Distribution of Dividends and Corporate Interest by French Companies During the COVID-19 Pandemic

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If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

Armand W. Grumberg
Partner / Paris
33.1.55.27.11.95
armand.grumberg@skadden.com

Francois Barriere
Counsel / Paris
33.1.55.27.11.45
francois.barriere@skadden.com

Pierre-Hadrien Darriet
Associate / Paris
33.1.55.27.61.17
pierre-hadrien.darriet@skadden.com

One Manhattan West
New York, NY 10001
212.735.3000

68, rue du Faubourg Saint-Honoré
75008 Paris, France
33.1.55.27.11.00

French companies' annual general shareholders' meetings season usually begins in mid-March and ends in June. The agendas typically include approving the annual financial statements and deciding on the distribution of dividends to shareholders.

In its efforts to stem the COVID-19 pandemic, the French government recently issued two ordinances to:

- allow general shareholders' meetings to be held behind closed doors, without the physical presence of any shareholder and/or other participant; and
- extend the deadline to approve financial statements to the end of September, as opposed to the end of June (assuming a December 31 financial year).

Several companies already have completed all or part of the corporate formalities to convene their upcoming annual general shareholders' meetings: Their boards of directors determined the agenda and established the proposed draft resolutions, and the companies issued the initial meeting notice. Certain adjustments may be needed for agendas and draft resolutions (which, for listed companies, may be made between the publication of the initial meeting notice and the convening notice) that were determined before the onset of the pandemic and the lockdown measures adopted by the French government. Shareholders remain free to vote for or against the resolutions submitted to them, or even to amend them.

The Demand of the Minister of the Economy and Finance — Endorsed by the Federation of French Employers (MEDEF) and French Association of Private Sector Companies (AFEP)

On March 27, 2020, French Minister for Economic Affairs and Finance Bruno Le Maire indicated that French companies that benefit from state measures intended to mitigate the fallout of the COVID-19 pandemic would not be able to distribute dividends to their shareholders this year or, if they do, would be required to repay the aid with penalties.[1] The president of the MEDEF described this position as "logical."

On March 29, 2020, the AFEP asked for:

- "the companies affected, to apply the government's decision to prohibit the payment of dividends in 2020 for those that use the deferral of payment of Social Security or tax contributions, as well as those that have obtained bank loans guaranteed by the state"; and

[1] The French Treasury Department has published a Q&A detailing the position of the French Minister for Economic Affairs and Finance. See: https://www.economie.gouv.fr/files/files/PDF/2020/covid-faq-termes-references-dividendes.pdf.

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- "its members who use partial unemployment schemes to present a new resolution at their next general meeting in order to reduce dividends payable in 2020 by 20% as compared to last year."[2]

In response, several companies of different sizes and from different industries — such as Accor, ADP, Airbus, Altice, Arkema, Auchan Holdings, BNP Paribas, Bouygues, Crédit Agricole, EDF, Engie, JCDecaux, Natixis, Orange, Safran, Société Générale, TF1 and Thalès — announced that they will not pay dividends to their shareholders this year.

The Recommendation Issued by the European Central Bank (ECB), European Insurance and Occupational Pensions Authority (EIOPA), and French Supervisory Authority (ACPR)

European and French banking and (re)insurance supervisors — *i.e.*, the ECB[3], EIOPA[4] and ACPR[5] — each recommended that credit institutions, insurers and reinsurers (among others and within their scope of competency):

- refrain from paying dividends until at least October 2020[6]; and
- do not undertake share buy-backs aimed at remunerating their shareholders.

[2] https://afep.com/wp-content/uploads/2020/03/Communiqu%C3%A9-de-presse-Afep_29-mars-2020-1.pdf.

[3] Recommendation of the European Central Bank of 27 March 2020, on dividend distributions during the COVID-19 pandemic and repealing Recommendation (ECB/2020/1) (ECB/2020/19), https://www.ecb.europa.eu/ecb/legal/pdf/ecb_2020_19_f_sign.pdf.

[4] EIOPA statement on dividends distribution and variable remuneration policies in the context of COVID-19, https://www.eiopa.europa.eu/content/eiopa-statement-dividends-distribution-and-variable-remuneration-policies-context-covid-19_en.

[5] L'ACPR appelle les établissements de crédit sous sa supervision directe et les sociétés de financement à s'abstenir de distribuer un dividende, https://acpr.banque-france.fr/communique-de-presse/lacpr-appelle-les-etablissements-de-credit-sous-sa-supervision-directe-et-les-societes-de. L'ACPR appelle les organismes d'assurance sous sa supervision à s'abstenir de distribuer un dividende, https://acpr.banque-france.fr/communique-de-presse/lacpr-appelle-les-organismes-dassurance-sous-sa-supervision-sabstenir-de-distribuer-un-dividende.

[6] According to the ECB and the ACPR, no dividend should be paid until October 2020. EIOPA states more generally that "[t]his suspension should be reviewed as the financial and economic impact of the COVID-19 starts to become clearer."

Consequences for Boards of Directors

These positions, recommendations and requests, regardless of their characterization, are only a reflection of the changing economic situation affecting companies. Directors should ensure that the draft resolutions relating to the proposed size of dividends that they submit to shareholders, or that they have already submitted, are in line with the corporate interest of the companies. This traditional compass becomes all the more important in times of unrest and when the future is uncertain. Preserving capital today so as to be better able to face, in particular, a potential reduction in the order book while costs continue to need to be paid may result in a different assessment of the amount of the dividend to be paid than what would have been decided before, when there was much less understanding of the extent of the crisis.

The corporate interest to be taken into account is, first and foremost, that of the concerned legal entity pursuant to French law. The so-called "PACTE" law of May 22, 2019, enshrined the corporate interest in Article 1833 of the French Civil Code, and Article L. 225-35 of the French Commercial Code incorporates the same obligation to take into account the interest of the relevant legal entity as the first priority. In order to determine whether a decision is in the corporate interest, the board of directors of a French company must take "into consideration the social and environmental issues pertaining to its activity," which is particularly important now, as companies face the consequences of the ongoing pandemic.

The board of directors must assess the compliance of its decisions when they are made based on known and estimated data. However, it also is necessary for the board to reassess its decisions periodically, in order to adapt them to new developments to the extent required. The evolution of the COVID-19 pandemic and the lockdown measures should, in all likelihood, encourage directors to take into account the economic impacts of the lockdown as they become known, whether they involve the anticipated recession or withdrawal of any state measure, especially when determining the amount of the dividend proposed to the shareholders, reducing the amount or cancelling the dividend previously proposed. The directors' role is all the more crucial now, and they must ensure that the decisions previously taken by their board continue to comply with the corporate interest of their companies and, if that is not the case, they must revise them.