european corporate governance institute

Directors' Remuneration in Listed Companies BELGIUM*

Name and contact details of respondents

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* The information and opinions included in this document are not intended to provide legal advice, and should not be relied on or treated as a substitute for specific advice concerning individual situations. The law, regulation and best practices are stated as they stood on 1 April 2009.

Questionnaire
Answers to this questionnaire should be given from the perspective of provisions included in national laws, regulations and exchange rules, and of best practices as recommended by either official reports or corporate governance codes.

1. General

1.1 Please indicate, as a general reference, the laws, case law, regulations, exchange rules and best practices concerning directors' remuneration in your country with respect to listed companies. Please indicate where these provisions (such as, for example, exchange rules) apply only to domestically-incorporated companies.

- The Belgian Companies Code does not contain specific rules regarding directors' remuneration.

-The Royal Decree of 30 January 2001[1], executing this Companies Code, prescribes that the explanation to the annual accounts (this requirement applies to both consolidated annual accounts and the annual accounts of the parent) should contain global information about directors' remuneration (cf. 4th and 7th Directive). (See article 91 resp. 114 of the RD of 30 January 2001). Article 11 of the Royal Decree of 14 November 2007 on the obligations of issuers of financial instruments admitted to trading on a regulated market[2] transposing the Transparency Directive 2004/109/EC obliges a listed issuer of financial instruments to publish annual accounts (including this explanation) and annual reports at least once a year[3].

- Commission Regulation (EC) No 809/2004 of 29 April 2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements[4] is directly applicable in Belgian law; Annex I: Minimum Disclosure Requirements for the Share Registration Document, nr. 15.
-The Law of 16 June 2006 on the public offering of investment instruments[5], transposing Directive 2003/71/EC, imposes the obligation to issue a prospectus for every public offering of investment instruments on Belgian territory and for every admission of those instruments to a Belgian regulated market. This obligation does not apply in certain circumstances, e.g. the offering of securities by an employer, or by an enterprise that was connected with it, to its directors, when certain conditions are met (article 18 of the Law of 16 June 2006).
- The Royal Decree of 31 October 1991 on the prospectus to be published for a public issue of securities[6] - Schedule A states that the remuneration and benefits in kind of all members of the administrative, management or supervisory bodies of the company should be mentioned.

- Best practices: the recommendations concerning Corporate Governance for listed

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[1] Moniteur 6 February 2001.
[2] Moniteur 3 December 2007.
[3] In some cases publication of certain information is required every half year, e.g. when the shares are listed (article 14 of this RD).
[4] O.J. L 149/1 of 30 April 2004.
[5] Moniteur 21 June 2006.
[6] Moniteur 25 November 1991.

companies (the 2009 Belgian Code on Corporate Governance which replaced the so-called Lippens Code of 2004) contains several rules regarding the remuneration of directors, both executive and non-executive, and of CEO's. These only apply to companies incorporated in Belgium whose shares are admitted to trading on a regulated market ('listed companies'). The 2009 Code applies to reporting years beginning on or after 1 January 2009.
It must be noted that there is a specific Code on Corporate Governance for non-listed companies (so-called Buysse Code of 2005)[7].

NB. All legislation (in Dutch and French) is available on http://www.belgielex.be/. The Corporate Governance Code is available on http://www.corporategovernancecommittee.be/.

1.2 As to best practices, please specify whether they are described in either a private (voluntary or non-statutory) code or other official report, and whether a "comply or explain" principle is applicable to compliance with the relevant provisions by listed companies. Where the "comply or explain" principle applies, please indicate, where such evidence is available, whether companies generally comply with best practices.

The 2009 Corporate Governance Code is a voluntary Code. A "comply or explain" principle is applicable. The CBFA[8], the Belgian supervisor, can verify the observance of this "comply or explain" principle, and invite companies to live up to it. It cannot sanction companies that do not live up to the Code, unless they are also in violation of a legal requirement[9].
The Corporate Governance Code consists of nine principles, which set out the basics of corporate governance, completed by provisions, i.e. recommendations as to how the principles should be complied with. The Code also contains guidelines which further detail the implementation or the interpretation of the provisions. The obligation to "comply or explain" only applies to the principles and the provisions, not to the guidelines.

According to the Code, companies should publish a Corporate Governance Charter and a Corporate Governance Statement. The Corporate Governance Statement, to be published as a part of the annual report (i.e. yearly), describes whether the company has adopted this code, lists the provisions it has not complied with and the reasons for non-compliance[10], and includes a

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[7] The Buysse Code is available in Dutch and French on http://www.codebuysse.be.
[8] Commission for Banking, Finance and Insurance (Commissie voor Bank- Financie- en Assurantiewezen; Commission Bancaire, Financière et des Assurance).
[9] Such as e.g. article 11 of the Royal Decree of 14 November 2007 on the obligations of issuers of financial instruments admitted to trading on a regulated market (Moniteur 3 December 2007), transposing the Transparency Directive 2004/109/EC. This is unlikely to apply in relation to remuneration issues.
[10] Appendix F, 9.3/1 of the 2009 Code on Corporate Governance gives a list of the items the Corporate Governance Statement should contain; e.g. a statement that the company adopts this Code as its reference code; in the event that the company does not fully comply with the Code, an indication of the provisions of the Code that were not complied with during the year and explanation of its reasons for non compliance; a description of the composition and operation of the board and its committees, including at least a list of the members of the board indicating which directors are independent etc.; comments on the application of the policy established by the board for transactions and other contractual relationships between the company, including its related companies, and its board members and executive managers, to the extent not covered by the legal provisions on conflicts of interest; information on the main features of the process for evaluating the board, its committees and its individual directors; key features of any incentives granted by way of shares, options or any other right to acquire shares as approved by, or submitted to, the general shareholders' meeting.

remuneration report[11]. The Corporate Governance Charter is to be published on the company's website and should describe the main aspects of the company's corporate governance[12].

Directive 2006/46/EC of the European Parliament and of the Council of 14 June 2006 amending Council Directives 78/660/EEC on the annual accounts of certain types of companies, 83/349/EEC on consolidated accounts, 86/635/EEC on the annual accounts and consolidated accounts of banks and other financial institutions and 91/674/EEC on the annual accounts and consolidated accounts of insurance undertakings[13] requires amongst other things that a listed company shall include a corporate governance statement in its annual report. That statement shall be included as a specific section of the annual report. This Directive should have been implemented into Belgian law on 5 September 2008. Belgium has not yet transposed this Directive.

As, a preliminary and general remark, it should be noted that the Belgian 2004 and 2009 Corporate Governance Codes make a distinction between non executive and executive directors on the one hand, and executive managers on the other. Executive managers are part of the "management committee" ("directiecomité" / "comité de direction")[14], which can be appointed by the board of directors in order to take on the management of the company[15]. When such a committee is installed, the board of directors supervises this committee. The members of this committee can, but need not be directors.
The Companies Code gives a non-exhaustive description of who is to be considered an executive member of the board of directors; e.g. every director that is a member of the management committee and every director that participates in the daily management of the company[16].

There is research on the implementation of the 2004 Corporate Governance Code (the 2009 Code's predecessor)[17]. The 2004 Corporate Governance Code required, amongst other things, the publication of a Corporate Governance Charter on the company's website, the drafting of a Corporate Governance Statement to be contained in the annual report, and applied a "comply or explain" approach. The research shows that approximately seventy-five per cent of the listed companies that were examined have published a Corporate Governance Charter. Up to eighty-

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[11] Appendix F, 9.3/2 of the 2009 Code on Corporate Governance gives a list of the items the remuneration report should contain.
[12] Appendix F, 9.1/1 of the 2009 Code on Corporate Governance gives a list of the items the Corporate Governance Charter should contain, e.g. a description of the governance structure of the company, with the terms of reference of the board, the policy established by the board for transactions and other contractual relationships between the company, including its related companies, and its board members and executive managers, to the extent not covered by the legal provisions on conflicts of interest, the measures taken by the company in order to comply with the Belgian rules on market abuse, the terms of reference of each committee and of the executive management; the identity of its major shareholders; a statement that the company adopts this Code as its reference code.
[13] O.J. L224 of 16 August 2006.
[14] Article 524 bis Companies Code.
[15] Albeit that some core tasks remain within the board of director's exclusive power.
[16] Article 526 bis, §3 in fine Companies Code.
[17] See Belgian Governance Institute (GUBERNA) and VBO, *Naleving van de Belgische Corporate Governance Code : een stand van zaken,* 2007, http://www.guberna.be; p. 5 ff. ; Belgian Governance Institute (GUBERNA) and VBO, *Onderzoek naleving Code Lippens inzake de publicatie van een Corporate Governance Charter,* 2006, http://www.guberna.be. For research about listed companies and corporate governance before the adoption of the 2004 Code on Corporate Governance, see C. Van der Elst, "De remuneratie van de raad van bestuur aan het begin van de 21e eeuw", 8 *Acc. Bedr.* (2002), 3-14.

five per cent of the companies have a Corporate Governance Statement in their annual report, in which either the code is applied, or an explanation for any deviation from the code's principles has been provided. Most of the companies have installed a remuneration committee.
Furthermore, the 2004 Code also contained detailed principles on remuneration, such as the recommendation that the board of directors draft a remuneration policy to be published as part of the Corporate Governance Charter; the recommendation that the remuneration of the CEO be published on an individual basis, with a distinction to be made between the fixed and the variable part and the other parts of the remuneration; the recommendation to publish, on a global basis, the remuneration of the executive management, with a distinction to be made between the fixed and the variable part and the other parts of the remuneration; and the recommendation to publish the most important features of the appointment and severance of the executive management in the Corporate Governance Statement.
The recommendations regarding the publication of the company's remuneration policy are respected by over ninety-five per cent of the companies that have applied the Code[18].
In seventy per cent of the cases, the individual director's remuneration was published. The 2004 Code's recommendations on the publication of the CEO's individual remuneration however, were followed by only sixty per cent of the companies, while almost thirty per cent did not comply but explained why. Two out of three companies that complied clearly distinguished basic salary from variable remuneration and other components.
More than half of the companies publish information on the shares, options etc. that were granted to members of the executive management.
Overall, the research showed that the recommendations regarding the recruitment and severance pay of the executive management, information on share options, the distinction between the types of remuneration that have been used (such as a fixed salary, variable remuneration, and so on) were not complied with, without any explanation, by almost half of the investigated companies.
This research was conducted in 2006-2007 when the 2004 Code was applicable. However, regarding directors' remuneration (as well as other topics), the 2009 Code made some significant amendments to the 2004 recommendations.

1.3 Please describe in summary: the institutional structure for adopting executive remuneration rules or best practice codes; and any major proposals for reform concerning directors' remuneration.

There are no specific legal provisions in this respect. The 2009 Corporate Governance Code is the result of a revision and update of the 2004 Corporate Governance Code, which itself had replaced and combined the three Corporate Governance Codes that up to that point existed alongside each other. It was the Corporate Governance Committee, composed of representatives of the corporate leaders of Belgium, of Euronext, the ECGI, etc., that, together with a Permanent Working Group, drafted the 2004 Code and conducted its review. In May 2007 the Committee became a private foundation and was expanded to include certain stakeholders, such as the Institute of Registered Auditors and the Central Economic Council, with a view to regularly updating the Code, in line with practice, legislation and international standards. The Corporate Governance Code contains two key recommendations in relation to directors' remuneration

[18] This is quite an improvement, compared to the research results for 2000; see C. Van der Elst, "De remuneratie van de raad van bestuur aan het begin van de 21e eeuw", 8 *Acc. Bedr.* (2002), 3-14; and C. Van der Elst, "The Belgian struggle for corporate governance improvements", ECGI Working Paper N°.114/2008, September 2008.

policy: first the remuneration report which should be part of the Corporate Governance Statement; and second, the remuneration committee, which should make proposals on the remuneration policy for non executive directors and executive managers[19].

Recently, some legal proposals have been submitted that deal with Corporate Governance Codes in general, and directors' remuneration in particular.
There is a proposal which aims at incorporating some corporate governance recommendations into a law, to ensure that companies are obliged to meet these obligations[20]. It would involve e.g. a recommendation regarding the fixed and variable salary for CEO's, which salary would be confined to a certain amount, set by the CBFA; a recommendation on the transparency of transactions entered into by managers in relation to securities; obliging the general meeting of shareholders to vote on all management remuneration; applying the tax regime applicable to wages to share option plans, and taxing the surplus value on these shares.
Two identical proposals target the so-called "fat cats" and excessive "rewards for failure", by imposing taxes on remuneration and severance pay exceeding a certain limit[21]. However, these proposals have been severely criticised, e.g. by the Conseil d'Etat.

2. Disclosure

2.1 Are listed companies required to publish a remuneration report, indicating the details of the compensation paid to the members of the Board of Directors? How often must it be published and where is it retrievable?

Listed companies are not required by law to publish a "remuneration report". However, according to the Corporate Governance Code, a remuneration report must be drafted, as a part of the Corporate Governance Statement[22]. This Statement is a specific section of the annual report.
The annual report is published once a year. This report must be lodged with the National Bank of Belgium, where it can be consulted.

The remuneration report contains several items, such as[23] :
- a description of the procedure adopted, for the applicable financial reporting year, for developing a remuneration policy for non-executive directors and executive managers and for setting the level of remuneration for non-executive directors and executive managers;
- a statement of the company's remuneration policy for executive managers, as applicable for the financial reporting year;
- on an individual basis, the amount of the remuneration and other benefits granted directly or indirectly by the company or its subsidiaries, to each non-executive director;

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[19] Recommendation 7.2 and 5.4 of the 2009 Corporate Governance Code.
[20] Draft Bill of 11 February 2009 (Wetsvoorstel van 11 februari 2009 tot wijziging van het Wetboek van vennootschappen en van de wet van 26 maart 1999 betreffende het Belgisch actieplan voor de werkgelegenheid 1998 en houdende diverse bepalingen, met het oog op een beter ondernemingsbestuur), *Parl. St.* Kamer, DOC 52 1805/001.
[21] Draft Bill of 14 October 2008 (Wetsvoorstel van 14 oktober 2008 tot afschaffing van de gouden parachute en tot beheersing van de bezoldiging van de topmanagers), *Parl. St.* Kamer, DOC 52, 1474/001; Draft Bill of 6 November 2008 (Wetsvoorstel van 6 november 2008 tot afschaffing van de gouden parachute en tot beheersing van de bezoldiging van de topmanagers), *Parl. St.* Senaat, DOC 52, 994/001.
[22] Recommendation 7.2 of the 2009 Corporate Governance Code.
[23] Recommendation 9.3/2 of Appendix F of the 2009 Corporate Governance Code.

- if an executive manager is also a member of the board, information on the amount of remuneration he receives in such capacity;
- if the executive managers are eligible for incentive based remuneration linked to the performance of the company or its subsidiaries, the criteria for the evaluation of performance achieved against targets, as well as the duration of the evaluation;
- the amount of the remuneration and other benefits granted directly or indirectly to the CEO by the company or its subsidiaries. This information should be disclosed with a distinction made between:

    * basic remuneration;

    * variable remuneration: for all incentives, indicating the form in which this variable remuneration is paid;

    * pension: the amounts paid during the financial reported year with an explanation of the applicable pension schemes; and

    * 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;

- on a global basis, the amount of the remuneration and other benefits granted directly or indirectly to the other members of the executive management by the company or its subsidiaries; divided between basic remuneration, variable remuneration etc.;
- for each executive manager, specified on an individual basis, the number and key features of shares, share options or any other rights to acquire shares, granted, exercised or lapsed during the financial reporting year.

2.2 Must these reports be submitted, or are recommended to be, to a Securities Market Regulator or to a public authority responsible for collecting these documents?

There is no recommendation that these reports be submitted to the CBFA. However, a duty to submit can be found in the rules on transparency. According to article 42 of the Royal Decree of 14 November 2007[24] an issuer of financial instruments that have been admitted to trading on a regulated market should publish e.g. its annual accounts and annual reports yearly; and submit this information to the CBFA as soon as possible and, at the latest, at the time when the information is made public.

2.3 What information on directors' remuneration, individually and collectively, and on the remuneration committee, must be included, or is recommended to be included as best practice, in the financial reports? Please include in your answer any specific requirements which apply to particular elements of remuneration, such as stock options, bonuses, and termination payments.

[24] See footnote 2.

The Royal Decree of 30 January 2001[25], executing the Belgian Companies Code, prescribes that the explanation to the annual accounts (this requirement applies to both consolidated annual accounts and the annual accounts of the parent) should contain global information about directors' remuneration.

The 2009 Code contains the recommendation that the Corporate Governance Statement, part of the annual report, should include e.g. a remuneration report.
Furthermore, some guidance on remuneration policy is provided.
Specifically in relation to the remuneration of non-executive directors, the Code states that their role as ordinary board members, and their specific roles, as chairman of the board, chairman or member of board committees, as well as their resulting responsibilities and time commitments should be taken into account. Non-executive directors should not be entitled to performance-related remuneration such as bonuses, stock based long-term incentive schemes, fringe benefits or pension benefits.
In any case, the amount of the remuneration and other benefits granted directly or indirectly to non-executive directors, by the company or its subsidiaries, should be disclosed, on an individual basis, in the remuneration report[26].
As to the remuneration of executive directors and managers, the Corporate Governance Code contains a set of detailed recommendations[27]. If an executive manager is also a member of the board, information on the amount of remuneration he receives in such capacity should be disclosed in the remuneration report. An appropriate proportion of an executive manager's remuneration package should be structured so as to link rewards to corporate and individual performance, thereby aligning the executive manager's interests with the interests of the company and its shareholders.
Where executive managers are eligible for incentive based remuneration linked to the performance of the company or its subsidiaries, the criteria for the evaluation of performance achieved against targets, as well as the term of evaluation, should be disclosed in the remuneration report. This information should be provided in such a way that it does not disclose any confidential information regarding the company's strategy.
Schemes under which executive managers are remunerated in shares, share options or any other right to acquire shares should be subject to prior shareholder approval by way of a resolution at the general shareholders' meeting. The approval should relate to the scheme itself and not to the grant of share-based benefits.
The Corporate Governance Code contains a guideline regarding this type of remuneration. As a rule, shares should not vest and options should not be exercisable within a timeframe of less than three years.
These rules have been detailed even further for the CEO and other members of executive management[28].
The amount of the remuneration and other benefits granted directly or indirectly to the CEO, by the company or its subsidiaries, should be disclosed in the remuneration report. This information should be disclosed, with a distinction to be made between: (a) basic remuneration; (b) variable remuneration: for all incentives indicating the form in which this variable remuneration is paid;

[25] Moniteur 6 February 2001.
[26] Recommendation 7.6-7.8 of the 2009 Corporate Governance Code.
[27] Recommendation 7.9-7.13 of the 2009 Corporate Governance Code.
[28] Recommendation 7.14-7.16 of the 2009 Corporate Governance Code.

(c) pension: the amounts paid during the financial reporting year with an explanation of the applicable pension schemes; and (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 deviated from its remuneration policy during the financial reporting year, this should be explained in the remuneration report. A similar rule exists for the remuneration and other benefits granted directly or indirectly to other members of the executive management. Research has showed that, under the 2004 Corporate Governance Code, approximately 40 % of executive directors' remuneration is fixed, about 28 % is variable and 30 % is made up of contributions to pension funds[29].
The remuneration report should disclose, on an individual basis, the number and key features of shares, share options or any other rights to acquire shares, granted, exercised or lapsed during the financial reporting year, to the CEO or executive directors.

The Code also deals with the contracts for the appointment of the CEO and other executive managers[30]. These contracts should be, further to the advice of the remuneration committee, approved by the board. The contract should contain specific provisions relating to early termination. Any contractual arrangement made with the company or its subsidiaries on or after 1 July 2009 concerning the remuneration of the CEO or any other executive manager should specify that severance pay awarded in the event of early termination should not exceed 12 months' basic and variable remuneration.
The board may consider higher severance pay further to a recommendation by the remuneration committee. Such higher severance pay should be limited to a maximum of 18 months' basic and variable remuneration. The contract should specify when such higher severance pay may be paid. The board should justify this higher severance pay in the remuneration report.
In this respect, a guideline specifies that the basic remuneration component should be based on the monthly remuneration paid in the last month before termination. The variable remuneration component should be contractually determined. It should be based on variable compensation effectively paid during the contract. It could, for instance, refer to the previous year's variable remuneration or to the mean value of the variable remuneration paid over a specific number of previous years. The guideline also provides examples of reasons which would justify a higher severance payment such as: departure because of a merger; a change of control or a change of strategy; termination rights under a pre-existing agreement with the company; the candidate's years of service in his previous position; or the payment being a necessary condition for obtaining the candidate's agreement.
The Code finally recommends that the contract should specify that the severance package should neither take account of variable remuneration nor exceed 12 months' basic remuneration if the departing CEO or executive manager did not meet the performance criteria referred to in the contract.

2.4 Is timely disclosure required with respect to stock options, their vesting, exercise, and the sale of the relevant shares to third parties?

[29] C. Naesens and F. Saelens, "Remuneratiebeleid en remuneratie in de Belgische corporate governance codes en het daarmee samenhangend wetgevend initiatief : een stand van zaken",5 *Orientatie* (2006) p. 124.
[30] Recommendation 7.17-7.18 of the 2009 Corporate Governance Code.

Timely disclosure is only legally required with regard to the rules on market abuse (see question 2.5). The Royal Decree on market abuse states that persons with management capacity in a listed company must give notice to the CBFA of any transactions in the company's financial instruments within five working days after the execution of the transaction[31]. See question 2.5.

2.5 What are the rules on disclosure of share transactions executed by the company's insiders (such as directors, officers, auditors, etc)?

Disclosure could be obligatory under the Transparency Law of 2 May 2007[32] (transposing the Transparency Directive 2004/109) when 5 % of the voting rights have been acquired.

The rules on market abuse are to be found in the Law of 2 August 2002[33]. Article 25 bis deals with transactions by e. g. directors of a listed company that have regular access to inside information. As a preventive measure, persons with management capacity of a company must alert the CBFA whenever they carry out a transaction in the company's financial instruments. The CBFA will then publish these transactions as soon as possible on its website. This rule stems from Directive 2003/6/EC on market abuse. See also question 2.4.

Appendix B of the Corporate Governance Code deals with transactions in company stock and compliance with the Belgian rules on market abuse.
According to this recommendation, the board should draw up a set of rules (the "dealing code") regulating transactions, and the disclosure of such transactions, in shares of the company or in derivatives or other financial instruments linked to them (the "company stock") carried out for their own account by directors and other persons discharging managerial responsibilities.
The dealing code should specify which information regarding those transactions should be disclosed to the market. The board should also designate the other persons to whom these rules will apply.
The Code gives a number of guidelines with respect to this "dealing code". First, the dealing code should set limitations on the carrying out of transactions in the company stock for a designated period preceding the announcement of the company's financial results (a "closed period") or in any other period considered sensitive (a "prohibited period"). Second, the board should ensure that a compliance officer is appointed whose duties and responsibilities will be assigned by the dealing code. The compliance officer should at least monitor compliance with the dealing code by directors and other persons discharging managerial responsibilities. Third, the dealing code should provide that before executing any transaction in the company stock, a director or other person discharging managerial responsibilities should at least inform the compliance officer about the transaction he intends to carry out. Fourth, if a director or other person discharging managerial responsibilities carries out a transaction in company stock and the compliance officer has been informed, the transaction should be made public according to the dealing code.

[31] Article 13 of the Royal Decree of 5 March 2006 on market abuse, Moniteur 10 March 2006. There are some exceptions to this rule (e.g. for transactions less than 5000 € in one calendar year).
[32] Moniteur 12 June 2006.
[33] Moniteur 4 September 2002.

According to article 10 of the Royal Decree of 10 January 1994[34], an auditor is not allowed to have a financial interest in the company he is controlling, nor is he allowed to borrow from such a company.

2.6 What information on directors' remuneration must be included in public offer prospectuses and listing particulars?

Commission Regulation (EC) No 809/2004 of 29 April 2004 implementing Directive 2003/71/EC[35] as regards information contained in prospectuses, states that the amount of the remuneration of the administrative, management or supervisory bodies and of senior management and any benefits in kind should be mentioned in the prospectus[36].

The Royal Decree of 31 October 1991 on the prospectus to be published for a public issue of securities[37] - Schedule A determines that the remuneration and benefits in kind of all members of the administrative, management or supervisory bodies of the company should be mentioned on a global basis.

3. Remuneration of the Board of Directors

3.1 Who fixes the board of directors' remuneration? What are the relevant procedures? (In two-tier systems, please refer to the supervisory board.)

Normally the directors' remuneration is either fixed in the company's articles of association[38] or decided by the general meeting (decided with a simple majority)[39]. This is one of the general meeting's exclusive powers, and cannot be delegated. In practice however, the decision is often vague, and limited to fixing a global amount. This gives the board of directors the de facto power to fill in all details and to decide how this global amount should be distributed to individual directors.
The Corporate Governance Code explicitly states that an individual should not decide on his own remuneration[40].

3.2 Are there provisions and/or practices as to the amount of the remuneration and its distribution (for example, as to whether distribution should be proportionate) among board members? What types of remuneration are allowed?

There are no specific provisions in the legislation. See question 3.1.
It will be the general meeting that fixes the amount; and the general meeting or, if applicable, the board of directors, that fixes the distribution.

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[34] Moniteur 18 January 1994.
[35] *OJ L 149*, 30 April 2004, p. 1–123.
[36] That information must be provided on an individual basis unless individual disclosure is not required in the issuer's home country and is not otherwise publicly disclosed by the issuer.
[37] Moniteir 25 November 1991.
[38] This rarely happens, acccording to C. Van der Elst, "De remuneratie van de raad van bestuur aan het begin van de 21e eeuw", 8 *Acc. Bedr.* (2002), 3-14.
[39] B. Tilleman, *Bestuur van vennootschappen* (Brugge : die Keure, 2005) p. 453, no. 739.
[40] Recommendation 7.5 of the 2009 Corporate Governance Code.

There is no strict proportionality rule.

All types of remuneration are allowed: fixed (according to the articles of association or pursuant to a decision of the general meeting), variable, a part of the profit, benefits in kind etc.

The Corporate Governance Code only states that the level of remuneration should be sufficient to attract, retain and motivate directors and executive managers[41]. More specifically, for executive directors and executive managers, the level and structure of the remuneration should be such that qualified and expert professionals can be recruited, retained and motivated, taking into account the nature and scope of their individual responsibilities [42].

3.3 Are personal loans to the company's directors and officers allowed?

There are no specific rules or prohibitions on this matter; personal loans to the directors are allowed. However the procedure in relation to conflicts of interest could be applicable. This procedure applies whenever the board of directors needs to decide upon an item where one of the directors has a conflicting interest. In brief, the procedure entails that the conflicting interest should be disclosed, the director in question should not take part in the vote (unless the company is not listed) and the auditor must report on the effect of the decision on the company[43]. This information is made public. As this procedure only relates to board decisions, it would not apply when the decision is taken by the general meeting.

Moreover, article 91 of the Royal Decree of 30 January 2001[44], executing this Companies Code, requires the amount of the direct and indirect remuneration and pensions to (ex) directors *in globo* to be included as part of the explanation to the annual accounts.

4. Executive Directors' Remuneration

4.1 Who fixes the executive directors' remuneration? What are the relevant procedures? Are shareholders required to approve directors' remuneration, the remuneration policy, or the remuneration report (see question 2) on an annual or other basis? (In two-tier systems, please refer to the management board.)

The general meeting fixes the total amount of remuneration of the board of directors. Unless otherwise provided in the articles of association, the board of directors distributes the amount fixed by the general meeting among its members.
In practice, the remuneration is agreed on by the board before an executive director enters into function: this cannot trigger the rules on conflicts of interest, as the executive is not yet a director. Once he has been appointed director, the rules on conflicts will apply.
The latter point is important if the board wants to grant options etc. A proposal to, for example, grant stock options, is sometimes submitted to the general meeting, since this submission avoids the application of the cumbersome rules on conflicts of interest.

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[41] Recommendation 7.1 of the 2009 Corporate Governance Code.
[42] Recommendation 7.9 of the 2009 Corporate Governance Code.
[43] These rules can be found in article 524 Companies Code for the "management committee" and article 523 bis Companies Code for the board of directors.
[44] Moniteur 6 February 2001.

Executive managers' remuneration is fixed by the company's articles of association, or, if nothing is mentioned in the articles, by the board of directors.

Recommendation 2004/913/EC explicitly requires that the remuneration policy, and any significant change to this policy, should be an explicit item on the agenda of the general meeting[45]. So far, neither the Code nor the Belgian legislator has explicitly adopted this recommendation.

There is one exception: the Corporate Governance Code explicitly states that schemes under which executive directors and managers are remunerated in shares, share options or any other right to acquire shares should be subject to prior shareholder approval by way of a resolution at the general shareholders' meeting[46]. The approval should relate to the scheme itself and not to the grant of share-based benefits under the scheme to individuals.

In any case, according to the Corporate Governance Code, information on the amount of the executive directors' remuneration should be disclosed in the remuneration report, which is part of the Corporate Governance Statement[47]. This Statement is a part of the annual report. Shareholders need to approve the annual report every year.

4.2 Is the board required, or recommended as best practice, to create a remuneration committee?

This recommendation is part of principle 5 of the Corporate Governance Code, and is further detailed in Appendix E of the Code.

If yes, please specify:
(i) the committee's composition (if independent directors should be appointed to this committee, please give the relevant definition and indicate whether any special procedures apply to the appointment of independent non-executive directors)
(ii) the committee's competences and which company body it reports to
(iii) how the committee operates

(i) It is the task of the board to appoint committee members and a committee chairman. Each committee is to be composed of at least three members, all of whom should be non-executive directors[48]. At least a majority of the members should be independent. As a guideline, the code states that consideration should be given to the needs and qualifications required for the optimal functioning of that committee, when deciding on the specific composition of the committee [49].

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[45] Article 4.2 of the Commission Recommendation 2004/913/EC of 14 December 2004 fostering an appropriate regime for the remuneration of directors of listed companies, *OJ* L 385, 29 December 2004, p. 55–59.
[46] Recommendation 7.13 of the 2009 Corporate Governance Code.
[47] Recommendation 7.10 of the 2009 Corporate Governance Code.
[48] Recommendation 5.4/1 of Appendix E of the 2009 Corporate Governance Code.
[49] Recommendation 5.5 of the 2009 Corporate Governance Code.

The chairman of the board, or another non-executive director, should chair the committee. The CEO should participate in the meetings of the remuneration committee where the committee deals with the remuneration of other executive managers[50].

The appointment to the committee should not be for a term exceeding that of board membership.

Another guideline of the Code states that the nomination committee and the remuneration committee may be combined, provided that the combined committee satisfies the composition requirements for the remuneration committee.

The conditions a director ought to meet in order to be classed as "independent" are specified in article 526 *ter* of the Belgian Companies Code. These are further elaborated in Appendix A of the Corporate Governance Code.

(ii) The remuneration committee only has advisory responsibilities.
This committee should make proposals to the board first, on the remuneration policy for non-executive directors and executive managers, as well as, where appropriate, on the resulting proposals to be submitted by the board to the shareholders. Secondly, the committee should make proposals on remuneration policy for directors and executive managers, which proposals should deal with variable remuneration and long-term incentives, whether or not these are stock-related, or are in the form of stock options or other financial instruments, arrangements in relation to early termination and, where applicable, on the resulting proposals to be submitted by the board to the shareholders[51].

After each committee meeting, the board should receive a report from the remuneration committee on its findings and recommendations.
In any case, the remuneration committee should report regularly to the board on the exercise of its duties[52].

(iii) The remuneration committee should report regularly to the board on the exercise of its duties. It should meet at least twice a year and whenever it deems necessary in order to carry out its duties[53].

As a guideline, each committee may invite any non-member to attend its meetings[54].
In any case, board committees should be entitled to seek external professional advice at the company's expense after informing the chairman of the board.

The terms of reference of this committee should be disclosed in the Corporate Governance Charter. The composition and operation of the committee should be detailed in the Corporate Governance Statement, which should be part of the annual report.

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[50] Recommendation 5.4/7 of Appendix E of the 2009 Corporate Governance Code.
[51] Recommendation 5.4/3 of Appendix E of the 2009 Corporate Governance Code.
[52] Recommendation 5.4/6 of Appendix E of the 2009 Corporate Governance Code.
[53] Recommendation 5.4/5 of Appendix E of the 2009 Corporate Governance Code.
[54] Recommendation 5.6 of the 2009 Corporate Governance Code.

The remuneration committee should regularly (at least every two to three years) review its terms of reference and its own effectiveness and recommend any necessary changes to the board.

4.3 Which types of remuneration are permitted?
In answering, please consider each of the following:
(a) bonuses
(b) stock options, including discounted stock options
(c) stock grants
(d) profit sharing
(e) benefits in kind

All of these types of remuneration are permitted.
The rules on conflicts of interest need to be taken into account (when applicable).

It must be noted that when the grant of a stock option implies an increase in capital (i.e. when the stock has not already been issued), the shareholders must vote on the stock option plan. There is one exception, i.e. the "authorized capital", according to which the board of directors is able to decide upon an increase of the capital. This possibility must be provided for in the articles of association and is limited in time[55].

4.4 Are there specific rules, including shareholder approval requirements, as to these different types of remuneration?

See question 4.1: the Corporate Governance Code explicitly states that schemes under which executive managers are remunerated in shares, share options or any other right to acquire shares should be subject to prior shareholder approval by way of a resolution at the general shareholders' meeting[56]. The approval should relate to the scheme itself and not to the grant of share-based benefits under the scheme to individuals. As a guideline, the Corporate Governance Code states that shares should not vest and options should not be exercisable within a timeframe of less than three years.

Moreover, the remuneration report should disclose, on an individual basis, the number and key features of shares, share options or any other rights to acquire shares granted, exercised or lapsed during the financial reporting year, to the CEO or to other executive directors[57].

The Code also contains a rule regarding remuneration based upon the company's performance. When executive managers are eligible for incentive based remuneration linked to the performance of the company or its subsidiaries, the criteria for the evaluation of performance achieved against targets, as well as the term of evaluation, should be disclosed in the remuneration report. This information should be provided in such a way that it does not disclose any confidential information regarding the company's strategy[58].

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[55] Article 603 Companies Code; F. Hellemans, *De algemene vergadering* (Kalmthout, Biblo, 2000), p. 557, nr. 511 ff.
[56] Recommendation 7.13 of the 2009 Corporate Governance Code.
[57] Recommendation 7.16 of the 2009 Corporate Governance Code.
[58] Recommendation 7.12 of Appendix E of the 2009 Corporate Governance Code.

It must be remembered that the entire remuneration policy is part of the Corporate Governance Statement, which is part of the annual report. The annual report needs to be approved annually by the general meeting[59].

4.5 Are there any restrictions on how payments are made?

There are no specific rules on this matter.

4.6 Are there any specific requirements for termination payments made on loss of office, whether through dismissal, retirement, on a takeover, or otherwise?

There are no specific legal requirements on this matter. Directors may be fired by the general meeting at any time. The "*ad nutum*" termination policy in relation to directors implies that it is not possible to agree on a contractual clause regarding severance periods or severance pay[60].
A contractual arrangement is only possible in the context of another contract between the company and the director in his executive management capacity.

The Corporate Governance Code deals with the early termination of the contracts with the CEO and other executive managers.
The board should approve the contracts for the appointment of the CEO and other executive managers further to the advice of the remuneration committee. Contracts entered into on or after 1 July 2009 should refer to the criteria to be taken into account when determining variable remuneration. The contract should contain specific provisions relating to early termination[61].

More specifically, as to severance pay, i.e. the compensation paid in case of termination of the contract, the Code contains limitations[62].
Any contractual arrangement made with the company or its subsidiaries on or after 1 July 2009 concerning the remuneration of the CEO or any other executive manager should specify that severance pay awarded in the event of early termination should not exceed 12 months' basic and variable remuneration. An increase in the amount of severance pay could be considered by the board, following a recommendation by the remuneration committee. Such increased severance pay should be limited to a maximum of 18 months' basic and variable remuneration. The contract should specify when such increased severance pay may be paid. The board should justify this increase in severance pay in the remuneration report. As a guideline, the Code states that the basic remuneration component should be based on the monthly remuneration paid in the last month before termination. The variable remuneration component should be contractually determined. It should be based on variable compensation effectively paid during the lifetime of

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[59] The Ghent Court of Appeal has explicitly ruled that, in case the directors are the only shareholders, and the annual accounts explicitly mention the amount of the directors' remuneration, the approval of the annual accounts is considered to be the same as a decision on the directors' remuneration (Ghent (23e ch.) nr. 1999/AR/1141, 17 October 2001 (*R.D.C.* 2002, p. 703).).
[60] Cass. 13 April 1989, R.C.J.B. 1991, p. 205; T.R.V. 1989, p. 321, note M. Wyckaert; F. Hellemans, *De algemene vergadering* (Kalmthout, Biblo, 2000, p. 651, nr. 592; D. Meeus & S. Rutten, "Europese corporate governance aanbevelingen inzake bestuursvergoedingen (over fat cats en rewards for failure)", 4 *T.R.V.* (2004) p.275.
[61] Recommendation 7.17 of the 2009 Corporate Governance Code.
[62] Recommendation 7.18 of the 2009 Corporate Governance Code.

the contract. It could, for instance, refer to the previous year's variable remuneration or to the mean value of the variable remuneration paid over a specific number of previous years.
Examples of reasons which might justify an increase in severance pay include: departure because of a merger, a change of control or a change of strategy; termination rights under a pre-existing agreement with the company; the candidate's years of service in his previous position; or the payment being a necessary condition for obtaining the candidate's agreement.

Finally, the Code recommends that the severance pay should partially depend upon the results achieved by the executive director: the contract should specify that the severance package should neither take account of variable remuneration nor exceed 12 months' basic remuneration if the departing CEO or executive manager did not meet the performance criteria referred to in the contract.

4.7 Are there any specific requirements concerning directors' service contracts with respect to, for example, their duration and disclosure?

There are no specific rules on this matter.

5. Non-executive Directors' Remuneration

5.1 Are non-executive directors separately paid for their participation in committees of the board of directors? Do any restrictions apply to the payment of non-executive directors' via stock options?

The Corporate Governance Code only makes a recommendation that the remuneration of non-executive directors should take into account their role as ordinary board members, and their specific roles, as chairman of the board, chairman or member of board committees, as well as their resulting responsibilities and time commitments[63]. This implies that separate remuneration for participation in any committee is possible.
However, only specific types of remuneration are allowed: non-executive directors should not be entitled to performance-related remuneration such as bonuses, stock related long-term incentive schemes, fringe benefits or pension benefits[64].
In any case, the amount of the remuneration and other benefits granted directly or indirectly to non-executive directors, by the company or its subsidiaries, should be disclosed, on an individual basis, in the remuneration report[65].

Research has shown that in the past (i.e. before the 2004 Code was applicable) one out of four listed companies that were investigated distributed variable remuneration to their non-executive directors[66]. Under the 2004 Code, one out of five companies distributed this type of remuneration, contrary to the 2004 (and 2009) Code's recommendations[67].

[63] Recommendation 7.6 of the 2009 Corporate Governance Code.
[64] Recommendation 7.7 of the 2009 Corporate Governance Code.
[65] Recommendation 7.8 of the 2009 Corporate Governance Code.
[66] D. Meeus & S. Rutten, "Europese corporate governance aanbevelingen inzake bestuursvergoedingen (over fat cats en rewards for failure)", 4 *T.R.V.* (2004) fn. 53.
[67] Belgian Governance Institute (GUBERNA) and VBO, *Naleving van de Belgische Corporate Governance Code : een stand van zaken,* 2007, http://www.guberna.be; p. 23.

5.2 May a company make payments to non-executive directors, additional to their directors' fees, for services, such as legal or brokerage services, outside the usual scope of directors' duties?

There are no specific rules on this matter. However, some general rules might be applicable, eg. the rules on the independence of independent directors. If a non-executive director wishes to be classed as independent, this might compromise his or her independence[68].

[68] Recommendation 2.4/1, 6) of Appendix A of the 2009 Corporate Governance Code.