

The updated audit committee

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On 31 December 2016, a new law came into force that is part of the European audit reform. Among other things, the law lays down new rules on supervision. In this article, we look at the background to the law and consider what impact the modifications may have for your company.

A. Background

1. Further to the law of 7 December 2016 **on the organisation of the profession and public supervision of company auditors**¹ (the “Law”), since 31 December 2016 additional obligations have applied as regards audit committees². In addition to far-reaching changes in the organisation of the profession and public supervision of company auditors, annual financial statements and consolidated annual financial statements and the auditing of these statements, the Law also changes the **provisions on audit committees**:

- They are given an **enhanced role as regards the appointment and remuneration** of the supervisory director³.
- They monitor the **independence** of the supervisory director or company auditor (Article 526bis, §7, 5) of the Companies Code).

The **Audit Directive** establishes the obligation to set up an **audit committee for all public interest entities**⁴. For listed companies within the meaning of Article 4 of the Companies Code, this rule is to

¹ Law of 7 December 2016 on the organisation of the profession and public supervision of company auditors, *Belgian official journal* 13 December 2016.

² Article 156; §1 of the Law.

³ For instance, the proposal for appointment to the position of supervisory director, which has to be put to the general meeting by the management body, is formulated at the recommendation of the audit committee on penalty of invalidity (Article 130, §4 and §5 of the Companies Code) and certain auditing services may only be provided after approval of the audit committee (Article 133/1, §5, Article 133/2, §4 of the Companies Code).

⁴ Classified as “public interest entities”: (i) entities that fall under the law of a member state whose securities are traded in a member state on a regulated market, (ii) credit institutions and (iii) insurance companies. The member states can

be found in Article 526bis, §1 of the Companies Code⁵, and for the remaining categories of public interest entities, in the specific regulations⁶.

B. What has changed?

2. The **composition of the audit committee** remains **unchanged** as regards listed companies. It must comprise non-executive members of the Board of Directors and at least one member of the audit committee must be an independent director⁷. The Audit Directive stipulates that the audit committee must consist largely of independent directors, but the Belgian legislator has not adopted this provision⁸.

Account does, however, have to be taken here of the Belgian Corporate Governance Code 2009 which, in line with the Audit Directive, stipulates that at least the majority of the members of the audit committee must be independent⁹. So the rule that at least the majority of the members of the audit committee must be independent will take effect on the basis of the *comply or explain* principle and the corporate governance declaration provided for in Article 96, §2 of the Companies Code¹⁰ and therefore not on the basis of the Audit Directive.

3. **Two additional requirements regarding the composition** of the committee are also being included in the updated Article 526bis of the Companies Code:

- (i) The chairman is appointed by the members of the audit committee.
- (ii) The members of the audit committee must have collective expertise in the field of the activities of the company audited (Article 526bis, §2 of the Companies Code).

4. In addition, the audit committee is given **two additional assignments**, namely:

- (iii) **informing the Board of Directors of the result** of a statutory audit of the annual financial statements and, if appropriate, of the consolidated annual financial statements and clarifying the way in which the statutory audit of the annual financial statements and, if appropriate, the consolidated annual financial statements, has contributed to the integrity of the financial reporting and what role the audit committee played in that process; and
- (iv) **making recommendations** to the Board of Directors of the company **for the appointment of the supervisory director** and, if appropriate, the company auditor who is responsible for the statutory audit of the consolidated annual financial statements¹¹.

C. What is the impact on your company?

5. As was said earlier, these obligations came into force on 31 December 2016. Does this mean that the chairman and the members of the audit committee who do not fulfil the above conditions

also designate other entities as public interest organisations, such as entities which are of great general interest owing to the nature of their business activities, their scope or their workforce (Article 2, 13 Audit Directive).

It should be noted that the Belgian legislator has made use of the possibility of extension and has also designated reinsurance companies and clearing houses as public interest entities (Article 4/1 of the Companies Code).

⁵ Whereby in Article 526bis, §3 of the Companies Code, the exemption is applied for "small and medium-sized enterprises" within the meaning of the Prospectus Directive as provided for in Article 41, paragraph 1 of the Regulation.

⁶ The law of 13 March 2016 on the status and supervision of insurance or reinsurance companies, *Belgian official journal* 23 March 2016, the law of 25 April 2014 on the status and supervision of credit institutions and listed companies, *Belgian official journal* 7 May 2014, and the Royal Decree of 26 September 2005 on the status of clearing agencies and bodies related to clearing agencies, *Belgian official journal* 11 October 2005.

⁷ See Article 526ter of the Companies Code for a description of an "independent director".

⁸ This is on the basis of the derogation provided for in Article 39, §5 of the Audit Directive.

⁹ Belgian Corporate Governance Code 2009 (Appendix C – 5.2./4).

¹⁰ Explanatory Memorandum to the draft law on the organisation of the profession and public supervision of company auditors, *Parl.St.* Chamber 2016-17, No 54 2083/001, 12-13.

¹¹ This principle was already to be found in the Belgian Corporate Governance Code 2009 (Appendix C – 5.2./20).

have held their positions invalidly since 1 January 2017 or even that their mandates have been terminated ipso jure? No, because the **transitional provisions** of the Law ¹² state that the legal provisions do not put an end to current mandates on the date on which the Law takes effect¹³. They remain in force until the expiry of the period of the mandates. However, if the competent body in the company terminates the mandate in question prematurely, the tolerance provided for in the transitional provisions also lapses.

6. If your company is classified as a public interest entity, you need to check whether the articles of association of the company are contrary to the new legal provisions. This will not pose a problem if your articles of association contain only a limited description of the working, composition and tasks of the audit committee, whether or not simply by referring to the applicable legal provisions. However, if these matters are laid down *in extenso* in the articles of association, for example by literally repeating the legal provisions, then it would be advisable to **update the articles of association**.

Note: would you like more concrete information after reading this text? Unfortunately Berquin Notarissen cvba is unable to advise you by email. If you wish, you can phone to make an appointment with one of our lawyers or notaries.

¹² Article 152-154 of the Law.

¹³ It should be noted that the transitional provisions for listed companies refer to "the current mandates of chairman" and as regards the other categories of public interest entities, "the current mandates of member or of chairman".