

Newsflash

8 January 2009

Corporate law

Audit committee in listed companies and financial institutions

1. Mandatory establishment of an audit committee

As of 8 January 2009, the date the law of 17 December 2008 (the "Law")¹ enters into force, listed companies² will be legally obliged to establish an audit committee within their statutory management body. The audit committee shall be solely composed of non-executive members of the management body. At least one of them must be independent and have the necessary expertise in the field of accounting and audit.

The mandatory establishment of an audit committee is not applicable to the so-called "smaller" listed companies³. For these companies, the tasks assigned to the audit committee may be performed by the board of directors, provided those companies have at least one independent director and that, in case the chairman of the board of directors is an executive director, he does not act as chairman of this body when it operates in the capacity of audit committee.

2. Tasks of the audit committee

The audit committee shall at least have the following tasks:

- a) monitoring the financial reporting process;
- b) monitoring the effectiveness of the company's systems for internal control and risk management;
- c) monitoring the internal audit, if any, and its efficiency;
- d) monitoring the statutory audit of the company's annual accounts
- e) assessing and monitoring the statutory auditor's independence and, as the case may be, the independence of the auditor responsible for the audit of the

¹ Law regarding the establishment of an audit committee in listed companies and financial institutions. This law implements the Directive 2006/43/EG of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts.

² The mandatory establishment of an audit committee applies to credit and insurance institutions as well as to investment companies and collective investment institutions, but according to more flexible requirements for the latter two. The new regulations apply *mutatis mutandis* to the listed European Companies (new articles 899bis, 913bis, 913ter and amendment of article 917, §4 of the Belgian Company Code).

³ The listed companies retain the choice whether or not to establish an audit committee if, on consolidated basis, at least two of the following three criteria are fulfilled:

- a) less than 250 employees on average during the financial year;
- b) balance sheet total not exceeding EUR 43.000.000;
- c) net annual turnover not exceeding EUR 50.000.000.

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consolidated annual accounts, in particular as regards the provision of additional services to the company⁴.

The audit committee must regularly report to the board of directors on the performance of its tasks.

3. Expertise in the field of accountancy and audit and new independence criteria

The independent director, who is a member of the audit committee, must have the necessary expertise in the field of accounting and audit (certificate of higher education in economics or finance or evidence of relevant professional experience in these fields). The annual report of the board of directors must justify the independence and expertise in the field of accounting and audit of at least one member of the audit committee⁵.

The Law provides for more stringent independence criteria. These independence criteria apply to both the independent director member of the audit committee and the independent directors who are members of the committee entrusted with the assessment of intra-group transactions⁶. To qualify as an independent director, at least the following criteria must be met⁷:

1. the director has not been an executive member of the management body, member of the management committee or person entrusted with the daily management, nor in the company nor in an affiliated company or person, during the five years⁸ immediately preceding his or her appointment;
2. the director has been a non-executive director for no more than three consecutive terms during a maximum period of 12 years (new criterion provided by the Law);
3. the director has not been a member of the managerial staff ("*leidinggevend personeel / personnel de direction*")⁹ of the company or of an affiliated company or person during the three years immediately preceding his or her appointment;
4. the director does not receive or has not received any remuneration or other significant pecuniary advantage, from the company or from an affiliated company or person, other than the bonuses and remuneration received in his or her capacity as a non-executive member of the management body or as a member of the supervisory body (new criterion provided by the Law);

⁴ The Law hereby provides that the statutory auditor and, as the case may be, the auditor responsible for the audit of the consolidated annual accounts: confirm annually in writing to the audit committee their independence with respect to the company; disclose annually to the audit committee all additional services provided to the company; consult with the audit committee on the risks that may jeopardize their independence and the safety measures taken to mitigate those risks, as recorded by them.

⁵ New article 96, 9° of the Belgian Company Code.

⁶ Article 524, §4 of the Belgian Company Code (defining the independence criteria for directors) was also amended by the Law.

⁷ New article 526ter of the Belgian Company Code, based on the Recommendation of the European Commission of 15 February 2005 on the role of non-executive directors or statutory auditors of listed companies and on the committees of the board of directors or of the board of statutory auditors (2005/162/EG). Most of these criteria were already provided by the Corporate Governance Code. Additional or more stringent criteria can be provided by Royal Decree or by the articles of association.

⁸ This period ran up to 2 years in the former article and applied to all mandates (executive or not).

⁹ This period ran up to 2 years in the former article. The concept of "managerial staff" ("*leidinggevend personeel/personnel de direction*") is defined by the law and is more specific than the concept of "executive" ("*kaderlid/cadre*") (old article 524, §4). "Managerial staff" refers to the persons entrusted with the daily management of the company that are authorized to represent and commit the employer, as well as the staff members directly subordinate to these persons, if they also perform daily management tasks.



5. the director does not hold any interests in the company that represent 10% or more of the capital or of the corporate funds or of a category of shares of the company¹⁰, and in any case does not represent a shareholder who falls under the conditions set forth in this point 5°;
6. the director has not or has not had within the past financial year a significant¹¹ business relationship with the company or with an affiliated company or person, either directly or as a partner, shareholder, member of the management body or member of the managerial staff (“leidinggevend personeel/ personnel de direction”) of the company or of a person that maintains such a relationship (new criterion provided by the Law);
7. the director is not or has not been at any time during the past three years, a partner or employee of the company’s current or former external auditor or of a company or person affiliated to the latter (new criterion provided by the Law);
8. the director is not an executive member of the management body of another company in which an executive director of the company is a non-executive member of the management body or member of the supervising body, and has no other significant ties¹² with executive directors of the company through his or her involvement in other companies or bodies (new criterion provided by the Law);
9. the director’s spouse, legal cohabitant or relatives to the second degree do not act as a member of the management body, member of the management committee, person entrusted with the daily management or member of the managerial staff (“leidinggevend personeel/ personnel de direction”) in the company or in an affiliated company or person, and do not meet one of the criteria in points 1° to 8°¹³.

The decision to appoint an independent director must mention the grounds for granting the capacity of independent director.

Independent directors who were appointed before 8 January 2009 (date of entry into force of the Law) and who satisfy the criteria of (former) article 524, §4, part 2 of the Belgian Company Code, but not all criteria of (new) article 526ter of the Belgian Company Code, can nonetheless continue to remain on board as independent directors until 1 July 2011.

4. Statutory auditor

The Law also modifies, for all (listed and non-listed) companies, the rules regarding the non-audit services (exception to the “one-to-one” rule after positive decision by the audit committee) and the revocation of the statutory auditors (mandatory information to the High Council for Economic Professions)¹⁴. In the companies that are legally obliged to establish an audit committee, the statutory auditor will still be appointed upon proposal of

¹⁰ Specific rules are provided so that directors do not indirectly (via companies controlled by them or via shareholders’ agreements) hold interests in the company that represent more than 10% of the share capital, the corporate funds or of a category of shares of the company.

¹¹ At aim: the important business relationships possibly maintained by the director and the company (e.g.: one of the company’s important clients or suppliers of goods or services, or each organization or person that has received significant benefits or important contributions from the company or the group of companies of which it is part).

¹² By “other significant ties” is meant for instance the situation in which an independent director is bound by an employment contract with another company and in that capacity would fall under the authority of another director of the first company.

¹³ It is now required that the director’s relatives fulfill the independence criteria such as the independent director (new criterion provided by the Law).

¹⁴ Amendment to articles 133 §6, 135 and 533 of the Belgian Company Code.



the management body but the management body can only make such a proposal following a proposal from the audit committee.¹⁵

5. Conclusion

The legal recognition of the audit committee aims to promote high quality financial information and to so reinforce public confidence that it gives a true and fair view. Nevertheless the strengthening of the independence criteria (especially the absence of significant business relationships and the numerous incompatibilities of office) may well make the appointment of people who are independent within the meaning of the Belgian Company Code more difficult.

The companies that fall under the scope of application of the Law will have to check the conformity of their articles of association and their internal regulations and corporate governance charter, if any, with the new legal provisions as soon as possible and, if necessary, will have to make amendments to ensure conformity. For companies that already have an audit committee, it will be important to verify if the composition of the audit committee respects the new Law and if this committee is entrusted with at least the list of tasks that are now provided by the Belgian Company Code.

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¹⁵ Amendment to articles 130 en 156 (communication of the proposal from the audit committee to the Works council) of the Belgian Company Code.