



Corporate Newsflash

New Corporate Governance Act on remuneration in listed companies

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This newsletter is sent by NautaDutilh



There has been a recent public outcry in Belgium over the extremely large bonuses and severance packages granted to certain company directors. At the same time, the ongoing financial crisis has prompted several initiatives at the national and international levels with respect to corporate governance, in particular executive remuneration policies.

The most recent measures, aimed at ensuring that investors have complete information about corporate remuneration policies, were adopted by the Act of 6 April 2010, published in the *Belgian State Gazette* on 23 April 2010 (the "**Act**").

The Act, which applies to companies listed on a regulated market in Belgium (i.e., Euronext Brussels), amends the Belgian Company Code in the following four main areas:

1. creation of a remuneration committee;
2. approval of a corporate governance statement;
3. approval of a remuneration report; and
4. specific rules on executive remuneration and severance packages.

Creation of a remuneration committee

Listed companies are obliged to set up a remuneration committee, composed of members of the board of directors. The committee must consist exclusively of nonexecutive directors, a majority of whom must be independent.

The members of the remuneration committee must possess the requisite level of expertise in the area of remuneration policy. The committee is entrusted with the following tasks:

1. formulating proposals concerning the remuneration policy for directors;
2. formulating proposals concerning the individual remuneration of directors, including variable compensation and severance packages;
3. preparing a remuneration report; and
4. commenting on the remuneration report during the annual general meeting of shareholders.

The remuneration committee must meet at least twice per year and each time it deems necessary to perform its tasks. It must report regularly to the board of directors on the fulfilment of its duties.

The obligation for listed companies to establish a remuneration committee applies as from the first fiscal year (FY) after publication of the Act in the *Belgian State Gazette* (although exemptions are provided for small listed companies). Since the Act was published on 23 April 2010, this means that listed companies must, if they haven't already done so, establish a remuneration committee during the course of FY 2011.

Corporate governance statement

Listed companies must publish an annual corporate governance statement, set forth in a specific and clearly identifiable section of their management report.

This obligation is effective immediately; in other words, it applies to the current fiscal year (FY 2010). The management report of each listed company, adopted at the beginning of 2011, must thus contain a corporate governance statement.

The corporate governance statement must contain certain information, including the name of the corporate governance code which the company applies and an indication of the place where this code can be publicly consulted (such as a website), a description of the main features of the company's internal control and risk management systems, and information concerning the composition and functioning of the company's management organs and their respective committees, including the remuneration committee and the audit committee.

Remuneration report

The corporate governance statement must contain a specific section on the remuneration report. The remuneration report must incorporate concrete data to ensure that the company's remuneration policy and the remuneration granted to the members of its management organs are transparent

As mentioned above, a remuneration report is only required as from the first fiscal year following publication of the Act in the *Belgian State Gazette*, that is as from FY 2011. Therefore, all information on the remuneration of top managers and directors required by the Act will only be disclosed in 2012.

The remuneration report is prepared by the remuneration committee, submitted to the board of directors and approved by the annual general meeting of shareholders.

The annual general meeting must also approve any agreement providing for (i) a severance package of more than 12 months' or 18 months' remuneration or (ii) the grant of variable remuneration to an independent director.

Executive remuneration and severance packages

The Act amends the Company Code with regard to the remuneration (in particular variable remuneration) and severance packages of directors and other top managers of listed companies.

The criteria used to determine the variable remuneration of an executive director (or other top manager) of a listed company must be expressly stated in the contract or other written document governing the company's legal relationship with that person. Variable remuneration may not be paid unless these predetermined criteria are satisfied for the specified period. If these rules are violated, variable remuneration may not be taken into account when calculating the relevant director's severance package.

Unless the company's articles of association provide otherwise or the general meeting of shareholders has given its express consent, the variable remuneration of an executive director of a listed company must meet the following requirements:

- at least 25% of the variable remuneration must be based on predetermined and objectively verifiable performance criteria measured over a period of at least two years, and
- at least another 25% of the variable remuneration must be based on predetermined and objectively verifiable performance criteria measured over a period of at least three years.

This rule will not apply if variable remuneration constitutes 25% or less of the relevant director's total annual remuneration.

With respect to the grant of shares or stock options, unless the company's articles of association provide otherwise or the general meeting of shareholders has given its express consent, shares may not be definitively acquired, and options may not be exercised, for a period of at least three years from the grant date.

The remuneration report must also include complete information, on an individual basis, on arrangements for severance pay (i.e. golden parachutes) for executive directors, members of the management committee and other persons entrusted with the company's day-to-day management. If any of the aforementioned persons leaves the company, the remuneration report must include the board's decision, further to a proposal by the remuneration committee, as to whether the individual in question is eligible for a severance package, the reasoning behind this decision, and the basis used to calculate the relevant amount.

Any agreement on severance pay that is not in line with the provisions of the Act must be approved by the general meeting of shareholders or it shall be deemed null and void. Approval of the agreement must be mentioned as a distinct item on the agenda of the meeting and submitted to a separate vote. The term "severance pay" should be interpreted broadly to include noncompete compensation as well as contributions to a pension plan and non-cash benefits paid or granted upon or after departure.

These new rules apply as from the first fiscal year starting after 31 December 2010, that is as from FY 2011, with the exception of the need to obtain shareholder approval for any agreement providing for a severance package of more than 12 or 18 months' remuneration or the grant of variable remuneration

to an independent director. This latter requirement applies to all agreements concluded or extended as from 10 days after publication of the Act in the *Belgian State Gazette*, that is as from 3 May 2010.

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