

## Newsflash

# The act on the corporate governance statement and the remuneration of directors and executives of listed companies



In the wake of various international initiatives, the Belgian legislator has set its rules on the bonuses and severance payments for the directors and executives of listed companies, as announced frequently by the press during the last few months. These new rules are included in a broader act “on the enhancement of corporate governance for listed companies and autonomous public undertakings and on the amendment of the rules with regard to the prohibition against pursuing functions in the banking and financial sector”. The text of the act is final and is awaiting publication in a few days.

The main rules can be outlined as follows.

### 1. Annual corporate governance statement

As from this financial year, each listed company must include in its annual report a specific section on corporate governance, disclosing the following information as a minimum:

- the corporate governance code applied by the company, as well as relevant information on any corporate governance practice applied beyond this code or any statutory obligation;
- the sections of this code from which the company departs and the reasons for doing so. The legislator has made the ‘comply or explain’ approach mandatory;
- a description of the main features of the company’s internal control and risk management systems in connection with the process of financial reporting;

- the shareholder structure on the balance sheet date and measures against hostile takeover bids: the holders of securities which grant rights of control, as well as a description of these rights; limitations on the exercise of voting rights under statutory law or the articles of association; rules governing the appointment and replacement of the members of the managing body and the amendment of the articles of association of the issuer; powers of the managing body, in particular as regards the ability to issue or buyback shares;
- the membership of the board and its committees and how they operate.

The act provides that a specific corporate governance code may be made mandatory by Royal Decree.. Discussions as to whether the Belgian Corporate Governance Code 2009 can serve this purpose are ongoing.

The above obligations apply to companies whose shares are listed on the public market Euronext Brussels.

Companies that do not have shares listed on the public market Euronext Brussels, but do have other securities listed on the public market Euronext Brussels or on the derivatives market of Euronext Brussels NV, must only include in their annual report a description of the most important features of the company's internal control and risk management systems in connection with the process of financial reporting. Should their shares however be traded on a multilateral trading facility (MTF), they shall also have to establish a comprehensive corporate governance statement in their annual report, with the exception of a description of measures against hostile takeover bids.

## **2. The mandatory establishment of a remuneration committee**

Companies obliged to establish an audit committee in accordance with the act of 17 December 2008, must also establish a remuneration committee as from the next financial year (new article 526 quater of the Companies Code). This concerns companies with shares listed on the public market Euronext Brussels.

The remuneration committee, of which a majority of the members must be independent, should exclusively be composed of non-executive directors. The board of directors must see to the fact that the remuneration committee has the necessary expertise as regards remuneration policy.<sup>1</sup> The CEO participates to the meetings of the remuneration committee in an advisory capacity each time the remuneration of another executive is being discussed.

According to article 522 of the Companies Code, the remuneration committee only has consultative powers and duties. The act imposes a minimum set of tasks. The remuneration committee should at least take charge of:

- proposing the remuneration policy for directors, members of the management committee, other executives of the company and persons in charge of the daily management of the company;

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<sup>1</sup> According to the Explanatory Memorandum, this condition is fulfilled as soon as at least one member has a degree of higher education and has at least three years experience regarding the management of personnel or regarding the remuneration of directors and executives of companies.

- proposing the individual remuneration of directors, members of the management committee, other executives of the company and persons in charge of the daily management of the company;
- preparing the annual remuneration report;
- explaining the remuneration report during the statutory shareholders' meeting.

“Small” listed companies<sup>2</sup> are not required to establish a separate remuneration committee. Their board of directors takes charge of the tasks of the remuneration committee on the condition that at least one of the directors qualifies as independent and that when the chairman is an executive director, the role of chairman shall be taken over by a non-executive director each time the board of directors exercises the statutory duties of the remuneration committee.

### **3. The annual remuneration report**

As of the next financial year, companies which have their shares listed on the public market Euronext Brussels will have to include a separate remuneration report on the remuneration of directors and executives in the annual report. As of now, the following persons are considered to be executives: the members of the management committee as referred to in article 524bis of the Companies Code, the members of the body of daily management and other executives of the company as determined by law (notably the members of each committee involved in the general management of the company and not organized as a statutory management committee).

This report must at least include the information as listed in the schedule to this Newsflash. For instance, the remuneration of the CEO<sup>3</sup> should be disclosed individually and in a detailed manner. The same applies to the individual shares and share options of the executive directors and other executives.

The work's council or other bodies of employee representation must be informed of the remuneration report.

The statutory shareholders meeting approves the remuneration report by way of separate voting.

These requirements also apply to a number of autonomous public undertakings: NMBS, NMBS Holding, Infrabel, De Post, Belgacom and Belgocontrol.

### **4. Deferral in time of bonuses**

The Companies Code will also regulate the variable remuneration of the executive directors, members of the management committee as referred to in article 524 bis of the Companies Code, the members of the body of daily management and the “other executives” of the company.

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<sup>2</sup> Companies which, on a consolidated basis, meet at least two the following three criteria: (a) average number of employees not exceeding 250 persons during the financial reported year; (b) balance sheet total of less than or equivalent to 43.000.000 EUR; (c) annual net turnover of less than or equivalent to 50.000.000 EUR.

<sup>3</sup> i.e. the chief representative of the executive directors, the chairman of the management committee, the chief representative of the “other executives” of the company or the chief representative of the persons in charge of the daily management of the company.

Criteria set for variable remuneration must not be arbitrary and must be determined in advance, as well as being explicitly included in an agreement or another document binding the company and the person concerned.

Moreover, the paying out of the variable remuneration may only occur if the criteria are effectively met.

The performance criteria need further to establish a deferral of bonuses in time: at least one quarter of the variable remuneration must be based on performance criteria measured over at least two years, while at least another quarter must be based on performance criteria measured over at least three years. Consequently, only half of the variable remuneration for one performance year may be awarded on the basis of criteria which are measured over the performance year itself.

The legal minimum deferral of bonuses in time does not apply if the variable remuneration merely accounts for one fourth or less of the annual remuneration of the person involved.

Companies may depart from these rules, subject to the prior approval by the shareholders' meeting.

These rules regarding the variable remuneration do not only concern companies which have their shares listed on the public market 'Euronext Brussels', but also apply to several autonomous public undertakings: NMBS, NMBS Holding, Infrabel, De Post and Belgacom. Belgacom is subject to the provisions applicable to listed companies.

The new regime applies as from the financial year which starts after 31 December 2010. As regards autonomous public undertakings, this regime applies from the first financial year following the publication of the act in the Belgian Official Journal.

## **5. Share-based remuneration**

Furthermore, the act imposes a mandatory minimum 'vesting period' for shares and share-based remuneration. Shares must not be vested earlier than three years after they are granted and share options or other share-based benefits must not be exercisable earlier than three years after they are granted.

Companies may also depart from this rule provided that the prior approval of the shareholders' meeting has been obtained.

This rule applies to the same companies as the rule on variable remuneration (see 4).

## **6. Limiting severance payments (golden parachutes)**

As from the tenth day after the publication of the act in the Belgian Official Journal, contractual arrangements executed or renewed with the executive directors, members of the management committee, members of the body of daily management or other executives of the company may no longer freely determine the severance payment awarded to these persons in the event of early termination of these contracts by the company. In other words, the so-called 'golden parachutes' are being limited.

Severance pay should not exceed twelve months' remuneration. If however the severance pay exceeds twelve months' remuneration or if it is higher than eighteen months' remuneration further to a recommendation by the remuneration committee, this departure should be approved by the very next ordinary shareholders' meeting.

The proposal to depart from the aforesaid rule must be reported to the work's council or the employee representation thirty days before the publication of the convening notice for the shareholders' meeting. These bodies may then issue an advice to the shareholders' meeting.

This rule applies to the same companies as the rule on variable remuneration (see 4), except that any departure from the rule by the autonomous public undertakings may be authorized by the competent minister.

## **7. Principle that bonuses are excluded for independent directors**

Independent directors may only receive variable remuneration if approved in advance by the shareholders' meeting. In the same way as for severance payments, the work's council or employee representation is also involved.

This rule is applicable to contractual agreements with independent directors executed or renewed as from the tenth day after the act has been published in the Belgian Official Journal.

This rule has not been extended to autonomous public undertakings which are not listed.

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Schedule: minimum content of the remuneration report

## **Schedule: minimum content of the remuneration report**

The remuneration report contains at least the following information:

1. a description of the procedure applied during the reported financial year with regard to (i) the development of a remuneration policy for the directors, members of the management committee, the other executives of the company and persons in charge of the daily management of the company, and (ii) the determination of the remuneration for individual directors, members of the management committee, other executives of the company and persons in charge of the daily management of the company.
2. a statement on the remuneration policy applied during the reported financial year towards the directors, members of the management committee, the other executives of the company and persons in charge of the daily management of the company which contains at least the following data:
  - a) The principles upon which the remuneration was based, indicating the correlation between remuneration and performance;
  - b) The relative importance of the various components of the remuneration;
  - c) The features of the performance-based premiums consisting of shares, options or other rights to acquire shares;
  - d) Information on the remuneration policy for the two financial years to come.

If the company has materially deviated from this remuneration policy during the reported financial year, this must be explained in the remuneration report;

3. on an individual basis, the amount of remuneration and other benefits which are awarded to the non-executive directors, directly or indirectly, by the company or a company to be consolidated;
4. if certain members of the management committee, or certain other executives of the company or persons in charge of the daily management of the company are also members of the board of directors, information on the amount of remuneration awarded to them in that capacity;
5. in case the executive directors, members of the management committee, other executives of the company or persons in charge of the daily management of the company are eligible for remuneration based on the performance of the company or a company to be consolidated, or based on the performance of the business unit or the performance of the person involved, the criteria for evaluating the performance in view of the objectives, the indication of the evaluation period and the description of the methods used to ascertain whether or not the performance criteria are met. This information should be stated in a manner that does not disclose any confidential information regarding the strategy of the company.
6. the amount of the remuneration and other benefits awarded directly or indirectly to the CEO by the company or a company to be consolidated. This information must be provided with a breakdown between:
  - a) basic remuneration;
  - b) variable remuneration: any additional remuneration linked to performance criteria, indicating the form in which this variable remuneration is paid;
  - c) pension: the amounts paid during the reported financial year or the costs for services rendered during the reported financial year, depending on the type of pension scheme, with an explanation of the applicable pension scheme;

- d) other components of the remuneration, such as the cost or monetary value of insurance coverage and fringe benefits, with an explanation of the details of the main components.

If the company has materially departed from this remuneration policy during the reported financial year, this must be specifically high-lighted in the remuneration report;

- 7. on a global basis, the amount of the remuneration and other benefits directly or indirectly awarded to the executive directors, members of the management committee, other executives of the company or persons in charge of the daily management of the company by the company or a company to be consolidated.

This information must be provided with a breakdown between:

- a) basic remuneration;
- b) variable remuneration: any additional remuneration linked to performance criteria, indicating the form in which this variable remuneration is paid;
- c) pension: the amounts paid during the financial reported year or the costs for services rendered during the financial reported year, depending on the type of pension scheme, with an explanation of the applicable pension scheme;
- d) other components of the remuneration, such as the cost or monetary value of insurance coverage and fringe benefits, with an explanation of the details of the main components.

If the company has materially departed from this remuneration policy during the reported financial year, this must be explained in the remuneration report;

- 8. as regards executive directors, members of the management committee, other executives of the company or persons in charge of the daily management of the company, on an individual basis, the number and main features of the shares, share options and all other rights to acquire shares which have been granted or exercised or have expired during the reported financial year;
- 9. as regards executive directors, members of the management committee, other executives of the company or persons in charge of the daily management of the company, on an individual basis, the provisions concerning severance payments;
- 10. in the event of departure of the executive directors, members of the management committee, other executives of the company or persons in charge of the daily management of the company, the justification and the decision of the board of directors, further to a proposal of the remuneration committee, on whether or not the persons involved qualify for the severance payment, and the calculation thereof;
- 11. as regards executive directors, members of the management committee, other executives of the company or persons in charge of the daily management of the company, the extent to which a right of recovery ('claw back') has been provided in favour of the company in case variable remuneration has been granted based on incorrect financial data.