreement<sup>41</sup>. Such agreement defines a merger calendar, as well as the purposes and the conditions of the operation (e.g. stocks' evaluation)<sup>42</sup>.

Company Directors' liability can be engaged by their misconduct during the negotiation of the merger/disposal's draft agreement. For example, following DELATTRE-LEVIVIER's acquisition by SIFB in 1986, M. PENDARIES SIFB's CEO has been condemned for misuse of company assets (SIFB acquired DELATTRE-LEVIVIER even if this operation was highly risky and in contradiction with the interests of the company)<sup>43</sup>.

- *Is it common to have contractual limitations of liability towards the acquirer?*  
Most of the time, the transferor entity grants guarantees in order to prevent the acquirer from supporting debts that were not known at the moment of the merger/disposal and that might modify the value of the shares (so called "balance sheet guarantee").
- *Is it common for the sale agreement to provide restrictive covenants on the part of directors / managing directors? If yes, what type of restrictive covenants?*  
Whenever a company Director leaves a company, no matter why (merger, disposal or dismissal), a non-compete clause may be provided for (see question 11 below).

## **10. Are there in your jurisdiction minimum requirements to become a company director?**

There are no specific obligations provided for in the regulation.

Nevertheless, company Directors' qualifications will be considered if their liability is challenged. Moreover, specific skills can be required in case of a delegation of powers.

## **11. Does a company director has specific obligations with regard to:**

- Loyalty obligation<sup>44</sup>: French case-law has developed the theory of the loyalty obligation arising from the mandate: company Directors should not realize any

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<sup>41</sup> Article L236-6 of the French commercial Code

<sup>42</sup> Article R236-1 of the French commercial Code

<sup>43</sup> French supreme Court, July 10<sup>th</sup> 1995, n° 94-82.665

<sup>44</sup> French Supreme Court, February 27<sup>th</sup> 1996, n° 94-11.241 *Vilgrain*



activity that might be in competition with the company's activity during their mission as well as after the mandate.

- Non-compete obligation: In addition, the company Directors can be subject to a specific non-compete obligation after their mission. In this case, the non-compete clause must be:
  - Balanced regarding the interests that the company aims to protect;
  - Limited in time and space: the non-competition obligation cannot excessively limit the ex-company Director's access to work.

The AFEP MEDEF code provides that the specific compensation should be limited at an amount of two years of compensation (fixed and variable) including the termination benefit, where applicable<sup>45</sup>.

Furthermore, it has to be noted that the Labor law regulation will be applicable where the non-compete obligation is provided for in an employment contract. Therefore, the company Director will be entitled to financial compensation regulated by Labor law.

- The obligation to reveal so-called "corporate opportunities" towards the company:  
The loyalty obligation towards the company implies an obligation to reveal "corporate opportunities"<sup>46</sup>.  
The company Director who breaches such obligation engages his liability towards the company.  
French Courts didn't have many occasions to state on corporate opportunities cases but we might expect an increasing number of cases in the very next years.

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<sup>45</sup> Article 23.2.5 of the AFEP-MEDEF Code

<sup>46</sup> French Supreme Court, December 18<sup>th</sup> 2012, n°11-24.305: a Managing Director, responsible for searching an office for the company, engaged his liability towards the company by buying a building for himself that would have fit the company's needs.