

Newsletter: **Executive remuneration in listed companies: new European ‘say on pay’**

May 2017

Table of contents

1	Introduction.....	2
2	Current laws and practices.....	2
3	Scope	2
4	Remuneration Policy to be voted by the Shareholders’ Meeting	2
5	Content of the Remuneration Policy	3
6	Content of the Remuneration Report ...	4
7	Vote on the Remuneration Report	5
8	Publication of the Remuneration Report	5
9	To be continued.....	6

Dear reader,

On 17 May 2017, the new Shareholders’ Rights Directive (the “Directive”) was adopted. The Directive contains provisions governing executive remuneration in EU listed companies. Among other things, it will give shareholders a right to vote on a remuneration policy for directors (‘say on pay’) and it will require publication of an annual remuneration report with details on individual directors’ remuneration.

For Belgian listed companies the main changes that the Directive will bring about are:

- the individual publication of the remuneration of management or executive committee members -- until now, only the aggregate figure for the entire management or executive committee is published; and
- the requirement that the shareholders vote in advance on the remuneration policy -- until now, they only vote on the report, established after the facts.

The Directive was published in the Official Journal of the European Union of 20 May 2017.

It must be implemented in Belgium and other EU countries by 10 June 2019 at the latest.

This newsletter reviews the main executive remuneration provisions of the Directive and their possible impact for Belgian listed companies.

We hope you enjoy the read!

1 Introduction

The Directive amends the so-called Shareholders' Rights Directive (officially EU Directive 2007/36 as regards the encouragement of long-term shareholder engagement). The stated objective is to overcome certain corporate governance shortcomings in European listed companies and to further promote long-term engagement of the shareholders.

The Directive deals with corporate law and corporate governance matters like identification of shareholders, information of shareholders, facilitation of voting rights, transparency of institutional investors, asset managers and proxy advisors and rules on related party transactions.

HR practitioners will, however, be primarily interested in the provisions dealing with the remuneration policy and the remuneration report, which are discussed in this newsletter.

2 Current laws and practices

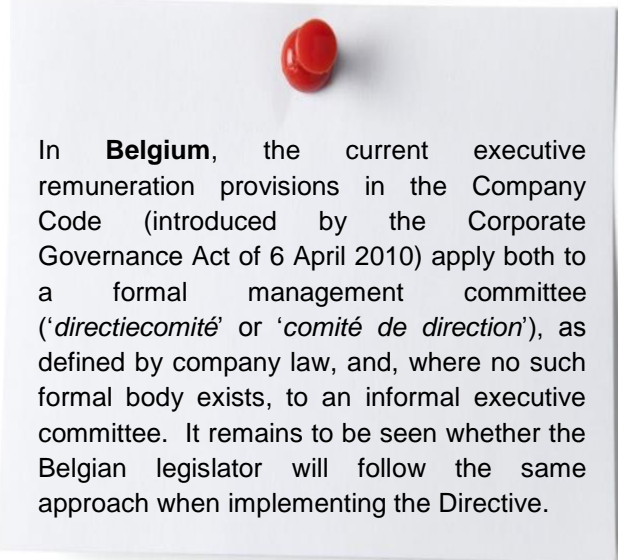
Current EU Member State laws and practices on executive remuneration vary widely. Publication of details on executive remuneration in listed companies is prescribed by Member State laws on annual accounts and/or investor information or imposed or recommended by applicable corporate governance codes. The EU Commission acknowledges the diversity in governance systems within the EU, but believes it is important to harmonise the rules on shareholders' 'say on pay' and publication requirements.

3 Scope

The Directive will impact directors in EU listed companies.

The term "director" is broadly defined as the CEO, the deputy CEO, and any member of the administrative, management or supervisory

bodies of a company. Regardless of the corporate governance structure, the term will therefore encompass both executive and non-executive roles. Where a listed company has, for instance, a management committee and a Board of Directors, the members of both bodies will be within scope.



In **Belgium**, the current executive remuneration provisions in the Company Code (introduced by the Corporate Governance Act of 6 April 2010) apply both to a formal management committee ('directiecomité' or 'comité de direction'), as defined by company law, and, where no such formal body exists, to an informal executive committee. It remains to be seen whether the Belgian legislator will follow the same approach when implementing the Directive.

The companies covered are those having their registered office in one of the 28 EU Member States and whose shares are admitted to trading on a regulated market in the EU (like Euronext).

4 Remuneration Policy to be voted by the Shareholders' Meeting


The Directive provides that the general meeting of shareholders must have a right to vote on the company's remuneration policy. The vote must be binding. Once approved, companies can only pay remuneration to their directors in accordance with the approved policy.

When implementing the Directive, the Member States can give companies some leeway: they can allow deviations for individual directors in exceptional circumstances. They can also provide that the vote will only be advisory. Where that is the case, the policy must still be submitted for a vote to the shareholders'

meeting, and if it is rejected, a revised draft policy must be submitted at the next meeting.

The remuneration policy must be submitted to a vote by the shareholders' meeting at every material change and in any case at least every four years.

The text of the policy and the results of the vote must be published on the company's website and remain available there as long as the policy remains in force.



Until now, in **Belgium**, the remuneration policy was an integral part of the remuneration report. The report has to indicate explicitly when the policy changes materially as compared to the policy applied during the year dealt with in the remuneration report. The policy is not, however, submitted to a separate shareholder vote. By separating the votes on policy (for the future) and report (for the past) the votes will become more meaningful.

5 Content of the Remuneration Policy

The remuneration policy must explain how it contributes to the business strategy, long-term interests and sustainability of the company. It must be clear and understandable and describe the different components of fixed and variable remuneration, including all benefits in whatever form, which can be awarded to directors and indicate their relative proportion.

The policy must also explain how the pay and employment conditions of employees of the company were taken into account when setting the policy or directors' remuneration. This vague requirement is a leftover of a more controversial proposal of the European Commission that the policy should also explain

and justify the ratio between director's pay and average employee's pay, which was taken out of the compromise text.

If the company awards variable pay, the policy must set clear, comprehensive and varied criteria for the award. The policy must indicate the financial and non-financial performance criteria including where appropriate, corporate social responsibility criteria, to be used for the calculation of variable remuneration and explain how they contribute to the business strategy, long-term interests and sustainability of the company.

The policy must specify any applicable deferral periods. It must also specify information on the possibility for the company to reclaim variable remuneration ('clawbacks'). For share-based remuneration, the policy must specify applicable vesting and retention periods.

The policy must also indicate the duration of the arrangements with directors and the applicable notice periods, the main characteristics of supplementary pension or early retirement schemes and severance pay.

Finally, the policy must explain the decision-making process for policy review, the measures taken to avoid or manage conflicts of interest and the role of the remuneration committee. Whenever it is revised, it must explain all significant changes and how it takes into account the votes and views of shareholders on the remuneration policy and remuneration reports since the last vote.

The European Parliament had proposed that share value should not have a dominant role in the financial performance criteria and that share-based remuneration should not represent the most significant part of the variable remuneration. But these ideas were rejected in the compromise text.

Although many **Belgian** listed companies already provide a lot of this information, until now, the Company Code provisions on the remuneration policy only require information on:

- the principles on which the remuneration is based, including the link between remuneration and performance;
- the relative share of the different components;
- the characteristics of all share-based remuneration; and
- the procedure followed to develop the policy.

Under the Directive, the remuneration policy will have to be much more explicit.

6 Content of the Remuneration Report

The remuneration policy is a prospective document determining what director remuneration should look like in the future. Companies must also annually draw up a remuneration report, providing a clear and comprehensive overview of the remuneration, including all benefits in whatever form, awarded or due over the last financial year to individual directors, including to newly recruited and to former directors.

The remuneration report must contain the following information regarding each individual director's remuneration:

- a. the total remuneration split out by component, the relative proportion of fixed and variable remuneration, an explanation how the total remuneration complies with the adopted remuneration policy, including how it contributes to the long-term performance, and information on how the performance criteria were applied;
- b. the annual change of the remuneration of directors over at least the last five financial years, the evolution of the performance of the company and of the average remuneration on a full time

equivalent basis of employees of the company other than directors during that period, presented together in a manner which permits comparison;

- c. any remuneration awarded or due to directors of the company from any subsidiary or other group company;
- d. the number of shares and share options granted or offered, and the main conditions for the exercise of the rights including the exercise price and date and any change thereof;
- e. information on the use of the possibility to reclaim variable remuneration ('clawback'); and
- f. information on any deviations from the procedure or any derogations, as well as the justifying exceptional circumstances.

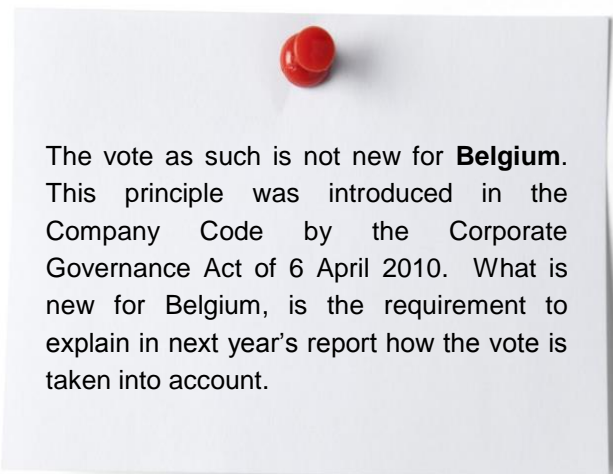
The language that was most debated in this section of the Directive is the last part of item (b) ('presented together in a manner which permits comparison'). It suggests that companies should have tables or graphs in their report showing increases of director pay and average pay, as compared to company growth over five years. It does not specify how one should measure "the evolution of the performance of the company" for this purpose, but when implementing the Directive, Member States could adopt more precise criteria.

While a number of Member States, including **Belgium**, already have remuneration reports (by law or in practice), item (b) with the comparative data is certainly a novelty.

What is also new in Belgium (and in certain other Member States) is that this information must be provided individually for each director (which is a broadly defined term -- see Scope above). The Directive contains some data protection provisions designed to address the privacy concern including a 10-year limit on the publication of the data. It remains to be seen whether Belgian listed companies will wish to reconsider the number of "directors" within scope once these individual publication requirements become applicable.

7 Vote on the Remuneration Report

The Directive provides that the annual shareholders' meeting has the right to hold an advisory vote on the remuneration report of the past financial year. As the report reflects historical data, a rejection will not affect remuneration paid, but will send a signal to the directors. The company is required to explain in the next remuneration report how the vote by the shareholders' meeting has been taken into account.



The vote as such is not new for **Belgium**. This principle was introduced in the Company Code by the Corporate Governance Act of 6 April 2010. What is new for Belgium, is the requirement to explain in next year's report how the vote is taken into account.

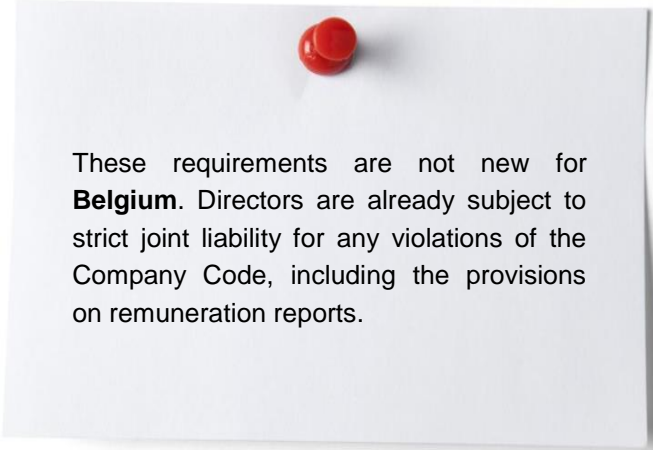
8 Publication of the Remuneration Report

After the annual shareholders' meeting, the remuneration report is to be published without delay on the company's website. It must remain publicly available, free of charge, for 10 years.

As part of its audit, the statutory auditor must check that the remuneration report contains the required information.

The Directive also states that Member States must make their existing rules on director's liability applicable to any breach of the remuneration report obligations.

Finally, the Directive authorises the EU Commission to come up with non-binding guidelines on a standardised presentation of the remuneration report to ensure consistent harmonisation.



These requirements are not new for **Belgium**. Directors are already subject to strict joint liability for any violations of the Company Code, including the provisions on remuneration reports.


9 To be continued...

Publication of remuneration policies and data is not new in the EU. In recent years, various initiatives have been taken in Member States to promote shareholder 'say on pay'. In many countries there are more or less binding rules in corporate governance codes. Proxy advisors have for some time focused their attention on director remuneration.

Still, the Directive brings the debate to a different level. When it will be implemented, its requirements will be cast into national laws and non-compliance may result in sanctions.

The Directive thus certainly creates new rights for shareholders. By the same token, these rights are also obligations. Indeed, the Directive makes the shareholders' meeting the ultimate judge on director remuneration matters.

At the very least, the Directive promises more lively debate on executive remuneration in shareholders' meetings in years to come...



In the meantime, in **Belgium**, the Corporate Governance Committee announced in November 2016 that in 2017, it would review the 2009 Belgian Code on Corporate Governance. The outcome of this review may already give us an indication of how the above provisions of the Directive will be put in practice in Belgium, pending their formal implementation in Belgian company law, which must occur prior to 10 June 2019.

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