

COMPANY DIRECTORS' REMUNERATIONS: NEW RECOMMENDATIONS OF THE CONSTITUTIONAL LAWS COMMISSION TO THE FRENCH NATIONAL ASSEMBLY

There is not one month going by without the public opinion having a reason to rise up against the amount of remunerations which are paid to Company Directors¹ or to the players of the financial sector.

Summer 2009 has not been an exception, as *Libération* daily paper disclosed the news relating to the additional distribution of one billion euros to BNP PARIBAS traders.

In the meantime, the Constitutional Laws Commission has submitted on July 7th, 2009 its special report on the remunerations of Company Directors and financial market operators to the French National Assembly (the “**Report**”).

After acknowledging the existence of unacceptable abuses and the guardedly successful attempts of moralization, the authors of the Report have painted a broad picture of the various measures that could be taken in order to make the remunerations of Company Directors and financial market operators more ethical.

Those measures are structured on the main following themes:

- Harmonization of regulations at an international level,
- Improvement of tax regulations,
- Enactment of a general rule,
- Consolidation of self-discipline,
- Improvement of corporate governance.

¹ The capitalised term “Company Director” shall designate one company’s directors (such as *Président Directeur général, Président du Conseil d’administration, Directeur général, Directeur Général Délégué, Directeur Général Unique* and *Président du Directoire*).

The term « director » with no capital D shall designate one company’s « *administrateur* » of a “*Conseil d’administration*” (member of the Board of Directors).

The following presentation is limited to the recommendations in the Report relating to the remunerations of Company Directors and does not deal with the remunerations of the financial market operators.

Its purpose is to describe to our readers the French lawmakers’ main orientations.

Harmonization of regulations at an international level – The globalization of the economy compels its actors to handle the issue of remunerations at a worldwide level in order to reach a lasting solution. According to the authors of the Report, actions could be taken at a G-20 level or at least at the OECD level, bearing in mind that these actions would be added to actions taken at the European Union level.

At an international level, new regulations could be implemented by an international agreement, to be ratified as the case may be, in order to be efficient.

At an E.U. level, the European Commission should go further the recommendations stage to launch the drafting of a directly enforceable and binding E.U. regulation.

Improvement of tax regulations – The authors of the Report have considered the withdrawal, for Company Directors only, of the tax shield system (“*Bouclier fiscal*”) which provides that a taxpayer should not pay more than 50% of its global income. However, this withdrawal has not been adopted mainly because it would have created unequal tax treatment and it would strongly weakened France’s attractiveness for Company Directors and investors.

On the other hand, the authors recommended a modification of the ceiling of corporate income tax deductibility for the total amount of the Company Directors' remunerations (whether direct or future). The recommended annual ceiling would be equivalent to thirty times the social security ceiling (i.e. approximately € 1,000,000).

As regards stock options taxation, the authors of the Report claim for (following the example of the *Institut Montaigne*²) a better distinction between the profits realised thanks to the beneficiaries' objective performances (approximately 26% taxation above € 152,500 per year) and the profits realised on the sale of the shares (subject to income taxes which depend on the total revenue of a household).

Enactment of a general rule – More cases of excessive remunerations would be referred to the Courts if a general rule was enacted pursuant to which Company Directors' remunerations must be determined “in the company's best interests” or “for the collective interest”.

Consolidation of self-discipline – The MEDEF and AFEP *Comité des Sages*³ - which is currently composed of 6 members - must be reorganised according to the authors of the Report in order to increase its credibility and to give to companies' self-discipline some efficiency. To this end, the following adjustments are suggested:

² The *Institut Montaigne* is a French eminent independent think tank.

³ The *Comité des Sages* has been created in May 2009 jointly by the *Association Française des Entreprises Privées* (AFEP) a French economic lobby which bring together 85 of the biggest private groups operating in France and by the *Mouvement des Entreprises de France* (MEDEF) the French leading business confederation which has more than 700,000 company members. Its purpose is to put an end to excessive remunerations granted to directors of listed companies which implement massive redundancy schemes.

- creation of a regulatory research institute on Directors' remuneration,
- increase of the number of members of the *Comité des Sages* while keeping a majority of personalities from the business sector,
- increase of the means to submit cases to the *Comité des Sages* (including granting the power to submit cases to a qualified minority of shareholders or to French authorities),
- for specific cases (such as redundancy schemes exceeding 1,000 employees), obligation to publish the submission to the *Comité des Sages* and the latter's decisions,
- annual follow-up of AFEP and MEDEF recommendations by CAC 40 companies which have decided to comply with the said recommendations.

Improvement of corporate governance – Finally, the authors of the Report have highlighted the importance of improving corporate governance as transparency is the best way to improve the code of ethics in remuneration practice in large companies. Those improvements are extremely varied:

- Remunerations committee: granting a legal status to those committees, obligation for listed companies to create such committee, compulsory attendance of employees' representatives to those committees with consultative voice.
- Consultative voice for shareholders on any decision pertaining to the remuneration of Company Directors.
- Increased restrictions on the number of mandates that can be held at the same time in French listed companies' board of directors.
- Prohibition for the *Président Directeur général, Président du Conseil d'administration, Directeur général,*

Directeur Général Unique and Président du Directoire of a *Société anonyme* to hold an employment contract.

- Replacement of the current “*Retraite-chapeaux*” (additional pension paid by companies to senior executives or Directors for the entire period of retirement) by self-funded pension plan with tax deductions.
- Prohibition on granting “*jetons de présence*” (directors’ fees) to the « *Président du Conseil d’administration* », « *Président du Conseil de Surveillance* », « *Directeur général* », « *Directeur général délégué* » when they also hold the office of directors of the company.

- Granting of “*jetons de présence*” subject to the effective attendance of the director to the Board of directors meetings.
- For the determination of the price of the stock options, cancellation - for Company Directors only - of the 20% discount on the average quote (calculated on the last 20 trading sessions).

With the Law on new economic regulations of May 15th, 2001, the French legislator has inaugurated a reform of Company Directors’ remunerations. Since then, no less than 5 laws in 8 years have been enacted and we can assume that this in-depth reform is not finished yet.

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Ichay & Mullenex Avocats is a French law firm focusing on all legal issues related to the new technologies, the green business and the sustainable development in France and abroad. They are considered experts in intellectual property and Internet law, e-commerce, online gaming, data protection. Ichay & Mullenex Avocats also assists its clients on all issues related to financing, mergers & acquisitions, restructuring, etc. and advises them on their litigation and arbitration procedures.

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