



european corporate governance institute

## **Directors' Remuneration in Listed Companies**

### **NETHERLANDS\***

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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 at 30 June 2003.

# 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 Book 2 of the Dutch civil code (BW) contains the most relevant legal provisions for directors' remuneration. The articles 135 and 145<sup>1</sup> provide that, unless the articles of association constitute otherwise, the remuneration of the supervisory board and the management board is fixed by the general meeting of shareholders. Usually the articles of association assign the authority to set the remuneration to the supervisory board. In the majority of listed companies the supervisory board decides on the remuneration of the management board.

The remuneration of directors is determined bilaterally in a contract between company and board. The company can be represented in that contract by another body than the board.

The provisions for directors' remuneration, which are laid down in the Dutch civil code, only apply to companies that are incorporated in the Netherlands. Article 383c of the book 2 of the Dutch civil code provides that the company shall report in the annual accounts each board member's remuneration amount. This amount shall be divided into periodically paid remuneration, long term remuneration, payments for termination of contract, and profit and bonus payments to the extent these amounts have been charged to the company in the financial year.

Apart from the Dutch civil code, provisions for directors' remuneration can be found in the Act on the Notification on Control 1996 (WMZ). Regulations in this act however mainly see to the disclosure of the number of shares and the number of voting rights a director holds.

The listing rules of Euronext Amsterdam do not contain provisions on the remuneration of directors, with exception of a few clauses in (an appendix to) the Euronext Rulebook in which prospectus requirements are taken up (see also paragraph 2.6).

**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.**

Some non-binding reports have been published based on which certain best practices can be described for the remuneration of directors of listed companies. The report of the Committee on Corporate Governance, published in 1997 (Peters Report) contains only a few recommendations on remuneration and remuneration policy of directors. The remuneration of

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<sup>1</sup> Because this investigation is limited to listed companies, only regulations with regard to companies of the NV type are mentioned.

supervisory board members should not be dependent on the results of the company. Neither should members of the supervisory board be remunerated in stock options. Company shares held by a supervisory board member and securities held by a member of the management board are meant to be long-term investments.

Another report worth mentioning is the report of VNO-NCW (the Dutch employers association) and NCD (the Dutch centre for directors), published in 1999. The VNO-NCW and NCD recommendations more specifically see to stock option plans. These plans ought to serve to strengthen directors' long-term commitment and the allotment of options should therefore be related to certain performance criteria. The main provisions on stock option plans also ought to be verifiable to stakeholders and should therefore be disclosed in the annual financial statements.

The 1997 and 1999 recommendations on the remuneration of directors, can be seen as establishing best practice. Compliance with each of the codes is voluntary, companies are not required to "comply or explain".

A first, voluntary, monitoring exercise conducted in 1998 showed varying levels of compliance with the Peters recommendations. A second report conducted in 2002 showed that the compliance was actually less than in 1998.

### **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 is no formal structure for adopting executive remuneration rules or best practice codes. The Committee on Corporate Governance was established in 1996 as a result of a private agreement between the Association of Securities Issuing Companies and the Amsterdam Stock Exchange.

A new Committee on Corporate Governance chaired by Mr. Tabaksblat has recently been set up to review the 1997 report in the light of recent developments, both nationally and internationally and its report is due by the end of 2003. The requirements for publication of directors' remuneration discussed below have come into force in 2002. Listed companies will have to report on individual directors' remuneration in 2003.

Further legislation is considered to give shareholders certain control rights in relation to directors' remuneration. The extent of these rights is not yet clear.

## **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?**

As of 1 September 2002 Dutch so called "open" public companies<sup>2</sup> have to include in the explanatory notes to their annual financial statements the amount of remuneration of each director to the extent charged to the company in the relevant financial year, 2:283c BW.

Beside the division of remuneration amounts per director, based on article 2:283c BW, the remuneration amount should also be split into *categories* of remuneration, namely: (a) periodically

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<sup>2</sup> "Open" public companies include all companies of the NV type, with the exclusion of NV's who (1) only have registered shares (no bearer shares) (2) have restrictions on transfer of shares and, and (3) whose articles do not allow for the issue of depository receipts of shares in bearer form.

paid remuneration (b) long-term payable remuneration (c) payments for termination of contract and (d) profit sharing schemes and bonus payments.

In case the company has made a payment in the form of a bonus (partly) based on the achievement of certain set targets, this bonus shall be reported together with whether or not these targets have been achieved in the specific financial year. If a company has made a payment in the form of a profit share or bonus to members of the supervisory board, the reasons for the decision to grant remuneration in this form to members of the supervisory board shall be reported separately.

Article 2:283c BW also requires to report the amount of remuneration of each former director (management as well as supervisory board), to the extent charged to the company in the relevant financial year. For former members of the management board this amount needs to be split into long-term payable remuneration and termination of contract rewards.

Apart from these requirements, a number of requirements for the company exist based on article 2:283d BW, in case the company grants one or more of its members of the management board and/or of the supervisory board a right to acquire shares in the company's capital. If this is the case, the company is required for each director or board member to report:

- the strike price of the rights and the price of the underlying shares in the company's capital<sup>3</sup>;
- the number of unexercised right at the beginning of the financial year;
- the number of rights granted by the company in the financial year together with their conditions<sup>4</sup>;
- the number of rights exercised during the financial year, whereby at least the number of shares involved and the strike price are to be reported;
- the number of unexercised rights at the end of the financial year<sup>5</sup>;
- if applicable: the criteria used by the company that apply to the granting or exercise of the rights.

Article 2:283e BW, finally, provides for reporting requirements in case a company, its subsidiary company or companies of whom it consolidates the financial data, has remunerated members of the supervisory or the management board in the form of a personal loans (see also paragraph 3.3 and paragraph 4. ).

## **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?**

Since there is no separate remuneration report, remuneration reports as such cannot be submitted to a public authority. According to proposals of the Dutch government, in the near future a requirement for listed companies will be introduced to submit their financial statements to a public supervisory authority. It is expected that this will be the Authority on Financial Markets (AFM). The supervision of the AFM will, for example, include the requirement to list the remuneration amount of each director individually in the explanatory notes to the annual financial statements.

## **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.**

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<sup>3</sup> In case the strike price is lower than the share price at the time of the granting of the rights.

<sup>4</sup> In case those conditions are changed during the financial year, these changes need to be reported separately.

<sup>5</sup> Whereby will be reported: the strike price of the rights granted, the time remaining for the unexercised rights, the main conditions that apply to the exercise of the rights, a financing arrangement that might have been reached about the granting of these rights, and (all) other data useful for the estimation of the value of the rights.

As mentioned above in paragraph 2.1, according to article 2:383c BW, listed companies are required to report the amount of remuneration of each individual director in the explanatory notes to their annual financial statements and to split this amount into certain categories.

Article 2:383d BW, also mentioned in paragraph 2.1, provides reporting requirements for the company in case the company remunerates directors in the form of granting rights to acquire shares in the company's capital. Finally, article 2:391 BW, subsection 2, constitutes that the company reports in its annual financial statements the policy concerning the remuneration of the directors and supervisory board members and the way in which this policy has been implemented in the financial year.

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

As described above in paragraph 2.1, according to article 2:383d BW, a listed company is required to report for every director his remuneration in stock options in the explanatory notes to the annual financial statements.

Further regulations on the timely disclosure of possession of shares and voting rights in companies can be found in article 2a WMZ. According to article 1, subsection 3, WMZ, shares include: (contractual) rights to acquire shares in the company's capital. Consequently, stock options are also covered by the reporting requirements of the WMZ.

Article 2a WMZ provides that each member of the supervisory board and each member of the management board is to disclose his possession of shares and voting rights in the company, or in an affiliated company, immediately. Every change in the number of shares and voting rights a director holds must also be disclosed (by the director). Disclosure takes place by a notification to the AFM. Notifications are filed in a public register.

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

As described above, based on article 2a, subsection 4, WMZ, each director or board member has to notify a change in the number of shares of the company (or allied companies) to his company and to the AFM immediately. Also, transactions in securities are to be reported based on The Securities Markets (Supervision) Act 1995 (Wte 1995). Because of the concurrence of these regulations as of September 1st, 2002, it is provided that disclosures of securities transactions that should be made based on article 46, subsection 3, Wte 1995, are assumed to be made in case a notification is filed based on article 2a WMZ.

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

The requirements relating to the content of the prospectus of listed companies or companies requesting a listing (IPO) are laid down in the Euronext rulebook (FR). Article 8 of this rulebook refers to appendix A of the FR which requires that the prospectus shall report: (i) the remuneration and benefits in kind of the complete management board and the complete supervisory board in the most recent financial year (ii) the total amount of loans made by the company to members of the management and supervisory board and (iii) the total amount of company shares owned by all members of the management and supervisory board together and their option rights granted on the shares of the company. This requirement clearly has not yet been brought in line with the new disclosure requirements of individual directors' remuneration of art. 2:283c BW.

In case of a public take-over bid, The Securities Markets (Supervision) Act (Wte) applies. The Resolution of the Finance Minister (Bte) based on article 6a of The Securities Markets (Supervision) Act provides that in an offer document the total amount shall be reported of eventual remuneration to members of the management and the supervisory board of the target company who will resign in case the offer is sustained. Again, this provision has not yet been aligned with the new disclosure requirements on individual director's pay.

### **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.)**

Article 2:145 BW provides that, unless the articles of association constitute otherwise, the remuneration of the supervisory board is fixed by the general meeting of shareholders. As mentioned already in paragraph 1.1, the articles of association usually assign the authority to set the remuneration to another body. It is allowed that the supervisory board decides on its own remuneration. In some listed companies the authority to set the remuneration is assigned to the meeting of priority-shareholders<sup>6</sup>, it's also possible that the remuneration of the members of the supervisory board is provided for in the articles of association.

The remuneration of members of the supervisory board is determined bilaterally in a contract between company and board. The company can be represented in that contract by another body than the board.

#### **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 legal provisions on that limit the amount of remuneration members of the supervisory board could receive. As became clear of the description of 'best practices' (paragraph 1.2) it is generally recommended that the remuneration of supervisory board members should not be (fully) dependent on the results of the company.

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

No provision prohibits the granting of personal loans to members of the supervisory board.<sup>7</sup> In case a company, its subsidiary company or companies of whom it consolidates the financial data, has made a payment to members of the supervisory board in the form of a personal loan, the company has to report the amount of personal loans of every member of the supervisory board in the explanatory notes to the annual financial statements. Reported shall be the amounts still due, the interest rate, the main other stipulations and the repayments during the financial year (article 2:383e BW).

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<sup>6</sup> Priority-shares are shares with special rights on

<sup>7</sup> Neither there exists provisions prohibiting the granting of personal loans to members of the supervisory board (see also paragraph 4.3).

## **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.)**

Article 2:135 BW provides that, unless the articles of association constitute otherwise, the remuneration of the management board is fixed by the general meeting of shareholders. As mentioned already in 1.1, the articles of association usually assign the authority to set the remuneration of the management board to the supervisory board.

The remuneration of members of the management board is determined bilaterally in a contract between company and board. The company can be represented in that contract by another body than the board. According to some, it is not yet clear whether the body that, based on article 2:135 BW, is authorized to fix remuneration, can alter this remuneration by itself. It is argued as well that unilateral alteration is only possible for as far as the contract between company and director permits this.

At present there is no legal obligation to have the remuneration of directors and the remuneration policy (annually) approved by shareholders. The general meeting of shareholders does have the authority to adopt or approve the financial statements. Implicitly, the general meeting of shareholders therewith has the opportunity to review the remuneration and the remuneration policy of the directors. The government has indicated that it plans to introduce a right of approval for shareholders concerning directors' remuneration policy in general and directors' remuneration through stock options specifically.

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

There is no legal requirement to set up a remuneration committee. However, the 1997 Peters report recommends forming a remuneration committee out of members of the supervisory board. This committee ought to deal with (i) the periodical evaluation of the remuneration scheme, (ii) the periodical evaluation of option rights, pension rights, redundancy pay plans, and other remunerations to be granted, (iii) the periodical evaluation of liability insurances.

The remuneration committee reports its findings and makes recommendations to the full supervisory board. The existence of a remuneration committee should be reported in the annual financial report, according to the 1997 recommendations. It is expected that the 2003 Corporate Governance Committee will elaborate on the role of the remuneration committee and its membership.

**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**

**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**

There are no legal restrictions on the types of remuneration which can be granted. In case the directors' remuneration consists of different types of remuneration, the amount of remuneration should be split into categories of remuneration per director and should be reported in the explanatory notes to the annual financial statements (article 2:283c BW, see also paragraph 1.2).

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

The only specific rules on the different types of remuneration are already described in paragraph 2.1. Particularly article 2:283d BW, applicable in case the company grants one or more members of the management board a right to acquire shares in the company's capital and article 2:283e BW, applicable in case a company remunerates members of the management board in the form of a personal loan, give specific rules for different reporting requirements<sup>8</sup>.

#### **4.5 Are there any restrictions on how payments are made?**

No legal restrictions exist on how payments are made.

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

A few specific requirements for termination payments can be found in article 2:238c, subsection 2, BW (see also paragraph 2.1). This article requires (i) to report the amount of remuneration of each former member of the management board and (ii) to split this amount out into long-term payable remuneration and termination of contract rewards<sup>9</sup>.

Special requirements for termination payments can also be found in article 9i, subsection p, Bte, which is applicable in case of a public offer (see also paragraph 2.6). This article contains the provision that in an offer document the total amount shall be reported of eventual remuneration to members of the management (and the supervisory) board of the target company who will resign in case the offer is sustained.

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

Specific requirements concerning directors' service contracts do not exist. The practice is that members of management boards have service contracts for indefinite periods. In only a few companies directors have one year service contracts.

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<sup>8</sup> To be included in the explanatory notes to the annual financial statements of the company.

<sup>9</sup> To the extent charged to the company in the relevant financial year.



## **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?**

In case a supervisory board member participates in one of the committees of the supervisory board, in many cases specific remuneration is granted. This specific remuneration is also determined as described under 3.1.

There are no legal regulations prohibiting the remuneration of supervisory board members via stock options. However, in the recommendations made in 1997 and 1999 (described in paragraph 1.2) it is indicated that remuneration of supervisory board members through stock options is found undesirable.

If stock options are granted to members of the supervisory board, for each member a report of the options granted to him together with the reasons underlying the decision to grant these options is required (in the explanatory notes to the annual financial statement) (article 2:283d, subsection 2, BW). Besides this, the information as described under 2.1 (such as strike price) is to be reported separately for each member of the supervisory board in the explanatory notes to the annual financial statement.

### **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 exist no legal prohibitions for the separate remuneration of members of the supervisory board for services provided by them to the company outside the usual scope of their directors' duties. In the 1997 Peters report however, it is recommended that it is not desirable to remunerate supervisory board members separately for their advice. The Peters report also recommends that the explanatory notes to the annual financial statements should state separately whether and, if so, what other business relationships exist between the company and a supervisory board member.