

## REMUNERATION OF EXECUTIVE CORPORATE OFFICERS OF FRENCH *SOCIÉTÉS ANONYMES* LEGAL AND TAX RULES

This memorandum explains the current legal and tax rules applicable to the remuneration of executive corporate officers of French companies organized in the legal form of a *société anonyme* and reiterates the recommendations made by MEDEF<sup>1</sup> and the terms of the Recommendation made by the European Commission.<sup>2</sup>

This memorandum applies to executive corporate officers. In the case of a *société anonyme* with a board of directors, this document applies to the Chairman, the managing director and the deputy managing directors, and in the case of a *société anonyme* with a management board and supervisory board, it applies to the chairman and the members of the management board.<sup>3</sup>

Along these lines, this document addresses the following:

- legal rules
  - conditions applicable to the award of the various components of the remuneration
  - disclosure of the remunerations
- tax rules applicable to the remunerations.

### I. LEGAL RULES

#### 1. Conditions applicable to the award of the remuneration

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##### **General provisions**

##### ■ *General remuneration policy*

##### ☞ *General recommendations issued by AFEP / MEDEF*

*Corporate officers' remuneration must be appropriate, balanced and fair. Such remuneration must strengthen the sense of solidarity and motivation within the enterprise. The need to provide explanations and to maintain balance must also prevail as regards shareholders. Remuneration must also take into account, to the greatest extent possible, the reactions of other stakeholders and public opinion at large. Finally, such remuneration must make it possible to attract, retain and motivate effective officers.*

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<sup>1</sup> Recommendations concerning the remuneration of corporate executive officers of listed companies, AFEP / MEDEF, January 2007.

<sup>2</sup> European Commission Recommendation of 14 December 2004 fostering an appropriate regime for the remuneration of directors of listed companies (2004/913/EC).

<sup>3</sup> Corporate governance of listed companies, AFEP / MEDEF, Oct. 2003, p. 1 note 1.

*While the market is a benchmark, it may not be the only one. A corporate officer's remuneration depends on the work carried out and the results obtained, but also depends on responsibilities. An executive director bears the ultimate responsibility for the management team, and this warrants a higher remuneration.*

*The remuneration of the corporate executive officer may also depend on the nature of the tasks entrusted to him or on special circumstances (e.g. the restructuring of an ailing enterprise).*

## ☞ **Recommendations made by the European Commission**

*The European Commission issued a recommendation concerning the remuneration of directors of listed companies. However, it is necessary to note that, when using the term "director," the Commission refers to "any member of the administrative, **managerial** or supervisory bodies of a listed company."<sup>4</sup> In addition, the Commission indicates that Member States should ensure that the recommendation "applies to the remuneration of the **chief executive officers** of a listed company in the case where they are not members of the administrative, managerial and supervisory bodies of the listed company."<sup>5</sup>*

*The recommendation emphasizes in particular that the form, structure and level of the directors' remuneration are the responsibility of companies and their shareholders and must make it possible to recruit and retain directors having the required quality in order to lead the company.*

*However, remuneration is one of the main areas in which directors/managers may have a conflict of interest with the company and where it is necessary to duly take into account the shareholders' interests. Remuneration rules should therefore be subject to appropriate corporate governance controls on the basis of adequate rights governing access to information. In this respect, it is necessary to strictly comply with the diversity of the corporate governance rules in existence within the Community, reflecting the various views of Member States concerning the role of companies and the bodies responsible for determining the director remuneration policy and the individual remuneration of each director.*

## ■ **Role played by a remuneration committee**

### ☞ **AFEP / MEDEF recommendations**

*In general, regardless of the remuneration item concerned, MEDEF and AFEP recommend involving a remuneration committee: while the members of the board of directors and supervisory board are solely responsible for determining the remuneration of executive officers, their decision must be prepared by a committee.*

↳ Composition of the remuneration committee: *The committee may not include any corporate executive officer, and the majority of its members must be non-executive directors meeting the criteria defined in the AFEP / MEDEF Code of October 2003.*

*A regulation approved by the board of directors or by the supervisory board must determine the committee's mandate and functioning mode. The annual report must contain an explanation concerning the proceedings of the remuneration committee over the last financial year.*

<sup>4</sup> Article 2.1 of the recommendation.

<sup>5</sup> Article 1.3 of the recommendation.

↳ **Role of the remuneration committee:** *The remuneration committee must enable the board of directors or supervisory board to determine, under the best possible conditions, all of the remunerations and benefits accruing to corporate executive officers:*

- ♦ *in order to compensate or motivate executive corporate officers by creating the most favorable conditions for the discharge of their duties;*
- ♦ *by ensuring maximum convergence between the interests of executive corporate officers and shareholders (such convergence may only be assessed over the long term);*
- ♦ *while maintaining social cohesion, whether within the management team or in the enterprise and its environment;*
- ♦ *with utmost transparency vis-à-vis shareholders in the annual report and during the general meeting, during which the chairman of the remuneration committee might usefully take the floor on the board's behalf, for instance in response to questions asked by shareholders.*

### ↳ **Recommendation issued by the European Commission**

*Concerning the remuneration committee, please refer to the recommendation made by the European Commission on 15 February 2005 concerning the role of non-executive directors and members of the supervisory board and of the committees of the board of directors and supervisory board.*

## **Principal remuneration**

### ■ **Responsibility**

The board of directors is responsible for determining the remuneration of the Chairman of the board of directors, the managing director and the deputy managing directors.<sup>6</sup> In the same manner, the supervisory board is responsible for determining the remuneration of the members of the management board.<sup>7</sup>

In addition, the chairman of the management board receives director's fees in his capacity as a director. The total amount of the directors' fees allocated to the board of directors is determined by the general meeting, but is apportioned among the members by the board itself.

### ↳ **Recommendation issued by the European Commission**

*The recommendation asks that the Member States provide that, without prejudice to the responsibilities of other bodies, the remuneration policy be an explicit item on the agenda of the annual general meeting.*

*The remuneration statement (see below) should be submitted to the annual general meeting of shareholders for a vote. However, Member States may provide that such a vote will be held only if requested by shareholders representing at least 25% of the total number of votes held by shareholders present or represented at the annual general meeting.*

<sup>6</sup> Articles L. 225-47 and L. 225-53 of the French Commercial Code.

<sup>7</sup> Article L. 225-63 of the French Commercial Code.

*The company should inform shareholders entitled to receive notice of the meeting of the intention to table a resolution approving the remuneration statement at the annual general meeting.*

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### ☞ **AFEP / MEDEF recommendations concerning the determination of the principal remuneration**

*Fixed part of the remuneration (including any non-cash benefits):*

- *this remuneration may be modulated differently depending on whether the corporate executive officer is working continuously within the enterprise or has been recruited from outside the company;*
- *in principle, the remuneration may not be revised, unless after a relatively long period;*
- *the remuneration's increase must be linked to events affecting the life of the enterprise and take into account the remuneration of performance through the variable part of the compensation package.*

*Variable part of the remuneration:*

- *must be easy to understand for shareholders;*
- *must be determined for a fixed term;*
- *the relationship between the variable part and the fixed part must be clear and consist in a maximum percentage of the fixed part, suited to the enterprise's business;*
- *the variable remuneration is not linked to the share price, but rewards short-term performance and the enterprise's progress in the medium term. The rules serving to determine the variable part of the remuneration must therefore be in line with the annual assessment of the executive officer's performance and with the enterprise's medium-term strategy;*
- *the qualitative and quantitative criteria must be clear and pre-established.*

*The board of directors or the supervisory board must monitor, over several years, all changes in the package comprised of the fixed and variable part in view of corporate performance.*

### **Termination payments and additional pensions**

The rules below apply whether the company's commitment is assumed in respect of the corporate office or in respect of an employment position held by a corporate officer.<sup>8</sup>

#### ■ **Performance conditions**

In those companies whose shares are admitted to trading on a regulated market, termination payments or other benefits granted to corporate officers must be subject to performance requirements (*Act of 21 August 2007 for labor, employment and purchasing power, the "TEPA" Act*<sup>9</sup>).

<sup>8</sup>As regards commitments assumed in respect of corporate offices: Articles L. 225-42-1 and L. 225-90-1; as regards commitments assumed in respect of an employment contract: Articles L. 225-22-1 and L. 225-79-1 of the French Commercial Code.

<sup>9</sup> Act No. 2007-1223 of 21 August 2007.

The above provision does not apply to any non-competition indemnities or top-up pensions, but covers the commitments cumulatively meeting the requirements below:

- commitments assumed by the company itself or by any company controlled by, or controlling, the company;
- commitments assumed in favor of the chairman, managing directors or deputy managing directors or the members of the management board;
- commitments corresponding to remuneration items, indemnities or benefits accruing or likely to accrue because of the termination of, or change in, a corporate office, or thereafter.

Such commitments are prohibited if the relevant benefit is not subject to compliance with conditions related to the beneficiary's performance, assessed on the basis of the performance of the company of which he is the chairman, managing director, deputy managing director or member of the management board.

Also, under penalty of nullity as a matter of right, the board of directors or supervisory board must, prior to any payment of any nature whatsoever, upon or after the termination or actual change in positions, ascertain whether or not the said conditions have been complied with. The decision by which the board of directors or supervisory board ascertains compliance with the performance conditions and decides on the resulting payment must be published on the Company's website within no more than five days from the date of the meeting during which the relevant decision was made. The said decision must be accessible on the said website at least until the date of the next general meeting (Decree of 7 May 2008<sup>10</sup>).

#### ■ ***Implementation of the procedure for the approval of agreements with related parties***

In companies whose securities are admitted to trading on a regulated market, the procedure for the approval of agreements with related parties is applicable to the grant of termination payments, additional pensions or any other benefit related to termination of office (Act for trust in, and the modernization of, the economy, of 26 July 2005<sup>11</sup>, "Breton Act").

This rule applies to commitments (including any non-competition indemnities and top-up pensions) cumulatively meeting the requirements below:

- commitments assumed by the company itself or by any company controlled by, or controlling, the company;
- commitments assumed in favor of the chairman, managing directors, deputy managing directors or the members of the management board;
- commitments corresponding to remuneration items, indemnities or benefits accruing or likely to accrue because of the termination of, or change in, a corporate office, or thereafter.

In general, the implementation of this procedure requires the following:

- prior approval by the board of directors or the supervisory board, it being understood that the officer concerned may not participate in the vote. Any commitments incurred without such prior approval may be cancelled if they have any adverse impact on the company. However, such nullity may be cured by a vote of the general meeting, deliberating on the basis of a special report prepared by the statutory auditors and detailing the circumstances because of which the approval procedure was not complied with.

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<sup>10</sup> Decree No. 2008-448 of 7 May 2008 implementing Articles L. 225-42-1 and L. 225-90-1 of the French Commercial Code concerning the disclosure of deferred compensation.

<sup>11</sup> Act No. 2005-842 of 26 July 2005.

- A special report prepared by the statutory auditor.
- A deliberation of the general meeting, made on the basis of a report prepared by the statutory auditor, it being understood that the officer concerned may not participate in the vote. However, any non-approved commitment shall be effective, but the person concerned and, where applicable, the members of the board of directors or the management board may be held liable for any damaging consequences for the company.

Specific requirements are to be complied with when this procedure is applied to the award of termination payments or other benefits related to any termination of, or change in, any corporate office.

Except where the assumed commitment corresponds to an indemnity granted under a non-compete clause or in connection with a top-up pension, it is also necessary to comply with the commitments below when implementing the procedure for the approval of related-party agreements (*TEPA Act*):

- the prior approval of the board of directors or the supervisory board must be published on the Company's website within no more than five days from the date on which the said approval was granted. The relevant approval must be accessible on the said website during the entire term of office of the beneficiary (Decree of 7 May 2008);
- the approval by the general meeting must be memorialized in a specific resolution for each beneficiary and must be reiterated upon each renewal of office.

#### ***☞ AFEP / MEDEF recommendations concerning the determination of the amount of termination payments***

*It is preferable that termination payments be provided for contractually from the outset, according to the fixed part of the remuneration.*

*Such termination payments must also take into account, where applicable, the existence of any rights to an additional pension. Any non-compete clauses must also be negotiated in the company's interest.*

*Such payments must be excluded in the event of removal with cause. The agreement must provide for the treatment of any unexercised options and any unvested bonus shares.*

### **Share purchase and subscription options – Bonus shares**

#### **■ Share purchase and subscription options**

The rules governing the award of share purchase and subscription options are contained in several laws and regulations, the latest of which being the new economic regulations act (the "NRE Act")<sup>12</sup>, the ordinance reforming the rules on investment securities<sup>13</sup> and the act for the development of mandatory profit-sharing and employee shareholder schemes.<sup>14</sup>

<sup>12</sup> Act No. 2001-420 of 15 May 2001.

<sup>13</sup> Ordinance No. 2004-604 of 24 June 2004.

<sup>14</sup> Act No. 2006-1770 of 30 December 2006.

The award of share purchase and subscription options to corporate executive officers is subject to the general rules applicable to the award of share options to employees, but is in addition subject to specific rules<sup>15</sup>.

### General rules

#### ↳ *Approval by the EGM*

The extraordinary general meeting must authorize the board of directors (or the management board) to grant options giving a right to the subscription of shares to all or certain of the company's employees, to the chairman of the board of directors, the managing director, the deputy managing directors or the members of the management board. The EGM decides on the basis of the report submitted by the board of directors or the management board and on the basis of a special report prepared by the statutory auditors.

The EGM must determine the term of the approval granted by it, but such term may not exceed 38 months.

The EGM's approval entails, in favor of the beneficiaries of the options, the shareholders' express waiver of their preferential subscription right in respect of the shares that shall be issued as and when options are exercised.

#### ↳ *Decision to be made by the board of directors or management board*

The board of directors or the management board determines the terms subject to which the options shall be awarded. The board of directors or the management board provides for clauses prohibiting the immediate resale of all or part of the shares ("custody period" which may not exceed 3 years from the date of exercise of the option).

The subscription price is set, as of the date of the option's grant, by the board of directors or the management board which determines the same in accordance with the terms approved by the EGM on the basis of the report prepared by the statutory auditors.<sup>16</sup>

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<sup>15</sup> Articles L. 225-177 *et seq.* of the French Commercial Code.

<sup>16</sup> The law makes a distinction as to whether or not the company's securities are admitted to trading on a regulated market.

- If the company's securities are not admitted to trading on a regulated market, then the subscription price is determined in accordance with the objective methods used for share valuation purposes, by taking into account, according to a weighting appropriate to each case, the company's net book value, profitability and outlook. The said criteria are assessed, where applicable, on a consolidated basis or, in default, by taking into account financial data related to material subsidiaries. In default, the subscription price is determined by dividing the amount of the revaluated net assets, calculated on the basis of the latest balance sheet by the number of existing shares.
- If the company's securities are admitted to trading on a regulated market, then the subscription price may not be less than 80% of the average of the prices quoted during the twenty trading days preceding the said day, and no option may be granted fewer than twenty trading days after the removal from the shares of a coupon giving a right to a dividend or capital increase.

In addition, in companies whose securities are admitted to trading on a regulated market, the law prohibits the grant of any option:

- within the 10 trading days preceding and following the date on which the consolidated financial statements or annual financial statements are made public;
- during the period in which the corporate bodies become aware of any information that, if made public, might have a material impact on the company's share price, and the date situated 10 trading days thereafter.

#### ↳ *Exercise of the options*

The capital increase resulting from the exercise of the options is finally completed by sole virtue of the option exercise declaration. Upon its first meeting, following the end of each financial year, the board of directors or the management board must acknowledge, where applicable, the number and amount of the shares issued during the financial year following the exercise of the options and must make the necessary changes to the relevant clauses of the articles of association concerning the amount of the share capital and the number of shares comprising the share capital.

The Chairman may, pursuant to a grant of authority from the board of directors or the management board, effect the said changes within one month from the close of the financial year.

The board of directors or the management board (or the chairman, in the event of a grant of authority) may also, at any time, make the foregoing acknowledgement for the current year and make the corresponding changes to the articles of association.

#### ↳ *Information to be given to the ordinary general meeting*

A special report shall, each year, inform the ordinary general meeting of any completed transactions.

*Conditions specific to the award of share purchase or subscription options to corporate executive officers* (Act for the development of mandatory profit-sharing and employee shareholder schemes of 30 December 2006)

The board of directors (or the supervisory board) must:

- either decide that no option may be exercised by the beneficiaries before the termination of their office; or
- determine such number of shares issued following the exercise of options as the relevant officers are required to hold in registered form until termination of their office.



## ■ **Bonus shares**

The rules governing the award of bonus shares are contained in the 2005 Finance Act<sup>17</sup> and the Act for the development of mandatory profit-sharing and employee shareholder schemes.<sup>18</sup>

The award of bonus shares to corporate executive officers is subject to the general rules governing the award of options to employees, but is also subject to special conditions.

### General rules

#### ↳ *Authorization granted by the EGM*

The extraordinary general meeting must authorize the board of directors (or the management board) to award, free of charge, to the chairman of the board of directors, the managing director, the deputy managing directors or the members of the management board, any bonus shares, whether existing or to be issued (the said beneficiaries may also receive shares of an affiliate,<sup>19</sup> provided that the said shares are admitted to trading on a regulated market).

The EGM decides, on the basis of a report prepared by the board of directors (or the management board) and on the basis of the special report prepared by the statutory auditor.

The extraordinary general meeting sets the maximum percentage of the share capital that may be awarded. The EGM must determine the term of the authorization granted by it, which may not be more than 38 months.

When the award covers shares to be issued, the EGM's authorization entails, as a matter of right in favor of the beneficiaries of the options, the shareholders' waiver of their preferential subscription right.

The EGM must also determine:

- the minimum term of the vesting period (period at the end of which the vesting of the shares is final), which may not be less than 2 years<sup>20</sup>;
- the minimum term of the custody period (period during which the shares must be held by the beneficiaries), which may not be less than 2 years from the final award date.<sup>21</sup> However, the custody period may be reduced or removed by the EGM if the EGM has approved a vesting period at least equal to 4 years for all or part of the awarded shares.

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<sup>17</sup> Act No. 2004-1484 of 30 December 2004.

<sup>18</sup> Act No. 2006-1770 of 30 December 2006.

<sup>19</sup> In accordance with the terms set forth in Article L. 225-197-2.

<sup>20</sup> However, the general meeting may provide for the final award of the shares before the end of the acquisition period in the event of disability of the beneficiary corresponding to his classification in the second or third category referred to in Article L. 341-4 of the French Social Security Code.

<sup>21</sup> However, the shares are freely transferable in the event of invalidity of the beneficiaries corresponding to their classification in the above categories of the French Social Security Code.

↳ *Decision made by the board of directors or the management board*

The total number of shares awarded free of charge may not exceed 10% of the share capital as of the date of the award made by the board of directors or the management board.

The board of directors or the management board shall determine the identity of the beneficiaries of the share awards referred to in the first paragraph. The board of directors or the management board determines the conditions and, where applicable, the criteria governing the share awards.

↳ *Share award*

The capital increase corresponding to the bonus share award is definitively completed by sole virtue of the final award of the shares to the beneficiaries (i.e. at the end of the acquisition period).

In those companies whose shares are admitted to trading on a regulated market, following the custody period, the shares may not be transferred:

- within the 10 trading days preceding and following the date on which the consolidated financial statements or annual financial statements are made public;
- during the period in which the corporate bodies become aware of any information that, if made public, might have a material impact on the company's share price, and the date situated 10 trading days after the date on which such information is made public.

No shares may be awarded to employees or officers individually holding more than 10% of the share capital. Also, no bonus share award may be made to employees or officers individually holding more than 10% of the share capital.

*Conditions specific to the award of bonus shares to corporate officers*

As a departure from the provisions of the general scheme, as regards the shares so awarded to the chairman of the board of directors, the managing director, the deputy managing directors or the members of the management board, the board of directors or the supervisory board must

- either decide that the said shares may not be sold by the beneficiaries before the termination of their office; or
- determine such number of shares as the relevant officers are required to hold in registered form until termination of their office.

The corresponding information is published in the report referred to in Article L. 225-102-1.

**☞ AFEP / MEDEF recommendations concerning the award of share acquisition or subscription options and bonus shares**

*The general policy for the award of share options and bonus shares must be debated within the compensation committee and, upon a recommendation from the compensation committee, must give rise to a decision by the board of directors or the supervisory board. The said policy, which must be reasonable and appropriate, is explained in the annual report and to the general meeting, when the general meeting is asked to authorize the award of share options or bonus shares.*

*It is advisable to make part of the exercise of the options or the vesting of bonus shares conditional upon performance objectives over one or more years. A corporate officer may not benefit from the award of share options or bonus shares upon leaving the company. Executive corporate officers who are in office and benefit from such options or awards may not rely on any hedging transactions in respect of their risks.*

*The award of share options and bonus shares must be reviewed in relation to the total amount of the annual compensation (fixed part + variable part). The award must be determined in view of the total number of awarded share options and shares and take into account their valuation by applying the methods used for the consolidated financial statements.*

*No discount should be applied upon the award of share options and in particular as regards share options allocated to corporate executive officers.*

*By making periodical awards, the company shall seek to avoid any opportunistic award of share options during periods of exceptional share price decreases. It is recommended to make the awards on a fixed date, for instance, after the publication of the financial statements and probably each year in order to diminish the impact of share price volatility.*

*The total of the share option plans and bonus share plans must represent a small part of the share capital, and the right balance must be identified according to the benefits that shareholders derive from the management process. The dilution level must be taken into account.*

*The board of directors or the supervisory board determines those periods preceding the publication of the financial statements, during which the exercise of the share options is not possible. Where applicable, the board of directors or the supervisory board also determines the procedure that must be applied by the corporate executive officers prior to exercising the share options, in order to ensure that they do not hold any inside information likely to prevent such exercise.*

*The board of directors or the supervisory board periodically determines the number of shares resulting from the exercise of share options or the number of bonus shares that the chairman of the board, the managing director, the deputy managing directors, the members of the management board or the statutory manager of a company limited by shares are required to hold in registered form until the end of their office.*

### **☞ Recommendation issued by the European Commission**

*Schemes under which directors are remunerated in shares, share options or any other right to acquire shares, or on the basis of share price movements should be subject to the prior approval of shareholders by way of a resolution of the general meeting of shareholders. Such approval should cover the scheme itself and not its implementation in favor of any individual directors.*

*Approval by the general meeting should be obtained for various items, including the grant of share-based remunerations or share options, the determination of their maximum number, the granting process and the term within which options can be exercised.*

## **2. Disclosure of the remuneration**

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### **☞ General recommendation made by AFEP / MEDEF**

*Very complete information must be provided to shareholders so that they may have a clear vision, not only of the individual remuneration paid to corporate executive officers, but also of the total cost of the senior management of their group and of the remuneration determination policy applied within the group.*

### **☞ Recommendation made by the European Commission**

*The European Commission considers that:*

- *The publication of accurate and updated information by issuers of investment securities strengthens investor confidence and is an excellent means of promoting sound corporate governance practices in the entire Community. To that end, it is important that listed companies ensure appropriate transparency vis-à-vis investors in order to enable them to express an opinion.*
- *It is important to give shareholders a clear and complete view of the company's remuneration policy. Such information would enable shareholders to assess the manner in which the company designs its remuneration policy and would strengthen the company's reporting obligation. Such information should include data related to remuneration, but the company should not be required to disclose any sensitive commercial information likely to harm its strategic position.*
- *It is also necessary to give shareholders sufficient information in order to enable them to seek from the directors clarifications concerning the remuneration that is or was paid to them. The disclosure of the individual remuneration of directors, whether or not they are entrusted with management responsibilities, and of members of the supervisory board, during the preceding year, is therefore an essential aspect in order to enable shareholders to assess the remuneration paid in light of the company's aggregate performance.*

## **Annual report submitted by the board of directors or the management board (Article L. 225-102-1 of the French Commercial Code)**

### **■ Scope**

In those companies whose shares are admitted to trading on a regulated market or that are controlled within the meaning of Article L. 233-16 by a company whose shares are admitted to trading on a regulated market, the annual report submitted by the board of directors or the management board must include information concerning the remuneration of corporate executive officers (however, this rule does not apply to officers who do not hold any office in a company whose shares are admitted to trading on a regulated market).

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The annual report submitted by the board of directors or the management board must disclose the total remuneration and any benefits of any kind paid, during the financial year, to each officer, including through the award of capital securities, debt securities or any security giving access to the company's capital or giving a right to the allocation of debt securities issued by the company or by any company referred to in Articles L. 228-13 and L. 228-93.

The annual report must also indicate the amount of the remunerations and any benefits of any kind received during the said financial year from any of the controlled companies within the meaning of Article L. 233-16 or from the company controlling, within the meaning of the said Article, the company in which the corporate office is being discharged.

The annual report must describe the said remunerations and benefits, with a distinction among the fixed, variable and extraordinary items comprising them, and must also detail the criteria according to which such remunerations and benefits were calculated or the circumstances on the basis of which they were determined. The said report also determines the commitments of all types made by the company in favor of its corporate executive officers, corresponding to remuneration items, indemnities or benefits, due or likely to be due, because of or subsequent to any assumption or termination of, or change in, these offices. The information provided in this respect must indicate the terms and conditions determining such commitments. Any payments made and commitments assumed in breach of the provisions of this paragraph may be cancelled save if the persons concerned have acted in good faith.

### **■ Publication**

The annual report must be filed, along with the annual financial statements, in duplicate at the registry of the commercial court within one month from approval of the annual financial statements by the general meeting. The annual report is included in the Commerce and Companies Register.

In addition, the company may prepare a reference document that will be used as an annual report and that will then include all mandatory indications to be provided in such report.

In particular, an AMF interpretation of Schedule I to Regulation 809/2004 of 29 April 2004 indicates that the information concerning the remuneration of corporate executive officers must be detailed on the basis of the information mandated by Article L. 225-102-1 of the French Commercial Code (as regards this interpretation, see the guide for the preparation of reference documents, AMF, January 2006).

## ☞ **AFEP / MEDEF recommendations concerning the contents of the annual report**

*The chapter of the annual corporate report informing shareholders of officer remuneration must be comprised of four parts.*

### Part 1:

♦ *detailed description of the officer remuneration determination policy (and in particular the rules governing the allocation of the variable part)*

♦ *indication of the criteria on the basis of which this variable part is determined, the mode of application of these criteria as compared with what was forecasted during the financial year and indication as to whether the personal objectives have been reached.*

*Such part might usefully be supplemented by information on any pension schemes or commitments provisioned by the company. Because of the considerable variety of existing pension schemes, it is necessary to indicate whether officers benefit from the same scheme as the group's executives or whether they are entitled to a specific pension scheme and to describe the main features of these schemes and in particular their calculation mode.*

### Part 2:

♦ *detailed indication of each corporate executive officer's individual remuneration and the total amount of the remunerations received by corporate executive officers during the last financial year, as compared with the remunerations of the preceding financial year, with a breakdown between fixed and variable components.*

*Although no such rule is imposed by the French Commercial Code, it appears that the most relevant shareholder information consists in linking the variable component to the financial year in which it is calculated, even where the variable compensation is only paid during the following financial year. It is therefore recommended to focus the disclosure, on a priority basis, on the remunerations due in respect of the financial year and to show, in a recapitulative report, the amounts due and paid in respect of the current financial year and the preceding financial year.*

### Part 3:

♦ *indication of the total and individual amount of the directors' fees paid to directors and the rules for the allocation of such directors' fees, as well any rules governing the collection of the directors' fees allocated where applicable to the senior management team, on account of any corporate offices held in any companies of the group.*

### Part 4:

♦ *description of the policy for the award of share options to all beneficiaries and, where applicable, separate indication of the special policy of allocation to corporate executive officers. It is in particular necessary to indicate the nature of the options (purchase or subscription options), the criteria for the definition of categories of beneficiaries, the periodicity of the plans, and the terms approved by the board for the exercise of the options. A recapitulative table must show all relevant data of the applicable option plans, as provided for in the reference document, by adding, where applicable, to the exercise price, an indication of any discount granted or price supplement applied.*

♦ *description of the policy for the award of bonus shares to employees or to certain categories of employees and to corporate executive officers, the terms and, where applicable, the criteria determined by the board of directors or the supervisory board and, where applicable, the dilutive effect of these bonus share awards. In the same manner as for share options, a recapitulative table must show all of these data and in particular the number of shares awarded to each corporate executive officer and the total number of shares awarded to the main beneficiaries who are employees of the group. It is also necessary to indicate the*

valuation, upon the award, in accordance with the method used for the consolidated financial statements, of share options and bonus shares allocated, where applicable, to these corporate executive officers and the proportion (divided by the capital) allocated to each of them.

### ☞ **Recommendation issued by the European Commission**

#### Disclosure of the policy on director remuneration

The European Commission recommends disclosure by each company of a statement of the remuneration policy of the company. Such report should, on the one hand, be part of an independent remuneration report and/or be included in the annual financial statements and annual report and, on the other hand, should be shown on the company's website. Such statement should mainly focus on the company's policy on director's remuneration for the following financial year and, if appropriate, the subsequent years. It should also contain an overview of the manner in which the remuneration policy has been implemented in the previous financial year and emphasize any material change made in this respect as compared with the previous financial year. The statement should in particular include information concerning the performance criteria and their link with the remuneration, an explanation of the relative importance of the fixed and variable components of the remuneration, a description of the main features of the additional and early pension schemes, etc.

The remuneration statement should also include information concerning the preparatory and decision-making process leading to the definition of the remuneration policy, with an indication, where applicable, of the mandate and composition of the remuneration committee, the names of any external consultants and the role of the annual general meeting.

#### Disclosure of individual remuneration

The European Commission recommends the publication in the annual financial statements or in the remuneration report of total individual remuneration and any other benefits received by any person who has held, at any time during the relevant financial year, the office of director. It is in particular necessary to disclose the total amount of the salary paid or to be paid, any directors' fees, any indemnities paid or to be paid on account of termination of office, the total value of the benefits other than remuneration, the remuneration received from an enterprise belonging to the group, etc.

As regards the disclosure of individual remuneration, in addition to the information concerning the share options (see below), the Commission also recommends disclosing various items of information concerning additional pension schemes: new benefits vested during the relevant financial year in the case of a defined benefits scheme or, in the case of a defined contributions scheme, the details of the contributions paid or to be paid by the company during the relevant financial year.

### **Report submitted by the chairman of the board of directors and the chairman of the supervisory board (Articles L. 225-37 and L. 225-68 of the French Commercial Code)**

#### ■ **Scope**

In companies making public offerings of shares or bonds, the chairman of the board of directors or the supervisory board must prepare a special report, attached to the board's annual report, primarily focused on internal control procedures.

When the company's shares are admitted to trading on a regulated market, the said special report must also contain information concerning the remuneration of corporate executive officers.

### ■ **Contents**

In listed companies, the chairman's special report must detail the principles and rules approved by the board of directors or the supervisory board for the determination of the remuneration and benefits of any type and description granted to corporate executive officers.

### ■ **Disclosure**

The chairman's report must be attached to the board's report and must be filed at the same time at the registry of the commercial court in order to be included in the commerce and companies register.<sup>22</sup>

The AMF further imposes specific disclosure steps as regards the chairman's report prepared by companies making public offerings of shares or bonds, with a distinction made as to whether or not the company prepares a reference document (see. Art. 222-9 of the AMF's General Regulation).

If the company does not prepare a reference document, then the company must disclose the chairman's report at the latest upon the filing of the annual report with the registry of the commercial court.<sup>23</sup> Such filing must ensure an actual and full disclosure of all relevant information.<sup>24</sup>

Also, the company must place the relevant information on its website immediately when the said information is circulated. The information must be retained during at least 5 years from the date of disclosure.<sup>25</sup>

If the company prepares a reference document, the said document must include the chairman's report. Therefore, the circulation terms provided for in the absence of a reference document do not apply.

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<sup>22</sup> See accordingly, Opinions No. 04-09 and 04-15 of the Coordination Committee of the Commerce and Companies Registry, cited by Lamy Sociétés commerciales 2008, No. 2283.

<sup>23</sup> This obligation applies to *sociétés anonymes* making public offerings of shares and bonds. As regards the other French or foreign legal persons making public offerings of shares and bonds, the General Regulations of the AMF set forth that the said legal persons must disclose information concerning the matters referred to in the last paragraph of Articles L. 225-37 and L. 225-68 of the French Commercial Code (i.e. the information concerning the remunerations) under the same terms as for *sociétés anonymes* if the said legal persons are required to file their financial statements with the Registry of the commercial court. In the contrary event, such filing is to be made immediately upon approval of the annual financial statements for the preceding financial year. Also, the relevant information must be made available on the website of the legal person concerned (Art. 222-9 of the AMF's General Regulation).

<sup>24</sup> Article 221-3, I of the AMF's General Regulation.

<sup>25</sup> Article 221-3, II of the AMF's General Regulation. However, we shall note that the same provision sets forth that when the issuer has no financial instrument admitted to trading on a regulated market, the publication of the said information on the issuer's website is deemed actual and full disclosure.



## **Special annual reports concerning share purchase and subscription options and bonus shares**

### ■ ***Special annual reports concerning share purchase and subscription options***

Each year, a special report must inform the ordinary general meeting of transactions carried out pursuant to the provisions concerning share purchase and subscription options.<sup>26</sup>

The said report must also include:

- the number, maturity dates, and price of the share purchase or subscription options that, during the year and because of the offices and positions held within the company, have been granted to each of the said officers by the company and by its affiliates under the terms referred to in Article L. 225-180;
- the number, maturity dates, and price of the share purchase or subscription options that have been granted during the year to each of the said officers, because of the offices and positions held by the said officers in the controlled companies within the meaning of Article L. 233-16;
- the number and price of the shares subscribed or purchased during the financial year by the company's officers through the exercise of one or more of the options held in respect of the companies referred to in the two preceding paragraphs.

The said report must also indicate:

- the number, price and maturity dates of the share purchase and subscription options granted, during the year, by the company and by the affiliated companies and groupings in accordance with the terms set forth in Article L. 225-180, to the ten employees of the company, who are not corporate officers, who have been awarded the greatest number of options;
- the number and price of the shares subscribed or purchased during the financial year through exercise of one or more options held in respect of the companies referred to in the above paragraph, by each of the ten employees of the company, who are not corporate officers, who have been awarded the greatest number of options;

### ***Special annual report on bonus share awards***

Each year, a special report must inform the ordinary general meeting of the transactions carried out under the provisions applicable to bonus share awards.<sup>27</sup>

The said report must also indicate<sup>28</sup>:

- the number and value of the shares that, during the year and because of the offices and positions held within the company, have been allocated free of charge to each of

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<sup>26</sup> Article L. 225-184 of the French Commercial Code.

<sup>27</sup> Article L. 225-197-4 of the French Commercial Code.

<sup>28</sup> The said report must also indicate the number and value of the shares that, during the financial year, have been allocated free of charge by the company and by the affiliated companies or groupings under the terms set forth under Article L. 225-197-2, to each to those ten employees of the company who are not corporate officers and to whom the highest number of options has been granted.

- the said officers by the company and by its affiliates under the terms of Article L. 225-197-2;
- the number and value of the shares that have been allocated free of charge during the year, to each of the said officers, because of the offices and positions held by such officers, by the companies controlled within the meaning of Article L. 233-16.

☞ **Recommendation issued by the European Commission**

*As regards the disclosure of individual remuneration, the European Commission recommends indicating the number of share options granted by the company during the relevant financial year and the terms of exercise thereof, the number of share options exercised during the relevant year and, for each such option, the number of shares concerned and the exercise price or the value of the interest.*

*In addition, before the general meeting during which a draft resolution concerning the share-based remuneration must be submitted to shareholders, an information memorandum should be made available to them. The said memorandum should at least contain the full text of the share-based remuneration systems or a description of their main terms and the names of the participants in the said systems and indicate the relationship between such systems and the general remuneration policy.*

*Information should also be made available to shareholders concerning the manner in which the company intends to hold the necessary shares in order to meet its obligations under the incentive schemes. The company should in particular indicate whether it intends to acquire the said shares on the market, retain the same as treasury shares or issue new shares.*

*Finally, the said information should contain an overall estimate of the cost of this scheme for the company.*

## II. TAX RULES APPLICABLE TO THE REMUNERATION

For tax purposes, officers are assimilated with employees: any officer remuneration, in any form whatsoever (basic treatment, benefit in kind, performance-related incentives, special directors' fees), is taxed as wages and salaries.

Type of remuneration	Mainstream SA <sup>29</sup>	SA with management board <sup>30</sup>	SAS		
<b>Fixed or proportionate wage</b>	B <sup>31</sup> : taxed in the wages and salaries category <sup>32</sup> . S <sup>33</sup> : expense deductible from taxable net income				
<b>Directors' fees</b>	B: taxed in the wages and salaries category S: Capped amount deductible from taxable income				
<b>Dividends</b>	B: election: either withholding of the 18% deduction in satisfaction of income tax + 11% = 29%, i.e. taxation as dividend income: gradual scheme after a 40% deduction and fixed deduction				
<b>Share-options</b>	B: <ul style="list-style-type: none"> <li>▪ Benefit derived from the exercise of the option = taxed in the W&amp;S category, unless an election is made for the preferential rules + 2.5% salary surcharge</li> <li>▪ Capital gain arising in connection with the sale: taxed as a capital gain related to movable property, at the standard rate (18% + 11% = 29%)</li> </ul> S: <ul style="list-style-type: none"> <li>▪ deduction from the taxable income of the expenses and capital losses resulting from the exercise of the options</li> <li>▪ special social levy due by the employer and equal to 10% (either on the fair value of the options or on 25% of the value of the shares)</li> </ul>				
<b>Bonus shares</b>	B: <ul style="list-style-type: none"> <li>▪ Benefit derived from the award (value of the shares upon the acquisition) = taxed at a rate of (30% + 11%) : 41% unless an election is made for the W&amp;S scheme</li> </ul>				

<sup>29</sup>The officers are: the chairman of the board of directors, the managing director, the deputy managing director and the provisionally appointed administrator.

<sup>30</sup> The officers are: the members of the management board.

<sup>31</sup> B: beneficiary

<sup>32</sup> W&S: wages and salaries

<sup>33</sup> S: company

	<ul style="list-style-type: none"> <li>▪ Capital gain arising in connection with the sale: taxed as a capital gain related to movable property, at the standard rate (18% + 11% = 29%)</li> </ul> <p>S:</p> <ul style="list-style-type: none"> <li>▪ Deduction from the taxable income of the expenses and capital losses resulting from the redemption of the shares</li> </ul>		
<b>Termination payments</b>	B: taxed in the W&S category; however, in the event of removal (forced termination) only part of the said amount is taxable.		