RAPPORT OVER BESTUURDERSBELONING IN NEDERLAND, DUITSLAND, FRANKRIJK, HET VERENIGD KONINKRIJK EN DE VERENIGDE STATEN

Opgesteld in opdracht van het Ministerie van Financiën

Juli 2008

NautaDutilh

In samenwerking met

Hengeler Mueller
Bredin Prat
Slaughter & May
Hughes Hubbard & Reed LLP

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I. INLEIDING

1. Opdracht

Dit rapport is opgesteld in opdracht van het Ministerie van Financiën en geeft een overzicht van de regelgeving en rechtsmiddelen omtrent beloningen van bestuurders in Nederland, Duitsland, Frankrijk, het Verenigd Koninkrijk en de Verenigde Staten van Amerika. Aanleiding voor dit onderzoek is de motie die op 17 oktober 2007 door het Kamerlid Weekers is ingediend in het kader van de discussie omtrent topinkomens alsmede de discussie over ontwikkelingen rond de overname van ABN AMRO Bank. De tekst van de betreffende motie is opgenomen als bijlage bij deze inleiding.

Het rapport geeft een rechtsvergelijkend overzicht van vier belangrijke Europese jurisdicties alsmede de Verenigde Staten, omtrent de regelgeving van beloningen inzake bestuurders van beursgenoteerde ondernemingen. De verschillende deelrapporten geven een overzicht van de wijze waarop bestuurdersbeloning door de organen van de vennootschap worden vastgesteld en/of goedgekeurd en hoe deze publiekelijk moeten worden bekendgemaakt. Aandacht wordt gegeven aan de sancties die gelden bij het niet naleven van de wettelijke regels en de juridische middelen die aandeelhouders of werknemers in dit verband ter beschikking staan. Eerst wordt een overzicht gegeven van de regelgeving in Nederland. Daarna volgen deelrapporten van de situatie in Duitsland, Frankrijk, het Verenigd Koninkrijk en de Verenigde Staten. Als bijlage bij dit rapport gaat een schematisch overzicht van de belangrijkste bevindingen per jurisdictie.

De opdracht van het Ministerie van Financiën is als volgt geformuleerd:

1. Op welke momenten en op welke wijzen dienen (componenten van) individuele beloningen van bestuurders openbaar te worden gemaakt (bijv. bij publicatie jaarverslag, sluiten contract, uitoefening opties, vervulling voorwaarden etc.);

2. Welke rechtsmiddelen hebben aandeelhouders, de algemene vergadering van aandeelhouders, werknemers, de ondernemingsraad of vakbonden, in de volgende situaties:

   a. zij zijn het oneens met de samenstelling of hoogte van de individuele beloning van een bestuurder of met het beloningsbeleid, bijvoorbeeld voor of na vaststelling van de beloning, toekenning van de beloning en/of uitbetaling van de beloning;

   b. zij vermoeden dat het persoonlijke (financiële) belang van een bestuurder heeft geprevaleerd boven het "vennootschapsbelang" bij het nemen van het besluit tot het al dan niet aangaan van een overname/fusie;

3. In hoeverre wordt er daadwerkelijk gebruik gemaakt van deze rechtsmiddelen?

Dit rapport is samengesteld door NautaDutilh in samenwerking met de buitenlandse advocatenkantoren Hengeler Mueller (Duitsland), Bredin Prat (Frankrijk), Slaughter & May (het Verenigd Koninkrijk) en Hughes Hubbard & Reed LLP (de Verenigde Staten van Amerika).[1]

2. Rechtsvergelijking

Vaststelling en goedkeuring van bestuurdersbeloning

Alhoewel de inrichting van de beursvennootschap in de vijf onderzochte jurisdicties in een aantal opzichten sterk verschilt, blijkt niettemin dat de wijze waarop de beloning van bestuurders door de organen van de vennootschap in deze jurisdicties wordt vastgesteld en goedgekeurd, in grote lijnen dezelfde is. Nederland en Duitsland kennen een vennootschapsmodel waarbij er sprake is van een verplicht ingestelde raad van commissarissen, althans in Nederland voor wat betreft de structuurvennootschap. In Frankrijk is het "two-tier" model optioneel. Vennootschappen in het Verenigd Koninkrijk en de Verenigde Staten kennen daarentegen een "one-tier" model, waarbij de bestuurs- en toezichthoudende taken zijn verdeeld over de uitvoerende ("executive") respectievelijk niet-uitvoerende ("non-executive") bestuurders. Echter, in alle jurisdicties wordt de beloning van individuele bestuurders vastgesteld hetzij door de raad van commissarissen als toezichthoudende organen van het bestuur dan wel door de niet-uitvoerende leden van het bestuur (de "Board"). Over het algemeen doet een remuneratiecommissie van de raad van commissarissen of het bestuur daartoe een voorstel.

In Nederland en het Verenigd Koninkrijk dient de bestuursbeloning te worden bepaald in overeenstemming met een door de aandeelhoudersvergadering vastgesteld bezoldigingsbeleid. In het Verenigd Koninkrijk hebben de aandeelhouders ten aanzien van het beloningsbeleid een adviserende stem, maar in de praktijk is deze stem van grote invloed op het bezoldigingsbeleid. In de Verenigde Staten is op dit moment federale wetgeving aanhangig die tot een vergelijkbare bevoegdhedenverdeling zou moeten leiden. In de andere jurisdicties bestaat er voor het bestuur geen specifieke verplichting om een bezoldigingsbeleid vast te stellen, dan wel om een dergelijk beleid ter vaststelling voor te leggen aan de aandeelhoudersvergadering.

In de meeste onderzochte jurisdicties bepaalt de wet dat het vaststellen van variabele beloningen, zoals aandelenopties, bonussen of vergoedingen van bijzondere aard, de goedkeuring behoeft van de vergadering van aandeelhouders. Met name in Frankrijk, maar ook in andere jurisdicties gaat de regelgeving omtrent de vereiste goedkeuring van de aandeelhouders voor variabele beloningscomponenten nog een stap verder. In bijzondere omstandigheden, zoals in situaties waar sprake is van een mogelijk conflicterend belang van het uitvoerend bestuur of de Board als geheel, dienen de aandeelhouders van Franse vennootschappen het beloningsvoorstel van het bestuur uitdrukkelijk goed te keuren. In de Verenigde Staten is, behoudens specifieke verplichtingen voortvloeiend uit bepaalde beursreglementen (onder meer van NYSE en NASDAQ), in beginsel geen goedkeurend aandeelhoudersbesluit nodig met betrekking tot het vaststellen van bestuurdersbeloning en de voorwaarden daaromtrent. Echter, door de fiscale wetgeving worden ondernemingen in de Verenigde Staten gestimuleerd om de bestuursbeloning te onderwerpen aan de goedkeuring

[1] Een eerste versie van dit rapport is in april 2008 aangeboden aan het Ministerie van Financiën. Nadien is het rapport nog op enkele punten geactualiseerd en zijn enkele wijzigingen van technische aard doorgevoerd.

van de aandeelhouders. Bij gebreke van een dergelijke goedkeuring, wordt aan de vennootschap een fiscaal gunstig regime onthouden. In Nederland is momenteel een wetsvoorstel met een soortgelijke strekking aanhangig.

Openbaarmaking van bestuurdersbeloning

Voorts laten de overzichten van de verschillende jurisdicties zien dat er verregaande eisen worden gesteld aan het publiekelijk bekend maken van het beloningspakket van het bestuur. In het algemeen gebeurt dit door het opnemen van een gedetailleerd overzicht van het vastgestelde beloningspakket van bestuurders in het jaarverslag, daaronder begrepen aandelenopties, bonussen en pensioenpremies. Maar ook in het geval dat de vennootschap betrokken is als bieder of doelvennootschap bij een fusie of overname, zal het biedingsbericht dan wel het prospectus van de uitgevende instelling gedetailleerde disclosures moeten bevatten omtrent het toegekende beloningspakket of vergoedingen die aan het bestuur van de overnemer dan wel de doelvennootschap in verband daarmee wordt toegekend. De buitengewone beloning van de bestuurders van de doelvennootschap in verband met een openbaar bod zal in het Verenigd Koninkrijk bovendien ter goedkeuring moeten worden voorgelegd aan de algemene vergadering van aandeelhouders. Alhoewel in de Verenigde Staten in beginsel geen goedkeurend aandeelhoudersbesluit nodig is met betrekking tot de vaststelling van bestuurdersbeloningen, gelden er in die jurisdictie strenge normen met betrekking tot de disclosure van beloningen en vergoedingen aan het bestuur in zowel "proxy statements" aan aandeelhouders als door middel van deponering van gegevens bij de Securities Exchange Commission.

Naast wettelijke vereisten met betrekking tot disclosures, dienen beursvennootschappen in de vier onderzochte Europese jurisdicties daarnaast aandacht te besteden aan de aanbevelingen uit de corporate governance codes. Deze corporate governance codes stellen in het algemeen nadere eisen met betrekking tot de wijze waarop beloningen en de (variabele) bestanddelen daarvan door het bestuur dient te worden vastgesteld, waarbij ook regels worden gesteld die paal en perk stellen aan de hoogte van dergelijke beloningen. Beursvennootschappen in deze jurisdicties dienen jaarlijks aan te geven of zij de corporate governance code toepassen en gemotiveerd aan te geven op welke punten zij afwijken ("comply-or-explain"). In Duitsland wordt aan dit principe een andere invulling gegeven in die zin dat geen uitdrukkelijke motivering voor eventuele afwijkingen vereist is.

Juridische middelen

Met uitzondering van Nederland staan aan werknemers dan wel aan vertegenwoordigers van werknemers, zoals ondernemingsraad of vakbonden, in de meeste van de onderzochte landen nauwelijks middelen ter beschikking om de beursonderneming tot naleving van wettelijke regels of gedragsnormen te dwingen.

Dit ligt anders wat betreft de macht van aandeelhouders van beursgenoteerde vennootschappen; zij hebben over het algemeen een sterk(er)e positie ten opzichte van het bestuur. Daarbij staan aandeelhouders in theorie meerdere middelen tot de beschikking om *in rechte* op te komen tegen buitensporige of op oneigenlijke wijze tot stand gekomen

bestuurdersbeloning. In de praktijk lijken deze rechtsmiddelen over het algemeen echter een relatief gering effect te sorteren.

Tot op heden zijn in Nederland de meeste rechtsgeschillen over bestuurdersbeloningen aan de orde gesteld in het kader van enquêteprocedures, waarbij zowel de Ondernemingskamer als de Hoge Raad echter niet snel geneigd lijken zijn beloningsbesluiten aan te tasten zolang zulke besluiten procedureel juist tot stand zijn gekomen. Wel wordt mede onder invloed van institutionele beleggers het onderwerp van bestuurdersbeloning in toenemende mate in de algemene vergadering van aandeelhouders aan de orde gesteld, hetgeen recentelijk bij een aantal beursvennootschappen ertoe heeft geleid dat het beloningsvoorstel is weggestemd, dan wel na kritiek van de algemene vergadering van aandeelhouders is ingetrokkenen.

In Duitsland en Frankrijk staat aandeelhouders onder meer het rechtsmiddel ter beschikking om de rechter te verzoeken een speciale deskundige te benoemen, die naar het (buitensporige) beloningsbeleid een onderzoek instelt. In de praktijk lijkt er echter weinig gebruik gemaakt te worden van dit rechtsmiddel. Ook in deze landen vindt momenteel echter een maatschappelijke discussie plaats over bestuurdersbeloning, wat in de toekomst tot veranderingen op dit gebied zou kunnen leiden.

Aandeelhouders in het Verenigd Koninkrijk en de Verenigde Staten hebben het recht om in bijzondere situaties door middel van de zogenaamde afgeleide actie (*derivative action*) namens de vennootschap tegen het bestuur een vordering in te stellen wegens, kort omschreven, het onbehoorlijk vaststellen of toekennen van een beloning of afvloeiingsregeling. Zulke acties lijken in de praktijk voornamelijk een preventief effect te sorteren. Nederland kent een dergelijke afgeleide actie niet. Duitsland kent sinds kort een variant van de afgeleide actie, maar deze rechtsfiguur wordt in de praktijk nog niet veel gebruikt.

In twee van de jurisdicties, Duitsland en Frankrijk, bestaat het juridische begrip dat het bestuur bij het toekennen van een "excessieve" beloning zich schuldig maakt aan misbruik van het aanwenden van het vermogen van de vennootschap. Aan een dergelijke inbreuk van deze norm kunnen tevens strafrechtelijke sancties voor het bestuur verbonden zijn. Gelet op de nog prille ontwikkeling van dit leerstuk, kan echter nog niet met zekerheid worden gezegd hoe deze norm in de praktijk wordt toegepast.

Tot slot

Uit de rapporten van de verschillende EU-jurisdicties blijkt dat met name in de afgelopen vijf jaar door middel van nieuwe wettelijke normen en aanvullende regels in buitenwettelijke corporate governance codes aan het bestuur van een onderneming verregaande eisen worden gesteld omtrent de wijze waarop bestuurdersbeloning dient te worden bepaald en de transparantie die dient te worden betoond naar aandeelhouders en het beleggend publiek met betrekking tot de inhoud en uitkomsten van de (variabele) beloningen.

Ten aanzien van de vraag of belanghebbenden (aandeelhouders dan wel werknemers) voldoende middelen hebben om te toetsen in hoeverre een persoonlijk belang van een bestuurder bij een overname heeft geprevaleerd boven het vennootschappelijk belang bij het

toekennen van bestuurdersbeloning, kunnen de volgende conclusies worden getrokken met betrekking tot de onderzochte jurisdicties.

Aandeelhouders van beursgenoteerde vennootschappen hebben, in tegenstelling tot werknemers, in theorie meerdere middelen tot de beschikking om *in rechte* op te komen tegen buitensporige of op oneigenlijke wijze tot stand gekomen bestuurdersbeloning. In de praktijk lijken deze rechtsmiddelen echter weinig concreet effect te sorteren. Er is niettemin een duidelijke tendens waarneembaar waarbij de macht en de invloed van de vergadering van aandeelhouders op het toekennen van bestuurdersbeloning, zeker in gevallen van bijzondere situaties, is vergroot. De recente ervaringen in Nederland laten zien dat deze tendens inmiddels gevolgen begint te krijgen voor het beloningsbeleid.

Tijdens de Ecofin vergadering in mei 2008 hebben de Europese ministers van financiën afgesproken dat zij ideeën en *best practices* zullen uitwisselen over het beleid ten aanzien van bestuurdersbeloningen. In dezelfde vergadering is uitgebreid gesproken over de aanpak die de verschillende landen kiezen om excessieve bestuurdersbeloningen tegen te gaan. Een Europese richtlijn op dit punt valt in de nabije toekomst niet te verwachten, maar niet ondenkbaar is dat lidstaten onderling hun beleid op bepaalde punten op elkaar zullen afstemmen. Dit rapport geeft alvast een overzicht van de aanpak van een aantal lidstaten en de Verenigde Staten.

Erik Hammerstein
Frans Overkleeft
Geert Raaijmakers
Rogier Stevens

Amsterdam, Juli 2008
NautaDutilh N.V.

Tweede Kamer der Staten-Generaal

2

Vergaderjaar 2007–2008

30 111 **Topinkomens**

31 052 **Ontwikkelingen rond de mogelijke overname van ABN AMRO Bank**

Nr. 25

MOTIE VAN HET LID WEEKERS
Voorgesteld 17 oktober 2007

De Kamer,

gehoord de beraadslaging,

overwegende, dat het vooruitzicht van aanzienlijke fusie-, overname- of vertrekbonussen en/of het vervroegd kunnen verzilveren van opties en aandelen ertoe kunnen leiden dat privébelangen voor bestuurders van ondernemingen kunnen prevaleren boven het vennootschapsbelang;

overwegende, dat dergelijke perverse prikkels goed ondernemingsbestuur kunnen ondermijnen;

overwegende, dat er in het buitenland rechtszaken zijn gevoerd in dergelijke zaken;

verzoekt de regering te onderzoeken of belanghebbenden in Nederland voldoende rechtsmiddelen hebben om te toetsen of het persoonlijke belang heeft geprevaleerd boven het vennootschapsbelang, de rechtspraktijk in het buitenland daarbij te betrekken en de Kamer hierover voor het einde van het jaar te informeren,

en gaat over tot de orde van de dag.

Weekers

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- **Naut**a*Dutilh*

4. Schematisch overzicht per jurisdictie

a. Openbaarmaking van bezoldiging			
	NL	**DE**	**FR**
Statutaire vereisten van openbaarmaking: **(i) algemeen** **(ii) in verband met prijsgevoelige informatie** **(iii) in verband met openbare biedingen** **(iv) beloningsbeleid**	**(i)** Gedetailleerde openbaarmaking van **bezoldiging** van **individuele bestuursleden** in het jaarverslag **(ii) Onmiddellijke** openbaarmaking van alle **prijsgevoelige informatie** (onder omstandigheden ook de bestuurdersbeloning in verband met ontslag of aanstelling) **(iii)** Openbaarmaking van vergoedingen voor **bestuur van bieder en doelvennootschap** in verband met het bod in de **biedingsdocumentatie** **(iv)** Openbaarmaking van het **beloningsbeleid** (en de wijze waarop dit beleid in praktijk is uitgevoerd) in het **jaarverslag**	**(i)** Gedetailleerde openbaarmaking van **bezoldiging** van **individuele bestuursleden** in de **toelichting** op de jaarrekening **(ii) Onmiddellijke** openbaarmaking van alle **prijsgevoelige informatie** (onder omstandigheden ook de bestuurdersbeloning in verband met ontslag of aanstelling) **(iii)** Openbaarmaking van vergoedingen voor **bestuur van bieder en doelvennootschap** in verband met het bod in de **biedingsdocumentatie en de jaarverslagen.** Daarnaast openbaarmaking van de vergoeding van **individuele bestuursleden** in de(effecten)**prospectus** uitgegeven in verband met het openbaar bod. **(iv))** Openbaarmaking van het **beloningsbeleid** in het **jaarverslag**	**(i)** Gedetailleerde openbaarmaking van **beloning** van het **bestuur en de individuele bestuursleden** in de **jaarrekening**, in het ***document référence***, en in het ***internal controls* rapport** **(ii) N.v.t.** (beloning van bestuurders wordt niet als prijsgevoelige informatie beschouwd) **(iii)** Openbaarmakingsverplichting van vergoedingen in verband met het bod voor het **bestuur van de bieder** in de **biedingsdocumentatie** (met inbegrip van het ***document référence***) en voor **het bestuur van de doelwitvennootschap** (in de *note en réponse*). **(iv)** Openbaarmaking van het **beloningsbeleid** in het ***document référence*** en het ***internal controls* rapport**.
Openbaarmakings-verplichtingen uit de Corporate Governance Code	• **Highlights van het beloningsrapport** zoals opgesteld door de beloningscommissie, inclusief het **beloningsbeleid,** in het jaarverslag van de onderneming. • Ad hoc openbaarmaking van de **belangrijkste elementen van het contract tussen een bestuurder** en de **onderneming**, inclusief de vaste salaris, de structuur en omvang van de variabele beloningscomponenten, een eventuele afvloeiingsregeling, pensioenafspraken en prestatiecriteria • Het **beloningsrapport** van de raad van commissarissen zal op de **website** van de onderneming worden geplaatst.	• Het jaarlijkse **corporate governance rapport** moet een **bezoldigingsrapport** bevatten, inclusief het **beloningsbeleid** en -systeem, een samenvatting van bestaande optieregelingen en vergelijkbare regelingen met een lange termijn premie en risicokarakter plus hun huidige waarde, en opbouw aan pensioenrechten en/of -fondsen. • **Jaarlijkse openbaarmaking** van de totale beloning van **elk bestuurslid** van een **beursgenoteerde onderneming**, waarbij onderscheid moet worden gemaakt tussen beloningselementen die gerelateerd zijn aan de zakelijke prestaties van de onderneming en elementen met een lange- termijn premie.	

a. Openbaarmaking van bezoldiging			
	UK	**USA (Delaware)**	
Statutaire vereisten van openbaarmaking: **(i) algemeen** **(ii) in verband met prijsgevoelige informatie** **(iii) in verband met openbare biedingen** **(iv) betreffende beloningsbeleid**	**(i)** Gedetailleerde openbaarmaking van de **totale bestuurdersbeloning** in de **toelichting op de jaarrekening**. Daarnaast moet eenmaal per jaar gedetailleerde informatie betreffende de beloning van individuele bestuursleden gepubliceerd worden in een **special bezoldigingsrapport**. **(ii)** Een genoteerde onderneming dient zo snel mogelijk een **voorlichtingsautoriteit** op de hoogte te brengen van alle **voorkennis** die direct betrekking heeft op de onderneming **(iii)** Openbaarmaking in de **biedingsdocumentatie** van vergoedingen voor **bestuur van bieder en doelwitvennootschap** in verband met het bod **(iv)** openbaarmaking van het **beloningsbeleid** (en de wijze waarop dit beleid in praktijk is uitgevoerd) in het **speciale bezoldigingsrapport** Aanvullend vereiste (*Listing Rules*): gedetailleerde openbaarmaking door de genoteerde onderneming in **de jaarrekening** hoe zij de vereisten van de Combined Code heeft toegepast die betrekking hebben op beloningsbeleid, arbeidscontracten en vergoedings- en beloningscommissies.	**(i)** Het vereist deponeren bij de **SEC** van kopieën van **alle bezoldigingsregelingen en -overeenkomsten** met betrekking tot de *executive officers* en *executive directors*. Tevens moeten de **volmachtverklaringen** (***proxy statements***), welke gedeponeerd moeten worden bij de SEC en worden gestuurd aan aandeelhouders wanneer deze om instemming wordt gevraagd, een uitgebreide beschrijving alsmede een uitleg in tabelvorm bevatten van de bestuurdersbeloning. **(ii)** De op grond van de *Securities Exchange Act* vereiste **jaarlijkse, driemaandelijkse en actuele rapporten** dienen specifieke informatie te bevatten, waaronder van prijsgevoelige informatie. De onderneming hoeft informatie waarvan de openbaarmaking niet wordt geëist door de *Securities Exchange Act*, niet openbaar te maken **(iii)** Zowel **volmachtsverklaringen** (***proxy statements)*** die om goedkeuring van aandeelhouders vragen van een fusie of een verkoop van bezittingen van de onderneming als **'tender offer' formulieren** dienen de belangen van de bestuurdersleden met betrekking tot de transactie te openbaren, met inbegrip van alle vergoedingen die uitgekeerd worden in verband met, of als gevolg van, de transactie.	
Openbaarmakings-verplichtingen uit de Corporate Governance Code	Wanneer een executive director van een beursgenoteerde onderneming tevens non-executive director is bij een andere onderneming, moet het **bezoldigingsrapport** een verklaring bevatten over de bezoldiging die deze bestuurder van de andere onderneming ontvangt.	**N.v.t.**	

b. (Rechts)middelen van aandeelhouders met betrekking tot bestuurdersbeloning (algemeen)			
	NL	**DE**	**FR**
(Rechts)middelen van aandeelhouders	• Initiëren van **enquêteprocedure** wegens wanbeleid • **Tegen** het **bezoldigingsbeleid** zoals voorgesteld door de raad van commissarissen **stemmen** tijdens de AvA • **Vernietiging** van het **aandeelhoudersbesluit** waarmee het bezoldigingsbeleid is goedgekeurd. • **Vernietiging** van het **besluit van de raad van commissarissen** waardoor een vergoeding voor een individueel bestuurslid wordt vastgesteld (indien in strijd met het bezoldigingsbeleid van de onderneming of met de redelijkheid en billijkheid) • Het **aanwijzen van een derde om de vennootschap te vertegenwoordigen** in geval van een tegenstrijdig belang • Het **aansprakelijk stellen** van bestuurders voor **schade** aan de onderneming in extreme gevallen (bijvoorbeeld in geval van **fraude**) • Het instellen van **jaarrekeningprocedure** bij de Ondernemingskamer wanneer de beloning van het bestuur niet afdoende openbaar is gemaakt in het jaarverslag. • Het aanspannen van een **kort geding** actie om het bestuur te verplichten bepaalde informatie over **bestuurdersbeloning openbaar te maken** indien het bestuur niet voldoet aan die vereisten • **Geen décharge verlenen** aan het bestuur • **Onderwerpen op de agenda** zetten van de AvA, waardoor een motie met betrekking tot het beloningsbeleid of de beloning van (een) individuele bestuurder(s) onderwerp van stemming wordt.	• Starten van **onderzoeksprocedures** (*Sonderprüfung*) middels een besluit te nemen tijdens de AvA wat leidt tot de aanstelling van een **speciale onderzoeker**. • Besluiten dat de beursvennootschap een **claim tot schadevergoeding** zal indienen tegen de leden van het bestuur of de raad van commissarissen in geval van een (vermeende) onrechtmatige vaststelling van beloning. Tevens het benoemen van een **speciale afgevaardigde** (*besonderer Vertreter*) om de claim van de beursvennootschap ten uitvoer te brengen. • Het ondernemen van **strafrechtelijke stappen** tegen leden van het bestuur en/of de raad van toezicht wegens vermeende frauduleuze schending van het vertrouwen. (*Untreue*). • **Weigeren** het bestuur en/of de raad van toezicht **décharge te verlenen** voor hun diensten in het afgelopen fiscale jaar.	• **De vernietiging** van **afvloeiingspremies** indien de toekenning van specifieke beloning van een CEO of *président* niet afhankelijk is gesteld van een prestatiecriterium, of indien aan de prestatie niet is voldaan en de beloning toch wordt toegekend, of indien het bestuursbesluit waarmee wordt bekrachtigd dat aan de prestatievoorwaarden is voldaan niet op de statutair vereiste manier is gepubliceerd. • Het doen van **strafrechtelijke aangifte** ten aanzien van bestuurders op grond van misbruik van bedrijfseigendom. Dit middel is beschikbaar voor zowel de aandeelhouders als voor de onderneming zelf. • **Het aansprakelijk stellen voor wanbeleid** van bestuurders (zowel individueel als collectief) die misbruik maken van hun positie of van hun aandelenparticipatie in de onderneming om een buitensporige beloning toegekend te krijgen. • Aandeelhouders die, individueel of gezamenlijk, niet minder dan 5% van het aandelenkapitaal bezitten kunnen een **speciale rechterlijke procedure** initiëren tot verzoek om de aanstelling van een **deskundige** die een rapport opstelt over een specifiek bestuursbesluit. • Iedere" belanghebbende", waaronder een aandeelhouder, kan **de rechter verzoeken** om de onderneming te dwingen tot het **voltooien en/of publiceren van het jaarverslag.**

b. (Rechts)middelen van aandeelhouders met betrekking tot bestuurdersbeloning (algemeen)			
	UK	**US (Delaware)**	
(Rechts)middelen van aandeelhouders	• Aandeelhouders **stemmen** elk jaar over het **bezoldigingsrapport** en kunnen een duidelijk **signaal** naar de onderneming afgeven door **tegen** het rapport te stemmen. • Indien een aandeelhouder meent dat het eigen belang van een bestuurder zijn boven dat van de onderneming heeft geprevaleerd kan hij een **afgeleide actie *(derivative action)*** starten namens de onderneming • Aandeelhouders hebben de mogelijkheid om **bestuurders te ontslaan** en om **de statuten te wijzigen** (bijvoorbeeld zodanig dat de aandeelhouders betrokken raken bij de vaststelling van de bestuurdersbeloning)	• De **instemming van aandeelhouders** is over het algemeen vereist voor bezoldigingsregelingen en -afspraken over de toekenning van **aandelen(opties)** aan het bestuur • Aandeelhouders kunnen aanbevelen of vereisen dat de onderneming een specifieke actie onderneemt ten aanzien van bestuurdersbeloning • Aandeelhouders kunnen de bestuurdersbeloning aanvechten door het initiëren van een **rechtzaak** tegen de onderneming en/of de bestuurders en directeuren op grond van een vergoeding die is betaald in strijd met de **bestuurlijke fiduciaire plichten**, of op grond van ***waste of corporate assets*** in verband met het buitensporige karakter van een dergelijke vergoeding.	

b. <u>(Rechts)middelen van werknemers met betrekking tot bestuurdersbeloning (algemeen)</u>			
	NL	**DE**	**FR**
(Rechts)middelen van werknemers, vakbonden en ondernemingsraden	• Initiëren van **enquêteprocedure** tegen de onderneming wegens wanbeleid (**vakbonden**) • De **ondernemingsraad** kan de kantonrechter verzoeken om het bestuur op te dragen om **gehoor te geven** aan bepalingen van de **Wet op de Ondernemingsraden**, waaronder artikel 31d, welke het vereiste betreft van het bestuur om aan de ondernemingsraad informatie over de hoogte en de structuur van beloning aan bestuursleden alsmede informatie over het beloningsbeleid van de onderneming en de totale beloning toegekend aan de raad van commissarissen, openbaar te maken • Het instellen van een **jaarrekeningprocedure** bij de Ondernemingskamer wanneer de beloning van het bestuur niet afdoende openbaar is gemaakt in het jaarverslag • In beginsel zou een individuele werknemer, een ondernemingsraad of een vakbond een procedure tegen de onderneming kunnen initiëren om zo een **besluit** van een van de organen van de onderneming te laten **vernietigen** (dit is echter lastig omdat het moeilijk zal zijn om aan de eis van 'redelijk belang' te voldoen).	• Individuele werknemers, ondernemingsraden en vakbonden als zodanig staan **geen rechtsmiddelen** tot hun beschikking om de beloning van leden van het bestuur van beursvennootschappen aan te vechten. Echter, in een Duitse beursvennootschap met medezeggenschap, kiezen de werknemers een bepaald aantal leden van de raad van toezicht. Als werknemersvertegenwoordigers zijn deze commissarissen vaak betrokken bij de besluitvorming over de aanstelling en bezoldiging van de leden van het bestuur.	• Iedere "belanghebbende", inclusief een aandeelhouder, kan **de rechter verzoeken** om de onderneming te dwingen tot het **voltooien en/of publiceren van het jaarverslag.** Het is nog onduidelijk of onder deze term ook werknemers en/of ondernemingsraden worden geschaard. • De ondernemingsraad kan een **speciale rechterlijke procedure** initiëren tot verzoek om de aanstelling van een **deskundige** die een rapport opstelt over een specifiek bestuursbesluit, zoals bijvoorbeeld een besluit waarmee de bestuurdersbeloning is toegekend.

b. (Rechts)middelen van werknemers met betrekking tot bestuurdersbeloning (algemeen)			
	UK	**US (Delaware)**	
(Rechts)middelen van werknemers, vakbonden en ondernemingsraden	• Werknemers staan **geen specifieke (rechts)middelen** tot hun beschikking	• Werknemers staan **geen specifieke (rechts)middelen** tot hun beschikking	

c. <u>(Rechts)middelen van aandeelhouders en werknemers met betrekking tot bestuurdersbeloning in verband met een fusie of overname</u>			
	NL	**DE**	**FR**
(Rechts)middelen van aandeelhouders	• Initiëren van **enquêteprocedure** tegen de onderneming wegens wanbeleid • **Tegen** een voorgestelde fusie of overname **stemmen**. • Het **aanwijzen van een derde om de vennootschap te vertegenwoordigen** door de algemene vergadering van aandeelhouders wanneer het bestuur naar de mening van de aandeelhouders als gevolg van de bestuurdersbeloning in verband met de fusie of overname een tegenstrijdig belang heeft.	• Zie de **beschikbare (rechts)middelen** zoals **hierboven beschreven.**	• **Tegen** een voorgestelde fusie of overname **stemmen.**
(Rechts)middelen van werknemers, vakbonden en ondernemingsraden	• Initiëren van **enquêteprocedure** tegen de onderneming wegens wanbeleid (**vakbonden**). • De **ondernemingsraad** kan **in beroep gaan** bij de Ondernemingskamer van het Amsterdamse Gerechtshof tegen een **besluit** van het bestuur ten aanzien waarvan het advies van de ondernemingsraad niet in acht is genomen	• Werknemers staan **geen specifieke (rechts)middelen** tot hun beschikking in dit kader	• Werknemers staan **geen specifieke (rechts)middelen** tot hun beschikking in dit kader.

c. <u>(Rechts)middelen van aandeelhouders en werknemers met betrekking tot bestuurdersbeloning in verband met een fusie of overname</u>			
	UK	**US (Delaware)**	
(Rechts)middelen van aandeelhouders	• **Tegen** een voorgestelde fusie of overname **stemmen**. • Indien een aandeelhouder meent dat het eigen belang van een bestuurder zijn boven dat van de onderneming heeft geprevaleerd kan hij een **afgeleide actie *(derivative action)*** starten namens de onderneming • Aandeelhouders kunnen een **rechterlijke procedure intitïeren** op grond dat de onderneming bestuurd is op een wijze die **onredelijk nadelig** is ten aanzien van de belangen van (één of meer van) haar *members*. • **Het ontslaan van een bestuurder** vóór het verstrijken van zijn termijn (met eenvoudige meerderheid van stemmen).	• **Tegen** een voorgestelde fusie of overname **stemmen**. • In het algemeen dienen ook de aandeelhouders van de verkrijgende onderneming in te stemmen met de transactie, indien de onderneming meer dan 20 % van het uitgegeven kapitaal zal uitgeven in de transactie. • Aandeelhouders kunnen de bestuursvergoeding aanvechten door het starten van een **rechtzaak** tegen de onderneming en/of de bestuurders en directeuren op grond van een vergoeding die is betaald in strijd met de **bestuurlijke fiduciaire plichten**, of op grond van **verkwisting van ondernemingsbezittingen** in verband met het buitensporige karakter van een dergelijke vergoeding.	
(Rechts)middelen van werknemers, vakbonden en ondernemingsraden	• Werknemers staan **geen specifieke (rechts)middelen** tot hun beschikking in dit kader	• Werknemers staan **geen specifieke (rechts)middelen** tot hun beschikking in dit kader	

II. NEDERLAND

1. Samenvatting

1.1. Vaststellen van bestuurdersbeloning bij beursvennootschappen

a. Hoofdregel

Het orgaan dat de bevoegdheid heeft om bestuursleden te benoemen en te ontslaan heeft ook de bevoegdheid om bestuurdersbeloning vast te stellen. Over het algemeen is dit de algemene vergadering van aandeelhouders. Bij een NV die onderworpen is aan de structuurregeling is het de raad van commissarissen.

b. Praktijk

Bij Nederlandse beursvennootschappen wordt de bovenstaande hoofdregel over het algemeen aangepast in de statuten in die zin dat de bevoegdheid van de algemene vergadering van aandeelhouders om de bestuurdersbeloning vast te stellen wordt gedelegeerd aan de raad van commissarissen:

i. Bezoldiging van individuele bestuurders wordt in de regel vastgesteld door de raad van commissarissen binnen het kader van het bezoldigingsbeleid van de vennootschap zoals vastgesteld door de aandeelhouders.

ii. Bezoldiging van commissarissen wordt in de regel voorgesteld door de raad van commissarissen en voorgelegd aan de algemene vergadering van aandeelhouders ter goedkeuring.

c. Bezoldigingsbeleid

Het bezoldigingsbeleid wordt vastgesteld door de algemene vergadering van aandeelhouders op voorstel van de raad van commissarissen, zoals voorbereid door de remuneratiecommissie.

1.2. Openbaarmaking van bestuurdersbeloning bij beursvennootschappen

a. Verplichte openbaarmaking in jaarverslag

i. Bezoldiging van individuele bestuursleden, waaronder inbegrepen salarissen, pensioenen en vertrekregelingen;
ii. Winstuitkeringen en bonussen;
iii. Bezoldiging in de vorm van aandelen of opties;
iv. Leningen, voorschoten en garanties.

b. Verplichte openbaarmaking aan ondernemingsraad

i. Het bezoldigingsbeleid moet ter kennisgeving worden aangeboden aan de ondernemingsraad tegelijkertijd met de aanbieding daarvan aan de algemene vergadering van aandeelhouders.

ii. Daarnaast moet de hoogte en inhoud van de arbeidsvoorwaardelijke regelingen en afspraken met betrekking tot bestuursleden ten minste eenmaal per jaar schriftelijk aan de ondernemingsraad worden verstrekt, met inbegrip van [het bezoldigingsbeleid en] de bezoldiging van de raad van commissarissen.

c. Verplichte openbaarmaking in de biedingsdocumentatie bij openbaar bod

i. De individuele vergoedingen aan de bestuurders en commissarissen van de doelvennootschap die bij gestanddoening van het bod zullen aftreden, en indien de doelvennootschap meewerkt aan het bod, de individuele vergoedingen aan de bestuurders en commissarissen van de doel-vennootschap die verband houden met de gestanddoening van het bod;

ii. De individuele vergoedingen aan de bestuurders en commissarissen van de bieder die verband houden met de gestanddoening van het bod;

En ingeval van een (gedeeltelijk) ruilbod:

i. De individuele vergoedingen aan bestuurders en commissarissen van de vennootschap, anders dan de bieder of doelvennootschap, waarvan effecten in ruil worden aangeboden, die bij gestanddoening van het openbaar bod zullen aftreden;

ii. De individuele vergoedingen aan bestuurders en commissarissen van de vennootschap, anders dan de bieder of doelvennootschap, waarvan effecten in ruil worden aangeboden, die verband houden met de gestanddoening van het openbaar bod.

1.3. Beschikbare (rechts)middelen in geval van onenigheid over bestuurdersbeloning

a. Algemeen

De beschikbare (rechts)middelen van aandeelhouders en werknemers in het geval van onenigheid over bestuurdersbeloning toegekend in verband met een fusie- of overname zijn gelijk aan de (rechts)middelen die hun in het algemeen toekomen.

b. Rechtsmiddelen

Rechtsmiddelen van aandeelhouders:

i. Het instellen van een enquêteprocedure bij de ondernemingskamer op gronden van wanbeleid, eventueel in combinatie met een verzoek tot onmiddellijke voorzieningen gericht op de instandhouding van de *status quo*. Verzoekers zullen moeten aandragen dat de bestuurdersbeloning in strijd is met de redelijkheid en billijkheid, of dat de bestuurdersbeloning deel uitmaakt van een algeheel wanbeleid;

ii. Vernietiging van het aandeelhoudersbesluit waarmee de bestuurdersbeloning is vastgesteld, bijvoorbeeld op de grond dat de meerderheid in de algemene vergadering misbruik heeft gemaakt van haar bevoegdheid door een besluit omtrent het bezoldigingsbeleid te nemen in strijd met de redelijkheid of billijkheid, of dat het besluit omtrent het bezoldigingsbeleid gebaseerd is op onjuiste of misleidende informatie;

iii. Vernietiging van het besluit van de raad van commissarissen waarmee de bezoldiging van een bestuurslid is vastgesteld welke in strijd is met het bezoldigingsbeleid van de vennootschap of met de algemene eisen van de redelijkheid en billijkheid;

iv. Aanwijzing van een derde om de vennootschap te vertegenwoordigen door de algemene vergadering van aandeelhouders. Hiertoe kan de ava overgaan wanneer zij van mening is dat het bestuur een tegenstrijdig belang met de vennootschap heeft. Een dergelijke aanwijzing geschiedt bij een daartoe strekkend besluit van de ava. Het bestuur is in zo'n geval gelet op het tegenstrijdig belang niet langer vertegenwoordigingsbevoegd;

v. In uitzonderlijke gevallen kunnen bestuursleden aansprakelijk worden gesteld voor het toebrengen van schade aan de vennootschap, bijvoorbeeld ingeval van fraude. Dit rechtsmiddel komt in principe echter alleen de vennootschap toe. Aandeelhouders mogen het bestuur verzoeken om een dergelijk rechtsmiddel tegen een (voormalig) bestuurslid in te stellen, maar het bestuur kent in principe geen verplichting aan een dergelijk verzoek gehoor te geven.

vi. Het instellen van een jaarrekeningprocedure bij de ondernemingskamer ingeval de bestuurdersbeloning op ontoereikende wijze is openbaar gemaakt in het jaarverslag. Deze procedure ziet echter alleen op herziening van de informatie in het jaarverslag, niet op feitelijke genoegdoening ten aanzien van buitensporige bezoldiging. Een verzoek tot instellen van de jaarrekeningprocedure kan worden ingediend door iedere belanghebbende.

vii. Aandeelhouders kunnen trachten d.m.v. een kort geding actie het bestuur te dwingen tot de openbaarmaking bepaalde informatie inzake bestuurdersbeloning, indien het bestuur de openbaarmakingverplichtingen aan de aandeelhouders inzake de bestuurdersbeloning niet in acht heeft genomen.

Rechtsmiddelen van werknemers:

i. Het instellen van een enquêteprocedure bij de ondernemingskamer door de vakbond (zie verder 1.3.a.i);

ii. De ondernemingsraad heeft het recht om advies te geven omtrent een fusie- of overnamevoorstel en kan daarbij bezwaar maken tegen buitensporige bezoldiging en/of de aanwezigheid van tegenstrijdige belangen bij het bestuur. Wanneer het bestuur zulks advies vervolgens naast zich neerlegt, kan de ondernemingsraad in beroep tegen dit besluit bij de ondernemingskamer. De ondernemingskamer zal het besluit echter slechts marginaal toetsen;

iii. De ondernemingsraad kan trachten d.m.v. een kort geding actie het bestuur te dwingen tot de openbaarmaking bepaalde informatie inzake bestuurdersbeloning, indien het bestuur de openbaarmakingverplichtingen aan de ondernemingsraad inzake de bestuurdersbeloning niet in acht heeft genomen. Als voorwaarde hierbij geldt dat de ondernemingsraad het geschil eerst moet voorleggen aan de bedrijfscommissie van de vennootschap in een mediation-procedure;

iv. Het instellen van een jaarrekeningprocedure bij de ondernemingskamer ingeval de bestuurdersbeloning op ontoereikende wijze is openbaar gemaakt in het jaarverslag (zie verder 1.3.a.v)

b. Overige middelen

Overige middelen van aandeelhouders:

i. Besluiten tot het niet verlenen van kwijting aan (een) bestuurder(s) tijdens de jaarlijkse algemene vergadering van aandeelhouders;

ii. Stemmen tegen het remuneratiebeleid zoals voorgesteld door de raad van commissarissen tijdens de algemene vergadering van aandeelhouders;

iii. Het toevoegen van een agendavoorstel voor de algemene vergadering van aandeelhouders, waarbij het bezoldigingsbeleid of de bezoldiging van een individuele bestuurder ter stemming wordt voorgelegd aan de aandeelhouders (NB: het is hierbij twijfelachtig of het vervolgens genomen aandeelhouders-besluit bindende werking heeft voor de vennootschap).

Overige middelen van werknemers:

i. Druk uitoefenen op het bestuur inzake bestuurdersbeloning door vakbonden tijdens CAO-onderhandelingen;

ii. Andere beschikbare middelen, zoals het organiseren van een staking.

1.4. Het gebruik van (rechts)middelen in de praktijk

a. Enquêteprocedure: het gebruikelijke rechtsmiddel in de context van een lopende fusie of overnametransactie. Gebruikt door zowel aandeelhouders als vertegenwoordigers van werknemers (vakbonden). Rechters zijn echter terughoudend met ingrijpen in de bezoldiging wanneer het vaststaat dat deze is vastgesteld volgens de interne procedures.

b. Stemmen tegen het remuneratiebeleid: recente voorbeelden bij onder meer Philips en Corporate Express laten zien dat het remuneratiebeleid in toenemende mate tijdens de algemene vergadering van aandeelhouders ter discussie is gesteld. Bij Philips is het remuneratiebeleid onlangs zelfs weggestemd door de aandeelhouders. Deze trend is mede ingegeven door de toegenomen aandacht voor bestuurdersbeloning vanuit institutionele beleggers.

c. Vernietiging van besluiten: lijkt niet vaak te worden ingezet, wat mogelijk te wijten is aan het omslachtige karakter van de procedure en aan het feit dat verzoekers vaak meer effectieve middelen ter beschikking staan, zoals de enquêteprocedure. Van het middel van vernietigen van besluiten gaat echter een sterke preventieve werking uit en is zo van invloed op de naleving van de wettelijke en statutaire verplichtingen inzake bezoldiging.

d. Aanwijzing derde als vertegenwoordiger in geval van een tegenstrijdig belang: in theorie zou dit een middel kunnen zijn voor aandeelhouders om een bestuurder bij een fusie of overname de bevoegdheid om de vennootschap te vertegenwoordigen te ontzeggen indien hij naar de mening van de algemene vergadering van aandeelhouders gelet op zijn beloning in verband met de transactie een tegenstrijdig belang met de vennootschap heeft. Tot op heden is van dit middel in de praktijk echter bij grote (beurs) N.V.'s in de praktijk nog geen gebruik gemaakt.

e. Aansprakelijk stellen van bestuurders: dit middel zal alleen slagen in uitzonderlijke gevallen. Bovendien kunnen aandeelhouders en werknemers bestuurders niet aansprakelijk stellen uit naam van de vennootschap, maar kunnen zij slechts de vennootschap verzoeken om zelf actie te ondernemen. Er is geen significante jurisprudentie gepubliceerd omtrent de aansprakelijkheid van bestuurders in een bezoldigingsgeschil. In de praktijk worden dit soort bezoldigingsgeschillen echter ook in arbitrage afgewikkeld, zie bijvoorbeeld *Ahold*.

f. Advies van de ondernemingsraad: strikt genomen geen rechtsmiddel aangezien het over het algemeen niet leidt tot een rechterlijk oordeel over de bezoldiging, behalve in gevallen waar het bestuur niet voldoet aan het advies van de ondernemingsraad en de ondernemingsraad hiertegen in beroep gaat bij de ondernemingskamer. Zulke gevallen komen niet vaak voor. Haar adviesrecht geeft de ondernemingsraad echter de mogelijkheid om het bestuur aan de tand te voelen over de merites van bestuursvergoedingen bij een fusie of overname.

g. Rechterlijke beschikking om openbaarmakingverplichtingen af te dwingen: aangezien genoteerde vennootschappen over het algemeen voldoen aan zowel de wettelijke en statutaire openbaarmakingverplichtingen als aan dergelijke verplichtingen uit de corporate governance code, wordt er in de praktijk nauwelijks gebruik gemaakt van dit middel.

h. Jaarrekeningprocedure: dit middel wordt nauwelijks gebruikt. Bovendien ziet deze procedure alleen op herziening van de informatie in het jaarverslag, niet op feitelijke genoegdoening ten aanzien van buitensporige bezoldiging.

i. Druk uitoefenen tijdens CAO-onderhandelingen: geen rechtsmiddel, maar vooral gebruikt door vakbonden om hogere salarissen voor werknemers te bedingen.

III. DUITSLAND

1. Samenvatting

1.1. Algemeen

Duitse beursgenoteerde vennootschappen hebben een dualistische structuur waarbij de algemene vergadering van aandeelhouders de leden van de raad van commissarissen benoemen en de raad van commissarissen de leden van de raad van bestuur benoemt. Naast de wettelijke bepalingen is ook een Corporate Governance Code ("Corporate Governance Kodex") op Duitse beursvennootschappen van toepassing. Duitse beursvennootschappen dienen jaarlijks aan te geven of zij de bepalingen uit de Code toepassen. Vanwege Duitse medezeggenschapswetgeving zijn werknemers ook op het niveau van de raad van commissarissen vertegenwoordigd.

1.2. Vaststellen van bestuurdersbeloning bij beursvennootschappen

a. Vaststellen van bestuurdersbeloning

In het Duitse *two-tier* model:

i. stelt de algemene vergadering van aandeelhouders de bezoldiging vast van de leden van de raad van commissarissen, door middel van een apart aandeelhoudersbesluit dan wel door een in de statuten van de vennootschap vastgelegd systeem dat door de aandeelhouders kan worden aangepast; en

ii. stelt de raad van commissarissen de bezoldiging vast van de leden van de raad van bestuur. Daarvoor is geen additionele aandeelhoudersgoedkeuring vereist.

b. Omvang van de bestuurdersbeloning

Het vaststellen van de bestuurdersbeloning door de raad van commissarissen is onderworpen aan een wettelijk vereiste waarbij het totaal aan bezoldiging per bestuurslid in een passende verhouding moet staan tot zijn taken en tot de staat waarin de vennootschap zich bevindt.

c. Toepasselijkheid voor niet-beursgenoteerde vennootschappen

De hierboven beschreven principes zijn van toepassing op zowel beursgenoteerde als niet-beursgenoteerde vennootschappen in Duitsland.

1.3. Openbaarmaking van bestuurdersbeloning bij beursvennootschappen

a. Openbaarmakingsvereisten (algemeen)

Het Duitse wetboek van koophandel (*Handelsgesetzbuch – HGB*) bepaalt dat zowel beursgenoteerde vennootschappen als niet-beursgenoteerde vennootschappen

informatie moeten opnemen in de toelichting op de jaarrekening (*Anhang*) over het totaal aan bestuurdersbeloning (met inbegrip van salaris, winstdelingen, aandelen en opties, onkostenvergoedingen, verzekeringspremies, provisies, en enige secundaire arbeidsvoorwaarden) uitgekeerd aan bestuurders als vergoeding voor hun werk in het voorgaande boekjaar.

b. Openbaarmakingsvereisten voor beursgenoteerde vennootschappen

i. Additionele openbaarmaking in de toelichting op de jaarrekening

Het Duitse wetboek van koophandel vereist daarnaast dat beursgenoteerde vennootschappen informatie verschaffen in de toelichting op de jaarrekening over de bezoldiging van individuele bestuurders, tenzij de algemene vergadering van aandeelhouders een besluit neemt tegen de openbaarmaking van individuele bestuurdersbeloning.

ii. Aanvullende openbaarmakingsvereisten in verband met een openbaar bod

- Het Duitse wetboek van koophandel bepaalt dat beursgenoteerde vennootschappen bovendien informatie moeten verschaffen in hun jaarverslag (*Lagebericht*) over, *inter alia*, de bezoldiging die leden van het bestuur van de beursvennootschap toekomt in verband met een openbaar bod. Het Duitse wetboek van koophandel vereist daarnaast dat beursvennootschappen informatie moeten verschaffen in hun jaarverslag over de gevolgen die voortvloeien uit materiële overeenkomsten met betrekking tot een *change of control* over de vennootschap. Dit openbaarmakingsvereiste kan ook betrekking hebben op bestuurdersbeloning.

- Daarnaast vereist de Duitse Overname Wet (*Wertpapiererwerbs- und Übernahmegesetz*) dat, in geval van een openbaar bod, de bieder in de biedingsdocumentatie elke vorm van vergoeding (zowel monetair als non-monetair) moet vermelden die de bieder toekent aan de bestuursleden van de beursgenoteerde doelvennootschap.

iii. Additionele openbaarmakingsvereisten in verband met een openbare aandelenemissie

In het geval van een openbare aandelenemissie vereist de Duitse Prospectus Wet (*Wertpapierprospektgesetz – WpPG*) dat de emissieprospectus informatie bevat over, *inter alia*, de bezoldiging verstrekt aan de leden van de raad van bestuur van de uitgevende vennootschap in het voorafgaande boekjaar.

iv. Openbaarmaking als gevolg van ad hoc meldingsplichten

Mogelijke openbaarmaking kan vereist zijn op grond van bepaalde ad hoc meldingsplichten (al dan niet in verband met *director's dealing*).

1.4. Beschikbare (rechts)middelen in geval van onenigheid over bestuurdersbeloning

a. Algemeen

Onder Duits recht, bestaat er geen onderscheid tussen (rechts)middelen beschikbaar indien (a) aandeelhouders het oneens zijn met de samenstelling of omvang van individuele bestuurdersbeloning of met het bezoldigingsbeleid, of (b) aandeelhouders vermoeden dat het persoonlijk (financieel) belang van een bestuurslid zwaarder heeft gewogen dan het belang van de vennootschap.

Daarnaast zijn de (rechts)middelen van aandeelhouders zoals hieronder beschreven ook van toepassing in een fusie- of overnamesituatie.

Aandeelhouders mogen de volgende (rechts)middelen instellen indien zij de toegekende bestuurdersbeloning ongepast of onrechtmatig vinden:

b. (Rechts)middelen van aandeelhouders

i. Aandeelhouders kunnen een speciale onderzoeksprocedure instellen (*Sonderprüfung*) door in de algemene vergadering te besluiten tot het aanstellen van een speciale onderzoeker, welke het recht heeft om een verzoek te doen tot het ontvangen van uitgebreide informatie over de uitgevoerde taken van de raad van commissarissen, en daarmee over de vaststellingsprocedure van de bestuurdersbeloning. Daarnaast kunnen bepaalde minderheidsaandeelhouders een beroep doen bij de relevante rechtbank op het instellen van een speciale onderzoeker.

ii. Aandeelhouders kunnen besluiten dat de vennootschap een aanspraak op schadevergoeding doet bij de leden van de raad van commissarissen in geval van een (vermeend) onrechtmatige vaststelling van bestuurdersbeloning. Aandeelhouders mogen ook een bijzondere vertegenwoordiger (*Besonderer Vertreter*) aanstellen die de claim tot schadevergoeding ten uitvoer brengt. Sinds kort kunnen individuele aandeelhouders ook ten behoeve van de vennootschap een vordering tot schadevergoeding tegen bestuurders of commissarissen instellen. Deze rechtsfiguur is in de praktijk nog niet uitgekristalliseerd.

iii. Aandeelhouders kunnen besluiten om leden van de raad van bestuur en/of raad van commissarissen geen décharge te verlenen voor de verleende diensten in het voorafgaande boekjaar.

iv. Aandeelhouders kunnen druk uitoefenen in de vergadering van aandeelhouders door te spreken en vragen te stellen.

v. Aandeelhouders kunnen trachten te bewerkstelligen dat een strafrechtelijke vervolging wordt ingesteld bij de rechtbank tegen bestuursleden en commissarissen op grond van een frauduleuze schending van vertrouwen (*Untreue*).

c. (Rechts)middelen van werknemers

Onder Duits recht staan individuele werknemers, ondernemingsraden en vakbonden geen (rechts)middelen tot de beschikking om de bezoldiging van bestuurders van beursgenoteerde vennootschappen aan te vechten. In bepaalde "*co-determined*" Duitse beursgenoteerde vennootschappen, worden een bepaald aantal leden van de raad van commissarissen benoemd door de werknemers. In zulke vennootschappen zijn de vertegenwoordigers van de werknemers regelmatig betrokken bij de besluiten omtrent de aanstelling en bezoldiging van de leden van de raad van bestuur.

1.5. Het gebruik van (rechts)middelen in de praktijk

a. Algemeen

In de praktijk wordt bestuurdersbeloning in Duitsland niet via juridische middelen aangevochten, hoewel het onderwerp van bestuurdersbeloning ook daar in de belangstelling staat.

b. Mannesmann overname

Volgend op de overname van Mannessmann AG door de Vodafone Group plc werden bijzondere vergoedingen uitgekeerd aan leden van de raad van bestuur van Mannessmann AG voor tijdens de overname verstrekte diensten. Deze bijzondere vergoedingen leidden tot een strafrechtelijke procedure en een beslissing van de Duitse Federale Hoge Raad (*Bundesverfassungsgericht*) in 2005. Deze beslissing is van invloed geweest - zowel direct alsook indirect vanwege de vele media aandacht - op de tot dan toe heersende praktijk van het toekennen van bijzondere bezoldiging aan bestuurders van beursvennootschappen.

IV. FRANKRIJK

1. Samenvatting

1.1. Algemeen

In Frankrijk zijn er drie bestuursmodellen:

i. Het "one-tier board" model waarbij de uitvoerende en toezichthoudende taken vanuit één orgaan worden verricht. In dit model staat het bestuur onder leiding van een Président Directeur Géneral.

ii. Het "one-tier board" model waarbij de uitvoerende taken zijn gedelegeerd aan hetzij een speciale comité binnen het bestuur, hetzij aan de CEO en andere gedelegeerde functionarissen die zelf geen deel van het bestuur uitmaken. In dit model houdt de *président* ("chairman") van het bestuur desalniettemin een grote invloed, ondanks het feit dat de uitvoerende bestuurstaken zijn gedelegeerd.

iii. Een traditioneel "two-tier" model waarbij de uitvoerende taken worden verricht door de raad van bestuur (*conseil d'administration*) en de toezichthoudende door de raad van commissarissen (*conseil de surveillance*).

1.2. Vaststellen van bestuurdersbeloning bij beursvennootschappen

a. Bestuurdersbeloning (algemeen)

i. Het totale bedrag aan bezoldiging voor alle bestuursleden in het kader van de reguliere uitoefening van hun taken ("*Jetons de Présence*") is onderworpen aan een stemming door de algemene vergadering van aandeelhouders, waaraan de betreffende bestuursleden kunnen deelnemen. Het bestuur verdeelt dit totale bedrag aan bezoldiging vervolgens onder de bestuursleden op discretionaire basis.

ii. De buitengewone bestuurdersbeloning, zoals vastgesteld door het bestuur zelf, is onderworpen aan wettelijke regels met betrekking tot handel met voorkennis ("*Conventions Réglementées*"), en is dientengevolge na goedkeuring door het bestuur onderworpen aan een accountantscontrole. De resultaten van deze controle worden verwerkt in een speciaal accountantsrapport wat samen met de betreffende bezoldigingsbesluiten wordt voorgelegd ter goedkeuring aan de algemene vergadering van aandeelhouders.

iii. Elke aanpassing van de arbeidsovereenkomst van een bestuurslid in loondienstverband is tevens onderworpen aan de hierboven beschreven *Conventions Réglementées*-procedure. Dit betekent dat een dergelijk besluit tot aanpassing op dezelfde wijze als hierboven beschreven aan de aandeelhoudersvergadering voorgelegd zal moeten worden.

b. Bezoldiging van de CEO/President

i. Het bestuur heeft de exclusieve bevoegdheid om zowel de vaste als variabele bezoldiging van de CEO en President van de vennootschap vast te stellen.

ii. Afvloeiingsuitkeringen aan de CEO en President (met inbegrip van indemniteit, pensioenen en andere bezoldigingsregelingen) zijn onderworpen aan de *Conventions Réglementées*-procedure en moeten dientengevolge worden voorgelegd aan de algemene vergadering van aandeelhouders. Wanneer de algemene vergadering het bestuursbesluit over dergelijke bezoldiging afkeurt, heeft dit geen gevolgen voor de geldigheid daarvan, maar de betreffende bestuurder is vanaf het moment van afkeuring persoonlijk aansprakelijk voor schade die de vennootschap lijdt in verband met zijn bezoldiging; dat wil zeggen, het bedrag dat ten onrechte in het kader van zijn bezoldiging is uitgekeerd.

c. Bezoldigingsbeleid

De Franse Corporate Governance Code beveelt beursgenoteerde vennootschappen aan een remuneratiecommissie in te stellen, bestaande uit een meerderheid van onafhankelijke bestuurders. De remuneratiecommissie doet een voorstel voor het beleid aangaande de verstrekking van opties en legt deze ter goedkeuring en vaststelling voor aan de raad van bestuur.

1.3. Openbaarmaking van bestuurdersbeloning bij beursvennootschappen

a. Wettelijke openbaarmakingsvereisten

i. Document de Réference: Vergelijkbaar met het jaarverslag, maar alleen van toepassing op beursgenoteerde vennootschappen, en overigens niet verplicht. Wanneer ingesteld, moet het *document de référence* gedetailleerde en specifieke informatie bevatten over alle soorten bezoldiging van de bestuursleden, CEO en/of president, met inbegrip van informatie over welk gedeelte van de bezoldiging variabel, vast, in natura en/of buitengewoon is. Bovendien moet het een duidelijke tabel bevatten waarin wordt weergeven welk gedeelte van de bezoldiging variabel en/of vast is, en welk gedeelte geschaard kan worden onder de *Jetons de Présence*. Als de vennootschap een *two-tier* structuur heeft, zal het *document de référence* tevens informatie over de bezoldiging van de leden van de raad van commissarissen moeten bevatten.

ii. Jaarverslag (Publication Annuelle): Is verplicht dezelfde informatie te bevatten als het hierboven vermelde *document de référence*. Moet gepubliceerd worden op de website van de vennootschap en gedeponeerd bij het relevante handelsregister (*Tribunal de Commerce*). Beursgenoteerde vennootschappen zijn verplicht om additionele informatie te vermelden, waaronder het bezoldigingsbeleid van de vennootschap, een gedetailleerd overzicht van de bezoldiging per individuele bestuurder en de president en/of CEO (inclusief pensioen arrangementen), het totale bedrag van bestuursvergoedingen en de individuele bedragen, het beleid met betrekking tot het

toebedelen van opties en aandelen aan de president en/of CEO,en gedetailleerde informatie over de voorwaarden die verbonden zijn aan de bezoldiging van de president en CEO, met inbegrip van de berekeningsformule. Deze verplichting heeft geen betrekking op leidinggevende functionarissen van de vennootschap ("executives") die geen CEO of president of lid zijn van de raad van bestuur.

iii. Internal Controls rapport: Beursgenoteerde vennootschappen zijn verplicht om een 'internal controls' rapport op te stellen en deze op de website te publiceren en ter inzage te leggen op het hoofdkantoor van de vennootschap. Het rapport moet de aandeelhouders uitleg verschaffen over de interne regels van de vennootschap, met inbegrip van de bezoldiging van bestuursleden, de president en CEO, en het bezoldigingsbeleid.

iv. Afvloeiingsuitkeringen: Verschillende documenten betreffende afvloeiingsuitkeringen van bestuurders moeten openbaar worden gemaakt: het in 1.2.a.ii genoemde accountantsrapport betreffende de buitengewone bestuurdersbeloning, het besluit van de raad van bestuur over de prestatiecriteria met betrekking tot de toekenning van de vertrekpremie, en het besluit van de raad van bestuur waarmee wordt vastgesteld dat aan deze prestatiecriteria is voldaan.

b. Openbaarmaking in verband met fusie of overname

i. Biedingsdocumentatie bij openbaar bod: De biedingsdocumentatie bij een openbaar bod moet informatie verschaffen over de bezoldiging van bestuurders en functionarissen van zowel de bieder als de doelvennootschap, door zowel het *document de référence* van de bieder als het antwoord daarop van de doelvennootschap *(note en réponse)* te bevatten.

ii. Overname: Elke overeenkomst tussen de vennootschap en een bestuurder of functionaris aangegaan in het kader van een overname, waarbij de mogelijkheid van directe of indirecte belangenverstrengeling bestaat, moet aan de algemene vergadering van aandeelhouders openbaar worden gemaakt in de vorm van een speciaal rapport dat, samen met het besluit in kwestie, onderworpen is aan voorafgaande goedkeuring door de raad van bestuur. Wat precies onder het begrip belangenverstrengeling moet verstaan in dit kader, is nader uitgewerkt in de Franse jurisprudentie.

c. Openbaarmakingvereisten uit de Corporate Governance Code

De Franse gecombineerde Corporate Governance Code ("The Corporate Governance of Listed Corporations") doet de aanbeveling tot gedetailleerde openbaarmaking van de bestuurdersbeloning en het bezoldigingsbeleid in het jaarverslag, met inbegrip van gedetailleerde informatie over bestuurdersbeloning in de vorm van opties op aandelen. De Code wordt op *comply-or-explain* basis toegepast.

1.4. Beschikbare (rechts)middelen in geval van onenigheid over bestuurdersbeloning

a. Algemeen

De (rechts)middelen van aandeelhouders zoals hieronder beschreven zijn ook van toepassing in een fusie- of overnamesituatie.

b. Beschikbare (rechts)middelen

(Rechts)middelen van aandeelhouders:

i. Specifieke middelen (uit de onlangs ingevoerde "*Loi TEPA*"): Indien de bezoldiging van een CEO of president niet aan prestatiecriteria is gekoppeld, of indien niet aan deze prestatiecriteria is voldaan maar de bezoldiging wel is toegekend, of indien het bestuursbesluit dat vaststelt dat aan de prestatiecriteria is voldaan niet wordt openbaar gemaakt, zijn de afvloeiingsuitkeringen nietig. In zo'n geval kunnen aandeelhouders uit naam van de vennootschap bij de rechter de betreffende bestuurder dwingen om zijn bezoldiging terug te betalen aan de vennootschap.

ii. Strafrechtelijke middelen: Buitensporige bezoldiging kan een grond opleveren voor het strafrechtelijke delict van misbruik van vennootschapseigendom ("*Abus de biens sociaux*"). In zo'n geval kan zowel door de aandeelhouders in naam van de vennootschap (*"ut singuli"*), als door de vennootschap zelf aangifte worden gedaan. De verdere afhandeling en eventuele vervolging is echter in handen van het openbaar ministerie.

iii. Bestuursaansprakelijkheid voor wanbeleid: Bestuurders die bij het toekennen van bezoldiging misbruik hebben gemaakt van hun positie of van hun aandelenparticipatie kunnen individueel en collectief aansprakelijk gehouden worden voor wanbeleid.

iv. "Expertise de gestion": Aandeelhouders die individueel dan wel collectief minstens 5% van het aandelenkapitaal in de vennootschap houden kunnen de rechtbank per kort geding verzoeken tot de aanstelling van een deskundige die een rapport samenstelt over een bepaald bestuursbesluit. Dit rechtsmiddel heet *l'expertise de gestion* ("beleidsexpertise").

v. Jaarrekeningprocedure: Iedere belanghebbende, waaronder zijn inbegrepen aandeelhouders, kan de rechtbank verzoeken om de vennootschap te dwingen om de jaarrekening af te ronden en/of te publiceren, op straffe van een boete (*"astreinte"*).

(Rechts)middelen van werknemers:

vi. Jaarrekeningprocedure: Iedere belanghebbende kan de rechtbank verzoeken om de vennootschap te dwingen om de jaarrekening af te ronden en/of te publiceren. Het is vooralsnog onduidelijk of werknemers dan wel de ondernemingsraad ook belanghebbenden zijn in de zin van dit rechtsmiddel.

vii. "Expertise de gestion": De ondernemingsraad kan de rechtbank per kort geding verzoeken tot de aanstelling van een deskundige die een rapport samenstelt over een bepaald bestuursbesluit.

1.5. Het gebruik van (rechts)middelen in de praktijk

Met uitzondering van het rechtsmiddel betreffende het strafrechtelijke delict van misbruik van vennootschapseigendom (Abus de biens sociaux) en het rechtsmiddel van bestuursaansprakelijkheid ingeval van wanbeleid, worden de bovenstaande rechtsmiddelen in de praktijk nauwelijks gebruikt. Wat de rechtsmiddelen uit de Loi TEPA betreft: deze treden pas volledig in werking in februari 2009.

V. HET VERENIGD KONINKRIJK

1. Samenvatting

1.1. Algemeen

Beursvennootschappen in het Verenigd Koninkrijk kennen een one-tier model waarbij bestuurstaken intern zijn verdeeld over uitvoerende ("*executive*") en toezichthoudende ("*non-executive*") bestuurders.

De algemene regels met betrekking tot de interne organisatie van de vennootschap met inbegrip van de verdeling van de bevoegdheden van de verschillende organen vloeien voort uit de Companies Act 1985, die momenteel geleidelijk wordt vervangen door de Companies Act 2006. Verder zijn voor beursgenoteerde vennootschappen van belang de FSA Listing Rules alsmede de Combined Code on Corporate Governance. De laatstgenoemde Code wordt op *comply-or-explain* basis toegepast.

1.2. Vaststellen van bestuurdersbeloning bij beursvennootschappen

a. Beursgenoteerde vennootschappen (*Listed Public Limited Companies (PLC's*))

Zowel de bezoldiging van *executive* bestuurders van beursgenoteerde vennootschappen als het bezoldigingsbeleid wordt vastgesteld door een remuneratiecommissie bestaande uit *non-executives*. De remuneratiecommissie moet de leidraad van de Combined Code on Corporate Governance volgen wanneer zij beslist over de bezoldiging en het bezoldigingsbeleid:

i. Een significant deel van de bestuurdersbeloning zal verband moeten houden met de individuele- en bedrijfsprestatie;

ii. Goedkeuring van aandeelhouders is vereist voor het toekennen van opties op aandelen en stimuleringspakketten voor de lange termijn (*long-term incentive schemes*).

iii. De bestuurdersbeloning van *non-executive* bestuurders, die over het algemeen wordt vastgesteld door de *executives*, mag geen aandelenopties bevatten tenzij de aandeelhouders het vooraf hebben goedgekeurd, en de aandelen die voortkomen uit het inroepen van de opties ten minste één jaar door de *non-executive* bestuurder zullen worden gehouden na zijn/haar vertrek;

Bepaalde groepen aandeelhouders, waaronder institutionele beleggers zoals de Vereniging van Britse Verzekeraars, volgen het onderwerp op de voet en publiceren hun eigen leidraden omtrent bestuurdersbeloning, welke van grote invloed zijn op beursgenoteerde vennootschappen bij het vaststellen van de bezoldiging van hun bestuurders.

b. Niet-beursgenoteerde vennootschappen

Niet-beursgenoteerde PLC's zijn niet verplicht om aan de vereisten van de Combined Code on Corporate Governance te voldoen. De statuten van niet-beursgenoteerde PLC's zullen over het

algemeen bepalen dat de bestuurders de bestuurdersbeloning vaststellen. In de praktijk neemt een bestuurder daarbij geen deel in de discussie en besluitvorming over de vaststelling van zijn eigen bezoldiging.

1.3. Openbaarmaking van bestuurdersbeloning

a. Openbaarmakingsvereisten voor beursgenoteerde PLC's (algemeen)

Companies Act:

Beursgenoteerde PLC's zijn vereist om een remuneratierapport over het voorafgaand boekjaar op te nemen in hun jaarverslag. Strafrechtelijke aansprakelijkheid is verbonden aan het niet-nakomen van deze verplichting. Het remuneratierapport bevat gedetailleerde informatie over de bezoldiging van individuele bestuurders, met inbegrip van salaris, aandelen, pensioenregelingen, afvloeiingsregelingen, en prestatiecriteria verbonden aan de bezoldiging. Het remuneratierapport moet voorafgaand aan publicatie aan de aandeelhouders van de vennootschap worden verstuurd, die een adviserende stem hebben.

Listing rules:

i. Op grond van de Listing rules moet het jaarverslag een verklaring bevatten over hoe de vennootschap de Combined Code heeft toegepast, met inbegrip van de vereisten omtrent vaststelling van bestuurdersbeloning. Dit is op basis van het *comply-or-explain* beginsel.

ii. In tegenstelling tot de adviserende stem van de aandeelhouders ten aanzien van het bezoldigingsbeleid, zullen aandelenopties en lange termijn-stimuleringspakketten (*long-term incentive schemes*) op grond van de Listing Rules ter goedkeuring moeten worden voorgelegd aan de aandeelhouders, die een doorslaggevende stem hebben.

b. Openbaarmakingsvereisten voor beursgenoteerde PLC's in verband met een overname en openbaar bod

Companies Act (overname):

Bij een overname moeten alle buitengewone vergoedingen aan de bestuurders van de doelvennootschap worden openbaar gemaakt en ter goedkeuring worden voorgelegd aan de aandeelhouders. Wanneer de bezoldiging wordt uitgekeerd zonder dat de vereiste goedkeuring is verkregen, wordt de ontvangende bestuurder het geacht in bewaring te houden voor de doelvennootschap en zijn alle bestuurders die de bezoldiging hebben goedgekeurd individueel en gezamenlijk aansprakelijk voor verliezen die daaruit voortvloeien en gehouden tot vrijwaring van de doelvennootschap daaromtrent. Goedkeuring van de aandeelhouders is echter niet vereist wanneer de vergoeding te goeder trouw is uitgekeerd aan de bestuurder om hem kwijting te verlenen voor bestaande juridische verplichtingen.

Takeover Code (openbaar bod):

Waar de vergoeding bij een openbaar bod aandelen bevat, zal het biedingsbericht moeten laten zien of en op welke manier de overname invloed zal hebben op de bezoldiging van de bestuurders van de bieder. Het daaropvolgende *response document* van de doelvennootschap moet informatie bevatten over de dienstverleningsovereenkomsten van de bestuurders van de doelvennootschap, met inbegrip van bezoldiging.

c. Openbaarmakingsvereisten voor niet-beursgenoteerde PLC's

Companies Act:

i. De toelichting op het jaarverslag van niet-beursgenoteerde vennootschappen moet gedetailleerde informatie bevatten over bestuurdersbeloning, waaronder het totale bedrag aan uitgekeerde bezoldiging, het aantal bestuurders dat aandelenopties heeft ingeroepen en/of aandelen heeft ontvangen in het kader van lange termijn- stimuleringspakketten, en de totale waarde van pensioencontributies aan bestuurders in het kader van zogenoemde *money-purchase benefits*.

ii. Waar het totale bedrag van de bezoldiging £200,000 bedraagt of meer, moet een niet-beursgenoteerde vennootschap additionele details omtrent bestuurdersbeloning vermelden in de toelichting bij het jaarverslag, met inbegrip van de proportie daarvan uitgekeerd aan de meest verdienende bestuurder, verhogingen in pensioenpremies aan (oud)bestuurders boven de afgesproken standaardpremie, en het totaal aan afvloeiingsregelingen uitgekeerd aan aftredende bestuurders.

1.4. Beschikbare (rechts)middelen in geval van onenigheid over bestuurdersbeloning

Aandeelhouders

a. (Rechts)middelen van aandeelhouders in het algemeen

i. Aandeelhouders hebben de gelegenheid om ieder jaar over het remuneratierapport te stemmen en kunnen een duidelijk signaal afgeven aan het bestuur door tegen het voorgestelde remuneratierapport te stemmen. Het betreft echter een adviserende stem.

ii. Aandeelhouders hebben de mogelijkheid om bestuurders te ontslaan voor het einde van hun en om de statuten van de vennootschap aan te passen (bijvoorbeeld zodat voor het vaststellen van bestuurdersbeloning de doorslaggevende goedkeuring van aandeelhouders vereist is).

iii. Een aandeelhouder kan uit naam van de vennootschap een afgeleide actie (*derivative action*) instellen tegen een bestuurder die zijn eigen belang zwaarder heeft laten wegen dan het belang van de vennootschap (bijvoorbeeld bij het toekennen van buitensporige bestuursbeloning).

b. (Rechts)middelen van aandeelhouders in verband met fusie of overname

Een aandeelhouder kan uit naam van de vennootschap een afgeleide actie (*derivative action*) instellen tegen een bestuurder die in verband met een fusie of overname zijn eigen belang zwaarder heeft laten wegen dan het belang van de vennootschap (bijvoorbeeld bij het toekennen van buitensporige bestuursbeloning).

Werknemers

c. (Rechts)middelen van werknemers

Het vennootschapsrecht van het Verenigd Koninkrijk biedt werknemers niet de mogelijkheid om invloed uit te oefenen op de *governance* van de vennootschap. Hoewel werknemers bepaalde rechten en bescherming toekomt (bijvoorbeeld het recht om zich bij een vakbond aan te sluiten) hebben ze niet de bevoegdheid om bestuurders te benoemen of de statuten van de vennootschap aan te passen.

Werknemers staan geen specifieke (rechts)middelen tot de beschikking wanneer zij van mening zijn dat het besluit van een bestuur(der) om een overname goed te keuren ingegeven is door persoonlijke belangen van zo'n bestuur(der).

1.5. Het gebruik van (rechts)middelen in de praktijk

Het stemmen tegen een remuneratierapport voorstel in de algemene vergadering van aandeelhouders is het enige middel dat in de praktijk door aandeelhouders van beursgenoteerde vennootschappen wordt gebruikt. Hoewel het een adviserende stem betreft, is het wel degelijk van grote invloed op het remuneratiebeleid van de vennootschap en leidt het in de praktijk regelmatig tot een vermindering van specifieke elementen van de bezoldiging van individuele bestuurders. Ook dient in dit verband de mogelijkheid tot het instellen van een afgeleide actie te worden genoemd. Dit rechtsmiddel heeft niet zozeer een direct invloed op het sanctioneren van bestuurdersbeloning, maar van het mogelijkheid tot het instellen van deze actie gaat wel een sterke preventieve werking uit.

VI. DE VERENIGDE STATEN

1. Samenvatting

1.1. Algemeen

Naast het federale rechtsstelsel, heeft iedere staat in de Verenigde Staten (VS) zijn eigen rechtsstelsel, dat van staat tot staat verschilt. Gezien de grote verscheidenheid tussen de verschillende rechtsstelsels in de VS kan geen eenduidig beeld van het Amerikaanse ondernemingsrecht geschetst worden. Dit deelrapport spitst zich toe op Delaware, de staat waarin de meeste van de Amerikaanse beursvennootschappen gevestigd zijn.

Over het algemeen wordt in de wetgeving met betrekking tot vennootschapsrecht in de verschillende staten geen onderscheid gemaakt tussen beursgenoteerde en besloten vennootschappen. De vereisten uit de Securities Exchange Act (federaal effectenrecht) omtrent openbaarmaking en omvang van bestuurdersbeloning hebben echter alleen betrekking op beursgenoteerde vennootschappen en op vennootschappen die wegens hun omvang (meer dan 500 aandeelhouders en activa van meer dan $10 miljoen) geregistreerd staan bij de Securities Exchange Committee ("SEC"). Bepaalde federale belastingwetten die verband houden met bezoldiging zijn zowel op besloten als op beursgenoteerde vennootschappen van toepassing.

1.2. Vaststellen van bestuurdersbeloning bij beursvennootschappen

a. Algemeen

Er bestaat geen bepaling van effecten- of vennootschapsrecht op federaal- dan wel staatsniveau die de omvang van bestuurdersbeloning op een concrete wijze beperkt.

b. Recht op staatsniveau (Delaware)

i. Het vennootschapsrecht van Delaware vereist dat bestuurdersbeloning wordt vastgesteld door de raad van bestuur van de vennootschap.

ii. De materiële juridische beperkingen op staatsniveau met betrekking tot bestuurdersbeloning vloeien voort uit de *fiduciary duties*: fiduciaire plichten die op bestuurders rusten en die zij uit hoofde van de vennootschap moeten navolgen. Deze fiduciaire plichten staan algemeen bekend als de *duties of care, loyalty, and good faith*, en zijn grotendeels ingevuld door jurisprudentie. De rechtbanken in Delaware kennen bestuurders aanzienlijke deferentie toe ten aanzien van hun besluiten (dit principe heet de "*business judgment rule*"), tenzij het een transactie betreft waar het risico van belangenverstrengeling bestaat.

iii. De "business judgment rule" heeft geen betrekking op transacties waar het risico van belangenverstrengeling bestaat, bijvoorbeeld wanneer bestuurders hun eigen bezoldiging bepalen. In plaats daarvan worden dergelijke transacties onderworpen aan een '*entire fairness test*' waarbij gekeken wordt of de transactie in alle aspecten *fair* is ten aanzien

van de vennootschap. Dit geldt niet wanneer de transactie is goedgekeurd door aandeelhouders die op de hoogte zijn van het risico van belangenverstrengeling.

b. Recht op federaal niveau

i. De federale effectenrechtelijke wetten bevatten bepaalde bepalingen die tot op zekere hoogte van invloed kunnen zijn op de omvang van bestuurdersbeloning. De federale belastingwetgeving speelt tevens een rol in de bepaling van de structuur en omvang van bestuurdersbeloning.

ii. De Securities Exchange Act vereist dat bestuurders van beursgenoteerde vennootschappen de winst behaald met de koop en verkoop van effecten van de vennootschap binnen zes maanden teruggeven aan de vennootschap. Een uitzondering bestaat voor transacties met de vennootschap die zijn goedgekeurd door een comité van onafhankelijke bestuurders, dan wel door het gehele bestuur of door de aandeelhouders. Van deze uitzondering wordt in de praktijk vrijwel altijd gebruik gemaakt.

iii. Beurzen in de VS, met inbegrip van NYSE en NASDAQ, vereisen in hun reglementen dat genoteerde vennootschappen de goedkeuring verkrijgen van de aandeelhouders met betrekking tot alle bezoldiging in de vorm van aandelen, en aanpassing van de regelingen daartoe (enkele uitzonderingen daargelaten).

iv. Op grond van beursreglementen wordt bestuurdersbeloning bij beursgenoteerde vennootschappen over het algemeen vastgesteld door een remuneratiecomité bestaande uit onafhankelijke bestuurders, vaak met inspraak van de CEO en soms onderworpen aan goedkeuring van het gehele bestuur. De bezoldiging van *non-executive* bestuurders kan worden vastgesteld door het remuneratiecomité, door het *nominating and governance* comité binnen het bestuur, dan wel door het gehele bestuur.

v. Bepaalde elementen van de bezoldiging van individuele bestuurders kunnen onderworpen worden aan de goedkeuring van aandeelhouders, zij het in het kader van beursreglementen dan wel als voorwaarde om aanspraak te kunnen maken op gunstige bepalingen op grond van de federale belastingwetgeving.

vi. De federale *Internal Revenue Code* bevat verschillende bepalingen waarbij de goedkeuring van aandeelhouders op bepaalde bestuursbesluiten een voorwaarde is om als vennootschap aanspraak te kunnen maken op gunstige belastingwetgeving.

vii. Er is op dit moment wetgeving aanhangig bij het parlement (*Congress*) waarin wordt bepaald dat vennootschappen de bezoldiging van individuele bestuurders voorleggen aan de algemene vergadering van aandeelhouders voor een adviserende stem in de volgende gevallen ("*say on pay*"):

- Jaarlijkse goedkeuring van de bestuurdersbeloning in de jaarlijkse vergadering van aandeelhouders zoals beschreven in de voor dat doeleinde verstuurde stemvolmacht verklaringen (*proxy statements*);

- Goedkeuring door aandeelhouders van overeenkomsten omtrent bestuurdersbeloning die verband houden met een fusie, overname of verkoop van delen van het bedrijf.

1.3. Disclosure of remuneration

a. Algemene openbaarmakingvereisten voor beursgenoteerde vennootschappen (federaal recht)

i. Wanneer een beursgenoteerde vennootschap dingt naar aandeelhouderstemmen (*proxy sollicitation)* met betrekking tot onder meer de benoeming van bestuurders of goedkeuring van een bezoldigingsregeling, vereist de SEC dat de stemvolmacht formulieren (*proxy statement*) aan de aandeelhouders gedetailleerde informatie bevatten omtrent bestuurdersbeloning. Dit betreft zowel een verhalende als schematische openbaarmaking, waarbij ieder element van de bezoldiging van individuele bestuurders dient te worden gekwantificeerd, de verschillende afvloeiingsregelingen dienen te worden vermeld, en een toelichting op al deze zaken moet worden gegeven.

ii. Beursgenoteerde vennootschappen zijn verplicht om bij de SEC kopieën van nagenoeg alle interne regelingen en overeenkomsten omtrent de bestuurdersbeloning te deponeren. Deze documenten kunnen door eenieder bekeken worden op de website van de SEC (http://www.sec.gov) .

b. Speciale openbaarmakingvereisten voor beursgenoteerde vennootschappen in verband met een overname of openbaar bod (federaal recht)

i. Indien een vennootschap die onderworpen is aan de Securities Exchange Act wordt overgenomen door middel van een juridische fusie dan wel een activa/passiva transactie, waarbij volgens het recht van de staat van vestiging goedkeuring van aandeelhouders vereist is, moet het stemvolmacht formulier (*proxy statement*) waarmee zulke goedkeuring wordt gevraagd de belangen van bestuurders met betrekking tot de transactie vermelden. Dit openbaarmakingvereiste bestaat onder meer uit vermelding van alle bezoldiging die de bestuurders toekomt in verband met of als gevolg van de transactie.

ii. Een zelfde openbaarmaking is vereist in de formulieren die de vennootschap in geval van een *tender offer* aan de aandeelhouders van de doelvennootschap stuurt.

1.4. Beschikbare (rechts)middelen in geval van onenigheid over bestuurdersbeloning

Aandeelhouders

a. (Rechts)middelen van aandeelhouders in het algemeen

i. Goedkeuring van aandeelhouders is vereist voor bezoldiging bestaande uit aandelen, en is daarnaast vereist als voorwaarde om aanspraak te kunnen maken op bepaalde gunstige bepalingen uit de federale belastingwetten.

ii. Aandeelhouders zijn bevoegd voorstellen in te dienen waarin zij kunnen aanbevelen dan wel eisen dat de vennootschap een bepaalde actie onderneemt. Op grond van de SEC regelgeving mag een aandeelhouder verlangen dat de vennootschap onder bepaalde voorwaarden een aandeelhoudersvoorstel opneemt in haar *proxy statement* (waarbij het mogelijk wordt voor aandeelhouders om een voorstel ter stemming voor te leggen aan de andere aandeelhouders door middel van volmacht zonder dat de initiatiefnemende aandeelhouder voor de kosten van de volmachten opdraait). De laatste tijd betreffen veel van zulke aandeelhoudersvoorstellen (elementen van) bestuurdersbeloning, waarbij het principe van "*say on pay"* erg populair is.

iii. Aandeelhouders kunnen optreden tegen bestuurdersbeloning door een rechtszaak te initiëren tegen de vennootschap en/of bestuurders en andere functionarissen. Een dergelijke rechtszaak kan over het algemeen alleen slagen indien de aandeelhouder aan kan tonen dat de bezoldiging is uitgekeerd in strijd met de fiduciaire plichten van de bestuurders, of dat de bezoldiging zo excessief is dat het opgevat moet worden als een "*waste of corporate assets*".

b. (Rechts)middelen van aandeelhouders in verband met fusie of overname

i. Goedkeuring van aandeelhouders is over het algemeen vereist in verband met de verkoop van het bedrijf door middel van een juridische fusie dan wel een activa/passiva transactie. Op grond van beursreglementen is voor het doen van een overname over het algemeen tevens goedkeuring van de transactie door de aandeelhouders van de verkrijgende vennootschap vereist, indien de vennootschap meer dan 20% van haar uitstaande aandelenkapitaal uitgeeft in het kader van de transactie.

ii. Aandeelhouders kunnen ook de bestuurdersbeloning aanvechten door de vennootschap en haar bestuurders in rechte te betrekken. Een dergelijke rechtszaak kan over het algemeen alleen slagen indien de aandeelhouder aan kan tonen dat de bezoldiging is uitgekeerd in strijd met de fiduciaire plichten van de bestuurders, of dat de bezoldiging zo excessief is dat het opgevat moet worden als een "*waste of corporate assets*".

Werknemers

c. (Rechts)middelen van werknemers

Geen. De werknemer is in de VS niet gerechtigd tot het aanvechten van bestuurdersbeloning bij de rechter.

1.5. Het gebruik van (rechts)middelen in de praktijk

Gezien het feit dat er aanzienlijke verschillen bestaat tussen de rechtsstelsels van de verschillende staten, kan geen eenduidig antwoord worden gegeven op de vraag in hoeverre de hiervoor genoemde (rechts)middelen in de praktijk worden toegepast. Echter, wel kan in het algemeen worden gesteld dat rechtszaak gericht tegen buitensporige bestuurdersbeloning over

het algemeen alleen kan slagen indien de aandeelhouder aan kan tonen dat de bezoldiging is uitgekeerd in strijd met de fiduciaire plichten van de bestuurders, of dat de bezoldiging zo excessief is dat het opgevat moet worden als een "*waste of corporate assets*".

Bij overnames komt het voor dat aandeelhouders de *fairness* van de biedprijs in rechte aanvechten. Soms worden deze vorderingen onderbouwd door de stelling dat het bestuur van de vennootschap de transactie heeft goedgekeurd terwijl dit niet in het belang van de aandeelhouders was, aangezien de bestuurders aanspraak konden maken op aanvullende vergoedingen in verband met de transactie.

VII. BIJLAGE

1. Report on Executive Remuneration in the Netherlands, Germany, France, United Kingdom and the United States

Hierna is als bijlage bijgevoegd het *Report on Executive Remuneration in the Netherlands, Germany, France, United Kingdom and the United States*. Dit is de uitgebreide, Engelstalige versie van het rapport.

REPORT ON EXECUTIVE REMUNERATION IN THE NETHERLANDS, GERMANY, FRANCE, THE UNITED KINGDOM AND THE UNITED STATES

Commissioned by the Dutch Ministry of Finance

July 2008

NautaDutilh

In cooperation with

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Hughes Hubbard & Reed LLP

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I. INTRODUCTION

1. Assignment

This report has been commissioned by the Dutch Ministry of Finance[1] and provides an overview of the legislation and legal and non-legal measures with regard to executive remuneration in the Netherlands, Germany, France, the United Kingdom and the United States of America. The reason for this report is the motion that Dutch Parliament member Weekers submitted in light of the discussions concerning executive remuneration and the developments regarding the take over of ABN AMRO Bank.

The report provides a comparative legal overview of the legislation concerning remuneration of directors of listed companies in four important European jurisdictions and the United States of America. Each separate jurisdiction report presents an overview of the manner in which executive remuneration is determined and/or approved by the corporate bodies and of related disclosure requirements. Furthermore, attention is given to the sanctions applicable in case of non-compliance with the legal requirements regarding executive remuneration and to the related legal and non-legal measures which are available to shareholders and employees in this respect. The report commences with an overview of the situation in the Netherlands, after which the jurisdiction reports of Germany, France, the United Kingdom and the United States of America are provided.

Also provided for in the report is a schematic overview of the most significant findings per jurisdiction.

The assignment is as follows:

I. At which moments in time and in what form should individual remunerations or elements of individual remunerations of board members be publicly disclosed (e.g. at the time of publication of annual report, entering into an agreement, exercise of options, fulfilment of certain conditions)?

II. Which judicial and/or non-judicial measures are available to individual shareholders, the general meeting of shareholders, individual employees, Works Councils and labour unions in the following situations:

a) they disagree with the composition or level of the individual remuneration of a board member or with the remuneration policy, for example before or after the remuneration is determined, granted and/or paid out;

b) they suspect that the personal (financial) interest of a board member has prevailed over the

[1] Instigated by a Parliamentary motion proposed by member Weekers dated 17 October 2007: "Parliament […] requests the government to investigate whether interested parties in the Netherlands have access to enough legal remedies to test whether or not the personal interest [of a director] has prevailed above the interest of the corporation, and to thereby involve the foreign legal practice and to inform Parliament about the results of the investigation before the end of this year".

interest of the corporation, in the process of making decisions about entering into a merger or acquisition;

III. To what extent are these measures used in practice?

The report has been drafted by NautaDutilh in cooperation with Hengeler Mueller (Germany), Bredin Prat (France), Slaughter & May (the United Kingdom) and Hughes Hubbard & Reed LLP (the United States of America).[2]

2. Legal comparison

Determination and approval of executive remuneration

Even though the organization of listed corporations in the researched jurisdiction differs significantly in certain respects, it appears nonetheless that the manner in which executive remuneration is determined and approved by the corporate bodies in these jurisdictions is generally similar. The Netherlands and Germany provide for corporate structures in which the instalment of a supervisory board is mandatory, at least in the Netherlands as far as 'structured corporations' are concerned. In France, the two-tier model is optional. Corporations in the United Kingdom and the United States use the one-tier model, where the managerial and supervisory tasks are divided between the executive and non-executive directors. In each jurisdiction, however, the remuneration of individual board members is determined by either the supervisory board or by the non-executive members of the board. Usually either a remuneration commission consisting of supervisory board members, or the board itself proposes the individual remuneration.

In the Netherlands and the United Kingdom, executive remuneration is to be determined in accordance with the company's remuneration policy as approved by the general meeting of shareholders. In the United Kingdom, the shareholders have an advisory vote with regard to the remuneration policy, but in practice this vote, while non-binding, has a significant effect on the remuneration policy. In the United States, there is currently legislation pending in Congress which would require companies to submit executive compensation packages to shareholders for a non-binding advisory uinder certain circumstances. In the other researched jurisdictions, there either exists no specific requirement to establish a remuneration policy, or no requirement to present such policy to the general meeting of shareholders for approval.

In most researched jurisdictions, statutory law provides that the determination of variable remuneration, such as share options, bonuses or exceptional compensation, requires the approval of the meeting of shareholders. Notably in France, but also in other jurisdictions, the legislation concerning the mandatory approval of shareholders carries a step further. In special circumstances, for instance in situations where a possible conflict of interest exist with regard to directors or the board as a whole, shareholders are required to explicitly approve the executive remuneration proposal. In the United States, with the exception of certain specific requirements pursuant to some stock exchange regulations (i.e. NYSE and NASDAQ), in principle no shareholder resolution is required by which executive remuneration and related conditions are

[2] An earlier version of this report was submitted to the Dutch Ministry of Finance in April 2008. This version contains a number of updates as well as some minor amendments.

approved. However, tax laws have a stimulating effect on US corporations to subject executive remuneration to shareholder approval. If such approval is absent, the corporation is withheld a more favourable tax treatment which applies to corporations which have subjected their directors' remuneration to shareholder approval. A proposal for similar legislation was recently introduced in the Dutch parliament.

Disclosure of executive remuneration

The overviews of the different jurisdictions further show that extensive requirements exist with regard to the disclosure of executive remuneration. In general, disclosure requirements consist of obligations to provide a detailed statement of the granted executive remuneration in the corporation's annual accounts, including share options, bonuses and pension contribution. However, in case the corporation is involved in a merger or acquisition as offeror or target, the offer document or prospectus of the issuing institution is required to contain detailed disclosure of the remuneration granted to directors of the offeror or target in connection with the merger or acquisition. In the United Kingdom, the exceptional remuneration granted to directors in connection with a public offer is furthermore required to be presented to the general meeting for approval. Although in the United States in principle no approving shareholder resolution is required for the determination of executive remuneration, this jurisdiction has strict rules with regard to the disclosure of executive remuneration, both in proxy statements to shareholders and by registration of information at the Security Exchange Commission.

The corporate governance codes of the different European jurisdictions generally contain further requirements with regard to the manner by which remuneration and the variable components thereof are to be determined by management, including rules which aim to limit the level of such remuneration. These corporate governance codes generally provide additional requirements with regard to the determination of remuneration and variable and non-variable components by the boards. Listed companies in the European jurisdictions are required to state whether or not they apply the provisions of the corporate governance code and give an explaination with regard to the provisions they choose not to apply ("comply-or-explain"). In Germany, this principle is applied somewhat differently, in the sense that no explicit reasons for the deviations need to be stated.

Legal measures

In most jurisdictions, with the exception of the Netherlands, employee representatives such as works councils or unions hardly have any legal measures at their disposal to force a listed corporation to comply with statutory legislation or standards of conduct regarding executive remuneration.

The situation regarding the power of shareholders is a different one. Shareholders in general have a more powerful position in respect of the company's management than the employees. In theory, shareholders have several options to take legal action against excessive or improperly established executive remuneration. In practice, however, these legal actions appear to produce relatively minor effects.

Until now, remuneration disputes in the Netherlands have generally been addressed in court by shareholders by means of inquiry proceedings. Dutch Courts, however, appear reluctant to strike down remuneration decisions when the board has adhered to the relevant procedures while taking such decisions. On the other hand, executive remuneration is increasingly addressed during the general meeting of shareholders, partly due to the influence of institutional investors. This has recently led to the proposed remuneration policy either being voted down or being withdrawn by the board in the face of criticism by the general meeting of shareholders.

Shareholders in Germany and France may request the court to appoint a special expert who will investigate the (excessive) remuneration policy. Furthermore, shareholders in some of the researched EU-jurisdictions as well as in the United States under certain circumstances have the right to bring a derivative action against management on behalf of the corporation, for, simply put, improperly granted or improperly determined executive remuneration or severance schemes. Such derivative action does not exist in the Netherlands. In Germany, a different version of a derivative action exists, but this legal remedy has not been widely used in practice as of yet.

In two of the jurisdictions, Germany and France, the legal notion exists that management can be held accountable for abuse of corporate assets when they have granted themselves excessive remuneration. Criminal sanctions could also apply to such a violation. Because of the recent nature of this remedy, it is not yet clear how this legal notion is applied in practice.

In conclusion

With regard to the question whether interested parties (shareholders or employees) have sufficient means at their disposal to assess whether the personal (financial) interest of a board member has allegedly prevailed over the interests of the company while deciding on executive remuneration, the following conclusions can be drawn as to the researched jurisdictions.

Shareholders of listed companies, as opposed to employees, in theory have access to several legal remedies to address excessive or inappropriately established executive remuneration. In practice, however, these legal remedies appear to produce relatively little substantial effect. Nonetheless, there is a perceptible tendency towards an increase of the power and influence of the meeting of shareholders to determine executive remuneration, especially in exceptional situations.

From the separate EU jurisdiction reports it appears that, especially in the past five years, management of listed corporations has been subjected to extensive new statutory requirements and supplementary corporate governance code requirements concerning both the way in which executive remuneration is to be determined and the pursuit of transparency towards shareholders and the investing public with regard to the composition and level of (variable) compensation.

In May 2008, the European Ministers of Finance have agreed during their Ecofin meeting that they will exchange ideas and best practices with regard to their policies concerning executive remuneration. These current policies were discussed in detail during the same meeting. While a European directive concerning executive remuneration is not to be expected in the near future,

member states may well choose to align certain aspects of their policies in this respect. In the meantime, this report provides an overview of the current policies of certain member states and the United States concerning executive remuneration.

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Amsterdam, July 2008
NautaDutilh N.V.

3. Schematic overview per jurisdiction

a. Disclosure of remuneration			
	NL	**DE**	**FR**
Statutory disclosure requirements: **(i) in general** **(ii) in connection with price-sensitive information** **(iii) in connection with public offers** **(iv) with regard to remuneration policy**	**(i)** detailed disclosure of **remuneration** of **individual board members** in the **annual report** **(ii) immediate** disclosure of **all price-sensitive information** (under circumstances entails board members' compensation in case of resignation or appointment) **(iii)** disclosure in **offer documentation** of **offeror and target board compensation** in connection with offer **(iv)** disclosure of **remuneration policy** (and how this policy was put into effect) in the **annual report**	**(i)** detailed disclosure of remuneration of **the board and individual board members** in the **supplementary notes** to the annual accounts **(ii) immediate** disclosure of **price-sensitive information** (under circumstances entails board members' compensation in case of resignation or appointment) **(iii)** disclosure in the **offer documentation** and in **annual reports** of **board compensation of offeror and target** in connection with offer. Additionally, disclosure of **individual board members' compensation** in the **securities prospectus** issued in connection with a public offer. **(iv)** disclosure of **remuneration policy** in the **annual reports**	**(i)** detailed disclosure of remuneration of the **board and individual board members** in the **annual accounts**, in the ***document référence***, and in the ***internal controls report***. **(ii) N/A** (remuneration of officers and directors is not considered to be price-sensitive information) **(iii)** disclosure in **offer documentation** of **offeror board compensation** (in the offeror's prospectus which includes the *document de référence*) and of **target board compensation** (in the *note en réponse*) which they receive in connection with the offer. **(iv)** disclosure of **remuneration policy** in the ***document référence*** and the ***internal controls report***.
Governance Code disclosure requirements	• **highlights of the remuneration report** as drawn up by the remuneration committee in the annual financial report of the company, including the company's **remuneration policy**. • the **main elements of the contract of a management board member** with the company shall be made public immediately after it is concluded, and shall include the amount of the fixed salary, the structure and amount of the variable remuneration component, any redundancy scheme, pension arrangements and performance criteria. • the **remuneration report** of the supervisory board shall be posted on the company's **website**.	• the annual corporate governance report as drawn up by the boards includes a **remuneration report** which includes the remuneration policy and system, a summary of existing stock option plans or comparable schemes with a long-term incentive and risk character plus their current value, and any additions to the pension accruals or pension funds. • The total remuneration of **each board member** has to be disclosed on an individual basis, providing for a split between such remuneration elements linked to the business performance of the stock corporation and to elements with a long-term incentive	

a. Disclosure of remuneration			
	UK	**USA (Delaware)**	
Statutory disclosure requirements: **(i) in general** **(ii) in connection with price-sensitive information** **(iii) in connection with public offers** **(iv) with regard to remuneration policy**	**(i)** detailed disclosure **of aggregate total remuneration** of the board in the **supplementary notes** to the annual accounts. Additionally, once a year detailed information regarding remuneration of individual board members must be disclosed in a **special remuneration report** **(ii)** a listed company must **notify a regulatory information service** as soon as possible of any inside information which directly concerns the listed company **(iii)** disclosure in **offer documentation** of **offeror and target board compensation** in connection with offer. **(iv)** disclosure of **remuneration policy** (and how this policy was put into effect) in the **special remuneration report** Additional requirement (Listing Rules): detailed disclosure by listed company in the **annual accounts** of the extent to which, and how, it has applied the Combined Code's requirements as to remuneration policy, service contracts and compensation and remuneration committees.	**(i)** Required filing with the **SEC** of copies of virtually **all compensatory plans and agreements** covering their executive officers or directors. Also, proxy statements which are to be filed with the SEC and distributed to shareholders when soliciting shareholder votes must include extensive narrative and tabular disclosure regarding executive and director compensation. **(ii)** The **annual, quarterly and current reports** required under the Exchange Act are required to contain specified types of information, which may often include **price-sensitive information**. However, as a general matter, information not required to be disclosed in Exchange Act reports may be kept confidential by the company. **(iii) Proxy statements** seeking shareholder approval of a merger or sale of the company's assets, and tender offer materials, are required to disclose the interests of the company's executive officers and directors in the transaction, including any compensation payable in connection with or as a result of the transaction. **(iv)** There is **no such disclosure requirement**.	
Governance Code disclosure requirements	• Where a company releases an executive director to serve as a nonexecutive director elsewhere, the **remuneration report** should include a statement as to whether or not the director will retain such earnings and, if so, what the remuneration is.	• There are **no such disclosure requirements**.	

b. Shareholder measures regarding board remuneration (in general)			
	NL	**DE**	**FR**
Measures available to shareholders	• Initiate **inquiry proceedings** for mismanagement • **Nullification** of the **shareholder resolution** which adopted the remuneration policy. • **Nullification** of the **supervisory board's resolution** by which a remuneration for an individual board member is fixed (if it is contrary to the company's remuneration policy or to the general principles of reasonableness and fairness). • **Appoint a special representative** in case of a conflict of interest between the board and the company. • Hold board members **liable for damages** to the company in extreme cases (for instance in case of fraud) • Initiate **annual report revision proceedings** before the Enterprise Chamber if the remuneration of the board has not been adequately disclosed in the annual reports. • Request for a court order in **summary proceedings** obliging the board to **disclose certain information regarding remuneration** if the board does not comply with the mandatory disclosure requirements to the general meeting of shareholders • **Withhold discharge** of the board at the annual general meeting of shareholders. • **Vote against** the adoption of the **remuneration policy** as proposed by the supervisory board during the general meeting of shareholders. • **Add items to the agenda** of the general meeting of shareholders, by which a motion regarding the overall remuneration policy or an individual board member's remuneration may be put to a shareholder vote.	• Initiate **special investigation proceedings** (*Sonderprüfung*) by resolving on the appointment of a special investigator in their meeting. • Resolve that the stock corporation shall raise a **compensation claim** against the members of the management or supervisory board in case of an (alleged) inappropriate determination of remuneration. Also appoint **a special representative** (*besonderer Vertreter*) to enforce the stock corporation's compensation claim. • Initiate **criminal proceedings** against the members of the management board and/or supervisory board based on alleged fraudulent breach of trust (*Untreue*). • **Deny discharge** to the members of the management board and/or supervisory board for their services in the past fiscal year.	• **Render severance payments null and void** if specific remuneration of a CEO or chairman is not conditioned upon performance, or if performance is not met but such remuneration is granted, or if the board decision that verifies that the performance conditions have been met has not been published as statutorily required**.** • Initiate **criminal proceedings** on grounds of misuse of corporate property (*Abus de biens sociaux*). The remedy available to the company can be initiated either by the shareholders, acting in the name of the company, or by the company itself • **Hold liable directors** who take advantage of their position in the company or of their equity participation so as to be granted an unreasonable remuneration for **mismanagement**, either individually or collectively with the board of directors. • Shareholders holding individually or collectively no less than 5% of the share capital can **use proceedings of special urgency** in order to ask for the appointment of an **expert** which will have to establish a report on a specific management decision. • "Any interested person", including shareholders, can issue an **order at court** to force the company to **finish and/or publish the annual report.**

b. Shareholder measures regarding board remuneration (in general)			
	UK	**US (Delaware)**	
Measures available to shareholders	• Shareholders **vote** on the **remuneration report** each year and can send a clear message to the company by voting against the resolution to approve the report. • If a shareholder believes that a director has put his own interests above those of the company, he is entitled to bring a **derivative action** on behalf of the company. • Shareholders have the ability to **remove directors** and to **change a company's articles** (for example, so that shareholders are involved in determining remuneration). • **Circulating a member's statement** or proposing a **member's resolution.**	• **Shareholder approval** is generally required for equity compensation plans and agreements. • Shareholders may submit **shareholder proposals** recommending or requiring that the company take specified action. • Shareholders may challenge executive compensation by bringing a **lawsuit** against the company and/or its officers and directors on grounds of compensation paid in **breach of the directors' fiduciary duties**, or on grounds of a **waste of corporate assets** with regard to the excessive nature of such compensation.	

b. Employee measures regarding board remuneration (in general)			
	NL	**DE**	**FR**
Measures available to employees, unions and works council	• Initiate **inquiry proceedings** against the company (**labour unions**). • The **works council** can request the subdistrict court (kantonrechter) to order the board to **comply** with any provision from the **Works Council Act**, including article 31d, which concerns the requirement of the board to disclose information to the works council about the level and structure of remuneration for management board members, as well as the company's remuneration policy and the total remuneration granted to the supervisory board. • Initiate **annual report revision proceedings** before the Enterprise Chamber if the remuneration of the board has not been adequately disclosed in the annual reports. • In principle, an individual employee, a works council, or a labour union could bring suit against a corporation seeking the **nullification of a resolution** of one of the corporation's bodies (however, not very likely because the 'reasonable interest' threshold will be quite difficult to satisfy)	• Individual employees, works councils and labour unions as such are **not entitled to any judicial or non-judicial remedies** to challenge the remuneration of members of the management board of stock corporations. In a co-determined German stock corporation, employees elect, however, a certain number of the members of the supervisory board. As employee representatives, these members of the supervisory board are regularly involved in the decision on the appointment and remuneration of the members of the management board of a co-determined stock corporation.	• Any "interested person" can issue an **order at court** to force the company to **complete and/or publish the annual report**. It is yet unclear if this term also comprises employees and/or a Works Council. • Works Councils can use the **proceedings of special urgency** in order to ask for the appointment of an expert which will establish a report on a specific management decision, such as the decision to grant the directors' remuneration.

b. Employee measures regarding board remuneration (in general)			
	UK	**US (Delaware)**	
Measures available to employees, unions and works council	• Employees **do not have any specific remedies**.	• Employees **do not have any specific remedies**.	

c. Shareholder and employee measures regarding board remuneration in a merger or take-over situation			
	NL	**DE**	**FR**
Measures available to shareholders	• Initiate **inquiry proceedings** for mismanagement. • **Vote against** a proposed **merger or takeover**. • **Appoint a special representative** by the general meeting of shareholders if the shareholders feel the board in view of its remuneration in connection with a merger or take-over has a conflict of interest with the company.	• **See available remedies under 2(b)**	• **Vote against** a proposed **merger or takeover**.
Measures available to employees, unions and works council	• A **labour union** could initiate **inquiry proceedings** against the corporation. • The **works council** may **appeal a decision of the board** (by which advice given by the works council is disregarded) before the Enterprise Chamber of the Amsterdam Court of Appeal.	• There are **no such remedies**.	• There are **no such remedies**.

c. Shareholder and employee measures regarding board remuneration in a merger or take-over situation			
	UK	**US (Delaware)**	
Measures available to shareholders	• **Vote against** a proposed **merger or takeover** • A shareholder who suspects that a director is acting or has acted in his own interests can bring a **derivative claim** on behalf of the company • Shareholders can **petition the court for an order** on the ground that the company's affairs are being or have been conducted in a manner that is **unfairly prejudicial** to the interests of the members generally or some part of its members • **Removal of a director** before the expiration of his period of office by a simple majority vote of the company's shareholders	• **Vote against** a proposed **merger or takeover** • Shareholders of the acquiring company are generally also required to **approve** the transaction if the company will issue **more than 20% of its outstanding stock** in the transaction. • Shareholders may challenge executive compensation by bringing a **lawsuit** against the company and/or its officers and directors on grounds of compensation paid in **breach of the directors' fiduciary duties**, or on grounds of a **waste of corporate assets** with regard to the excessive nature of such compensation.	
Measures available to employees, unions and works council	• Employees do **not have any specific remedies**.	• Employees do **not have any specific remedies**.	

II. THE NETHERLANDS

1. Executive summary

1.1. Determination of executive remuneration within Dutch listed companies

a. General rule: the body within the company that has the power to appoint and dismiss a member of the board also has the power to determine the executive remuneration. Normally this is the general meeting of shareholders. In large public companies subject to all provisions of the statutory "structure regime", this is the supervisory board.

b. Application in practice: in Dutch listed companies, the abovementioned general rule is typically modified in the articles of association in the sense that the power of the general meeting of shareholders to determine the executive remuneration is delegated to the supervisory board.

   i. Remuneration of individual management board members: usually determined by the supervisory board within the framework of the remuneration policy determined by the shareholders. Shareholder approval by law only required for individual remuneration in the form of shares and options.
   ii. Remuneration of supervisory board members: commonly proposed by the supervisory board, submitted to the general meeting of shareholders for approval.

c. Remuneration policy: determined by the general meeting of shareholders upon a proposal by the supervisory board, prepared by the remuneration committee.

1.2. Disclosures of executive remuneration within Dutch listed companies

a. Disclosure in annual reports:

   i. Individual board members' remuneration, such as annual salary, pension, and severance pay;
   ii. Profit and bonus payments;
   iii. Remuneration in the form of shares or options;
   iv. Loans, advance payments and warranties.

b. Disclosure to works council:

   i. The company's remuneration policy has to be presented to the works council at the same time as it is presented to the general meeting of shareholders.
   ii. In addition, the level and structure of employment related schemes and arrangements with board members, including remuneration policy and total remuneration granted to the supervisory board needs to be disclosed to the works council at least once a year.

c. Disclosure in public offer documentation:

i. The compensation of each individual board member of the target company who will resign if the offer is declared unconditional, and, in the event the target company recommends the offer, the compensation of each individual board member of the target payable in connection with the offer being declared unconditional;
ii. The compensation of each individual board member of the offeror payable in connection with the offer being declared unconditional.

Additionally, in case the consideration of the public offer is in shares (in whole or in part):

iii. the compensation for each individual member of the boards of the company, not being the target or offeror, the shares of which are offered in exchange, who will resign if the offer is declared unconditional;
iv. the compensation for each individual member of the board of the company, not being the target or offeror, the shares of which are offered in exchange, payable in connection with the offer being declared unconditional.

1.3. Remedies and measures available in case of remuneration disputes

a. Judicial measures

Measures available to shareholders:

i. Initiate inquiry proceedings with the Enterprise Chamber for mismanagement, possibly in combination with a request for immediate measures e.g. to preserve the status quo. Applicants would have to allege either that the remuneration paid to the board is contrary to the general principles of reasonableness and fairness, or that the executive remuneration is part of a general pattern of mismanagement;
ii. Nullification of the shareholder resolution which adopted the remuneration policy. In this case, a shareholder would for instance have to allege that the majority in the general meeting of shareholders has abused its power to pass a remuneration policy resolution which is contrary to the general principles of reasonableness and fairness, or that the remuneration policy was adopted based on false or misleading information;
iii. Nullification of the supervisory board's resolution by which a remuneration for an individual board member is fixed which is contrary to the company's overall remuneration policy or otherwise contrary to the general principles of reasonableness and fairness;
iv. Appoint a special representative to represent the company by the general meeting of shareholders. The general meeting of shareholder may resolve to appoint a special representative if the shareholders feel that the board has a conflict of interest with the company. Such an appointment is effectuated

through a resolution by the general meeting of shareholders. In such a case, the board in view of the conflict of interest is no longer authorised to represent the company.

v. In extreme cases, board members may be held liable for damages to the company, for instance in case of fraud. This action, however, can in principle only be brought by the company itself. Shareholders may request the board to bring suit against a current or former board member, but the board is generally not under an obligation to honour this request;

vi. Initiate annual report revision proceedings before the Enterprise Chamber if the remuneration of the board has not been adequately disclosed in the annual reports. These proceedings, however, only amount to a revision of the annual accounts in accordance with the disclosure requirements, not to an actual redress for the excessive remuneration. This action can be brought by plaintiffs who have an interest in the revision of the annual report;

vii. Request for a court order in summary proceedings obliging the board to disclose certain information regarding remuneration if the board does not comply with the mandatory disclosure requirements to the general meeting of shareholders;

Measures available to employees:

i. Initiate inquiry proceedings against the company by labour unions. See above under 1.3a(i);

ii. The works council has the right to advise on the merits of a merger or takeover and could object on account of excessive remuneration and/or conflicts of interest of the board. If the board chooses to disregard the advice, the works council may subsequently appeal this decision at the Enterprise Chamber of the Amsterdam Court of Appeals. The court, however, only performs a marginal test;

iii. The works council could seek a court order forcing the board to disclose certain information regarding remuneration if the board does not comply with the mandatory disclosure requirements to the works council. Before the works council may bring suit, however, the dispute has to be brought before a mediation committee within the company;

iv. Initiate annual report revision proceedings before the Enterprise Chamber if the remuneration of the board has not been adequately disclosed in the annual reports. See above under 1.3a(v).

b. <u>Non-judicial measures</u>

Measures available to shareholders:

i. Withhold discharge of the board at the annual general meeting of shareholders;

ii. Vote against the adoption of the remuneration policy as proposed by the supervisory board during the general meeting of shareholders;

iii. Add proposals to the agenda of the general meeting of shareholders, by which a motion regarding the remuneration policy or an individual board member's remuneration may be put to a shareholder vote, albeit that the latter will not be binding on the company if adopted.

Measures available to employees:

i. Exert pressure on the board regarding executive remuneration by labour unions during negotiations regarding collective labour agreements (*CAO onderhandelingen)*;
ii. Other means available such as initiating a strike in extreme cases.

1.4. Use of judicial measures in practice:

a. Inquiry proceedings: commonly the legal remedy in the context of pending mergers and acquisitions. Used by shareholders as well as employee representatives (labour unions). Courts, however, are reluctant to interfere in remuneration matters once it is established that the corporate procedure for determining the board's remuneration has been complied with.

b. Nullification of resolutions: does not appear to be used frequently, possibly due to the cumbersome nature of the proceedings and the fact that claimants have more effective means at their disposal, such as the inquiry proceedings. This measure, however, serves as an important preventive measure ensuring compliance with statutory requirements and requirements pursuant to the company's articles.

c. Directors' liability: given the high onus for holding a board member liable for damages, this action will only be successful in extreme circumstances. Also, shareholders or employees cannot bring this action on behalf of the company, but instead can only make a demand upon the company itself to bring suit. As to remuneration disputes, no significant cases have been reported in Dutch case law in which this action was used. In practice, however, disputes between the company and its directors over remuneration issues may also be adjudicated in arbitration proceedings, such as in the *Ahold* case.

d. Appointment of a special representative in case of a conflict of interest: in theory, this would be a means for shareholders to den a board member the power to represent the company in case of a merger or takeover if the shareholders feel the board member has a conflict of interest with the company in view of his remuneration in connection with the transaction. In practice, however, this means has not been applied within large public companies to date.

e. Works council advice: not a judicial remedy in the strict sense as it generally does not provide judicial scrutiny of remuneration issues, except in cases where the board disregards the works council's advice and this decision is subsequently appealed at the Enterprise Chamber. Such an appeal is not launched frequently. The mandatory

advice, however, enables the works council to question the board on the potential merits of executive remuneration on a proposed merger or takeover.

f. Court order to enforce disclosure requirements: since listed companies generally comply with both the statutory disclosure requirements as well as the corporate governance code based disclosure requirements, actions for court orders to enforce these requirements are rarely brought.

g. Annual report revision proceedings: these proceedings are rarely initiated. Also, these proceedings in practice cannot constitute a direct challenge on the board's remuneration, but can only amount to a correction of statements in the annual report regarding executive remuneration.

h. Exert pressure in collective labour agreement negotiations: not a judicial remedy, but mostly a negotiating tool which may be employed by labour unions in order to obtain a raise in employees' salaries.

2. Introduction

Dutch company law is largely codified in Book 2 of the Dutch Civil Code ("DCC"). The statutory provisions of the Dutch Civil Code and of the other Acts as mentioned below apply to both listed and non-listed NV's (public companies).

The Decree concerning Public Offers and the Dutch Corporate Governance Code (the "Code") only applies to listed NV's. For non-listed NV's, application of the Code is optional. The Code is meant to have a supplementary effect on the statutory provisions concerning corporate governance, including remuneration. The Code has a statutory basis through article 2:392 section 5 of the DCC. The Code requires companies to either comply with the best practice provisions of the Code or to explain why they deviate from these best practice provisions.

3. Determining executive remuneration and its level and structure

3.1. Company Law requirements for determining executive remuneration

According to the statutory provisions of company law, the general meeting of shareholders is required to adopt the remuneration policy with regard to the management board.[3] The general meeting of shareholders is also entitled to determine the remuneration of the management board (based on the remuneration policy), unless this power has been granted to another body of the company by the articles of association.[4] In respect of listed companies, it is common that the supervisory board is authorised in the articles of association to determine the remuneration of individual members of the management board, based on the policy as adopted by the general meeting of shareholders.

Remuneration of the management board in the form of shares or options to acquire shares always requires the approval of the general meeting of shareholders. For this purpose, a proposal including the maximum number of shares or options to acquire shares to be granted to the management board and the criteria for granting and changing the number of shares should be provided to the general meeting for approval.[5]

3.2. Governance Code requirements for determining remuneration

More explicitly than the relevant statutory provisions, the Code details the role of the supervisory board with regard to establishing remuneration and remuneration policy, with a monitoring role of the general meeting of shareholders.

A summary of the principles and best practice provisions with regard to determining the remuneration of the board of directors as found in the Code is stated below:

- Every supervisory board with more than four members is required to install a special remuneration committee (consisting of supervisory board members).[6]

[3] Article 2:135 section 1 DCC
[4] Article 2:135 section 4 DCC
[5] Article 2:135 section 4 DCC
[6] Principle III.5 Code

- This committee is required to draw up a remuneration report. This report will be summarized in a general report of the supervisory board, to be adopted in the annual accounts.[7]
- The supervisory board shall determine the remuneration of the individual members of the management board, on a proposal by the remuneration committee, within the scope of the remuneration policy adopted by the general meeting of shareholders.[8]
- If a management board member or former management board member is awarded special remuneration during a given financial year, an explanation in this respect shall be included in the remuneration report.[9] The remuneration report shall in any event account for and explain of severance pay paid or promised in the year under review to a management board member.[10]
- The remuneration report of the supervisory board shall outline how the remuneration policy has been implemented in the past financial year. It shall also contain an overview of the contemplated remuneration policy planned by the supervisory board for the next financial year and subsequent years.[11]
- The remuneration policy proposed for the next financial year and subsequent years as specified in the remuneration report shall be submitted to the general meeting of shareholders for adoption. Every material change in the remuneration policy shall also be submitted to the general meeting of shareholders for adoption.[12]
- Schemes whereby management board members are remunerated in the form of shares or rights to subscribe for shares, and major changes to such schemes, also shall be submitted to the general meeting of shareholders for approval.[13]

3.3. Works council

Statutory company law requires that the company's remuneration policy is presented to the works council at the same time as it is presented to the general meeting of shareholders[14].

According to the *Wet op de Ondernemingsraden* ("WOR", the Dutch Works Council Act), at least once a year, a company representative (usually someone from the management board) is required to provide the works council (if applicable) with written information about the level and structure of the employment related schemes and arrangements for management board members, as well as the company's remuneration policy and the total remuneration granted to the supervisory board.[15]

In addition, at each other's request, the works council and a company representative are required to discuss issues deemed relevant by either party, which could include the schemes and arrangements as mentioned above. In these meetings with the company representatives, the works council has the possibility to advise upon and criticize the schemes, arrangements and policy.[16] However, the works council does not have the authority to amend or block them.

[7] Principle II.2 Code
[8] Principle II.2 Code
[9] Best Practice II.2.12
[10] Best Practice II.2.13
[11] Best Practice II.2.9
[12] Principle II.2 Code
[13] Principle II.2 Code
[14] Article 2:135 section 2 DCC
[15] Article 31d WOR
[16] Article 23 WOR

Furthermore, this is not a formal right to advise in the sense of article 25 of the WOR, which means that the company representative does not have an active duty to provide the works council with an opportunity to advise on the matter.

Recently, a proposal for a bill was designed by the Ministery of Justice which gives the works council the authority to advise upon all changes in remuneration policy and to present this advice to the general meeting of shareholders. According to the draft bill, such advice by the works council is to be sent to the shareholders before the general meeting, along with the related proposal of the board to amend the remuneration policy. The works council would subsequently have the opportunity to further explain its advice in the general meeting. The proposed bill has not yet been introduced in parliament but has been published on the website of the Ministery of Justice.[17] At this moment it is still unclear if or when the proposed bill will become effective.

3.4. Code requirements for the level and structure of remuneration

The Code contains principles and best practice provisions about the level and structure of remuneration of board members. A summary of the principles and best practice provisions with regard to the level or structure of remuneration of the board of directors as found in the Code is stated below:

- If the remuneration of a management board member contains a variable element, this shall be linked to previously-determined, measurable and influenceable targets, which must be achieved partly in the short term and partly in the long term.[18]
- The remuneration structure, including severance pay, is such that it promotes the interests of the company in the medium and long term and does not encourage management board members to act in their own interests.[19]
- The level and structure of remuneration shall be determined in the light of, among other things, the results, the share price performance and other developments relevant to the company.[20]
- Options to acquire shares should form a conditional remuneration component, to become unconditional only when the management board members have fulfilled predetermined performance criteria after a period of at least three years from the date the options were granted.[21]
- If the company grants unconditional options to management board members, it shall apply performance criteria when doing so. In any event, the options should not be exercised in the first three years after they have been granted[22].
- Shares granted to management board members without financial consideration shall be retained for a period of at least five years or until at least the end of the employment, if this period is shorter[23].
- The standard maximum remuneration in the event of dismissal is one year's salary (the

[17] 'Adviesrecht OR wetsvoorstel', 18 December 2007. See http://www.minjus.nl/images/wetsvoorstel%20standpunt%20OR_tcm34-95412.pdf
[18] Principle II.2 Code
[19] Principle II.2 Code
[20] Principle II.2 Code
[21] Best Practice II.2.1
[22] Best Practice II.2.2
[23] Best Practice II.2.3

'fixed' remuneration component). If the maximum of one year's salary would be manifestly unreasonable for a management board member who is dismissed during his first term of office, such board member shall be eligible for a severance pay not exceeding twice the annual salary[24].

- The company shall not grant its management board members any personal loans, guarantees or the like save in the normal course of business and on terms applicable to the personnel as a whole, and after approval of the supervisory board[25].

4. Disclosure of Remuneration

Question I: At which moments in time (for instance: at the time of publication of the annual report, entering into an agreement, exercise of options, fulfilment of certain conditions) and in what form are individual remunerations or components of individual remunerations of board members required to be made public?

4.1. Company Law disclosure requirements

DCC

Statutory provisions of company law determine that listed companies are required to provide detailed information in the supplementary notes to the annual accounts about the following remuneration components with regard to all supervisory and management board members:[26]

- remuneration in the form of salary;
- remuneration in the form of pensions;
- remuneration in the form of severance pay;
- participation in profits and bonus payments;
- remuneration in the form of shares or options to acquire shares (including the exercise price);
- loans, advance payments and warranties.

In addition, all listed companies are required to provide detailed information in their annual reports about the company's remuneration policy and how this policy is put into effect during the relevant year.[27]

Financial Supervision Act (Wet financieel toezicht)

Pursuant to the Financial Supervision Act, within two weeks of his appointment, a board member of a listed company is required to report to the Dutch Financial Markets Authority (*AFM*) the shares and voting rights he holds in that company or in any other listed company.[28] Board members also have to report their holdings of shares and voting rights in companies which become listed during the period that they hold such shares and/or voting rights.[29] Furthermore,

[24] Best Practice II.2.7
[25] Best Practice II.2.8
[26] Article 2:383c-e DCC
[27] Article 2:391 section 2 DCC
[28] Article 5:48 section 3 Wft
[29] Article 5:48 section 4 and 5 Wft

board members are required to report every change in the amount of shares and voting rights in listed companies that they hold.[30]

4.2. Special statutory disclosure requirements in connection with price-sensitive information

Pursuant to implementation of the Market Abuse Directive (2003/6/EC), the Financial Supervision Act requires all listed companies to publicly disclose price-sensitive information relating to such company immediately.[31] Price-sensitive information is defined as information which is 'concrete' and which directly relates to a listed company or to the trade in securities of a listed company, which has not yet been disclosed and of which disclosure could have a significant influence on the price of the company's securities or its derivative financial instruments.[32] This information is required to be disclosed on the company's website.[33]

Under circumstances, for instance in light of the extensive size of the severance payment of a board member, the decision by which large compensation is granted to management board members or amended could constitute price-sensitive information which is required to be publicly disclosed pursuant to the aforementioned provisions.

4.3. Special statutory disclosure requirements in connection with public offers

The *Public Offers Decree* (*Besluit openbare biedingen*), which came into effect on 28 October 2007, contains several requirements with regard to disclosure of executive remuneration in the offer documentation which is published in connection with a public offer.

All offer documents in connection with public offers are required to contain information (if applicable) about:[34]

- the compensation for each individual member of the management and supervisory boards of the *target company* that will resign if the offer is declared unconditional; and
- the compensation for each individual member of the management and supervisory boards of the *offeror* which he will receive in connection with the offer being declared unconditional.

If the target company recommends the offer, the offer document is also required to contain the compensation for each individual member of the management and supervisory boards of the target company which they receive in connection with the offer being declared unconditional.

Additionally, all public offers which contain an element of consideration in shares, are required to contain information (if applicable) about:[35]

- the compensation of each individual member of the management and supervisory boards of the company of which shares are offered in exchange, not being the target or offeror, that will step down if the offer is declared unconditional;

[30] Article 5:48 section 6 and 7 Wft
[31] Article 5:59 section 1 Wft.
[32] Article 5:53 section 1 Wft
[33] Article 5:59 section 2 Wft
[34] Annex A to the Decree concerning Public Offers, par. 2.8 and 2.9
[35] Annex F to the Decree concerning Public Offers, article 5 and 6.

- the compensation which each individual member of the management and supervisory boards of the company of which shares are offered in exchange, not being the target or offeror, will receive in connection with the offer being declared unconditional.

Additionally, pursuant to the Public Offer Decree, an offeror who does not have any securities listed on a Dutch financial market is nevertheless required to publicly disclose price-sensitive information relating to the listed target company. Such information will have to be disclosed in accordance with the relevant provisions of the Financial Supervision Act (*Wft*, see also 4.2).[36]

4.4. Governance Code disclosure requirements

In addition to the statutory requirements of company law, the Code contains the following principles and best practice provisions about the disclosure of remuneration of board members and remuneration policy (in short):

- the annual financial report of the company shall include a report by the supervisory board in which the supervisory board describes its activities in the financial year and which includes the highlights of the remuneration report by the remuneration committee, including the company's remuneration policy[37].
- the main elements of the contract of a management board member with the company shall be made public immediately after it is concluded. These elements shall in any event include the amount of the fixed salary, the structure and amount of the variable remuneration component, any redundancy scheme, pension arrangements and performance criteria.[38]
- the remuneration report of the supervisory board shall, in any event, be posted on the company's website[39].

4.5. Recommendations by the Code Monitoring Commission concerning executive remuneration

In the 2007 report[40] by the Monitoring Commission Corporate Governance Code ("Monitoring Commission") concerning compliance by companies with regard to the Code, the Monitoring Commission makes the following non-binding recommendations with regard to change of control clauses in contracts with management board members:

- the conditions for change of control clauses in contracts with management board members and for other prospective payments to management board members (whether in the form of securities or otherwise) should be disclosed immediately. Such information should also be provided in the event of a resolution or motion of the management board in respect of a takeover or other important change in the nature of the company which is presented to the general meeting of shareholders and may result in the applicability of the compensation clause.

[36] Article 5:59 section 1 Wft
[37] Best Practice II.1.2
[38] Best Practice II.2.11
[39] Best Practice II.2.13
[40] See http://www.commissiecorporategovernance.nl/page/downloads/MC_Nalevingsrapport_2007_.pdf

- compensation for a change of control, whether or not granted pursuant to a board member's employment contract, should be based on a relevant scheme included in the remuneration policy of the company.
- if a motion which adoption results in a change-of-control clause becoming applicable is submitted by the management board to the general meeting for approval, the specific consequences of the application of the clause - should the motion be adopted - must be stated in the explanatory notes thereto.

In the recently released evaluation report by the Monitoring Commission (June 2008)[41], the above recommendations regarding change of control were reaffirmed. In addition, the Monitoring Commission issued a number of recommendations for substantive amendments to the Code provisions regarding executive remuneration. These recommendations include the following:

- with regard to disclosure of executive remuneration, the Monitoring Commission proposes to include more detailed rules in the Code regarding the content and structure of the remuneration report as well as the content of the supervisory board's report regarding remuneration issues.
- the Code provisions concerning severance pay (i.e. the maximum amount receivable) are to be amended as such that the scope of these provisions should cover all cases of board members' redundancy instead of just cases of involuntary dismissal.
- the inclusion of the following 'claw back' provision in the Code containing an ultimate remedy: if a variable remuneration component (shares, options or a bonus) conditionally awarded in a previous financial year would, in the opinion of the supervisory board, produce an unfair result on account of incorrect financial data or special circumstances in the period in which the predetermined performance criteria have been or should have been achieved, the supervisory board may adjust the value downwards or upwards. This power of the supervisory board should in any event be included in new remuneration contracts with management board members.

5. Available measures

Question II: Which measures are available to individual shareholders and the general meeting of shareholders, and to individual employees, works councils and labour unions in the following situations:

a) they disagree with the composition or level of the individual remuneration of a board member or with the remuneration policy, for instance before or after the remuneration is established, granted and/or paid;

5.1. Measures available to shareholders outside of merger, acquisition or take-over situations

5.1.1. Judicial measures available to shareholders

Inquiry proceedings

[41] See http://www.commissiecorporategovernance.nl/page/downloads/MC_rapport_juni_2008_DEF.pdf

A shareholder or a group of shareholders holding at least 10% of the company's outstanding share capital or shares to an amount of EUR 225,000 in nominal value may initiate inquiry proceedings against the company.[42] In these proceedings, which are brought before the specialised Enterprise Chamber of the Amsterdam Court of Appeals, the court can order an independent investigation into the company's dealings upon request of the shareholders if it holds that there are substantial reasons to question the company's policy. If the results of the investigation show mismanagement, the court may then upon request order a number of measures,[43] such as nullification of board resolutions or suspension of individual board members. At any stage during the proceedings, however, the court may also upon request order immediate measures,[44] such as enjoining the company from undertaking certain actions for the duration of the proceedings. In practice, these immediate measures have proven to be an effective means to force the relevant company to alter its course.

As will be set out in more detail below (see 5.1.1), inquiry proceedings have been used on multiple occasions by shareholders who were dissatisfied with the board's remuneration. In these cases, however, remuneration issues were mostly brought up as additional circumstances to more general mismanagement allegations. The inquiry proceedings can nonetheless provide a forum for judicial scrutiny of a company's remuneration policy.

Nullification of resolutions

A resolution adopted by a body of the company is void if the resolution is in conflict with a statutory provision or a provision in the company's articles of association[45]. This situation may arise, for instance, when the body did not have the power to pass that specific resolution, or when the body did not obtain prior approval of another body if such a prior approval is required either by statute or by the company's articles. A void resolution does not have any legal effect, and any person could seek a court declaration in which the nullity of the resolution is determined.

In addition, any person with a "reasonable interest" may seek the nullification of a resolution by challenging the resolution in court.[46] This action may be brought if the proper procedure for the adoption of the resolution has not been observed, if the resolution is in conflict with an internal regulations of the company, or if the resolution is contrary to the general principles of reasonableness and fairness. The company itself may also initiate these proceedings. A cause of action for nullification must be brought within a period of one year after the resolution has been sufficiently made known.

With regard to remuneration disputes, a number of situations may arise in which a resolution concerning remuneration could qualify as null and void. First, in case the supervisory board would adopt a resolution by which a individual board member is granted a remuneration package that is not in accordance with the overall remuneration policy as set by the general

[42] Article 2:345 DCC
[43] Article 2:356 DCC
[44] Article 2:349a sub d section 2 DCC
[45] Article 2:14 DCC.
[46] Article 2:15 DCC.

meeting of shareholders, a shareholder or a group of shareholders could challenge this resolution, since the power of the general meeting of shareholders to set the remuneration policy has been encroached on.[47] Second, shareholders could invoke the nullity of a remuneration resolution in case the board resolves to fix its own remuneration and the power to pass such resolutions has not been assigned to the board by the articles. [48]

Actions for nullification of a resolution regarding remuneration issues could be brought under certain circumstances. A shareholder or a group of shareholders could allege that a supervisory board resolution which grants an excessive remuneration package to an individual board member, even though not in conflict with the overall remuneration policy, is contrary to the general principles of reasonableness and fairness due to, for instance, certain detrimental developments in the company's business. Also, at least in theory, a shareholder could challenge the resolution of the general meeting of shareholders by which the overall remuneration policy has been set when, for instance, this resolution was passed based upon incomplete information. A shareholder, however, does not automatically have standing to bring a cause of action for nullification under all circumstances[49]. Instead he has to demonstrate that he has a reasonable interest in the nullification of the specific resolution. As a general rule, a shareholder lacks a reasonable interest if the nullification of the resolution would not lead to the shareholder's overall desired result.[50]

Annual report revision proceedings

Any person who has a reasonable interest - including a shareholder - can file a petition with the Enterprise Chamber of the Amsterdam Court of Appeals for a court order to correct a company's annual report if the annual report has not been drawn up in accordance with the applicable statutory provisions.[51] If the Enterprise Chamber rules accordingly, the company has to correct and/or amend its annual report in accordance with instructions given by the Enterprise Chamber in the verdict. Annual report revision proceedings do not directly offer redress for excessive remuneration or remuneration-driven mergers and acquisitions, but could lead to a correction of statements made in the annual report regarding remuneration. However, an annual report revision proceeding could serve a "naming and shaming" purpose if the board has acted contrary to its statements in the annual report on remuneration matters.

Liability of management board members vis-à-vis the company and individual shareholders

In Dutch companies, members of the management board have an obligation toward the company to properly discharge their tasks and duties.[52] If a member of the management board breaches this obligation, he may be held liable for the resulting damages. This provision also applies to members of the supervisory board. A court will only hold a board member liable if it finds that a "serious reproach" (*ernstig verwijt*) of improper discharge of tasks and duties can be made to the board member.[53] Apart from the specific cause of action regarding director's liability,

[47] See "Groene Serie Privaatrecht: Rechtspersonen", digital edition Kluwer 2004, Article 2:135 DCC, note 2 (J. Huizink).
[48] Dutch Supreme Court judgment of September 15, 1995, NJ 1996, 139 (Kuijpers)
[49] "Groene Serie Privaatrecht: Rechtspersonen", digital edition Kluwer 2003, Article 2:15 DCC, note 7 (J. Huizink).
[50] Dutch Supreme Court judgment of May 19, 1989, NJ 1989, 652 (Lucas-Academie).
[51] Article 2:447 and 2:448 DCC
[52] Article 2:9 DCC
[53] Dutch Supreme Court judgment of January 10, 1997, NJ 1997, 360 (Staleman / van der Ven).

a board member could under circumstances also be sued under the general concept of tort (*"onrechtmatige daad"*).[54]

A cause of action based on director liability or unlawful acts in the context of executive remuneration is not easily construed under normal circumstances. Nevertheless it could be envisaged e.g. in cases where board members have misappropriated company funds by awarding themselves excessive remuneration packages, thereby circumventing requirements regarding remuneration from the applicable statutory provisions and/or provisions in the company's articles. A director liability action, however, may in principle only be brought by the company itself, not by individual shareholders, whether acting on their own behalf or on behalf of the company.[55] The general meeting of shareholder could adopt a resolution in which it urges the management board (or the supervisory board if the management board has a conflict of interest) to bring suit on behalf of the company against the director, but such a resolution would be non-binding in nature.

Summary proceedings against the company in case of non-compliance with disclosure requirements

As described above, Dutch companies and their respective boards are subject to a variety of disclosure requirements regarding remuneration issues. In case of non-compliance with statutory disclosure requirements, a shareholder could bring suit against the company through summary proceedings ("*kort geding"*)[56] seeking a court order obliging the company to disclose certain information. Whether a claim aimed at non-compliance with the corporate governance code disclosure requirements would succeed is not entirely clear.

5.1.2. Non-judicial measures available to shareholders

In addition to the measures described above, the shareholders also have a number of powers at their disposal by which they can press the board into disclosing information on remuneration matters.

Withhold discharge to the board

According to Dutch company law, the board is accountable to the shareholders in the sense that the shareholders decide whether or not the board is granted discharge (*"décharge*"), i.e. a release for liabilities arising out of their actions for which they have accounted to the general meeting of shareholders by means of the annual report. The discharge of the board is by statute required to be included as a separate item on the annual general meeting of shareholders and is to be voted on separately. If the shareholders disapprove of the remuneration of individual board members or the board as a whole, they may withhold discharge to the board as a means of putting the board under pressure to alter its course on remuneration issues.

Refuse to approve the remuneration policy

[54] Article 6:162 DCC.
[55] Dutch Supreme Court judgment of December 2, 1994, NJ 1995, 288 (Poot / ABP).
[56] Article 254 et seq. Dutch Civil Procedure Code.

As mentioned above, the general meeting of shareholders has the power to adopt the company's remuneration policy.[57] In most listed companies, the remuneration policy itself is drawn up by the supervisory board's Remuneration Committee and subsequently put to a shareholder vote in the general meeting of shareholders. Shareholders do not have the ability in practice to make amendments to the proposed remuneration policy, but provided that a majority of the shareholders present or represented at the meeting disagree with the proposed policy, the remuneration proposal can be voted down, in which case a new remuneration proposal will have to be drawn up. Shareholders may use this power to voice their disapproval of the board's remuneration.

Recently, the general meeting of shareholders of Philips voted down a proposal concerning the company's remuneration policy, by which the performance conditions attached to the grant of options to the board would have been cancelled. This is the first time a remuneration proposal was voted down by a general meeting of shareholders in the Netherlands. Shortly after, the shareholders of listed company Vastned Retail also voted down a remuneration proposal. Furthermore, a controversial remuneration proposal was recently withdrawn at the last minute by the boards of Corporate Express, as a result of severe criticism by their general meeting of shareholders.[58]

Call for a general meeting of shareholders and add items regarding remuneration issues to the agenda

One or more shareholders who individually or collectively hold more than 10% of the issued stock capital in a company or depositary receipts thereof (or who hold a lesser percentage if so allowed by the articles) can request a court order which calls for a general meeting of shareholders.[59]

Furthermore, a shareholder or group of shareholders holding at least 1% of the outstanding shares or whose shares represent at least EUR 50.000.000 in value may request the board to add certain items to the agenda of the general meeting of shareholders.[60] In principle such items will not amount to binding resolutions when adopted by the general meeting if they concern matters over which the general meeting has no authority. However, in theory shareholders could bring a remuneration policy proposal to a vote, which would result in a binding resolution if adopted, as adopting such policies is a power attributed to the general meeting. In any case, the provision could serve to facilitate discussion on remuneration matters during the shareholder meetings. Also, a shareholder motion calling for a change in the board's remuneration under circumstances may be difficult for the board to ignore, especially in the event of possible future inquiry proceedings brought against the company.

Conflict of interests

[57] Article 2:135 DCC
[58] Source: "Toploon weer onder vuur", article published in 'het Financieele Dagblad' on 31 March 2008. Since then, the topic of executive remuneration has been addressed by shareholders in the general meetings of Shell, Unilever and Fortis.
[59] Article 2:110 section 1 DCC
[60] Article 2:114a DCC

Under certain circumstances, a remuneration arrangement between a member of the management board and the company can lead to a conflict of interest in the sense of article 2:146 DCC. This article provides that in case of any conflict of interest between a public company and one or more of its directors, the company will automatically be represented by the supervisory board.[61] Alternatively, the articles could provide that in certain specific cases of conflict of interest, management board members will still be competent to represent the company. However, according to article 2:146 DCC, the general meeting of shareholders is always authorized to appoint any person(s) to represent the company in case of conflict of interest. Such appointment will overrule the general appointment of the supervisory board or any other appointment of company representatives as provided for by the articles of association. According to relevant case law, the board is under an active duty to inform the general meeting of the existence of a conflict of interest as early as possible, but in any case timely enough to enable the general meeting to exercise its power of appointing a company representative.[62]

Article 2:146 DCC only applies to the situation where the event which causes the conflict of interest has already taken place or the conflict otherwise already exists. It does not aim to prevent conflicts of interests. However, if board members have not adequately prevented a conflict of interest taking place, shareholders will under certain circumstances have the option of starting inquiry proceedings on the basis of mismanagement (see 5.1.1).[63]

In 2007, the Supreme Court ruled in the *Bruil* decision[64] that article 2:146 can only be successfully invoked in order to attack a legal act by an 'interested' director if a personal interest of that director was contrary to an interest of the company because of clear and sufficiently supported circumstances, which likely had such an influence on the decision making process of the director, that the director should have deemed himself not capable of representing the company's interests with the necessary integrity and objectivity, and that he therefore should have abstained from the legal act in question. With this decision, the Supreme Court has given article 2:146 a more strict interpretation.

Additionally, the Code contains several detailed provisions on decision-making of management board members in case of a conflict of interest. If these provisions are not adhered to, board decisions which caused the conflict of interest can be nullified by shareholders under certain circumstances (see 5.1.1).

As mentioned above, the general meeting of shareholders may at all times appoint a special representative to represent the company in case of a conflict of interest between one or more board members or the entire board on the one hand, and the company on the other. Such an appointment is effectuated through a resolution to that end by the general meeting of shareholders. In theory, this would provide shareholders with a means to deny board members who they feel have a conflict of interest in view of their remuneration arrangements the power to represent the company in case of a pending merger or takeover. In practice, however, resolutions to appoint a special representative within large public companies are rarely proposed, let alone adopted. The requirement of a resolution of the general meeting of

[61] Article 2:146 DCC
[62] Supreme Court of the Netherlands, 3 May 2002, NJ 2002/393 (Brandao/Jorall)
[63] See Enterprise Chamber of the Amsterdam Court of Appeals, 3 December 1987, NV 1988, pg. 78 (Ogem)
[64] Supreme Court of the Netherlands, 29 June 2007, NJ 2007/420 (Bruil)

shareholders obviously poses a high threshold, and getting the resolution adopted would mean convincing a majority of the shareholders that the implicated board members indeed have a conflict of interest which would disqualify them from representing the company and acting in the company's best interests.

Other non-judicial measures

Depending on the size and structure of the company, the members of the management board are appointed either by the supervisory board or by the general meeting of shareholders, in which case the articles can provide that this appointment is made pursuant to a binding recommendation of the supervisory board. Members of the supervisory board are generally appointed by the general meeting of shareholders based on a non-binding recommendation of the board. The articles usually provide for a high shareholder voting threshold to dismiss members of the management board or supervisory board. In companies which are subject to the statutory "structure regime" for large companies, however, the general meeting of shareholders may adopt a resolution of no confidence directed at the entire supervisory board by simple majority vote, provided that at least one third of the outstanding share capital has participated in the vote.[65]

Since individual board members cannot be easily removed by the shareholders, dismissal of individual board members does not seem to provide shareholders with an effective remedy in remuneration conflicts. In extreme cases, however, the shareholders could attempt to dismiss individual board members or even the management board or supervisory board as a whole, provided that they are able to meet the high voting threshold required by statute or pursuant to the company's articles for such an action. Also, if a company is subject to the structure regime, the shareholders could adopt a vote of no confidence in the supervisory board over remuneration issues.

Furthermore, the general meeting of shareholders has a statutory right to make enquiries to the management board and supervisory board with regard to any information regarding the company.[66] This could potentially be used as a means of pressuring the board with regard to remuneration of board members. It is yet unclear if individual shareholders also can make use of this provision outside of the general meeting, although various commentators have argued so.

5.2. Measures available to employees outside of merger, acquisition or take-over situations

5.2.1. Judicial measures available to employees

Please note: employees can mostly exert influence on the remuneration process through either a labour union or a works council instead of in their individual capacity. Whether a company is under an obligation to establish a works council is determined pursuant to the WOR. For purposes of this fact sheet, we will assume that all publicly Dutch listed companies have established a works council.

[65] Article 2:161a DCC
[66] Article 2:107 section 2 DCC

Inquiry proceedings

The inquiry proceedings as described above can also be initiated by a labour union.[67] A works council does not have the power to initiate these proceedings on its own, but if a labour union wishes to bring an action against the company through the inquiry proceedings, the works council must be given the opportunity to voice its opinion on the matter before a request may be filed with the court. Also, it is possible that the works council either by agreement or pursuant to the company's Articles is granted the right to bring inquiry proceedings independently.

Request a court order to comply with WOR obligations

Pursuant to article 36 section 2 of the WOR, the works council can request the subdistrict court (*kantonrechter*) to order the board to comply with any provision from the WOR, including article 31d WOR, which concerns the requirement of the board to disclose information to the works council about the level and structure of remuneration for management board members, as well as the company's remuneration policy and the total remuneration granted to the supervisory board. As a prerequisite for requesting such a court order pursuant to article 36 section 2 WOR, the works council has to instigate a mandatory mediation procedure led by the 'joint sectoral committee' (*bedrijfscommissie*). In practice article 36 section 2 WOR appears not to be invoked frequently, possibly because listed companies often comply with these disclosure requirements by presenting a copy of their annual report to the works council, which is required to contain detailed information about the company's remuneration policy and how this policy is put into effect during the preceding year.[68]

Annual report revision proceedings

Any person who has a reasonable interest can file a petition with the Enterprise Chamber of the Amsterdam Court of Appeals for a court order to correct a company's annual report if this report has not been drawn up in accordance with the applicable statutory provisions (see 5.1.1).[69] For the purpose of this provision, employees, unions and work councils are considered persons with a 'second-tier' interest. Unlike shareholders, when filing a petition for annual report revision, they will have to argue and prove that they suffer a specific disadvantage (*nadeel ondervinden)* as a result of the annual report.

If the Enterprise Chamber rules accordingly, the company has to correct its annual report in accordance with instructions given by the Enterprise Chamber in the verdict. Annual report revision proceedings do not directly offer redress for excessive remuneration or remuneration-driven mergers and acquisitions, but could lead to a correction of statements made in the annual report regarding remuneration. However, an annual report revision proceeding could serve a "naming and shaming" purpose if the board has acted contrary to its statements in the annual report on remuneration matters.

[67] Article 2:347 DCC
[68] Article 2:391 section 2 DCC
[69] Article 2:447 and 2:448 DCC

Nullification of resolutions

In principle, an individual employee, a works council, or a labour union could bring suit against a corporation seeking the nullification of a resolution of one of the corporation's bodies (see above). For an individual employee, however, the "reasonable interest" threshold will be more difficult if not impossible to satisfy, since an employee is not part of one of the corporation's decision-making bodies. The same holds true for works councils and labour unions, but given the fact that they represent the collective interests of the corporation's employees and employees in general respectively, a court could under circumstances find that they have a reasonable interest in the nullification of a resolution. There is, however, no significant Dutch case law to provide guidance on this issue.

5.2.2. Non-judicial measures available to employees

Exert pressure by labour unions on the corporation in collective bargaining negotiations

Besides the more formal measures available to employees to challenge the board members' remuneration, labour unions may also press corporations on remuneration matters during the negotiations for a collective bargaining agreement (*"collectieve arbeidsovereenkomst, CAO*"). If, for instance, the corporation's board announces that the corporation has insufficient funds to raise the employees' salaries while it becomes public that the board members' remuneration at the same time rises nonetheless, a labour union could threaten to break down the collective bargaining negotiations if the board members' proposed remuneration packages aren't revised.

Other measures considered

Pursuant to the WOR[70], the works council may request certain information of the board. Whether the board would in that event be under an obligation to disclose specific information on individual remuneration arrangements, is unclear, but the possibility cannot be excluded. In either event, the board is already under an obligation to annually disclose information on the board members' remuneration to the works council.[71]

b) individual shareholders and the general meeting of shareholders, or individual employees, works councils and labour unions suspect that the personal (financial) interest of a board member has prevailed over the interest of the company, in the process of making decisions about entering into a merger or acquisition;

5.3. Measures available to shareholders in merger, acquisition or takeover situations

Inquiry proceedings

As described above under 5.1, a shareholder or a group of shareholders holding at least 10% of the corporation's outstanding shares or shares to an amount of EUR 225,000 in nominal share

[70] Article 31 WOR
[71] Article 31(d) WOR

value may initiate inquiry proceedings against the corporation. In case of a proposed merger or takeover, the plaintiffs in the inquiry proceedings could request the Enterprise Chamber to impose an immediate measure preventing the transaction from going forward for the duration of the proceedings. Such a measure has been imposed in a number of past high profile cases involving a pending takeover[72], but a recent Supreme Court verdict has obliged the Enterprise Chamber to be more restrictive in imposing these measures.[73] Nonetheless, the inquiry proceedings provide shareholders with an effective means to challenge a proposed merger or takeover on the merits.

With regard to remuneration disputes, shareholders could for instance challenge the board's decision to agree to a takeover bid or merger protocol by initiating inquiry proceedings bid if they feel that the board's decision was unduly influenced by the board members' personal financial interest in the takeover. If the shareholders succeed in substantiating that claim, the Enterprise Chamber could temporarily block the takeover pending the results of the inquiry. If the inquiry subsequently shows that the board's decision to accept the takeover bid qualifies as mismanagement, the Enterprise Chamber can nullify this decision[74].

Vote against a proposed merger or takeover

In Dutch company law, a proposal for a legal merger has to be submitted for approval to the general meeting of shareholders of the disappearing entity.[75] As a default rule, approval of the general meeting of shareholders of the surviving entity is not required[76], but a shareholder or a group of shareholders representing at least 5% of the corporation's outstanding shares can request the corporation to hold an extraordinary general meeting of shareholders in which the merger proposal is put to a shareholder vote.[77] If such a request is made, shareholder approval is required.

As to takeovers, prior shareholder approval of the shareholders of the offeror company is only required in cases of a large scale takeover[78] (if the target is valued at at least one-third of the offeror's assets), or in cases where the identity of the offeror company will be profoundly impacted by the takeover.[79] Shareholders of the target corporation do not have the right to vote on the takeover in the general meeting of shareholders, but instead can decide individually whether or not they will sell their shares to the offeror.

In the cases where shareholder approval is required, either in the general meeting of shareholders of one of the entities that is party to the transaction or in the general meeting of shareholders of both parties, the shareholders can block the transaction from going forward by voting against a proposed merger or - in somewhat more limited cases, given the fact that prior shareholder approval is required less frequently - a proposed takeover. Also, if a majority or at

[72] See f.i. Dutch Supreme Court judgment of February 21, 2003, NJ 2003, 182 (HBG) and Dutch Supreme Court judgment of July 13, 2007, NJ 2007, 434 (VEB / ABN AMRO).
[73] Dutch Supreme Court judgment of 14 December 2007, JOR 2008/1, (DSM)
[74] Article 2:356 subd. a DCC.
[75] Article 2:317 DCC.
[76] Article 2:331 DCC.
[77] Article 2:331 subd. 3 DCC.
[78] Article 2:107a subd. 1(c) DCC.
[79] Article 2:107a DCC.

least a substantial number of shareholders of the target company in a public offer decline to sell their shares to the offeror, the offeror could decline to declare its offer unconditional.

5.4. Measures available to employees in merger, acquisitions, or takeover situations

Inquiry proceedings

As mentioned above, a labour union also has the right to initiate inquiry proceedings against the corporation (see above under 5.2.1 for a more detailed description).

Litigation in connection with a mandatory works council advice

In the event of a planned merger or takeover, the works council has to be allowed to offer its advice on the proposed transaction and the possible impact on employee matters.[80] If a works council suspects that the board has a disproportionate financial stake in the transaction, it may decide to issue a negative advice on the proposed merger or takeover, even though it is unclear whether the works council would be allowed to take this element into consideration in its advice, since the remuneration of board members is not strictly related to the employment issues entrusted to the works council. Still, the deliberation in the works council would offer a platform for discussion of the financial interests of board members in the proposed transaction.

If the works council has issued a negative advice and the board nonetheless proceeds with the proposed merger or takeover, thus disregarding the advice, the works council may appeal this decision before the Enterprise Chamber of the Amsterdam Court of Appeals. In such an appeal, the decision of the board to disregard the works council's advice will be examined by the Court. In these proceedings, the works council can also request for immediate measures to be ordered by the Court.

6. Measures in practice

QUESTION III: To what extent are these measures used in practice?

6.1. General remarks

Most of the challenges against excessive remuneration or remuneration-motivated mergers and takeovers seem to be brought in the form of inquiry proceedings. Below, a number of examples in which this was the case, and a number of other measures abailable to shareholders and/or employees, are set out in more detail.

6.2. Measures used outside of merger, acquisition or take-over situations

6.2.1. Shareholder measures

Inquiry proceedings

[80] Article 25 WOR

In the *Ahold* case[81], a shareholder interest group challenged, among other things, the compensation package which the supervisory board of the Dutch company Ahold had agreed to for its new CEO Anders Moberg. Inquiry proceedings were brought before the Enterprise Chamber, and was mostly concerned with the accounting scandals Ahold was facing. The Enterprise Chamber declined to interfere with the amount of the CEO's compensation package, nor did it find that the compensation package presented substantial reasons to doubt the validity of Ahold's remuneration policy. According to the court, the procedural rules for determining the compensation package had been properly observed, and the competent body within the company had the discretion to decide on the appropriateness of the compensation package.

More recently, the Enterprise Chamber stated in its ruling on an inquiry proceedings request that no rule of law exists in the Netherlands, at least not as of yet, which states that managing or supervisory directors who have a financial interest in their company (i.e. shares or options) cannot participate in merger discussions, nor does any rule of law prescribe that having financial interests in the company precludes a managing or supervisory director from taking strategic decisions which lead to merger discussions[82].

Nullification of resolutions

In Dutch case law, not many cases in which the nullity of a resolution was invoked or in which the nullification of a resolution was sought have been reported. More specifically, nullification of a resolution relating to remuneration issues appears to occur even less. Possible explanations include the cumbersome nature of the nullification proceedings, i.e. extensive litigation which may require multiple court instances and may last very long without means for immediate measures, and the fact that shareholders and employees have more efficient means at their disposal such as the inquiry proceedings. The value of this measure, however, lies mostly in its preventive effect. Since corporations and their respective bodies are aware of the fact that their resolutions have to meet certain requirements in order to avoid nullity or nullification, they will generally see to it that proper procedures are observed and ensure that the resolutions can pass muster as to their content.

Refuse to approve the remuneration policy

Recently, the general meeting of shareholders of Philips voted down a proposal concerning the company's remuneration policy, by which the performance conditions attached to the grant of options to the board would have been cancelled. This is the first time a remuneration proposal was voted down by a general meeting of shareholders in the Netherlands.

Liability of board members vis-à-vis the corporation and individual shareholders

Barring extreme circumstances, such as outright fraud of board members, matters concerning remuneration will not give rise to director liability or an unlawful act. Cases of such extreme circumstances have not been reported in Dutch case law. Possibly this could be explained by

[81] Amsterdam Court of Appeals (Enterprise Chamber) judgment of January 6, 2005, JOR 2005, 6 (Ahold)

[82] Amsterdam Court of Appeals (Enterprise Chamber) judgment of 17 April 2008 (VEB/ABN AMRO)

the fact that these disputes in practice are often solved by means of arbitration (see below). Generally the "grave reproach" requirement precludes imposing liability on board members for relatively minor breaches of their obligations vis-à-vis the corporation. Furthermore, a shareholder or a group of shareholders cannot assert this claim in their own name. Hence, director liability proceedings cannot be initiated by the shareholders, but instead the suit must be brought by the corporation itself, acting through its board. Therefore, the director liability cause of action in practice does not appear to provide shareholders with an effective means to challenge the board on remuneration issues.

Apart from initiating court proceedings such as director liability suits, the company on the one hand and one or more board members on the other hand can also agree to submit disputes involving remuneration to arbitration. Such an arbitration agreement can either be agreed to by both parties *ex ante*, for instance through including an arbitration clause in the board members' employment contracts, or *ex post*, i.e. through an agreement to submit an already pending dispute to arbitration. An example of the latter can be found in the *Ahold* case[83], in which the board of Ahold corporation and two former board members agreed to submit their dispute over severance payments, certain bonus payments and reimbursement for expired options to arbitration.[84]

Summary proceedings against the corporation in case of non-compliance with disclosure requirements

These proceedings do not provide relief for shareholders in the sense that they provide for judicial scrutiny of the board's remuneration, but merely amount to obtaining a court order forcing the board to comply with the disclosure requirements regarding remuneration. Since listed public Dutch corporations generally comply with those requirements – statutory requirements as well as requirements pursuant to the corporate governance code - , summary proceedings aimed at disclosure do not appear to occur frequently.

6.2.2. Employee measures

Nullification of resolutions

The measure of nullification of resolutions does not appear to be used by employees in practice. This may be explained by the fact that, as set out in more detail above, any person who wishes to nullify a resolution must demonstrate a reasonable interest in order to have standing to bring the suit. Employees, acting either in their individual capacity or through a works council or labour union, will only satisfy this requirement under very limited circumstances.

Exert pressure by labour unions on the corporation in collective bargaining negotiations

Since use of this measure does not generate case law, and in most cases will not even be made public through other means, it is difficult to assess the extent to which this measure is actually used in practice. In any case, however, exerting pressure in collective bargaining negotiations is

[83] Amsterdam Court of Appeals (Enterprise Chamber) judgment of January 6, 2005, JOR 2005, 6 (Ahold) at no. 3.71.
[84] See the Annual Report of Ahold of 2003 as published on April 24, 2004, p. 175 (source: http://www.ahold.nl).

more of a negotiating tool aimed at obtaining a more favourable collective bargaining agreement for the employees than a measure by which excessive remuneration of board members can effectively be challenged.

6.3. Measures used in connection with merger, acquisition or take-over situations

6.3.1. Shareholder measures

Inquiry proceedings

A prime example can be found in the *RNA/Westfield*[85] case. During the take-over battle concerning Rodamco North America NV, the supervisory board of Rodamco North America had changed the employment contracts with the management board members. The changes amounted to (inter alia) that in case of a change of control, the management board members would be entitled to a payment of three annual salaries, even if they would keep their appointment as board member (the so called 'single trigger' scheme). Shareholders commenced inquiry proceedings at the Enterprise Chamber granted relief to plaintiffs. Ultimately, the Supreme Court struck down the decision of the Enterprise Chamber, but did so on other grounds, without specifically addressing the remuneration issue in this case.

Another example is the *Uni-Invest*[86] case, which was litigated in the inquiry proceedings setting before the Enterprise Chamber. The board of Uni-Invest had concluded a merger agreement with another company pursuant to which Uni-Invest would merge into the other entity. In connection with the merger agreement, Uni-Invest's board stood to receive a substantial compensation package in severance pay. This compensation package was challenged in court, but the Enterprise Chamber denied plaintiffs their claim, citing that there were sound business purposes for the proposed merger and that Uni Invest's board had demonstrated that it had taken all relevant interests into consideration in deciding on the merger.

6.3.2. Employee measures

Inquiry proceedings

In the recent *PCM*[87] case, the Labour Union FNV brought suit against the publishing company PCM, alleging substantial reasons to question PCM's policy in connection with the participation of private equity funds Apax, which according to the plaintiffs had resulted in PCM incurring substantial debts while getting little in return. Even though this case in a strict sense does not concern a merger or takeover issue, the Apax restructuring contained some of the same elements as commonly found in mergers or takeover, such as remuneration arrangement of incumbent management. Plaintiffs challenged, among other things, the management participation arrangements that had been determined in connection with the Apax participation. The Enterprise Chamber granted the request for an investigation, which is currently pending. In its decision, it did not explicitly cite the management participation arrangements, but it is

[85] Amsterdam Court of Appeals, (Enterprise Chamber) March 22, 2002, 182/2002 OK, and Dutch Supreme Court judgment of April 18, 2003, NJ 2003, 286 (RNA/Westfield)
[86] Amsterdam Court of Appeals (Enterprise Chamber) judgment of November 12, 1998, JOR 1999/29 (Uni-Invest).
[87] Amsterdam Court of Appeals (Enterprise Chamber) judgment of January 10, 2008, JOR 2008, 39 (PCM).

possible that this subject will be brought up once more after the investigation has been completed.

7. Different requirements and measures for non-listed companies

Please refer to the introduction.

III. GERMANY

1. Executive summary

1.1. General remarks on the determination of executive remuneration within German stock corporations

German stock corporations have a two-tier system in which the shareholders' meeting elects the members of the supervisory board and the supervisory board elects the members of the management board. Next to the statutory provisions, the German Corporate Governance Code ("German Corporate Governance Kodex") applies to listed stock corporations. Because of German employee participation laws, employees are represented on the level of the supervisory board.

Discussions on the appropriate remuneration of members of the management board of German stock corporations, in particular listed stock corporations, are frequent in Germany. Proposals on how to amend the current applicable provisions vary and comprise for example the requirement of a shareholder approval to enter into service agreements with members of the management board or the statutory definition of an appropriate remuneration. There are, however, no current legislative procedures ongoing to amend the applicable law as it stands now.

a. Determination of remuneration:

In the German two-tier system,

i. the shareholders' meeting determines the remuneration of the members of the supervisory board, either by shareholders' resolution or by agreeing on respective provisions in the articles of association of the stock corporation; and

ii. the supervisory board determines the remuneration of the members of the management board for their services. No additional approval is required.

b. Appropriateness of remuneration:

The supervisory board's determination of remuneration is subject to the principle of appropriateness. The payable total remuneration shall appropriately reflect the duties of each member of the management board and the condition of the stock corporation in general.

c. Applicability to listed and non-listed German stock corporations:

The principles in a. and b. above apply to listed German stock corporations, *i.e.* stock corporations the shares of which are admitted to trading to the regulated market, and non-listed German stock corporations.

1.2. Disclosure of executive remuneration within German stock corporations

a. Disclosure by listed and non-listed German stock corporations:

The provisions of the German Commercial Code (*Handelsgesetzbuch – HGB*) provide that listed and non-listed stock corporations must, *inter alia*, report on the total remuneration (*i.e.* all salaries, profit participations, subscription rights and other stock-based compensation elements, reimbursement of expenses, insurance premiums, commissions and fringe benefits of all kinds) paid to the members of the management board for services rendered in the past fiscal year in the notes to their annual accounts (*Anhang*).

b. Additional disclosure requirements for listed stock corporations only:

i. Additional disclosure in the notes to the annual accounts:

The German Commercial Code furthermore states that listed stock corporations are obliged to provide information with respect to the remuneration of the members of their management boards on an individual basis in their notes, unless the shareholders' meeting votes against the individual disclosure requirement by shareholders' resolution.

ii. Additional disclosure requirements relating to a public takeover:

- Pursuant to the German Commercial Code, listed stock corporations must also disclose in their annual reports (*Lagebericht*), *inter alia*, information on agreements relating to compensation which the stock corporation grants to the members of its management board and which becomes payable in case of a public takeover offer. The German Commercial Code furthermore requires that listed stock corporations disclose information in their annual reports on the consequences arising from material agreements concluded by them and relating to a change of control in a public takeover. This disclosure requirement may relate to information on remuneration payable to members of the management board.

- In addition, the German Takeover Act (*Wertpapiererwerbs- und Übernahmegesetz*) requires that, in the event of a public takeover offer, the bidder discloses in its offer document information on any benefits (*i.e.* monetary and non-cash benefits (*geldwerter Vorteil*)) which the bidder grants to the members of the management board of the target stock corporation.

iii. Additional disclosure requirements in case of a public share offer:

In case of a public offer of shares by a listed stock corporation, the German Securities Prospectus Act (*Wertpapierprospektgesetz – WpPG*) requires that the securities prospectus contains, *inter alia*, information on the remuneration paid to the members of the management board in the past fiscal year.

iv. Disclosure due to ad hoc notification requirements:

Disclosure may be necessary if ad hoc notification requirements or directors' dealing notification requirements are triggered.

1.3. Measures available to shareholders in connection with remuneration disputes

a. General:

i. Under German law, there is no distinction between remedies applicable if (a) shareholders disagree with the composition or level of the individual remuneration of a board member or with the remuneration policy or (b) shareholders suspect that the personal (financial) interest of a board member has prevailed over the interest of the stock corporation.

ii. Shareholders may initiate the following judicial and non-judicial remedies if they consider the remuneration granted to the members of the management board inappropriate or unlawful.

b. Judicial measures available to shareholders:

i. Shareholders may initiate special investigation proceedings (*Sonderprüfung*) by resolving on the appointment of a special investigator in their meeting. Such special investigator has right to demand comprehensive information on the services rendered by the supervisory board and, thus, on the determination of the remuneration payable to the members of the management board. In addition, certain minority shareholders may initiate similar special investigation proceedings or request the appointment of another special investigator if there are reasons to believe that the initial special investigator appointed by the shareholders lacks the necessary expertise, is conflicted or not reliable.

ii. Shareholders may resolve that the stock corporation shall raise a compensation claim against the members of the management or supervisory board in case of an (alleged) inappropriate determination of remuneration. Shareholders may also appoint a special representative (*besonderer Vertreter*) to enforce the stock corporation's compensation claim.

iii. In principle: No right of individual shareholders to bring own compensation claims.

c. Non-judicial measures available to individual shareholders:

i. Shareholders may deny to discharge the members of the management board and/or supervisory board for their services in the past fiscal year.

ii. Shareholders may exercise their right to speak and their right to ask questions in a shareholders' meeting.

iii. Shareholders may try to initiate criminal proceedings against the members of the management board and/or supervisory board based on an alleged fraudulent breach of trust (*Untreue*).

1.4. Measures available to individual employees, works' councils and labour unions in connection with remuneration disputes

Under German law, individual employees, works' councils and labour unions as such are not entitled to any judicial or non-judicial remedies to challenge the remuneration of members of the management board of stock corporations. In a co-determined German stock corporation, employees elect, however, a certain number of the members of the supervisory board. As employee representatives, these members of the supervisory board are regularly involved in the decision on the appointment and remuneration of the members of the management board of a co-determined stock corporation.

1.5. Use of judicial measures by shareholders in practice

a. General:

There is no common practice to challenge the remuneration of members of the management board in Germany. However, the topic of executive remuneration currently generates considerable public interest.

b. Mannesmann takeover:

Following the takeover of Mannesmann AG by Vodafone Group plc special payments were made to members of the management board of Mannesmann AG for their services in the takeover. These special payments led to criminal proceedings and a decision of the German Federal Supreme Court in 2005. The decision of the German Federal Supreme Court influenced - directly as well as indirectly because of the considerable media attention - the then current practice on agreeing on special payments in service agreements with members of the management board of stock corporations.

2. Introduction

German stock corporations (*Aktiengesellschaften*) follow a two-tier system with a management board (*Vorstand*) being responsible for the day to day management of the stock corporation and the supervisory board (*Aufsichtsrat*) being responsible for the supervision of the management board. The supervisory board elects the members of the management board, whereas the shareholders' meeting elects the members of the supervisory board. In a co-determined stock corporation, a certain number of the members of the supervisory board – depending on the number of employees employed by the stock corporation – is elected by the employees of the stock corporation. The same regime applies to a German-based European stock corporation (*Societas Europaea – SE*) with a two-tier system.

In the above two-tier system, the shareholders' meeting determines the remuneration of the members of the supervisory board (either by resolution or – as usually the case with listed stock corporations – by agreeing on respective provisions in the articles of association) and the supervisory board supervises the management board and represents the stock corporation *vis-à-vis* the members of the management board, *e.g.* when entering into agreements with the members of the management board and determining the remuneration payable to them.

The German Stock Corporation Act (*Aktiengesetz – AktG*) contains certain general provisions on the determination, structure and disclosure of the remuneration of the members of the management board of German stock corporations. Further provisions are set forth in the German Corporate Governance Kodex ("GCGK") as amended[88] which is applicable to listed stock corporations only, *i.e.* stock corporations the shares of which are admitted to trading to the regulated market. The GCGK sets out recommendations and suggestions. Whereas recommendations are marked by the use of the word "shall", suggestions use the terms "should" or "can" in the GCGK. The difference is important as adherence to the GCGK is voluntary but listed stock corporations are required to disclose, if they deviate from recommendations of the GCGK in a corporate governance report (*Comply or Explain Principle*). They do not, however, need to state the reasons for the deviation.

3. Determining board members' remuneration and its level and structure

3.1. Requirements regarding determining board members' remuneration

3.1.1. Company law requirements applicable to listed and non-listed stock corporations

Pursuant to the German Stock Corporation Act, the supervisory board of a stock corporation shall, when determining the aggregate remuneration of any member of the management board, ensure that such aggregate remuneration appropriately reflects the duties of each member of the management board and the condition of the stock corporation. The aggregate remuneration comprises the member's salary, profit participations, reimbursement of expenses, insurance premiums, commissions and additional benefits of any kind. It shall also comprise pensions, payments to surviving dependents and similar payments[89]. Benefits, such as appreciation awards, stock options or change of control clauses pursuant to which the respective member of

[88] Deutscher Corporate Governance Kodex as amended, in its current version dated 14 June 2007.
[89] Section 87 para. 1 sentence 1 and 2 of the German Stock Corporation Act.

the management board receives certain benefits in case of a change of control, are also part of the remuneration and subject to the above requirement of appropriateness.

Pursuant to the German Stock Corporation Act, it is the supervisory board which takes the decision on the total remuneration granted to each individual member of the management board. An approval of the shareholders' meeting, the works council, the employees, the unions etc. is generally not required. This principle is, however, not universally applicable:

- Stock options, convertible bonds etc.: In case stock options, convertible bonds or other similar instruments shall be granted as part of the remuneration, an authorized capital and/or an approval for the acquisition of own shares may be necessary to install the respective remuneration programme. Measures such as creating an authorized capital or acquiring own shares require the approval of the shareholders' meeting of the stock corporation pursuant to the German Stock Corporation Act. Shareholders are therefore indirectly required to approve this type of remuneration.

- Co-determination: In a co-determined stock corporation, employees elect a certain number of the members of the supervisory board. These members are involved in the decision on the appointment and remuneration of the members of the management board. Thus, employee representatives are regularly involved in the decision-making process on the remuneration of the management board in a co-determined stock corporation.

3.1.2. Additional GCGK requirements applicable to listed stock corporations only

The GCGK contains recommendations and suggestions regarding the determination of the remuneration payable to the members of the management board. These recommendation and suggestions comprise:

- Remuneration committee: The supervisory board may delegate certain items to one or several committees. These items include, inter alia, the strategy of the company, the remuneration of the members of the management board, investments and financing[90].

- Chairman of the remuneration committee: The chairman of the supervisory board shall also chair the committees that are responsible for the agreements concluded between the stock corporation and the members of the management board and the preparation of the meetings of the supervisory board[91].

- Determination of remuneration: At the proposal of such committee of the supervisory board which is responsible for the agreements between the stock corporation and the members of the management board, the supervisory board shall discuss and regularly review the structure of the management board compensation system. The supervisory board shall appropriately determine the amount of the compensation payable to the members of the

[90] Section 5.3.4 of the GCGK.
[91] Section 5.2 of the GCGK.

management board on the basis of a performance assessment and in consideration of the remuneration paid by other group companies[92].

- Criteria: The assessment whether the remuneration is appropriate must reflect the duties of the respective member of the management board, its individual performance, the performance of the management board as well as the overall condition of the stock corporation, its performance and its outlook, in particular in comparison to its peer group companies[93].

3.2. Requirements regarding level and structure of board members' remuneration

3.2.1. Company law requirements applicable to listed and non-listed stock corporations

The German Stock Corporation Act only sets forth which components shall be considered in the calculation of the total remuneration of members of the management board of stock corporations and that such total remuneration must be appropriate (see 3.1.1 above).

3.3. Additional GCGK requirements applicable to listed stock corporations only

The GCGK provides further recommendations and suggestions for listed stock corporations. The recommendations and suggestions relating to the level and structure of the remuneration of the members of the management board comprise[94]:

- Total remuneration: The total remuneration comprises monetary components, pension commitments, other commitments (in particular commitments that are triggered if the appointment of a member of the management board is terminated), fringe benefits of all kinds and benefits receivable from third parties which were promised due to the respective member's duty as member of the management board or granted in the current fiscal year of the stock corporation.

- Monetary remuneration: The monetary remuneration shall comprise fix and variable components. The variable remuneration components should include (i) one-time elements, (ii) annually payable elements, which are linked to the business performance of the stock corporation and (iii) elements with a long-term incentive and risk character. All of these remuneration components must be appropriate, both individually and in total.

- Variable components and cap: Variable remuneration components with a long-term incentive and risk character are in particular shares of the stock corporation combined with a long-term lock-up period, stock options or comparable instruments (*e.g.* phantom stocks). Stock options and comparable instruments shall be based on sophisticated and relevant parameters. Changing the performance targets or the parameters retroactively shall be excluded. The supervisory board and the member of the management board shall agree on a cap if the stock corporation performs extraordinarily and this performance has not been foreseen.

[92] Section 4.2.2 of the GCGK.
[93] Section 4.2.2 of the GCGK.
[94] Section 4.2.3 of the GCGK.

- Severance payment cap: If an agreement with a member of the management board is concluded, the supervisory board should not agree on payments which are to be made in case of a premature termination of the agreement without cause and which exceed the value of a two years' total remuneration including fringe benefits (*Severance Payment Cap*). It should furthermore not agree to remuneration payable following the termination for a term that is longer than the remaining term of the agreement. The Severance Payment Cap should be calculated on the basis of the total remuneration for the past fiscal year and, if appropriate, also reflect the expected total remuneration for the current fiscal year.

- Change of control: A payment commitment relating to a premature termination of the management board member's agreement due to a change of control should not exceed 150% of the Severance Payment Cap.

4. Disclosure of remuneration

Question I: At which moments in time (for instance: at the time of publication of the annual report, entering into an agreement, exercise of options, fulfilment of certain conditions) and in what form are individual remunerations or components of individual remunerations of board members required to be made public?

4.1. Corporate law disclosure requirements

4.1.1. Disclosure in connection with the annual reporting applicable to listed and non-listed stock corporations

Pursuant to the German Commercial Code (*Handelsgesetzbuch – HGB*), stock corporations are obliged to set up annual accounts and to set up notes (*Anhang*) and an annual report (*Lagebericht*) to such annual accounts[95]. Stock corporations are furthermore required to publish the annual accounts, the notes and their annual report in the electronic federal Gazette (*elektronischer Bundesanzeiger*).

The notes to the annual accounts must, *inter alia*, include for the members of management, any supervisory board, any advisory board or any similar body, separately for each group[96]:

- the total remuneration (all salaries, profit participations, subscription rights and other stock-based compensation elements, reimbursement of expenses, insurance premiums, commissions and fringe benefits of all kinds) for services rendered in the fiscal year. The total remuneration shall also include such remuneration not paid out but converted into claims of another kind or used to increase other claims. In addition, remuneration shall be reported that was granted in the fiscal year but has not yet been stated in any annual accounts. The number of subscription rights and other stock-based compensation elements has to be provided.

[95] Sections 242 para. 3, 264 para. 1 sentence 1 of the German Commercial Code.
[96] Section 285 sentence 1 no. 9 a) and b) of the German Commercial Code.

- Total remuneration (severance pay, pensions, payments to surviving dependents and similar payments) for the previous members of such bodies and their survivors must also be disclosed. In addition, the amount of accruals for current pensions and accrued rights with respect to pensions established for each such group and the amount of accruals not established for these liabilities shall be reported.

4.1.2. Disclosure in connection with the annual reporting applicable to listed stock corporations only

Furthermore, listed stock corporations are subject to additional statutory disclosure requirements pursuant to the German Commercial Code:

- Information in the supplementary notes to the annual accounts:

  - The supplementary notes to the annual accounts of listed stock corporations must provide, *inter alia*, information on remuneration on an individual basis for each member of the management board and shall state the amount of the fix and variable remuneration. A split between the elements linked to the business performance of the stock corporation and the elements with a long-term incentive is required. The disclosure requirement also relates to any benefits granted to the members of the management board and triggered in case of the termination of their appointments and also to benefits by third parties which were promised due to the respective member's duty as member of the management board or granted in the current fiscal year of the stock corporation[97].
  - Listed stock corporations are exempt from the above disclosure requirement in their notes if the shareholders' meeting votes against the individual disclosure requirement. Such resolution may only be resolved for a maximum period of five years and requires a three-quarter majority of the share capital present at the respective shareholders' meeting[98].

- Information in the annual reports:

  - In addition, the annual reports of listed stock corporations must provide information on the principles of the remuneration system relating to the members of the management board[99].
  - The annual reports of listed stock corporations must also disclose agreements of the stock corporation relating to compensations payable to members of the management board or employees which are triggered in case of a public takeover offer[100].
  - Furthermore, the annual reports of listed stock corporations must contain information on the consequences arising from material agreements concluded by the respective stock corporation and relating to a change of control in a public

97 Section 285 sentence 1 no. 9 a) of the German Commercial Code.
98 Section 286 para. 5 of the German Commercial Code.
99 Section 289 para. 2 no. 5 of the German Commercial Code.
100 Section 289 para. 4 no. 9 of the German Commercial Code.

takeover. This disclosure requirement may also relate to remuneration payable to members of the management board[101].

4.1.3. Disclosure due to ad hoc or directors' dealing publication requirements applicable to listed stock corporations only

The German Securities Trading Act (*Wertpapierhandelsgesetz – WpHG*) sets forth certain additional publication requirements which apply to listed stock corporations only. These publication requirements include, *inter alia*, the ad hoc publication requirement and the directors' dealing publication requirement[102], which have been implemented pursuant to the Market Abuse Directive (2003/6/EC).

These publication requirements may be of relevance with respect to the disclosure of remuneration of members of the management board or supervisory board in the following cases:

- Agreements with members of the management board: In principle, it is not necessary to disclose information on the details of the agreements concluded with the members of the management board by way of an ad hoc publication under the German Securities Trading Act. The resignation (as well as the appointment) of an existing member of the management board of a listed stock corporation may, however, be of such relevance that it is subject to the ad hoc notification requirement[103]. This may be the case if the information on changes in the composition of the management board of a listed stock corporation is expected to influence the business development of the stock corporation and potentially could affect its stock price[104]. Information on such changes could include information on ongoing remuneration or severance payments to be made to such leaving member of the management board. An ad hoc notification could, for example, state that the leaving member's management contract is not terminated prematurely but shall expire at the end of its regular term.

- Stock options: Certain transactions relating to shares of a listed stock corporation or to financial instruments based on such stock, which members of the management or supervisory board of a stock corporation receive as part of their remuneration trigger the directors' dealing publication requirement under the German Securities Trading Act. The director's dealing publication requirement is only triggered in case members of the management board of a listed stock corporation deal with stock in the concerning stock corporation. The requirement relates in particular to the sale and transfer of shares, stock options or subscription rights of the stock corporation by members of its management board, its supervisory board or the members' close relatives. In these cases, explicit information on the directors' dealings has to be published.

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101 Section 289 para. 4 no. 8 of the German Commercial Code.

102 Sections 15 and 15a of the German Securities Trading Act.

103 Issuers' guidelines (Emittentenleitfaden) of the German Financial Services Supervisory Authority (BaFin), section IV.2.2.11.

104 Issuers' guidelines (Emittentenleitfaden) of the German Financial Services Supervisory Authority (BaFin), section IV.2.2.11.

4.1.4. Disclosure requirements in a takeover offer applicable to listed stock corporations only

In case of a public takeover offer relating to a listed German stock corporation, the German Takeover Act (*Wertpapiererwerbs- und Übernahmegesetz – WpÜG*) requires the publication of an offer document. This offer document must contain information on monetary benefits or any non-cash benefits (*geldwerter Vorteil*) which the offerer grants or may propose to the members of the management or supervisory board of the target company[105]. Non-cash benefits include all benefits which the members of the management or supervisory board are not generally entitled to, *e.g.* severance payments, prolongation or beneficial amendments of the existing management contracts or the conclusion of additional consultancy agreements.

In addition, as described above in 4.1.2, the German Commercial Code requires that the annual reports of listed stock corporations must disclose agreements of the stock corporation relating to compensations payable to members of the management board or employees which are triggered in case of a public takeover offer[106]. It also requires disclosure of information on the consequences arising from material agreements concluded by the respective stock corporation and relating to a change of control in a public takeover, which may include remuneration payable to members of the management board[107].

4.1.5. Disclosure requirements in case of a share offer of a listed stock corporation

In case of a public offer of shares, the German Securities Prospectus Act (*Wertpapierprospektgesetz – WpPG*) in connection with the EC-Regulation implementing the Prospectus Directive[108] requires that a securities prospectus discloses information on the amount of remuneration paid (including any contingent or deferred compensation) and benefits in kind granted to members of the management and supervisory board by the stock corporation and its subsidiaries for services in all capacities to the stock corporation and its subsidiaries by any person in the past fiscal year. The 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[109]. In Germany, listed stock corporations are required to publish the information on an individual basis, unless the shareholders' meeting resolved to vote against such disclosure requirement (see 4.1.2 above). Furthermore, a securities prospectus must disclose the total amounts set aside or accrued by the stock corporation or its subsidiaries to provide pension, retirement or similar benefits to the members of the management and supervisory board.

4.2. Additional GCGK disclosure requirements applicable to listed stock corporations only

The GCGK provides for the following recommendations and suggestions with respect to the disclosure of information on the remuneration of the members of the management board:

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105 Section 11 para. 2 sentence 3 no. 3 of the German Takeover Act.

106 Section 289 para. 4 no. 9 of the German Commercial Code.

107 Section 289 para. 4 no. 8 of the German Commercial Code.

108 Section 7 of the German Securities Prospectus Act in connection with section 15, Annex I, of the Commission Regulation (EC) No. 809/2004 of 29 April 2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as amended.

109 Section 15, Annex I, of the Commission Regulation (EC) No. 809/2004 of 29 April 2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as amended.

- Corporate governance report: The management and supervisory boards of listed stock corporations are required to annually submit a corporate governance report which is part of and disclosed with the stock corporation's financial statements. In such corporate governance report, the members of the management and supervisory boards set out and explain, *inter alia*, to which extent and why they did not comply with the recommendations contained in the GCGK[110].

- Remuneration report: The disclosure on remuneration shall be provided in a remuneration report which is part of the corporate governance report and describes the system relating to the remuneration of the members of the management board. The report shall include a summary of existing stock option plans or comparable schemes with a long-term incentive and risk character, if any, and shall state their current value. In case of pension commitments, additions to the pension accruals or pension funds shall be stated. The material content of commitments, which are triggered by the termination of the services of the respective members the management board also have to be disclosed, unless they do not differ materially from those commitments granted to employees. The remuneration report shall also include information on fringe benefits received by the stock corporation[111].

- Individual information on remuneration: The total remuneration of each member of the management board in the fiscal year has to be disclosed on an individual basis, providing for a split between such remuneration elements linked to the business performance of the stock corporation and to such elements with a long-term incentive, unless the shareholders' meeting votes against such individual disclosure requirement by resolution with a three-quarter majority[112].

- Shareholder information: In the shareholders' meeting, the chairman of the supervisory board shall outline the principles of the remuneration system and any changes thereto to the shareholders[113]. Whereas the practice of German listed stock corporations varies from case to case, German scholars opine that the information does not have to be provided on an annual basis but only as and when required, for example in case of a change of the existing remuneration system.

5. Available measures

Question II: Which judicial and/or non-judicial measures are available to individual shareholders and the general meeting of shareholders, and to individual employees, Works Councils and labour unions in the following situations:

a) they disagree with the composition or level of the individual remuneration of a board member or with the remuneration policy, for example before or after the remuneration is determined, granted and/or paid out;

110 Section 3.10 of the GCGK.
111 Section 4.2.5 of the GCGK.
112 Section 4.2.4 of the GCGK.
113 Section 4.2.3 of the GCGK.

5.1. Judicial measures available to shareholders

Shareholders of a stock corporation who wish to challenge the remuneration of a member of the management board may request the commencement of special investigation proceedings (*Sonderprüfung*) or raise compensation claims.

5.1.1. Special investigation proceedings under the German Stock Corporation Act

Commencement of special investigation proceedings on the basis of a shareholders' resolution

Under the German Stock Corporation Act, shareholders may resolve in a shareholders' meeting with simple majority that matters relating to the stock corporation's business shall be investigated by a special investigator[114]. The matters relating to the stock corporation's business also comprise the supervisory board tasks and measures performed by the supervisory board and, thus, include the determination of the remuneration payable to the members of the management board.

The special investigator has, *inter alia*, the right to audit the company's books and may require from the management and supervisory board all information and evidence required for the audit of the appropriateness of the remuneration of the members of the management board[115]. Following its investigation, the special investigator submits a report to the management board and files such report with the commercial register of the stock corporation. The management board has to forward the special investigator's report to the supervisory board and has to put such report as an item on the agenda of the next shareholders' meeting[116]. The special investigator's report shall inform the shareholders and be the basis for their further resolutions on the investigated matter, *e.g.* for the shareholders' resolution that the stock corporation shall bring a compensation claim against the members of the management or supervisory board (see 5.1.2 below).

Commencement of special investigation proceedings on the basis of an application of minority shareholders

If the shareholders do not resolve to commence special investigation proceedings relating to the appropriateness of the remuneration of members of the management board in their meeting, minority shareholders holding 1 % of the share capital of the stock corporation or holding shares in the notional amount of EUR 100,000 may apply for the commencement of such proceedings at the competent court. They may also request the appointment of another special investigator if there are reasons to believe that the special investigator appointed by the shareholders lacks the necessary expertise, is conflicted or not reliable[117].

5.1.2. Shareholder claims for compensation

Stock corporation's claim for compensation on the basis of a shareholders' resolution

114 Section 142 of the German Stock Corporation Act.
115 Section 145 paras. 1 to 3 of the German Stock Corporation Act.
116 Section 145 para. 6 of the German Stock Corporation Act.
117 Section 142 paras. 2 and 4 of the German Stock Corporation Act.

Under the German Stock Corporation Act, shareholders may resolve in their meeting with the majority of the votes cast that the stock corporation brings a claim for compensation against the members of the management board or supervisory boards[118]. Such claim may also be based on the alleged fact that the remuneration of the members of the management board determined by the supervisory board was inappropriate or unlawful.

As part of such resolution by the shareholders' meeting, the shareholders may appoint a special representative (*besonderer Vertreter*) who shall implement the shareholders' resolution[119]. Such special representative shall represent the stock corporation instead of the management board and raise the compensation claims against the members of the management or supervisory board. The appointment of a special representative is not frequently used in practice, but was carried out recently by the shareholders of Bayerische Hypo- und Vereinsbank AG, Munich ("HVB"), in connection with the investigation and alleged compensation claims with respect to the sale of assets to HVB's majority shareholder[120].

Stock corporation's claim for compensation on the basis of an application of minority shareholders

If the shareholders do not pass the required resolution to raise compensation claims in their meeting with the majority of the votes cast in their meeting, shareholders holding 1 % of the share capital of the stock corporation or holding shares in the notional amount of EUR 100,000 may apply at the competent court for permission to bring the stock corporation's compensation claims in their own name but for the benefit of the stock corporation[121]. In addition, shareholders holding 10 % of the share capital of a stock corporation or holding shares in the notional amount of EUR 1,000,000 may apply at the competent court for the appointment of a special representative (or another special representative than the already appointed one), who shall raise the stock corporation's compensation claims.

Individual shareholder's claim for compensation

Under the German Stock Corporation Act, individual shareholders are in principle not entitled to bring any compensation claims directly against the stock corporation or members of the management or supervisory board. There is, however, in extraordinary cases a possibility for individual shareholders to claim for compensation, *e.g.* in the case of abuse of influence on the stock corporation to determine a member of the management or supervisory board to cause damage to the stock corporation and/or its individual shareholders[122]. Other cases relate, *inter alia*, to the disclosure of false information to the individual shareholders or the public, etc.

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118 Section 147 para. 1 of the German Stock Corporation Act.

119 Section 147 para. 2 of the German Stock Corporation Act.

120 In its decision given in summary proceedings dated 28 November 2007 (see ZIP 2008, p. 73 et seqq.), the Higher Local Court of Munich held, inter alia, that a special representative may exercise information rights to clarify the facts on which the respective compensation claims are based.

121 Section 148 of the German Stock Corporation Act.

122 See section 117 para.1 of the German Stock Corporation Act.

5.2. Non-judicial measures available to individual shareholders

Potential non-judicial measures which individual shareholders may use to challenge the amount of remuneration granted to members of the management board are:

- Denial of discharge: Under the German Stock Corporation Act, shareholders have to resolve in their annual general meeting on the discharge of the members of the management and supervisory board[123]. With their resolution to discharge the board members, the shareholders approve the stock corporation's administration in the past fiscal year. In case an individual shareholder considers the granted remuneration as inappropriate, it may deny such discharge by not voting in favour of the respective resolution. The effects of such denial of discharge are, however, rather limited. The denial will, in particular, not result in (i) a repayment obligation of any of the remuneration paid, (ii) an amendment of the remuneration principles or (iii) a termination of the appointment of any of the members of the management or supervisory board.

- Right to speak and to ask questions: Under the German Stock Corporation Act, individual shareholders have the right to speak and to ask questions in each shareholders' meeting[124]. In case of the (alleged) inappropriateness of remuneration, individual shareholders may use these rights in the shareholders' meeting and put respective questions to the management and supervisory board. The effects of such exercise of information rights by individual shareholders would, however, be rather limited as no shareholders' resolution on the remuneration of the members of the management board is required.

- Initiate criminal proceedings: An individual shareholder may try to initiate criminal proceeding based on fraudulent breach of trust (*Untreue*) pursuant to section 266 of the German Criminal Code (*Strafgesetzbuch – StGB*) if such individual shareholder considers the remuneration of the members of the management board inappropriate or unlawful (see for the so called "Mannesmann"-case, 6.1 below). An offender commits a fraudulent breach of trust if

  - it abuses its right (i) to dispose of the assets of a third party or (ii) to commit a third party to an obligation, whereas in both cases the respective right is entrusted to the offender by law, administrative order or agreement (*Abusive Offence - Missbrauchstatbestand*); or

  - it violates its obligation to protect the interests of a third party, whereas such obligation is entrusted to the offender by law, administrative order, agreement or an existing fiduciary duty (*Breach of Trust Offence – Treubruchstatbestand*);

  and the abuse or violation, respectively, by the offender causes damage to the third party. If the payment of the remuneration to the members of the management board is not a fraudulent breach of trust, an individual shareholder may bring an individual civil law compensation claim only in extraordinary cases (see 5.1.2 above).

[123] Section 120 para. 1 of the German Stock Corporation Act.
[124] Section 131 para. 1 of the German Stock Corporation Act.

5.3. Measures available to individual employees, works' councils and labour unions

Under German law, individual employees, works' councils and labour unions as such are not entitled to any judicial or non-judicial remedies to challenge the remuneration of members of the management board of stock corporations. In a co-determined stock corporation, a certain number of employee representatives are however members of the supervisory board and thus regularly involved in the decision-making process on the remuneration of the management board (see 3.1.1 above).

b) individual shareholders and the general meeting of shareholders, or individual employees, works councils and labour unions suspect that the personal (financial) interest of a board member has prevailed over the interest of the corporation, in the process of making decisions about entering into a merger or acquisition.

5.4. Measures available to shareholders in merger, acquisition or takeover situations

Under German law, all of the remedies as mentioned above may be pursued by shareholders who consider a remuneration payment inappropriate or unlawful in a merger, acquisition or takeover situation. There is no distinction between remedies applicable if (a) shareholders disagree with the composition or level of the individual remuneration of a board member or with the remuneration policy or (b) shareholders suspect that the personal (financial) interest of a board member has prevailed over the interest of the stock corporation in the process of making decisions about entering into a merger or acquisition.

6. Measures in practice

Question III: To what extent are these measures used in practice?

6.1. General remarks

There is no common practice in Germany to challenge the remuneration of members of the management board. However, discussions in this regard are – with a focus on listed stock corporations – ongoing since the very prominent so called "Mannesmann"-case.

In 2000, Vodafone Group plc, Berkshire, United Kingdom, took over Düsseldorf-based Mannesmann AG in takeover proceedings which lasted for months. Following the takeover, the supervisory board of Mannesmann AG resolved to pay out double-digit million special payments to, *inter alia*, the members of the management board for their services in the course of the takeover. Due to these special payments, shareholders of Mannesmann AG made a report to the competent authorities and criminal proceedings against former members of the management and supervisory board of Mannesmann AG were initiated. Certain members of the management and supervisory board were accused of fraudulent breach of trust (*Untreue*) or the abetment of fraudulent breach of trust (*Beihilfe zur Untreue*), respectively.[125]

[125] See Sections 266, 27 of the German Criminal Code.

In 2005, the German Federal Court of Justice held that members of the supervisory board act in breach of trust and damage the stock corporation's assets entrusted to them if they make special payments to members of the management board retroactively, without being obliged to do so under the respective service agreements and if these payments shall only reward the members of the management board for their past services and do not serve the benefit of the stock corporation in the future.

The Mannesmann-case is, however, so far the only prominent case on remuneration of members of the management board in Germany. Since, however, the German Federal Court of Justice did not render a full judgment on the merits of the case, and the case was subsequently settled before the lower court, to which the case was remanded, could render its decision, the exact legal consequences of the decision are difficult to assess. Nonetheless, the German Federal Court decision, in combination with the publicity generated by the case, has led to a change in current practice in terms of agreeing on additional payments in service agreements with the members of the management board.

Since the Mannesmann-case, discussions on the limitation of remuneration of members of the management board are frequent. It is discussed whether the shareholders' meeting should be required to approve the service agreement to be concluded with the members of the management board or whether there should be a statutory definition of an appropriate remuneration[126]. Currently, there are, however, no legislative procedures ongoing to amend the above stated principles.

6.2. Measures used outside of merger, acquisition or take-over situations

6.2.1. Shareholder measures

So far, no suits are known which deal with the inappropriate remuneration of members of the management board outside of merger, acquisition or takeover situations.

6.2.2. Employee measures

Individual employees, works' councils and labour unions as such are not entitled to any judicial or non-judicial remedies to challenge the remuneration of members of the management board of stock corporations under German law.

6.3. Measures used in connection with merger, acquisition or take-over situations

6.3.1. Shareholder measures

The "Mannesmann"-case which relates to the takeover of Mannesmann AG by Vodafone Group plc is so far the only prominent case in this regard (see 6.1 above).

[126] „Vorstandsentgelt nicht Sache der Hauptversammlung", article in Börsen-Zeitung, dated 13 February 2008, p. 2; "Der Aufsichtsrat hat großen Spielraum bei Vorstandsgehältern", article in Börsen-Zeitung, dated 30 January 2008, p. 2.

6.3.2. Employee measures

Individual employees, works' councils and labour unions as such are not entitled to any judicial or non-judicial remedies to challenge the remuneration of members of the management board of stock corporations under German law.

7. Different requirements and measures for non-listed companies

All the rules mentioned in the present report indifferently apply to listed and non-listed companies, except when provided otherwise in the above developments.

IV. FRANCE

1. Executive summary

1.1. General

In France, there are three options with regard to corporate governance structure[127]:

(i) the one-tier model whereby both management and control are in the hands of the board of directors, who are vested with universal powers. In this model, the board is led by a Président Directeur Générale.

(ii) a one-tier model where managerial power is revocably entrusted upon either groups of directors (committees) or individuals below board level. In this model, the chairman is the highest non-executive director and the CEO is the highest executive functionary. The indirect influence of the chairman (*président*) will remain strong even though the functions are separated.

(iii) the two-tier model, where the managerial duties are performed by a board of management (*conseil d'administration*) and the supervisory duties by a separate supervisory board (*conseil de surveillance*). The two-tier structure, which is closely tied to the German supervisory model, is not very frequent (about 3 % of all stock corporations have opted for it) and mainly used by large listed corporations.

1.2. Determination of executive remuneration within French listed companies

a. Remuneration of board members (general)

i. The global amount of remuneration for all board members for the regular performance of their duties ("*Jetons de Présence*") is subject to a vote by the general meeting of shareholders in which the concerned board members can take part. The board then allocates this global amount among its various members on a discretionary basis.

ii. In addition to the *Jetons de Présence*, exceptional executive remuneration, which is determined by the board itself, is subject to insider transactions regulations ("*Conventions Réglementées*"), and accordingly is required to be authorized by the board, analyzed by the auditor in a special report to the general meeting, and then ratified by the general meeting of shareholders.

iii. Any modification of an employment contract of a salaried board member occurring after his appointment as board member is also subject to the procedure of *Conventions Réglementées*.

[127] See "Board Models in Europe. Recent Developments of Internal Corporate Governance Structures in Germany, the United Kingdom, France, and Italy", Klaus J. Hopt and Patrick C. Leyens, published online in 2004 in the ECGI Working Paper Series in Law, which can be downloaded from http://ssrn.com/abstract=487944.

b. Remuneration of CEO/Chairman (*Directeur Général* /PDG or *Président Directeur Général*):

i. The CEO's and chairman's remuneration are determined by the board, which is solely competent to determine both the fixed and variable part.

ii. Severance payments to CEO's and chairmen (including any indemnities, advantages, pensions and similar remuneration arrangements) fall within the scope of the *Conventions Réglementées* and accordingly have to be presented to the general meeting for a vote. If the general meeting does not approve the decision regarding such severance payment, it is still enforceable, but the beneficiary will be personally liable for any damages suffered by the company in connection thereto.

c. Remuneration policy

The Corporate Governance of Listed Corporations ("CGLC Report") recommends the instalment of a special remuneration committee ("compensation committee"), consisting of a majority of independent directors and no corporate officers. The committee (inter alia) designs the general policy regarding the granting of options and makes it subject of a proposal to the board of directors, who ultimately decide on it.

1.3. Disclosures of board member remuneration within French listed companies

a. General statutory disclosure requirements

i. Document de Réference: Comparable to an annual report, but only applies to listed companies, and is not compulsory. If installed, it should provide detailed and specific information about any kind of remuneration received by each board member, CEO and/or chairman, including any fixed, variable and exceptional remuneration granted. Additionally, it should clearly mention, by way of a table, which part of the remuneration is fixed, which one is variable, which one corresponds to *Jetons de Présence* and which one corresponds to benefits in kind. If the company has a two-tier board, the *document de référence* should also contain the remuneration of the supervisory board members.

ii. Publication Annuelle *(Annual Report)*: Required to contain the same information as in the *document de référence*, as mentioned above, to be posted on the website of the company and has to be registered at the *Tribunal de Commerce* (Commercial Court) of the relevant area in France. Listed companies are required to provide additional information including a global overview of the remuneration policy of the company with regard to board members, chairman and CEO (including the pension schemes), detailed individual remuneration of each of them, the total amount of directors' fees and the amount per director, the general policy concerning the allocation of stock or stock options to the chairman and the CEO, and detailed information about any conditions on which the remuneration of the chairman or of the CEO depends, including the precise calculation formula. This requirement does not apply to executives who are not board members, chairman or CEO.

iii. Internal Control Report Listed companies are required to establish an "Internal Control Report" and post it on the company website and on public display at the company's head office. This report should explain the internal regulation of the company to the shareholders, including the remuneration of board members, chairman and CEO, and the company's remuneration policy.

iv. Severance Payments Several documents concerning severance payments are to be publicly disclosed: the auditor's special report on the agreement between the CEO or chairman and its company, the board's decision defining the performance criteria the severance payment depends on and the board's decision acknowledging that these criteria are met.

b. Disclosure in connection with public offers and acquisitions

i. Public offer documentation Public offer documentation should disclose information on the remuneration of the directors and officers of both target and offeror, in the form of inclusion of the offeror's *document de référence* as well as the target's response document *(Note en réponse*).

ii. Acquisition Disclosure to the general meeting of any agreement entered into during the course of an acquisition between the company and a directly or indirectly interested director of officer, in the form of a special report, which is subject to prior authorization of the board.

c. CGLC disclosure requirements

The CGLC recommends detailed disclosure in the listed companies' annual reports on executive compensation and remuneration policy, including detailed information on any board compensation in the form of stock options. The CGLC is applied on a comply-or-explain basis.

1.4. Remedies and measures available in case of remuneration disputes

a. General

The measures available to shareholders as described below are also available in merger, acquisition or take-over situation.

b. Measures available

Measures available to shareholders:

i. Specific measures (Loi Tepa): If a CEO's or chairman's specific remuneration is not conditioned upon performance, or if performance is not met but such remuneration is granted, or if the board decision that verifies that the performance conditions have

been met has not been published as required, any severance payments will be rendered null and void. In such case, shareholders, acting before court in the name of the company, can force the concerned beneficiary to pay back its remuneration to the company.

ii. Criminal remedy Excessive remuneration can lead to the offence of misuse of corporate property (*Abus de biens sociaux*). In such case, the remedy available to the company can be initiated either by the shareholders, acting in the name of the company (*"ut singuli"*), or by the company itself.

iii. Civil liability for management fault Directors who take advantage of their position in the company or of their equity participation so as to be granted an unreasonable remuneration can be found liable either individually or collectively with the board of directors for wrongly managing the company.

iv. Expertise of Management Shareholders holding individually or collectively no less than 5% of the share capital can use the proceedings of special urgency in order to ask for the appointment of an expert which will have to establish a report on a specific management decision.

v. Annual Report revision proceedings "Any interested person" (including shareholders) can issue an order at court to force the company to finish and/or publish the annual report, failure of which would result in a penalty payment ("*Astreinte"*).

Measures available to employees:

vi. Annual Report revision proceedings Any "interested person" can issue an order at court to force the company to complete and/or publish the annual report. It is possible that (but yet unclear if) this term also comprises employees and/or a Works Council.

vii. Expertise of Management Works council can use the proceedings of special urgency in order to ask for the appointment of an expert which will have to establish a report on a specific management decision.

1.5. Use of judicial measures in practice:

In practice, excepted the remedy related to the misuse of corporate property (*Abus de biens sociaux)* and the civil remedy consisting in holding the directors liable for management fault, the remedies above described are rarely used. The judicial measures pursuant to the Loi TEPA will enter into full effect from February 2009.

2. Introduction

In France, there are three options with regard to corporate governance structure[128]:

(i) the "traditional" one-tier model whereby both management and control are in the hands of the board of directors, who are vested with universal powers. In a one-tier board where both management and control are in the hands of the board, this board is led by a Président Directeur Générale.

(ii) a one-tier model[129] with functional division between management and control. In larger companies, managerial power in practice is often revocably entrusted upon either groups of directors (committees) or individuals below board level. In this model, the chairman is the highest non-executive director and the CEO is the highest executive functionary. This model relies on the traditional one-tier structure but breaks with the formerly mandatory concentration of powers in the hands of the Président Directeur Générale (PDG), who took both the position of chairman of the board and of the chief executive officer. The indirect influence of the chairman (*président*) will remain strong even if the functions are separated, for he continues to decide on the frequency of meetings, sets the agenda, and will probably be the chairman of important committees. The conseil d'administration remains responsible for setting the business strategy and for controlling its implementation in the day-to-day business, which is run by the direction générale. Unlike English directors, their French counterparts are not universally empowered and in particular cannot bind the company by acting as representatives;

(iii) the two-tier model, with a board of management and a separate supervisory board. The two-tier structure, which is closely tied to the German supervisory model, is not very frequent (about 3 % of all stock corporations have opted for it) and mainly used by large listed corporations.

Corporate governance principles have been formalized in a corporate governance report dated October 2003, titled "The Corporate Governance of Listed Corporations" ("CGLC Report"). This report is based on the Viénot reports of July 1995 and July 1999 and the Bouton Report of September 2002, and was developed by working parties composed of Chairmen of French listed corporations, at the request of the Association Française des Entreprises Privées (AFEP) and the Mouvement des Entreprises de France (MEDEF).

According to the CGLC Report, listed corporations should report in their reference documents or in their annual report on the implementation of these recommendation from the CGLC Report and, if applicable, explain the reasons why any of them may not have been implemented.[130]

[128] See "Board Models in Europe. Recent Developments of Internal Corporate Governance Structures in Germany, the United Kingdom, France, and Italy", Klaus J. Hopt and Patrick C. Leyens, published online in 2004 in the ECGI Working Paper Series in Law, which can be downloaded from http://ssrn.com/abstract=487944.

[129] Pursuant to the Loi Nouvelles Régulations Economiques, no. 2001-420, 15.05.2001, Journal Officiel (J.O.),16.05.2001, 7776 ff, adopted in 2001.

[130] CGLC Report, section 20

3. General overview of directors' and officers' remuneration in France

3.1. Determining directors' and officers' remuneration

3.1.1. Statutory company law requirements

Members of the board

Under the French Commercial Code, members of the board may only be granted three different types of remuneration:

(i) for the regular performance of their duties ("*Jetons de Présence"*);
(ii) for the performance of exceptional duties; and
(iii) in relation to an employment contract.

Any other remuneration is forbidden[131].

The global amount of the *Jetons de Présence* for all board members is voted upon in a general meeting of shareholders in which the concerned board member can take part. The board then allocates this global amount among its various members on a discretionary basis[132].

In addition to the Jetons de Presence, board members can also receive an exceptional remuneration, as determined by the board, for activities that do not fall within the normal exercise of the board members' duties.[133] However, such remuneration is subject to the procedure applicable to related parties agreements of section L.225-38 of the French Commercial Code ("*Conventions Réglementées*" (insider transactions)), and accordingly needs to be authorized by the board, analyzed by the auditor in a special report to the general meeting, and then ratified by the general meeting of shareholders. The procedure for "*Conventions Réglementées*" is described in 4.2.2 below.

Finally, if a board member is also employed by the company (in which case his employment contract must have been entered into before his nomination as a board member[134]), he can be paid a salary. Any modification of such an employment contract occurring after his appointment as board member is also subject to the procedure of Conventions Réglementées.

Should the company be managed by a management board ("*Directoire*") under the supervision of a supervisory board, the above also applies to members of the supervisory board.

CEO and chairman

In France, there are two different ways of managing a company: either the chairman (*Président*) of the board also manages the company, in which case he is called a "chairman/CEO" (PDG or *Président Directeur Général*), or another person (who is not necessarily a board member),

[131] Section L.225-44 of the French Commercial Code.
[132] Section L.225-45 of the French Commercial Code.
[133] Section L. 225-46 of the French Commercial Code.
[134] Section L.225-22 of the French Commercial Code.

called the "CEO" (*Directeur Général*), is in charge of the management of the company and coexists with the chairman.

The following considerations with regard to the CEO hence apply to the chairman/CEO as well since the latter is simultaneously a CEO and a chairman.

When the company is managed by a management board under the supervision of a supervisory board, the rules applicable to the CEO apply to all members of the management board.

Regular remuneration

The CEO's and chairman's remuneration are determined by the board which is solely competent to determine both the fixed and variable part[135].

Severance payment

Since a 2005 statute[136], all indemnities, advantages, pensions and similar remuneration arrangements with a CEO or a chairman of a listed company, due in case of termination of mandate or of modification of job functions ("*Golden Parachutes*"), are considered to fall within the scope of *Conventions Réglementées*.[137]

If the general meeting withholds its approval, this will not render the agreement void. In such case, the *"Golden Parachute"* is still enforceable, but from that moment on, the beneficiary will be personally liable for any damages suffered by the company in connection thereto.

The very recent *Loi TEPA*[138] which applies to *Golden Parchutes* granted after October 1st, 2007, and to which existing *Golden Parachutes* must comply by February 22, 2009, adds additional constraints to the above-mentioned procedure.

Specifically, it requires that *Golden Parachutes* granted to a CEO or a chairman of a listed company depend on performance criteria. These performance criteria, which are not statutorily fixed but are determined by the board of directors at its discretion, can provide for the application of various criteria, such as an increase of the market price of the shares, of the company's turnover or results, *etc*. The board's determination of the criteria follows the approval procedure for *Conventions Réglementées.* They are then approved by the general meeting of shareholders. Finally, upon departure of the CEO or chairman, a second decision of the board acknowledges that these criteria have been met before authorizing the payment of the *Golden Parachute*.

135 Section L.225-53 indent 3 (applicable to CEO) and Section L.225-47 (applicable to chairman) of the French Commercial Code.
136 Statute n°2005-842 dated July 26, 2005, called "Loi Breton".
137 Previously, "golden parachute" agreements with board members were considered normal and therefore did not fall under the specific control consent.
138 Statute n° 2007-1223 dated August 21, 2007 on employment and purchasing power, transposed to sections L.225-42-1 and L.225-90-1 of the French Commercial Code and implementing the European Commission Recommendation of 14 December 2004 fostering an appropriate regime for directors of listed companies (2004/913/EC).

The *Loi TEPA* requires that the board of directors' decision determining the criteria as well as the one acknowledging that these criteria are met should be disclosed shortly after such a decision has been made. The exact time frame in which this information should be disclosed will be determined in a governmental decree, which has not been published yet. The current project states that the information about the determination of such remuneration has to be posted on the Internet within ten days of the board meeting's decision.

3.1.2. Corporate Governance Code (CGLC Report)

The Corporate Governance of Listed Corporations ("CGLC Report") recommends the instalment of a special remuneration committee, referred to as the "compensation committee".[139] The compensation committee should not include any corporate officers, and should have a majority of independent directors. The committee is to draft a chapter in the company's annual report, dedicated to information to the shareholders relating to the compensation received by managers (see 3.1.1).[140]

Furthermore, the compensation committee should define the rules for determination of the variable portion of corporate officer's compensation (also see 3.1.1), ensuring that they are consistent with the annual evaluation of the corporate officer's performance and the corporation's medium-term strategy. Additionally, the compensation committee should review the annual application of these rules.[141]

The compensation committee should also evaluate the total compensation and benefits collected by such managers, if any, from other group affiliates, including pension benefits and other benefits of all kinds. Furthermore, the general policy regarding the granting of options should be debated by the compensation committee and made the subject of a proposal by the latter to the board of directors. Ultimately, the CGLC Report provides that the board of directors has sole authority to determine the compensation of the chairman, chief executive officer and chief operating officers.[142]

3.1.3. Works council

There are no special requirements for works councils to be informed or render advice on the directors' and officers' remuneration or on the remuneration policy of the company.

3.2. Level and structure of directors' and officers' remuneration

3.2.1. Statutory company law requirements

Board members

As mentioned above, the board freely allocates *Jetons de Présence* between its members. However, in practice, the level of remuneration allocated to board members of listed companies

[139] CGLC Report, section 15
[140] CGLC Report, section 15.3.1
[141] CGLC Report, section 15.3.1
[142] CGLC Report, section 15.3.2

depends on their participation to various committees (Appointment Committee, Remuneration Committee, Audit Committee, *etc*.). Thus, a member of the board who is also member of a committee would be granted more *Jetons de Présence*.

Conversely, a member of the board who will not attend meetings of the board or of the Committee he is a member of, could see his part of the *Jetons de Présence* reduced.

CEO and chairman

Regular remuneration

In practice, the remuneration of a listed company's CEO or chairman often consists in a fixed part and a variable part. The variable part is in practice (but not compulsorily) subject to the performance of criteria determined by the board at the beginning of the fiscal year. Such criteria may be objective criteria (such as turnover, EBITDA, *etc.*) as well as subjective criteria (such as the integration of the chairman or CEO in the company, *etc.*).

Even though the chairman of the board is not an executive member of the company chairmen of the major French listed companies are, in fact, often remunerated a variable amount, in addition to a fixed one, which depends on the company's performance.

Severance remuneration

Golden Parachutes mainly consist of two different types of remuneration: severance payment strictly speaking and additional pension remuneration.

3.2.2. CGLC Report

The CGLC Report strongly recommends that there is no discount at the time of grant of options to management board members, and in particular for options granted to corporate officers.[143]

4. Disclosure of remuneration

Question I: At which moments in time (for instance: at the time of publication of the annual report, entering into an agreement, exercise of options, fulfilment of certain conditions) and in what form are individual remunerations or components of individual remunerations of board members required to be made public?

4.1. Statutory company law requirements

Document Réference

The *document de référence* is comparable to an annual report, but only applies to listed companies. Establishing such a document is not compulsory; a listed company may decide whether or not it establishes a *document de reference*. If it decide to do so, the company is then

[143] CGLC Report, section 15.3.2

required to comply with the European and AMF (the French stock exchange regulation authority) regulations regarding its content.

The European regulation n°809/2004[144] requires that the *document de référence* should provide detailed and specific information regarding any kind of remuneration received by each board member, CEO and chairman. As construed by the AMF, this information should mention any fixed, variable and exceptional remuneration granted.[145] This includes remuneration in cash or other ancillary non-cash remuneration (e.g. cars, apartments, stock, stock options *etc*.), *"Welcome Bonuses"* and any *Golden Parachutes*.[146] Additionally, it should clearly mention, by way of a table, which part of the remuneration is fixed, which one is variable, which one corresponds to *Jetons de Présence* and which one corresponds to benefits in kind.[147]

If the company has a two-tier board, the *document de référence* has to contain the remuneration of all the directors and the remuneration of the supervisory board members.

Publication Annuelle (Annual Report)

All public companies**,** including non-listed companies, are required to publish an annual management report fifteen days before the annual general meeting of shareholders is held.[148] The AMF strongly recommends to listed companies that this report should be posted on the website of the company.[149] Furthermore, the annual report has to be registered at the *Tribunal de Commerce* (Commercial Court) of the relevant area in France.

The annual report is required to contain the same information as in the *document de référence*, as mentioned above. Listed companies are required to provide additional information including a global overview of the remuneration policy of the company with regard to board members, chairman and CEO (including the pension schemes), detailed individual remuneration of each of them, the total amount of directors' fees and the amount per director, and the general policy concerning the allocation of stock or stock options to the chairman and the CEO.[150] This requirement does not apply to executives (Chief Legal Officer, Chief Financial Officer, *etc.*) who are not board members, chairman or CEO.

Additionally, the annual report should give detailed information about any conditions the remuneration of the chairman or of the CEO depends on. The precise formula which leads to the calculation of the remuneration should be disclosed.

Non-disclosure of such information neither renders resolutions adopted at a shareholder meeting null and void[151], nor does it lead to the application of criminal sanctions. However, any interested person, which obviously includes shareholders, can file an action before the relevant

[144] Annex 1 of European Regulation n°809/2004, dated April 29, 2004.
[145] Interpretation guide of the elaboration of a document de référence - Interpretation n°4 of the European regulation.
[146] The statutory requirement only concerns the global remuneration of the board member; however, AMF strongly recommends to present detailed information for the remuneration of each individual Board member.
[147] Interpretation n°4 of the AMF op.cit.
[148] Sections R.225-83-4° and R.225-89 of the French Commercial Code.
[149] AMF Recommendation on Shareholder Participation in general Meetings dated April 16, 2007.
[150] AFEP- MEDEF Recommendations dated January 2007.
[151] CNCC Communication dated October 11, 2005.

Commercial Court so as to enjoin the board to disclose such information[152], failure of which would result in a penalty payment ("*Astreinte"*).

Finally, the aggregate amount of remuneration of the ten most highly remunerated persons in the company are to be disclosed to the shareholders of both listed and non-listed companies prior to the general annual meeting of shareholders.[153] In practice, listed companies disclose such information in their annual report which is posted on their website.

Internal Control Report

Statutory company law furthermore requires listed companies to establish and publish an *internal control report*.[154] This report should explain the internal regulation of the company to the shareholders, including its reporting procedures, ethic rules, the specific committees which are established in the company, the board members', chairman's and CEO's remuneration and company policy with regard to board members' remuneration. This information requirement is similar to the information that companies are required to provide in their annual report. According to company law, the internal control report should restate what is decided about the remuneration of board members, chairman and CEO. However, the emphasis of the internal control report lies more on the remuneration policy than on the level of remuneration.

The internal control report should be posted on the company website[155]. It should also be on public display at the company's head office, just like the annual management report to which it is attached. It does not have to be registered at the trade register.

Severance Package

As mentioned in 3.1.1, and pursuant to the procedure of *Conventions Réglementées* and the *Loi TEPA*, several documents concerning severance payments are to be disclosed: the auditor's special report on the agreement between the CEO or chairman and its company, the board's decision defining the performance criteria the severance payment depends on and the board's decision acknowledging that these criteria are met.

4.2. Special statutory disclosure requirements in connection with public offers, acquisitions and mergers

4.2.1. Public offers

First of all, the offeror's prospectus, which includes the above mentioned *document de référence* as well as the target's response document *(Note en réponse*), discloses information on the remuneration of their directors and officers.

Pursuant to the AMF General Regulation, the target company of a takeover bid shall appoint an independent appraiser if the transaction is likely to cause conflicts of interest within its board of

[152] Section L.225-102 indent 3 which refers to section L. 225-102-1 indent 2.
[153] Section L.225-115 of the French Commercial Code.

[154] Section L.225-37 of the French Commercial Code.
[155] Sections 221-1 and 221-3 of the AMF General Regulation.

directors, supervisory board or governing body that could impair the objectivity of the reasoned opinion (*"Avis motivé"*) of the target's board on the interest of the operation or jeopardise the fair treatment of shareholders or bearers of the financial instruments targeted by the bid[156]. Such regulation applies to any agreement which has been entered into between a director or officer of the target company and the offeror. This independent appraiser then drafts a report on the financial conditions of the public offer, referred to as a fairness opinion[157]. Under certain circumstances (see article 261-2 of the Commercial Code), the fairness opinion must be distributed at least ten trading days before the general meeting convened to authorise the transaction, by making it available at the issuer's registered office, publishing a news release, and publishing it on the issuer's website.

4.2.2. Acquisitions

Pursuant to section L.225-38 to L.225-40 of the French Commercial Code related to the procedure of *Conventions Réglementées*, any agreement entered into, either directly or through an intermediary, between the company and its CEO, one of its assistant CEOs, one of its board members, one of its shareholders holding a fraction of the voting rights greater than 10% or, in the case of a corporate shareholder, the company which controls it, must be subject to the prior consent of the board of directors.

The same procedure applies to agreements in which a person referred to in the previous paragraph has an indirect interest.

Agreements entered into between the company and another firm are also subject to prior consent of the board if the company's CEO, one of its assistant CEOs or one of its board members is the owner, an indefinitely liable partner, a manager, a board member or a member of that firm's supervisory board or is, more generally, involved in its management. The interested party may not participate to the vote of the board related to the authorization and such interested party shall not be taken into account for the calculation of the quorum and the majority.

The chairman of the board of directors shall then advise the auditors of all agreements authorised and shall submit them to the general meeting for approval.[158]

After prior authorization of the board, the auditors shall then present a special report on the agreements to the meeting of shareholders, which shall rule on this report. The interested party may not participate to the vote and their shares shall not be taken into account for the calculation of the quorum and the majority.

This procedure applies to any acquisition in which a director or officer is either directly interested (because the seller and the offeror both have common directors or because the director entered in his own name into an agreement with the other company) or indirectly interested, as defined by case law.

[156] Section 261-1of the AMF General Regulation.
[157] Section 262-1 of the AMF General Regulation.
[158] Section L.225-40 of the French Commercial Code.

4.2.3. Mergers

Mergers are not subject to this procedure of *Conventions réglementées*, as they are of the sole competence of the general meeting of shareholders.

4.3. Special statutory disclosure requirements in connection with price-sensitive information

In French Law, the remuneration of officers and directors is not considered to be price-sensitive information.

4.4. CGLC Report disclosure requirements

Compensation committee's activity

According to the CGLC Report requirements, the annual report should include a statement on the compensation committee's activity during the elapsed financial year.[159]

Board compensation (not being stock options)

Furthermore, listed companies' annual reports should include a chapter, drafted with assistance from the compensation committee, dedicated to information to the shareholders relating to the compensation received by managers, containing the following parts:

- The policy for the determination of corporate officer's compensation, including principles for allocation of fixed and variable portions, criteria determining the grounds used for the variable parts and rules for awards of bonuses;
- The individual compensation of each corporate officer and the total amount of compensation paid to corporate officers during the elapsed financial year, compared with the previous financial year, and broken down between fixed and variable parts, in aggregate;
- Aggregate and individual amount of attendance fees paid to directors and the rules for allocation among them, and the rules for collection of attendance fees paid to members of the general management team in connection with corporate offices held in group affiliates;[160]
- The number of shares in the corporation held personally by each director.[161]

Furthermore, the policy regarding remuneration, including the rules for allocation of attendance fees and individual amounts of payments made to directors, should be set out in the annual report.[162]

Board compensation in the form of stock options

[159] CGLC Report, section 15.2
[160] CGLC Report, section 15.3.1
[161] CGLC Report, section 12
[162] CGLC Report, section 18.3

The annual reports of listed corporations having granted options should include a section relating to such options in the part of the report dealing with the composition of and changes to the capital of the company. That section, drafted by the committee of directors in charge of granting the options, should describe the policy for the award of options for all beneficiaries and state separately, if applicable, the specific policy for awards to corporate officers and to the employees covered by the new legal provisions described a few lines above. In particular, the following should be stated:

- the nature of the options,
- the criteria for definition of classes of beneficiaries,
- the intervals at which options are granted, and
- the terms set by the board for exercise of the options.

The second part should consist of a summary in tabular form setting out all the relevant data for the option plans in force, as provided for in the reference document, adding thereto, if applicable, next to the exercise price, a statement of the discount granted or premium applied.[163]

Furthermore, the compensation committee should make known to the board its proposals concerning the choice between granting subscription or purchase options, specifying the reasons for its choice as well as the consequences of this choice.[164]

5. Available measures

Question II: Which measures are available to individual shareholders and the general meeting of shareholders, and to individual employees, works councils and labour unions in the following situations:

a) they disagree with the composition or level of the individual remuneration of a board member or with the remuneration policy, for instance before or after the remuneration is established, granted and/or paid;

5.1. Judicial measures available to shareholders outside of merger, acquisition or take-over situations

There are three types of remedies available to shareholders concerning the remuneration of directors and officers:

- Specific remedies provided by the *Loi TEPA;*
- Criminal remedies; and
- Civil remedies

5.1.1. Specific measures provided by "Loi TEPA"

Pursuant to the new *Loi TEPA* applicable since October 1st, 2007 (only to listed companies), if specific CEO's or chairman's remuneration is not conditioned upon performance, or if

[163] CGLC Report, section 15.3.2
[164] CGLC Report, section 15.3.2

performance is not met but such remuneration is granted, or if the board decision that verifies that the performance conditions have been met has not been published as required under section L.225-42-1 of the French Commercial Code, any severance payments will be rendered null and void. This way, shareholders, acting before Court in the name of the company *("ut singuli"*) can force the concerned beneficiary to pay back its remuneration to the company.[165]

5.1.2. Criminal remedies

An excessive remuneration can also lead to the offence of misuse of corporate property (*Abus de biens sociaux)*. The director or officer is more likely to be found liable for such an offence since in most cases he took advantage of his position in the company or of his equity participation. Case-law consistently establishes that the offence of *Abus de biens sociaux* does not harm directly and certainly shareholders but harms the company itself. Therefore, no remedies are granted to the shareholders, or even the company's creditors, employees, Works Council, auditors, *etc*. However, the remedy available to the company can be initiated either by the shareholders, acting in the name of the company (*"ut singuli"*), or by the company itself (*"ut universi"*).

For instance, a CEO was found liable for *Abus de biens sociaux* for having received an excessive remuneration, partly based upon his company's turnover which he artificially inflated by issuing fake invoices, when the company was in fact facing serious financial difficulties.[166]

5.1.3. Civil remedies related to the remuneration

Civil liability for management fault

Directors who take advantage of their position in the company or of their equity participation so as to be granted an unreasonable remuneration can be found liable either individually or collectively with the board of directors for wrongly managing the company. In practice, courts hold overpaid directors liable more easily when the company is facing financial difficulties.

Similarly, when a company is in insolvency proceedings *(procedure de redressement judiciaire)*, directors can be more easily held civilly liable since specific rules of liability apply in such case, in particular, the rules related to the *"action en comblement de passif"* provided by section L.651-2 of the French Commercial Code.

Under such section, when a company reveals an excess of liabilities over assets, the court may, in instances where management fault has contributed to the excess of liabilities over assets, decide that the debts of the legal entity will be borne, in whole or in part, by all or some of the de jure or de facto directors, who have contributed to the management fault. If there are several managers, the court may, by way of a reasoned ruling, declare them jointly and severally liable.

The difficulty is that the management fault is characterized by the Court, on a case by case basis, in the light of the specific circumstances of the case. For instance, it has already been

[165] Accordingly, the prejudice being directly suffered by the company (as opposed to a prejudice that would have been directly and personally suffered by the shareholders) is exclusively available to the company.
[166] Criminal section of the Cour de Cassation, September 22, 2004 n°03-82266.

judged that an important increase in the remuneration of a director even though the company was in insolvency proceedings could be qualified as a management fault[167].

Expert opinion on management

The shareholders suspecting the allocation of an excessive/irregular remuneration to the directors/officers may also have recourse to seek an expert opinion on the management *(expertise de gestion)* provided by section L.225-231 of the French Commercial Code. Such section enables shareholders holding individually or collectively no less than 5% of the share capital to use the proceedings of special urgency in order to ask for the appointment of an expert which will have to establish a report on a specific management decision.

According to the French case-law, a management decision is a decision given by a body of management (organic criteria). Since the board (which is a management body) is exclusively competent to grant remuneration to a CEO or to a chairman, section L.225-231 aforementioned applies to decisions related to allocation of remunerations.

By way of example, a French court agreed to appoint an expert in order to establish a report on the nature of the sums granted to the directors[168].

5.1.4. Civil remedies related to disclosure

Section L.225-102 of the French Commercial Code provides that "any interested person" can issue an order at court to force the company to finish and/or publish the annual report, failure of which would result in a penalty payment ("*Astreinte"*). The term "interested person" also entails shareholders.

5.2. Judicial measures available to employees and works councils outside of merger, acquisition or take-over situations

As stated before in section 5.1.4, any "interested person" can issue an order at court to force the company to complete and/or publish the annual report. It is yet unclear if this definition also encompasses employees and/or a Works Council.

The difficulty lies in the fact that the concept of "interested person" is not precisely defined by French Law.

The French Court and the major authors widely interpret such concept by referring to the general rules of civil proceedings described in the French civil proceedings code (*Nouveau Code de Procédure Civile*) related to the rules of receivability of the actions before the court *i.e.* the existence of a legitimate interest necessary to act.

[167] Paris Court of Appeal, January 17, 1981; Commercial section of the Cour de Cassation, September 21, 2004.
[168] CA Rouen, 2e Ch civ. 16 avril 1992.

Thus, any person, meaning a shareholder, an employee or a third party, can issue an order in court as long as it has proved its legitimate interest and that the person is directly concerned by the litigious situation.

It must also be pointed out that section L.225-231 above mentioned allows works councils, just like the minority shareholders, to use the proceedings of special urgency in order to ask for the appointment of an expert which will establish a report on a specific management decision, such as the decision to grant the directors' remuneration.

b) individual shareholders and the general meeting of shareholders, or individual employees, works councils and labour unions suspect that the personal (financial) interest of a board member has prevailed over the interest of the company, in the process of making decisions about entering into a merger or acquisition;

5.3. Measures available to shareholders in merger, acquisition or take-over situations

There are no other measures than those described above in section 4.2.1, related to the specific procedure applicable to related parties agreements provided under section L.225-38 of the French Commercial Code *(Conventions Réglementées)* and to the appointment of an independent appraiser provided under section 261-1 of AMF General Regulation, and obviously, the general rules described in section 5.1.

5.4. Measures available to employees in merger, acquisition or take-over situations

There are no such remedies.

6. Measures in practice

Question III: To what extent are these measures used in practice?

6.1. General remarks

In practice, excepted the remedy related to the misuse of corporate property (*Abus de biens sociaux;* see 5.1.2*)* and the civil remedy consisting in holding the directors liable for management fault *(action en comblement de passif;* see 5.1.2*)*, the remedies above described are rarely used.

7. Different requirements and measures for non-listed companies

All the rules mentioned in the present report indifferently apply to listed and non-listed companies, except when provided otherwise in the above developments.

- **Naut**a*Dutilh*

V. THE UNITED KINGDOM

1. Executive summary

1.1. General

Listed companies in the United Kingdom are structured pursuant to the one-tier model, whereby managerial tasks are allocated between the executive and non-executive directors.

The general rules concerning the internal organisation of the company, including the allocation of powers to the several corporate bodies, follow from the Companies Act 1985, which is currently gradually being replaced by the Companies Act 2006. Furthermore, the Financial Services Authority ("FSA") Listing Rules and the Combined Code on Corporate Governance apply to listed corporations. The Code is applied on a comply-or-explain basis.

1.2. Determination, level and structure of executive remuneration

a. Listed Public Limited Companies (PLC)

The remuneration of directors of listed companies is determined by a remuneration committee comprised of non-executive directors. The remuneration committee must follow the guidance set out in the Combined Code on Corporate Governance when deciding on a remuneration policy and setting pay:

- A significant proportion of executive remuneration is required to be linked to corporate and individual performance;
- Shareholder approval is required for any share-option or long-term incentive schemes.
- Executive remuneration of non-executive directors must not include share options unless prior shareholder approval is obtained and any shares acquired by exercise of the options are held until at least one year after the non-executive director leaves the board;

Shareholder bodies – such as the Association of British Insurers – take a close interest in remuneration and publish their own guidelines on directors' remuneration, which are an important consideration for listed companies when determining directors' remuneration.

b. Unlisted PLCs

Unlisted PLC are not required to comply with the Combined Code and the remuneration of its directors will be determined by its articles of association. Usually an unlisted company's articles provide that the directors determine the remuneration of directors (although a director would not normally attend or take part in any discussion or vote on his own service contract).

1.3. Disclosure of Remuneration

a. Disclosure requirements for listed PLC's

Companies Act:

Listed companies must, in respect of each financial year, include as part of their annual report a remuneration report. Criminal liability is attached to non-compliance. This will set out details of each director's remuneration, including basic salary, share-based benefits and pensions, any provision for compensation payable upon early termination of the director's contract, and performance conditions with regard to remuneration. The remuneration report must be sent to the company's shareholders, who have an advisory vote on approval of the remuneration report.

Listing rules:

- The annual report must contain a statement on how the company has applied the Combined Code on Corporate Governance, which includes recommendations on the determination of remuneration. Where the company has not complied, it must explain why this is the case.

- Significantly, the Listing Rules also require share option and long-term incentive schemes to be circulated to and voted on by a company's shareholders. Unlike the statutory vote on the remuneration report as a whole, this vote is not advisory and must be passed if the relevant scheme is to go ahead.

b. Disclosure requirements for listed PLC's in connection with public offers

Companies Act:

- In a takeover situation, any extraordinary payments made to the target's directors must be disclosed to and approved by the shareholders. If the payment is made without the required disclosure and approval, it is held by the recipient director on trust for the target and any directors who authorised the payment are jointly and severally liable to indemnify the target for any loss resulting from it. However, if that payment is made in good faith to discharge existing legal obligations, such approval is not required.

Takeover Code:

- Where a takeover offer includes shares in the offeror as consideration, the offer document must state whether the remuneration of the offeror directors will be affected by the target's acquisition.

- Any offer document must state whether (e.g. compensation) arrangements have been made with the target's directors. In its first response document, the target's directors must disclose details of their service contracts.

c. Disclosure requirements for unlisted PLC's

Companies Act:

- Unlisted companies are required to disclose detailed information on executive remuneration in the notes to their annual accounts, including the aggregate amount of remuneration paid, the number of directors who have exercised share options or received shares under long-term incentive schemes, and the aggregate value of any company contributions paid to directors' pension schemes where the contributions are in respect of money-purchase benefits.

- Where the aggregate amount of remuneration is £200,000 or more, an unlisted company must disclose additional remuneration details in the notes to its annual accounts, including the proportion of that aggregate remuneration which was paid to the highest-earning director, any increases in retirement benefits paid to directors or past directors in excess of amounts to which they were entitled and the aggregate of amounts paid to directors as compensation for loss of office.

1.4. Available measures

Shareholders:

a. Measures available to shareholders in general:

- Shareholders vote on the remuneration report each year and can send a clear message to the company by voting against the resolution to approve the report. However, the vote is advisory only.

- Shareholders have the ability to remove directors before the end of their term with a simple majority vote and to change a company's articles (for example, so that shareholders are involved in determining remuneration).

- If a shareholder believes that a director has put his own interests above those of the company, he is entitled to bring a derivative action on behalf of the company (for instance, when excessive executive remuneration has been granted).

b. Measures available to shareholders in connection with merger, acquisition or take-over situations:

If a shareholder believes that a director has put his own interests above those of the company in connection with a merger, acquisition or take-over, he is entitled to bring a derivative action on behalf of the company.

Employees:

c. Measures available to employees in general:

UK company law does not provide employees with any significant degree of participation in the running of corporate entities. Whilst employees have certain protections (for example, the right

to join a trade union) they do not, for example, have any right to appoint directors or change a company's articles.

Employees do not have any specific remedies where they believe that the directors' decision to approve a takeover is motivated by the prospect of personal gains.

1.5. Measures in practice

In the context of listed companies, the only option commonly used in practice is for shareholders to vote against the remuneration report. Although the vote is advisory, where a significant minority rejects the report, the likelihood is that the company will reconsider its policy on remuneration and may even attempt to deny individual directors their specific benefits.

The judicial measure of derivative action also needs to be mentioned in this regard. While this measure does not appear to have a significant direct influence on sanctioning executive remuneration, the possibility of shareholders using a derivative action has a strong preventative effect.

2. Introduction

The law in relation to the remuneration of directors is split roughly between non-statutory sources dealing with the determination of remuneration and statutory sources dealing with disclosure of remuneration.

How remuneration should be set is dealt with largely by the Combined Code on Corporate Governance ("the Combined Code"). The Combined Code sets out standards of good practice in relation to issues such as board composition and development, remuneration, accountability and audit and relations with shareholders. Whilst it does not have statutory force, all companies incorporated in the UK and listed on the Main Market of the London Stock Exchange are required under the Listing Rules (see below) to report on how they have applied the Combined Code in their annual report and accounts. Such companies are required to report on how they have applied the principles of the Combined Code, and either to confirm that they have complied with the Combined Code's provisions or - where they have not - to provide an explanation.[169]

When and to what extent remuneration must be disclosed is provided for by statute and rules having statutory effect. The basic requirements are set out in the Companies Acts. The UK company law regime is currently in a period of transition, with the Companies Act 1985 ("CA 1985") being replaced by the Companies Act 2006 ("CA 2006"). For financial years beginning before 6 April 2008, the provisions of CA 1985 will apply; for financial years beginning on or after that date, CA 2006 will apply. However, broadly speaking the change will not result in any significant changes with regard to directors' remuneration. In addition to these Acts, there are also disclosure requirements in the Listing Rules, which form part of the Financial Services Authority ("**FSA**") Handbook. Whilst not in themselves of a statutory nature, the Listing Rules are enforced by the FSA under a statutory power.

3. Determination, level and structure of executive remuneration

3.1. Unlisted public limited companies ("PLCs")

An unlisted PLC is not required to comply with the Combined Code and the remuneration of its directors will be determined by its articles of association. These may provide for the remuneration to be determined from time to time by the company in general meeting[170], but usually an unlisted company's articles provide that the directors determine the remuneration of directors (although a director would not normally attend or take part in any discussion or vote on his own service contract).

3.2. Listed PLCs: the Combined Code

Procedure for determining remuneration

Listed PLCs are required by the Combined Code to have a remuneration committee comprised of at least three independent non-executive directors that determines the company's remuneration policy and the contractual provisions and remuneration terms of executive

[169] LR 9.8.6R(6).
[170] See 1985 Table A, reg. 82.

directors.[171] The company chairman may also be a member of, but not chair, the committee if he or she was considered independent on appointment as chairman. In any event, the remuneration committee is required to consult the chairman and/or chief executive about their proposals relating to the remuneration of other executive directors. The committee should make available its terms of reference, explaining its role and the authority delegated to it by the board.

The remuneration committee should have delegated to it all responsibility for setting remuneration for executive directors and the chairman, including pension rights and any compensation payments. It should also recommend and monitor the level and structure of remuneration for senior management.[172] How the remuneration of non-executive directors is determined will depend on the company's articles of association, which may leave that responsibility with the shareholders. However, non-executive remuneration is usually set by the executive directors.[173] The over-arching principle is that no director should be involved in deciding his or her own remuneration.

It is therefore clear that the power to determine the remuneration of directors rests firmly in the hands of the directors themselves and in particular with the remuneration committee. However, the Combined Code does require the chairman of the board to ensure that the company maintains contact as required with its principal shareholders about remuneration in the same way as for other matters. In addition, the Combined Code states that shareholders should be invited specifically to approve all new long-term incentive schemes and significant changes to existing schemes.[174]

The level and make-up of remuneration

The Combined Code requires generally that levels of remuneration be sufficient to attract, retain and motivate directors of the quality required to run the company successfully, at the same time as warning that a company should avoid paying more than is necessary for this purpose. Further, a significant proportion of executive directors' remuneration should be structured so as to link rewards to corporate and individual performance. The remuneration committee should judge where to position their company relative to other companies, but use such comparisons with caution, in view of the risk of an upward ratchet of remuneration levels with no corresponding improvement in performance. The committee should also be sensitive to pay and employment conditions elsewhere in the group, especially when determining annual salary increases.

The performance-related elements of remuneration should form a significant proportion of the total remuneration package of executive directors and should be designed both to align their interests with those of the company's shareholders and to give them incentives to perform at the highest levels.[175] Executive share options are, however, not to be offered at a discount save as permitted by the relevant provisions of the Listing Rules (see below).[176]

[171] Code Provision B.2.1. The remuneration of a smaller company (i.e. one that is below the FTSE 350 throughout the year immediately prior to the reporting year) need only comprise of two independent non-executive directors.
[172] Code Provision B.2.2.
[173] Code Provision B.2.3.
[174] Code Provision B.2.4.
[175] Code Provision B.1.1.
[176] Code Provision B.1.2.

Levels of remuneration for non-executive directors should reflect the time commitment and responsibilities of the role, but must not include share options unless prior shareholder approval is obtained and any shares acquired by exercise of the options are held until at least one year after the non-executive director leaves the board.[177]

The remuneration committee is required to carefully consider what compensation commitments (including pension contributions and all other elements) directors' terms of appointment would entail in the event of early termination. The aim should be to avoid rewarding poor performance. They should take a robust line on reducing compensation to reflect departing directors' obligations to mitigate loss.[178] Further, notice or contract periods must be set at one year or less. If it is necessary to offer longer notice or contract periods to new directors recruited from outside, such periods should reduce to one year or less after the initial period.[179]

3.3. Listed PLCs: institutional pressure

As stated above, the Combined Code requires the chairman to ensure that the company maintains contact as required with its principal shareholders about remuneration. Shareholder bodies – including the Association of British Insurers ("**API**") – take a close interest in such matters and publish their own guidelines on directors' remuneration. Whilst these guidelines have no legal force, most companies will want to avoid the adverse publicity and potential withdrawal of support which may result if they do not comply, and so they are an important consideration for listed companies when looking at directors' remuneration.

The ABI's guidelines broadly follow the Combined Code, stressing for example that bonuses should be determined against performance levels. They are more significant, however, in relation to share-based incentive schemes. It is recommended that executive directors not be granted discounted share options, and share options not granted to non-executive directors at all. Further recommendations include the following:

- Dilution under all schemes should not exceed 10% in any rolling 10-year period and, as a general rule, commitments under executive (discretionary) schemes should not exceed 5% of the issued share capital over a similar period.

- Awards should be conditional on the satisfaction of certain challenging performance criteria related to the overall performance of the company including, for example, the total return made to shareholders. Performance levels should be measured over a period of at least three years.

- There should be no automatic waiving of performance conditions either in the event of a change of control or where subsisting options and awards are 'rolled over' in the event of a capital reconstruction, and/or the early termination of the participant's employment.

- Initial vesting levels should not be significant in relation to annual salary.

[177] Code Provision B.1.3.
[178] Code Provision B.1.4.
[179] Code Provision B.1.5.

4. Disclosure of Remuneration

Question I: At which moments in time (for instance: at the time of publication of the annual report, entering into an agreement, exercise of options, fulfilment of certain conditions) and in what form are individual remunerations or components of individual remunerations of board members required to be made public?

4.1. Unlisted PLCs

The Companies Acts require unlisted companies in the notes to their annual accounts to disclose, separately, each of the following:

(a) the aggregate amount of remuneration paid to or receivable by directors;

(b) the number of directors who have exercised share options or received shares under long- term incentive schemes;

(c) the aggregate of the amount of money paid to or receivable by directors, and the net value of assets (other than money and share options) received or receivable by directors, under long term incentive schemes; and

(d) the aggregate value of any company contributions paid to directors' pension schemes where the contributions are in respect of money-purchase benefits.[180]

The essential difference here to the disclosures required of listed companies is that disclosures are not made in respect of individual directors but in respect of the directors as a collective. However, where the aggregate amount of remuneration is £200,000 or more, an unlisted company must also disclose the following in the notes to its annual accounts:

(e) the proportion of that aggregate remuneration which was paid to the highest-earning director;

(f) the proportion of that highest earning director's remuneration consisting of pension contributions, and that highest earning director's accrued pension;

(g) any increases in retirement benefits paid to directors or past directors in excess of amounts to which they were entitled;

(h) the aggregate of amounts paid to directors as compensation for loss of office; and

(i) the aggregate amount of consideration paid to third parties in respect of services made available to them by the directors.[181]

[180] CA 1985, sch. 6, para. 1(1); The Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008 ("the Regulations"), sch. 5, para. 1(1).
[181] CA 1985, sch. 6, paras 2 to 9; the Regulations, sch. 5, paras 2 to 5.

4.2. Listed PLCs: Companies Acts

The disclosure requirements for unlisted companies set out in sub-paragraphs (a), (c) and (d) above also apply to listed companies. Further, rather than state the number of directors who have exercised share options or received shares under long-term incentive schemes, listed companies are required to disclose the aggregate of the amount of gains made by directors on the exercise of share options.

A more significant disclosure obligation for listed companies, however, is the requirement that for each financial year they produce a directors' remuneration report.[182] Criminal liability is attached to non-compliance[183] and it is the duty of any director, and anyone who has been a director at any time within the preceding five years, to give notice to the company of matters relating to himself as are necessary for the purposes of the report.[184] The content of the remuneration report can be divided between that which is subject to audit and that which is not. However, all of the information listed below must be included in the report.

Remuneration report: information not subject to audit

- Information regarding the remuneration committee, including the name of each director who has been a member of it during the reporting year and the name of any person who has advised the committee and the nature of the service they provided.[185]

- A statement of the company's policy on directors' remuneration for the following and future financial years, including:

    - for each director, a detailed summary for each director of any performance conditions to which any entitlement of the director to share options, or under a long term incentive scheme, is subject;

    - an explanation as to why any such performance conditions were chosen;

    - a summary of the methods to be used in assessing whether any such performance conditions are met and an explanation as to why those methods were chosen;

    - the identity of any company or index against which such a performance condition involves any comparison;

    - a description of, and an explanation for, any significant amendment proposed to be made to the terms and conditions of any entitlement of a director to share options or under a long term incentive scheme; and

[182] CA 1985, s234B(1); CA 2006, s420(1).
[183] CA 1985, s234B(3); CA 2006, s420(2).
[184] CA 1985, s234B(5); CA 2006, s421(3).
[185] CA 1985, sch. 7A, para. 2(1); the Regulations, sch. 8, para. 2(1).

  - if any entitlement of a director to share options, or under a long term incentive scheme, is not subject to performance conditions, an explanation as to why that is the case.[186]

- A performance graph setting out the total shareholder return on the company's listed equity share capital.[187]

- Information regarding the contracts of service or contracts for services of each person who has served as a director of the company at any time during the financial year, including the date of the contract, the unexpired term and the details of any notice periods, any provision for compensation payable upon early termination of the contract and any other such details as are necessary to enable members of the company to estimate the liability of the company in the event of early termination of the contract.[188]

- For financial years beginning on or after 6 April 2009, a statement of how pay and employment conditions of employees of the company and of other undertakings within the same group as the listed company were taken into account when determining directors' remuneration for the relevant financial year.[189]

Remuneration report: information subject to audit

For each person who has served as a director of the company at any time during the relevant financial year:

- The total amount of salary and fees paid to or receivable by him.[190]

- The total amount of bonuses so paid or receivable.[191]

- The total amount of sums paid by way of expenses allowance that are chargeable to UK income tax.[192]

- The total amount of any compensation for loss of office paid to or receivable by him, and any other payments paid to or receivable by him in connection with the termination of his services.[193]

- The total estimated value of any benefits received by him otherwise than in cash that do not fall within any of the four categories immediately above and a statement of the nature of such non-cash remuneration.[194]

[186] CA 1985, sch. 7A, para. 3; the Regulations, sch. 8, para. 3.
[187] CA 1985, sch. 7A, para. 4; The Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008 ("the Regulations"), sch. 8, para. 5.
[188] CA 1985, sch. 7A, para. 5; the Regulations, sch. 8, para. 6.
[189] The Regulations 2008, sch. 8, para. 4.
[190] CA 1985, sch. 7A, para. 6(1)(a); the Regulations, sch. 8, para. 7(1)(a).
[191] CA 1985, sch. 7A, para. 6(1)(b); the Regulations, sch. 8, para. 7(1)(b).
[192] CA 1985, sch. 7A, para. 6(1)(c); the Regulations, sch. 8, para. 7(1)(c).
[193] CA 1985, sch. 7A, para. 6(1)(d); the Regulations, sch. 8, para. 7(1)(d).
[194] CA 1985, sch. 7A, para. 6(1)(e); the Regulations, sch. 8, para. 7(1)(e).

- The amount that is the total of the sums mentioned in the five categories immediately above.[195]

- Information about any share options held by him, such as details of the number of shares that are subject to his options, how many have been exercised, the exercise prices and the market price of the shares subject to exercised options.[196]

- Information about any long term incentive schemes in which he participates, such as details of the scheme interests that the person has been awarded during the relevant financial year and the amount of money that has become receivable in respect of such interests.[197]

- The accrued benefits of the director under any defined-benefit pension scheme or contributions made to any money-purchase scheme on his behalf.[198]

- The amount of any excess retirement benefits paid to or receivable by him.[199]

- If he is no longer a director, the amount of compensation paid to him by the company for loss of office.[200]

- The sum of any amounts paid to third parties in respect of his services.[201]

Remuneration report: circulation to and approval by shareholders

The remuneration report must be approved by the directors and signed on the board's behalf by a single director or the company secretary. More significantly, the report must be laid before the company's shareholders at a general meeting and, in advance of that meeting, be sent to each shareholder.[202] At the meeting, the shareholders must vote on a resolution to approve the report, with such approval requiring a simple majority.[203] However, the vote is advisory only and a director's entitlement to remuneration is not conditional on the report being approved.[204]

4.3. Listed PLCs: Listing Rules

The Listing Rules require a listed company to provide in its annual report and accounts a narrative statement of how it has applied the principles of the Combined Code (see above).[205] Thus the company must disclose details of the extent to which, and how, it has applied the Combined Code's requirements as to remuneration policy, service contracts and compensation and remuneration committees. Where the company has failed to adhere to the Code it is required by the Listing Rules to explain why it has done so.

[195] CA 1985, sch. 7A, para. 6(1)(f); the Regulations, sch. 8, para. 7(1)(f).
[196] CA 1985, sch. 7A, para. 7; the Regulations, sch. 8, para. 8.
[197] CA 1985, sch. 7A, para. 8; the Regulations, sch. 8, para. 11.
[198] CA 1985, sch. 7A, para. 12; the Regulations, sch. 8, para. 13.
[199] CA 1985, sch. 7A, para. 13; the Regulations, sch. 8, para. 14.
[200] CA 1985, sch. 7A, para. 14; the Regulations, sch. 8, para. 15.
[201] CA 1985, sch. 7A, para. 15; the Regulations, sch. 8, para. 16.
[202] CA 1985, s238 and s241; CA 2006, s432 and s437.
[203] CA 1985, s241A; CA 2006, s239.
[204] CA 1985, s241A(8); CA 2006, s439(5).
[205] LR 9.8.6R(6).

The Listing Rules currently require information similar to that required by statute to be included in the annual report. These requirements will, however, be removed from 6 April 2008.

Significantly, the Listing Rules also require share option and long-term incentive schemes to be circulated to and voted on by a company's shareholders. Unlike the statutory vote on the remuneration report as a whole, this vote is not advisory and must be passed if the relevant scheme is to go ahead.

Inside Information

Under the Disclosure Rules, a listed company must notify a regulatory information service as soon as possible of any inside information which directly concerns the listed company.[206] For the purposes of the Financial Services and Markets Act 2000, which provides for the UK's market abuse regime, inside information is, broadly, information of a precise nature which:

(a) is not generally available;

(b) relates directly or indirectly to one or more issuers of qualifying investments or to the qualifying investments themselves; and

(c) would, if generally available, be likely to have a significant effect on the price of the qualifying investments or on the price of related investments.[207]

Information is precise if it indicates circumstances that exist or may reasonably be expected to come into existence or an event that has occurred or may reasonably be expected to occur and is specific enough to enable a conclusion to be drawn as to the possible effect of those circumstances or that event on the price of qualifying investments.[208]

It is possible that in certain circumstances a change to a company's remuneration policy or to the terms of a particular director's remuneration package could constitute inside information. The test would in practice be largely one of price sensitivity. In determining the likely price significance of information an issuer should assess whether the information in question would be likely to be used by a reasonable investor as part of the basis of his investment decisions and would therefore be likely to have a significant effect on the price of the issuer's financial instruments.[209] A change would thus have to be significant enough to effect a reasonable investor's decision as to whether or not to buy shares in the company and thus significantly effect share prices.

4.4. Listed PLCs: disclosure requirements in connection with public offers

Companies Acts

[206] DTR 2.2.1R.
[207] FSMA 2000, s118C(2).
[208] FSMA 2000 s118C(5).
[209] DTR 2.2.4G(1).

A payment made to a director by a company for loss of, or retirement from, office can only be made if particulars of the proposed payments have been disclosed to all the members[210] (whether or not entitled to attend and vote at general meetings) and if the proposal has been approved by ordinary resolution of the members of the company.[211] This applies to listed and unlisted companies, but is particularly relevant in a takeover situation, where the bidder does not require the continuing services of target directors and a termination settlement is negotiated as part of the takeover arrangements. If the payment is made without the required disclosure and approval, it is held by the recipient director on trust for the target and any directors who authorised the payment are jointly and severally liable to indemnify the target for any loss resulting from it.[212]

However, in many cases the statutory exceptions for payments made in good faith in discharge of legal obligations described below will be relevant.

Of particular relevance in a takeover is the specific statutory duty of disclosure imposed by the Companies Acts where, in connection with the transfer of shares in a company or one of its subsidiaries pursuant to a takeover, a payment is to be made to a director of that company by way of compensation for his loss of office.[213] In these circumstances, the target must ensure that details of the proposed payment (including the amount thereof) are included in a memorandum that is made available to the shareholders of the target prior to the passing of a resolution approving the payment. This disclosure obligation arises whether or not the payment of compensation is to be made by the target or is a separate arrangement with another party, such as the bidder. Thus, any termination payments to the target's directors agreed to be made by the bidder must be disclosed in the offer document. Any payment made under an arrangement entered into as part of the agreement for the transfer, or within one year before or two years after that agreement is presumed to be a payment made in connection with a takeover for the purposes CA 2006, thereby requiring shareholder approval. If the payment is made without the required disclosure and approval, it is held by the recipient director on trust for those of the target shareholders who have sold their shares as a result of the offer, and the expenses incurred by the recipient director in distributing that sum amongst those persons will be borne by the director alone and may not be deducted from the payment out.[214] However, the statutory exception for good faith payments in discharge of legal obligations discussed below are also relevant.

There is an important exception to the restrictions described in the two paragraphs immediately above. Shareholder approval is not required under those rules for payments made in good faith in discharge of an existing legal obligation that was not entered into for the purposes of, or in connection with, the transfer in question; by way of damages for breach of an obligation; by way of settlement or compromise of any claim in connection with the termination of the director's office or employment; or by way of pension in respect of past services.[215] Thus, where a

[210] CA 2006, ss.112: "(1) The subscribers of a company's memorandum are deemed to have agreed to become members of the company, and on its registration become members and must be entered as such in its register of members. (2) Every other person who agrees to become a member of a company, and whose name is entered in its register of members, is a member of the company."
[211] CA 2006, ss215-217.
[212] CA 2006, s222(1).
[213] CA 2006, s219.
[214] CA 2006, s222(3).
[215] CA 2006, s220(1).

director whose contract has been prematurely terminated receives a compensation payment which is a reasonable estimate of the damages which would have been awarded by a court (including an appropriate allowance for mitigation, that is, finding new employment), this will not fall within the restrictions. In the case of a "golden parachute" this would, of course, cover payment of the whole of the fixed sum which the director is entitled to receive on a takeover.

Takeover Code

The City Code on Takeovers and Mergers ("the Takeover Code") provides that where the consideration under a takeover offer includes equity securities in the offeror, the offer document must state whether and in what manner the remuneration of the offeror directors will be affected by the acquisition of the target company or by any other associated transaction. If there will be no effect, this must be stated.[216] It is normally acceptable for the effects of the transaction on the remuneration of several directors to be grouped or aggregated.[217]

The Takeover Code also stipulates that unless otherwise agreed with the Takeover Panel, the offer document must include a statement as to whether or not any agreement, arrangement or understanding (including any compensation arrangement) exists between the offeror (or any person acting in concert with it) and any of the directors or recent directors of the target company. Full particulars of any such agreement, arrangement or understanding are also required.[218]

If there arise any material changes to the information on such remuneration or special arrangements set out in the offer document, documents subsequently sent to target shareholders must contain details of such changes.[219]

Obligations are also owed by the target company's directors. The first major circular from the target's directors advising target shareholders on whether or not to accept the offer ("the first response document") must contain details of every director's service contract(s).[220] Such details should include:

(a) the name of the director;

(b) the date of the contract, the unexpired term and details of any notice periods;

(c) full particulars of the director's remuneration including salary and other benefits;

(d) any commission or profit-sharing arrangement;

(e) any provision for compensation payable upon early termination of the contract; and

[216] The Takeover Code, Rule 24.4.
[217] The Takeover Code, note to Rule 24.4.
[218] The Takeover Code, Rule 24.5.
[219] The Takeover Code, Rule 27.1.
[220] The Takeover Code, Rule 25.4(a).

(f) anything else necessary to enable investors to estimate the possible liability of the company on early termination of the contract.[221]

If any such contracts have been entered into or amended within six months of the date of the first response document, details must be given in respect of any earlier contracts which have been replaced or amended as well as in respect of the current contracts. If there have been none, this should be stated.[222] The Takeover Panel will regard as the amendment of a service contract under this requirement any case where the remuneration of a director of the target is increased within six months of the date of the first response document. Therefore, any such increase must be disclosed in the first response document and the current and previous levels of remuneration stated.[223]

Where, during the course of an offer – or even before that date if the board suspects an imminent offer – a director's service contract is to be amended in such a way that it gives rise to an abnormal increase in his remuneration, that amendment must first be approved by the company's shareholders.[224]

5. Available measures

Question II: Which measures are available to individual shareholders and the general meeting of shareholders, and to individual employees, works councils and labour unions in the following situations:

(a) they disagree with the composition or level of the individual remuneration of a board member or with the remuneration policy, for instance before or after the remuneration is established, granted and/or paid;

5.1. Measures available to shareholders outside of merger, acquisition or take-over situations

Where a company's shareholders disagree with the terms of a proposed share-option or long-term incentive scheme for the directors, those shareholders can vote against the resolution required by the Listing Rules to approve the scheme. If a simple majority of the shareholders vote against the resolution the scheme cannot be implemented.

It has been noted above that the shareholders of a company must be given an opportunity to vote on the annual remuneration report. Although the vote is advisory only – meaning that it cannot directly prevent any remuneration being awarded or the policy being maintained – a lack of approval (even if comprising less than a majority of the members) will give a clear message to the directors and, in particular, the remuneration committee that they should revise directors' remuneration. A negative vote would also worry potential investors and create adverse publicity, so the vote is a significant weapon in the shareholder's arsenal.

[221] The Takeover Code, note 1 to Rule 25.4.
[222] The Takeover Code, Rule 24.5(b).
[223] The Takeover Code, note 2 to Rule 25.4.
[224] The Takeover Code, Rule 21.1(b)(v) (see note 6).

Other options for shareholders wishing to communicate their dissatisfaction to the board include circulating a member's statement[225] or proposing a member's resolution[226]. Where the company receives requests from shareholders representing 5% of the total voting rights of the company or from at least 100 shareholders, it is required to circulate to all of the company's shareholders a member's statement of up to 1,000 words. The statement could, for example, discuss the demerits of the remuneration report being discussed at a proposed meeting. Alternatively, the same proportion of shareholders in a public company (whether or not it is listed) can require the company to distribute a resolution to the other shareholders which will in turn be voted upon by the shareholders at a general meeting. Thus the shareholders could stage a vote against one particular element of the remuneration report or the company's policy on remuneration. Depending on the articles of association of the company, the directors would not be obliged to follow the resolution, but it would nonetheless send them a very powerful message.

A more drastic solution would be for shareholders to resolve to change the company's articles, for example to give them direct involvement in the determination of remuneration. This could be achieved by a shareholder vote approved by 75% of the members.

5.2. Measures available to employees outside of merger, acquisition or take-over situations

UK company law does not provide employees with any significant degree of participation in the running of corporate entities. Whilst employees have certain protections (for example, the right to join a trade union) they do not, for example, have any right to appoint directors or change a company's articles. Consequently, employees do not usually have any means of affecting remuneration directly. However, trade unions can apply pressure on employers through lobbying or possibly at the general meeting of the company. Further, directors are under a statutory duty, when considering what is in the best interests of the company, to consider the interests of employees and the remuneration report must, from 6 April 2009, give a statement explaining how the company has considered employee conditions within the group when determining directors' remuneration.

(b) individual shareholders and the general meeting of shareholders, or individual employees, works councils and labour unions suspect that the personal (financial) interest of a board member has prevailed over the interest of the company, in the process of making decisions about entering into a merger or acquisition?

5.3. Measures available to shareholders in merger, acquisition or take-over situations

Since 1 October 2007, directors of UK companies have been under a statutory duty to act in the way they consider most likely to promote the success of the company for the benefit of its members as a whole.[227] Where a director acts in breach of this duty, he is personally liable for any loss sustained by the company. The company's shareholders can bring a derivative claim on behalf of the company.[228] This means that a shareholder who suspects that a director is

[225] CA 2006, s314.
[226] CA 2006, s338.
[227] CA 2006, s172(1). "Members" here means "shareholders".
[228] CA 2006, s260.

acting or has acted in his own interests (for example, with regard to remuneration) rather than the interests of the company can bring a claim to recoup any losses the company might have suffered as a result. To bring such a claim the shareholder must apply to the court for permission. In considering whether to give permission, the court must take a number of factors into account, including whether it is likely to promote the success of the company.[229]

Shareholders may also petition the court for an order on the ground that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of the members generally or some part of its members.[230] However, in practice this is a costly and often very cumbersome procedure and the derivative action is consequently a more popular choice.

An alternative – or additional – course of action may to have the director in question dismissed. Any director may be removed before the expiration of his period of office by a simple majority vote of the company's shareholders.[231] It should be noted that the director in question must be given forward notice of the resolution to remove him and allowed the opportunity to be heard on the motion at the relevant shareholder meeting.[232] If the other directors refuse to call a meeting or propose a resolution to remove the director, shareholders representing at least 10% of the total votes can require the directors to call the meeting and propose the resolution.[233]

The Takeover Code requires the board of an offeree company to act in the best interests of the company as a whole.[234] A possible conflict could arise from a director holding shares in the offeree, and so the first circular issued by the offeree's directors must give details of their shareholdings.[235] If a director of the offeree company does have a conflict of interest, his views on the offer should not be expressed together with those of the rest of the board and the nature of the conflict should be clearly expressed to shareholders.[236] Were a director to put his own personal interests ahead of those of the company, he could be made subject to disciplinary action by the Takeover Panel. Sanctions arising from this could include, for example, public censure and enforcement action (such as the imposition of a fine) by a regulatory authority such as the FSA.

5.4. Measures available to employees in merger, acquisition or take-over situations

Employees are afforded certain information rights in takeover situations. It has always been a principle of the Takeover Code that the board should consider the interests of employees as well as those of shareholders when analysing the merits of a takeover offer. Offer documents and response documents must be made available to employee representatives or, where there are no such representatives, the employees themselves.[237] In addition, the target board must, when circulating a first response to an offer, append to that document a separate opinion from the

[229] CA 2006, s263(3).
[230] CA 2006, s994(1).
[231] CA 2006, s168(1).
[232] CA 2006, s169.
[233] CA 2006, s303.
[234] The Takeover Code, General Principle 3.
[235] The Takeover Code, Rule 25.3(a)(ii).
[236] The Takeover Code, Note 3 to Rule 25.1.
[237] The Takeover Code, Rules 30.1(b) and 30.2(a).

representatives of its employees on the effects of the offer on employment.[238] However, despite these protections, employees do not have any specific remedies where they believe that the directors' decision to approve a takeover is motivated by the prospect of personal gains.

6. Measures in practice

QUESTION III: To what extent are these measures used in practice?

The only remedy used with any frequency in the context of listed companies is the shareholder's right to express his views at general meetings and, in particular, to vote on the remuneration report. Since the vote on remuneration reports was introduced in 2002, shareholders have on a number of occasions used it to express their dissatisfaction with board remuneration. This is in line with the government's policy goal in introducing the requirement, namely was that the vote should enable shareholders to "send an appropriate message to directors".

In a small number of high-profile instances the vote has been rejected by a majority of shareholders. Although not having the effect of preventing the remuneration packages in question being awarded, this has in almost every case resulted in the company in question revising its remuneration policy or changing a specific payment to a director. In 2003, GlaxoSmithKline became the first company in the FTSE 100 index to have its remuneration reported rejected. The report disclosed that executive directors would be awarded two-year contracts and that the company's chief-executive, Jean-Pierre Garnier, would be paid almost £23m were he ever to be removed. More than 50% of the shareholders voted to reject the remuneration report. Consequently, GlaxoSmithKline independently reviewed its entire remuneration policy, reduced the length of its directors' service contracts to one year and also reduced the size of Dr Garnier's pay package.

It has been more common for a significant minority to reject the remuneration report at general meetings. This has often resulted in the company reconsidering its policies, given the clear message being given my investors. Reed Elsevier and Berkeley, for example, have in the past revised the terms of their remuneration strategies in response to large minority votes against remuneration reports. However, companies have in many cases reacted to negative votes by refusing to amend remuneration strategies, claiming that as the majority approved the scheme there is no action to be taken. Nevertheless, despite public statements of this kind, many such companies do in practice alter their remuneration strategies, so as to avoid a larger revolt in future.

[238] The Takeover Code, Rule 30.2(b).

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VI. THE UNITED STATES

1. Executive summary

1.1. General

This chapter describes the United States ("U.S.") system in the broadest terms and is for informational purposes only, and not intended as legal advice.

In addition to U.S. federal law, each state has its own laws, which vary from state to state. Because of the great variety in legal systems in the U.S., it is practically impossible to provide an general overview of U.S. corporate law. This report focuses on Delaware, which is one of the most popular states of incorporation.

As a general matter, state corporate laws do not differentiate between publicly-traded and privately-held companies. The Securities Exchange Act requirements with respect to disclosure and structure of executive and director compensation apply only to publicly-traded companies and companies of a size (over 500 shareholders and assets over $10 million) that requires them to be registered under the Securities Exchange Act. Certain U.S. federal tax requirements apply only to publicly-traded companies; other U.S. Internal Revenue Code provisions apply to both publicly-traded and private companies.

1.2. Determination, level, and structure of executive officer and director remuneration

a. General:

There is no provision of either federal or state securities law or state corporate law that expressly limits the level of remuneration.

b. State law (Delaware):

- State corporate law provides that remuneration of officers and directors of companies is generally determined by the board of directors.

- The key state law constraints on board action are the fiduciary duties that directors owe to the corporation. These fiduciary duties are commonly referred to as the duties of care, loyalty, and good faith, and their scope has largely been defined by judicial case law. Delaware courts afford substantial deference to business decisions made by corporate directors, except where “interested” transactions are at issue.

- The business judgment rule does not apply to “interested” transactions, such as where the directors set their own compensation. Instead, unless approved by the shareholders (following disclosure of the directors’ self-interest), such transactions are reviewed for “entire fairness” to the corporation.

b. Federal law:

- The federal securities laws contain certain provisions that to some extent affect the structure of remuneration. U.S. federal tax laws play a role in shaping the structure and level of executive and director compensation.

- The Securities Exchange Act requires executive officers and directors of publicly-traded companies to return to the company any profit realized from a purchase and sale (in any order) of equity securities of the company within a six-month period. An exemption exists for transactions with the company that are approved by either a committee of the board comprised of independent directors, the full board of directors, or the shareholders. As a result, most equity compensation awards to executive officers and directors are granted or approved by one of these bodies.

- U.S. stock exchanges, including the NYSE and NASDAQ, require listed companies to obtain shareholder approval of all equity compensation plans and agreements, and material amendments thereto, with certain limited exceptions.

- As a result of stock exchange requirements, executive officer remuneration is typically determined by the compensation committee of the board whose members are "independent" from management, typically with input from the CEO and sometimes subject to approval by the full board. Non-executive director remuneration may be determined by any of the compensation committee, the nominating and governance committee of the board, or the full board.

- Certain elements of individual board members' compensation may be made subject to shareholder approval, either to satisfy stock exchange requirements (which apply to equity compensation) or to obtain favorable U.S. federal income tax treatment.

- The U.S. Internal Revenue Code contains several provisions under which shareholder approval is one of the conditions for obtaining favourable U.S. federal income tax treatment.

- There is legislation pending in Congress which would require companies to submit executive compensation packages to shareholders for a non-binding advisory vote in the following circumstances ("*say on pay*"):

  (i) annually, to approve the executive compensation as described in the company's proxy statement for its annual meeting, and

  (ii) as part of any proxy solicitation for an acquisition, merger, or sale of assets of the company, to approve any agreements or understandings with respect to compensation of the company's executive officers that relate to the proposed transaction.

1.3. Disclosure of remuneration

a. General disclosure requirements for listed companies (Federal law):

- Whenever a publicly-traded company solicits shareholder votes with respect to election of directors, approval of a compensation plan, or certain other matters, it is required to do so

by means of a proxy statement which is filed with the SEC and distributed to shareholders, which must include extensive disclosure regarding executive and director compensation. The required disclosure is both narrative and tabular, quantifies each element of compensation for each of specified executive officers and each director, includes the amounts payable upon certain directors' termination of employment under various termination scenarios, and includes an analysis of why the executives were paid what they were paid.

- Publicly-traded companies are required to file with the SEC copies of virtually all compensatory plans and agreements covering their executive officers or directors. These documents are available to the general public through the SEC's website at www.sec.gov.

b. Special statutory disclosure requirements for listed companies in connection with public offers (Federal law)

- If a company subject to the Securities Exchange Act is being acquired by way of a merger or sale of substantially all assets which, under state law, requires a shareholder vote, the proxy statement seeking such shareholder vote is required (under the Exchange Act) to disclose the interests of the company's executive officers and directors in the transaction. This disclosure includes any compensation payable in connection with or as a result of the transaction.

- Similar disclosure is required to be made in the tender offer materials when a company is the subject of a tender offer.

1.4. Available measures

Shareholders:

a. Measures available to shareholders in general:

- Shareholder approval is generally required for equity compensation plans and agreements, and is required as a condition of certain favorable tax treatment.

- Shareholders may submit shareholder proposals recommending or requiring that the company take specified action. Under SEC rules, a shareholder may require the company to include the proposal in the company's proxy statement (and thereby make it possible for shareholders to vote on the proposal by proxy without requiring the proposing shareholder to bear the costs of soliciting proxies) if the shareholder and the proposal satisfy certain requirements. Recently, many of such proposals have involved aspects of executive compensation, with "say on pay" being among the most popular.

- Shareholders may challenge executive compensation by bringing a lawsuit against the company and/or its officers and directors. In order to prevail in a lawsuit, the shareholder normally would need to show that the compensation was paid in breach of the directors' fiduciary duties, or was so excessive as to constitute a "waste of corporate assets".

b. Measures available to shareholders in connection with merger, acquisition or take-over situations:

- Shareholder approval is normally required in connection with a sale of the company by merger or sale of substantially all the assets of the company. Under stock exchange rules, shareholders of the acquiring company are generally also required to approve the transaction if the company will issue more than 20% of its outstanding stock in the transaction.

- Shareholders may also challenge executive compensation by bringing a lawsuit against the company and/or its officers and directors. In order to prevail in a lawsuit, the shareholder normally would need to show that the compensation was paid in breach of the directors' fiduciary duties, or was so excessive as to constitute a "waste of corporate assets".

Employees:

c. Measures available to employees

None. In the U.S., status as an employee does not entitle a person to challenge executive compensation.

1.5. Measures in practice

Given the fact that there are substantial differences between the various states' corporate law, no general answer can be provided as to the question to what extent these actions are used in practice. However, generally speaking, in order to prevail in a lawsuit, the shareholder normally would need to show that the compensation was paid in breach of the directors' fiduciary duties, or was so excessive as to constitute a "waste of corporate assets".

Shareholders sometimes sue to challenge the fairness of the merger price. Sometimes such suits buttress their claim by arguing that that the corporation's directors approved the transaction against the best interests of the shareholders because they would receive additional compensation on completion of the transaction.

2. Introduction

Business corporations in the United States ("U.S.") are organized under state law, with each state having its own business corporation statute. Both the statutes and the judicial decisions relating to corporation law thus vary to some extent from state to state. This report focuses on Delaware, which is among the most popular states of incorporation.[239] States are not the sole corporate regulators, however. Federal law also defines fundamentally important aspects of certain business corporations in the U.S. as a consequence of, *inter alia*, its securities regulations.[240]

The federal securities laws are comprised of a series of statutes, which in turn authorize a series of regulations and rules, promulgated by the government agency with general oversight responsibility for the securities industry, the U.S. Securities and Exchange Commission ("SEC"). The two main statutes regulating business corporations are the Securities Act of 1933, as amended ("Securities Act"), and the Securities Exchange Act of 1934, as amended ("Exchange Act"). Generally speaking, the Securities Act governs the initial sale of securities by companies, and the Exchange Act governs the subsequent trading of those securities in the public market. (Unless otherwise stated, the discussion of U.S. securities laws in this report assumes the company is a publicly-traded U.S. company that is required to file reports under the Exchange Act.)

A U.S. corporation is owned by its shareholders. Shareholders normally vote to elect the corporation's governing board, known as the board of directors. Some U.S. corporations have "classified" boards, in which only a portion of the board (typically one-third) is elected each year. Recently, in response to corporate governance initiatives, some companies have eliminated their classified boards and have begun to hold annual elections of the entire board. Most state corporation statutes provide that directors are elected by a plurality of the vote, which means that in the absence of a contested election, a nominee for director needs only a single vote to be elected. However, in response to corporate governance initiatives, a number of companies have recently adopted policies or bylaws under which a director who fails to receive a majority of the votes cast is required to tender his or her resignation. Shareholder approval is also necessary to authorize certain major corporate events specified in the statute, such as changes in the charter,[241] certain mergers or a sale of the company. Shareholders may place other items on the

[239]Delaware is a popular state of incorporation both because its statute is thought to be most friendly to management and because it has the largest body of judicial decisions regarding corporations, which makes interpretation of its statute more certain. More than 800,000 business entities have their legal home in Delaware, including more than 50% of all U.S. publicly-traded companies and 60% of the Fortune 500. Source: http://corp.delaware.gov/.

[240]Each state also has its own securities laws, many of which are preempted by the federal securities laws in the case of companies listed on a stock exchange and in certain other situations.

[241]The charter, sometimes referred to as "articles of incorporation" or "certificate of incorporation", is a public document filed with the appropriate state agency (in Delaware, the Secretary of State), which normally states the corporation's name, period of existence, purpose and power, authorized number of shares, classes of stock, and other conditions of operation. A U.S. corporation also has bylaws, which normally contain rules governing the corporation's internal affairs, such as the date, time, and place for the annual meeting of shareholders, procedures for bringing matters to a shareholder meeting, and the number of directors. The bylaws are not filed with any state agency, but publicly-traded companies are required to file both their charter and bylaws as exhibits to certain SEC filings.

agenda of a shareholder meeting, subject to compliance with procedural requirements set forth in the company's bylaws.

A U.S. corporation has only a single governing board. The board of directors is responsible for the overall direction and management of the corporation. The board of directors delegates the duties of day-to-day management of the corporation to various officers, who the board (not the shareholders) select and who are accountable to the board of directors. While the Chief Executive Officer ("CEO") is typically a member of the board of directors, in most publicly-traded companies at least a majority of the board of directors consists of individuals who are not officers. The members of the board of directors act only as a board, or as members of a board committee, and not individually.

The day-to-day management of a corporation's business is entrusted to the officers. It is the officers who, as agents of the corporation, can bind the corporation in areas of their real or apparent authority. In addition to the CEO, there will typically be a chief financial officer ("CFO"), one or more vice presidents for areas such as manufacturing or marketing, a corporate secretary and a treasurer. Some companies have a President or Chief Operating Officer separate from the CEO, and in other companies one or both of these functions is assigned to the CEO.

In the U.S., the primary focus in relation to remuneration has been on officer compensation. However, as a result of significant increases in director remuneration over the last several years,[242] director remuneration has also come under greater scrutiny.

It should be noted that U.S. law, unlike, *e.g.*, Dutch law, does not have different corporate name identifiers to distinguish between publicly-traded corporations (*e.g.,* "naamloze vennootschappen" or "N.V.s") and privately held corporations (*e.g.,* "besloten vennootschappen" or "B.V.s").[243] However, U.S. securities laws apply different provisions to publicly-traded companies than to privately held companies.[244]

3. Determining executive remuneration and its level and structure

3.1. Company law requirements for determining executive remuneration

3.1.1. State corporate law

State corporate law provides that remuneration of officers and directors is generally determined by the board of directors. As a result of stock exchange requirements (discussed below),

[242]The increase in director remuneration has been largely in response to the increased responsibilities assigned to directors, particularly as relates to the company's financial statements, under the Sarbanes-Oxley Act of 2002, which was enacted in response to a number of major corporate accounting scandals.

[243]By contrast, in the U.S. there are company name identifiers to differentiate between certain types of entities, such as corporations, partnerships, and limited liability companies.

[244]In particular, the Exchange Act (which is the primary source of disclosure requirements regarding executive and director remuneration) applies only to companies that are listed on a U.S. stock exchange, companies that have publicly sold securities in the U.S. (subject to maintaining a certain number of shareholders) and companies that have over 500 shareholders and assets over $10 million.

executive officer remuneration is typically determined by the compensation committee of the board, typically with input from the CEO and sometimes subject to approval by the full board. Non-executive director remuneration may be determined by any of the compensation committee, the nominating and governance committee of the board, or the full board.

The key state law constraints on board action are the fiduciary duties that directors owe to the corporation. These fiduciary duties are commonly referred to as the duties of care, loyalty, and good faith, and their scope has largely been defined by judicial case law. The duty of care requires that directors inform themselves, prior to making a business decision, of all material information reasonably available to them, and then make a reasoned decision – they must act with "due care".[245] In general terms, the duty of loyalty requires that directors not place their own interests (or those of an entity in which they have an interest) ahead of the corporation's interests. The scope of the duty of good faith has not been fully articulated. A recent landmark case held that a violation of this duty requires more than a mere failure to act with due care, but something less than an actual intent to do harm. Bad faith also includes "a failure to act in the face of a known duty to act, demonstrating a conscious disregard for [one's] duties."[246]

Delaware courts afford substantial deference to business decisions made by corporate directors under the "business judgment rule": as long as directors act in good faith, on an informed basis, and not for a self-interested purpose, the Delaware courts will generally defer to the decisions of the board. The business judgment rule affords the directors of a corporation the presumption that in making a business decision, the directors satisfied their fiduciary duties. If the presumption is not rebutted by the plaintiff, the board's decision will be upheld unless it is determined that the transaction serves no rational business purpose or constitutes corporate waste.

The business judgment rule does not apply to "interested" transactions, such as where the directors set their own compensation.[247] Instead, unless approved by the shareholders (following disclosure of the directors' self-interest), such transactions are reviewed for "entire fairness" to the corporation. The directors bear the burden of showing that their action was "entirely fair" to the corporation and its shareholders, both as to procedural process and price. While the entire fairness standard is not impossible to meet, it nevertheless is a heavy and exacting one. In some recent cases, shareholders have argued that compensation or transactions of executives should also be judged under the "entire fairness" standard, either because the board setting the compensation was self-interested (for example, because the directors' compensation was so large as to make the directors unwilling to stand up to the CEO and risk losing their board seats) or was dominated by the CEO.

[245]Delaware law permits a company to include in its certificate of incorporation a provision limiting or eliminating the personal liability of directors for violation of the duty of care, subject to certain exceptions.

[246]In re The Walt Disney Co. Derivative Litig., 2006 WL 1562466 (Del. Supr. Jun. 8, 2006).

[247]The business judgment rule also does not apply to the board's adoption of anti-takeover defenses or to transactions resulting in a change of control of the company, where a heightened standard of judicial review will apply in the event a shareholder challenges the board's action.

It has become common for boards and board committees to obtain the advice of outside compensation consultants in setting executive and director compensation. While in the past compensation consultants were chosen by the executive officers, it is now standard practice for the consultant that advises the compensation committee to be chosen by that committee. A current area of controversy is whether the compensation committee should be permitted to use a consulting firm that does other work for the company (such as pension administration or rank-and-file salary setting). It has been argued that performance of such services creates a potential conflict of interest in that the consultant's desire to continue providing these often more profitable services to management may affect their advice regarding management remuneration. While some compensation committees have chosen to retain only advisors who perform no other services for the company, this is not currently a mainstream practice.

3.1.2. Federal law

Section 16(b) of the Exchange Act requires executive officers and directors of publicly-traded companies to return to the company any profit realized from a purchase and sale (in any order) of equity securities of the company within a six-month period. SEC regulations provide certain exemptions from this provision, including an exemption for transactions with the company that are approved by either a committee of the board comprised of independent directors (as defined in the regulation), the full board of directors, or the shareholders. As a result, most equity compensation awards to executive officers and directors are granted or approved by one of these bodies.

In addition, there is legislation pending in Congress which would require companies to submit executive compensation packages to shareholders for a non-binding advisory vote in the following circumstances ("say on pay"): (i) annually, to approve the executive compensation as described in the company's proxy statement for its annual meeting, and (ii) as part of any proxy solicitation for an acquisition, merger, or sale of assets of the company, to approve any agreements or understandings with respect to compensation of the company's executive officers that relate to the proposed transaction.

3.2. Other legal requirements for determining executive remuneration

3.2.1. Stock exchange requirement for independent directors

U.S. stock exchanges, such as the New York Stock Exchange ("NYSE") and the NASDAQ Stock Market ("NASDAQ"), typically require that the compensation of executive officers of listed companies be determined by a committee of "independent directors".

Each exchange has its own definition of director "independence". The definition contains a general standard together with a list of specific relationships which automatically disqualify a director from being independent. Under the NYSE general standard, the board of directors must determine that the director has no material relationship with the listed company (or any parent or subsidiary), either directly or as a partner, shareholder or officer of an organization that has a relationship with the company. Relationships to be considered include charitable and familial as well as business relationships. Under the NASDAQ general standard, the director cannot have any relationship that would interfere with the exercise of independent judgment in carrying out

the responsibilities of a director. In general, and subject to minor differences at each exchange, a director is disqualified from being independent if the director or a family member[248] has, or in the prior three years had, one of the following relationships with the company:

- received compensation from the company in excess of a specified amount (excluding certain types of compensation);
- was an employee or executive officer of the company;
- was an officer, partner, or controlling shareholder of an entity that in any of the prior three years had a specified level of transactions with the company; or
- had specified relationships with the company's outside auditor.

3.2.2. Stock exchange requirement for shareholder approval

U.S. stock exchanges, including the NYSE and NASDAQ, require listed companies to obtain shareholder approval of all equity compensation plans and agreements, and material amendments thereto, with certain limited exceptions. The exceptions, which differ slightly in scope at each exchange, are as follows:

- awards payable in cash;
- shares voluntarily purchased at current market prices, whether delivered on a current or deferred basis, and whether purchased on the open market or from the company;
- grants to induce employment, in which case the company must issue a press release describing the award;
- replacement awards in an acquisition transaction and unused shares approved by shareholders of the acquired company (subject to certain limits);
- tax-qualified retirement plans and certain parallel non-qualified supplemental retirement plans (subject to certain limits).

3.2.3. Tax law requirement for shareholder approval

The U.S. Internal Revenue Code ("IR Code") does not require shareholder approval as a condition to payment of compensation. It does, however, contain several provisions under which shareholder approval is one of the conditions for obtaining favorable U.S. federal income tax treatment. These include the following:

[248]The term family member is broadly defined to include the director's spouse, parents, children, and siblings, and their respective spouses.

- IR Code Section 162(m) provides that annual compensation paid to certain executives in excess of $1 million cannot be deducted by the company as an ordinary and necessary business expense unless it qualifies as "performance-based". Shareholder approval of the general performance criteria and the maximum compensation payable (stated in cash and/or shares) is one requirement for such qualification.

- Incentive Stock Options under IR Code Section 422 – if stock options qualify under this provision, there is no federal income tax to the employee at the time of option exercise and ordinary income is converted to capital gain (taxed at more favorable rates) if certain holding periods are satisfied.

- Employee Stock Purchase Plans under IR Code Section 423 – qualifying plans entitle the employees to tax benefits generally similar to those for incentive stock options.

- For non-listed companies, shareholder approval can exempt compensation from the additional 20% tax (and non-deductibility) otherwise imposed on "excess parachute payments" under IR Code Section 280G.[249]

3.3. Company law requirements regarding level and structure of executive remuneration

There is no provision of either federal or state securities law or state corporate law that expressly limits the level of remuneration. Remuneration is set by a company's board of directors or a committee thereof, whose discretion is limited only by the fiduciary duties of directors and statutory constraints regarding self-interested transactions, as described in Section 3.1.1. The knowledge that disclosure of executive and director compensation is required under the federal securities laws, which may affect how shareholders vote regarding equity plans (and potentially other matters), may also affect the compensation decisions of the board.

Federal securities laws contain the following provisions that to some extent affect the structure of remuneration:

- Section 13(k) of the Exchange Act, added by the Sarbanes-Oxley Act of 2002 ("SOX"), generally prohibits publicly-traded companies (and certain other companies) from directly or indirectly extending, maintaining or arranging for a personal loan (which is not defined by the statute) to or for any executive officer or director.

- Section 304 of SOX provides that if a company is required to restate its financial statements as a result of misconduct, the CEO and CFO of the company are required to reimburse the company for (1) all bonus or other incentive-based or equity-based compensation they received during the twelve months following the first public disclosure of the incorrect financial statements and (2) any profits they realized from the sale of the company's securities during this period. The SEC has taken the position that this provision is enforceable only by the SEC, and not by individual shareholders. Nevertheless, some

[249] Section 280G is described in more detail in Section 3.4.

companies have voluntarily adopted provisions modeled on this provision in company policies, incentive plans or employment agreements.

3.4. Other legal requirements regarding level and structure of executive remuneration

In the U.S., federal tax laws (and to a lesser extent accounting rules) play a role in shaping the structure and level of executive and director compensation.[250]

3.4.1. Section 162(m) – performance-based compensation

Section 162(a)(1) of the IR Code permits a taxpayer to take a deduction for ordinary and necessary business expenses, including reasonable compensation for services rendered. Internal Revenue Service efforts to disallow deductions for compensation under this provision have generally been targeted at small private corporations, where the executive is essentially setting his or her own salary and the allegation is that the amounts paid are unreasonable or are really disguised dividends rather than compensation.

Section 162(m) of the IR Code provides generally that annual compensation paid to each of the CEO and certain other high paid officers of public companies in excess of $1 million cannot be deducted as an ordinary and necessary business expense unless it qualifies as "performance-based". In order to be "performance-based" the compensation must be payable only upon achievement of objective performance goals that are established at the beginning of a performance period by a compensation committee composed of independent directors, and certified by the company's compensation committee as having been met. Although the amount payable upon attainment of each level of performance must be objective and established by the compensation committee at the start of the performance period, the committee may retain discretion to reduce the amount actually paid below these amounts. The basic criteria on which the goals are based – but not necessarily the target levels of performance – and the maximum amount that may be paid upon achievement of the goals must be approved by shareholders.

Section 162(m) so far has had little effect on the amount paid to executives. A number of companies have chosen to forego the tax deduction for all or part of the compensation paid to their top executives, particularly where the company wishes to use subjective rather than formulaic criteria for compensating its executives. For those companies for whom preserving the deduction is important, it is relatively easy to structure annual and long-term incentive compensation so as to qualify it as performance-based. There is no requirement that the performance goal be difficult to attain – only that its attainment be "substantially uncertain" at the time the goal is set.

3.4.2. Section 280G – excess parachute payments

[250]The IR Code imposes numerous requirements with respect to the structuring of tax-qualified pension and savings plans, including limits on the amount payable under such plans. These limits primarily affect the benefits payable to the rank and file and middle management. Companies frequently adopt supplemental plans or individual agreements to provide executives with benefits that cannot be provided under the tax-qualified plans due to these IR Code limits. Other laws, such as the Employee Retirement Income Security Act of 1974 (ERISA) and state labor laws impose restrictions on the structure, but not the level, of compensation, in areas such as vesting requirements and forfeitures for competing with the employer, but these are not key factors in structuring compensation arrangements for executives and directors.

Section 280G of the IR Code aims at limiting so-called golden parachutes (*i.e.,* amounts payable upon a change of control). Under Section 280G, if amounts payable upon a change of control exceed a defined limit (generally three times the recipient's average taxable compensation over the prior five years), amounts in excess of one time such average compensation are not deductible by the company and are subject to a 20% excise tax payable by the recipient.

Not only have many corporations chosen to forego the deduction, but a substantial number have also added a "gross-up" to the compensation paid to executives; that is, they increase the compensation intended to be paid by an amount that would put the executive in the same after-tax position he or she would have been in absent the 20% excise tax. Frequently this results in a payment by the company that is more than double the amount that would have been paid without the gross-up. Recent surveys have shown that over 70% of large U.S. publicly-traded companies have gross-ups for at least some of their senior executives.

3.4.3. Section 409A – non-qualified deferred compensation

Section 409A of IR Code does not affect the amount of compensation, but instead imposes detailed restrictions on the timing of compensation. In very broad terms and subject to a number of exceptions, Section 409A applies to any arrangement in which an employee or director acquires a legally enforceable right to compensation in one year but payment is made in a subsequent year. Compensation subject to Section 409A must be paid either on a fixed date or pursuant to a fixed schedule, or on (or a specified period after) one of five specified events – death, disability, termination of employment, change of control, or financial hardship (each as defined in regulations). Payments cannot be made by reference to the occurrence of an event other than the five specified events. Payments to the 50 highest paid officers of a publicly-traded company that are scheduled to be made upon termination of employment must be delayed until six months after such termination. The timing of the payments must be specified in advance – within deadlines provided under the rules – and once specified cannot be changed (either accelerated or further deferred) except in the limited circumstances provided in the regulations. If these requirements are not met, amounts deferred under the plan (and all other plans of the same "type") will be currently taxable and subject to an additional 20% tax plus interest.

Section 409A also imposes restrictions on the funding of deferred compensation. It generally prohibits setting aside assets in a non-U.S. trust, funding a deferred compensation arrangement upon a decline in the employer's financial health, and funding such an arrangement during certain periods in which the employer's tax-qualified pension plan is significantly underfunded or the employer is subject to bankruptcy proceedings.

3.5. Other

Proxy advisory firms, most notably ISS Governance Services (now a division of Riskmetrics Group), and corporate governance activists, including many pension funds and hedge funds, play an increasingly important role in corporate governance and executive compensation matters. A number of institutional investors routinely vote in accordance with the recommendations of a particular proxy advisory firm, while others make their own voting decisions but take such recommendations into account.

The influence of such firms can be seen in three separate but related aspects of the shareholder voting process. Most directly, their recommendations are often a key factor in whether shareholders approve new equity plans or share authorizations. (Shareholder approval of these matters is, with limited exceptions, required by the stock exchanges, as described above.) Many companies review the published ISS guidelines, and some purchase the ISS proprietary model for determining the "cost" of a plan, when designing their equity plans prior to submitting them for shareholder approval. Second, large U.S. companies frequently are required to include shareholder proposals in their proxy statements. Recently, the vast majority of such proposals have focused on remuneration and corporate governance matters, with "say on pay" being among the most popular. Proxy advisory firms and corporate governance activists can affect the success of such proposals. Finally, if a company fails to follow ISS guidelines, ISS has been instrumental in conducting campaigns to vote against (or withhold votes from) targeted directors, or in certain cases the entire board. Such campaigns, if successful, are powerful weapons when used against companies that have adopted majority vote policies for directors.

4. Disclosure of remuneration

Question I: At which moments in time (for instance: at the time of publication of the annual report, entering into an agreement, exercise of options, fulfilment of certain conditions) and in what form are individual remunerations or components of individual remunerations of board members required to be made public?

4.1. Statutory disclosure requirements

4.1.1. Proxy statement disclosure

Whenever a publicly-traded company solicits shareholder votes with respect to election of directors, approval of a compensation plan, or certain other matters, it is required to do so by means of a proxy statement which is filed with the SEC and distributed to shareholders, in which it has to disclose, *inter alia*, executive and director compensation and transactions with the issuer, as well as compensation committee procedures.[251]

The proxy statement must contain both narrative and tabular disclosure regarding the compensation of so-called "named executive officers" ("NEOs"). The NEOs are every person who served as the company's CEO or CFO during the prior fiscal year; the three highest paid additional executive officers serving at year-end; and up to two additional individuals who would have been among the most highly paid executive officers, but who left before year-end.

The focal point of the narrative disclosure is the Compensation Discussion and Analysis ("CD&A"). It is required to address the following specific items: the objectives of the company's compensation program; what the program is designed to reward; identification of each element of compensation; why the company chooses to pay each element; how the company determines the amount or formula for each element of pay; and how each element (and decisions regarding that element) fits into the company's overall compensation objectives and affects decisions

[251]This information is also required to be included in Securities Act registration statements for a company's sale of its securities in the public market.

regarding other elements. The primary purpose of the discussion is to provide an understanding of why the executives were paid what they were paid, and why programs are structured the way they are.

One of the most controversial aspects of the CD&A is the requirement to disclose actual performance targets unless disclosure would result in competitive harm. The standards for determining whether potential harm justifies non-disclosure are still not clear. If target levels are not disclosed, the CD&A must disclose the likelihood or difficulty of meeting the target levels.

The centrepiece of the tabular disclosure is the Summary Compensation Table ("SCT"), which breaks out the component parts of each NEO's remuneration for each of the prior three years. The SCT has separate columns for salary, bonus, stock awards, option awards, non-equity incentive plan compensation payments, increase in pension benefits, above-market earnings on deferred compensation, all other compensation, and a "total" column showing the sum of all the other columns.[252] A table essentially the same as the SCT is required to show the remuneration of each non-officer director, but only a single year's remuneration must be shown.

A number of additional tables are required to supplement the SCT. These include tables showing, for each NEO, (i) the key features and value of all equity and non-equity awards granted in the prior year, (ii) the number and key features of all outstanding equity awards (separately for each award), (iii) the number of options exercised and shares vested in the prior year, and amount realized, (iv) the lump sum value of accrued pension benefits, separately for each plan, and (v) the aggregate amount payable under non-qualified deferred compensation plans and the amount of employee and employer contributions and earnings for the most recent year. Each table is required to be accompanied by a narrative discussion that describes the key features of each plan or award. In addition, the company is required to disclose, in either tabular or narrative form, the amounts payable upon each NEO's termination of employment under various termination scenarios.

If a compensation plan is being submitted for shareholder approval, certain additional disclosure is required, including a description of the plan, certain tax consequences of awards under the plan, the size of awards granted or to be granted to NEOs, officers, directors, and rank and file employees (for certain types of plans), and information regarding the number of shares subject to outstanding awards and remaining available for future awards under outstanding plans.

Proxy statements are also required to describe so-called "related party transactions". These include transactions and relationships between the company and any executive officer, director, nominee for election as director, shareholder owning 5% or more of the company, or any of their family members, where the amount involved in the transaction exceeds $120,000.

The required corporate governance disclosures in the annual proxy statement include extensive disclosure of the processes and procedures of the compensation committee. The requirements include: the scope of the committee's authority and the extent to which it can delegate such

[252]The identification of the highest paid executive officers for purposes of determining the NEOs is based on this total compensation number, but excluding the pension and deferred compensation components.

authority; the role of executive officers in determining or recommending the amount or form of executive and director compensation; and the role of compensation consultants in the process, including the identity of the consultants, whether they were engaged directly by the compensation committee, the nature and scope of their assignment, and any special instructions given in connection with their assignment. The company must also state whether the compensation committee has a charter, and either identify its location on the company's website or attach it to the proxy statement at least once every three years.

4.1.2. Other disclosure requirements

Companies subject to the Exchange Act are required to file with the SEC annual (10-K) and quarterly (10-Q) reports containing financial statements and other specified information. Among the documents required to be filed as Exhibits to such reports are virtually all compensatory plans or agreements covering executive officers or directors that were adopted during the period covered by a quarterly report, or were adopted or in effect during the period covered by an annual report. Where the arrangement is not set forth in a formal document, a written description of it must be filed. These documents are publicly available on the SEC's website.

Companies subject to the Exchange Act are also required to file with the SEC so-called current reports (on Form 8-K) promptly upon the occurrence of specified events. Among the events triggering such a filing are (i) the adoption or material amendment of a material compensatory plan or arrangement covering the current CEO or CFO or any NEO, in which case the arrangement must be described; and (ii) the election or appointment of directors or specified officers, in which case the filing must disclose all material compensatory plans or arrangements, including grants of awards, entered into or modified in connection with the appointment.

4.2. Special statutory disclosure requirements in connection with public offers

If a company subject to the Exchange Act is being acquired by way of a merger or sale of substantially all assets which, under state law, requires a shareholder vote, the proxy statement seeking such shareholder vote is required (under the Exchange Act) to disclose the interests of the company's executive officers and directors in the transaction. This disclosure includes any compensation payable in connection with or as a result of the transaction. Similar disclosure is required to be made in the tender offer materials when a company is the subject of a tender offer.

4.3. Special statutory disclosure requirements in connection with price-sensitive information

We understand "price-sensitive" information to mean information that a reasonable investor would likely consider important in making his or her investment decisions, or information that is reasonably certain to have a material effect on the price of a company's securities. Examples of price-sensitive information include dividend changes, earnings estimates, changes in previously released earnings estimates, and significant expansion or curtailment of operations.

The annual, quarterly and current reports required under the Exchange Act are required to contain specified types of information, which may often include price-sensitive information. In addition, the U.S. stock exchanges generally encourage prompt disclosure of price-sensitive

information. However, as a general matter, information not required to be disclosed in Exchange Act reports may be kept confidential by the company.

SEC Selective Disclosure and Insider Trading Regulation ("Regulation FD") generally prohibits companies from making price-sensitive information available to select investors or analysts ahead of the general public. There is a general prohibition against trading in securities of a company by a person who has material non-public information about that company. However, it is permissible to enter into written arrangements to make non-discretionary scheduled purchases or sales over a period of time; such scheduled transactions may take place at a time when the person has non-public information if the person did not have any such information at the time the arrangement was entered into.

5. Available measures

5.1. General remarks

In the U.S., status as an employee does not entitle a person to challenge executive compensation. Shareholders may challenge executive compensation, both through the proxy voting process and by bringing a lawsuit against the company and/or its officers and directors.

Question II: Which remedies are available to individual shareholders and the general meeting of shareholders, and to individual employees, Works Councils and labour unions in the following situations:

(a) they disagree with the composition or level of the individual remuneration of a board member or with the remuneration policy, for instance before or after the remuneration is established, granted and/or paid;

5.2. Measures available to shareholders

Shareholder approval is generally required for equity compensation plans and agreements, as described in Section 3.2.2, and is required as a condition of certain favorable tax treatment, as described in Section 3.2.3. Legislation is pending in Congress to give shareholders a non-binding vote on the entire executive compensation package of NEOs, as described in Section 3.1.2.

Shareholders may submit shareholder proposals recommending or requiring that the company take specified action. Many companies have adopted bylaws providing procedures which must be followed by a shareholder wishing to present a proposal at a shareholder meeting; these generally include a deadline by which notice of the proposal must be provided to the company. Under SEC rules, a shareholder may require the company to include the proposal in the company's proxy statement (and thereby make it possible for shareholders to vote on the proposal by proxy without requiring the proposing shareholder to bear the costs of soliciting proxies) if the shareholder has continuously held shares having at least $2,000 in market value or 1% of the company's voting securities for at least one year and satisfies certain other requirements. The rules identify certain categories of proposals which the company may exclude

from its proxy statement, and the SEC is regularly engaged in determining whether particular proposals qualify for exclusion.

Shareholders may challenge executive compensation by bringing a lawsuit against the company and/or its officers and directors. In order to prevail in a lawsuit, the shareholder normally would need to show that the compensation was paid in breach of the directors' fiduciary duties, as discussed in Section 3.1.1, or was so excessive as to constitute a "waste of corporate assets".

5.3. Measures available to employees

None.

b) individual shareholders and the general meeting of shareholders, or individual employees, works councils and labour unions suspect that the personal (financial) interest of a board member has prevailed over the interest of the company, in the process of making decisions about entering into a merger or acquisition;

5.4. Measures available to shareholders

Shareholder approval is normally required in connection with a sale of the company by merger or sale of substantially all the assets of the company. Under stock exchange rules, shareholders of the acquiring company are generally also required to approve the transaction if the company will issue more than 20% of its outstanding stock in the transaction.

Legislation is pending in Congress to give shareholders a non-binding vote on the compensation payable to the company's executive officers that relates to a sale of the company, as described in Section 3.1.2.

Shareholders may also challenge executive compensation by bringing a lawsuit against the company and/or its officers and directors. In order to prevail in a lawsuit, the shareholder normally would need to show that the compensation was paid in breach of the directors' fiduciary duties, as discussed in Section 3.1.1, or was so excessive as to constitute a "waste of corporate assets".

5.5. Measures available to employees

None.

6. <u>Measures in practice</u>

6.1. General remarks

There is a considerable amount of shareholder litigation in the U.S., more than in Europe. Some of the reasons that shareholder litigation is more prevalent in the U.S. include the "class action" mechanism, the ability of shareholders to retain legal counsel on a contingency fee basis, the rules requiring the corporation to pay the shareholders' attorney's fees, and the shareholder derivative suit mechanism.

A class action is a gathering together of many individual plaintiffs whose claims share important common aspects. In a class action alleging violation of U.S. or state securities laws, claimants may combine their claims in one action and seek class-wide relief for damages suffered as the result of their purchase or sale of securities. Such lawsuits are an important part of the U.S. legal system, as they permit resolution of claims of numerous parties by allowing those claims to be aggregated into a single action against defendants that have allegedly caused harm. A class action may, *inter alia,* overcome the problem that small recoveries do not provide sufficient incentive for any individual claimant to bring a solo action prosecuting its rights.

In general, plaintiffs in the U.S. may retain counsel on an hourly basis or a contingent fee basis. Under a contingent fee arrangement, the plaintiff only pays the attorney if the action settles favorably or is successfully litigated to judgment. The fee is often specified as a certain percentage of the plaintiff's recovery. Therefore, shareholders in the U.S. are easily able to engage counsel to pursue their claims provided that counsel is reasonably certain that the suit can be won or settled.

Another incentive to shareholder litigation involves the rules on who pays the attorney's fees. In the U.S., each party to an action generally must pay their own attorney's fees, regardless of whether they are successful on the merits. However, in the context of shareholder derivative litigation (that is, where a shareholder sues on behalf of the corporation, as described below), this rule is suspended. Instead, under the common fund doctrine, if litigation produces a fund that benefits an entire class of persons or an entity, the plaintiff's reasonable litigation expenses may be taken out of the recovery. Courts have also said that plaintiffs in shareholder derivative suits may recover attorney's fees from the corporation if the court finds that a "substantial benefit" has accrued to the corporation as a result of the litigation. Under this theory, attorney's fees may be awarded even if there is no monetary award as long as there is substantial benefit.

The shareholder derivative suit is a procedural device whereby an individual shareholder can initiate litigation for the benefit of the corporation. It is one of the many devices provided in the law for controlling the conflict of interest between managers and shareholders. While the U.S. Supreme Court has praised the shareholder derivative suit as an important regulator of corporate management, some commentators contend that little value would be lost by its abolition.

In a shareholder derivative suit, the shareholder sues to enforce a claim that belongs to the corporation. The corporation must be joined as a nominal defendant in the action. If successful, relief is granted in favor of the corporation against third persons (usually company officers and directors), also named as defendants. Generally speaking, before resorting to this action, the shareholder must first demand that the corporation act in its own behalf, by making a formal demand on the board of directors.

Derivative suits pose potential for abuse. "Strike suits" may be brought by minority shareholders who disagree with decisions made by company management. Such suits are brought by shareholders simply to force a settlement rather than to pursue a claim on the merits, simply because it may be less expensive for the corporation to settle than to litigate. The law attempts

to address these concerns by application of the “business judgment” rule and deference to the decisions of special committees of the board of directors.

All states in the U.S. permit corporations to indemnify directors for litigation costs incurred in defending against litigation arising from acts done on behalf of the corporation (subject to any exceptions in the applicable state statute). Most states provide for both mandatory and permissive indemnification and distinguish between third-party litigation and derivative litigation. Delaware law, for example, mandates corporate indemnification of directors and officers for expenses, including attorneys’ fees, incurred in any proceeding if the director or officer has been successful in defending against the litigation.

If the director or officer is unsuccessful in defending against such litigation, the Delaware statute distinguishes between third-party actions and derivative litigation in determining the extent to which the corporation may, but is not required to, indemnify the director. If the action is a third-party action, indemnification is permitted for expenses (including attorneys’ fees), judgments, fines and amounts paid in settlement in such action, if the director or officer acted in good faith and in a manner he or she reasonably believed to be in (or not opposed to) the best interests of the corporation and, with respect to any criminal proceeding, had no reasonable cause to believe his or her conduct was unlawful.

In contrast, if the action is a derivative action, the Delaware statute does not permit corporate indemnification of costs and expenses incurred in defending the lawsuit when the director or officer has been adjudged liable to the corporation, unless there is a court determination that the circumstances entitle him or her to indemnification. Moreover, the Delaware statute does not permit corporate indemnification against judgments, fines and amounts paid in settlement in derivative litigation, whereas these amounts are indemnifiable in third-party actions.
Many states, like Delaware, provide in their statutes that the indemnification provisions are not exclusive of any other indemnification rights to which directors or officers may be entitled. Many companies adopt indemnification provisions in their charter or bylaws, and some companies enter into agreements with directors and officers, providing for indemnification if certain conditions are met. These actions can sometimes expand the protection afforded to the directors and officers by the state statute.

Closely related to a director’s right to obtain indemnification from the corporation is the corporation’s ability to procure directors’ and officers’ liability insurance (“D&O insurance”).

Delaware law allows corporations to purchase insurance on behalf of any director, officer, employee or agent of the corporation, against liability arising out of such capacity, regardless of whether the corporation would have the power to indemnify against the liability. The typical D&O insurance policy insures against the obligation of the corporation to indemnify its directors and officers and individual liability. The individual liability protection covers the wrongful acts of the directors and officers for which the corporation has no indemnification obligation.

In general, D&O insurance policies insure against losses, including damages, judgments and settlement costs arising out of wrongful acts occurring in connection with service to the corporation. Wrongful acts are defined as any breach of duty, neglect, error, misstatement,

misleading statement, omission or other act done or wrongfully attempted by the insureds or any matter claimed against them solely by reason of their being directors or officers of the company. This broad statement of coverage is subject, however, to many exclusions.

Examples of typical exclusions include claims against officers and directors relating to illegal remuneration.

Although public policy considerations limit the right of the corporation to purchase D&O insurance policies (*e.g.*, prohibiting insurance against willful misconduct), such policies may insure against judgments and amounts paid in settlement of derivative suits even though, as previously discussed, indemnification of these amounts would violate public policy. Thus, a director or officer who was found liable to the corporation in a shareholder derivative suit might be able to file a claim under the corporation's D&O insurance policy and have the amount paid by the corporation's insurance company.

6.2. Measures used in practice outside of merger, acquisition or take-over situations

6.2.1. Measures used by shareholders

Given the fact that there are substantial differences between the various states' corporate law, no general answer can be provided as to the question to what extent these actions are used in practice. However, generally speaking, in order to prevail in a lawsuit, the shareholder normally would need to show that the compensation was paid in breach of the directors' fiduciary duties, as discussed in Section 3.1.1, or was so excessive as to constitute a "waste of corporate assets". Further, please refer to the general remarks in section 6.1 above.

6.2.2. Measures used by employees

None.

6.3. Measures used in practice in connection with mergers, acquisitions or take-overs

6.3.1. Measures used by shareholders

See 6.2.1. Shareholders sometimes sue to challenge the fairness of the merger price. Sometimes such suits buttress their claim by arguing that that the corporation's directors approved the transaction against the best interests of the shareholders because they would receive additional compensation on completion of the transaction.

6.3.2. Measures used by employees

None.

7. Different requirements and measures for non-listed companies

As a general matter, state corporate laws do not differentiate between publicly-traded and privately-held companies. The Exchange Act requirements with respect to disclosure of executive and director compensation (and the few Exchange Act provisions affecting the

structure of such compensation) apply only to publicly-traded companies and companies of a size (over 500 shareholders and assets over $10 million) that requires them to be registered under the Exchange Act. Certain U.S. federal tax requirements – most notably Section 162(m) of the IR Code – apply only to publicly-traded companies; other IR Code provisions, including Section 409A (deferred compensation), Section 280G (excess parachute payments), and Section 422 (Incentive Stock Options) apply to both publicly-traded and private companies (although shareholders of private companies can vote to exempt compensation from being subject to Section 280G).

VII. ANNEXES

1. ANNEX A - Abbreviations

AFEP	-	*Association Française des Entreprises Privées*
AFM	-	*Autoriteit Financiële Markten* (Dutch Financial Markets Authority)
AG	-	*Aktiengesellschaft* (German public company)
AMF	-	*Autorité des Marchés Financiers* (French financial markets authority)
BV	-	*Besloten Vennootschap* (Dutch private company)
CA 1985	-	Companies Act 1985 (United Kingdom)
CA 2006	-	Companies Act 2006 (United Kingdom)
CAO	-	*Collectieve Arbeids Overeenkomst* (collective bargaining agreement)
CD&A	-	Compensation Discussion and Analysis within a proxy statement (US)
CEO	-	Chief Executive Officer
CFO	-	Chief financial officer
CGLC Report	-	The Corporate Governance of Listed Corporations (France)
Code	-	the Dutch Corporate Governance Code
Combined Code	-	Combined Code on Corporate Governance (United Kingdom)
DCC	-	Dutch Civil Code (*Burgerlijk Wetboek*)
D&O insurance	-	directors' and officers' liability insurance (US)
EBITDA	-	Earnings before interest, taxes, depreciation and amortization
Exchange Act	-	Securities Exchange Act of 1934, as amended (US)
FSA	-	Financial Services Authority (United Kingdom)
FSMA	-	Financial Services and Markets Act 2000 (United Kingdom)
GCGK	-	German Corporate Governance Kodex
HVB	-	*Bayerische Hypo- und Vereinsbank AG*
IR Code	-	U.S. Internal Revenue Code
LR	-	Listing Rules (United Kingdom)
MEDEF	-	*Mouvement des Entreprises de France*
Monitoring Commission	-	Monitoring Commission Corporate Governance Code (Netherlands)
NASDAQ	-	the NASDAQ Stock Market (US)
NEO	-	named executive officer (US)
NV	-	*Naamloze Vennootschap* (Dutch public company)
NYSE	-	New York Stock Exchange
PDG	-	*Président Directeur Général* (French chairman or CEO)
PLC	-	Public limited company (United Kingdom)
Regulation FD	-	SEC Selective Disclosure and Insider Trading Regulation (US)
SCT	-	Summary Compensation Table within a proxy statement (US)
SE	-	*Societas Europaea* (European public company)
SEC	-	US Securities and Exchange Commission
Securities Act	-	Securities Act of 1933, as amended (US)
SOX	-	Sarbanes-Oxley Act of 2002 (US)
StGB	-	*Strafgesetzbuch* (German Criminal Code)
Takeover Code	-	City Code on Takeovers and Mergers (United Kingdom)
WOR	-	*Wet op de Ondernemingsraden* (Dutch Works Council Act)
WpHG	-	*Wertpapierhandelsgesetz* (German Securities Trading Act)
WpPG	-	*Wertpapierprospektgesetz* (German Securities Prospectus Act)
WpÜG	-	*Wertpapiererwerbs- und Übernahmegesetz* (German Takeover Act)
UK	-	United Kingdom
US	-	United States of America

2. ANNEX B - Relevant legislation per jurisdiction

Please refer to the separate Annex B for the relevant legislation per jurisdiction.

ANNEX B

TO THE REPORT ON EXECUTIVE REMUNERATION IN THE NETHERLANDS, GERMANY, FRANCE, THE UNITED KINGDOM AND THE UNITED STATES

Relevant Legislation per Jurisdiction

July 2008

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1. THE NETHERLANDS

1.1. Dutch Civil Code (Burgerlijk Wetboek, Boek 2)

Article 2:9

Elke bestuurder is tegenover de rechtspersoon gehouden tot een behoorlijke vervulling van de hem opgedragen taak. Indien het een aangelegenheid betreft die tot de werkkring van twee of meer bestuurders behoort, is ieder van hen voor het geheel aansprakelijk terzake van een tekortkoming, tenzij deze niet aan hem is te wijten en hij niet nalatig is geweest in het treffen van maatregelen om de gevolgen daarvan af te wenden.

Article 2:14

1. Een besluit van een orgaan van een rechtspersoon, dat in strijd is met de wet of de statuten, is nietig, tenzij uit de wet iets anders voortvloeit.
2. Is een besluit nietig, omdat het is genomen ondanks het ontbreken van een door de wet of de statuten voorgeschreven voorafgaande handeling van of mededeling aan een ander dan het orgaan dat het besluit heeft genomen, dan kan het door die ander worden bekrachtigd. Is voor de ontbrekende handeling een vereiste gesteld, dan geldt dat ook voor de bekrachtiging.
3. Bekrachtiging is niet meer mogelijk na afloop van een redelijke termijn, die aan de ander is gesteld door het orgaan dat het besluit heeft genomen of door de wederpartij tot wie het was gericht.

Article 2:15

1. Een besluit van een orgaan van een rechtspersoon is, onverminderd het elders in de wet omtrent de mogelijkheid van een vernietiging bepaalde, vernietigbaar:
a. wegens strijd met wettelijke of statutaire bepalingen die het tot stand komen van besluiten regelen;
b. wegens strijd met de redelijkheid en billijkheid die door artikel 8 worden geëist;
c. wegens strijd met een reglement.
2. Tot de bepalingen als bedoeld in het vorige lid onder a, behoren niet die welke de voorschriften bevatten waarop in artikel 14 lid 2 wordt gedoeld.
3. Vernietiging geschiedt door een uitspraak van de rechtbank van de woonplaats van de rechtspersoon:
a. op een vordering tegen de rechtspersoon van iemand die een redelijk belang heeft bij de naleving van de verplichting die niet is nagekomen, of
b. op vordering van de rechtspersoon zelf, ingesteld krachtens bestuursbesluit tegen degene die door de voorzieningenrechter van de rechtbank is aangewezen op een daartoe gedaan verzoek van de rechtspersoon; in dat geval worden de kosten van het geding door de rechtspersoon gedragen.
4. Indien een bestuurder in eigen naam de vordering instelt, verzoekt de rechtspersoon de voorzieningenrechter van de rechtbank iemand aan te wijzen, die terzake van het geding in de plaats van het bestuur treedt.
5. De bevoegdheid om vernietiging van het besluit te vorderen, vervalt een jaar na het einde van de dag, waarop hetzij aan het besluit voldoende bekendheid is gegeven, hetzij de belanghebbende van het besluit kennis heeft genomen of daarvan is verwittigd.
6. Een besluit dat vernietigbaar is op grond van lid 1 onder a, kan door een daartoe strekkend besluit worden bevestigd; voor dit besluit gelden de zelfde vereisten als voor het te bevestigen besluit. De bevestiging werkt niet zolang een tevoren ingestelde vordering tot vernietiging aanhangig is. Indien de vordering wordt toegewezen, geldt het vernietigde besluit als opnieuw genomen door het latere besluit, tenzij uit de strekking van dit besluit het tegendeel voortvloeit.

Article 2:107

1. Aan de algemene vergadering van aandeelhouders behoort, binnen de door de wet en de statuten gestelde grenzen, alle bevoegdheid, die niet aan het bestuur of aan anderen is toegekend.
2. Het bestuur en de raad van commissarissen verschaffen haar alle verlangde inlichtingen, tenzij een zwaarwichtig belang der vennootschap zich daartegen verzet.

Article 2:107a

1. Aan de goedkeuring van de algemene vergadering zijn onderworpen de besluiten van het bestuur omtrent een belangrijke verandering van de identiteit of het karakter van de vennootschap of de onderneming, waaronder in ieder geval:
a. overdracht van de onderneming of vrijwel de gehele onderneming aan een derde;
b. het aangaan of verbreken van duurzame samenwerking van de vennootschap of een dochtermaatschappij met een andere rechtspersoon of vennootschap dan wel als volledig aansprakelijke vennote in een commanditaire vennootschap of vennootschap onder firma, indien deze samenwerking of verbreking van ingrijpende betekenis is voor de vennootschap;
c. het nemen of afstoten van een deelneming in het kapitaal van een vennootschap ter waarde van ten minste een derde van het bedrag van de activa volgens de balans met toelichting of, indien de vennootschap een geconsolideerde balans opstelt, volgens de geconsolideerde balans met toelichting volgens de laatst vastgestelde jaarrekening van de vennootschap, door haar of een dochtermaatschappij.
2. Het ontbreken van de goedkeuring van de algemene vergadering op een besluit als bedoeld in lid 1 tast de vertegenwoordigingsbevoegdheid van bestuur of bestuurders niet aan.

Article 2:110

1. Een of meer houders van aandelen die gezamenlijk ten minste een tiende gedeelte van het geplaatste kapitaal vertegenwoordigen, of een zoveel geringer bedrag als bij de statuten is bepaald, kunnen door de voorzieningenrechter van de rechtbank op hun verzoek worden gemachtigd tot de bijeenroeping van een algemene vergadering. De voorzieningenrechter wijst dit verzoek af, indien hem niet is gebleken, dat verzoekers voordien aan het bestuur en aan de raad van commissarissen schriftelijk en onder nauwkeurige opgave van de te behandelen onderwerpen het verzoek hebben gericht een algemene vergadering bijeen te roepen, en dat noch het bestuur noch de raad van commissarissen - daartoe in dit geval gelijkelijk bevoegd - de nodige maatregelen hebben getroffen, opdat de algemene vergadering binnen zes weken na het verzoek kon worden gehouden.
2. Voor de toepassing van dit artikel worden met houders van aandelen gelijkgesteld de houders van de certificaten van aandelen, welke met medewerking van de vennootschap zijn uitgegeven.
3. Tenzij de statuten anders bepalen, wordt aan de eis van schriftelijkheid van het verzoek als bedoeld in lid 1 voldaan indien dit verzoek elektronisch is vastgelegd.

Article 2:114a

1. Een onderwerp, waarvan de behandeling schriftelijk is verzocht door een of meer houders van aandelen die daartoe krachtens het volgende lid gerechtigd zijn, wordt opgenomen in de oproeping of op dezelfde wijze aangekondigd indien de vennootschap het verzoek niet later dan op de zestigste dag voor die van de vergadering heeft ontvangen en mits geen zwaarwichtig belang van de vennootschap zich daartegen verzet.
2. Om behandeling kan worden verzocht door een of meer houders van aandelen die alleen of gezamenlijk ten minste een honderdste gedeelte van het geplaatste kapitaal vertegenwoordigen of, indien de aandelen zijn toegelaten tot de handel op een gereglementeerde markt of een multilaterale handelsfaciliteit, als bedoeld in artikel 1:1 van de Wet op het financieel toezicht of een met een gereglementeerde markt of multilaterale handelsfaciliteit vergelijkbaar systeem uit een staat die geen lidstaat is ten minste een waarde vertegenwoordigen van € 50 miljoen. Bij algemene maatregel van bestuur kan dit bedrag worden verhoogd of verlaagd in verband met de ontwikkeling van het loon- en prijspeil.

3. In de statuten kan het vereiste gedeelte van het kapitaal of de waarde van de aandelen lager worden gesteld en de termijn voor indiening van het verzoek worden verkort.
4. Voor de toepassing van dit artikel worden met de houders van aandelen gelijkgesteld de houders van de certificaten van aandelen die met medewerking van de vennootschap zijn uitgegeven.
5. Tenzij de statuten anders bepalen, wordt aan de eis van schriftelijkheid van het verzoek als bedoeld in lid 1 voldaan indien dit verzoek elektronisch is vastgelegd.

Article 2:135

1. De vennootschap heeft een beleid op het terrein van bezoldiging van het bestuur. Het beleid wordt vastgesteld door de algemene vergadering. In het bezoldigingsbeleid komen ten minste de in artikel 383c tot en met e omschreven onderwerpen aan de orde, voor zover deze het bestuur betreffen.
2. Indien de vennootschap krachtens wettelijke bepalingen een ondernemingsraad heeft ingesteld wordt het beloningsbeleid schriftelijk en gelijktijdig met de aanbieding aan de algemene vergadering van aandeelhouders ter kennisneming aan de ondernemingsraad aangeboden. Voor de toepassing van de vorige zin is het bepaalde in artikel 158 lid 11 van overeenkomstige toepassing op de dochtermaatschappij bedoeld in de leden 1 en 2 van artikel 24a.
3. De bezoldiging van bestuurders wordt met inachtneming van het beleid, bedoeld in lid 1, vastgesteld door de algemene vergadering, tenzij bij de statuten een ander orgaan is aangewezen.
4. Indien in de statuten is bepaald dat een ander orgaan dan de algemene vergadering van aandeelhouders de bezoldiging vaststelt, legt dat orgaan ten aanzien van regelingen in de vorm van aandelen of rechten tot het nemen van aandelen een voorstel ter goedkeuring voor aan de algemene vergadering. In het voorstel moet ten minste zijn bepaald hoeveel aandelen of rechten tot het nemen van aandelen aan het bestuur mogen worden toegekend en welke criteria gelden voor toekenning of wijziging. Het ontbreken van de goedkeuring van de algemene vergadering tast de vertegenwoordigingbevoegdheid van het orgaan niet aan.

Article 2:146

Tenzij bij de statuten anders is bepaald, wordt de naamloze vennootschap in alle gevallen waarin zij een tegenstrijdig belang heeft met een of meer bestuurders, vertegenwoordigd door commissarissen. De algemene vergadering is steeds bevoegd een of meer andere personen daartoe aan te wijzen.

Article 2:161a

1. De algemene vergadering kan bij volstrekte meerderheid van de uitgebrachte stemmen, vertegenwoordigend ten minste een derde van het geplaatste kapitaal, het vertrouwen in de raad van commissarissen opzeggen. Het besluit is met redenen omkleed. Het besluit kan niet worden genomen ten aanzien van commissarissen die zijn aangesteld door de ondernemingskamer overeenkomstig lid 3.
2. Een besluit als bedoeld in lid 1 wordt niet genomen dan nadat het bestuur de ondernemingsraad van het voorstel voor het besluit en de gronden daartoe in kennis heeft gesteld. De kennisgeving geschiedt ten minste 30 dagen voor de algemene vergadering waarin het voorstel wordt behandeld. Indien de ondernemingsraad een standpunt over het voorstel bepaalt, stelt het bestuur de raad van commissarissen en de algemene vergadering van dit standpunt op de hoogte. De ondernemingsraad kan zijn standpunt in de algemene vergadering doen toelichten.
3. Het besluit bedoeld in lid 1 heeft het onmiddellijk ontslag van de leden van de raad van commissarissen tot gevolg. Alsdan verzoekt het bestuur onverwijld aan de ondernemingskamer van het gerechtshof te Amsterdam tijdelijk een of meer commissarissen aan te stellen. De ondernemingskamer regelt de gevolgen van de aanstelling.
4. De raad van commissarissen bevordert dat binnen een door de ondernemingskamer vastgestelde termijn een nieuwe raad wordt samengesteld met inachtneming van artikel 158.

Article 2:317

1. Het besluit tot fusie wordt genomen door de algemene vergadering; in een stichting wordt het besluit genomen door degene die de statuten mag wijzigen of, als geen ander dat mag, door het bestuur. Het besluit mag niet afwijken van het voorstel tot fusie.
2. Een besluit tot fusie kan eerst worden genomen na verloop van een maand na de dag waarop alle fuserende rechtspersonen de nederlegging van het voorstel tot fusie hebben aangekondigd.
3. Een besluit tot fusie wordt genomen op dezelfde wijze als een besluit tot wijziging van de statuten. Vereisen de statuten hiervoor goedkeuring, dan geldt dit ook voor het besluit tot fusie. Vereisen de statuten voor de wijziging van afzonderlijke bepalingen verschillende meerderheden, dan is voor een besluit tot fusie de grootste daarvan vereist, en sluiten de statuten wijziging van bepalingen uit, dan zijn de stemmen van alle stemgerechtigde leden of aandeelhouders vereist; een en ander tenzij die bepalingen na de fusie onverminderd zullen gelden.
4. Lid 3 geldt niet, voor zover de statuten een andere regeling voor besluiten tot fusie geven.
5. Een besluit tot fusie van een stichting behoeft de goedkeuring van de rechtbank, tenzij de statuten het mogelijk maken alle bepalingen daarvan te wijzigen. De rechtbank wijst het verzoek af, indien er gegronde redenen zijn om aan te nemen dat de fusie strijdig is met het belang van de stichting.

Article 2:331

1. Tenzij de statuten anders bepalen, kan een verkrijgende vennootschap bij bestuursbesluit tot fusie besluiten.
2. Dit besluit kan slechts worden genomen, indien de vennootschap het voornemen hiertoe heeft vermeld in de aankondiging dat het voorstel tot fusie is neergelegd.
3. Het besluit kan niet worden genomen, indien een of meer aandeelhouders die tezamen ten minste een twintigste van het geplaatste kapitaal vertegenwoordigen, of een zoveel geringer bedrag als in de statuten is bepaald, binnen een maand na de aankondiging aan het bestuur hebben verzocht de algemene vergadering bijeen te roepen om over de fusie te besluiten. De artikelen 317 en 330 zijn dan van toepassing.

Article 2:345

1. Op schriftelijk verzoek van degenen die krachtens de artikelen 346 en 347 daartoe bevoegd zijn, kan de ondernemingskamer van het gerechtshof te Amsterdam een of meer personen benoemen tot het instellen van een onderzoek naar het beleid en de gang van zaken van een rechtspersoon, hetzij in de gehele omvang daarvan, hetzij met betrekking tot een gedeelte of een bepaald tijdvak. Onder het beleid en de gang van zaken van een rechtspersoon zijn mede begrepen het beleid en de gang van zaken van een commanditaire vennootschap of een vennootschap onder firma waarvan de rechtspersoon volledig aansprakelijke vennoot is.
2. De advocaat-generaal bij het gerechtshof te Amsterdam kan om redenen van openbaar belang een verzoek doen tot het instellen van een onderzoek als bedoeld in het eerste lid. Hij kan ter voorbereiding van een verzoek een of meer deskundige personen belasten met het inwinnen van inlichtingen over het beleid en de gang van zaken van de rechtspersoon. De rechtspersoon is verplicht de gevraagde inlichtingen te verschaffen en desgevraagd ook inzage in zijn boeken en bescheiden te geven aan de deskundigen.

Article 2:347

Tot het indienen van een verzoek als bedoeld in artikel 345 is voorts bevoegd een vereniging van werknemers die in de onderneming van de rechtspersoon werkzame personen onder haar leden telt en ten minste twee jaar volledige rechtsbevoegdheid bezit, mits zij krachtens haar statuten ten doel heeft de belangen van haar leden als werknemers te behartigen en als zodanig in de bedrijfstak of onderneming werkzaam is.

Article 2:349a

1. De ondernemingskamer behandelt het verzoek met de meeste spoed. De verzoekers en de rechtspersoon verschijnen hetzij bij procureur, hetzij bijgestaan door hun procureurs. Alvorens te beslissen kan de ondernemingskamer ook ambtshalve getuigen en deskundigen horen.
2. Indien in verband met de toestand van de rechtspersoon of in het belang van het onderzoek een onmiddellijke voorziening is vereist, kan de ondernemingskamer in elke stand van het geding op verzoek van de indieners van het in artikel 345 bedoelde verzoek een zodanige voorziening treffen voor ten hoogste de duur van het geding.

Article 2:356

De voorzieningen, bedoeld in het vorige artikel, zijn:
a. schorsing of vernietiging van een besluit van de bestuurders, van commissarissen, van de algemene vergadering of van enig ander orgaan van de rechtspersoon;
b. schorsing of ontslag van een of meer bestuurders of commissarissen;
c. tijdelijke aanstelling van een of meer bestuurders of commissarissen;
d. tijdelijke afwijking van de door de ondernemingskamer aangegeven bepalingen van de statuten;
e. tijdelijke overdracht van aandelen ten titel van beheer;
f. ontbinding van de rechtspersoon.

Article 2:383c

1. De vennootschap doet opgave van het bedrag van de bezoldiging voor iedere bestuurder. Dit bedrag wordt uitgesplitst naar
a. periodiek betaalde beloningen,
b. beloningen betaalbaar op termijn,
c. uitkeringen bij beëindiging van het dienstverband,
d. winstdelingen en bonusbetalingen,
voor zover deze bedragen in het boekjaar ten laste van de vennootschap zijn gekomen.
Indien de vennootschap een bezoldiging in de vorm van bonus heeft betaald die geheel of gedeeltelijk is gebaseerd op het bereiken van de door of vanwege de vennootschap gestelde doelen, doet zij hiervan mededeling. Daarbij vermeldt de vennootschap of deze doelen in het verslagjaar zijn bereikt.
2. De vennootschap doet opgave van het bedrag van de bezoldiging voor iedere gewezen bestuurder, uitgesplitst naar beloningen betaalbaar op termijn en uitkeringen bij beëindiging van het dienstverband, voor zover deze bedragen in het boekjaar ten laste van de vennootschap zijn gekomen.
3. De vennootschap doet opgave van het bedrag van de bezoldiging voor iedere commissaris, voor zover deze bedragen in het boekjaar ten laste van de vennootschap zijn gekomen. Indien de vennootschap een bezoldiging in de vorm van winstdeling of bonus heeft toegekend, vermeldt zij deze afzonderlijk onder opgave van de redenen die ten grondslag liggen aan het besluit tot het toekennen van bezoldiging in deze vorm aan een commissaris. De laatste twee volzinnen van lid 1 zijn van overeenkomstige toepassing.
4. De vennootschap doet opgave van het bedrag van de bezoldiging van iedere gewezen commissaris, voor zover dit bedrag in het boekjaar ten laste van de vennootschap is gekomen.
5. Indien de vennootschap dochtermaatschappijen heeft of de financiële gegevens van andere maatschappijen consolideert, worden de bedragen die in het boekjaar te hunnen laste zijn gekomen, in de opgaven begrepen, toegerekend naar de betreffende categorie van bezoldiging bedoeld in de leden 1 tot en met 4.

Article 2:383d

1. De vennootschap die bestuurders of werknemers rechten toekent om aandelen in het kapitaal van de vennootschap of een dochtermaatschappij te nemen of te verkrijgen, doet voor iedere bestuurder en voor de werknemers gezamenlijk opgave van:
a. de uitoefenprijs van de rechten en de prijs van de onderliggende aandelen in het kapitaal van de vennootschap indien die uitoefenprijs lager ligt dan de prijs van die aandelen op het moment van toekenning van de rechten;

b. het aantal aan het begin van het boekjaar nog niet uitgeoefende rechten;
c. het aantal door de vennootschap in het boekjaar verleende rechten met de daarbij behorende voorwaarden; indien dergelijke voorwaarden gedurende het boekjaar worden gewijzigd, dienen deze wijzigingen afzonderlijk te worden vermeld;
d. het aantal gedurende het boekjaar uitgeoefende rechten, waarbij in ieder geval worden vermeld het bij die uitoefening behorende aantal aandelen en de uitoefenprijzen;
e. het aantal aan het einde van het boekjaar nog niet uitgeoefende rechten, waarbij worden vermeld:
– de uitoefenprijs van de verleende rechten;
– de resterende looptijd van de nog niet uitgeoefende rechten;
– de belangrijkste voorwaarden die voor uitoefening van de rechten gelden;
– een financieringsregeling die in verband met de toekenning van de rechten is getroffen; en andere gegevens die voor de beoordeling van de waarde van de rechten van belang zijn;
f. indien van toepassing: de door de vennootschap gehanteerde criteria die gelden voor de toekenning of uitoefening van de rechten.
2. De vennootschap die commissarissen rechten toekent om aandelen in het kapitaal van de vennootschap of een dochtermaatschappij te verkrijgen, doet voorts voor iedere commissaris opgave van deze rechten, alsmede van de redenen die ten grondslag liggen aan het besluit tot het toekennen van deze rechten aan de commissaris. Lid 1 is van overeenkomstige toepassing.
3. De vennootschap vermeldt hoeveel aandelen in het kapitaal van de vennootschap per balansdatum zijn ingekocht of na balansdatum zullen worden ingekocht dan wel hoeveel nieuwe aandelen per balansdatum zijn geplaatst of na balansdatum zullen worden geplaatst ten behoeve van de uitoefening van de rechten bedoeld in lid 1 en lid 2.
4. Voor de toepassing van dit artikel wordt onder aandelen tevens verstaan de certificaten van aandelen welke met medewerking van de vennootschap zijn uitgegeven.

Article 2:383e

De vennootschap doet opgave van het bedrag van de leningen, voorschotten en garanties, ten behoeve van iedere bestuurder en iedere commissaris van de vennootschap verstrekt door de vennootschap, haar dochtermaatschappijen en de maatschappijen waarvan zij de gegevens consolideert. Opgegeven worden de nog openstaande bedragen, de rentevoet, de belangrijkste overige bepalingen, en de aflossingen gedurende het boekjaar.

Article 2:391

1. Het jaarverslag geeft een getrouw beeld van de toestand op de balansdatum, de ontwikkeling gedurende het boekjaar en de resultaten van de rechtspersoon en van de groepsmaatschappijen waarvan de financiële gegevens in zijn jaarrekening zijn opgenomen. Het jaarverslag bevat, in overeenstemming met de omvang en de complexiteit van de rechtspersoon en groepsmaatschappijen, een evenwichtige en volledige analyse van de toestand op de balansdatum, de ontwikkeling gedurende het boekjaar en de resultaten. Indien noodzakelijk voor een goed begrip van de ontwikkeling, de resultaten of de positie van de rechtspersoon en groepsmaatschappijen, omvat de analyse zowel financiële als niet-financiële prestatie-indicatoren, met inbegrip van milieu- en personeelsaangelegenheden. Het jaarverslag geeft tevens een beschrijving van de voornaamste risico's en onzekerheden waarmee de rechtspersoon wordt geconfronteerd. Het jaarverslag wordt in de Nederlandse taal gesteld, tenzij de algemene vergadering tot het gebruik van een andere taal heeft besloten.
2. In het jaarverslag worden mededelingen gedaan omtrent de verwachte gang van zaken; daarbij wordt, voor zover gewichtige belangen zich hiertegen niet verzetten, in het bijzonder aandacht besteed aan de investeringen, de financiering en de personeelsbezetting en aan de omstandigheden waarvan de ontwikkeling van de omzet en van de rentabiliteit afhankelijk is. Mededelingen worden gedaan omtrent de werkzaamheden op het gebied van onderzoek en ontwikkeling. Vermeld wordt hoe bijzondere gebeurtenissen waarmee in de jaarrekening geen rekening behoeft te worden gehouden, de verwachtingen hebben beïnvloed. De naamloze vennootschap waarop artikel 383b van toepassing is, doet voorts mededeling van het beleid van de vennootschap aangaande de bezoldiging van haar bestuurders en commissarissen en de wijze waarop dit beleid in het verslagjaar in de praktijk is gebracht.
3. Ten aanzien van het gebruik van financiële instrumenten door de rechtspersoon en voor zover zulks van betekenis is voor de beoordeling van zijn activa, passiva, financiële toestand en

resultaat, worden de doelstellingen en het beleid van de rechtspersoon inzake risicobeheer vermeld. Daarbij wordt aandacht besteed aan het beleid inzake de afdekking van risico's verbonden aan alle belangrijke soorten voorgenomen transacties. Voorts wordt aandacht besteed aan de door de rechtspersoon gelopen prijs-, krediet-, liquiditeits- en kasstroomrisico's.
4. Het jaarverslag mag niet in strijd zijn met de jaarrekening. Indien het verschaffen van het in lid 1 bedoelde overzicht dit vereist, bevat het jaarverslag verwijzingen naar en aanvullende uitleg over posten in de jaarrekening.
5. Bij algemene maatregel van bestuur kunnen nadere voorschriften worden gesteld omtrent de inhoud van het jaarverslag. Deze voorschriften kunnen in het bijzonder betrekking hebben op naleving van een in de algemene maatregel van bestuur aan te wijzen gedragscode.
6. De voordracht voor een krachtens lid 5 vast te stellen algemene maatregel van bestuur wordt niet eerder gedaan dan vier weken nadat het ontwerp aan beide kamers der Staten-Generaal is overgelegd.

Article 2:447
1. Op verzoek van degenen die krachtens artikel 448 daartoe bevoegd zijn, kan de ondernemingskamer van het gerechtshof te Amsterdam aan een rechtspersoon of vennootschap als bedoeld in artikel 360 waarop deze titel van toepassing is, een effectenuitgevende instelling als bedoeld in artikel 1, onderdeel b, van de Wet toezicht financiële verslaggeving of een beleggingsinstelling als bedoeld in artikel 1:1 van de Wet op het financieel toezicht bevelen de jaarrekening, het jaarverslag of de daaraan toe te voegen overige gegevens in te richten overeenkomstig door haar te geven aanwijzingen.
2. Het verzoek kan slechts worden ingediend op de grond dat de verzoeker van oordeel is dat de in het eerste lid bedoelde stukken niet voldoen aan de bij of krachtens artikel 3 van verordening (EG) 1606/2002 van het Europees Parlement en de Raad van de Europese Unie van 19 juli 2002 betreffende de toepassing van internationale standaarden voor jaarrekeningen (PbEG L 243), deze titel, onderscheidenlijk de Wet op het financieel toezicht gestelde voorschriften. Het verzoekschrift vermeldt in welk opzicht de stukken herziening behoeven.
3. Het verzoek heeft geen betrekking op een accountantsverklaring als bedoeld in artikel 393 lid 5.

Article 2:448

1. Tot het indienen van het verzoek is bevoegd:
a. iedere belanghebbende;
b. de advocaat-generaal bij het gerechtshof te Amsterdam in het openbaar belang.
2. Tot het indienen van het verzoek is voorts bevoegd de Stichting Autoriteit Financiële Markten, voor zover het stukken betreft die betrekking hebben op een effectenuitgevende instelling als bedoeld in artikel 1, onderdeel b, van de Wet toezicht financiële verslaggeving en met inachtneming van het in artikel 4 van die wet bepaalde.

Article 6:162

1. Hij die jegens een ander een onrechtmatige daad pleegt, welke hem kan worden toegerekend, is verplicht de schade die de ander dientengevolge lijdt, te vergoeden.
2. Als onrechtmatige daad worden aangemerkt een inbreuk op een recht en een doen of nalaten in strijd met een wettelijke plicht of met hetgeen volgens ongeschreven recht in het maatschappelijk verkeer betaamt, een en ander behoudens de aanwezigheid van een rechtvaardigingsgrond.
3. Een onrechtmatige daad kan aan de dader worden toegerekend, indien zij te wijten is aan zijn schuld of aan een oorzaak welke krachtens de wet of de in het verkeer geldende opvattingen voor zijn rekening komt.

1.2. Dutch Civil Procedure Code (Wetboek van Burgerlijke Rechtsvordering)

Article 254

1. In alle spoedeisende zaken waarin, gelet op de belangen van partijen, een onmiddellijke voorziening bij voorraad wordt vereist, is de voorzieningenrechter bevoegd deze te geven.

2. Op aanvraag van de belanghebbende partij kan de voorzieningenrechter de dagvaarding bevelen tegen de dag en het uur, de zondag daarbij inbegrepen, voor elk geval te bepalen. Hij kan daarbij tevens bevelen dat de terechtzitting op een andere plaats dan in het gerechtsgebouw wordt gehouden. De voorzieningenrechter kan aan de dagbepaling voorwaarden verbinden, die door de eiser in acht moeten worden genomen. Deze voorwaarden moeten uit de dagvaarding blijken.
3. De zaak kan ook worden aangebracht op een terechtzitting, door de voorzieningenrechter te houden op de daartoe door hem te bepalen werkdagen.
4. In zaken die ten gronde door de kantonrechter worden behandeld en beslist is ook de kantonrechter bevoegd tot het geven van een voorziening als in deze afdeling bedoeld. Daarbij is op de kantonrechter van toepassing hetgeen omtrent de voorzieningenrechter is bepaald.

1.3. Financial Supervision Act (Wet op het financieel toezicht (Wft))

Article 5:48 Wft

1. In dit artikel en de daarop berustende bepalingen wordt, in afwijking van artikel 5:33, eerste lid, onderdeel a, onder uitgevende instelling verstaan: een naamloze vennootschap naar Nederlands recht waarvan aandelen als bedoeld in artikel 5:33, eerste lid, onderdeel b, onder 1° of 2°, zijn toegelaten tot de handel op een gereglementeerde markt.
2. In dit artikel en de daarop berustende bepalingen wordt onder gelieerde uitgevende instelling verstaan: elke andere uitgevende instelling:
1°. waarmee de uitgevende instelling in een groep is verbonden of waarin de uitgevende instelling een deelneming heeft en waarvan de meest recent vastgestelde omzet ten minste tien procent van de geconsolideerde omzet van de uitgevende instelling bedraagt;
2°. die rechtstreeks of middellijk meer dan 25 procent van het kapitaal van de uitgevende instelling verschaft.
3. Een bestuurder of commissaris van een uitgevende instelling meldt aan de Autoriteit Financiële Markten de aandelen en stemmen in de uitgevende instelling en de gelieerde uitgevende instellingen waarover hij beschikt. Deze meldingen worden gedaan binnen twee weken na de aanwijzing of benoeming als bestuurder of commissaris.
4. Een bestuurder of commissaris van een naamloze vennootschap die een uitgevende instelling wordt in de zin van het eerste lid, meldt onverwijld aan de Autoriteit Financiële Markten de aandelen en stemmen in de uitgevende instelling en de gelieerde uitgevende instellingen waarover hij beschikt. Aan de verplichting op grond van de vorige volzin is voldaan, indien terzake van hetzelfde feit een melding is gedaan op grond van artikel 5:43, eerste lid.
5. Een bestuurder of commissaris van een uitgevende instelling ten opzichte waarvan een andere naamloze vennootschap een gelieerde uitgevende instelling wordt in de zin van het tweede lid, meldt onverwijld aan de Autoriteit Financiële Markten de aandelen en stemmen in de desbetreffende gelieerde uitgevende instelling waarover hij beschikt. Aan de verplichting op grond van de vorige volzin is voldaan, indien terzake van hetzelfde feit een melding is gedaan op grond van artikel 5:43.
6. Een bestuurder of commissaris van een uitgevende instelling meldt onverwijld aan de Autoriteit Financiële Markten elke wijziging in de aandelen in de uitgevende instelling en de gelieerde uitgevende instellingen waarover hij beschikt. Aan de verplichting op grond van de vorige volzin is voldaan, indien terzake van hetzelfde feit een melding is gedaan op grond van artikel 5:38, eerste lid, of 5:40, eerste volzin.
7. Een bestuurder of commissaris van een uitgevende instelling meldt onverwijld aan de Autoriteit Financiële Markten elke wijziging in de stemmen in de uitgevende instelling en de gelieerde uitgevende instellingen waarover hij beschikt. Aan de verplichting op grond van de vorige volzin is voldaan, indien terzake van hetzelfde feit een melding is gedaan op grond van artikel 5:38, tweede lid.
8. Een uitgevende instelling meldt het feit dat een bestuurder of commissaris niet langer in functie is onverwijld aan de Autoriteit Financiële Markten.
9. Indien een bestuurder van een uitgevende instelling een rechtspersoon is, zijn het derde tot en met het achtste lid van overeenkomstige toepassing op de natuurlijke personen die het dagelijks beleid van deze rechtspersoon bepalen, alsmede op de natuurlijke personen die toezicht houden op het beleid van het bestuur en de algemene gang van zaken in deze rechtspersoon.

10. Bij algemene maatregel van bestuur worden regels gesteld met betrekking tot de gegevens die bij een melding als bedoeld in dit artikel dienen te worden verstrekt en de wijze van melden.

Article 5:53 Wft

1. In dit hoofdstuk en de daarop berustende bepalingen wordt verstaan onder voorwetenschap: bekendheid met informatie die concreet is en die rechtstreeks of middellijk betrekking heeft op een uitgevende instelling als bedoeld in het vierde lid, onderdeel a, waarop de financiële instrumenten betrekking hebben of omtrent de handel in deze financiële instrumenten, welke informatie niet openbaar is gemaakt en waarvan openbaarmaking significante invloed zou kunnen hebben op de koers van de financiële instrumenten of op de koers van daarvan afgeleide financiële instrumenten. Voorzover het grondstoffenderivaten betreft wordt in dit hoofdstuk en de daarop berustende bepalingen, in afwijking van de vorige volzin, onder voorwetenschap verstaan: bekendheid met niet openbaar gemaakte informatie die concreet is en die rechtstreeks of middellijk betrekking heeft op een of meer grondstoffenderivaten, van welke informatie beleggers in die grondstoffenderivaten bekendmaking mogen verwachten op grond van marktpraktijken die gebruikelijk zijn op de gereglementeerde markt of vervangen door: de multilaterale handelsfaciliteit waarvoor de beleggingsonderneming een vergunning heeft als bedoeld in artikel 2:96 waarop die grondstoffenderivaten worden verhandeld.
2. Bij of krachtens algemene maatregel van bestuur kunnen marktpraktijken als bedoeld in het eerste lid, tweede volzin, worden aangewezen.
3. In dit hoofdstuk en de daarop berustende bepalingen wordt, in aanvulling op artikel 1:1, onder financieel instrument mede verstaan: elk ander instrument dat op een gereglementeerde markt of een multilaterale handelsfaciliteit waarvoor de beleggingsonderneming een vergunning heeft als bedoeld in artikel 2:96 tot de handel is toegelaten of waarvoor toelating tot de handel op een gereglementeerde markt is aangevraagd.
4. In dit hoofdstuk en de daarop berustende bepalingen wordt, in afwijking van artikel 1:1, verstaan onder uitgevende instelling:
a. rechtspersoon, vennootschap of instelling die financiële instrumenten heeft uitgegeven als bedoeld in artikel 5:56, eerste lid, onderdeel a of b, of degene op wiens voorstel een koopovereenkomst inzake een financieel instrument, niet zijnde een effect, tot stand is gekomen; of
b. rechtspersoon, vennootschap of instelling die voornemens is financiële instrumenten uit te geven als bedoeld in artikel 5:56, eerste lid, onderdeel a of b, of degene die een koopovereenkomst inzake een financieel instrument, niet zijnde een effect, voorstelt.
5. In dit hoofdstuk en de daarop berustende bepalingen wordt verstaan onder beleggingsaanbeveling: voor het publiek bestemde informatie die wordt opgesteld of uitgebracht door:
a. de personen, bedoeld in artikel 5:64, tweede lid, onderdeel a, waarin expliciet of impliciet een beleggingsstrategie wordt aanbevolen of voorgesteld met betrekking tot:
1°. financiële instrumenten die zijn toegelaten tot de handel op een gereglementeerde markt waarvoor een vergunning als bedoeld in artikel 5:26, eerste lid, is verleend of een multilaterale handelsfaciliteit waarvoor de beleggingsonderneming een vergunning heeft als bedoeld in artikel 2:96 of waarvoor toelating tot die handel is aangevraagd;
2°. financiële instrumenten die zijn toegelaten tot de handel op een gereglementeerde markt in een andere lidstaat; of
3°. een uitgevende instelling die financiële instrumenten als bedoeld onder 1° of 2° heeft uitgegeven;
b. de personen, bedoeld in artikel 5:64, tweede lid, onderdeel b, waarin expliciet een beleggingsbeslissing wordt aanbevolen met betrekking tot:
1°. financiële instrumenten die zijn toegelaten tot de handel op een gereglementeerde markt waarvoor een vergunning als bedoeld in artikel 5:26, eerste lid, is verleend of een multilaterale handelsfaciliteit waarvoor de beleggingsonderneming een vergunning heeft als bedoeld in artikel 2:96 of waarvoor toelating tot die handel is aangevraagd; of
2°. financiële instrumenten die zijn toegelaten tot de handel op een gereglementeerde markt in een andere lidstaat.
6. In dit hoofdstuk en de daarop berustende bepalingen wordt verstaan onder uitbrenger van een beleggingsaanbeveling: een persoon die in het kader van de uitoefening van zijn beroep of bedrijf een beleggingsaanbeveling uitbrengt.

Article 5:59 Wft

1. Een uitgevende instelling als bedoeld in artikel 5:53, vierde lid, onderdeel a, die financiële instrumenten heeft uitgegeven als bedoeld in artikel 5:56, eerste lid, onderdeel a of b, die met haar instemming zijn toegelaten tot de handel op een gereglementeerde markt waarvoor een vergunning als bedoeld in artikel 5:26, eerste lid, is verleend of een multilaterale handelsfaciliteit waarvoor de beleggingsonderneming een vergunning heeft als bedoeld in artikel 2:96 of waarvoor met haar instemming verzocht is om toelating van die financiële instrumenten tot de handel op een dergelijke markt, maakt informatie als bedoeld in artikel 5:53, eerste lid, die rechtstreeks op haar betrekking heeft, onverwijld openbaar. De openbaarmaking vindt plaats door middel van een persbericht dat gelijktijdig wordt uitgebracht in Nederland en in elke andere lidstaat waar de door de uitgevende instelling uitgegeven financiële instrumenten met haar instemming zijn toegelaten tot de handel op een gereglementeerde markt of een multilaterale handelsfaciliteit waarvoor de beleggingsonderneming een vergunning heeft als bedoeld in artikel 2:96 of waar de uitgevende instelling heeft verzocht om of heeft ingestemd met toelating tot de handel van die financiële instrumenten op een dergelijke markt. De uitgevende instelling stelt de Autoriteit Financiële Markten gelijktijdig met de openbaarmaking op de hoogte van deze informatie.
2. De uitgevende instelling beschikt over een website en maakt de informatie onverwijld op deze website openbaar. Indien de uitgevende instelling een beleggingsinstelling is, kan de informatie ook op de website van de beheerder van die beleggingsinstelling onverwijld openbaar worden gemaakt. De uitgevende instelling of beheerder houdt de informatie gedurende ten minste een jaar op de website toegankelijk.
3. In afwijking van het eerste en tweede lid kan de uitgevende instelling de openbaarmaking van de informatie uitstellen indien:
a. het uitstel een rechtmatig belang van de uitgevende instelling dient;
b. van het uitstel geen misleiding van het publiek te duchten is; en
c. zij de vertrouwelijkheid van deze informatie kan waarborgen.
4. Bij algemene maatregel van bestuur worden regels gesteld met betrekking tot het derde lid. Daarbij wordt bepaald wat onder een rechtmatig belang van de uitgevende instelling kan worden verstaan en aan welke vereisten de uitgevende instelling dient te voldoen om de vertrouwelijkheid van de informatie te waarborgen.
5. Indien de uitgevende instelling of een persoon die deze vertegenwoordigt, doelbewust informatie als bedoeld in artikel 5:53, eerste lid, in het kader van de normale uitoefening van werk, beroep of functie meedeelt aan een derde, maakt de uitgevende instelling die informatie gelijktijdig openbaar. Indien de informatie niet doelbewust aan een derde is meegedeeld maakt de uitgevende instelling haar onverwijld daarna openbaar. Het eerste lid is van overeenkomstige toepassing.
6. Het vijfde lid is niet van toepassing indien de persoon aan wie de informatie wordt meegedeeld terzake daarvan gehouden is tot geheimhouding.
7. Een uitgevende instelling met zetel in Nederland die financiële instrumenten als bedoeld in artikel 5:56, eerste lid, onderdeel a of b, heeft uitgegeven die met haar instemming zijn toegelaten tot de handel op een daar bedoelde gereglementeerde markt of een multilaterale handelsfaciliteit waarvoor de beleggingsonderneming een vergunning heeft als bedoeld in artikel 2:96 of waarvoor met haar instemming verzocht is om toelating van die financiële instrumenten tot de handel op een dergelijke markt, een uitgevende instelling met zetel in een andere lidstaat die financiële instrumenten als bedoeld in artikel 5:56, eerste lid, onderdeel d, heeft uitgegeven die met haar instemming zijn toegelaten tot de handel op een daar bedoeld met een gereglementeerde markt of multilaterale handelsfaciliteit vergelijkbaar systeem, een uitgevende instelling met zetel in een staat die geen lidstaat is die financiële instrumenten als bedoeld in artikel 5:56, eerste lid, onderdeel a, heeft uitgegeven of voornemens is uit te geven die met haar instemming zijn toegelaten tot de handel op een daar bedoelde gereglementeerde markt of een multilaterale handelsfaciliteit waarvoor de beleggingsonderneming een vergunning heeft als bedoeld in artikel 2:96 of waarvoor met haar instemming verzocht is om toelating van die financiële instrumenten tot de handel op een dergelijke markt, alsmede een ieder die namens of voor rekening van een hiervoor bedoelde uitgevende instelling optreedt, houdt een lijst bij van de bij haar of hem werkzame personen die op regelmatige of incidentele basis kennis kunnen hebben van informatie als bedoeld in artikel 5:53, eerste lid, en stelt deze personen op de hoogte van de in deze afdeling gestelde verboden en de hoogte van de sancties die op overtreding daarvan zijn gesteld.

8. Bij of krachtens algemene maatregel van bestuur worden regels gesteld met betrekking tot de wijze waarop de in het eerste, tweede en vijfde lid bedoelde openbaarmaking dient plaats te vinden, alsmede met betrekking tot de inhoud, het bijwerken en bewaren van de lijst, bedoeld in het zevende lid.

1.4. Annex A to the Decree concerning Public Offers (Bijlage A bij het Besluit Openbare Biedingen)

Par. 2.8

8. Indien van toepassing: het bedrag van de vergoedingen aan de bestuurders en commissarissen van de doelvennootschap die bij de gestanddoening van het bod zullen aftreden, vermeld per bestuurder of commissaris.

Par. 2.9

9. Indien van toepassing: het bedrag van de vergoedingen aan de bestuurders en commissarissen van de bieder die verband houden met de gestanddoening van het openbaar bod en, indien het biedingsbericht tezamen met de doelvennootschap wordt opgesteld, het bedrag van de vergoedingen aan de bestuurders en commissarissen van de doelvennootschap die verband houden met de gestanddoening van het openbaar bod, vermeld per bestuurder of commissaris.

1.5. Annex F to the Decree concerning Public Offers (Bijlage F bij het Besluit Openbare Biedingen)

Par. 5

5. Indien van toepassing: het bedrag van de vergoedingen aan de bestuurders en commissarissen van de vennootschap, anders dan de bieder of de doelvennootschap, waarvan effecten in ruil worden aangeboden, die bij gestanddoening van het openbaar bod zullen aftreden, vermeld per bestuurder of commissaris.

Par. 6

6. Indien van toepassing: het bedrag van de vergoedingen aan de bestuurders en commissarissen van de vennootschap, anders dan de bieder of de doelvennootschap, waarvan effecten in ruil worden aangeboden, die verband houden met de gestanddoening van het openbaar bod, vermeld per bestuurder of commissaris.

1.6. Works Council Act (Wet op de Ondernemingsraden)

Article 23 WOR

1. De ondernemer en de ondernemingsraad komen met elkaar bijeen binnen twee weken nadat hetzij de ondernemingsraad hetzij de ondernemer daarom onder opgave van redenen heeft verzocht.
2. In de in het eerste lid bedoelde overlegvergaderingen worden de aangelegenheden, de onderneming betreffende, aan de orde gesteld, ten aanzien waarvan hetzij de ondernemer, hetzij de ondernemingsraad overleg wenselijk acht of waarover ingevolge het bij of krachtens deze wet bepaalde overleg tussen de ondernemer en de ondernemingsraad moet plaatsvinden. De ondernemingsraad is bevoegd omtrent de bedoelde aangelegenheden voorstellen te doen en standpunten kenbaar te maken. Onder de aangelegenheden, de onderneming betreffende, is niet begrepen het beleid ten aanzien van, alsmede de uitvoering van een bij of krachtens een wettelijk voorschrift aan de ondernemer opgedragen publiekrechtelijke taak, behoudens voor zover deze uitvoering de werkzaamheden van de in de onderneming werkzame personen betreft.

3. De ondernemingsraad is ook buiten de overlegvergadering bevoegd aan de ondernemer voorstellen te doen omtrent de in het tweede lid bedoelde aangelegenheden. Een dergelijk voorstel wordt schriftelijk en voorzien van een toelichting aan de ondernemer voorgelegd. De ondernemer beslist over het voorstel niet dan nadat daarover ten minste éénmaal overleg is gepleegd in een overlegvergadering. Na het overleg deelt de ondernemer zo spoedig mogelijk schriftelijk en met redenen omkleed aan de ondernemingsraad mee, of en in hoeverre hij overeenkomstig het voorstel zal besluiten.
4. Het overleg wordt voor de ondernemer gevoerd door de bestuurder van de onderneming. Wanneer een onderneming meer dan één bestuurder heeft, bepalen dezen te zamen wie van hen overleg pleegt met de ondernemingsraad.
5. De in het vorige lid bedoelde bestuurder kan zich in geval van verhindering of ten aanzien van een bepaald onderwerp laten vervangen door een medebestuurder. Heeft de onderneming geen meerhoofdig bestuur, dan kan de bestuurder zich bij verhindering doen vervangen door een persoon als bedoeld in artikel 24, tweede lid, of door een in de onderneming werkzame persoon die beschikt over bevoegdheden om namens de ondernemer overleg te voeren met de ondernemingsraad.
6. De bestuurder of degene die hem vervangt kan zich bij het overleg laten bijstaan door een of meer medebestuurders, personen als bedoeld in artikel 24, tweede lid, of in de onderneming werkzame personen.

Article 25 WOR

1. De ondernemingsraad wordt door de ondernemer in de gelegenheid gesteld advies uit te brengen over elk door hem voorgenomen besluit tot:
a. overdracht van de zeggenschap over de onderneming of een onderdeel daarvan;
b. het vestigen van, dan wel het overnemen of afstoten van de zeggenschap over, een andere onderneming, alsmede het aangaan van, het aanbrengen van een belangrijke wijziging in of het verbreken van duurzame samenwerking met een andere onderneming, waaronder begrepen het aangaan, in belangrijke mate wijzigen of verbreken van een belangrijke financiële deelneming vanwege of ten behoeve van een dergelijke onderneming;
c. beëindiging van de werkzaamheden van de onderneming of van een belangrijk onderdeel daarvan;
d. belangrijke inkrimping, uitbreiding of andere wijziging van de werkzaamheden van de onderneming;
e. belangrijke wijziging in de organisatie van de onderneming, dan wel in de verdeling van bevoegdheden binnen de onderneming;
f. wijziging van de plaats waar de onderneming haar werkzaamheden uitoefent;
g. het groepsgewijze werven of inlenen van arbeidskrachten;
h. het doen van een belangrijke investering ten behoeve van de onderneming;
i. het aantrekken van een belangrijk krediet ten behoeve van de onderneming;
j. het verstrekken van een belangrijk krediet en het stellen van zekerheid voor belangrijke schulden van een andere ondernemer, tenzij dit geschiedt in de normale uitoefening van werkzaamheden in de onderneming;
k. invoering of wijziging van een belangrijke technologische voorziening;
l. het treffen van een belangrijke maatregel in verband met de zorg van de onderneming voor het milieu, waaronder begrepen het treffen of wijzigen van een beleidsmatige, organisatorische en administratieve voorziening in verband met het milieu;
m. vaststelling van een regeling met betrekking tot het zelf dragen van het risico, bedoeld in artikel 40, aanhef en eerste lid, onderdeel a, artikel 40, aanhef en eerste lid, onderdeel b, of artikel 40, aanhef en eerste lid, onderdeel c, van de Wet financiering sociale verzekeringen;
n. het verstrekken en het formuleren van een adviesopdracht aan een deskundige buiten de onderneming betreffende een der hiervoor bedoelde aangelegenheden.

Het onder b bepaalde, alsmede het onder n bepaalde, voor zover dit betrekking heeft op een aangelegenheid als bedoeld onder b, is niet van toepassing wanneer de andere onderneming in het buitenland gevestigd is of wordt en redelijkerwijs niet te verwachten is dat het voorgenomen besluit zal leiden tot een besluit als bedoeld onder c-f ten aanzien van een onderneming die door de ondernemer in Nederland in stand wordt gehouden.

2. De ondernemer legt het te nemen besluit schriftelijk aan de ondernemingsraad voor. Het advies moet op een zodanig tijdstip worden gevraagd, dat het van wezenlijke invloed kan zijn op het te nemen besluit.
3. Bij het vragen van advies wordt aan de ondernemingsraad een overzicht verstrekt van de beweegredenen voor het besluit, alsmede van de gevolgen die het besluit naar te verwachten valt voor de in de onderneming werkzame personen zal hebben en van de naar aanleiding daarvan voorgenomen maatregelen.
4. De ondernemingsraad brengt met betrekking tot een voorgenomen besluit als bedoeld in het eerste lid geen advies uit dan nadat over de betrokken aangelegenheid ten minste éénmaal overleg is gepleegd in een overlegvergadering. Ten aanzien van de bespreking van het voorgenomen besluit in de overlegvergadering is artikel 24, tweede lid, van overeenkomstige toepassing.
5. Indien na het advies van de ondernemingsraad een besluit als in het eerste lid bedoeld wordt genomen, wordt de ondernemingsraad door de ondernemer zo spoedig mogelijk van het besluit schriftelijk in kennis gesteld. Indien het advies van de ondernemingsraad niet of niet geheel is gevolgd, wordt aan de ondernemingsraad tevens meegedeeld, waarom van dat advies is afgeweken. Voor zover de ondernemingsraad daarover nog niet heeft geadviseerd, wordt voorts het advies van de ondernemingsraad ingewonnen over de uitvoering van het besluit.
6. Tenzij het besluit van de ondernemer overeenstemt met het advies van de ondernemingsraad, is de ondernemer verplicht de uitvoering van zijn besluit op te schorten tot een maand na de dag waarop de ondernemingsraad van het besluit in kennis is gesteld. De verplichting vervalt wanneer de ondernemingsraad zulks te kennen geeft.

Article 31 WOR

1. De ondernemer is verplicht desgevraagd aan de ondernemingsraad en aan de commissies van die raad tijdig alle inlichtingen en gegevens te verstrekken die deze voor de vervulling van hun taak redelijkerwijze nodig hebben. De inlichtingen en gegevens worden desgevraagd schriftelijk verstrekt.
2. De ondernemer is verplicht aan de ondernemingsraad bij het begin van iedere zittingsperiode schriftelijk gegevens te verstrekken omtrent:
a. de rechtsvorm van de ondernemer, waarbij indien de ondernemer een niet-publiekrechtelijke rechtspersoon is, mede de statuten van die rechtspersoon moeten worden verstrekt;
b. indien de ondernemer een natuurlijke persoon, een maatschap of een niet-rechtspersoonlijkheid bezittende vennootschap is: de naam en de woonplaats van onderscheidenlijk die persoon, de maten of de beherende vennoten;
c. indien de ondernemer een rechtspersoon is: de naam en de woonplaats van de commissarissen of de bestuursleden;
d. indien de ondernemer deel uitmaakt van een aantal in een groep verbonden ondernemers: de ondernemers die deel uitmaken van die groep, de zeggenschapsverhoudingen waardoor zij onderling zijn verbonden, alsmede de naam en de woonplaats van degenen die ten gevolge van de bedoelde verhoudingen feitelijke zeggenschap over de ondernemer kunnen uitoefenen;
e. de ondernemers of de instellingen met wie de ondernemer, anders dan uit hoofde van zeggenschapsverhoudingen als bedoeld onder d, duurzame betrekkingen onderhoudt die van wezenlijk belang kunnen zijn voor het voortbestaan van de onderneming, alsmede de naam en de woonplaats van degenen die ten gevolge van zodanige betrekkingen feitelijke zeggenschap over de ondernemer kunnen uitoefenen;
f. de organisatie van de onderneming, de naam en de woonplaats van de bestuurders en van de belangrijkste overige leidinggevende personen, alsmede de wijze waarop de bevoegdheden tussen de bedoelde personen zijn verdeeld.
3. De ondernemer is verplicht de ondernemingsraad zo spoedig mogelijk in kennis te stellen van wijzigingen die zich in de in het tweede lid bedoelde gegevens hebben voorgedaan.

Article 31d WOR

1. De ondernemer verstrekt, mede ten behoeve van de bespreking van de algemene gang van zaken van de onderneming, ten minste eenmaal per jaar aan de ondernemingsraad schriftelijk informatie over de hoogte en inhoud van de arbeidsvoorwaardelijke regelingen en afspraken per verschillende groep van de in de onderneming werkzame personen.

2. De ondernemer verstrekt daarbij tevens schriftelijke informatie over de hoogte en inhoud van de arbeidsvoorwaardelijke regelingen en afspraken met het bestuur dat de rechtspersoon vertegenwoordigt en het totaal van de vergoedingen, dat wordt verstrekt aan het toezichthoudend orgaan, bedoeld in artikel 24, tweede lid.
3. Ten aanzien van het eerste en tweede lid wordt inzichtelijk gemaakt met welk percentage deze arbeidsvoorwaardelijke regelingen en afspraken zich verhouden tot elkaar en tot die van het voorgaande jaar.
4. Indien een groep, als bedoeld in het eerste lid, het bestuur of het toezichthoudend orgaan, bedoeld in het tweede lid, uit minder dan vijf personen bestaat, is het mogelijk om voor de toepassing van deze leden twee of meer functies samen te voegen, zodat een groep van ten minste vijf personen ontstaat.
5. De ondernemer is verplicht de ondernemingsraad zo spoedig mogelijk in kennis te stellen van belangrijke wijzigingen die in deze regelingen en afspraken worden aangebracht.
6. Dit artikel is uitsluitend van toepassing op ondernemingen waarin in de regel ten minste 100 personen werkzaam zijn.

1.7. Corporate Governance Code (Code Tabaksblat)

Best Practice II.1.2

Het bestuur legt ter goedkeuring voor aan de raad van commissarissen:
a) de operationele en financiële doelstellingen van de vennootschap;
b) de strategie die moet leiden tot het realiseren van de doelstellingen;
c) de randvoorwaarden die bij de strategie worden gehanteerd, bijvoorbeeld ten aanzien van de financiële ratio's.
De hoofdzaken hiervan worden vermeld in het jaarverslag.

Principe II.2

De bestuurders ontvangen voor hun werkzaamheden een bezoldiging van de vennootschap, die wat betreft hoogte en structuur zodanig is dat gekwalificeerde en deskundige bestuurders kunnen worden aangetrokken en behouden. Voor het geval de bezoldiging bestaat uit een vast en een variabel deel, is het variabele deel gekoppeld aan vooraf bepaalde, meetbare en beïnvloedbare doelen, die deels op korte termijn en deels op lange termijn moeten worden gerealiseerd. Het variabele deel van de bezoldiging moet de binding van de bestuurders aan de vennootschap en haar doelstellingen versterken.

De bezoldigingsstructuur, met inbegrip van ontslagvergoeding, is zodanig dat zij de belangen van de vennootschap op middellange en lange termijn bevordert, niet aanzet tot gedrag van bestuurders in hun eigen belang met veronachtzaming van het belang van de vennootschap en falende bestuurders bij ontslag niet 'beloont'. Bij de vaststelling van de hoogte en structuur van de bezoldiging worden onder meer de resultatenontwikkeling, de ontwikkeling van de beurskoers van de aandelen, alsmede andere voor de vennootschap relevante ontwikkelingen in overweging genomen.

Het aandelenbezit van een bestuurder in de vennootschap waarvan hij bestuurder is, is ter belegging op de lange termijn. De hoogte van een ontslagvergoeding voor een bestuurder bedraagt niet meer dan éénmaal het jaarsalaris, tenzij dit in de omstandigheden van het geval kennelijk onredelijk is.

Best Practice II.2.1

Opties ter verkrijging van aandelen zijn een voorwaardelijke bezoldigingscomponent, waarbij de opschortende voorwaarde bij de toekenning is dat de bestuurders na een periode van ten minste drie jaar na de toekenning vooraf vastgestelde prestatiecriteria hebben gerealiseerd.

Best Practice II.2.2

In het geval dat de vennootschap, in afwijking van het in best practice bepaling II.2.1

bepaalde, onvoorwaardelijke opties aan haar bestuurders toekent, hanteert zij prestatiecriteria voor de toekenning van opties en worden de opties in ieder geval de eerste drie jaar na toekenning niet uitgeoefend.

Best Practice II.2.3

Aandelen die zonder financiële tegenprestaties aan bestuurders worden toegekend, worden aangehouden voor telkens een periode van ten minste vijf jaar of tot ten minste het einde van het dienstverband indien deze periode korter is. Het aantal toe te kennen aandelen wordt afhankelijk gesteld van de realisatie van vooraf aangegeven, duidelijk kwantificeerbare en uitdagende doelen.

Best Practice II.2.7

De maximale vergoeding bij onvrijwillig ontslag bedraagt éénmaal het jaarsalaris (het “vaste” deel van de bezoldiging). Indien het maximum van éénmaal het jaarsalaris voor een bestuurder die in zijn eerste benoemingstermijn wordt ontslagen kennelijk onredelijk is, komt deze bestuurder in dat geval in aanmerking voor een ontslagvergoeding van maximaal twee maal het jaarsalaris.

Best Practice II.2.8

De vennootschap verstrekt aan haar bestuurders geen persoonlijke leningen, garanties, en dergelijke, tenzij in de normale uitoefening van het bedrijf en tegen de daarvoor voor het gehele personeel geldende voorwaarden en na goedkeuring van de raad van commissarissen. Leningen worden niet kwijtgescholden.

Best Practice II.2.9

Het remuneratierapport van de raad van commissarissen bevat een verslag van de wijze waarop het bezoldigingsbeleid in het afgelopen boekjaar in de praktijk is gebracht, en bevat tevens een overzicht van het bezoldigingsbeleid dat het komende boekjaar en de daaropvolgende jaren door de raad wordt voorzien.

Best Practice II.2.11

De belangrijkste elementen uit het contract van de bestuurder met de vennootschap worden onverwijld na het afsluiten daarvan openbaar gemaakt. Dit betreffen in ieder geval de hoogte van het vaste salaris, de opbouw en hoogte van het variabele deel van de bezoldiging, de eventuele afvloeiingsregeling, pensioenafspraken en de prestatiecriteria.

Best Practice II.2.12

In het geval dat gedurende het boekjaar aan een (voormalig) bestuurder een bijzondere vergoeding is betaald, wordt in het remuneratierapport een uitleg voor deze vergoeding gegeven. Het remuneratierapport bevat in ieder geval een verantwoording en een uitleg van de aan een in het boekjaar vertrokken bestuurder betaalde of toegezegde vergoedingen.

Best Practice II.2.13

Het remuneratierapport van de raad van commissarissen wordt in ieder geval op de website van de vennootschap geplaatst.

Principe III.5

Indien de raad van commissarissen meer dan vier leden omvat, stelt de raad van commissarissen uit zijn midden een auditcommissie, een remuneratiecommissie en een selectie- en benoemingscommissie in. De taak van de commissies is om de besluitvorming van de raad van commissarissen voor te bereiden. Indien de raad van commissarissen van vennootschappen besluit tot het niet instellen van een audit, remuneratie- en een selectie- en

benoemingscommissie, dan gelden de best practice bepalingen III.5.4, III.5.5, III.5.8, III.5.9, III.5.10, III.5.13, V.1.2, V.2.3 en V.3.1 ten aanzien van de gehele raad van commissarissen. In het verslag van de raad van commissarissen doet de raad verslag van de uitvoering van de taakopdracht van de commissies in het boekjaar.

2. GERMANY

2.1. German Commercial Code (Handelsgesetzbuch):

§ 242 HGB Pflicht zur Aufstellung

[...]
(3) Die Bilanz und die Gewinn- und Verlustrechnung bilden den Jahresabschluss.

§ 264 HGB Pflicht zur Aufstellung

(1) Die gesetzlichen Vertreter einer Kapitalgesellschaft haben den Jahresabschluss (§ 242) um einen Anhang zu erweitern, der mit der Bilanz und der Gewinn- und Verlustrechnung eine Einheit bildet, sowie einen Lagebericht aufzustellen.

§ 285 HGB Sonstige Pflichtangaben

Ferner sind im Anhang anzugeben:
[...]
9.für die Mitglieder des Geschäftsführungsorgans, eines Aufsichtsrats, eines Beirats oder einer ähnlichen Einrichtung jeweils für jede Personengruppe

a) die für die Tätigkeit im Geschäftsjahr gewährten Gesamtbezüge (Gehälter, Gewinnbeteiligungen, Bezugsrechte und sonstige aktienbasierte Vergütungen, Aufwandsentschädigungen, Versicherungsentgelte, Provisionen und Nebenleistungen jeder Art). In die Gesamtbezüge sind auch Bezüge einzurechnen, die nicht ausgezahlt, sondern in Ansprüche anderer Art umgewandelt oder zur Erhöhung anderer Ansprüche verwendet werden. Außer den Bezügen für das Geschäftsjahr sind die weiteren Bezüge anzugeben, die im Geschäftsjahr gewährt, bisher aber in keinem Jahresabschluss angegeben worden sind. Bezugsrechte und sonstige aktienbasierte Vergütungen sind mit ihrer Anzahl und dem beizulegenden Zeitwert zum Zeitpunkt ihrer Gewährung anzugeben; spätere Wertveränderungen, die auf einer Änderung der Ausübungsbedingungen beruhen, sind zu berücksichtigen. Bei einer börsennotierten Aktiengesellschaft sind zusätzlich unter Namensnennung die Bezüge jedes einzelnen Vorstandsmitglieds, aufgeteilt nach erfolgsunabhängigen und erfolgsbezogenen Komponenten sowie Komponenten mit langfristiger Anreizwirkung, gesondert anzugeben. Dies gilt auch für Leistungen, die dem Vorstandsmitglied für den Fall der Beendigung seiner Tätigkeit zugesagt worden sind. Hierbei ist der wesentliche Inhalt der Zusagen darzustellen, wenn sie in ihrer rechtlichen Ausgestaltung von den den Arbeitnehmern erteilten Zusagen nicht unerheblich abweichen. Leistungen, die dem einzelnen Vorstandsmitglied von einem Dritten im Hinblick auf seine Tätigkeit als Vorstandsmitglied zugesagt oder im Geschäftsjahr gewährt worden sind, sind ebenfalls anzugeben. Enthält der Jahresabschluss weitergehende Angaben zu bestimmten Bezügen, sind auch diese zusätzlich einzeln anzugeben;

b) die Gesamtbezüge (Abfindungen, Ruhegehälter, Hinterbliebenenbezüge und Leistungen verwandter Art) der früheren Mitglieder der bezeichneten Organe und ihrer Hinterbliebenen. Buchstabe a Satz 2 und 3 ist entsprechend anzuwenden. Ferner ist der Betrag der für diese Personengruppe gebildeten Rückstellungen für laufende Pensionen und Anwartschaften auf Pensionen und der Betrag der für diese Verpflichtungen nicht gebildeten Rückstellungen anzugeben;
[...]

§ 286 HGB Unterlassen von Angaben

[...]
(5) Die in § 285 Satz 1 Nr. 9 Buchstabe a Satz 5 bis 9 verlangten Angaben unterbleiben, wenn die Hauptversammlung dies beschlossen hat. 2Ein Beschluss, der höchstens für fünf Jahre gefasst werden kann, bedarf einer Mehrheit, die mindestens drei Viertel des bei der

Beschlussfassung vertretenen Grundkapitals umfasst. 3§ 136 Abs. 1 des Aktiengesetzes gilt für einen Aktionär, dessen Bezüge als Vorstandsmitglied von der Beschlussfassung betroffen sind, entsprechend.

§ 289 HGB Lagebericht

[...]
(2) Der Lagebericht soll auch eingehen auf:
[...]

(5) die Grundzüge des Vergütungssystems der Gesellschaft für die in § 285 Satz 1 Nr. 9 genannten Gesamtbezüge, soweit es sich um eine börsennotierte Aktiengesellschaft handelt. Werden dabei auch Angaben entsprechend § 285 Satz 1 Nr. 9 Buchstabe a Satz 5 bis 9 gemacht, können diese im Anhang unterbleiben.
[...]

(4) Aktiengesellschaften und Kommanditgesellschaften auf Aktien, die einen organisierten Markt im Sinne des § 2 Abs. 7 des Wertpapiererwerbs- und Übernahmegesetzes durch von ihnen ausgegebene stimmberechtigte Aktien in Anspruch nehmen, haben im Lagebericht anzugeben:
[...]

(8) Wesentliche Vereinbarungen der Gesellschaft, die unter der Bedingung eines Kontrollwechsels infolge eines Übernahmeangebots stehen, und die hieraus folgenden Wirkungen; die Angabe kann unterbleiben, soweit sie geeignet ist, der Gesellschaft einen erheblichen Nachteil zuzufügen; die Angabepflicht nach anderen gesetzlichen Vorschriften bleibt unberührt;

(9) Entschädigungsvereinbarungen der Gesellschaft, die für den Fall eines Übernahmeangebots mit den Mitgliedern des Vorstands oder Arbeitnehmern getroffen sind.

2.2. German Corporate Governance Kodex (GCGK):

[...]
3.10 Vorstand und Aufsichtsrat sollen jährlich im Geschäftsbericht über die Corporate Governance des Unternehmens berichten (Corporate Governance Bericht). Hierzu gehört auch die Erläuterung eventueller Abweichungen von den Empfehlungen dieses Kodex. Dabei kann auch zu den Kodexanregungen Stellung genommen werden. Die Gesellschaft soll nicht mehr aktuelle Entsprechenserklärungen zum Kodex fünf Jahre lang auf ihrer Internetseite zugänglich halten.
[...]

4.2.2 Das Aufsichtsratsplenum soll auf Vorschlag des Gremiums, das die Vorstandsverträge behandelt, über die Struktur des Vergütungssystems für den Vorstand beraten und soll sie regelmäßig überprüfen.
Die Vergütung der Vorstandsmitglieder wird vom Aufsichtsrat unter Einbeziehung von etwaigen Konzernbezügen in angemessener Höhe auf der Grundlage einer Leistungsbeurteilung festgelegt. Kriterien für die Angemessenheit der Vergütung bilden insbesondere die Aufgaben des jeweiligen Vorstandsmitglieds, seine persönliche Leistung, die Leistung des Vorstands sowie die wirtschaftliche Lage, der Erfolg und die Zukunftsaussichten des Unternehmens unter Berücksichtigung seines Vergleichsumfelds.

4.2.3 Die Gesamtvergütung der Vorstandsmitglieder umfasst die monetären Vergütungsteile, die Versorgungszusagen, die sonstigen Zusagen, insbesondere für den Fall der Beendigung der Tätigkeit, Nebenleistungen jeder Art und Leistungen von Dritten, die im Hinblick auf die Vorstandstätigkeit zugesagt oder im Geschäftsjahr gewährt wurden.
Die monetären Vergütungsteile sollen fixe und variable Bestandteile umfassen. Die variablen Vergütungsteile sollten einmalige sowie jährlich wiederkehrende, an den geschäftlichen Erfolg gebundene Komponenten und auch Komponenten mit langfristiger Anreizwirkung und Risikocharakter enthalten. Sämtliche Vergütungsbestandteile müssen für sich und insgesamt angemessen sein.

Als variable Vergütungskomponenten mit langfristiger Anreizwirkung und Risikocharakter dienen insbesondere Aktien der Gesellschaft mit mehrjähriger Veräußerungssperre, Aktienoptionen oder vergleichbare Gestaltungen (z.B. Phantom Stocks). Aktienoptionen und vergleichbare Gestaltungen sollen auf anspruchsvolle, relevante Vergleichsparameter bezogen sein. Eine nachträgliche Änderung der Erfolgsziele oder der Vergleichsparameter soll ausgeschlossen sein. Für außerordentliche, nicht vorhergesehe ne Entwicklungen soll der Aufsichtsrat eine Begrenzungsmöglichkeit (Cap) vereinbaren.
Bei Abschluss von Vorstandsverträgen sollte darauf geachtet werden, dass Zahlungen an ein Vorstandsmitglied bei vorzeitiger Beendigung der Vorstandstätigkeit ohne wichtigen Grund einschließlich Nebenleistungen den Wert von zwei Jahresvergütungen nicht überschreiten (Abfindungs-Cap) und nicht mehr als die Restlaufzeit des Anstellungsvertrages vergüten. Für die Berechnung des Abfindungs-Caps sollte auf die Gesamtvergütung des abgelaufenen Geschäftsjahres und gegebenenfalls auch auf die voraussichtliche Gesamtvergütung für das laufende Geschäftsjahr abgestellt werden.
Eine Zusage für Leistungen aus Anlass der vorzeitigen Beendigung der Vorstandstätigkeit infolge eines Kontrollwechsels (Change of Control) sollte 150 % des Abfindungs-Caps nicht übersteigen.
Der Vorsitzende des Aufsichtsrats soll die Hauptversammlung über die Grundzüge des Vergütungssystems und deren Veränderung informieren.

4.2.4 Die Gesamtvergütung jedes Vorstandsmitglieds wird, aufgeteilt nach erfolgsunabhängigen, erfolgsbezogenen und Komponenten mit langfristiger Anreizwirkung, unter Namensnennung offengelegt, soweit nicht die Hauptversammlung mit Dreiviertelmehrheit anderweitig beschlossen hat.

4.2.5 Die Offenlegung soll in einem Vergütungsbericht erfolgen, der als Teil des Corporate Governance Berichts auch das Vergütungssystem für die Vorstandsmitglieder in allgemein verständlicher Form erläutert.
Die Darstellung der konkreten Ausgestaltung eines Aktienoptionsplans oder vergleichbarer Gestaltungen für Komponenten mit langfristiger Anreizwirkung und Risikocharakter soll deren Wert umfassen. Bei Versorgungszusagen soll jährlich die Zuführung zu den Pensionsrückstellungen oder Pensionsfonds angegeben werden.
Der wesentliche Inhalt von Zusagen für den Fall der Beendigung der Tätigkeit als Vorstandsmitglied ist anzugeben, wenn die Zusagen in ihrer rechtlichen Ausgestaltung von den den Arbeitnehmern erteilten Zusagen nicht unerheblich abweichen. Der Vergütungsber icht soll auch Angaben zur Art der von der Gesellschaft erbrachten Nebenleistungen enthalten.
[...]

5.2 Der Aufsichtsratsvorsitzende koordiniert die Arbeit im Aufsichtsrat und leitet dessen Sitzungen und nimmt die Belange des Aufsichtsrats nach außen wahr.
Der Aufsichtsratsvorsitzende soll zugleich Vorsitzender der Ausschüsse sein, die die Vorstandsverträge behandeln und die Aufsichtsratssitzungen vorbereiten. Den Vorsitz im Prüfungsausschuss (Audit Committee) sollte er nicht innehaben.
Der Aufsichtsratsvorsitzende soll mit dem Vorstand, insbesondere mit dem Vorsitzenden bzw. Sprecher des Vorstands, regelmäßig Kontakt halten und mit ihm die Strategie, die Geschäftsentwicklung und das Risikomanagement des Unternehmens beraten. Der Aufsichtsratsvorsitzende wird über wichtige Ereignisse, die für die Beurteilung der Lage und Entwicklung sowie für die Leitung des Unternehmens von wesentlicher Bedeutung sind, unverzüglich durch den Vorsitzenden bzw. Sprecher des Vorstands informiert. Der Aufsichtsratsvorsitzende soll sodann den Aufsichtsrat unterrichten und erforderlichenfalls eine außerordentliche Aufsichtsratssitzung einberufen.
[...]

5.3.4 Der Aufsichtsrat kann weitere Sachthemen zur Behandlung in einen oder mehrere Ausschüsse verweisen. Hierzu gehören u. a. die Strategie des Unternehmens, die Vergütung der Vorstandsmitglieder, Investitionen und Finanzierungen.
[...]

2.3. German Criminal Code (*Strafgesetzbuch*):

§ 27 StGB Beihilfe

(1) Als Gehilfe wird bestraft, wer vorsätzlich einem anderen zu dessen vorsätzlich begangener rechtswidriger Tat Hilfe geleistet hat.

(2) Die Strafe für den Gehilfen richtet sich nach der Strafdrohung für den Täter. 2Sie ist nach § 49 Abs. 1 zu mildern.

§ 266 StGB Untreue

(1) Wer die ihm durch Gesetz, behördlichen Auftrag oder Rechtsgeschäft eingeräumte Befugnis, über fremdes Vermögen zu verfügen oder einen anderen zu verpflichten, missbraucht oder die ihm kraft Gesetzes, behördlichen Auftrags, Rechtsgeschäfts oder eines Treueverhältnisses obliegende Pflicht, fremde Vermögensinteressen wahrzunehmen, verletzt und dadurch dem, dessen Vermögensinteressen er zu betreuen hat, Nachteil zufügt, wird mit Freiheitsstrafe bis zu fünf Jahren oder mit Geldstrafe bestraft.

(2) § 243 Abs. 2 und die §§ 247, 248a und 263 Abs. 3 gelten entsprechend.

2.4. German Securities Prospectus Act (*Wertpapierprospektgesetz*) / Commission Regulation (EC) No. 809/2004 (*Prospektverordnung*):

§ 7 WpPG Mindestangaben

Die Mindestangaben, die in einen Prospekt aufzunehmen sind, bestimmen sich nach der Verordnung (EG) Nr. 809/2004 der Kommission vom 29. April 2004 zur Umsetzung der Richtlinie 2003/71/EG des Europäischen Parlaments und des Rates betreffend die in Prospekten enthaltenen Informationen sowie das Format, die Aufnahme von Informationen mittels Verweis und die Veröffentlichun g solcher Prospekte und die Verbreitung von Werbung (ABl. EU Nr. L 149 S. 1, Nr. L 215 S. 3).

Ziffer 15 Anhang I Prospektverordnung Bezüge und Vergünstigungen

Für das letzte abgeschlossene Geschäftsjahr sind für die im ersten Unterabsatz von Punkt 14.1 unter den Buchstaben a) und d) genannten Personen folgende Angaben zu machen.

15.1. Betrag der gezahlten Vergütung (einschließlich etwaiger erfolgsgebundener oder nachträglicher Vergütungen) und Sachleistungen, die diesen Personen von der emittierenden Gesellschaft und ihren Tochterunternehmen für Dienstleistungen jeglicher Art gezahlt oder gewährt werden, die der emittierenden Gesellschaft oder ihren Tochtergesellschaften von einer jeglichen Person erbracht wurden.
Diese Informationen sind auf Einzelfallbasis beizubringen, es sei denn, eine individuelle Offenlegung ist im Herkunftsland des Emittenten nicht erforderlich und wird vom Emittenten nicht auf eine andere Art und Weise öffentlich vorgenommen.

15.2. Angabe der Gesamtbeträge, die vom Emittenten oder seinen Tochtergesellschaften als Reserve oder Rückstellungen gebildet werden, um Pensions- und Rentenzahlungen vornehmen oder ähnliche Vergünstigungen auszahlen zu können.

2.5. German Securities Trading Act (*Wertpapierhandelsgesetz*):

§ 15 WpHG Mitteilung, Veröffentlichung und Übermittlung von Insiderinformationen an das Unternehmensregister

(1) Ein Inlandsemittent von Finanzinstrumenten muss Insiderinformationen, die ihn unmittelbar betreffen, unverzüglich veröffentlichen; er hat sie außerdem unverzüglich, jedoch nicht vor ihrer Veröffentlichung dem Unternehmensregister im Sinne des § 8b des Handelsgesetzbuchs zur Speicherung zu übermitteln. Als Inlandsemittent gilt im Sinne dieser Vorschrift auch ein solcher, für dessen Finanzinstrumente erst ein Antrag auf Zulassung gestellt ist. Eine Insiderinformation

betrifft den Emittenten insbesondere dann unmittelbar, wenn sie sich auf Umstände bezieht, die in seinem Tätigkeitsbereich eingetreten sind. 4Wer als Emittent oder als eine Person, die in dessen Auftrag oder auf dessen Rechnung handelt, im Rahmen seiner Befugnis einem anderen Insiderinformationen mitteilt oder zugänglich macht, hat diese gleichzeitig nach Satz 1 zu veröffentlichen und dem Unternehmensregister im Sinne des § 8b des Handelsgesetzbuchs zur Speicherung zu übermitteln, es sei denn, der andere ist rechtlich zur Vertraulichkeit verpflichtet. Erfolgt die Mitteilung oder Zugänglichmachung der Insiderinformation nach Satz 4 unwissentlich, so ist die Veröffentlichung und die Übermittlung unverzüglich nachzuholen. In einer Veröffentlichung genutzte Kennzahlen müssen im Geschäftsverkehr üblich sein und einen Vergleich mit den zuletzt genutzten Kennzahlen ermöglichen.
[...]

§ 15a WpHG Mitteilung von Geschäften, Veröffentlichung und Übermittlung an das Unternehmensregister

(1) Personen, die bei einem Emittenten von Aktien Führungsaufgaben wahrnehmen, haben eigene Geschäfte mit Aktien des Emittenten oder sich darauf beziehenden Finanzinstrumenten, insbesondere Derivaten, dem Emittenten und der Bundesanstalt innerhalb von fünf Werktagen mitzuteilen. Die Verpflichtung nach Satz 1 obliegt auch Personen, die mit einer solchen Person in einer engen Beziehung stehen. Die Verpflichtung nach Satz 1 gilt nur bei Emittenten solcher Aktien, die

1.an einer inländischen Börse zum Handel zugelassen sind oder

2.zum Handel an einem ausländischen organisierten Markt zugelassen sind, sofern der Emittent seinen Sitz im Inland hat oder es sich um Aktien eines Emittenten mit Sitz außerhalb der Europäischen Union und des Europäischen Wirtschaftsraums handelt, für welche die Bundesrepublik Deutschland Herkunftsstaat im Sinne des Wertpapierprospektgesetzes ist.
Der Zulassung zum Handel an einem organisierten Markt steht es gleich, wenn der Antrag auf Zulassung gestellt oder öffentlich angekündigt ist. 5Die Pflicht nach Satz 1 besteht nicht, solange die Gesamtsumme der Geschäfte einer Person mit Führungsaufgaben und der mit dieser Person in einer engen Beziehung stehenden Personen insgesamt einen Betrag von 5.000 Euro bis zum Ende des Kalenderjahres nicht erreicht.

(2) Personen mit Führungsaufgaben im Sinne des Absatzes 1 Satz 1 sind persönlich haftende Gesellschafter oder Mitglieder eines Leitungs-, Verwaltungs- oder Aufsichtsorgans des Emittenten sowie sonstige Personen, die regelmäßig Zugang zu Insiderinformationen haben und zu wesentlichen unternehmerischen Entscheidungen ermächtigt sind.

(3) Personen im Sinne des Absatzes 1 Satz 2, die mit den in Absatz 2 genannten Personen in einer engen Beziehung stehen, sind deren Ehepartner, eingetragene Lebenspartner, unterhaltsberechtigte Kinder und andere Verwandte, die mit den in Absatz 2 genannten Personen zum Zeitpunkt des Abschlusses des meldepflichtigen Geschäfts seit mindestens einem Jahr im selben Haushalt leben. Juristische Personen, bei denen Personen im Sinne des Absatzes 2 oder des Satzes 1 Führungsaufgaben wahrnehmen, gelten ebenfalls als Personen im Sinne des Absatzes 1 Satz 2. Unter Satz 2 fallen auch juristische Personen, Gesellschaften und Einrichtungen, die direkt oder indirekt von einer Person im Sinne des Absatzes 2 oder des Satzes 1 kontrolliert werden, die zugunsten einer solchen Person gegründet wurden oder deren wirtschaftliche Interessen weitgehend denen einer solchen Person entsprechen.

(4) Ein Inlandsemittent hat Informationen nach Absatz 1 unverzüglich zu veröffentlichen und gleichzeitig der Bundesanstalt die Veröffentlichung mitzuteilen; er übermittelt sie außerdem unverzüglich, jedoch nicht vor ihrer Veröffentlichung dem Unternehmensregister im Sinne des § 8b des Handelsgesetzbuchs zur Speicherung. § 15 Abs. 1 Satz 2 gilt entsprechend mit der Maßgabe, dass die öffentliche Ankündigung eines Antrags auf Zulassung einem gestellten Antrag auf Zulassung gleichsteht.
[...]

2.6. German Stock Corporation Act (*Aktiengesetz*):

§ 87 AktG Grundsätze für die Bezüge der Vorstandsmitglieder

(1) Der Aufsichtsrat hat bei der Festsetzung der Gesamtbezüge des einzelnen Vorstandsmitglieds (Gehalt, Gewinnbeteiligungen, Aufwandsentschädigungen, Versicherungsentgelte, Provisionen und Nebenleistungen jeder Art) dafür zu sorgen, dass die Gesamtbezüge in einem angemessenen Verhältnis zu den Aufgaben des Vorstandsmitglieds und zur Lage der Gesellschaft stehen. Dies gilt sinngemäß für Ruhegehalt, Hinterbliebenenbezüge und Leistungen verwandter Art.
[...]

§ 117 AktG Schadenersatzpflicht

(1) Wer vorsätzlich unter Benutzung seines Einflusses auf die Gesellschaft ein Mitglied des Vorstands oder des Aufsichtsrats, einen Prokuristen oder einen Handlungsbevollmächtigten dazu bestimmt, zum Schaden der Gesellschaft oder ihrer Aktionäre zu handeln, ist der Gesellschaft zum Ersatz des ihr daraus entstehenden Schadens verpflichtet. Er ist auch den Aktionären zum Ersatz des ihnen daraus entstehenden Schadens verpflichtet, soweit sie, abgesehen von einem Schaden, der ihnen durch Schädigung der Gesellschaft zugefügt worden ist, geschädigt worden sind.
[...]

§ 120 AktG Entlastung

(1) Die Hauptversammlung beschließt alljährlich in den ersten acht Monaten des Geschäftsjahrs über die Entlastung der Mitglieder des Vorstands und über die Entlastung der Mitglieder des Aufsichtsrats. Über die Entlastung eines einzelnen Mitglieds ist gesondert abzustimmen, wenn die Hauptversammlung es beschließt oder eine Minderheit es verlangt, deren Anteile zusammen den zehnten Teil des Grundkapitals oder den anteiligen Betrag von einer Million Euro erreichen.
[...]

§ 131 AktG Auskunftsrecht des Aktionärs

(1) Jedem Aktionär ist auf Verlangen in der Hauptversammlung vom Vorstand Auskunft über Angelegenheiten der Gesellschaft zu geben, soweit sie zur sachgemäßen Beurteilung des Gegenstands der Tagesordnung erforderlich ist. Die Auskunftspflicht erstreckt sich auch auf die rechtlichen und geschäftlichen Beziehungen der Gesellschaft zu einem verbundenen Unternehme n. Macht eine Gesellschaft von den Erleichterungen nach § 266 Abs. 1 Satz 2, § 276 oder § 288 des Handelsgesetzbuchs Gebrauch, so kann jeder Aktionär verlangen, dass ihm in der Hauptversammlung über den Jahresabschluss der Jahresabschluss in der Form vorgelegt wird, die er ohne Anwendung dieser Vorschriften hätte. Die Auskunftspflicht des Vorstands eines Mutterunternehmens (§ 290 Abs. 1, 2 des Handelsgesetzbuchs) in der Hauptversammlung, der der Konzernabschluss und der Konzernlagebericht vorgelegt werden, erstreckt sich auch auf die Lage des Konzerns und der in den Konzernabschluss einbezogenen Unternehmen.
[...]

§ 142 AktG Bestellung der Sonderprüfer

(1) Zur Prüfung von Vorgängen bei der Gründung oder der Geschäftsführung, namentlich auch bei Maßnahmen der Kapitalbeschaffung und Kapitalherabsetzung, kann die Hauptversammlung mit einfacher Stimmenmehrheit Prüfer (Sonderprüfer) bestellen. Bei der Beschlussfassung kann ein Mitglied des Vorstands oder des Aufsichtsrats weder für sich noch für einen anderen mitstimmen, wenn die Prüfung sich auf Vorgänge erstrecken soll, die mit der Entlastung eines Mitglieds des Vorstands oder des Aufsichtsrats oder der Einleitung eines Rechtsstreits zwischen der Gesellschaft und einem Mitglied des Vorstands oder des Aufsichtsrats zusammenhängen. Für ein Mitglied des Vorstands oder des Aufsichtsrats, das nach Satz 2 nicht mitstimmen kann, kann das Stimmrecht auch nicht durch einen anderen ausgeübt werden.

(2) Lehnt die Hauptversammlung einen Antrag auf Bestellung von Sonderprüfern zur Prüfung eines Vorgangs bei der Gründung oder eines nicht über fünf Jahre zurückliegenden Vorgangs

bei der Geschäftsführung ab, so hat das Gericht auf Antrag von Aktionären, deren Anteile bei Antragstellung zusammen den hundertsten Teil des Grundkapitals oder einen anteiligen Betrag von 100.000 Euro erreichen, Sonderprüfer zu bestellen, wenn Tatsachen vorliegen, die den Verdacht rechtfertigen, dass bei dem Vorgang Unredlichkeiten oder grobe Verletzungen des Gesetzes oder der Satzung vorgekommen sind. Die Antragsteller haben nachzuweisen, dass sie seit mindestens drei Monaten vor dem Tag der Hauptversammlung Inhaber der Aktien sind und dass sie die Aktien bis zur Entscheidung über den Antrag halten.

(3) Für eine Vereinbarung zur Vermeidung einer solchen Sonderprüfung gilt § 149 entsprechend.
[...]

(4) Hat die Hauptversammlung Sonderprüfer bestellt, so hat das Gericht auf Antrag von Aktionären, deren Anteile bei Antragstellung zusammen den hundertsten Teil des Grundkapitals oder einen anteiligen Betrag von 100.000 Euro erreichen, einen anderen Sonderprüfer zu bestellen, wenn dies aus einem in der Person des bestellten Sonderprüfers liegenden Grund geboten erscheint, insbesondere, wenn der bestellte Sonderprüfer nicht die für den Gegenstand der Sonderprüfung erforderlichen Kenntnisse hat, seine Befangenheit zu besorgen ist oder Bedenken wegen seiner Zuverlässigkeit bestehen. Der Antrag ist binnen zwei Wochen seit dem Tag der Hauptversammlung zu stellen.
[...]

§ 145 AktG Rechte der Sonderprüfer. Prüfungsbericht

(1) Der Vorstand hat den Sonderprüfern zu gestatten, die Bücher und Schriften der Gesellschaft sowie die Vermögensgegenstände, namentlich die Gesellschaftskasse und die Bestände an Wertpapieren und Waren, zu prüfen.

(2) Die Sonderprüfer können von den Mitgliedern des Vorstands und des Aufsichtsrats alle Aufklärungen und Nachweise verlangen, welche die sorgfältige Prüfung der Vorgänge notwendig macht.

(3) Die Sonderprüfer haben die Rechte nach Absatz 2 auch gegenüber einem Konzernunternehmen sowie gegenüber einem abhängigen oder herrschenden Unternehmen.
[...]

(6) Die Sonderprüfer haben über das Ergebnis der Prüfung schriftlich zu berichten. Auch Tatsachen, deren Bekanntwerden geeignet ist, der Gesellschaft oder einem verbundenen Unternehmen einen nicht unerheblichen Nachteil zuzufügen, müssen in den Prüfungsbericht aufgenommen werden, wenn ihre Kenntnis zur Beurteilung des zu prüfenden Vorgangs durch die Hauptversammlung erforderlich ist. Die Sonderprüfer haben den Bericht zu unterzeichnen und unverzüglich dem Vorstand und zum Handelsregister des Sitzes der Gesellschaft einzureichen. Auf Verlangen hat der Vorstand jedem Aktionär eine Abschrift des Prüfungsberichts zu erteilen. Der Vorstand hat den Bericht dem Aufsichtsrat vorzulegen und bei der Einberufung der nächsten Hauptversammlung als Gegenstand der Tagesordnung bekanntzumachen.

§ 147 AktG Geltendmachung von Ersatzansprüchen

(1) Die Ersatzansprüche der Gesellschaft aus der Gründung gegen die nach den §§ 46 bis 48, 53 verpflichteten Personen oder aus der Geschäftsführung gegen die Mitglieder des Vorstands und des Aufsichtsrats oder aus § 117 müssen geltend gemacht werden, wenn es die Hauptversammlung mit einfacher Stimmenmehrheit beschließt. Der Ersatzanspruch soll binnen sechs Monaten seit dem Tage der Hauptversammlung geltend gemacht werden.

(2) Zur Geltendmachung des Ersatzanspruchs kann die Hauptversammlung besondere Vertreter bestellen. Das Gericht (§14) hat auf Antrag von Aktionären, deren Anteile zusammen den zehnten Teil des Grundkapitals oder den anteiligen Betrag von einer Million Euro erreichen, als Vertreter der Gesellschaft zur Geltendmachung des Ersatzanspruchs andere als die nach den §§ 78, 112 oder nach Satz 1 zur Vertretung der Gesellschaft berufenen Personen zu

bestellen, wenn ihm dies für eine gehörige Geltendmachung zweckmäßig erscheint. Gibt das Gericht dem Antrag statt, so trägt die Gesellschaft die Gerichtskosten. Gegen die Entscheidung ist die sofortige Beschwerde zulässig. Die gerichtlich bestellten Vertreter können von der Gesellschaft den Ersatz angemessener barer Auslagen und eine Vergütung für ihre Tätigkeit verlangen. Die Auslagen und die Vergütung setzt das Gericht fest. Gegen die Entscheidung ist die sofortige Beschwerde zulässig. Die weitere Beschwerde ist ausgeschlossen. Aus der rechtskräftigen Entscheidung findet die Zwangsvollstreckung nach der Zivilprozessordnung statt.
[...]

§ 148 AktG Klagezulassungsverfahren

(1) Aktionäre, deren Anteile im Zeitpunkt der Antragstellung zusammen den einhundertsten Teil des Grundkapitals oder einen anteiligen Betrag von 100.000 Euro erreichen, können die Zulassung beantragen, im eigenen Namen die in § 147 Abs. 1 Satz 1 bezeichneten Ersatzansprüche der Gesellschaft geltend zu machen. Das Gericht lässt die Klage zu, wenn:

1.die Aktionäre nachweisen, dass sie die Aktien vor dem Zeitpunkt erworben haben, in dem sie oder im Falle der Gesamtrechtsnachfolge ihre Rechtsvorgänger von den behaupteten Pflichtverstößen oder dem behaupteten Schaden auf Grund einer Veröffentlichung Kenntnis erlangen mussten,

2.die Aktionäre nachweisen, dass sie die Gesellschaft unter Setzung einer angemessenen Frist vergeblich aufgefordert haben, selbst Klage zu erheben,

3.Tatsachen vorliegen, die den Verdacht rechtfertigen, dass der Gesellschaft durch Unredlichkeit oder grobe Verletzung des Gesetzes oder der Satzung ein Schaden entstanden ist, und

4.der Geltendmachung des Ersatzanspruchs keine überwiegenden Gründe des Gesellschaftswohls entgegenstehen.
[...]

2.7. German Takeover Act (*Wertpapiererwerbs- und Übernahmegesetz*):

§ 11 WpÜG Angebotsunterlage

(2) Die Angebotsunterlage hat den Inhalt des Angebots und ergänzende Angaben zu enthalten.
[...]

3. Angaben über Geldleistungen oder andere geldwerte Vorteile, die Vorstands- oder Aufsichtsratsmitgliedern der Zielgesellschaft gewährt oder in Aussicht gestellt werden, [...]

3. FRANCE

3.1. Extracts from the French Commercial Code

Article L225-22

An employee of the company can only become a director if his contract of employment relates to actual employment. He shall not lose the benefit of that contract of employment. Any directorship conferred in breach of this paragraph is null and void. Such voidance shall not entail voidance of the deliberations that the illegally appointed director participated in.

The number of directors bound to a company by a contract of employment shall not exceed one third of the serving directors.

However, directors elected by the employees, directors representing the employee shareholders or the company's open-end investment company pursuant to Article L225-23, and, in public companies with worker participation, the representatives of the workers' cooperative society, are not included in the number of directors bound to the company by a contract of employment referred to in the previous paragraph. In the case of a merger or demerger, the contract of employment may have been entered into with one of the merged companies or with the demerged company.

Article L225-37

The board of directors may validly deliberate only if at least half of its members are present. Any clause to the contrary is deemed unwritten.

Unless the memorandum and articles of association require a larger majority, the decisions are taken on a majority vote of the members present or represented.

Unless the board is convened to deal with matters referred to in Articles L232-1 and L233-16, and barring any contrary provision in the memorandum and articles of association, the internal regulations may provide for directors who participate in the meeting via videoconferencing or via a telecommunications medium which permits their identification and guarantees their effective participation to be deemed to be present for calculation of the quorum and the majority. The nature of, and implementing regulations for, such media are determined in a Conseil d'Etat decree. The memorandum and articles of association may limit the nature of the decisions which may be made at such meetings and provide for a right of objection for a given number of directors.

Barring any contrary provision in the memorandum and articles of association, the chairman of the meeting has a casting vote in the event of a split vote. The directors, and any other persons invited to attend board meetings, are bound by secrecy in regard to any information of a confidential nature presented as such by the chairman of the board of directors.

In companies that make public offerings, the chairman of the board of directors describes the preparation and organisation of the board's work and the internal auditing procedures put in place by the company in a report attached to the report referred to in Articles L225-100, L225-102, L225-102-1 and L233-26. Without prejudice to the provisions of Article L225-56, the said report also indicates any limitations the board of directors places on the powers of the general manager.

In listed companies, the report mentioned above also describes the main rules and principles according to which the board or the supervisory board has determined the remuneration and advantages granted to directors and officers.

Article L225-38

Any agreement entered into, either directly or through an intermediary, between the company and its general manager, one of its assistant general managers, one of its directors, one of its shareholders holding a fraction of the voting rights greater than 10% or, in the case of a corporate shareholder, the company which controls it within the meaning of Article L. 233-3, must be subject to the prior consent of the board of directors.The same applies to agreements in which a person referred to in the previous paragraph has an indirect interest. Agreements entered into between the company and another firm are also subject to prior consent if the company's general manager, one of its assistant general managers or one of its directors is the owner, an indefinitely liable partner, a manager, a director or a member of that firm's supervisory board or, more generally, is in any way involved in its management.

Article L225-39

The provisions of Article 225-38 are not applicable to agreements relating to current operations entered into under normal terms and conditions. Such agreements are nevertheless made known to the chairman of the board of directors by the interested party unless they are of no significance to any party, given their objective or their financial implications. A list of such agreements and their objectives is sent to the members of the board of directors and to the auditors by the chairman.

Article L225-40

The interested party must inform the board immediately upon becoming aware of an agreement to which Article L. 225-38 applies. They may not participate in the vote on the requested prior approval of the Board. The chairman of the board of directors shall advise the auditors of all agreements authorised and shall submit them to the general meeting for approval.
The auditors shall present a special report on the agreements to the meeting, which shall rule on this report. The interested party may not participate in the vote and their shares shall not be taken into account for the calculation of the quorum and the majority.

Article L225-41

Agreements approved by the meeting shall produce their effects with respect to third parties, as shall those which it refuses, unless they are cancelled in the event of fraud.
Even in the absence of fraud, the prejudicial consequences to the company of refused agreements may be charged to the interested party and, potentially, to the other members of the board of directors.

Article L225-42

Without prejudice to the liability of the interested party, agreements referred to in Article L. 225-38 and entered into without the prior authorisation of the board of directors may be cancelled if they have prejudicial consequences for the company.

Nullity proceedings shall be time-barred after three years with effect from the date of the agreement. However, should the agreement have been dissembled, the starting point for the term of limitation shall be carried forward to the date on which it was revealed. Nullity may be covered by a vote of the general meeting taken on the special report of the auditors setting out the circumstances by virtue of which the authorisation procedure has not been followed. The provisions of subparagraph four of Article L. 225-40 shall apply.

Article L225-42-1 (as changed by the Loi Brenton and Loi TEPA)

In listed companies, agreements entered into between a chairman or general manager on one hand and the company or any controlled company as defined in section L 233-16 II and III on the other hand, corresponding to elements of remuneration, allowances or advantages granted or likely to be granted upon or after severance or change in functions, are subject to sections L-225-40 to L 225-42.

The elements of remuneration, allowances or advantages whose granting does not depend on the meeting of performance criteria, in relation to the company of which he is chairman or general manager, are forbidden.

The board's authorization pursuant to section L 225-38 is made public in compliance with conditions and delays determined by decree.

There must be a specific resolution for each director or officer for the general meeting of shareholder's approval required by section L 225-40.

No payment of any form whatsoever shall be allocated before the board acknowledges, either upon or after severance, that the criteria are met. This decision is made public in compliance with conditions and delays determined by decree. Any payment not complying with these requirements is automatically null and void.

Agreements consisting of allowances granted in exchange for the beneficiary, after severance, not to engage in a competing occupation affecting the company's interests are only subject to this first section's paragraph. It is also the case for pension agreements with a defined benefit scheme which corresponds to the features of the regimes mentioned in section L. 137-11 of the Social Security Code, as well as the agreements corresponding to the features of collective and obligatory pension regimes mentioned in section L 242-1 of the same Code.

Article L225-44

Subject to the provisions of Article L. 225-22 and Article L. 225-27, the directors may not receive any permanent or other remuneration from the company other than those specified in Articles L. 225-45, L. 225-46, L. 225-47 and L. 225-53.

Any clause to the contrary in the memorandum and articles of association shall be deemed null and void and any decision to the contrary shall be deemed null and void.

Article L225-45

As remuneration for their activities and in the form of directors' fees, the general meeting may grant the directors an annual fixed amount which this meeting shall determine without being bound by the provisions of the memorandum and articles of association or previous decisions. The amount of these shall be charged to operating expenses. Their distribution among the directors shall be determined by the board of directors.

Article L225-46

The board of directors may grant exceptional remunerations for missions or mandates conferred upon directors. In such cases, these remunerations shall be charged to operating expenses and subject to the provisions of Articles L. 225-38 to L. 225-42.

Article L225-47

The board of directors shall elect a chairman from among its members who, in order for their appointment to be valid, must be a natural person. It shall determine their remuneration. The chairman shall be appointed for a term which may not exceed their term of office as a director. They shall be eligible for re-election. The board of directors may dismiss them at any time. Any provision to the contrary shall be deemed null and void.

Article L225-53

On the proposal of the general manager, the board of directors may appoint one or more natural persons charged with assisting the general manager, with the title of assistant general manager. The memorandum and articles of association shall determine the maximum number of assistant general managers, which may not exceed five. The board of directors shall determine the remuneration of the general manager and the assistant general managers.

Article L225-102

The report submitted to the routine meeting by the board of directors or the management, as the case may be, shall give an annual account of the number of shares of the company's capital held by employees at the last day of the financial year and shall establish the proportion of the share capital represented by shares held by company personnel and personnel of companies associated with it for the purposes of Article L.225-180 under a company savings scheme as provided for by Articles L.443-1 to L.443-9 of the Employment Code and by employees and former employees in connection with company investment trusts governed by Chapter III of Law No 88-1201 of 23 December 1988 relating to security investment trusts and creating debt investment trusts. Shares directly held by employees during the periods of inaccessibility specified in Articles L.225-194 and L.225-197, in Article 11 of Law to 86-912 of 6 August 1986 relating to terms and conditions of privatisation and Article 442-7 of the Employment Code shall also be taken into account. Shares acquired by employees in connection with the buy-out of a company by its employees, as provided for by Law No 84-578 of 9 July 1984 on the development of economic initiatives, or by employees of a production workers' co-operative within the meaning of Law No 78-763 of 19 July 1978 laying down rules for production co-operatives shall not be taken into account when evaluating the proportion of capital as mentioned in the preceding sub-paragraph.

Where the Annual Report does not contain the information referred to in the first sub-paragraph, any interested party may make an interlocutory application to the Presiding Judge of the Court for an order to the effect that the board of directors or the management, as the case may be, must disclose the said information, subject to a daily penalty if it fails to do so.

Where the application is granted, any penalty and the expenses of the proceedings shall be payable by the directors or members of the management, as the case may be.

Article L225-102-1

The report referred to in Article L225-102 itemises the total remuneration and benefits of all kinds paid to each company officer during the accounting period including any allotments of capital securities, debt instruments or securities giving access to the capital or giving entitlement to an allotment of debt instruments of a company or companies referred to in Articles L228-13 and L228-93.

It also indicates the amount of the remuneration and benefits of all kinds which each company officer received from controlled companies within the meaning of Article L233-16 or from the company which controls the company in which the duties are performed within the meaning of that same article during the accounting period. The said report also describes and distinguishes between the fixed, variable and exceptional elements that make up that remuneration and those benefits as well as the criteria used to calculate them or the circumstances giving rise to them. It likewise indicates the commitments of all kinds made by the company in favour of the company officers relating to elements of remuneration, compensation or benefits payable or likely to be payable on account of them taking up or ceasing their functions or of their functions changing, or subsequently thereto. The information provided in this regard must specify the method used to determine those commitments. Barring arrangements made in good faith, payments and commitments made in violation of the provisions of the present paragraph may be cancelled. It also includes a list of all the remits and functions performed in each company by each company officer during the accounting period. It also includes a list of information as laid down in a Conseil d'Etat decree concerning the manner in which the company deals with the social and environmental consequences of its business. The present paragraph does not apply to companies whose securities are not admitted to trading on a regulated market.

The provisions of the last two paragraphs of Article L225-102 apply to the information referred to in the present article. The provisions of the first to third paragraphs do not apply to companies whose securities are not admitted to trading on a regulated market and which are not controlled within the meaning of Article L233-16 by a company whose securities are admitted to trading on

a regulated market. Moreover, these provisions do not apply to company officers who do not hold any remit in a company whose securities are admitted to trading on a regulated market.

Article L225-90-1 (as changed by the Loi Brenton and Loi TEPA)

In listed companies, agreements entered into between a member of the executive board on one hand and the company or any controlled company as defined in section L 233-16 II and II on the other hand, corresponding to elements of remuneration, allowances or advantages greanted or likely to be granted upon severance or change in functions, or after, are subject to sections L 225-38 and L 225-88 to L-225-90.

Forbidden are the elements of remuneration, allowances, or advantages whose granting does not depend on the meeting of performace criteria, in relation to the executive board member's company.

The supervisory board's authorization pursuant to section L 225-86 is made public in compliance with conditions and delays determined by decree.

There must be a specific resolution for each director or officer for the general meeting of shareholders' approval required by section L 225-88. This approval mist be renewed every time the functions of the directors mentioned in the first paragraph are renewed.

No payment of any form whatsoever shall be allocated before the board acknowledges, either upon or after severance, that the criteria are met. This decision is made public in compliance with conditions and delays determined by decree. Any payment not complying with these requirements is automatically null and void.

Agreements consisting of allowances granted in exchange for the beneficiary, after severance, not to engage in a competing occupation affecting the company’s interests are only subject to this first section's paragraph. It is also the case for pension agreements with a defined benefit scheme which corresponds to the features of the regimes mentioned in section L. 137-11 of the Social Security Code, as well as the agreements corresponding to the features of collective and obligatory pension regimes mentioned in section L 242-1 of the same Code.

Article L225-115

Any shareholder is entitled, under the conditions and subject to the time limits determined in a Conseil d'Etat decree, to discovery of:

1. The inventory, the annual accounts and the list of directors or members of the executive board and the supervisory board, and, where applicable, the consolidated accounts;

2. The reports of the board of directors or the executive board and the supervisory board, as applicable, and the auditors, which shall be presented to the meeting;

3. Where applicable, the text of, and the objects and reasons for, the proposed resolutions, as well as information concerning candidates for the board of directors or the supervisory board, whichever applies;

4. The total amount, certified as accurate by the auditors, of the remuneration paid to the highest-paid persons, the number of such persons being ten or five depending on whether or not the workforce exceeds two hundred employees;

5. The total amount, certified as accurate by the auditors, of the payments made pursuant to 1 and 4 of Article 238 bis of the General Tax Code, as well as a list of the registered shares under sponsorship and the registered shares under patronage;

6. A list of the agreements relating to normal business entered into under normal terms and conditions, and their objects, drawn up pursuant to Articles L. 225-39 and L. 225-87.

Regulatory part:

Article R225-83

The company sends to or makes available to the shareholders, according to the conditions provided under section R 225-88 and R 225-89, the following information, contained in one or several documents:

[…]

4. The board's or the board of management's report, depending on the situation, which will be presented, as well as the supervisory board's remarks, if any.

[…]

Article R225-89

As from the day the ordinary general meeting is summoned, and for at least 15 days preceding the ordinary general meeting, any shareholder has the right to access, at the company's seat or administrative headquarters, the documents enumerated under section L 225-115 and R 225-83. However, shareholders may access the auditor's report only during the 15 days preceding the general annual meeting.

Any shareholder may also, as from the day the extraordinary general meetin or the special meeting is summoned, and at least during the 15 days preceding the date of the meeting, access, at the same place, the text of any resolution presented to the extraordinary general meeting, of the report of the board of administrators, or of the auditor's report.

3.2. General Regulation of the Autorité des Marchés Financiers (AMF) Book II - Issuers and Financial Disclosure

TITLE I - ISSUANCE OF FINANCIAL INSTRUMENTS TO THE PUBLIC

Section 1 - Definition

Article 211-1

Persons or entities issuing financial instruments to the public, within the meaning of Article L. 411-1 of the Monetary and Financial Code, shall be subject to Chapter II of this Title if the offer involves : 1° financial instruments referred to in Points 1° and 2°, Section I of Article L. 211-1 of said Code ; 2° financial instruments referred to in Point 3°, Section I of Article L. 211-1 of said Code where they are issued by the bodies referred to in Points 2° to 4°, Section I of Article L. 214-1 of said Code ; 3° all equivalent instruments issued in accordance with foreign law.

The issuance and disposal of financial instruments referred to in Point 1°, Section II of Article L. 211-1 of said Code shall be subject to Chapter III of this Title.

Article 211-2

The transactions referred to in Article L. 411-2 of the Monetary and Financial Code do not constitute public issuance.
The issuance or disposal of financial instruments referred to in Points 1° or 2° of Article L. 211-1 of the Monetary and Financial Code issued by a société anonyme (public limited company), a société en commandite par actions (limited partnership with share capital) or an equivalent corporate structure under foreign law do not constitute public issuance, within the meaning of Section II of the above article, if the transaction has one of the following characteristics :

1° the total amount is less than EUR 100,000 or the foreign currency equivalent ;

2° the total amount is between EUR 100,000 and EUR 2,500,000 or the foreign currency equivalent and the transaction concerns financial instruments accounting for no more than fifty per cent of the capital of the issuer ; The total amount of the transaction referred to in Points 1° or 2° shall be calculated over a twelve-month period from the date of the first transaction.

3° The transaction is intended for investors acquiring at least EUR 50,000 worth, or the foreign currency equivalent, per investor and per transaction, of the relevant financial instruments ;

4° The transaction concerns financial instruments with a minimum denomination of at least EUR 50,000 or the foreign currency equivalent.

TITLE II - PERIODIC AND ONGOING DISCLOSURE OBLIGATIONS
CHAPTER I - COMMON PROVISIONS AND DISSEMINATION OF REGULATED INFORMATION

Article 221-1

For the purposes of this title :

1° "issuer" means any legal entity or corporate body with publicly listed status or whose financial instruments are the underlying securities for a futures contract or for a financial instrument admitted to trading on a regulated market ;

2° Where the issuer's financial instruments are admitted to trading on a regulated market, "regulated information" means the following documents and information :
a) the annual financial report referred to in Article 222-3 ;
b) the half-yearly financial report referred to in Article 222-4 ;
c) the quarterly financial reporting referred to in paragraph IV of Article L. 451-1-2 of the Monetary and Financial Code ;
d) the reports referred to in Article 222-9 concerning the conditions for preparing and organising the work of the board of directors or the supervisory board and the internal control procedures put in place by issuers ;
e) the news release concerning the fees paid to statutory auditors referred to in Article 222-8 ;
f) information on the total number of voting rights and the number of shares making up the share capital referred to in Article 223-16 ;
g) the description of the buyback programmes referred to in Article 241-2 ;
h) the press release setting out the arrangements for supplying the prospectus referred to in Article 212-27 ;
i) the information published in accordance with Article 223-2 ;
j) a press release stipulating the procedures for supplying and accessing the information Referred to in Article R. 225-83 of the Commercial Code ;
k) the information published pursuant to Article 223-21 ;

Where none of the issuer's financial instruments is admitted to trading on a regulated market, "regulated information" means the documents and information referred to in d, e, h and i.

3° "person" means a natural person or a corporate body. The provisions of this title also apply to the senior managers of the issuer, legal entity or corporate body concerned.

Article 221-2

I. - Where the AMF is the competent authority for monitoring compliance with the requirements relating to the information referred to in a, b, c, f, i and k of points 2° of Article 221-1, this information shall be drafted :
1° In French if the financial instruments are admitted to trading on a French regulated market.
However, in the cases referred to in II of Article 212-12, the following information may be drawn up in a language
other than French that is customary in the sphere of finance:
a) the information referred to in a, b, c, f, i and k of Point 2 of Article 221-1;

b) the information referred to in d, g, h and j of Point 2 of Article 221-1, where the issuer has its registered office
outside France and the financial instruments are admitted to trading on the compartment referred to Article 516-18.

2° In French or another language customary in the sphere of finance if the financial instruments are admitted to trading on a regulated market in a State, other than France, that is party to the European Economic Area agreement .

II. - Where the AMF is not the competent authority for monitoring the information referred to in paragraph I and where the financial instruments are admitted to trading on a French regulated market, that information shall be in French or another language customary in the sphere of finance.

III. - Notwithstanding point 5° of Article L. 451-1-4 of the Monetary and Financial Code, where the minimum denomination of the financial instruments is EUR 50,000 or the foreign currency equivalent, the regulated information to be supplied shall be in French or another language customary in the sphere of finance.

Article 221-3

I. - The issuer shall ensure that the regulated information defined in Article 221-1 is disseminated effectively and in full.

II. - The issuer shall post the regulated information on its website as soon as it has been disseminated. The information shall remain on the site for at least five years from the date of dissemination. Where none of the issuer's financial instruments is admitted to trading on a regulated market, regulated information shall be deemed to have been fully and effectively disseminated, in accordance with paragraph I, if it is posted on the website.

Article 221-4

I. - This article applies to issuers whose financial instruments are admitted to trading on a regulated market and for which the AMF is the competent authority for controlling regulated information.

II. - Dissemination of regulated information is considered full and effective if it makes it possible to reach the widest possible audience in the shortest possible period of time between its being distributed in France and in the other Member States of the European Community or other States party to the European Economic Area (EEA) agreement. Regulated information shall be transmitted in full to the media in a way that ensures secure transmission, minimises the risk of data corruption and unauthorised access, and allows total certainty as to the source of the transmitted information.
Regulated information shall be transmitted to the media in a way that clearly identifies the issuer concerned, the purpose of the regulated information and the date and time at which the issuer transmitted it. The issuer shall rectify as quickly as possible any shortcomings or disruptions in the transmission of regulated information.
The issuer shall not be held liable for systemic defects or malfunctions affecting the media to which the regulated information has been transmitted.

III. - The issuer shall provide the AMF, on request, with the following :

1° the name of the person that transmitted the regulated information to the media ;

2° details of the security measures taken ;

3° the date and time at which the information was transmitted to the media ;

4° the means by which the information was transmitted ;

5° details of any embargo placed on the information by the issuer, where such is the case.

IV. - The issuer is deemed to have fulfilled the requirement referred to in paragraph I of Article 221-3 and the AMF filing requirement referred to in Article 221-5 when it transmits regulated information electronically to a primary information provider that follows the transmission procedures described in paragraph I and that is registered on a list published by the AMF.

V. - For the reports and information referred to in a, b, c and d of point 2° of Article 221-1, the issuer may distribute a news release, in accordance with the procedures provided for in this article, describing how such reports and information are to be made available. In this case, the provisions of paragraph I of Article 221-3 are waived.

VI. - The issuer shall also make a financial disclosure through the print media, at a frequency and in a presentation format that it considers appropriate to the type of financial instruments issued, its size and shaReholder base, and the circumstances in which its financial instruments were admitted to the compartment referred to Article 516-18. This disclosure must not be misleading and must be consistent with the information referred to in paragraph I of Article 221-3.

Article 221-5

The regulated information is filed electronically with the AMF by the issuer at the same time as specified in an AMF instruction.

Article 221-6

The provisions of Articles 221-3 and 221-4 apply to issuers having financial instruments, as referred to in paragraphs I and II of Article L. 451-1-2 of the Monetary and Financial Code, that are admitted to trading solely on a regulated market, even if the issuer has its registered office outside France and is not subject to the requirements of the above article.

TITLE VI - FAIRNESS OPINIONS

CHAPTER I - APPOINTING AN INDEPENDENT APPRAISER

Article 261-1

I. - The target company of a takeover bid shall appoint an independent appraiser if the transaction is likely to cause conflicts of interest within its Board of Directors, Supervisory Board or governing body that could impair the objectivity of the reasoned opinion mentioned in Article 231-19 or jeopardise the fair treatment of shareholders or bearers of the financial instruments targeted by the bid. The situations described below, in particular, constitute such cases :

1° if the target company is already controlled by the offeror, within the meaning of Article L. 233-3 of the Commercial Code, before the bid is launched ;

2° if the senior managers of the target company or the persons that control it, within the meaning of Article L. 233- 3 of the Commercial Code, have entered into an agreement with the offeror that could compromise their independence ;

3° if the controlling shareholder, within the meaning of Article L. 233-3 of the Commercial Code, does not tender its securities to a buyback offer launched by the company for its own securities ;

4° if the offer is related to one or more transactions that could have a significant impact on the price or exchange ratio of the proposed offer ;

5° if the offer pertains to financial instruments in multiple categories and is priced in a way that could jeopardise the fair treatment of shareholders or bearers of the financial instruments targeted by the bid ;

6° if the non-equity financial instruments mentioned in Point 1° of Part I of Article L. 211-1 of the Monetary and Financial Code that give or could give direct or indirect access to the capital or voting rights of the offeror or of a company belonging to the offeror's group are provided as consideration for the takeover of the target company.

II. - The target company shall also appoint an independent appraiser before implementing a squeeze-out, subject to the provisions of Article 237-16.

Article 261-2

Any issuer that carries out a reserved capital increase at a discount to the market price greater than the maximum discount authorised for capital increases without pre-emptive subscription rights and giving a shareholder, acting alone or in concert within the meaning of Article L. 233-10 of the Commercial Code, control over the issuer within the meaning of Article L. 233-3 of the aforementioned code, shall appoint an independent appraiser who will apply the provisions of this title.

Article 261-3

Any issuer or offeror carrying out a takeover bid may appoint an independent appraiser who will apply the provisions of this title.

Article 261-4

I. - The independent appraiser must not be placed in a conflict of interest in relation to the parties concerned by the public offer or transaction and their advisors. An AMF instruction shall describe situations in which the independent appraiser is considered to be placed in a conflict of interest, although this shall not constitute an exhaustive list. The independent appraiser shall not work repeatedly with the same sponsoring institution(s) or within the same group if the regular nature of such work could compromise his independence.

II. - The appraiser shall prepare a statement certifying that there are no known past, present or future ties between him and the parties concerned by the offer or transaction and their advisors that could compromise his independence or impair the objectivity of his assessment when carrying out the appraisal. If there is the risk of a conflict of interest but the appraiser deems this unlikely to compromise his independence or impair the objectivity of his assessment, he shall mention this risk in his statement, including relevant supporting information.

CHAPTER II - APPRAISAL REPORT

Article 262-1

I. - The independent appraiser prepares a report on the financial terms of the offer or transaction. Content requirements for the report are set out in an AMF instruction. In particular, the report contains the statement of independence mentioned in Part II of Article 261-4, a description of the verifications performed and a valuation of the company in question. The report's conclusion takes the form of a fairness opinion. No other type of opinion shall count as a fairness opinion.

II. - Once appointed, the appraiser must have sufficient time to prepare the report mentioned in Part I, taking into account the complexity of the transaction and the quality of the information provided to him. The appraiser shall have at least fifteen trading days to prepare his report.

Article 262-2

I. - In the cases provided for in Article 261-2, the issuer shall distribute the report by the independent appraiser at least ten trading days before the general meeting convened to authorise the transaction, or, where the meeting has exercised its powers of delegation, as soon

as possible after the decision by the Board of Directors or Management Board. The report shall be distributed by :

1° making it available free of charge at the issuer's registered office ;

2° publishing a news release in accordance with Article 221-3 ;

3° publishing it on the issuer's website.

II. - An issuer that appoints an independent appraiser pursuant to Article 261-3 shall follow the procedures set forth in Part I when publishing the appraiser's report.

3.3. Guide for compiling Registration Documents: Regulations in force and AMF interpretations and recommendations.

Please see below.

I. New rules for Registration Documents

Regulation (EC) 809/2004 of 29 April 2004 ("European Regulation") implementing Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 ("Prospectus Directive") has been in force since 1 July 2005. The Regulation specifies the information that must be included in prospectuses.

The transposition of the Prospective Directive into French law has upheld the Registration Document system, used in France for the last fifteen years. This means that issuers of securities traded on Eurolist may continue filing a Registration Document with the AMF, regardless of any corporate finance transactions. This document is both an annual report and a presentation of the issuer's financial condition and prospects, and it can be incorporated into the prospectus by reference. The Registration Document must now contain, at least, the information required by the European Regulation in order to be incorporated by reference into the prospectus.

The content of the Registration Document is now defined by two regulatory sources:

- The European Regulation (1), with some items supplemented by AMF interpretations and, where appropriate, recommendations, which are set out in Part II below;

- The AMF General Regulation (2), which specifically stipulates that the report on corporate governance and internal control must be included in the Registration Document and requires pro forma financial information about the previous accounting period if the consolidation has changed by more than 25%.

1.1. European Regulation

Issuers of shares shall apply Annex I of the European Regulation when compiling their Registration Documents.

For example, if a bank's shares are traded on Eurolist, it shall compile its Registration Document on the basis of Annex I, since Annex XI, which is specifically for banks, applies only when banks' debt securities are admitted to trading on the market. Similarly, Annexes IV, VII and IX of the European Regulation cannot be used to compile a Registration Document unless the issuer's only traded securities are those stipulated in the said Annexes[1].

1.2. French laws and regulations

Article 221-8 of the AMF General Regulation also stipulates that issuers compiling Registration Documents must include the chairman's report on corporate governance and internal control. Article 221-1 stipulates that the issuer shall present a pro-forma financial statement if a change in the consolidation causes the accounting figures to vary by more than 25%. Issuers are also allowed to include some of the reports required by law in their Registration Document in order to comply with the requirements of specific sections. For example, the environmental impact report may be used for the "risk factors" section; however, this section can also be compiled specially, without including the said report.

Generally speaking, issuers wishing to use their Registration Document as an annual report can include all of the documents that need to be presented to the shareholders' general meeting. However, issuers are free to prepare a "specific" Registration Document containing the information required by the laws and regulations mentioned above and supplementary information included at the issuer's initiative, even though the Document need not contain all of the information provided in the Annual Report.

Issuers wishing to be exempted from the disclosure requirements stipulated in Articles 2211-1, 221-1-2, and 241-2 of the AMF General Regulation, may include the following items in their Registration Documents:

- The annual information document referred to in Article L.451-1-1 of the Financial and Monetary Code, as long as the Registration Document is made available to the public within 20 days of the publication of the issuer's provisional annual financial statements in the official gazette (*Bulletin des Annonces Légales Obligatoires*);

- The amount paid in fees to each of the statutory auditors referred to in Article 221-1-2 of the General Regulation;

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[1] Annex IV of Regulation 809/2004 applies to debt and derivative securities with a denomination per unit of less than EUR 50,000, Annex VII applies to asset-backed securities, and Annex XI applies to debt and derivative securities with a denomination per unit of more than EUR 50,000.

- The description of the share buyback programme referred to in Article 241-2 of the General Regulation.

1.3. CESR Recommendations

Issuers compiling their Registration Documents shall also comply with the recommendations that the Committee of European Securities Regulators (CESR) published in February 2005 to ensure consistent enforcement of the European Regulation (3). These recommendations are explicitly mentioned in the AMF General Regulation[2], which states in Article 212-7 of Title 1 of Book II: "For the purposes of the Regulation [809/2004 of 29 April 2004], the AMF shall take into account the recommendations published by the Committee of European Securities Regulators."

The AMF also points out that, in accordance with the principle set out by CESR in its recommendations, issuers may refer readers from one section to another of their Registration Document in order to avoid duplication of information, provided that such references do not compromise the clarity of the document.

II. AMF Interpretations and Recommendations

In January 2003[3], the Commission des Opérations de Bourse (COB) published a set of 14 recommendations to be applied when compiling Registration Documents. The recommendations were as follows:

- Recent trends and outlook
- Pro-forma financial information
- Creation of shareholder value
- Off-balance sheet commitments
- Pledges, guarantees and collateral
- Risk factors
- Insurance and risk hedging
- Corporate governance
- Remuneration of corporate officers and stock option plans
- Ownership structure: table of changes in shareholdings over the last three years and shareholder agreements
- Voting rights restrictions and multiple voting rights
- Markets and competition
- Segment reporting
- Parent-subsidiary relationships

In March 2004, the AMF's monthly review[4] contained four new recommendations regarding:

-Impairment of intangible assets and goodwill
-Risks and disputes: provisioning method
-Disclosure requirements for credit derivatives (financial corporations primarily)
-Transparency of the criteria for including asset financing in the balance sheet

These two lists of recommendations constituted the entire set of COB-AMF recommendations for compiling Registration Documents up until now. They have been re-examined in light of the European Regulation, IFRS, and CESR recommendations to determine which ones shall be maintained and which ones are no longer relevant.

2.1. AMF recommendations that are no longer valid

The recommendations regarding the following five areas are no longer in force. They have been rendered superfluous by the enforcement of the European Regulation and IFRS, or else by CESR recommendations:

1 Recent trends and outlook
2 Pro-forma financial information

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[2] The French version of CESR recommendations is available on the AMF website: www.amf-france.org / Textes de référence>Accès par type de textes>Règlement général AMF>Réglementation de référence: Règlement général de l'AMF et textes cités
[3] *Bulletin Mensuel*, COB – January 2003 – No. 375
[4] *Revue Mensuelle de l'AMF,* No. 1 – March 2004

3 Segment reporting[5]

4 Transparency of the criteria for including asset financing in the balance sheet[6]

5 Impairment of intangible assets and goodwill[7]

- Several sections of the European Regulation[8] now cover the information that COB and the AMF required about recent trends and outlook. Consequently, the AMF wishes simply to point out that the Registration Document must contain all material information that is likely to influence the share price and market data, including forecasts, if any.

- Developments in 2003 altered two aspects of pro-forma financial information. The first aspect concerned pro forma accounting information. This subject is now covered by Article 5 and Annex II of the European Regulation, by Article 221-1 of the AMF General Regulation and by IFRS 3. The second aspect dealt with pro forma indicators[9]. The words "pro forma indicators" do not appear in the European Regulation and issuers are not required to include such indicators in their Registration Documents. However, when issuers do decide to publish pro forma indicators, the presentation must comply with CESR recommendations on "selected financial information" (Recommendations 20 to 26): such indicators must be presented along with a clear description and a definition of the calculation method.

- Segment reporting is required under IAS 14. However, many issuers provide only limited information, on the grounds of confidentiality. The AMF points out that, according to IAS 14 only exceptional situations to be considered on a case-by-case basis, where publicity might result in serious prejudice, could warrant not providing all of the segment information required.

- Point 11 of the AMF communiqué published on 7 December 2005 on issuers' disclosures about the transition to IFRS sets out new recommendations on the transparency of the criteria for including asset financing in the balance sheet[10].

- Similarly, the AMF considers that Point 12 of the same communiqué and IAS 36 call for the same information as the Recommendation published in 2004 on the impairment of intangible assets and goodwill.

2.2. AMF Interpretations of the European Regulation

On the other hand, the explanations that the COB and AMF published on the following subjects shall henceforward constitute an AMF Interpretation of the information required under certain sections of the Annexes to the European Regulation:

Interpretation 1: Off-balance sheet commitments
Interpretation 2: Risk factors
Disclosure requirements for credit derivatives (financial corporations primarily)

[5] Paragraph "13. Information sectorielle", pages 44 and 45 *Bulletin Mensuel,* COB – January 2003 – No. 375
[6] Paragraph "2.2.4. "Transparence des critères relatifs à l'inscription au bilan des financements d'actifs", pages 25 and 26, *Revue mensuelle de l'AMF* – March 2004 – No. 1
[7] Paragraph 2.2.1 "Dépréciation des actifs incorporels et des écarts d'acquisition"; pages 22 and 23, *Revue mensuelle de l'AMF* – March 2004 – No. 1
[8] Section 12 "Trend Information" of Annex I to the European Regulation requires similar information to that required of issuers by the COB-AMF Recommendations up until now.
Section 20.6.1 of the same Annex explains that "If the issuer has published quarterly or half yearly financial information since the date of its last audited financial statements, these must be included […]. Then, Section 20.9 of the Annex requires issuers to provide "A description of any significant change in the financial or trading position of the group which has occurred since the end of the last full financial year for which either audited financial statements or interim financial statements have been published […]." This information includes any change in the issuer's cash situation.
[9] These are "pro forma" indicators or management ratios published for the sole purpose of measuring performance or the creation of value using a method that is original or adapted to the issuer or its market segment. See also the AMF Communiqué dated 20 September 2005 on issuers' earnings disclosures and the CESR recommendation of October 2005 entitled "Alternative Performance Measures".
[10] Points raised by the AMF when the first disclosures on the transition to IFRS came out.

Interpretation 3: Corporate governance
Interpretation 4: Remuneration of corporate officers and stock option plans
Interpretation 5: Voting rights restrictions and multiple voting rights
Interpretation 6: Markets and competition
Interpretation 7: Parent-subsidiary relationships

These interpretations are intended to specify the information that issuers are required to provide when compiling their Registration Documents under the terms of some of the Sections in Annex I to the European Regulation, in light of practices stemming from earlier positions taken by the COB and the AMF and, in some cases, under French legislation.

Each of the subjects mentioned above corresponds to a specific section of Annex I to the European Regulation. In some cases, the very general title of the section does not enable issuers to determine exactly what information is to be provided. This is the case for risk factors, for example. CESR's recommendations do not deal with this subject, but the COB and the AMF have defined a specific set of disclosures. Therefore, under this section, issuers shall apply the AMF interpretation with regard to risk factors.

On other subjects, issuers provided detailed information in their Registration Documents in accordance with the AMF recommendations and the regulatory provisions that were formerly in force. This was the case for corporate governance and disclosure of the remuneration of corporate officers and stock option plans. The AMF considers that issuers should continue to provide an equivalent degree of information in their future Registration Documents.

The AMF has also included several specimen tables in its interpretations. However, issuers can use other tables that are more appropriate for their specific situation, as long as the information contained in them is equivalent.

2.3. Supplementary AMF Recommendations

The other subjects addressed in 2003 and 2004 with regard to compiling Registration Documents included publishing details about the five following subjects. Issuers should apply these five Recommendations at their own initiative, depending on how relevant and meaningful they are to the issuer’s specific situation or activity:

Recommendation 1: Creation of shareholder value
Recommendation 2: Insurance and risk hedging
Recommendation 3: Ownership structure: table of changes in shareholding over the last three years and shareholder agreements
Recommendation 4: Pledges, guarantees and collateral
Recommendation 5: Risks and disputes: provisioning method

* * *

The AMF has prepared the following table to help issuers compile their Registration Documents in strict compliance with prevailing laws and regulations. The table explains the applicable French regulations, the relevant AMF Interpretations and Recommendations, and the applicable CESR Recommendations for each section of Annex I to the European Regulation.

PROVISIONS APPLYING TO THE COMPILING OF REGISTRATION DOCUMENTS

Annex I to European Regulation (EC) 809/2004 of 29 April 2004		**AMF General Regulation**	**AMF Interpretations and Recommendations**	**CESR Recommendations of February 2005**
1	**PERSONS RESPONSIBLE**			
2	**STATUTORY AUDITORS**			
3	**SELECTED FINANCIAL INFORMATION**			**Recommendations 20 to 26**
4	**RISK FACTORS** Prominent disclosure of risk factors that are specific to the issuer or its industry in a section headed "Risk Factors".		**Interpretation 2 on risk factors / Recommendation 2 on insurance and risk hedging / Recommendation 5 on the provisioning method**	
5	**INFORMATION ABOUT THE ISSUER**			
6	**BUSINESS OVERVIEW**			
6.1	**Principal activities**			
6.1.1	A description of, and key factors relating to, the nature of the issuer's operations and its principal activities, stating the main categories of products sold and/or services performed for each financial year for the period covered by the historical financial information; and		**Interpretation 6 on markets**	
(…)				
6.2	**Principal Markets** A description of the principal markets in which the issuer competes, including a breakdown of total revenues by category of activity and geographic market for each financial year for the period covered by the historical financial information.		**Interpretation 6 on markets and competition**	
(…)				
7.	**ORGANISATIONAL STRUCTURE**			
7.1	If the issuer is part of a group, a brief description of the group and the issuer's position within the group.		**Interpretation 7 on parent-subsidiary relationships**	
(…)				

8	**PROPERTY, PLANTS AND EQUIPMENT**			
8.1	Information regarding any existing or planned material tangible fixed assets, including leased properties, and any major encumbrances thereon.			**Recommendation 146**
(…)				
9	**OPERATING AND FINANCIAL REVIEW**			**Recommendations 27 to 32**
10	**CAPITAL RESOURCES**			**Recommendations 33 to 37**
11	**RESEARCH AND DEVELOPMENT, PATENTS AND LICENCES** Where material, provide a description of the issuer's research and development policies for each financial year for the period covered by the historical financial information, including the amount spent on issuer-sponsored research and development activities.			
12	**TREND INFORMATION**			
13	**PROFIT FORECASTS OR ESTIMATES** If an issuer chooses to include a profit forecast or a profit estimate the Registration Document must contain the information set out in items 13.1 and 13.2:			**Recommendations 38 to 50**
14	**ADMINISTRATIVE, MANAGEMENT, AND SUPERVISORY BODIES AND SENIOR MANAGEMENT**			
15	**REMUNERATION AND BENEFITS** In relation to the last full financial year for those persons referred to in points (a) and (d) of the first subparagraph of item 14.1.			
15.1	The amount of remuneration paid (including any contingent or deferred compensation), and benefits in kind granted to such persons by the issuer and its subsidiaries for services in all capacities to the issuer and its subsidiaries by any person. 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.		**Interpretation 4 on remuneration of corporate officers and stock option plans**	**Recommendations 147 and 148**
(…)				

16	**BOARD PRACTICES** In relation to the issuer's last completed financial year, and unless otherwise specified, with respect to those persons referred to in point (a) of the first subparagraph of 14.1.	**Article 221-8 on the requirement that the corporate governance and internal control report be included in the Registration Document**	**Interpretation 3 on corporate governance**	
17	**EMPLOYEES**			
(…)				
17.2	Shareholdings and stock options With respect to each person referred to in points (a) and (d) of the first subparagraph of item14.1. provide information as to their share ownership and any options over such shares in the issuer as of the most recent practicable date.		**Interpretation 4 on remuneration of corporate officers and stock option plans**	
(…)				
18	**MAJOR SHAREHOLDERS**			
19	**RELATED PARTY TRANSACTIONS** Details of related party transactions (which for these purposes are those set out in the Standards adopted according to the Regulation (EC) No 1606/2002), that the issuer has entered into during the period covered by the historical financial information and up to the date of the Registration Document, must be disclosed in accordance with the respective standard adopted according to Regulation (EC) No 1606/2002 if applicable. If such standards do not apply to the issuer the following information must be disclosed: a) The nature and extent of any transactions which are - as a single transaction or in their entirety - material to the issuer. Where such related party transactions are not concluded at arm's length provide an explanation of why these transactions were not concluded at arms length. In the case of outstanding loans including guarantees of any kind indicate the amount outstanding. b) The amount or the percentage to which related party transactions form part of the		**Interpretation 7 on parent-subsidiary relationships**	**Recommendation 149**

	turnover of the issuer.			
20	**FINANCIAL INFORMATION CONCERNING THE ISSUER'S ASSETS AND LIABILITIES, FINANCIAL POSITION AND PROFIT AND LOSSES**			
20.1	**Historical financial information** Audited historical financial information covering the latest 3 financial years (or such shorter period that the issuer has been in operation), and the audit report in respect of each year. Such financial information must be prepared according to Regulation (EC) No 1606/2002, or if not applicable to a Member State national accounting standards for issuers from the Community. For third country issuers, such financial information must be prepared according to the international accounting standards adopted pursuant to the procedure of Article 3 of Regulation (EC) No 1606/2002 or to a third country's national accounting standards equivalent to these standards. If such financial information is not equivalent to these standards, it must be presented in the form of restated financial statements. The last two years audited historical financial information must be presented and prepared in a form consistent with that which will be adopted in the issuer's next published annual financial statements having regard to accounting standards and policies and legislation applicable to such annual financial statements. If the issuer has been operating in its current sphere of economic activity for less than one year, the audited historical financial information covering that period must be prepared in accordance with the standards applicable to annual financial statements under the Regulation (EC) No 1606/2002, or if not applicable to a Member State national accounting standards where the issuer is an issuer		**AMF Accounting Recommendations (see the Communiqué of 7 December 2005 printed in the December monthly review "Points raised in the first disclosures about the transition to IFRS) / Interpretation 1 on off-balance sheet commitments**	**Recommendations 51 to 86 on the application of the second paragraph of Section 20.1 of Annex I, CESR Communiqué of 12 January 2006 on transparency of accounting choices**

	from the Community. For third country issuers, the historical financial information must be prepared according to the international accounting standards adopted pursuant to the procedure of Article 3 of Regulation (EC) No 1606/2002 or to a third country's national accounting standards equivalent to these standards. This historical financial information must be audited. If the audited financial information is prepared according to national accounting standards, the financial information required under this heading must include at least: (a) balance sheet; (b) income statement; (c) a statement showing either all changes in equity or changes in equity other than those arising from capital transactions with owners and distributions to owners; (d) cash flow statement; (e) accounting policies and explanatory notes The historical annual financial information must be independently audited or reported on as to whether or not, for the purposes of the registration document, it gives a true and fair view, in accordance with auditing standards applicable in a Member State or an equivalent standard.			
20.2	**Pro forma financial information** In the case of a significant gross change, a description of how the transaction might have affected the assets and liabilities and earnings of the issuer, had the transaction been undertaken at the commencement of the period being reported on or at the date reported. This requirement will normally be satisfied by the inclusion of pro forma financial information. This pro forma financial information is to be presented as set out in Annex II and must include the	**Article 221-1 on the requirement to present *pro forma* information about the previous year if the consolidation has changed by more than 25%**		

	information indicated therein. Pro forma financial information must be accompanied by a report prepared by independent accountants or auditors.			
(…)				
20.4. 3	Where financial data in the Registration Document is not extracted from the issuer's audited financial statements state the source of the data and state that the data is unaudited.			**Recommendations 95 to 97**
20.5	**Age of latest financial information**			
20.6	**Interim and other financial information**			**Recommendations 98 to 106**
(…)				
21	**ADDITIONAL INFORMATION**			
21.1	**Share capital** The following information as of the date of the most recent balance sheet included in the historical financial information:			
(…)				
21.1.5	Information about and terms of any acquisition rights and or obligations over authorised but unissued capital or an undertaking to increase the capital.			**Recommendation 150**
21.1.6 21.1.7	Information about any capital of any member of the group which is under option or agreed conditionally or unconditionally to be put under option and details of such options including those persons to whom such options relate. A history of share capital, highlighting information about any changes, for the period covered by the historical financial information.			**Recommendations 151 and 152 Recommendations 153 and 154**
21.2	**Memorandum and Articles of Association**			
(…)				
21.2.3	A description of the rights, preferences and restrictions attaching to each class of the existing shares.		**Interpretation 5 on voting rights restrictions and multiple voting rights**	**Recommendation 155**
(…)				
22	**MATERIAL CONTRACTS** A summary of each material contract, other than contracts entered into in the ordinary course of business, to which the issuer or			

	any member of the group is a party, for the two years immediately preceding publication of the Registration Document. A summary of any other contract (not being a contract entered into in the ordinary course of business) entered into by any member of the group which contains any provision under which any member of the group has any obligation or entitlement which is material to the group as at the date of the Registration Document.			
23	**THIRD PARTY INFORMATION AND STATEMENT BY EXPERTS AND DECLARATIONS OF ANY INTEREST**			
23.1	Where a statement or report attributed to a person as an expert is included in the Registration Document, provide such person's name, business address, qualifications and material interest if any in the issuer. If the report has been produced at the issuer's request a statement to the effect that such statement or report is included, in the form and context in which it is included, with the consent of the person who has authorised the contents of that part of the Registration Document.			**Recommendations 156 to 159**
(…)				
24	**DOCUMENTS ON DISPLAY** A statement that for the life of the Registration Document the following documents (or copies thereof), where applicable, may be inspected: (a) the memorandum and articles of association of the issuer; (b) all reports, letters, and other documents, historical financial information, valuations and statements prepared by any expert at the issuer's request any part of which is included or referred to in the Registration Document; (c) the historical financial information of the issuer or, in the case of a group, the historical financial information for the issuer and its subsidiary			

	undertakings for each of the two financial years preceding the publication of the Registration Document. An indication of where the documents on display may be inspected, by physical or electronic means.			
25	**INFORMATION ON HOLDINGS** Information relating to the undertakings in which the issuer holds a proportion of the capital likely to have a significant effect on the assessment of its own assets and liabilities, financial position or profits and losses.			**Recommendations 160 to 165**

AMF Interpretations of the European Prospectus Regulation

for Compiling Registration Documents

The following constitutes the AMF's Interpretations of certain sections of the Annexes to Regulation (EC) 809/2004 of 29 April 2004 implementing the Prospectus Directive (European Regulation), which came into force on 1 July 2005.

The following refers solely to the sections of Annex I to the European Regulation. However, these Interpretations also apply to issuers that compile their Registration Documents on the basis of another Annex where information is required.

Interpretation 1: Off-balance sheet commitments

Section 20.1 of Annex I to the European Regulation requires disclosure of the issuer's consolidated or parent-company financial statements for the last three financial years.

The notes to the issuer's financial statements shall contain information about off-balance sheet commitments. However, this information may be dispersed in various notes to the financial statements. The AMF requires issuers to assemble this information and present it in table form to facilitate the reader's task. Some more complex commitments also require more detailed disclosures so that readers can understand how they work and the potential obligations resulting from them.

Issuers should also refer to the recommendation posted to the AMF website on 7 December 2005 entitled: **"Points raised by the AMF in respect of the first disclosures on transition to IFRS"**.

Description of off-balance sheet commitments stemming from ordinary business

The AMF requires issuers to present information about off-balance sheet commitments stemming from their ordinary business under broad categories (guarantees and endorsements, for example) and to present it in table form for two financial years only.

Example of a table of off-balance sheet commitments given as part of an issuer's ordinary business:

	N	**N-1**
Market guarantees		
Pledges, mortgages and collateral		
Endorsements and guarantees given		
Other commitments given		
Total		

Details about complex commitments

The AMF requires detailed disclosure of more complex commitments stemming from external growth, special asset financing methods, such as equity swaps or securitisation, or any other exceptional transactions:

- If a commitment is given or received as part of an exceptional transaction, the amount, term, conditions for calling in the commitment, and the identity of the beneficiary constitute critical information that needs to be disclosed. If a commitment can be determined only on the basis of future parameters, the minimum and maximum amounts can be given, subject to further explanations and a cross-reference to the full description of the commitment concerned. In most cases, the commitments that are hardest to describe involve financial commitments (particularly supplementary price clauses in contracts for the acquisition of companies) or commitments given under shareholder agreements (especially call and put options on shares), where specific issues are raised by the complexity of the mechanism, its degree of sensitivity if it relies on, for example, confidential information such as internal growth targets, or the confidentiality of the commitment under the terms of an agreement. In accordance with the regulations in force, an issuer may take responsibility for delaying disclosure of information that could harm its legitimate interests, if it is able to ensure the confidentiality of the information and as long as this omission does not mislead the public. The issuer must assess the risks in terms of the importance of the subject, the probability of its occurrence in the near future and the difficulty of maintaining confidentiality.

- To ensure that issuers provide a complete review of their commitments, they should be required to affirm in their document that their presentation does not omit any material off-balance sheet commitments according to prevailing accounting standards.

Details about the table used to disclose commitments and other contractual obligations

To supplement the description of off-balance sheet commitments, as presented above, the AMF requires that all the information about issuers' contractual obligations and commitments to make future payments (under loan or lease contracts, for example) and their contingent commitments (such as financial guarantees) should be assembled in a single note to the financial statements.

This information may be presented in table form as below, followed by a narrative explanation.

Contract obligations	**Total**	**Payments due**		
		In less than 1 year'	**In one to five years**	**In more than five years**
Long-term liabilities				
Financial leasing commitments				
Operating leases				
Irrevocable purchase obligations				
Other long-term liabilities				
TOTAL				

Other commitments given	**Total**	**Amounts committed by period**		
		In less than 1 year'	**In one to five years**	**In more than five years**
Lines of credit				
Letters of credit				
Guarantees				
Repurchase obligations				
Other commitments				
TOTAL				

As a general rule, issuers should rely as heavily as possible on best practices in this area. Some issuers may make a textual presentation of their off-balance sheet commitments stemming from complex transactions and then supplement this information with a table summarising the main data (amounts, terms, counterparties, implementation conditions, etc.)

Interpretation 2: Risk factors

Section 4 of Annex I of the European Regulation requires "Prominent disclosure of risk factors that are specific to the issuer or its industry in a section headed 'Risk Factors'", without giving any further details. Under this section, issuers must present the information cited below.

Furthermore, the information required under Section 20.8 (Legal and arbitration proceedings) and Section 9.2.3. on governmental, economic, fiscal, monetary or political policies or factors that could materially affect the issuer's operations may also be dealt with in the presentation of risk factors.

CESR Recommendation 37 calls for information on covenants to be discussed as part of information about capital resources. Issuers may also choose to provide this information in the "risk factors" section and, more specifically, in the part dealing with liquidity risks.

General rules for presenting risks

Issuers shall highlight business-specific risk factors. It is important for listed companies to explain the special characteristics of their business with regard to each risk factor and how these characteristics expose them to a specific risk and how they avoid generic risks that are unquantifiable and not specific to their company or their industry (industrial and environmental risks, risk of non-performance of contracts) or their financial situation (customer credit risk, liquidity risk). As a minimum requirement, the discussion should cover the factors exposing the issuer to the following risks: market risk (interest rates, exchange rates, share prices, credit risks), industrial risk and legal risk. If the information about market risk has already been discussed in the financial statements, the issuer may refer readers to the passages and notes concerned.

The information shall be presented for each type or risk and ranked according to the issuer's assessment of its exposure.

Information about specific risks shall be presented in three parts:

- Links between the issuer's activity and the identified risks;

- Risk assessment. This part shall provide a quantitative risk measurement whenever possible;

- The measures taken to monitor and measure the various types of risk.

Presentation of legal risks

The issuer shall provide information about the general legal risks incurred in its business (risks relating to intellectual property, product marketing methods, such as franchising and licensing, and risks relating to certain regulations or lack thereof in some countries). Furthermore, information about all material disputes involving the issuer must be provided, with an evaluation, where possible, of the financial consequences for the issuer.

Presentation of industrial and environmental risks

The information in this section shall focus on material elements that may affect the issuer's assets or earnings, thereby impacting on its share price. Therefore, this information is not the same as the information that must be provided to annual shareholders' meetings under the terms of the New Economic Regulations Act, where the issuer is free to decide whether that information is to be included in the Registration Document.

Issuers shall present their policies for preventing and monitoring specific environmental risks and the resulting costs. Specific mention shall be made of the requirements and costs for compliance with current or planned regulatory standards.

Even if the probability of the risks per se occurring is unknown, if the issuer has been able to assess the impact of such risks on its business, it must explain:

- How it assessed the risks (in general or on a case-by-case basis);

- How it conducted the assessment (internal review and/or external consultant);

- How much it has set aside in provisions, if any, to cope with such environmental risks.

If the issuer has not assessed its risks, it shall make a statement to that effect.

Liquidity risk

International standards require that the information provided in the notes to the financial statements include the following information under this section, or if the issuer chooses, under the "Capital Resources" section of Annex I to the European Regulation:

- Detailed information about any default or foreclosure clauses, if there is a significant probability that the triggering events will occur, and their potential impact on the group's financial situation and, more specifically, its cash position. In this case, issuers may refer to the list of information cited in the "observations" paragraph, putting the emphasis on providing concise and relevant information;

- It is also important that issuers with tight liquidity provide information about their capacity to access credit, by mentioning confirmed open lines of credit from banks or, if none, by inserting the word "none".

Market risk (interest rates, exchange rates, share prices)

If the information required about market risk is contained in other sections of the Registration Document and, more specifically, in the notes to the issuer's financial statements, then the issuer may refer readers to this information.

Interest rate risk

A nonbank corporation incurs interest rate risk if it has debts or if it holds financial assets, bearing in mind that it may incur additional interest rate risk on transactions involving off-balance sheet interest rate instruments. Precise information about these data must therefore be provided in the section on risk factors, in addition to the information presented in the off-balance sheet section. Some issuers have models that are better suited to their situation or business activity (in the finance industry, this applies to banks and insurance companies), and they are invited to submit their own models rather than using the models proposed.

A schedule of financial assets and liabilities must be compiled in order to quantify risk. This schedule tracks outstanding financial liabilities and debts at the close of each financial year, according to the maturity ranges presented in the table below (overnight to one year, one to five years, more than five years) and before and after off-balance sheet transactions. The maturity for revisable-rate assets and liabilities is the revision date. The net interest rate position is the net borrowing or net lending position in these products.

	Overnight to 1 year****	1 to 5 years	More than 5 years
Financial liabilities**			
Financial assets*			
Net position before risk management			
Off-balance sheet items***			
Net position after risk management			

* Corporate and Treasury bonds, other negotiable debt instruments, loans and advances, miscellaneous assets, etc.
** Deposits, negotiable debt instruments, bond issues, other borrowings and debts, miscellaneous liabilities, etc.
***Interest-bearing securities, forward rate agreements, interest rate swaps, other off-balance sheet commitments including contingent positions (options, caps and floors, dollars, future commitments, renegotiations). Each off-balance sheet transaction is a short or long position and affects the schedule of liabilities and/or the nature of the interest rate.
****Including variable-rate assets and liabilities.

The issuer must also analyse its sensitivity to changes in interest rates. The AMF proposes the following simplified model, which any issuer can easily apply.

An issuer with fixed-rate debt is exposed to a cut in interest rates. A fall in interest rates means it would incur an opportunity cost. By contrast, an issuer with variable-rate debt is exposed to a rise in interest rates, which would increase the cost of the debt.

The simulation is aimed at analysing the issuer's exposure to added costs or an opportunity cost resulting from a change in interest rates as a function of the relative proportions of its fixed-rate and variable-rate positions.

Listed companies can carry out this calculation by starting from the variable-rate position, which, for simplicity, is based on their net position at less than one year at the end of the financial year concerned, after risk management. A variation is the short-term interest rate is then simulated using the following formula:

Net position to renew at less than 1 year (after risk management)	X	1% change in issuer's short-term rate	X	Average residual maturity until the end of the next financial year

The resulting amount is compared to the total financial expense paid in the previous year in order to assess the relative impact of interest rate movements on the financial expense.

Issuers must then explain all the measures it has taken to monitor and manage interest rate risk. The description of these measures shall include information about how the company is organised. The information shall cover available human resources (whether or not the company has a treasurer, how large the treasurer's staff is, who the treasurer reports to, etc.), material resources (information systems) and the interest rate risk monitoring system (computerised tools, reporting to senior management, limits, if any, etc.)

Exchange rate risk

The calculation of exchange rate risk counts the transactional position only, i.e. the position created by any transactions recorded as balance sheet or off-balance sheet items that give rise to future payments or receipts (acquisitions, marketing operations and dividend payments).

The exchange rate risk in terms of earnings is evaluated on a consolidated basis. The issuer's net positions in each of the major foreign currencies have to be calculated and an aggregate position has to be calculated for other currencies. The net position is the long or short position in the currency under consideration.
The following table is proposed:

	Currency 1	Currency 2	Other currencies
ASSETS			
LIABILITIES			
NET POSITION BEFORE RISK MANAGEMENT			
OFF-BALANCE SHEET POSITIONS			
NET POSITION AFTER RISK MANAGEMENT			

The table can be used to calculate the risk of a loss on the aggregate net position in foreign currencies in the

event of a one-centime adverse change in the currency of account against all the currencies under consideration.

Listed companies shall explain their procedures for monitoring and managing exchange rate risks, their procedures for supervising and limiting investments and debts in foreign currencies, and any hedging strategies implemented.

They must also describe the computerised tools available for monitoring this risk and any reporting schedules submitted to senior management.

Share price risk

- Information provided in the Registration Document shall explain the intention behind the portfolio allocation (investment strategy: investing directly or through collective investment schemes, and investment horizon). The information should also include a table showing the carrying amount, the market value, and any provisions or gains relating to the portfolio (recognised as securities held for sale).

- The information must indicate the sensitivity of the issuer's earnings, for all shares held directly or indirectly through collective investment schemes, to a 10% drop in the price of the share concerned or of a benchmark stock market index. Issuers must also make a special assessment for their treasury shares.

	Portfolio of other shares or equity funds	**Treasury shares**
Asset position		
Off-balance sheet		
Aggregate net position		

Issuers must also explain the measures taken to manage share price risk, including any limits set internally to ensure risk diversification (limits by financial exchange, by counterparty, by industry). There may also be limits on shareholding per se, with a maximum equity portfolio amount, for example, expressed in nominal terms or as a percentage of total assets.

Measures for monitoring share price risk should also be described (e.g. reporting to senior management), along with the procedures for supervising investment decisions.

Disclosure requirements for credit derivatives (primarily for financial corporations)

Given the growth in trading in credit derivatives, the issuers concerned (primarily credit institutions, insurance companies and reinsurance companies) shall provide specific information on this point.

This information shall explain the issuer's position on such markets and the strategy it uses for this type of transaction. Accordingly, the issuer must state whether it is a buyer or seller of protection and what its goals and motives are for using credit derivatives.

The issuer shall describe the organisation used to initiate, monitor and manage such transactions, and explain the reporting and special control procedures used.

Interpretation 3: Corporate governance

Sections 14.1 and 16 of Annex I to the European Regulation call for information about the posts held by corporate officers in the previous five years, and about board practices.

Issuers must provide detailed information about the members of the board of directors or the supervisory board, their role and their practices, with regard to the elements cited below. Furthermore, Article 221-8 of the AMF General Regulation stipulates that issuers compiling Registration Documents must include the report on corporate governance and internal control.

Members of the board of directors

The Registration Document shall provide information about the members of the board of directors, including the full list of all of the posts and functions that each member holds in any company. The following table is an example of how this information may be presented:

Last name and first name or company name of the member (1)	Date appointed	Expiry of term of office	Main function in the company	Main function outside the company	Other posts and functions held in any company

(1) For corporations holding directorships, the name of the permanent representative should also be given.

In addition to this information, issuers shall also specify:

- The number of independent directors;
- The criteria used to ascertain that a director is independent;
- Whether the board has examined each director's status with regard to such criteria;
- The number of directors elected by employees;
- Whether one or more non-voting advisors have been appointed;
- The director(s) whose cooptation is subject to ratification by the annual shareholders' meeting (in accordance with Article L. 225-24 of the Commercial Code);
-The number of shares that a director is required to hold.

Board practices

The board's rules of procedure

In keeping with the findings of the AFEP-MEDEF report, the board's operations should be governed by rules of procedure. The Registration Document shall state whether such rules exist and describe their main characteristics. The Registration Document shall also mention any rules that restrict or prohibit directors from trading in securities when they are privy to inside information.

Assessment of the board of directors

The assessment of the board is critical. Therefore, in keeping with the recommendations made in the AFEP-MEDEF Report, the Registration Document shall indicate what measures have been taken to assess the performance of the board of directors or what measures are planned for the future. The Registration Document shall also indicate how many meetings were held during the last full financial year, as well as each member's attendance record. The Registration Document shall also explain the rules for paying directors' fees and the individual amounts of such fees paid to directors, along with allotment criteria.

Board practices

The Registration Document must provide precise information about the committees set up by the board of directors, since such committees contribute effectively to the board's decision-making.

For each committee, the Registration Document shall specify:

- The name of the committee;
- The names of the committee members;
- The number of independent directors;
- The attendance records of the members;
- Whether there are rules governing the committee's powers and working methods;
- The committee's tasks;
- How many meetings were held during the last full financial year.

The Registration Document shall include reports on each committee's activities during the last full financial year.

On the specific subject of accounting and internal audit, the Registration Document shall describe how the board or the specialised committee performed its task (for example: hearing the statutory auditors, financial officers, accountants, reviewing the consolidation, engaging outside consultants, reviewing material off-balance sheet risks and commitments, hearing the head of the internal audit function, reviewing the amount of the statutory auditors' fees and the procedures for renewing their engagement, etc.)

Since the board or a specialised committee plays a key role in determining the variable portion of executives' compensation, the Registration Document shall explain the rules that were defined for calculating this variable portion and how such rules are applied, as well as explaining the policy on option grants.

The AMF is aware that issuers must adapt corporate governance principles to their specific situations and review them as their environment and market expectations evolve. Those principles must also be supplemented with other information that issuers deem necessary, such as the proposals made in the Institut

Montaigne Report or other such initiatives.

Issuers are also encouraged to explain any measures they have taken to comply with the new rules and recommendations on corporate governance in force in the United States (Sarbanes-Oxley Act), specifying the policies that they apply, especially when these rules are not exactly the same as those generally applied in France.

Interpretation 4: Remuneration of corporate officers and stock option plans

The information required under Sections 15 and 17.2 of Annex I to the European Regulation dealing with the remuneration of corporate officers and stock option plans shall be provided in detail on the basis of the disclosure requirements set out in Article L. 225-102-1 of the Commercial Code and, more specifically, the new specifications set out in Article 9 of the Breton Act:

- The distinction between the fixed, variable and bonus components of corporate officers' remuneration and benefits;
- The criteria applied to calculate these components or the circumstances under which they were determined;
- Commitments of any type that the issuer has made on behalf of its corporate officers, which correspond to remuneration components, compensation or benefits owed or likely to be owed as a result of taking up, leaving or changing functions or following such changes. The information provided about these matters must explain how the commitments are calculated.

Issuers shall also give an account of the following:

Remuneration of corporate officers

- For permanent representatives or legal persons fulfilling such functions, issuers shall indicate the directors' fees paid to them, as well as the remuneration that corporate officers receive in the form of management commissions paid by the listed company to another company outside of the consolidated group (holding company, affiliate, etc.) that are then used to provide indirect remuneration for the corporate officers of the listed company.

- The AMF reiterates that the relevant information for the market concerns the remuneration paid to "senior managers" and that consequently, salaries paid to directors (or members of the supervisory board) who have a contract of employment with the issuer and who represent the employees or employee shareholders do not have to be disclosed on an individual basis in Registration Documents.

Issuers shall explain whether the remunerations paid are calculated on a net or gross basis. In both cases the pre-tax remuneration shall be specified. Issuers following best practices with regard to information about how corporate officers' remuneration is calculated shall provide:

- A table showing the fixed remuneration, variable remuneration, directors' fees and benefits in kind for each corporate officer;
- A comparative table of remuneration over several financial years;
- Further information about the specific supplementary pension schemes set up for certain corporate officers.

Stock options

The European Regulation does not require any disclosure about the 10 largest grants of stock options to employees or the 10 employees exercising the largest number of options. However, the New Economic Regulations Act does require such disclosures. Consequently, issuers shall include a table in their Registration Documents that shows the information about stock options reproduced below.

In any event, issuers shall specify what type of options have been granted (warrants to subscribe for new or existing shares) and shall present this information using the tables defined by the AMF or another type of table, as long as the information provided is equivalent.

Section 21.1.4 of Annex I to the European Regulation requires disclosure of the amount of convertible securities. Issuers shall provide details about the convertible securities subscribed by senior managers or employees during reserved transactions (warrants to subscribe for new or existing shares, warrants for founders' shares) for corporate officers and the 10 largest grants to employees, on an aggregate basis.

Historical information about stock options

Date of general meeting	Information about stock options Plan 1	Plan 2	Plan 3	Etc.
Date of board of directors or executive board meeting, as appropriate				
Total number of shares available for subscription or purchase by: . Corporate officers . 10 employees with the largest option grants				
Earliest exercise date				
Expiry date				
Exercise price				
Exercise procedures (if the plan covers more than one tranche)				
Number of shares subscribed at […] (most recent date)				
Stock options cancelled during the financial year				
Remaining stock options				

STOCK OPTIONS GRANTED TO EACH CORPORATE OFFICER AND OPTIONS EXERCISED BY SAME	Number of options granted/ number of shares subscribed or purchased	Price	Exercise dates	Plan No.
Options granted to each corporate officer by the issuer or any company in the group during the financial year (names of officers)				
Options exercised by each corporate officer during the financial year (names of officers)				

STOCK OPTIONS GRANTED TO THE TEN EMPLOYEES OTHER THAN CORPORATE OFFICERS WITH THE LARGEST OPTION GRANTS, AND OPTIONS EXERCISED BY SAME	Number of options granted/ number of shares subscribed or purchased	Average weighted price	Plan No. X	Plan No. Y
Options granted by the issuer or by any company covered by the option plan during the financial year to the employees of the issuer or of any company covered by the option plan who hold the largest number of options (aggregate information)				
Options on the issuer or the above companies exercised during the financial year by the ten employees of the issuer or of these companies exercising the largest number of options (aggregate information)				

The same information shall be provided for other types of options granted under plans reserved for corporate officers and the ten employees holding the largest number of options, on an aggregate basis.

Interpretation 5: Voting rights restrictions and multiple voting rights

Section 21.2.3 of Annex I to the European Regulation requires a description of the rights, preferences and restrictions attaching to each class of existing shares. Issuers shall also provide the following information:

Voting rights restrictions and multiple voting rights

If there are multiple voting rights, the issuer shall specify the conditions for acquiring such rights and the date of the general meeting that authorised such rights.

Double voting rights

Issuers shall specify:

- The minimum holding period required to obtain double voting rights for registered shares;
- The date of the general meeting that approved this procedure;
- Provisions under which bonus allotments of registered shares to shareholders on the basis of their existing holdings of shares with double voting rights also carry double voting rights (articles of association);
- Provisions under which the double voting rights expire for any shares converted from registered to bearer securities or for transferred shares, except in the case of registered shares transferred as a result of an inheritance or a family donation (legal provisions);
- Provisions under which double voting rights may be abolished by an extraordinary general meeting, after ratification by a special meeting of the beneficiary shareholders (articles of association).

Voting rights restrictions

The following disclosures about voting rights restrictions is also required:
- Threshold for restricting voting rights when they are exercised at the general meeting (articles of association);
- The date of the general meeting that approved this procedure;
- Voidance conditions (articles of association).

Interpretation 6: Markets and competition

Sections 6.1.1 and 6.2 of Annex I to the European Regulation require a description of the issuer's activities and the principal markets in which it competes. Furthermore, if the issuer chooses to provide information about its competitive position, Section 6.5 of Annex I to the European Regulation requires it to provide the basis for any of its statements.

Issuers shall supplement the required information in consideration of the following:

- Information provided by issuers about their competitive positions and their competition shall be quantified as far as is practicable. The information shall relate to the market size, market shares or rankings, for example. If such statistics are provided, the dates and sources must be explicitly cited;
- The seasonal or cyclical nature of the markets concerned shall be analysed, where appropriate;
- Issuers shall describe changes in products and in the competitive structure of the markets in which they compete;
- Issuers shall identify their principal competitors on domestic and international markets;
- Information about markets and competition shall be broken down into geographical and industry segments.

Interpretation 7: Parent-subsidiary relationships

The following information is provided under the terms of Section 7 of Annex I to the European Regulation or Section 14.1 of the same Annex, with regard to functions that senior managers perform in subsidiaries. If the required information is provided elsewhere in the Registration Document (in the management report, in the segment reporting, in the notes to the consolidated financial statements, etc.) the issuer may simply make a reference thereto:

- The section includes an indication of the parent company's role with regard to its subsidiaries (simple holding company, or separate business). The explanation should make it clear where the group's assets and liabilities are located. Therefore, a concise account of a holding company's balance sheet structure is recommended;
- The information should specify the number of subsidiaries in the group and where they are located;
- The information should explain the legal structure (ownership links) between the parent company and its principal subsidiaries, whether the senior managers of the parent company perform the same functions in the

principal subsidiaries, and how the group's business structure is organised (distribution of the group's activities by business line, functional links between the various group entities, etc.);
- The information shall include a presentation of the principal subsidiaries' business, the relevant intermediate totals, and any strategic business assets held by subsidiaries;
- More specific information on the latest acquisitions, with regard to the acquisition's financial equation, its share of the group's business, and the strategy applied by the parent company;
- Financial flows and the nature of such flows between the parent company and the subsidiaries should also be discussed, with a cross-reference to the statutory auditors' report on regulated agreements if appropriate. This means:

    - Explaining the principal flows between the listed parent company and its main consolidated subsidiaries (royalties received by the parent company or share of invoiced costs, explanation of any loans or guarantees granted to subsidiaries);

    - When subsidiaries include minority interests, provide information about any resulting particularities, especially if one or more minority shareholders have significant influence over the subsidiary's management through a shareholder's agreement or seats on the management or supervisory bodies, etc. The issuer shall explain the impact of such a situation if it poses a risk for the group's structure, especially for the location and matching of assets, cash and financial debts.

The following is an example of table that can be used for this purpose:

Consolidated interests (excl. dividends)	**Subsidiary or sub-group 1**	**Subsidiary or sub-group 2**	**Other subsidiaries**	**Listed company**	**Consolidated total**
Fixed assets (incl. Goodwill)					
Financial debts outside of group					
Cash on balance sheet					
Cash flows from activity					
Dividends paid during the financial year attributable to the listed company					

Supplementary AMF Recommendations for the Compiling of Registration Documents

Issuers may choose to apply the following recommendations when compiling their Registration Documents, depending on how relevant and material these recommendations are to their specific situation or business.

Recommendation 1: Creation of shareholder value

The AMF has already indicated that it does not intend to standardise presentations in this area. The techniques are evolving, and the way in which they are used depends entirely on the judgement of finance or business management professionals. However, information for savers who have invested or are likely to invest in financial instruments issued by companies must be based on best practices. Accordingly, it is important that the indicators used should be the same from one financial year to the next and should be based on a clear, stable methodology.

In the interest of harmonising shareholder-value indicators and ensuring that they are presented consistently over time, the AMF recommends providing the indicator for the last full financial year and the previous year, along with any targets that the issuer has set for this indicator. The AMF also recommends that issuers draw a clear distinction between ratios relating to business performances, which correspond to the creation of value per se, and ratios relating to stock market performance.

Issuers may, as appropriate:

- Give their reasons for any decision to stop disclosing this type of information, if they did so in their previous Registration Documents.
- Provide an explanation of why they have chosen to use new criteria.

Recommendation 2: Insurance and risk hedging

The AMF recommends that issuers present their general coverage policy, the various categories of insurance contracts taken out, covering both general risks and the issuer's specific risks (performance guarantees, property damage, liability, loss of future production) and assessment items, including cost information, and the level of coverage of potential risks at the end of the last full financial year. In its assessment of the timeliness and content of the information, the issuer can take account of the fact that its dealings with insurance companies may require confidentiality with regard to the coverage provided.

The information provided by issuers may include:

- Indications about their coverage strategy, which encompasses both implementation of prevention policies and taking out insurance contracts or any other form of more or less outsourced coverage. Issuers may mention risks that are managed without coverage under conventional insurance contracts (how any self-insurance systems work);
- The business continuity policy or the policy measures (e.g. computer back-ups, business loss insurance) designed to prevent any substantial losses in the event of a major disaster. If issuers have no coverage or no special prevention policy in this area, they may make a statement to this effect.

Issuers may choose, where appropriate, to break down the information provided about their insurance strategy according to the major risk categories, business segments, subsidiaries and/or geographical areas. As part of the description of the coverage strategy, it may also be appropriate to mention any insurance contracts taken out with a captive company (i.e. an insurance company belonging to the same group). In this case, it is helpful for the issuer to discuss how it manages risk and the proportion of risk exposure that it keeps.

Recommendation 3: Ownership structure: table of changes in shareholdings over the last three years and shareholder agreements

Annex I to the European Regulation requires a presentation of shareholders owning more than 5% of the issuer's share capital and voting rights, as well as all of the option products approved by the general meeting of shareholders. Therefore, issuers must provide such information in their Registration Documents. The other elements cited below are recommended by the AMF, particularly when the issuer has seen substantial changes in its ownership in recent financial years.

- A table summarizing any changes in shareholdings over the last three years;
- A breakdown for each shareholder category: manager shareholders, total managers, concerted action, partner shareholder group, employee shareholders, treasury stock, general public (bearer shares and registered shares), resident and non-resident shareholders.

Ownership	Situation at X/X/N			Situation at X/X/N-1			Situation at X/X/N-2		
	Number of shares	% of capital	% of voting rights	Number of shares	% of capital	% of voting rights	Number of shares	% of capital	% of voting rights
1st category									
2nd category									
…									

The following information may also be presented in this table:

- If the issuer has commissioned a review of the identifiable bearer shares, it can indicate the number of shareholders and the review date;
- Comments on substantial changes in the ownership structure taking place in the three previous years and any reasons for these changes;
- An explanation as to whether there are double voting rights and, if there are none, but there is a difference between the percentage of share capital and the percentage of voting rights, an explanation for the difference, which may depend on the number of directly or indirectly held shares without voting rights;
- An indication of shareholdings exceeding disclosure thresholds under the articles of association or under legal requirements, or an appropriate negative statement; "*To the best of the issuer's knowledge, there are no other shareholders holding more than 5% (or the disclosure threshold) of the share capital or voting rights*";
- For the last full financial year and the current financial year, transactions involving share capital, including buyout or exchange offers and standing market offers for the issuers' shares provided by third parties, and share exchange offers by the issuer for another company's shares. The price and terms of the exchange shall be discussed, as well as the outcome of such offers.

Information about shareholder agreements

After the information about the distribution of share capital and changes in ownership, disclosures about shareholder agreements and agreements between shareholders seem to be critical for market transparency. The filing and notification requirements with regard to such agreements are set out in Articles L.233-11 and L.225-100 of the Commercial Code and Article 222-13 of the AMF General Regulation. However, issuers may supplement this information in their Registration Documents in consideration of the following recommendations:

Provisions regarding shareholders

If the AMF has been notified of agreement clauses calling for preferential terms of sale or acquisition of listed shares or shares for which an application for listing has been made and involving at least 0.5% of the share capital or the voting rights in the company that issued the shares, and the AMF has made these clauses public, then such clauses can be mentioned and the notifications can be referred to in the Registration Document.

Provisions regarding issuers

In keeping with the principles governing the elements to be disclosed in the Registration Document, the AMF would like disclosure of all clauses relating to shareholder agreements to which the issuer is a party and which could have a material impact on the share price, regardless of whether the shareholder agreements relate to a listed company or an unlisted subsidiary. The issuer should provide relevant information about such agreements or certain elements in such agreements. The full documents may be posted to the issuer's website with a reference to the website in the Registration Document.

In addition to making an effort to clarify breaches of disclosure thresholds, issuers are encouraged to provide detailed information about the implementation of share buyback plans during the last full financial year.

Recommendation 4: Pledges, guarantees and collateral

Section 21.1 of Annex I to the European Regulation requires information about the issuer's share capital.

The AMF recommends that issuers provide information about the proportion of their share capital that is pledged, if such proportions are significant. The information may be presented using the table below:

Name of registered shareholder	Beneficiary	Pledge start date	Pledge expiry date	Condition for releasing the pledge	Number of issuer's shares pledged	% of issuer's share capital pledged
Shareholder X						
Total						

If appropriate, the absence of any pledges should be mentioned in the Registration Document.

Furthermore, AMF recommends that issuers supplement the information provided in the notes to their financial statements, as required under IAS 16, IAS 32 and IAS 38, by presenting it in a table containing the following:

Types of pledges/mortgages (3)	Pledge start date	Pledge expiry date	Amount of the pledged asset (a)	Total balance sheet item	% (a)/(b)
Of intangible fixed assets					
Of tangible fixed assets					
Of financial fixed assets (1)					
TOTAL					(2)

(1) Indicate also the number of pledged shares in the issuer's subsidiaries, as well as the pledged percentage of their share capital.
(2) Indicate also the % of fixed assets pledged, the % of total assets pledged.
(3) If appropriate, the absence of any such pledges should be mentioned in the Registration Document.

If assets are pledged, then the table above must contain a column that specifies the conditions for releasing the pledge, if this information is material.

Recommendation 5: Risks and disputes: provisioning method

Issuers may provide the following information to supplement the information required under IAS 37:

- If the information is sensitive and significant amounts are involved, the aggregate amount of "provisions for risks and liabilities" can be broken down to show the specific total of provisions for disputes. The disputes covered by this amount can then be broken down into broad categories, as appropriate, and analysed.

- Similarly, issuers that have implemented a comprehensive methodology for applying the accounting principles cited above may indicate this fact in their Registration Documents, stating at which stage in the dispute proceedings the company sets aside provisions and how the provisions are constituted.

Issuers may also identify the most important disputes, which are deemed to be significant enough to be mentioned individually, and describe their development from one financial year to the next (nature of the obligation for which the provision as been set aside, expected resolution date, uncertainties about the outcome or resolution date, expected write-backs, etc.)

AMF Recommendation on Shareholder Participation in General Meetings

In France and the rest of Europe, changes are being made to the legal and regulatory provisions governing shareholder participation and voting rights at the general meetings of companies with securities admitted to a regulated market. To pave the way for these developments and in an effort to build on the report by the working group led by Yves Mansion on improving the exercise of shareholder voting rights in France[1], the French securities regulator, Autorité des Marchés Financiers (AMF), wants to encourage stakeholders, issuers, financial intermediaries and shareholders to comply with a set of principles that will promote shareholder participation in general meetings.

Accordingly, the AMF reiterates that taking part in general meetings is one of the primary rights of shareholders. Furthermore, senior corporate executive and financial intermediaries, especially custody account-keepers and transfer agents, must do everything in their power to facilitate such participation.

On an earlier occasion the AMF's predecessor, Commission des Opérations de Bourse, published Recommendation 88-02 on shareholder participation in general meetings[2]. The AMF now wishes to confirm that recommendation and to expand on it in the following areas.

I. Pre-meeting information

a. Companies with shares admitted to trading on a regulated market

When a company publishes a meeting announcement and a notice of meeting in the legal gazette, as required under Articles R. 225-66 and R. 225-73 of the Commercial Code, the AMF recommends that it simultaneously:

- post the announcement and notice on its website;
- publish a news release in the national press indicating the date, place and time of the meeting;
- specify in the news release and on its website how shareholders can obtain pre-meeting literature, giving the postal or electronic address to which requests should be sent, or post online all the pre-meeting literature referred to in Article R. 225-81 of the Commercial Code that shareholders are entitled to receive. The pre-meeting literature referred to in Article R. 225-83 of the Commercial Code may be posted on the company's website, although this does not exempt the issuer from sending these documents to the shareholder if so requested;
- send the requested documentation within a reasonable period of time before the meeting, using the postal or electronic address given by the shareholder.

Steps should be taken to encourage shareholders to access meeting-related literature. To facilitate distribution, electronic versions of these documents should be prepared wherever possible.

Furthermore, the underlying arguments and text of draft resolutions should be written in clear, precise language so that shareholders can clearly understand the issues they are asked to consider.

b. Custody account-keepers

Pursuant to Point 1 of General Regulation Article 332-4, which requires custody account-keepers to do their utmost to facilitate the exercise of rights attached to the financial instruments held by their customers, the AMF reiterates that custody account-keepers must[3]:

- make sure that pre-meeting literature is supplied speedily to any shareholder who asks for it;
- promptly process requests for attendance cards and proxy and mail-in voting forms and forward these requests to the company or its agent, checking proof of share ownership and the number of securities owned;

1. AMF Monthly Review 17, September 2005.
2. COB Monthly Bulletin 212, March 1988.
3. AMF News Release, 26 March 2004.

The AMF also wishes to note that:

- the book-entry procedure conducted in accordance with Article R. 225-85 of the Commercial Code does not prevent shareholders from selling their shares;
- under Article R. 225-88 of the Commercial Code, to exercise their right to receive information before the meeting, shareholders are simply required to request documentation and provide proof of share ownership. In the case of registered shareholders, proof is automatically provided through registration in the accounts held by the company. Bearer shareholders must provide a certificate indicating that they are registered in the bearer share accounts kept by the authorised intermediary.

II. Conducting the meeting

Companies using electronic voting systems must comply with the guidelines on traceability, robust protection against intrusion, or failing that, guarantees for the integrity of the data exchanged, and storage of data for three years, which is consistent with the prescriptive period for a nullity action (Article L. 235-9 of the Commercial Code).

To give the Board a reasonable amount of time to prepare its answers, shareholders are encouraged to submit written questions at least five days before the meeting. However, this is merely a suggested time limit.

III. After the meeting

Companies are encouraged to act promptly to make voting results and a meeting report available to all shareholders:

- The company could release voting results shortly after the meeting and post them on its website, giving the breakdown of votes on each resolution;
- A meeting report could be posted online within three months.

Posted online on 21 April 2006
Modified on 24 April 2007

3.5. Recommendations concerning compensation of executive corporate officers of listed companies

Please see below

RECOMMENDATIONS CONCERNING COMPENSATION OF EXECUTIVE CORPORATE OFFICERS OF LISTED COMPANIES

january
2007

AFEP
Association Française des
Entreprises Privées

MEDEF

This document, which amalgamates, supplements and clarifies the recommendations of the AFEP / MEDEF Code concerning corporate governance and of MEDEF's Ethics Committee, is intended for the boards and supervisory boards of listed companies and their compensation committees. The boards of unlisted companies may of course apply and adapt them to their specific situation.

Principles governing the determination of executive corporate officers' compensation and role of the Board of Directors

■ While the compensation committees are responsible for making proposals as regards the compensation of the executive corporate officers, the whole of the board of directors or supervisory board is responsible for decision-making in this area. In this respect, the boards must deliberate on compensation matters without the presence of the executive corporate officers.

■ The board of directors must define the data supporting the analysis (and in particular comparative analysis) that it intends to receive from the compensation committee in support of its recommendations. The board of directors must determine the time frame to be taken into account in order to determine the compensation of the executive corporate officers and ensure compliance with the following principles:

Completeness: compensation review must be exhaustive: fixed part, variable part (bonus), stock options, award of bonus shares, directors' fees, pension terms, termination payment, special benefits, etc. All of these components must be assessed as a whole, before any decision is reached.

Benchmark market / Business line: compensation must be seen by reference to the relevant business line and market, which may be global.

Consistency: the compensation of each executive corporate officer must be determined in line with that of other officers in order to maintain solidarity with the management team.

Simplicity and stability of the rules: the performance criteria used in order to determine the variable component of the compensation or where applicable for the award of options or bonus shares must correspond to the corporate targets, be simple to determine and explain and where applicable must be stable over time.

Measurement : the determination of the compensation must strike a right balance, taking into account the common good of the enterprise, market practices and officer performance.

Policy governing the compensation of the executive officers and the award of stock options and bonus shares

■ The compensation of the executive corporate officers must be appropriate, balanced and fair. Such compensation must strengthen the sense of solidarity and motivation within the enterprise. The need to provide explanations and to maintain balance must also prevail as regards shareholders. Compensation must also take into account, to the greatest extent possible, the reactions of the other stakeholders, and of public opinion at large. Finally, such compensation must make it possible to attract, retain and motivate effective officers.

■ While the market is a benchmark, it may not be the sole one. A corporate officer's compensation depends on the work carried out, the results obtained but also assumed responsibilities. An executive director bears the ultimate responsibility for the management team, and this warrants a higher compensation.

■ The compensation of an executive director may also depend on the nature of the tasks entrusted to him or on special circumstances (e.g. the restructuring of an ailing enterprise).

Compensation committee

Composition: the compensation committee may not include any executive corporate officer and the majority of its members must be independent directors meeting the criteria defined in the AFEP / MEDEF Code of October 2003. A regulation approved by the board of directors or by the supervisory board must clarify the committee's mandate and functioning mode. The annual report must contain an explanation concerning the proceedings of the compensation committee over the last financial year.

Role: The compensation committee must help place the board of directors or supervisory board under the best conditions in order to determine all of the compensation and benefits accruing to the executive directors:

- in order to compensate or motive executive corporate officers by placing them under the most favourable conditions for the discharge of their duties,
- by ensuring maximum convergence between the interests of executive corporate officers and shareholders (such convergence may only be assessed over time),
- while maintaining social cohesion, whether within the management team or in the enterprise and its environment,
- with utmost transparency vis-à-vis shareholders in the annual report and during the general meeting, during which the chairman of the compensation committee might usefully take the floor on the board's behalf, for instance in response to questions asked by shareholders.

Data to be taken into consideration by the compensation committee

Fixed part:

The fixed part may be calculated differently depending on whether the executive corporate officers has made a continuous career within the enterprise or is recruited outside the enterprise.

In principle, such fixed compensation may only be reviewed at relatively long intervals, e.g. every three years. Its evolution must be linked to events affecting the enterprise, and take into account the fact that performance is compensated through the variable component.

It is advisable that the aggregate compensation be monitored regularly and matched with corporate performance.

The fixed part includes benefits in kind.

Variable part:

The variable component must be understandable by shareholders and must be determined by the board of directors or the supervisory board for a fixed period.

The board of directors must monitor any changes of the aggregate comprised of the fixed part and the variable part over a few years, having regard to corporate performance.

The relationship between the variable part and the fixed part must be clear. The variable part is a maximum percentage of the fixed part, and is suited to the business conducted by the enterprise.

The variable part is not linked to the share price, but rewards short-term performance, as well as progress made by the enterprise in the medium term.

The quantitative and qualitative criteria guiding the award of the variable part must be specific and of course predetermined.

The rules governing the determination of the variable part must be consistent with the annual assessment of corporate officers' performance and with the enterprise's medium-term strategy.

Within the variable part, the qualitative part must be appropriate and where applicable make it possible to account for exceptional circumstances.

Quantitative criteria must be simple, in limited number, objective, measurable and suited to corporate strategy. These criteria must be regularly reviewed in order to avoid ad-hoc adjustments. It is also necessary to pay great attention to possible threshold effects generated by the quantitative criteria. Only highly specific circumstances may warrant the award of an extraordinary variable component.

Stock options and bonus shares

■ Stock options and bonus shares aim at strengthening over time the convergence between the interests of shareholders and corporate management. The general policy for the award of stock options and bonus shares must be debated within the compensation committee and, on the basis of a recommendation made by the compensation committee, must give rise to a decision made by the board of directors or the supervisory board. This policy must be reasonable and appropriate and must be explained in the annual report and submitted to the general meeting, when the general meeting is asked to debate on a resolution for the award of stock options or bonus shares.

■ It is advisable to make the exercise of stock options and the acquisition of bonus shares partly conditional on the attainment of performance targets over one or more years. An executive corporate officer may not be awarded any stock option or bonus share at the time of his or her departure.

Executive corporate officers who are in office and benefit from these awards may not engage in any risk hedging transaction.

- The award of stock options and bonus shares must be reviewed in relation to the total amount of the annual compensation (fixed part + variable part). Such award must be compared with the total number of awarded stock options and bonus shares and take into account their valuation by applying the methods used for consolidated financial statements.

- No discount should be applied upon the award of stock options and in particular as regards stock options awarded to executive corporate officers.

- Periodical awards must make it possible to avoid opportunistic stock option awards during periods in which share prices are falling exceptionally. It is recommended to award the shares at fixed dates for instance after the publication of the financial statements and probably each year in order to reduce the impact of share price volatility.

- The aggregate stock option and bonus share plans must represent a small part of the company's capital and the right balance must be struck according to the benefits that shareholders derive from corporate management. Dilution must be taken into account.

- The board of directors or supervisory board determines the periods, preceding the publication of the financial statements, during which stock options may not be exercised. Where applicable, the board of directors or supervisory board also determines the procedure to be observed by executive corporate officers prior to the exercise of stock options, in order to ensure that they are not in possession of privileged information likely to prevent such exercise.

- The board of directors or supervisory board determines periodically the number of shares resulting from the exercise of stock options or the award of bonus shares that the chairman of the board, the chief executive officer, the senior vice-presidents, the members of the management board or the statutory managers of a company limited by shares are required to hold as registered shares until the end of their term of office.

Termination payments:

It is preferable that termination indemnities be provided for by contract from the outset, on the basis of the fixed part of the compensation. Such indemnities must also take into account the existence or lack of entitlements to an additional pension. Any non-compete clauses must be negotiated bearing in mind corporate interests.

These indemnities must be excluded in the event of removal with cause. The agreement must set forth the treatment of unexercised options and unvested bonus shares.

Shareholder information

Very clear information must be provided to shareholders so that they may have a clear vision, not only of the individual compensation paid to corporate officers but also of the aggregate cost of their group's senior management and the policy applied to them for the determination of their compensation.

The chapter of the company's annual report focusing on the compensation information provided to shareholders must include four sections:

▸▸ **The first section** must present in detail the policy for the determination of corporate officers' compensation, and in particular the rules governing the award of the variable part. This section must indicate the criteria on the basis of which the variable part is determined, the way in which such criteria have been applied as compared with forecasts made during the financial year and whether personal targets have been attained.

This section may be usefully supplemented by information on pension schemes or commitments provisioned by the company. Taking into account the great diversity of pension schemes, it is necessary to indicate whether executive corporate officers benefit from the same pension schemes as the group's senior officers or if they benefit from a specific pension scheme, and to describe the main features of these schemes and in particular their calculation mode.

▸▸ **The second section** must indicate in detail the individual compensation of each executive corporate officer, as well as the aggregate amount of the compensation received by the executive corporate officers during the last financial year, as compared with the compensation of the previous year, with a breakdown between fixed part and variable part. Although the French Commercial Code does not impose any obligation in this respect, it appears that the most relevant information for shareholders is the information connecting the variable part to the financial year in respect of which it is calculated, even though such compensation is paid only during the next financial year. It is therefore recommended to focus the communication effort on the compensation due in respect of the financial year, and to show in a recapitulative table the amounts due and paid for the current year and the preceding year.

▸▸ **The third section** must indicate the total and individual amount of the directors' fees paid to directors and the rules for the allocation of such fees, as well as the rules governing the payment of the directors' fees allocated where applicable to the management team in respect of corporate offices held in companies of the group.

▸▸ **The fourth section** must describe the policy for the award of stock options to all beneficiaries and explain separately where applicable, the special award policy applied to executive corporate officers. In particular, it is necessary to indicate the nature of the options (purchase or subscription options), the criteria for defining the beneficiaries of the options, the periodicity of the plans and the terms approved by the board for the exercise of the options. A recapitulative table must show all of the data relevant to the applicable option plans, as set forth in the reference document, by adding where applicable, in addition to the exercise price, the discount granted or price supplement applied.

This section must also describe the policy for the award of bonus shares to the employees, or certain categories of employees, and to executive corporate officers, as well as the terms and where applicable the applicable criteria where the same have been set by the board of directors or the supervisory board, as well as the dilutive effect of such bonus share awards. In the same manner as for stock options, a recapitulative table must show all of these data and in particular the number of shares awarded to each executive officer and the number of shares awarded to the main beneficiaries who are employees of the group.

It is also necessary to indicate the valuation on the grant date and according to the method used for the consolidated financial statements, as regards both the stock options and bonus shares awarded where applicable to executive corporate officers and the fraction of the capital awarded to each executive corporate officer.

4. THE UNITED KINGDOM

4.1. Companies Act 1985

s234B

(1)The directors of a quoted company shall for each financial year prepare a directors' remuneration report which shall contain the information specified in Schedule 7A and comply with any requirement of that Schedule as to how information is to be set out in the report.
(2)In Schedule 7A—
Part 1 is introductory,
Part 2 relates to information about remuneration committees, performance related remuneration and liabilities in respect of directors' contracts,
Part 3 relates to detailed information about directors' remuneration (information included under Part 3 is required to be reported on by the auditors, see section 235), and
Part 4 contains interpretative and supplementary provisions.
(3)In the case of any failure to comply with the provisions of this Part as to the preparation of a directors' remuneration report and the contents of the report, every person who was a director of the quoted company immediately before the end of the period for laying and delivering accounts and reports for the financial year in question is guilty of an offence and liable to a fine.
(4)In proceedings against a person for an offence under subsection (3) it is a defence for him to prove that he took all reasonable steps for securing compliance with the requirements in question.
(5)It is the duty of any director of a company, and any person who has at any time in the preceding five years been a director of the company, to give notice to the company of such matters relating to himself as may be necessary for the purposes of Parts 2 and 3 of Schedule 7A.
(6)A person who makes default in complying with subsection (5) commits an offence and is liable to a fine.]

s238

(1)A copy of each of the documents mentioned in subsection (1A) shall be sent to—
(a)every member of the company,
(b)every holder of the company's debentures, and
(c)every person who is entitled to receive notice of general meetings,
(1A) Those documents are—
(a)the company's annual accounts for the financial year,
(b)the directors' report for that financial year,
(c)(in the case of a quoted company) the directors' remuneration report for that financial year, and
(d)the auditors' report on those accounts and that directors' report and (in the case of a quoted company) on . . . the auditable part of that directors' remuneration report.
(2) Copies need not be sent—
(a)to a person who is not entitled to receive notices of general meetings and of whose address the company is unaware, or
(b)to more than one of the joint holders of shares or debentures none of whom is entitled to receive such notices, or
(c)in the case of joint holders of shares or debentures some of whom are, and some not, entitled to receive such notices, to those who are not so entitled.
(3) In the case of a company not having a share capital, copies need not be sent to anyone who is not entitled to receive notices of general meetings of the company.
(4) . . .
(5) If default is made in complying with this section or section 238A, the company and every officer of it who is in default is guilty of an offence and liable to a fine.
(6) Where copies are sent out under this section over a period of days, references elsewhere in this Act to the day on which copies are sent out shall be construed as references to the last day of that period.

s241

(7) The directors of [a public company] shall in respect of each financial year lay before the company in general meeting [copies of—
(a) the company's annual accounts,
(b) the directors' report,
(c) (in the case of a quoted company) the directors' remuneration report, and
(d) the auditors' report on those accounts and that directors' report and (in the case of a quoted company) on . . . the auditable part of that directors' remuneration report.
(2) If the requirements of subsection (1) are not complied with before the end of the period allowed for laying and delivering accounts and reports, every person who immediately before the end of that period was a director of the company is guilty of an offence and liable to a fine and, for continued contravention, to a daily default fine.
(3) It is a defence for a person charged with such an offence to prove that he took all reasonable steps for securing that those requirements would be complied with before the end of that period.
(4) It is not a defence to prove that the documents in question were not in fact prepared as required by this Part.

s241A

(1) This section applies to every company that is a quoted company immediately before the end of a financial year.
(2) In this section "the meeting" means the general meeting of the company before which the company's annual accounts for the financial year are to be laid.
(3) The company must, prior to the meeting, give to the members of the company entitled to be sent notice of the meeting notice of the intention to move at the meeting, as an ordinary resolution, a resolution approving the directors' remuneration report for the financial year.
(4) Notice under subsection (3) shall be given to each such member in any manner permitted for the service on him of notice of the meeting.
(5) The business that may be dealt with at the meeting includes the resolution.
(6) The existing directors must ensure that the resolution is put to the vote of the meeting.
(7) Subsection (5) has effect notwithstanding—
(a) any default in complying with subsections (3) and (4);
(b) anything in the company's articles.
(8) No entitlement of a person to remuneration is made conditional on the resolution being passed by reason only of the provision made by this section.
(9) In the event of default in complying with the requirements of subsections (3) and (4), every officer of the company who is in default is liable to a fine.
(10)If the resolution is not put to the vote of the meeting, each existing director is guilty of an offence and liable to a fine.
(11)If an existing director is charged with an offence under subsection (10), it is a defence for him to prove that he took all reasonable steps for securing that the resolution was put to the vote of the meeting.
(12)In this section "existing director" means a person who, immediately before the meeting, is a director of the company.

sch. 6, paras 1 to 9

1

(13)Subject to sub-paragraph (2), the following shall be shown, namely—
(a) the aggregate amount of emoluments paid to or receivable by directors in respect of qualifying services;
(b) the aggregate of the amount of gains made by directors on the exercise of share options;
(c) the aggregate of the following, namely—
(i) the amount of money paid to or receivable by directors under long term incentive schemes in respect of qualifying services; and

(ii) the net value of assets (other than money and share options) received or receivable by directors under such schemes in respect of such services;
(d) the aggregate value of any company contributions paid, or treated as paid, to a pension scheme in respect of directors' qualifying services, being contributions by reference to which the rate or amount of any money purchase benefits that may become payable will be calculated; and
(e) in the case of each of the following, namely—
(i) money purchase schemes; and
(ii) defined benefit schemes, the number of directors (if any) to whom retirement benefits are accruing under such schemes in respect of qualifying services.
(2) In the case of a company which is not a quoted company and whose equity share capital is not listed on the market known as AIM—
(a) sub-paragraph (1) shall have effect as if paragraph (b) were omitted and, in paragraph (c)(ii), "assets" did not include shares; and
(b) the number of each of the following (if any) shall be shown, namely—
(i) the directors who exercised share options; and
(ii) the directors in respect of whose qualifying services shares were received or receivable under long term incentive schemes.
(2) In this paragraph "emoluments" of a director—
(a) includes salary, fees and bonuses, sums paid by way of expenses allowance (so far as they are chargeable to United Kingdom income tax) and, subject to paragraph (b), the estimated money value of any other benefits received by him otherwise than in cash; but
(b) does not include any of the following, namely—
(i) the value of any share options granted to him or the amount of any gains made on the exercise of any such options;
(ii) any company contributions paid, or treated as paid, in respect of him under any pension scheme or any benefits to which he is entitled under any such scheme; or
(iii) any money or other assets paid to or received or receivable by him under any long term incentive scheme.
(4) In this paragraph "long term incentive scheme" means any agreement or arrangement under which money or other assets may become receivable by a director and which includes one or more qualifying conditions with respect to service or performance which cannot be fulfilled within a single financial year; and for this purpose the following shall be disregarded, namely—
(a) bonuses the amount of which falls to be determined by reference to service or performance within a single financial year;
(b) compensation for loss of office, payments for breach of contract and other termination payments; and
(c) retirement benefits.
(5) In this paragraph—
"amount", in relation to a gain made on the exercise of a share option, means the difference between—
(a) the market price of the shares on the day on which the option was exercised; and
(b) the price actually paid for the shares;
"company contributions", in relation to a pension scheme and a director, means any payments (including insurance premiums) made, or treated as made, to the scheme in respect of the director by a person other than the director;
"defined benefits" means retirement benefits payable under a pension scheme which are not money purchase benefits;
"defined benefit scheme", in relation to a director, means a pension scheme which is not a money purchase scheme;
"money purchase benefits", in relation to a director, means retirement benefits payable under a pension scheme the rate or amount of which is calculated by reference to payments made, or treated as made, by the director or by any other person in respect of the director and which are not average salary benefits;
"money purchase scheme", in relation to a director, means a pension scheme under which all of the benefits that may become payable to or in respect of the director are money purchase benefits;
"net value", in relation to any assets received or receivable by a director, means value after deducting any money paid or other value given by the director in respect of those assets;

"the official list" has the meaning given in section 103(1) of the Financial Services and Markets Act 2000;
"qualifying services", in relation to any person, means his services as a director of the company, and his services while director of the company—
(a) as director of any of its subsidiary undertakings; or
(b) otherwise in connection with the management of the affairs of the company or any of its subsidiary undertakings;
"recognised investment exchange" has the same meaning as in the Financial Services and Markets Act 2000;
"shares" means shares (whether allotted or not) in the company, or any undertaking which is a group undertaking in relation to the company, and includes a share warrant as defined by section 188(1);
"share option" means a right to acquire shares;
"value", in relation to shares received or receivable by a director on any day, means the market price of the shares on that day.
(6) For the purposes of this paragraph—
(a) any information, other than the aggregate amount of gains made by directors on the exercise of share options, shall be treated as shown if it is capable of being readily ascertained from other information which is shown; and
(b) emoluments paid or receivable or share options granted in respect of a person's accepting office as a director shall be treated as emoluments paid or receivable or share options granted in respect of his services as a director.
(7) Where a pension scheme provides for any benefits that may become payable to or in respect of any director to be whichever are the greater of—
(a) money purchase benefits as determined by or under the scheme; and
(b) defined benefits as so determined,
the company may assume for the purposes of this paragraph that those benefits will be money purchase benefits, or defined benefits, according to whichever appears more likely at the end of the financial year.
(8) For the purpose of determining whether a pension scheme is a money purchase or defined benefit scheme, any death in service benefits provided for by the scheme shall be disregarded.

2

(1) Where the aggregates shown under paragraph 1(1)(a), (b) and (c) total £200,000 or more, the following shall be shown, namely—
(a) so much of the total of those aggregates as is attributable to the highest paid director; and
(b) so much of the aggregate mentioned in paragraph 1(1)(d) as is so attributable.
(2) Where sub-paragraph (1) applies and the highest paid director has performed qualifying services during the financial year by reference to which the rate or amount of any defined benefits that may become payable will be calculated, there shall also be shown—
(a) the amount at the end of the year of his accrued pension; and
(b) where applicable, the amount at the end of the year of his accrued lump sum.
(3) Subject to sub-paragraph (4), where sub-paragraph (1) applies in the case of a company which is not a listed company, there shall also be shown—
(a) whether the highest paid director exercised any share options; and
(b) whether any shares were received or receivable by that director in respect of qualifying services under a long term incentive scheme.
(4) Where the highest paid director has not been involved in any of the transactions specified in sub-paragraph (3), that fact need not be stated.
(5) In this paragraph—
"accrued pension" and "accrued lump sum", in relation to any pension scheme and any director, mean respectively the amount of the annual pension, and the amount of the lump sum, which would be payable under the scheme on his attaining normal pension age if—
(a) he had left the company's service at the end of the financial year;
(b) there were no increase in the general level of prices in Great Britain during the period beginning with the end of that year and ending with his attaining that age;
(c) no question arose of any commutation of the pension or inverse commutation of the lump sum; and

(d) any amounts attributable to voluntary contributions paid by the director to the scheme, and any money purchase benefits which would be payable under the scheme, were disregarded;
"the highest paid director" means the director to whom is attributable the greatest part of the total of the aggregates shown under paragraph 1(1)(a), (b) and (c);
"normal pension age", in relation to any pension scheme and any director, means the age at which the director will first become entitled to receive a full pension on retirement of an amount determined without reduction to take account of its payment before a later age (but disregarding any entitlement to pension upon retirement in the event of illness, incapacity or redundancy).
(1) Sub-paragraphs (4) to (8) of paragraph 1 apply for the purposes of this paragraph as they apply for the purposes of that paragraph.

7

(1) Subject to sub-paragraph (2), there shall be shown the aggregate amount of—
(a) so much of retirement benefits paid to or receivable by directors under pension schemes; and
(b) so much of retirement benefits paid to or receivable by past directors under such schemes,
as (in each case) is in excess of the retirement benefits to which they were respectively entitled on the date on which the benefits first became payable or 31st March 1997, whichever is the later.
(2) Amounts paid or receivable under a pension scheme need not be included in the aggregate amount if—
(a) the funding of the scheme was such that the amounts were or, as the case may be, could have been paid without recourse to additional contributions; and
(b) amounts were paid to or receivable by all pensioner members of the scheme on the same basis;
and in this sub-paragraph "pensioner member", in relation to a pension scheme, means any person who is entitled to the present payment of retirement benefits under the scheme.
(3) In this paragraph—
(a) references to retirement benefits include benefits otherwise than in cash; and
(b) in relation to so much of retirement benefits as consists of a benefit otherwise than in cash, references to their amount are to the estimated money value of the benefit;
and the nature of any such benefit shall also be disclosed.

8

(1) There shall be shown the aggregate amount of any compensation to directors or past directors in respect of loss of office.
(2) This amount includes compensation received or receivable by a director or past director for—
(a) loss of office as director of the company, or
(b) loss, while director of the company or on or in connection with his ceasing to be a director of it, of—
(i) any other office in connection with the management of the company's affairs, or
(ii) any office as director or otherwise in connection with the management of the affairs of any subsidiary undertaking of the company.
(3) References to compensation include benefits otherwise than in cash; and in relation to such compensation references to its amount are to the estimated money value of the benefit. The nature of any such compensation shall be disclosed.
(4) In this paragraph, references to compensation for loss of office include the following, namely—
(a) compensation in consideration for, or in connection with, a person's retirement from office; and
(b) where such a retirement is occasioned by a breach of the person's contract with the company or with a subsidiary undertaking of the company—
(i) payments made by way of damages for the breach; or
(ii) payments made by way of settlement or compromise of any claim in respect of the breach.
(5) Sub-paragraph (6)(a) of paragraph 1 applies for the purposes of this paragraph as it applies for the purposes of that paragraph.

9

(1) There shall be shown the aggregate amount of any consideration paid to or receivable by third parties for making available the services of any person—
(a) as a director of the company, or
(b) while director of the company—
(i) as director of any of its subsidiary undertakings, or
(ii) otherwise in connection with the management of the affairs of the company or any of its subsidiary undertakings.
(2) The reference to consideration includes benefits otherwise than in cash; and in relation to such consideration the reference to its amount is to the estimated money value of the benefit. The nature of any such consideration shall be disclosed.
(3) The reference to third parties is to persons other than—
(a) the director himself or a person connected with him or body corporate controlled by him, and
(b) the company or any of its subsidiary undertakings.

sch. 7A, para. 2-8

2

(1) If a committee of the company's directors has considered matters relating to the directors' remuneration for the relevant financial year, the directors' remuneration report shall—
(a) name each director who was a member of the committee at any time when the committee was considering any such matter;
(b) name any person who provided to the committee advice, or services, that materially assisted the committee in their consideration of any such matter;
(c) in the case of any person named under paragraph (b), who is not a director of the company, state—
(i) the nature of any other services that that person has provided to the company during the relevant financial year; and
(ii) whether that person was appointed by the committee. (2) In sub-paragraph (1)(b) "person" includes (in particular) any director of the company who does not fall within sub-paragraph (1)(a).

3

(1) The directors' remuneration report shall contain a statement of the company's policy on directors' remuneration for the following financial year and for financial years subsequent to that.
(2) The policy statement shall include—
(a) for each director, a detailed summary of any performance conditions to which any entitlement of the director—
(i) to share options, or
(ii) under a long-term incentive scheme, is subject;
(b) an explanation as to why any such performance conditions were chosen;
(c) a summary of the methods to be used in assessing whether any such performance conditions are met and an explanation as to why those methods were chosen;
(d) if any such performance condition involves any comparison with factors external to the company—
(i) a summary of the factors to be used in making each such comparison, and
(ii) if any of the factors relates to the performance of another company, of two or more other companies or of an index on which the securities of a company or companies are listed, the identity of that company, of each of those companies or of the index;
(e) a description of, and an explanation for, any significant amendment proposed to be made to the terms and conditions of any entitlement of a director to share options or under a long term incentive scheme; and
(f) if any entitlement of a director to share options, or under a long-term incentive scheme, is not subject to performance conditions, an explanation as to why that is the case.
(3) The policy statement shall, in respect of each director's terms and conditions relating to remuneration, explain the relative importance of those elements which are, and those which are not, related to performance.

(4) The policy statement shall summarise, and explain, the company's policy on—
(a) the duration of contracts with directors, and
(b) notice periods, and termination payments, under such contracts.
(5) In sub-paragraphs (2) and (3), references to a director are to any person who serves as a director of the company at any time in the period beginning with the end of the relevant financial year and ending with date on which the directors' remuneration report is laid before the company in general meeting.

4

(1) The directors' remuneration report shall—
(a) contain a line graph that shows for each of—
(i) a holding of shares of that class of the company's equity share capital whose listing, or admission to dealing, has resulted in the company falling within the definition of "quoted company", and
(ii) a hypothetical holding of shares made up of shares of the same kinds and number as those by reference to which a broad equity market index is calculated, a line drawn by joining up points plotted to represent, for each of the financial years in the relevant period, the total shareholder return on that holding; and
(b) state the name of the index selected for the purposes of the graph and set out the reasons for selecting that index.
(2) For the purposes of sub-paragraphs (1) and (4), "relevant period" means the five financial years of which the last is the relevant financial year.
(3) Where the relevant financial year
(a) is the company's second, third or fourth financial year, sub-paragraph (2) has effect with the substitution of "two", "three" or "four" (as the case may be) for "five"; and
(b) is the company's first financial year, "relevant period", for the purposes of subparagraphs (1) and (4), means the relevant financial year.
(4) For the purposes of sub-paragraph (1), the "total shareholder return" for a relevant period on a holding of shares must be calculated using a fair method that—
(a) takes as its starting point the percentage change over the period in the market price of the holding;
(b) involves making—
(i) the assumptions specified in sub-paragraph (5) as to reinvestment of income, and
(ii) the assumption specified in sub-paragraph (7) as to the funding of liabilities; and
(c) makes provision for any replacement of shares in the holding by shares of a different description;
and the same method must be used for each of the holdings mentioned in sub-paragraph (1).
(5) The assumptions as to reinvestment of income are—
(a) that any benefit in the form of shares of the same kind as those in the holding is added to the holding at the time the benefit becomes receivable; and
(b) that any benefit in cash, and an amount equal to the value of any benefit not in cash and not falling within paragraph (a), is applied at the time the benefit becomes receivable in the purchase at their market price of shares of the same kind as those in the holding and that the shares purchased are added to the holding at that time.
(6) In sub-paragraph (5) "benefit" means any benefit (including, in particular, any dividend) receivable in respect of any shares in the holding by the holder from the company of whose share capital the shares form part.
(7) The assumption as to the funding of liabilities is that, where the holder has a liability to the company of whose capital the shares in the holding form part, shares are sold from the holding—
(a) immediately before the time by which the liability is due to be satisfied, and
(b) in such numbers that, at the time of the sale, the market price of the shares sold equals the amount of the liability in respect of the shares in the holding that are not being sold.
(8) In sub-paragraph (7) "liability" means a liability arising in respect of any shares in the holding or from the exercise of a right attached to any of those shares.

5

(1) The directors' remuneration report shall contain, in respect of the contract of service or contract for services of each person who has served as a director of the company at any time during the relevant financial year, the following information:
(a) the date of the contract, the unexpired term and the details of any notice periods;
(b) any provision for compensation payable upon early termination of the contract; and
(c) such details of other provisions in the contract as are necessary to enable members of the company to estimate the liability of the company in the event of early termination of the contract.
(2) The directors' remuneration report shall contain an explanation for any significant award made to a person in the circumstances described in paragraph 14.]

6

(1) The directors' remuneration report shall for the relevant financial year show, for each person who has served as a director of the company at any time during that year, each of the following—
(a) the total amount of salary and fees paid to or receivable by the person in respect of qualifying services;
(b) the total amount of bonuses so paid or receivable;
(c) the total amount of sums paid by way of expenses allowance that are—
(i) chargeable to United Kingdom income tax (or would be if the person were an individual); and
(ii) paid to or receivable by the person in respect of qualifying services;
(d) the total amount of—
(i) any compensation for loss of office paid to or receivable by the person, and
(ii) any other payments paid to or receivable by the person in connection with the termination of qualifying services;
(e) the total estimated value of any benefits received by the person otherwise than in cash that—
(i) do not fall within any of sub-paragraphs (a)—(d) or paragraphs 7–11 below,
(ii) are emoluments of the person, and
(iii) are received by the person in respect of qualifying services; and
(f) the amount that is the total of the sums mentioned in paragraphs (a) to (e).
(2) The directors' remuneration report shall show, for each person who has served as a director of the company at any time during the relevant financial year, the amount that for the financial year preceding the relevant financial year is the total of the sums mentioned in paragraphs (a) to (e) of sub-paragraph (1).
(3) The directors' remuneration report shall also state the nature of any element of a remuneration package which is not cash.
(4) The information required by sub-paragraphs (1) and (2) shall be presented in tabular Form

7

(1) The directors' remuneration report shall contain, in respect of each person who has served as a director of the company at any time in the relevant financial year, the information specified in paragraph 8.
(2) Sub-paragraph (1) is subject to paragraph 9 (aggregation of information to avoid excessively lengthy reports).
(3) The information specified in paragraphs (a) to (c) of paragraph 8 shall be presented in tabular form in the report.
(4) In paragraph 8 "share option", in relation to a person, means a share option granted in respect of qualifying services of the person.

8

(1) The information required by sub-paragraph (1) of paragraph 7 in respect of such a person as is mentioned in that sub-paragraph is—
(a) the number of shares that are subject to a share option—
(i) (i) at the beginning of the relevant financial year or, if later, on the date of the appointment of the person as a director of the company, and

(ii) (ii) at the end of the relevant financial year or, if earlier, on the cessation of the person's appointment as a director of the company,
in each case differentiating between share options having different terms and conditions;
(b) information identifying those share options that have been awarded in the relevant financial year, those that have been exercised in that year, those that in that year have expired unexercised and those whose terms and conditions have been varied in that year;
(c) for each share option that is unexpired at any time in the relevant financial year—
(i) the price paid, if any, for its award,
(ii) the exercise price,
(iii) the date from which the option may be exercised, and
(iv) the date on which the option expires;
(d) a description of any variation made in the relevant financial year in the terms and conditions of a share option;
(e) a summary of any performance criteria upon which the award or exercise of a share option is conditional, including a description of any variation made in such performance criteria during the relevant financial year;
(f) for each share option that has been exercised during the relevant financial year, the market price of the shares, in relation to which it is exercised, at the time of exercise; and
(g) for each share option that is unexpired at the end of the relevant financial year—
(i) the market price at the end of that year, and
(ii) the highest and lowest market prices during that year,
of each share that is subject to the option.

Sch. 7A, para. 12-15

12

(1) The directors' remuneration report shall, for each person who has served as a director of the company at any time during the relevant financial year, contain the information in respect of pensions that is specified in sub-paragraphs (2) and (3).
(2) Where the person has rights under a pension scheme that is a defined benefit scheme in relation to the person and any of those rights are rights to which he has become entitled in respect of qualifying services of his—
(a) details
(i) of any changes during the relevant financial year in the person's accrued benefits under the scheme, and
(ii) of the person's accrued benefits under the scheme as at the end of that year;
(b) the transfer value, calculated in a manner consistent with "Retirement Benefit Schemes—Transfer Values (GN 11)" published by the Institute of Actuaries and the Faculty of Actuaries and dated 6th April 2001, of the person's accrued benefits under the scheme at the end of the relevant financial year;
(c) the transfer value of the person's accrued benefits under the scheme that in compliance with paragraph (b) was contained in the director's remuneration report for the previous financial year or, if there was no such report or no such value was contained in that report, the transfer value, calculated in such a manner as is mentioned in paragraph (b), of the person's accrued benefits under the scheme at the beginning of the relevant financial year;
(d) the amount obtained by subtracting—
(i) the transfer value of the person's accrued benefits under the scheme that is required to be contained in the report by paragraph (c), from
(ii) the transfer value of those benefits that is required to be contained in the report by paragraph (b),
and then subtracting from the result of that calculation the amount of any contributions made to the scheme by the person in the relevant financial year.
(2) Where—
(a) the person has rights under a pension scheme that is a money purchase scheme in relation to the person, and
(b) any of those rights are rights to which he has become entitled in respect of qualifying services of his, details of any contribution to the scheme in respect of the person that is paid or payable by the company for the relevant financial year or paid by the company in that year for another financial year.

13

(1) Subject to sub-paragraph (3), the directors' remuneration report shall show in respect of each person who has served as a director of the company—
(a) at any time during the relevant financial year, or
(b) at any time before the beginning of that year,
the amount of so much of retirement benefits paid to or receivable by the person under pension schemes as is in excess of the retirement benefits to which he was entitled on the date on which the benefits first became payable or 31st March 1997, whichever is the later.
(2) In subsection (1) "retirement benefits" means retirement benefits to which the person became entitled in respect of qualifying services of his.
(3) Amounts paid or receivable under a pension scheme need not be included in an amount required to be shown under sub-paragraph (1) if—
(a) the funding of the scheme was such that the amounts were or, as the case may be, could have been paid without recourse to additional contributions; and
(b) amounts were paid to or receivable by all pensioner members of the scheme on the same basis;
and in this sub-paragraph "pensioner member", in relation to a pension scheme, means any person who is entitled to the present payment of retirement benefits under the scheme.
(4) In this paragraph—
(a) references to retirement benefits include benefits otherwise than in cash; and
(b) in relation to so much of retirement benefits as consists of a benefit otherwise than in cash, references to their amount are to the estimated money value of the benefit; and the nature of any such benefit shall also be shown in the report.

14

The directors' remuneration report shall contain details of any significant award made in the relevant financial year to any person who was not a director of the company at the time the award was made but had previously been a director of the company, including (in particular) compensation in respect of loss of office and pensions but excluding any sums which have already been shown in the report under paragraph 6(1)(d).

15

(1) The directors' remuneration report shall show, in respect of each person who served as a director of the company at any time during the relevant financial year, the aggregate amount of any consideration paid to or receivable by third parties for making available the services of the person—
(a) as a director of the company, or
(b) while director of the company—
(i) as director of any of its subsidiary undertakings, or
(ii) as director of any other undertaking of which he was (while director of the company) a director by virtue of the company's nomination (direct or indirect), or
(iii) otherwise in connection with the management of the affairs of the company or any such other undertaking.
(2) The reference to consideration includes benefits otherwise than in cash; and in relation to such consideration the reference to its amount is to the estimated money value of the benefit. The nature of any such consideration shall be shown in the report.
(3) The reference to third parties is to persons other than—
(a) the person himself or a person connected with him or a body corporate controlled by him, and
(b) the company or any such other undertaking as is mentioned in sub-paragraph (1)(b)(ii).

4.2. Financial Services and Markets Act 2000 (FSMA)

s118C

(1) This section defines “inside information” for the purposes of this Part.
(2) In relation to qualifying investments, or related investments, which are not commodity derivatives, inside information is information of a precise nature which—
(a) is not generally available,
(b) relates, directly or indirectly, to one or more issuers of the qualifying investments or to one or more of the qualifying investments, and
(c) would, if generally available, be likely to have a significant effect on the price of the qualifying investments or on the price of related investments.
(3) In relation to qualifying investments or related investments which are commodity derivatives, inside information is information of a precise nature which—
(a) is not generally available,
(b) relates, directly or indirectly, to one or more such derivatives, and
(c) users of markets on which the derivatives are traded would expect to receive in accordance with any accepted market practices on those markets.
(4) In relation to a person charged with the execution of orders concerning any qualifying investments or related investments, inside information includes information conveyed by a client and related to the client's pending orders which—
(a) is of a precise nature,
(b) is not generally available,
(c) relates, directly or indirectly, to one or more issuers of qualifying investments or to one or more qualifying investments, and
(d) would, if generally available, be likely to have a significant effect on the price of those qualifying investments or the price of related investments.
(1) Information is precise if it—
(a) indicates circumstances that exist or may reasonably be expected to come into existence or an event that has occurred or may reasonably be expected to occur, and
(b) is specific enough to enable a conclusion to be drawn as to the possible effect of those circumstances or that event on the price of qualifying investments or related investments.
(6) Information would be likely to have a significant effect on price if and only if it is information of a kind which a reasonable investor would be likely to use as part of the basis of his investment decisions.
(7) For the purposes of subsection (3)(c), users of markets on which investments in commodity derivatives are traded are to be treated as expecting to receive information relating directly or indirectly to one or more such derivatives in accordance with any accepted market practices, which is—
(a) routinely made available to the users of those markets, or
(b) required to be disclosed in accordance with any statutory provision, market rules, or contracts or customs on the relevant underlying commodity market or commodity derivatives market.
(8) Information which can be obtained by research or analysis conducted by, or on behalf of, users of a market is to be regarded, for the purposes of this Part, as being generally available to them.

4.3. Companies Act 2006

s168

(9) A company may by ordinary resolution at a meeting remove a director before the expiration of his period of office, notwithstanding anything in any agreement between it and him.
(10)Special notice is required of a resolution to remove a director under this section or to appoint somebody instead of a director so removed at the meeting at which he is removed.
(11)A vacancy created by the removal of a director under this section, if not filled at the meeting at which he is removed, may be filled as a casual vacancy.
(12)A person appointed director in place of a person removed under this section is treated, for the purpose of determining the time at which he or any other director is to retire, as if he had become director on the day on which the person in whose place he is appointed was last appointed a director.
(13)This section is not to be taken—

(a) as depriving a person removed under it of compensation or damages payable to him in respect of the termination of his appointment as director or of any appointment terminating with that as director, or
(b) as derogating from any power to remove a director that may exist apart from this section.

s169

(1) On receipt of notice of an intended resolution to remove a director under section 168, the company must forthwith send a copy of the notice to the director concerned.
(2) The director (whether or not a member of the company) is entitled to be heard on the resolution at the meeting.
(3) Where notice is given of an intended resolution to remove a director under that section, and the director concerned makes with respect to it representations in writing to the company (not exceeding a reasonable length) and requests their notification to members of the company, the company shall, unless the representations are received by it too late for it to do so—
(a) in any notice of the resolution given to members of the company state the fact of the representations having been made; and
(b) send a copy of the representations to every member of the company to whom notice of the meeting is sent (whether before or after receipt of the representations by the company).
(4) If a copy of the representations is not sent as required by subsection (3) because received too late or because of the company's default, the director may (without prejudice to his right to be heard orally) require that the representations shall be read out at the meeting.
(5) Copies of the representations need not be sent out and the representations need not be read out at the meeting if, on the application either of the company or of any other person who claims to be aggrieved, the court is satisfied that the rights conferred by this section are being abused.
(6) The court may order the company's costs (in Scotland, expenses) on an application under subsection (5) to be paid in whole or in part by the director, notwithstanding that he is not a party to the application.

s172

(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—
(a) the likely consequences of any decision in the long term,
(b) the interests of the company's employees,
(c) the need to foster the company's business relationships with suppliers, customers and others,
(d) the impact of the company's operations on the community and the environment,
(e) the desirability of the company maintaining a reputation for high standards of business conduct, and
(f) the need to act fairly as between members of the company.
(2) Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes.
(3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company.

s215

(1) In this Chapter a “payment for loss of office” means a payment made to a director or past director of a company—
(a) by way of compensation for loss of office as director of the company,
(b) by way of compensation for loss, while director of the company or in connection with his ceasing to be a director of it, of—
(i) any other office or employment in connection with the management of the affairs of the company, or

(ii) any office (as director or otherwise) or employment in connection with the management of the affairs of any subsidiary undertaking of the company,
(c) as consideration for or in connection with his retirement from his office as director of the company, or
(d) as consideration for or in connection with his retirement, while director of the company or in connection with his ceasing to be a director of it, from—
(i) any other office or employment in connection with the management of the affairs of the company, or
(ii) any office (as director or otherwise) or employment in connection with the management of the affairs of any subsidiary undertaking of the company.
(2) The references to compensation and consideration include benefits otherwise than in cash and references in this Chapter to payment have a corresponding meaning.
(3) For the purposes of sections 217 to 221 (payments requiring members' approval)—
(a) payment to a person connected with a director, or
(b) payment to any person at the direction of, or for the benefit of, a director or a person connected with him,
is treated as payment to the director.
(4) References in those sections to payment by a person include payment by another person at the direction of, or on behalf of, the person referred to.

s216

(1) This section applies where in connection with any such transfer as is mentioned in section 218 or 219 (payment in connection with transfer of undertaking, property or shares) a director of the company—
(a) is to cease to hold office, or
(b) is to cease to be the holder of—
(i) any other office or employment in connection with the management of the affairs of the company, or
(ii) any office (as director or otherwise) or employment in connection with the management of the affairs of any subsidiary undertaking of the company.
(2) If in connection with any such transfer—
(c) the price to be paid to the director for any shares in the company held by him is in excess of the price which could at the time have been obtained by other holders of like shares, or
(d) any valuable consideration is given to the director by a person other than the company,
the excess or, as the case may be, the money value of the consideration is taken for the purposes of those sections to have been a payment for loss of office.

s217

(1) A company may not make a payment for loss of office to a director of the company unless the payment has been approved by a resolution of the members of the company.
(2) A company may not make a payment for loss of office to a director of its holding company unless the payment has been approved by a resolution of the members of each of those companies.
(3) A resolution approving a payment to which this section applies must not be passed unless a memorandum setting out particulars of the proposed payment (including its amount) is made available to the members of the company whose approval is sought—
(a) in the case of a written resolution, by being sent or submitted to every eligible member at or before the time at which the proposed resolution is sent or submitted to him;
(b) in the case of a resolution at a meeting, by being made available for inspection by the members both—
(i) at the company's registered office for not less than 15 days ending with the date of the meeting, and
(ii) at the meeting itself.
(2) No approval is required under this section on the part of the members of a body corporate that—
(a) is not a UK-registered company, or
(b) is a wholly-owned subsidiary of another body corporate.

s219

(1) No payment for loss of office may be made by any person to a director of a company in connection with a transfer of shares in the company, or in a subsidiary of the company, resulting from a takeover bid unless the payment has been approved by a resolution of the relevant shareholders.
(2) The relevant shareholders are the holders of the shares to which the bid relates and any holders of shares of the same class as any of those shares.
(3) A resolution approving a payment to which this section applies must not be passed unless a memorandum setting out particulars of the proposed payment (including its amount) is made available to the members of the company whose approval is sought—
(a) in the case of a written resolution, by being sent or submitted to every eligible member at or before the time at which the proposed resolution is sent or submitted to him;
(b) in the case of a resolution at a meeting, by being made available for inspection by the members both—
(i) at the company's registered office for not less than 15 days ending with the date of the meeting, and
(ii) at the meeting itself.
(4) Neither the person making the offer, nor any associate of his (as defined in section 988), is entitled to vote on the resolution, but—
(a) where the resolution is proposed as a written resolution, they are entitled (if they would otherwise be so entitled) to be sent a copy of it, and
(b) at any meeting to consider the resolution they are entitled (if they would otherwise be so entitled) to be given notice of the meeting, to attend and speak and if present (in person or by proxy) to count towards the quorum.
(5) If at a meeting to consider the resolution a quorum is not present, and after the meeting has been adjourned to a later date a quorum is again not present, the payment is (for the purposes of this section) deemed to have been approved.
(6) No approval is required under this section on the part of shareholders in a body corporate that—
(a) is not a UK-registered company, or
(b) is a wholly-owned subsidiary of another body corporate.
(7) A payment made in pursuance of an arrangement—
(a) entered into as part of the agreement for the transfer in question, or within one year before or two years after that agreement, and
(b) to which the company whose shares are the subject of the bid, or any person to whom the transfer is made, is privy,
(7) is presumed, except in so far as the contrary is shown, to be a payment to which this section applies.

s220(1)

Approval is not required under section 217, 218 or 219 (payments requiring members' approval) for a payment made in good faith—
(a) in discharge of an existing legal obligation (as defined below),
(b) by way of damages for breach of such an obligation,
(c) by way of settlement or compromise of any claim arising in connection with the termination of a person's office or employment, or
(d) by way of pension in respect of past services.

s222(1)

If a payment is made in contravention of section 217 (payment by company)—
(a) it is held by the recipient on trust for the company making the payment, and
(b) any director who authorised the payment is jointly and severally liable to indemnify the company that made the payment for any loss resulting from it.

s222(3)

If a payment is made in contravention of section 219 (payment in connection with share transfer)—
(c) it is held by the recipient on trust for persons who have sold their shares as a result of the offer made, and
(d) the expenses incurred by the recipient in distributing that sum amongst those persons shall be borne by him and not retained out of that sum.

s239

(1) This section applies to the ratification by a company of conduct by a director amounting to negligence, default, breach of duty or breach of trust in relation to the company.
(2) The decision of the company to ratify such conduct must be made by resolution of the members of the company.
(3) Where the resolution is proposed as a written resolution neither the director (if a member of the company) nor any member connected with him is an eligible member.
(4) Where the resolution is proposed at a meeting, it is passed only if the necessary majority is obtained disregarding votes in favour of the resolution by the director (if a member of the company) and any member connected with him. This does not prevent the director or any such member from attending, being counted towards the quorum and taking part in the proceedings at any meeting at which the decision is considered.
(5) For the purposes of this section—
(a) "conduct" includes acts and omissions;
(b) "director" includes a former director;
(c) a shadow director is treated as a director; and
(d) in section 252 (meaning of "connected person"), subsection (3) does not apply (exclusion of person who is himself a director).
(6) Nothing in this section affects—
(e) the validity of a decision taken by unanimous consent of the members of the company, or
(f) any power of the directors to agree not to sue, or to settle or release a claim made by them on behalf of the company.
(1) This section does not affect any other enactment or rule of law imposing additional requirements for valid ratification or any rule of law as to acts that are incapable of being ratified by the company.

s260

(1) This Chapter applies to proceedings in England and Wales or Northern Ireland by a member of a company—
(a) in respect of a cause of action vested in the company, and
(b) seeking relief on behalf of the company.
This is referred to in this Chapter as a "derivative claim".
(2) A derivative claim may only be brought—
(a) under this Chapter, or
(b) in pursuance of an order of the court in proceedings under section 994 (proceedings for protection of members against unfair prejudice).
(3) A derivative claim under this Chapter may be brought only in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company.
The cause of action may be against the director or another person (or both).
(4) It is immaterial whether the cause of action arose before or after the person seeking to bring or continue the derivative claim became a member of the company.
(5) For the purposes of this Chapter—
(a) "director" includes a former director;
(b) a shadow director is treated as a director; and
(c) references to a member of a company include a person who is not a member but to whom shares in the company have been transferred or transmitted by operation of law.

s263(3)

In considering whether to give permission (or leave) the court must take into account, in particular—
(a) whether the member is acting in good faith in seeking to continue the claim;
(b) the importance that a person acting in accordance with section 172 (duty to promote the success of the company) would attach to continuing it;
(c) where the cause of action results from an act or omission that is yet to occur, whether the act or omission could be, and in the circumstances would be likely to be—
(i) authorised by the company before it occurs, or
(ii) ratified by the company after it occurs;
(d) where the cause of action arises from an act or omission that has already occurred, whether the act or omission could be, and in the circumstances would be likely to be, ratified by the company;
(e) whether the company has decided not to pursue the claim;
(f) whether the act or omission in respect of which the claim is brought gives rise to a cause of action that the member could pursue in his own right rather than on behalf of the company.
s303
(1) The members of a company may require the directors to call a general meeting of the company.
(2) The directors are required to call a general meeting once the company has received requests to do so from—
(a) members representing at least the required percentage of such of the paid-up capital of the company as carries the right of voting at general meetings of the company (excluding any paid-up capital held as treasury shares); or
(b) in the case of a company not having a share capital, members who represent at least the required percentage of the total voting rights of all the members having a right to vote at general meetings.
(3) The required percentage is 10% unless, in the case of a private company, more than twelve months has elapsed since the end of the last general meeting—
(a) called in pursuance of a requirement under this section, or
(b) in relation to which any members of the company had (by virtue of an enactment, the company's articles or otherwise) rights with respect to the circulation of a resolution no less extensive than they would have had if the meeting had been so called at their request,
in which case the required percentage is 5%.
(4) A request—
(a) must state the general nature of the business to be dealt with at the meeting, and
(b) may include the text of a resolution that may properly be moved and is intended to be moved at the meeting.
(5) A resolution may properly be moved at a meeting unless—
(a) it would, if passed, be ineffective (whether by reason of inconsistency with any enactment or the company's constitution or otherwise),
(b) it is defamatory of any person, or
(c) it is frivolous or vexatious.
(6) A request—
(a) may be in hard copy form or in electronic form, and
(b) must be authenticated by the person or persons making it.

s314

(1) The members of a company may require the company to circulate, to members of the company entitled to receive notice of a general meeting, a statement of not more than 1,000 words with respect to—
(a) a matter referred to in a proposed resolution to be dealt with at that meeting, or
(b) other business to be dealt with at that meeting.
(2) A company is required to circulate a statement once it has received requests to do so from—
(a) members representing at least 5% of the total voting rights of all the members who have a relevant right to vote (excluding any voting rights attached to any shares in the company held as treasury shares), or

(b) at least 100 members who have a relevant right to vote and hold shares in the company on which there has been paid up an average sum, per member, of at least £100.
See also section 153 (exercise of rights where shares held on behalf of others).
(3) In subsection (2), a "relevant right to vote" means—
(a) in relation to a statement with respect to a matter referred to in a proposed resolution, a right to vote on that resolution at the meeting to which the requests relate, and
(b) in relation to any other statement, a right to vote at the meeting to which the requests relate.
(4) A request—
(a) may be in hard copy form or in electronic form,
(b) must identify the statement to be circulated,
(c) must be authenticated by the person or persons making it, and
(d) must be received by the company at least one week before the meeting to which it relates.

s338

(1) The members of a public company may require the company to give, to members of the company entitled to receive notice of the next annual general meeting, notice of a resolution which may properly be moved and is intended to be moved at that meeting.
(2) A resolution may properly be moved at an annual general meeting unless—
(a) it would, if passed, be ineffective (whether by reason of inconsistency with any enactment or the company's constitution or otherwise),
(b) it is defamatory of any person, or
(c) it is frivolous or vexatious.
(3) A company is required to give notice of a resolution once it has received requests that it do so from—
(a) members representing at least 5% of the total voting rights of all the members who have a right to vote on the resolution at the annual general meeting to which the requests relate (excluding any voting rights attached to any shares in the company held as treasury shares), or
(b) at least 100 members who have a right to vote on the resolution at the annual general meeting to which the requests relate and hold shares in the company on which there has been paid up an average sum, per member, of at least £100.

See also section 153 (exercise of rights where shares held on behalf of others).
(1) A request—
(a) may be in hard copy form or in electronic form,
(b) must identify the resolution of which notice is to be given,
(c) must be authenticated by the person or persons making it, and
(d) must be received by the company not later than—
(i) 6 weeks before the annual general meeting to which the requests relate, or
(ii) if later, the time at which notice is given of that meeting.

s420(1)-(2)

(1) The directors of a quoted company must prepare a directors' remuneration report for each financial year of the company.
(2) In the case of failure to comply with the requirement to prepare a directors' remuneration report, every person who—
(a) was a director of the company immediately before the end of the period for filing accounts and reports for the financial year in question, and
(b) failed to take all reasonable steps for securing compliance with that requirement,
commits an offence.

s421

(1) The Secretary of State may make provision by regulations as to—
(a) the information that must be contained in a directors' remuneration report,
(b) how information is to be set out in the report, and
(c) what is to be the auditable part of the report.

(2) Without prejudice to the generality of this power, the regulations may make any such provision as was made, immediately before the commencement of this Part, by Schedule 7A to the Companies Act 1985 (c 6).
(3) It is the duty of—
(a) any director of a company, and
(b) any person who is or has at any time in the preceding five years been a director of the company,
(c) to give notice to the company of such matters relating to himself as may be necessary for the purposes of regulations under this section.
(1) A person who makes default in complying with subsection (3) commits an offence and is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

s432

(1) A member of, or holder of debentures of, a quoted company is entitled to be provided, on demand and without charge, with a copy of—
(a) the company's last annual accounts,
(b) the last directors' remuneration report,
(c) the last directors' report, and
(d) the auditor's report on those accounts (including the report on the directors' remuneration report and on the directors' report).
(2) The entitlement under this section is to a single copy of those documents, but that is in addition to any copy to which a person may be entitled under section 423.
(3) If a demand made under this section is not complied with within seven days of receipt by the company, an offence is committed by—
(a) the company, and
(b) every officer of the company who is in default.
(1) A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 3 on the standard scale and, for continued contravention, a daily default fine not exceeding one-tenth of level 3 on the standard scale.

s437

(1) The directors of a public company must lay before the company in general meeting copies of its annual accounts and reports.
(2) This section must be complied with not later than the end of the period for filing the accounts and reports in question.
(3) In the Companies Acts “accounts meeting”, in relation to a public company, means a general meeting of the company at which the company's annual accounts and reports are (or are to be) laid in accordance with this section.

s439(5)

No entitlement of a person to remuneration is made conditional on the resolution being passed by reason only of the provision made by this section.

s994(1)

A member of a company may apply to the court by petition for an order under this Part on the ground—
(c) that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself), or
(d) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.
the circumstances permitted by the Listing Rules.

4.4. The Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations 2008

sch. 5, paras 1 to 5

1

(1) There must be shown—
the aggregate amount of remuneration paid to or receivable by directors in respect of qualifying services;
(a) the aggregate of the amount of gains made by directors on the exercise of share options;
(b) the aggregate of the amount of money paid to or receivable by directors, and the net value
(c) of assets (other than money and share options) received or receivable by directors, under
(d) long term incentive schemes in respect of qualifying services; and
(e) the aggregate value of any company contributions—
(i) paid, or treated as paid, to a pension scheme in respect of directors' qualifying services, and
(ii) by reference to which the rate or amount of any money purchase benefits that may become payable will be calculated.
(2) There must be shown the number of directors (if any) to whom retirement benefits are accruing in respect of qualifying services—
(a) under money purchase schemes, and
(b) under defined benefit schemes.
(3) In the case of a company which is not a quoted company and whose equity share capital is not listed on the market known as AIM—
(a) sub-paragraph (1) has effect as if paragraph (b) were omitted and, in paragraph (c), "assets" did not include shares; and
(b) the number of each of the following (if any) must be shown, namely—
(i) the directors who exercised share options, and
(ii) the directors in respect of whose qualifying services shares were received or receivable under long term incentive schemes.

2

(1) Where the aggregates shown under paragraph 1(1)(a), (b) and (c) total £200,000 or more, there must be shown—
(c) so much of the total of those aggregates as is attributable to the highest paid director, and
(d) so much of the aggregate mentioned in paragraph 1(1)(d) as is so attributable.
(2) Where sub-paragraph (1) applies and the highest paid director has performed qualifying services during the financial year by reference to which the rate or amount of any defined benefits that may become payable will be calculated, there must also be shown—
(a) the amount at the end of the year of his accrued pension, and
(b) where applicable, the amount at the end of the year of his accrued lump sum.
(3) Subject to sub-paragraph (4), where sub-paragraph (1) applies in the case of a company which is not a listed company, there must also be shown—
(a) whether the highest paid director exercised any share options, and
(b) whether any shares were received or receivable by that director in respect of qualifying services under a long term incentive scheme.
(4) Where the highest paid director has not been involved in any of the transactions specified in sub-paragraph (3), that fact need not be stated.

3

(1) Subject to sub-paragraph (2), there must be shown the aggregate amount of—
(a) so much of retirement benefits paid to or receivable by directors under pension schemes, and
(b) so much of retirement benefits paid to or receivable by past directors under such schemes,

as (in each case) is in excess of the retirement benefits to which they were respectively entitled on the date on which the benefits first became payable or 31st March 1997, whichever is the later.
(2) Amounts paid or receivable under a pension scheme need not be included in the aggregate amount if—
(a) the funding of the scheme was such that the amounts were or, as the case may be, could have been paid without recourse to additional contributions, and
(b) amounts were paid to or receivable by all pensioner members of the scheme on the same basis.
(3) In sub-paragraph (2), "pensioner member", in relation to a pension scheme, means any person who is entitled to the present payment of retirement benefits under the scheme.
(4) In this paragraph—
(c) references to retirement benefits include benefits otherwise than in cash, and
(d) in relation to so much of retirement benefits as consists of a benefit otherwise than in cash, references to their amount are to the estimated money value of the benefit, and the nature of any such benefit must also be disclosed.

4

(1) There must be shown the aggregate amount of any compensation to directors or past directors in respect of loss of office.
(2) This includes compensation received or receivable by a director or past director—
(a) for loss of office as director of the company, or
(b) for loss, while director of the company or on or in connection with his ceasing to be a director of it, of—
(i) any other office in connection with the management of the company's affairs, or
(ii) any office as director or otherwise in connection with the management of the affairs of any subsidiary undertaking of the company.
(3) In this paragraph references to compensation for loss of office include—
(c) compensation in consideration for, or in connection with, a person's retirement from office, and
(d) compensation where such a retirement is occasioned by a breach of the person's contract with the company or with a subsidiary undertaking of the company—
(i) payments made by way of damages for the breach, or
(ii) payments made by way of settlement or compromise of any claim in respect of the breach.
(4) In this paragraph—
(a) references to compensation include benefits otherwise than in cash, and
(b) in relation to such compensation references to its amount are to the estimated money value of the benefit.
The nature of any such compensation must be disclosed.

5

(1) There must be shown the aggregate amount of any consideration paid to or receivable by third parties for making available the services of any person—
(a) as a director of the company, or
(b) while director of the company—
(i) as director of any of its subsidiary undertakings, or
(ii) otherwise in connection with the management of the affairs of the company or any of its subsidiary undertakings.
(2) In sub-paragraph (1)—
(a) the reference to consideration includes benefits otherwise than in cash, and
(b) in relation to such consideration the reference to its amount is to the estimated money value of the benefit.
The nature of any such consideration must be disclosed.
(3) For the purposes of this paragraph a "third party" means a person other than—
(a) the director himself or a person connected with him or a body corporate controlled by him, or
(b) the company or any of its subsidiary undertakings.

sch. 8, para. 2-8

2

(1) If a committee of the company's directors has considered matters relating to the directors' remuneration for the relevant financial year, the directors' remuneration report must—
(a) name each director who was a member of the committee at any time when the committee was considering any such matter;
(b) name any person who provided to the committee advice, or services, that materially assisted the committee in their consideration of any such matter;
(c) in the case of any person named under paragraph (b), who is not a director of the company, state—
(i) the nature of any other services that that person has provided to the company during the relevant financial year; and
(ii) whether that person was appointed by the committee.
(2) In sub-paragraph (1)(b) "person" includes (in particular) any director of the company who does not fall within sub-paragraph (1)(a).

3

(1) The directors' remuneration report must contain a statement of the company's policy on directors' remuneration for the following financial year and for financial years subsequent to that.
(2) The policy statement must include—
(a) for each director, a detailed summary of any performance conditions to which any entitlement of the director—
(i) to share options, or
(ii) under a long term incentive scheme,
is subject;
(b) an explanation as to why any such performance conditions were chosen;
(c) a summary of the methods to be used in assessing whether any such performance conditions are met and an explanation as to why those methods were chosen;
(d) if any such performance condition involves any comparison with factors external to the company—
(i) a summary of the factors to be used in making each such comparison, and
(ii) if any of the factors relates to the performance of another company, of two or more other companies or of an index on which the securities of a company or companies are listed, the identity of that company, of each of those companies or of the index;

(e) a description of, and an explanation for, any significant amendment proposed to be made to the terms and conditions of any entitlement of a director to share options or under a long term incentive scheme; and
(f) if any entitlement of a director to share options, or under a long term incentive scheme, is not subject to performance conditions, an explanation as to why that is the case.
(3) The policy statement must, in respect of each director's terms and conditions relating to remuneration, explain the relative importance of those elements which are, and those which are not, related to performance.
(4) The policy statement must summarise, and explain, the company's policy on—
(a) the duration of contracts with directors, and
(b) notice periods, and termination payments, under such contracts.
(1) In sub-paragraphs (2) and (3), references to a director are to any person who serves as a director of the company at any time in the period beginning with the end of the relevant financial year and ending with the date on which the directors' remuneration report is laid before the company in general meeting.

4

The directors' remuneration report must contain a statement of how pay and employment conditions of employees of the company and of other undertakings within the same group as the company were taken into account when determining directors' remuneration for the relevant financial year.

5

(1) The directors' remuneration report must—
(a) contain a line graph that shows for each of—
(i) a holding of shares of that class of the company's equity share capital whose listing, or admission to dealing, has resulted in the company falling within the definition of "quoted company", and
(ii) a hypothetical holding of shares made up of shares of the same kinds and number as those by reference to which a broad equity market index is calculated,
a line drawn by joining up points plotted to represent, for each of the financial years in the relevant period, the total shareholder return on that holding; and
(b) state the name of the index selected for the purposes of the graph and set out the reasons for selecting that index.
(2) For the purposes of sub-paragraphs (1) and (4), "relevant period" means the five financial years of which the last is the relevant financial year.
(3) Where the relevant financial year—
(a) is the company's second, third or fourth financial year, sub-paragraph (2) has effect with the substitution of "two", "three" or "four" (as the case may be) for "five"; and
(b) is the company's first financial year, "relevant period", for the purposes of subparagraphs (1) and (4), means the relevant financial year.
(4) For the purposes of sub-paragraph (1), the "total shareholder return" for a relevant period on a holding of shares must be calculated using a fair method that—
(c) takes as its starting point the percentage change over the period in the market price of the holding;
(d) involves making—
(i) the assumptions specified in sub-paragraph (5) as to reinvestment of income, and
(ii) the assumption specified in sub-paragraph (7) as to the funding of liabilities, and
(e) makes provision for any replacement of shares in the holding by shares of a different description;
and the same method must be used for each of the holdings mentioned in sub-paragraph (1).
(5) The assumptions as to reinvestment of income are—
(a) that any benefit in the form of shares of the same kind as those in the holding is added to the holding at the time the benefit becomes receivable; and
(b) that any benefit in cash, and an amount equal to the value of any benefit not in cash and not falling within paragraph (a), is applied at the time the benefit becomes receivable in the purchase at their market price of shares of the same kind as those in the holding and that the shares purchased are added to the holding at that time.
(6) In sub-paragraph (5) "benefit" means any benefit (including, in particular, any dividend) receivable in respect of any shares in the holding by the holder from the company of whose share capital the shares form part.
(7) The assumption as to the funding of liabilities is that, where the holder has a liability to the company of whose capital the shares in the holding form part, shares are sold from the holding—
(a) immediately before the time by which the liability is due to be satisfied, and
(b) in such numbers that, at the time of the sale, the market price of the shares sold equals the amount of the liability in respect of the shares in the holding that are not being sold.
(8) In sub-paragraph (7) "liability" means a liability arising in respect of any shares in the holding or from the exercise of a right attached to any of those shares.

6

(1) The directors' remuneration report must contain, in respect of the contract of service or contract for services of each person who has served as a director of the company at any time during the relevant financial year, the following information—
(a) the date of the contract, the unexpired term and the details of any notice periods;
(b) any provision for compensation payable upon early termination of the contract; and
(c) such details of other provisions in the contract as are necessary to enable members of the company to estimate the liability of the company in the event of early termination of the contract.

(2) The directors' remuneration report must contain an explanation for any significant award made to a person in the circumstances described in paragraph 15.

7

(1) The directors' remuneration report must for the relevant financial year show, for each person who has served as a director of the company at any time during that year, each of the following—
(a) the total amount of salary and fees paid to or receivable by the person in respect of qualifying services;
(b) the total amount of bonuses so paid or receivable;
(c) the total amount of sums paid by way of expenses allowance that are—
(i) chargeable to United Kingdom income tax (or would be if the person were an individual), and
(ii) paid to or receivable by the person in respect of qualifying services;
(d) the total amount of—
(i) any compensation for loss of office paid to or receivable by the person, and
(ii) any other payments paid to or receivable by the person in connection with the termination of qualifying services;
(e) the total estimated value of any benefits received by the person otherwise than in cash that—
(i) do not fall within any of paragraphs (a) to (d) or paragraphs 8 to 12,
(ii) are emoluments of the person, and
(iii) are received by the person in respect of qualifying services; and
(f) the amount that is the total of the sums mentioned in paragraphs (a) to (e).
(2) The directors' remuneration report must show, for each person who has served as a director of the company at any time during the relevant financial year, the amount that for the financial year preceding the relevant financial year is the total of the sums mentioned in paragraphs (a) to (e) of sub-paragraph (1).
(3) The directors' remuneration report must also state the nature of any element of a remuneration package which is not cash.
(4) The information required by sub-paragraphs (1) and (2) must be presented in tabular form.

8

(1) The directors' remuneration report must contain, in respect of each person who has served as a director of the company at any time in the relevant financial year, the information specified in paragraph 9.
(2) Sub-paragraph (1) is subject to paragraph 10 (aggregation of information to avoid excessively lengthy reports).
(3) The information specified in sub-paragraphs (a) to (c) of paragraph 9 must be presented in tabular form in the report.
(4) In paragraph 9 "share option", in relation to a person, means a share option granted in respect of qualifying services of the person.

Sch. 8, para. 11

(1) The directors' remuneration report must contain, in respect of each person who has served as a director of the company at any time in the relevant financial year, the information specified in paragraph 12.
(2) Sub-paragraph (1) does not require the report to contain share option details that are contained in the report in compliance with paragraphs 8 to 10.
(3) The information specified in paragraph 12 must be presented in tabular form in the report.
(4) For the purposes of paragraph 12—
(a) "scheme interest", in relation to a person, means an interest under a long term incentive scheme that is an interest in respect of which assets may become receivable under the scheme in respect of qualifying services of the person; and
(b) such an interest "vests" at the earliest time when—
(i) it has been ascertained that the qualifying conditions have been fulfilled, and

(ii) the nature and quantity of the assets receivable under the scheme in respect of the interest have been ascertained.
(2) In this Schedule "long term incentive scheme" means any agreement or arrangement under which money or other assets may become receivable by a person and which includes one or more qualifying conditions with respect to service or performance that cannot be fulfilled within a single financial year, and for this purpose the following must be disregarded, namely—
(a) any bonus the amount of which falls to be determined by reference to service or performance within a single financial year;
(b) compensation in respect of loss of office, payments for breach of contract and other termination payments; and
(c) retirement benefits.

Sch. 8, para. 13-16

13

(1) The directors' remuneration report must, for each person who has served as a director of the company at any time during the relevant financial year, contain the information in respect of pensions that is specified in sub-paragraphs (2) and (3).
(2) Where the person has rights under a pension scheme that is a defined benefit scheme in relation to the person and any of those rights are rights to which he has become entitled in respect of qualifying services of his—
(a) details—
(i) of any changes during the relevant financial year in the person's accrued benefits under the scheme, and
(ii) of the person's accrued benefits under the scheme as at the end of that year;
(b) the transfer value, calculated in a manner consistent with "Retirement Benefit Schemes – Transfer Values (GN 11)" published by the Institute of Actuaries and the Faculty of Actuaries and dated 6th April 2001, of the person's accrued benefits under the scheme at the end of the relevant financial year;
(c) the transfer value of the person's accrued benefits under the scheme that in compliance with paragraph (b) was contained in the directors' remuneration report for the previous financial year or, if there was no such report or no such value was contained in that report, the transfer value, calculated in such a manner as is mentioned in paragraph (b), of the person's accrued benefits under the scheme at the beginning of the relevant financial year;
(d) the amount obtained by subtracting—
(i) the transfer value of the person's accrued benefits under the scheme that is required to be contained in the report by paragraph (c), from
(ii) the transfer value of those benefits that is required to be contained in the report by paragraph (b),
and then subtracting from the result of that calculation the amount of any contributions made to the scheme by the person in the relevant financial year.
(3) Where—
(a) the person has rights under a pension scheme that is a money purchase scheme in relation to the person, and
(b) any of those rights are rights to which he has become entitled in respect of qualifying services of his,
details of any contribution to the scheme in respect of the person that is paid or payable by the company for the relevant financial year or paid by the company in that year for another financial year.

14

(1) Subject to sub-paragraph (3), the directors' remuneration report must show in respect of each person who has served as a director of the company—
(a) at any time during the relevant financial year, or
(b) at any time before the beginning of that year,
the amount of so much of retirement benefits paid to or receivable by the person under pension schemes as is in excess of the retirement benefits to which he was entitled on the date on which the benefits first became payable or 31st March 1997, whichever is the later.

(2) In subsection (1) “retirement benefits” means retirement benefits to which the person became entitled in respect of qualifying services of his.
(3) Amounts paid or receivable under a pension scheme need not be included in an amount required to be shown under sub-paragraph (1) if—
(a) the funding of the scheme was such that the amounts were or, as the case may be, could have been paid without recourse to additional contributions; and
(b) amounts were paid to or receivable by all pensioner members of the scheme on the same basis;
and in this sub-paragraph “pensioner member”, in relation to a pension scheme, means any person who is entitled to the present payment of retirement benefits under the scheme.
(4) In this paragraph—
(a) references to retirement benefits include benefits otherwise than in cash; and
(b) in relation to so much of retirement benefits as consists of a benefit otherwise than in cash, references to their amount are to the estimated money value of the benefit, and the nature of any such benefit must also be shown in the report.

15

The directors’ remuneration report must contain details of any significant award made in the relevant financial year to any person who was not a director of the company at the time the award was made but had previously been a director of the company, including (in particular) compensation in respect of loss of office and pensions but excluding any sums which have already been shown in the report under paragraph 7(1)(d).

16

(1) The directors’ remuneration report must show, in respect of each person who served as a director of the company at any time during the relevant financial year, the aggregate amount of any consideration paid to or receivable by third parties for making available the services of the person—
(a) as a director of the company, or
(b) while director of the company—
(i) as director of any of its subsidiary undertakings, or
(ii) as director of any other undertaking of which he was (while director of the company) a director by virtue of the company’s nomination (direct or indirect), or
(iii) otherwise in connection with the management of the affairs of the company or any such other undertaking.
(2) The reference to consideration includes benefits otherwise than in cash; and in relation to such consideration the reference to its amount is to the estimated money value of the benefit.
The nature of any such consideration must be shown in the report.
(3) The reference to third parties is to persons other than—
(a) the person himself or a person connected with him or a body corporate controlled by him, and
(b) the company or any such other undertaking as is mentioned in sub-paragraph (1)(b)(ii).

4.5. Disclosure Rules (http://fsahandbook.info/FSA/html/handbook/DTR/2/2)

DTR 2.2.1R

An issuer must notify a RIS as soon as possible of any inside information which directly concerns the issuer unless DTR 2.5.1R applies.

DTR 2.2.4G(1)

In determining the likely price significance of the information an issuer should assess whether the information in question would be likely to be used by a reasonable investor as part of the basis of his investment decisions and would therefore be likely to have a significant effect on the price of the issuer's financial instruments (the reasonable investor test).

4.6. Listing Rules

LR 9.8.6R

In the case of a listed company incorporated in the United Kingdom, the following additional items must be included in its annual financial report:
(1) a statement setting out all the interests (in respect of which transactions are notifiable to the company under DTR 3.1.2 R) of each person who is a director of the listed company, as at the end of the period under review including:
(a) all changes in the interests of each director that have occurred between the end of the period under review and a date not more than one month prior to the date of the notice of the annual general meeting; or
(b) if there have been no changes in the period described in paragraph (a), a statement that there have been no changes in the interests of each director.
Interests of each director includes the interests of connected persons of which the listed company is, or ought upon reasonable enquiry to become, aware.
(2) a statement showing, as at a date not more than one month prior to the date of the notice of the annual general meeting:
(a) all information disclosed to the listed company in accordance with DTR 5; or
(b) that there have been no disclosures, if no disclosures have been made.
(3) a statement made by the directors that the business is a going concern, together with supporting assumptions or qualifications as necessary, that has been prepared in accordance with Going Concern and Financial Reporting: Guidance for Directors of listed companies registered in the United Kingdom, published in November 1994;
(4) a statement setting out:
(a) details of any shareholders authority for the purchase, by the listed company of its own shares that is still valid at the end of the period under review;
(b) in the case of purchases made otherwise than through the market or by tender to all shareholders, the names of sellers of such shares purchased, or proposed to be purchased, by the listed company during the period under review;
(c) in the case of any purchases made otherwise than through the market or by tender or partial offer to all shareholders, or options or contracts to make such purchases, entered into since the end of the period covered by the report, information equivalent to that required under Part II of Schedule 7 to the Companies Act 1985 (Disclosure required by company acquiring its own shares, etc); and
(d) in the case of sales of treasury shares for cash made otherwise than through the market, or in connection with an employees' share scheme, or otherwise than pursuant to an opportunity which (so far as was practicable) was made available to all holders of the listed company's securities (or to all holders of a relevant class of its securities) on the same terms, particulars of the names of purchasers of such shares sold, or proposed to be sold, by the company during the period under review;
(5) a statement of how the listed company has applied the principles set out in Section 1 of the Combined Code, in a manner that would enable shareholders to evaluate how the principles have been applied.
(6) a statement as to whether the listed company has:
(a) complied throughout the accounting period with all relevant provisions set out in Section 1 of the Combined Code; or
(b) not complied throughout the accounting period with all relevant provisions set out in Section 1 of the Combined Code and if so, setting out:
(i) those provisions, if any it has not complied with;
(ii) in the case of provisions whose requirements are of a continuing nature, the period within which, if any, it did not comply with some or all of those provisions; and
(iii) the company's reasons for non-compliance; and
(7) a report to the shareholders by the Board which contains all the matters set out in LR 9.8.8 R.

4.7. Combined Code

Section 1.B

B.1 The Level and Make-up of Remuneration

Main Principles
Levels of remuneration should be sufficient to attract, retain and motivate directors of the quality required to run the company successfully, but a company should avoid paying more than is necessary for this purpose. A significant proportion of executive directors' remuneration should be structured so as to link rewards to corporate and individual performance.
Supporting Principle
The remuneration committee should judge where to position their company relative to other companies. But they should use such comparisons with caution, in view of the risk of an upward ratchet of remuneration levels with no corresponding improvement in performance.
They should also be sensitive to pay and employment conditions elsewhere in the group, especially when determining annual salary increases.

Remuneration policy

B.1.1 The performance-related elements of remuneration should form a significant proportion of the total remuneration package of executive directors and should be designed to align their interests with those of shareholders and to give these directors keen incentives to perform at the highest levels. In designing schemes of performance-related remuneration, the remuneration committee should follow the provisions in Schedule A to this Code.
B.1.2 Executive share options should not be offered at a discount save as permitted by the relevant provisions of the Listing Rules.
B.1.3 Levels of remuneration for non-executive directors should reflect the time commitment and responsibilities of the role. Remuneration for nonexecutive directors should not include share options. If, exceptionally, options are granted, shareholder approval should be sought in advance and any shares acquired by exercise of the options should be held until at least one year after the non-executive director leaves the board. Holding of share options could be relevant to the determination of a non-executive director's independence (as set out in provision A.3.1).
B.1.4 Where a company releases an executive director to serve as a nonexecutive director elsewhere, the remuneration report should include a statement as to whether or not the director will retain such earnings and, if so, what the remuneration is.
Service Contracts and Compensation
B.1.5 The remuneration committee should carefully consider what compensation commitments (including pension contributions and all other elements) their directors' terms of appointment would entail in the event of early termination. The aim should be to avoid rewarding poor performance. They should take a robust line on reducing compensation to reflect departing directors' obligations to mitigate loss.
B.1.6 Notice or contract periods should be set at one year or less. If it is necessary to offer longer notice or contract periods to new directors recruited from outside, such periods should reduce to one year or less after the initial period.

B.2 Procedure

Main Principle

There should be a formal and transparent procedure for developing policy on executive remuneration and for fixing the remuneration packages of individual directors. No director should be involved in deciding his or her own remuneration.

Supporting Principles

The remuneration committee should consult the chairman and/or chief executive about their proposals relating to the remuneration of other executive directors. The remuneration committee should also be responsible for appointing any consultants in respect of executive director remuneration. Where executive directors or senior management are involved in advising or supporting the remuneration committee, care should be taken to recognise and avoid conflicts of interest.
The chairman of the board should ensure that the company maintains contact as required with its principal shareholders about remuneration in the same way as for other matters.
B.2.1 The board should establish a remuneration committee of at least three, or in the case of smaller companies two, independent non-executive directors. In addition the company chairman may also be a member of, but not chair, the committee if he or she was considered independent on appointment as chairman. The remuneration committee should make available its terms of reference, explaining its role and the authority delegated to it by the board. Where remuneration consultants are appointed, a statement should be made available of whether they have any other connection with the company.
B.2.2 The remuneration committee should have delegated responsibility for setting remuneration for all executive directors and the chairman, including pension rights and any compensation payments. The committee should also recommend and monitor the level and structure of remuneration for senior management. The definition of 'senior management' for this purpose should be determined by the board but should normally include the first layer of management below board level.
B.2.3 The board itself or, where required by the Articles of Association, the shareholders should determine the remuneration of the non-executive directors within the limits set in the Articles of Association. Where permitted by the Articles, the board may however delegate this responsibility to a committee, which might include the chief executive.
B.2.4 Shareholders should be invited specifically to approve all new long-term incentive schemes (as defined in the Listing Rules) and significant changes to existing schemes, save in the circumstances permitted by the Listing Rules.

4.8. The Takeover Code

General Principle 3

The board of an offeree company must act in the interests of the company as a whole and must not deny the holders of securities the opportunity to decide on the merits of the bid.

Rule 21.1

During the course of an offer, or even before the date of the offer if the board of the offeree company has reason to believe that a bona fide offer might be imminent, the board must not, without the approval of the shareholders in general meeting:—
(c) take any action which may result in any offer or bona fide possible offer being frustrated or in shareholders being denied the opportunity to decide on its merits; or
(d)
(i) issue any authorised but unissued shares or transfer or sell, or agree to transfer or sell, any shares out of treasury;
(ii) issue or grant options in respect of any unissued shares;
(iii) create or issue, or permit the creation or issue of, any securities carrying rights of conversion into or subscription for shares;
(iv) sell, dispose of or acquire, or agree to sell, dispose of or acquire, assets of a material amount; or
(v) enter into contracts otherwise than in the ordinary course of business.
The Panel must be consulted in advance if there is any doubt as to whether any proposed action may fall within this Rule.
The notice convening any relevant meeting of shareholders must include information about the offer or anticipated offer.
Where it is felt that:
(A) the proposed action is in pursuance of a contract entered into earlier or another pre-existing obligation; or

(B) a decision to take the proposed action had been taken before the beginning of the period referred to above which:
(i) has been partly or fully implemented before the beginning of that period; or
(ii) has not been partly or fully implemented before the beginning of that period but is in the ordinary course of business,
the Panel must be consulted and its consent to proceed without a shareholders' meeting obtained.

Note 6 to Rule 21.1

The Panel will regard amending or entering into a service contract with, or creating or varying the terms of employment of, a director as entering into a contract ''otherwise than in the ordinary course of business'' for the purpose of this Rule if the new or amended contract or terms constitute an abnormal increase in the emoluments or a significant improvement in the terms of service.

Rule 24.4

The offer document must state (in the case of a securities exchange offer only) whether and in what manner the emoluments of the offeror directors will be affected by the acquisition of the offeree company or by any other associated transaction. If there will be no effect, this must be stated.

Rule 24.5

Unless otherwise agreed with the Panel, the offer document must contain a statement as to whether or not any agreement, arrangement or understanding (including any compensation arrangement) exists between the offeror or any person acting in concert with it and any of the directors, recent directors, shareholders or recent shareholders of the offeree company, or any person interested or recently interested in shares of the offeree company, having any connection with or dependence upon the offer, and full particulars of any such agreement, arrangement or understanding.

Note 3 to Rule 25.1

Where a director has a conflict of interest, he should not normally be joined with the remainder of the board in the expression of its views on the offer and the nature of the conflict should be clearly explained to shareholders. Depending on the circumstances, such a director may have to make the responsibility statement required by Rule 19.2, appropriately amended to make it clear that he does not accept responsibility for the views of the board on the offer. Where the statement relates to a prospectus or an equivalent document, the provisions of the UKLA Rules may affect the position.

Note 1 to Rule 25.4

Particulars in respect of existing service contracts and, where appropriate under Rule 25.4(b), earlier contracts or an appropriate negative statement must be provided as follows:—
(b) the name of the director under contract;
(c) the date of the contract, the unexpired term and details of any notice periods;
(d) full particulars of the director's remuneration including salary and other benefits;
(e) any commission or profit sharing arrangements;
(f) any provision for compensation payable upon early termination of the contract; and
(g) details of any other arrangements which are necessary to enable investors to estimate the possible liability of the company on early termination of the contract.
It is not acceptable to refer to the latest annual report, indicating that information regarding service contracts may be found there, or to state that the contracts are open for inspection at a specified place.

Rule 25.3(a)

(a) The first major circular from the offeree board advising shareholders on an offer (whether recommending acceptance or rejection of the offer) must state:—
(i) details of any relevant securities of the offeror in which the offeree company or any of the directors of the offeree company has an interest or in respect of which it or he has a right to subscribe, in each case specifying the nature of the interests or rights concerned (see Note 5(a) on Rule 8). Similar details of any short positions (whether conditional or absolute and whether in the money or otherwise), including any short position under a derivative, any agreement to sell or any delivery obligation or right to require another person to purchase or take delivery, must also be stated;
(ii) the same details as in (i) above in respect of any relevant securities of the offeree company in relation to each of:
(a) the directors of the offeree company;
(b) any company which is an associate of the offeree company by virtue of paragraph (1) of the definition of associate;
(c) any pension fund of the offeree company or of a company which is an associate of the offeree company by virtue of paragraph (1) of the definition of associate;
(d) any employee benefit trust of the offeree company or of a company which is an associate of the offeree company by virtue of paragraph (1) of the definition of associate;
(e) any connected adviser to the offeree company, to a company which is an associate of the offeree company by virtue of paragraph (1) of the definition of associate or to a person acting in concert with the offeree company;
(f) any person controlling#, controlled by or under the same control as any connected adviser falling within (e) above (except for an exempt principal trader or an exempt fund manager); and
(g) any person who has an arrangement of the kind referred to in Note 6 on Rule 8 with the offeree company or with any person who is an associate of the offeree company by virtue of paragraphs (1), (2), (3) or (4) of the definition of associate;
(ii) in the case of a securities exchange offer, the same details as in (i) above in respect of any relevant securities of the offeror in relation to each of the persons listed in (ii)(b) to (g) above;
(iii) details of any relevant securities of the offeree company and (in the case of a securities exchange offer only) the offeror which the offeree company or any person acting in concert with the offeree company has borrowed or lent, save for any borrowed shares which have been either on-lent or sold; and
(iv) whether the directors of the offeree company intend, in respect of their own beneficial shareholdings, to accept or reject the offer.

Note 2 to Rule 25.4

The Panel will regard as the amendment of a service contract under this Rule any case where the remuneration of an offeree company director is increased within 6 months of the date of the document. Therefore, any such increase must be disclosed in the document and the current and previous levels of remuneration stated.

Rule 27.1

Documents subsequently sent to shareholders of the offeree company by either party must contain details of any material changes in information previously published by or on behalf of the relevant party during the offer period; if there have been no such changes, this must be stated. In particular, the following matters must be updated:—
(a) changes or additions to material contracts, irrevocable commitments or letters of intent (Rules 24.2(a), (c) and (d)(x) and 25.6);
(b) interests and dealings (Rules 24.3 and 25.3);
(c) directors' emoluments (Rule 24.4);
(d) special arrangements (Rule 24.5);
(e) ultimate owner of securities acquired under the offer (Rule 24.8);
(f) arrangements in relation to dealings (Rules 24.12 and 25.5); and
(g) changes to directors' service contracts (Rule 25.4).

Rule 30.1

(a) The offer document should normally be posted to shareholders of the offeree company within 28 days of the announcement of a firm intention to make an offer. The Panel must be consulted if the offer document is not to be posted within this period. On the day of posting, the offeror must put the offer document on display in accordance with Rule 26 and announce in accordance with Rule 2.9 that the offer document has been posted and where the document can be inspected.
(b) At the same time, both the offeror and the offeree company must make the offer document readily available to their employee representatives or, where there are no such representatives, to the employees themselves.

Rule 30.2

(a) The board of the offeree company must publish a circular containing its opinion, as required by Rule 25.1(a), as soon as practicable after publication of the offer document and normally within 14 days and must:
(i) post it to its shareholders; and
(ii) make it readily and promptly available to its employee representatives or, where there are no such representatives, the employees themselves.
On the day of posting, the board of the offeree company must put the circular on display in accordance with Rule 26 and announce in accordance with Rule 2.9 that the circular has been posted and where it can be inspected.
(b) The board of the offeree company must append to the circular containing its opinion a separate opinion from the representatives of its employees on the effects of the offer on employment, provided such opinion is received in good time before publication of that circular.

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5. THE UNITED STATES

5.1. The Securities Exchange Act

Section 13(k) 1. PROHIBITION ON PERSONAL LOANS TO EXECUTIVES.

(1) IN GENERAL.—It shall be unlawful for any issuer (as defined in section 2 of the Sarbanes-Oxley Act of 2002), directly or indirectly, including through any subsidiary, to extend or maintain credit, to arrange for the extension of credit, or to renew an extension of credit, in the form of a personal loan to or for any director or executive officer (or equivalent thereof) of that issuer. An extension of credit maintained by the issuer on the date of enactment of this subsection shall not be subject to the provisions of this subsection, provided that there is no material modification to any term of any such extension of credit or any renewal of any such extension of credit on or after that date of enactment.
(2) LIMITATION.—Paragraph (1) does not preclude any home improvement and manufactured home loans (as that term is defined in section 5 of the Home Owners' Loan Act (12 U.S.C. 1464)), consumer credit (as defined in section 103 of the Truth in Lending Act (15 U.S.C. 1602)), or any extension of credit under an open end credit plan (as defined in section 103 of the Truth in Lending Act (15 U.S.C. 1602)), or a charge card (as defined in section 127(c)(4)(e) of the Truth in Lending Act (15 U.S.C. 1637(c)(4)(e)), or any extension of credit by a broker or dealer registered under section 15 of this title to an employee of that broker or dealer to buy, trade, or carry securities, that is permitted under rules or regulations of the Board of Governors of the Federal Reserve System pursuant to section 7 of this title (other than an extension of credit that would be used to purchase the stock of that issuer), that is—
(A) made or provided in the ordinary course of the consumer credit business of such issuer;
(B) of a type that is generally made available by such issuer to the public; and
(C) made by such issuer on market terms, or terms that are no more favorable than those offered by the issuer to the general public for such extensions of credit.
(3) RULE OF CONSTRUCTION FOR CERTAIN LOANS.—Paragraph (1) does not apply to any loan made or maintained by an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)), if the loan is subject to the insider lending restrictions of section 22(h) of the Federal Reserve Act (12 U.S.C. 375b)."

Section 16(b) [2]

"(b) For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) or a security-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act) involving any such equity security within any period of less than six months, unless such security or security-based swap agreement was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security or security-based swap agreement purchased or of not repurchasing the security or security-based swap agreement sold for a period exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall not be construed to cover any transaction where such beneficial owner as not such both at the time of the purchase and sale, or the sale and purchase, of the security or security-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act) involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection."

[1] http://www.sec.gov/about/laws/sea34.pdf, p. 95-96
[2] http://www.sec.gov/about/laws/sea34.pdf, p. 156-157.

5.2. Sarbanes-Oxley Act

Section 304[3]

"(a) ADDITIONAL COMPENSATION PRIOR TO NONCOMPLIANCE WITH COMMISSION FINANCIAL REPORTING REQUIREMENTS.—If an issuer is required to prepare an accounting restatement due to the material noncompliance of the issuer, as a result of misconduct, with any financial reporting requirement under the securities laws, the chief executive officer and chief financial officer of the issuer shall reimburse the issuer for—
(1) any bonus or other incentive-based or equity-based compensation
received by that person from the issuer during the 12-month period following the first public issuance or filing with the Commission (whichever first occurs) of the financial document embodying such financial reporting requirement; and
(2) any profits realized from the sale of securities of the issuer during that 12-month period.
(b) COMMISSION EXEMPTION AUTHORITY.—The Commission may exempt any person from the application of subsection (a), as it deems necessary and appropriate."

5.3. SEC Selective Disclosure and Insider Trading Regulation

Please see: http://www.sec.gov/rules/final/33-7881.htm

5.4. U.S. Internal Revenue Code

Section 162(a)(1)[4]

(a) In general.--There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including--
(1) a reasonable allowance for salaries or other compensation for personal services actually rendered;"

Section 162(m)

"(m) Certain excessive employee remuneration.--
(1) In general.--In the case of any publicly held corporation, no deduction shall be allowed under this chapter for applicable employee remuneration with respect to any covered employee to the extent that the amount of such remuneration for the taxable year with respect to such employee exceeds $1,000,000.
(2) Publicly held corporation.--For purposes of this subsection, the term “publicly held corporation” means any corporation issuing any class of common equity securities required to be registered under section 12 of the Securities Exchange Act of 1934.
(3) Covered employee.--For purposes of this subsection, the term “covered employee” means any employee of the taxpayer if--
(A) as of the close of the taxable year, such employee is the chief executive officer of the taxpayer or is an individual acting in such a capacity, or
(B) the total compensation of such employee for the taxable year is required to be reported to shareholders under the Securities Exchange Act of 1934 by reason of such employee being among the 4 highest compensated officers for the taxable year (other than the chief executive officer).
(4) Applicable employee remuneration.--For purposes of this subsection--
(A) In general.--Except as otherwise provided in this paragraph, the term “applicable employee remuneration” means, with respect to any covered employee for any taxable year, the aggregate amount allowable as a deduction under this chapter for such taxable year (determined without regard to this subsection) for remuneration for services performed by such employee (whether or not during the taxable year).
(B) Exception for remuneration payable on commission basis.--The term “applicable employee remuneration” shall not include any remuneration payable on a commission basis solely on

[3] http://www.sec.gov/about/laws/soa2002.pdf.
[4] Westlaw: United States Code Annotated, (C) 2008 Thomson/West. No Claim to Orig. U.S. Govt. Works.

account of income generated directly by the individual performance of the individual to whom such remuneration is payable.
(C) Other performance-based compensation.--The term “applicable employee remuneration” shall not include any remuneration payable solely on account of the attainment of one or more performance goals, but only if--
(i) the performance goals are determined by a compensation committee of the board of directors of the taxpayer which is comprised solely of 2 or more outside directors,
(ii) the material terms under which the remuneration is to be paid, including the performance goals, are disclosed to shareholders and approved by a majority of the vote in a separate shareholder vote before the payment of such remuneration, and
(iii) before any payment of such remuneration, the compensation committee referred to in clause (i) certifies that the performance goals and any other material terms were in fact satisfied.
(D) Exception for existing binding contracts.--The term “applicable employee remuneration” shall not include any remuneration payable under a written binding contract which was in effect on February 17, 1993, and which was not modified thereafter in any material respect before such remuneration is paid.
(E) Remuneration.--For purposes of this paragraph, the term “remuneration” includes any remuneration (including benefits) in any medium other than cash, but shall not include--
(i) any payment referred to in so much of section 3121(a)(5) as precedes subparagraph (E) thereof, and
(ii) any benefit provided to or on behalf of an employee if at the time such benefit is provided it is reasonable to believe that the employee will be able to exclude such benefit from gross income under this chapter.
For purposes of clause (i), section 3121(a)(5) shall be applied without regard to section 3121(v)(1).
(F) Coordination with disallowed golden parachute payments.--The dollar limitation contained in paragraph (1) shall be reduced (but not below zero) by the amount (if any) which would have been included in the applicable employee remuneration of the covered employee for the taxable year but for being disallowed under section 280G.
(G) Coordination with excise tax on specified stock compensation.--The dollar limitation contained in paragraph (1) with respect to any covered employee shall be reduced (but not below zero) by the amount of any payment (with respect to such employee) of the tax imposed by section 4985 directly or indirectly by the expatriated corporation (as defined in such section) or by any member of the expanded affiliated group (as defined in such section) which includes such corporation."

Section 280G

"(a) General rule.--No deduction shall be allowed under this chapter for any excess parachute payment.
(b) Excess parachute payment.--For purposes of this section--
(1) In general.--The term “excess parachute payment” means an amount equal to the excess of any parachute payment over the portion of the base amount allocated to such payment.
(2) Parachute payment defined.--
(A) In general.--The term “parachute payment” means any payment in the nature of compensation to (or for the benefit of) a disqualified individual if--
(i) such payment is contingent on a change--
(I) in the ownership or effective control of the corporation, or
(II) in the ownership of a substantial portion of the assets of the corporation, and
(ii) the aggregate present value of the payments in the nature of compensation to (or for the benefit of) such individual which are contingent on such change equals or exceeds an amount equal to 3 times the base amount.
For purposes of clause (ii), payments not treated as parachute payments under paragraph (4)(A), (5), or (6) shall not be taken into account.
(B) Agreements.--The term “parachute payment” shall also include any payment in the nature of compensation to (or for the benefit of) a disqualified individual if such payment is made pursuant to an agreement which violates any generally enforced securities laws or regulations. In any proceeding involving the issue of whether any payment made to a disqualified individual is a parachute payment on account of a violation of any generally enforced securities laws or

regulations, the burden of proof with respect to establishing the occurrence of a violation of such a law or regulation shall be upon the Secretary.
(C) Treatment of certain agreements entered into within 1 year before change of ownership.--For purposes of subparagraph (A)(i), any payment pursuant to--
(i) an agreement entered into within 1 year before the change described in subparagraph (A)(i), or
(ii) an amendment made within such 1-year period of a previous agreement,
shall be presumed to be contingent on such change unless the contrary is establish by clear and convincing evidence.
(3) Base amount.--
(A) In general.--The term “base amount” means the individual's annualized includible compensation for the base period.
(B) Allocation.--The portion of the base amount allocated to any parachute payment shall be an amount which bears the same ratio to the base amount as--
(i) the present value of such payment, bears to
(ii) the aggregate present value of all such payments.
(4) Treatment of amounts which taxpayer establishes as reasonable compensation.--In the case of any payment described in paragraph (2)(A)--
(A) the amount treated as a parachute payment shall not include the portion of such payment which the taxpayer establishes by clear and convincing evidence is reasonable compensation for personal services to be rendered on or after the date of the change described in paragraph (2)(A)(i), and
(B) the amount treated as an excess parachute payment shall be reduced by the portion of such payment which the taxpayer establishes by clear and convincing evidence is reasonable compensation for personal services actually rendered before the date of the change described in paragraph (2)(A)(i).
For purposes of subparagraph (B), reasonable compensation for services actually rendered before the date of the change described in paragraph (2)(A)(i) shall be first offset against the base amount.
(5) Exemption for small business corporations, etc.--
(A) In general.--Notwithstanding paragraph (2), the term “parachute payment” does not include--
(i) any payment to a disqualified individual with respect to a corporation which (immediately before the change described in paragraph (2)(A)(i)) was a small business corporation (as defined in section 1361(b) but without regard to paragraph (1)(C) thereof), and
(ii) any payment to a disqualified individual with respect to a corporation (other than a corporation described in clause (i)) if--
(I) immediately before the change described in paragraph (2)(A)(i), no stock in such corporation was readily tradeable on an established securities market or otherwise, and
(II) the shareholder approval requirements of subparagraph (B) are met with respect to such payment.
The Secretary may, by regulations, prescribe that the requirements of subclause (I) of clause (ii) are not met where a substantial portion of the assets of any entity consists (directly or indirectly) of stock in such corporation and interests in such other entity are readily tradeable on an established securities market, or otherwise. Stock described in section 1504(a)(4) shall not be taken into account under clause (ii)(I) if the payment does not adversely affect the shareholder's redemption and liquidation rights.
(B) Shareholder approval requirements.--The shareholder approval requirements of this subparagraph are met with respect to any payment if--
(i) such payment was approved by a vote of the persons who owned, immediately before the change described in paragraph (2)(A)(i), more than 75 percent of the voting power of all outstanding stock of the corporation, and
(ii) there was adequate disclosure to shareholders of all material facts concerning all payments which (but for this paragraph) would be parachute payments with respect to a disqualified individual.
The regulations prescribed under subsection (e) shall include regulations providing for the application of this subparagraph in the case of shareholders which are not individuals (including the treatment of nonvoting interests in an entity which is a shareholder) and where an entity holds a de minimis amount of stock in the corporation.
(6) Exemption for payments under qualified plans.--Notwithstanding paragraph (2), the term “parachute payment” shall not include any payment to or from--

(A) a plan described in section 401(a) which includes a trust exempt from tax under section 501(a),
(B) an annuity plan described in section 403(a),
(C) a simplified employee pension (as defined in section 408(k)), or
(D) a simple retirement account described in section 408(p).
(c) Disqualified individuals.--For purposes of this section, the term “disqualified individual” means any individual who is--
(1) an employee, independent contractor, or other person specified in regulations by the Secretary who performs personal services for any corporation, and
(2) is an officer, shareholder, or highly-compensated individual.
For purposes of this section, a personal service corporation (or similar entity) shall be treated as an individual. For purposes of paragraph (2), the term “highly-compensated individual” only includes an individual who is (or would be if the individual were an employee) a member of the group consisting of the highest paid 1 percent of the employees of the corporation or, if less, the highest paid 250 employees of the corporation.
(d) Other definitions and special rules.--For purposes of this section--
(1) Annualized includible compensation for base period.--The term “annualized includible compensation for the base period” means the average annual compensation which--
(A) was payable by the corporation with respect to which the change in ownership or control described in paragraph (2)(A) of subsection (b) occurs, and
(B) was includible in the gross income of the disqualified individual for taxable years in the base period.
(2) Base period.--The term “base period” means the period consisting of the most recent 5 taxable years ending before the date on which the change in ownership or control described in paragraph (2)(A) of subsection (b) occurs (or such portion of such period during which the disqualified individual performed personal services for the corporation).
(3) Property transfers.--Any transfer of property--
(A) shall be treated as a payment, and
(B) shall be taken into account as its fair market value.
(4) Present value.--Present value shall be determined by using a discount rate equal to 120 percent of the applicable Federal rate (determined under section 1274(d)), compounded semiannually.
(5) Treatment of affiliated groups.--Except as otherwise provided in regulations, all members of the same affiliated group (as defined in section 1504, determined without regard to section 1504(b)) shall be treated as 1 corporation for purposes of this section. Any person who is an officer of any member of such group shall be treated as an officer of such 1 corporation.
(e) Regulations.--The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of this section (including regulations for the application of this section in the case of related corporations and in the case of personal service corporations)."

Section 409A

"(a) Rules relating to constructive receipt.--
(1) Plan failures.--
(A) Gross income inclusion.--
(i) In general.--If at any time during a taxable year a nonqualified deferred compensation plan--
(I) fails to meet the requirements of paragraphs (2), (3), and (4), or
(II) is not operated in accordance with such requirements,
all compensation deferred under the plan for the taxable year and all preceding taxable years shall be includible in gross income for the taxable year to the extent not subject to a substantial risk of forfeiture and not previously included in gross income.
(ii) Application only to affected participants.--Clause (i) shall only apply with respect to all compensation deferred under the plan for participants with respect to whom the failure relates.
(B) Interest and additional tax payable with respect to previously deferred compensation.--
(i) In general.--If compensation is required to be included in gross income under subparagraph (A) for a taxable year, the tax imposed by this chapter for the taxable year shall be increased by the sum of--
(I) the amount of interest determined under clause (ii), and

(II) an amount equal to 20 percent of the compensation which is required to be included in gross income.
(ii) Interest.--For purposes of clause (i), the interest determined under this clause for any taxable year is the amount of interest at the underpayment rate plus 1 percentage point on the underpayments that would have occurred had the deferred compensation been includible in gross income for the taxable year in which first deferred or, if later, the first taxable year in which such deferred compensation is not subject to a substantial risk of forfeiture.
(2) Distributions.--
(A) In general.--The requirements of this paragraph are met if the plan provides that compensation deferred under the plan may not be distributed earlier than--
(i) separation from service as determined by the Secretary (except as provided in subparagraph (B)(i)),
(ii) the date the participant becomes disabled (within the meaning of subparagraph (C)),
(iii) death,
(iv) a specified time (or pursuant to a fixed schedule) specified under the plan at the date of the deferral of such compensation,
(v) to the extent provided by the Secretary, a change in the ownership or effective control of the corporation, or in the ownership of a substantial portion of the assets of the corporation, or
(vi) the occurrence of an unforeseeable emergency.
(B) Special rules.--
(i) Specified employees.--In the case of any specified employee, the requirement of subparagraph (A)(i) is met only if distributions may not be made before the date which is 6 months after the date of separation from service (or, if earlier, the date of death of the employee). For purposes of the preceding sentence, a specified employee is a key employee (as defined in section 416(i) without regard to paragraph (5) thereof) of a corporation any stock in which is publicly traded on an established securities market or otherwise.
(ii) Unforeseeable emergency.--For purposes of subparagraph (A)(vi)--
(I) In general.--The term “unforeseeable emergency” means a severe financial hardship to the participant resulting from an illness or accident of the participant, the participant's spouse, or a dependent (as defined in section 152(a)) of the participant, loss of the participant's property due to casualty, or other similar extraordinary and unforeseeable circumstances arising as a result of events beyond the control of the participant.
(II) Limitation on distributions.--The requirement of subparagraph (A)(vi) is met only if, as determined under regulations of the Secretary, the amounts distributed with respect to an emergency do not exceed the amounts necessary to satisfy such emergency plus amounts necessary to pay taxes reasonably anticipated as a result of the distribution, after taking into account the extent to which such hardship is or may be relieved through reimbursement or compensation by insurance or otherwise or by liquidation of the participant's assets (to the extent the liquidation of such assets would not itself cause severe financial hardship).
(C) Disabled.--For purposes of subparagraph (A)(ii), a participant shall be considered disabled if the participant--
(i) is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or can be expected to last for a continuous period of not less than 12 months, or
(ii) is, by reason of any medically determinable physical or mental impairment which can be expected to result in death or can be expected to last for a continuous period of not less than 12 months, receiving income replacement benefits for a period of not less than 3 months under an accident and health plan covering employees of the participant's employer.
(3) Acceleration of benefits.--The requirements of this paragraph are met if the plan does not permit the acceleration of the time or schedule of any payment under the plan, except as provided in regulations by the Secretary.
(4) Elections.--
(A) In general.--The requirements of this paragraph are met if the requirements of subparagraphs (B) and (C) are met.
(B) Initial deferral decision.--
(i) In general.--The requirements of this subparagraph are met if the plan provides that compensation for services performed during a taxable year may be deferred at the participant's election only if the election to defer such compensation is made not later than the close of the preceding taxable year or at such other time as provided in regulations.

(ii) First year of eligibility.--In the case of the first year in which a participant becomes eligible to participate in the plan, such election may be made with respect to services to be performed subsequent to the election within 30 days after the date the participant becomes eligible to participate in such plan.
(iii) Performance-based compensation.--In the case of any performance-based compensation based on services performed over a period of at least 12 months, such election may be made no later than 6 months before the end of the period.
(C) Changes in time and form of distribution.--The requirements of this subparagraph are met if, in the case of a plan which permits under a subsequent election a delay in a payment or a change in the form of payment--
(i) the plan requires that such election may not take effect until at least 12 months after the date on which the election is made,
(ii) in the case of an election related to a payment not described in clause (ii), (iii), or (vi) of paragraph (2)(A), the plan requires that the payment with respect to which such election is made be deferred for a period of not less than 5 years from the date such payment would otherwise have been made, and
(iii) the plan requires that any election related to a payment described in paragraph (2)(A)(iv) may not be made less than 12 months prior to the date of the first scheduled payment under such paragraph.
(b) Rules relating to funding.--
(1) Offshore property in a trust.--In the case of assets set aside (directly or indirectly) in a trust (or other arrangement determined by the Secretary) for purposes of paying deferred compensation under a nonqualified deferred compensation plan, for purposes of section 83 such assets shall be treated as property transferred in connection with the performance of services whether or not such assets are available to satisfy claims of general creditors--
(A) at the time set aside if such assets (or such trust or other arrangement) are located outside of the United States, or
(B) at the time transferred if such assets (or such trust or other arrangement) are subsequently transferred outside of the United States.
This paragraph shall not apply to assets located in a foreign jurisdiction if substantially all of the services to which the nonqualified deferred compensation relates are performed in such jurisdiction.
(2) Employer's financial health.--In the case of compensation deferred under a nonqualified deferred compensation plan, there is a transfer of property within the meaning of section 83 with respect to such compensation as of the earlier of-
(A) the date on which the plan first provides that assets will become restricted to the provision of benefits under the plan in connection with a change in the employer's financial health, or
(B) the date on which assets are so restricted, whether or not such assets are available to satisfy claims of general creditors.
(3) Treatment of employer's defined benefit plan during restricted period.--
(A) In general.--If--
(i) during any restricted period with respect to a single-employer defined benefit plan, assets are set aside or reserved (directly or indirectly) in a trust (or other arrangement as determined by the Secretary) or transferred to such a trust or other arrangement for purposes of paying deferred compensation of an applicable covered employee under a nonqualified deferred compensation plan of the plan sponsor or member of a controlled group which includes the plan sponsor, or
(ii) a nonqualified deferred compensation plan of the plan sponsor or member of a controlled group which includes the plan sponsor provides that assets will become restricted to the provision of benefits under the plan in connection with such restricted period (or other similar financial measure determined by the Secretary) with respect to the defined benefit plan, or assets are so restricted,
such assets shall, for purposes of section 83, be treated as property transferred in connection with the performance of services whether or not such assets are available to satisfy claims of general creditors. Clause (i) shall not apply with respect to any assets which are so set aside before the restricted period with respect to the defined benefit plan.
(B) Restricted period.--For purposes of this section, the term “restricted period” means, with respect to any plan described in subparagraph (A)--
(i) any period during which the plan is in at-risk status (as defined in section 430(i));
(ii) any period the plan sponsor is a debtor in a case under title 11, United States Code, or similar Federal or State law, and

(iii) the 12-month period beginning on the date which is 6 months before the termination date of the plan if, as of the termination date, the plan is not sufficient for benefit liabilities (within the meaning of section 4041 of the Employee Retirement Income Security Act of 1974).
(C) Special rule for payment of taxes on deferred compensation included in income.--If an employer provides directly or indirectly for the payment of any Federal, State, or local income taxes with respect to any compensation required to be included in gross income by reason of this paragraph--
(i) interest shall be imposed under subsection (a)(1)(B)(i)(I) on the amount of such payment in the same manner as if such payment was part of the deferred compensation to which it relates,
(ii) such payment shall be taken into account in determining the amount of the additional tax under subsection (a)(1)(B)(i)(II) in the same manner as if such payment was part of the deferred compensation to which it relates, and
(iii) no deduction shall be allowed under this title with respect to such payment.
(D) Other definitions.--For purposes of this section--
(i) Applicable covered employee.--The term “applicable covered employee” means any--
(I) covered employee of a plan sponsor,
(II) covered employee of a member of a controlled group which includes the plan sponsor, and
(III) former employee who was a covered employee at the time of termination of employment with the plan sponsor or a member of a controlled group which includes the plan sponsor.
(ii) Covered employee.--The term “covered employee” means an individual described in section 162(m)(3) or an individual subject to the requirements of section 16(a) of the Securities Exchange Act of 1934.

(4) Income inclusion for offshore trusts and employer's financial health.--For each taxable year that assets treated as transferred under this subsection remain set aside in a trust or other arrangement subject to paragraph (1), (2), or (3), any increase in value in, or earnings with respect to, such assets shall be treated as an additional transfer of property under this subsection (to the extent not previously included in income).

(5) Interest on tax liability payable with respect to transferred property.--
(A) In general.--If amounts are required to be included in gross income by reason of paragraph (1), (2), or (3) for a taxable year, the tax imposed by this chapter for such taxable year shall be increased by the sum of--
(i) the amount of interest determined under subparagraph (B), and
(ii) an amount equal to 20 percent of the amounts required to be included in gross income.
(B) Interest.--For purposes of subparagraph (A), the interest determined under this subparagraph for any taxable year is the amount of interest at the underpayment rate plus 1 percentage point on the underpayments that would have occurred had the amounts so required to be included in gross income by paragraph (1), (2), or (3) been includible in gross income for the taxable year in which first deferred or, if later, the first taxable year in which such amounts are not subject to a substantial risk of forfeiture.
(c) No inference on earlier income inclusion or requirement of later inclusion.--Nothing in this section shall be construed to prevent the inclusion of amounts in gross income under any other provision of this chapter or any other rule of law earlier than the time provided in this section. Any amount included in gross income under this section shall not be required to be included in gross income under any other provision of this chapter or any other rule of law later than the time provided in this section.
(d) Other definitions and special rules.--For purposes of this section:
(1) Nonqualified deferred compensation plan.--The term “nonqualified deferred compensation plan” means any plan that provides for the deferral of compensation, other than--
(A) a qualified employer plan, and
(B) any bona fide vacation leave, sick leave, compensatory time, disability pay, or death benefit plan.
(2) Qualified employer plan.--The term “qualified employer plan” means--
(A) any plan, contract, pension, account, or trust described in subparagraph (A) or (B) of section 219(g)(5) (without regard to subparagraph (A)(iii)),
(B) any eligible deferred compensation plan (within the meaning of section 457(b)), and
(C) any plan described in section 415(m).
(3) Plan includes arrangements, etc.--The term “plan” includes any agreement or arrangement, including an agreement or arrangement that includes one person.

(4) Substantial risk of forfeiture.--The rights of a person to compensation are subject to a substantial risk of forfeiture if such person's rights to such compensation are conditioned upon the future performance of substantial services by any individual.
(5) Treatment of earnings.--References to deferred compensation shall be treated as including references to income (whether actual or notional) attributable to such compensation or such income.
(6) Aggregation rules.--Except as provided by the Secretary, rules similar to the rules of subsections (b) and (c) of section 414 shall apply.
(e) Regulations.--The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of this section, including regulations--
(1) providing for the determination of amounts of deferral in the case of a nonqualified deferred compensation plan which is a defined benefit plan,
(2) relating to changes in the ownership and control of a corporation or assets of a corporation for purposes of subsection (a)(2)(A)(v),
(3) exempting arrangements from the application of subsection (b) if such arrangements will not result in an improper deferral of United States tax and will not result in assets being effectively beyond the reach of creditors,
(4) defining financial health for purposes of subsection (b)(2), and
(5) disregarding a substantial risk of forfeiture in cases where necessary to carry out the purposes of this section."

Sec. 421. General rules

(a) Effect of qualifying transfer
If a share of stock is transferred to an individual in a transfer in respect of which the requirements of section 422(a) or 423(a) are met--
(1) no income shall result at the time of the transfer of such share to the individual upon his exercise of the option with respect tosuch share;
(2) no deduction under section 162 (relating to trade or business expenses) shall be allowable at any time to the employer corporation, a parent or subsidiary corporation of such corporation, or a corporation issuing or assuming a stock option in a transaction to which section 424(a) applies, with respect to the share so transferred; and
(3) no amount other than the price paid under the option shall be considered as received by any of such corporations for the share so transferred.

(b) Effect of disqualifying disposition
If the transfer of a share of stock to an individual pursuant to his exercise of an option would otherwise meet the requirements of section 422(a) or 423(a) except that there is a failure to meet any of the
holding period requirements of section 422(a)(1) or 423(a)(1), then any increase in the income of such individual or deduction from the income of his employer corporation for the taxable year in which such exercise occurred attributable to such disposition, shall be treated as an increase in income or a deduction from income in the taxable year of such individual or of such employer corporation in which such disposition occurred. No amount shall be required to be deducted and withheld under chapter 24 with respect to any increase in income attributable to a disposition described in the preceding sentence.

(c) Exercise by estate
(1) In general
If an option to which this part applies is exercised after the death of the employee by the estate of the decedent, or by a person who acquired the right to exercise such option by bequest or inheritance or by reason of the death of the decedent, the provisions of subsection (a) shall apply to the same extent as if the option had been exercised by the decedent, except that--
(A) the holding period and employment requirements of sections 422(a) and 423(a) shall not apply, and
(B) any transfer by the estate of stock acquired shall be considered a disposition of such stock for purposes of section 423(c).

(2) Deduction for estate tax

If an amount is required to be included under section 423(c) in gross income of the estate of the deceased employee or of a person described in paragraph (1), there shall be allowed to the estate or such person a deduction with respect to the estate tax attributable to the inclusion in the taxable estate of the deceased employee of the net value for estate tax purposes of the option. For this purpose, the deduction shall be determined under section 691(c) as if the option acquired from the deceased employee were an item of gross income in respect of the decedent under section 691 and as if the amount includible in gross income under section 423(c) were an amount included in gross income under section 691 in respect of such item of gross income.

(3) Basis of shares acquired
In the case of a share of stock acquired by the exercise of an option to which paragraph (1) applies--
(A) the basis of such share shall include so much of the basis of the option as is attributable to such share; except that the basis of such share shall be reduced by the excess (if any) of (i) the amount which would have been includible in gross income under section 423(c) if the employee had exercised the option on the date of his death and had held the share acquired pursuant to such exercise at the time of his death, over (ii) the amount which is includible in gross income under such section; and
(B) the last sentence of section 423(c) shall apply only to the extent that the amount includible in gross income under such section exceeds so much of the basis of the option as is attributable to such share.

(d) Certain sales to comply with conflict-of-interest requirements
If--
(1) a share of stock is transferred to an eligible person (as defined in section 1043(b)(1)) pursuant to such person's exercise of an option to which this part applies, and
(2) such share is disposed of by such person pursuant to a certificate of divestiture (as defined in section 1043(b)(2)),
such disposition shall be treated as meeting the requirements of section 422(a)(1) or 423(a)(1), whichever is applicable.

Section 422

"(a) In general.--Section 421(a) shall apply with respect to the transfer of a share of stock to an individual pursuant to his exercise of an incentive stock option if--
(1) no disposition of such share is made by him within 2 years from the date of the granting of the option nor within 1 year after the transfer of such share to him, and
(2) at all times during the period beginning on the date of the granting of the option and ending on the day 3 months before the date of such exercise, such individual was an employee of either the corporation granting such option, a parent or subsidiary corporation of such corporation, or a corporation or a parent or subsidiary corporation of such corporation issuing or assuming a stock option in a transaction to which section 424(a) applies.
(b) Incentive stock option.--For purposes of this part, the term “incentive stock option” means an option granted to an individual for any reason connected with his employment by a corporation, if granted by the employer corporation or its parent or subsidiary corporation, to purchase stock of any of such corporations, but only if--
(1) the option is granted pursuant to a plan which includes the aggregate number of shares which may be issued under options and the employees (or class of employees) eligible to receive options, and which is approved by the stockholders of the granting corporation within 12 months before or after the date such plan is adopted;
(2) such option is granted within 10 years from the date such plan is adopted, or the date such plan is approved by the stockholders, whichever is earlier;
(3) such option by its terms is not exercisable after the expiration of 10 years from the date such option is granted;
(4) the option price is not less than the fair market value of the stock at the time such option is granted;
(5) such option by its terms is not transferable by such individual otherwise than by will or the laws of descent and distribution, and is exercisable, during his lifetime, only by him; and

(6) such individual, at the time the option is granted, does not own stock possessing more than 10 percent of the total combined voting power of all classes of stock of the employer corporation or of its parent or subsidiary corporation.
Such term shall not include any option if (as of the time the option is granted) the terms of such option provide that it will not be treated as an incentive stock option.
(c) Special rules.--
(1) Good faith efforts to value stock.--If a share of stock is transferred pursuant to the exercise by an individual of an option which would fail to qualify as an incentive stock option under subsection (b) because there was a failure in an attempt, made in good faith, to meet the requirement of subsection (b)(4), the requirement of subsection (b)(4) shall be considered to have been met. To the extent provided in regulations by the Secretary, a similar rule shall apply for purposes of subsection (d).

(2) Certain disqualifying dispositions where amount realized is less than value at exercise.--If--
(A) an individual who has acquired a share of stock by the exercise of an incentive stock option makes a disposition of such share within either of the periods described in subsection (a)(1), and
(B) such disposition is a sale or exchange with respect to which a loss (if sustained) would be recognized to such individual,
then the amount which is includible in the gross income of such individual, and the amount which is deductible from the income of his employer corporation, as compensation attributable to the exercise of such option shall not exceed the excess (if any) of the amount realized on such sale or exchange over the adjusted basis of such share.
(3) Certain transfers by insolvent individuals.--If an insolvent individual holds a share of stock acquired pursuant to his exercise of an incentive stock option, and if such share is transferred to a trustee, receiver, or other similar fiduciary in any proceeding under title 11 or any other similar insolvency proceeding, neither such transfer, nor any other transfer of such share for the benefit of his creditors in such proceeding, shall constitute a disposition of such share for purposes of subsection (a)(1).
(4) Permissible provisions.--An option which meets the requirements of subsection (b) shall be treated as an incentive stock option even if--
(A) the employee may pay for the stock with stock of the corporation granting the option,
(B) the employee has a right to receive property at the time of exercise of the option, or
(C) the option is subject to any condition not inconsistent with the provisions of subsection (b).
Subparagraph (B) shall apply to a transfer of property (other than cash) only if section 83 applies to the property so transferred.
(5) 10-percent shareholder rule.--Subsection (b)(6) shall not apply if at the time such option is granted the option price is at least 110 percent of the fair market value of the stock subject to the option and such option by its terms is not exercisable after the expiration of 5 years from the date such option is granted.
(6) Special rule when disabled.--For purposes of subsection (a)(2), in the case of an employee who is disabled (within the meaning of section 22(e)(3)), the 3-month period of subsection (a)(2) shall be 1 year.
(7) Fair market value.--For purposes of this section, the fair market value of stock shall be determined without regard to any restriction other than a restriction which, by its terms, will never lapse.
(d) $100,000 per year limitation.--
(1) In general.--To the extent that the aggregate fair market value of stock with respect to which incentive stock options (determined without regard to this subsection) are exercisable for the 1st time by any individual during any calendar year (under all plans of the individual's employer corporation and its parent and subsidiary corporations) exceeds $100,000, such options shall be treated as options which are not incentive stock options.
(2) Ordering rule.--Paragraph (1) shall be applied by taking options into account in the order in which they were granted.
(3) Determination of fair market value.--For purposes of paragraph (1), the fair market value of any stock shall be determined as of the time the option with respect to such stock is granted."

Section 423

"(a) General rule.--Section 421(a) shall apply with respect to the transfer of a share of stock to an individual pursuant to his exercise of an option granted after December 31, 1963, under an employee stock purchase plan (as defined in subsection (b)) if--
(1) no disposition of such share is made by him within 2 years after the date of the granting of the option nor within 1 year after the transfer of such share to him; and
(2) at all times during the period beginning with the date of the granting of the option and ending on the day 3 months before the date of such exercise, he is an employee of the corporation granting such option, a parent or subsidiary corporation of such corporation, or a corporation or a parent or subsidiary corporation of such corporation issuing or assuming a stock option in a transaction to which section 424(a) applies.
(b) Employee stock purchase plan.--For purposes of this part, the term “employee stock purchase plan” means a plan which meets the following requirements:
(1) the plan provides that options are to be granted only to employees of the employer corporation or of its parent or subsidiary corporation to purchase stock in any such corporation;
(2) such plan is approved by the stockholders of the granting corporation within 12 months before or after the date such plan is adopted;
(3) under the terms of the plan, no employee can be granted an option if such employee, immediately after the option is granted, owns stock possessing 5 percent or more of the total combined voting power or value of all classes of stock of the employer corporation or of its parent or subsidiary corporation. For purposes of this paragraph, the rules of section 424(d) shall apply in determining the stock ownership of an individual, and stock which the employee may purchase under outstanding options shall be treated as stock owned by the employee;
(4) under the terms of the plan, options are to be granted to all employees of any corporation whose employees are granted any of such options by reason of their employment by such corporation, except that there may be excluded--

(A) employees who have been employed less than 2 years,
(B) employees whose customary employment is 20 hours or less per week,
(C) employees whose customary employment is for not more than 5 months in any calendar year, and
(D) highly compensated employees (within the meaning of section 414(q));
(5) under the terms of the plan, all employees granted such options shall have the same rights and privileges, except that the amount of stock which may be purchased by any employee under such option may bear a uniform relationship to the total compensation, or the basic or regular rate of compensation, of employees, and the plan may provide that no employee may purchase more than a maximum amount of stock fixed under the plan;
(6) under the terms of the plan, the option price is not less than the lesser of--
(A) an amount equal to 85 percent of the fair market value of the stock at the time such option is granted, or
(B) an amount which under the terms of the option may not be less than 85 percent of the fair market value of the stock at the time such option is exercised;
(7) under the terms of the plan, such option cannot be exercised after the expiration of--
(A) 5 years from the date such option is granted if, under the terms of such plan, the option price is to be not less than 85 percent of the fair market value of such stock at the time of the exercise of the option, or
(B) 27 months from the date such option is granted, if the option price is not determinable in the manner described in subparagraph (A);
(8) under the terms of the plan, no employee may be granted an option which permits his rights to purchase stock under all such plans of his employer corporation and its parent and subsidiary corporations to accrue at a rate which exceeds $25,000 of fair market value of such stock (determined at the time such option is granted) for each calendar year in which such option is outstanding at any time. For purposes of this paragraph--
(A) the right to purchase stock under an option accrues when the option (or any portion thereof) first becomes exercisable during the calendar year;
(B) the right to purchase stock under an option accrues at the rate provided in the option, but in no case may such rate exceed $25,000 of fair market value of such stock (determined at the time such option is granted) for any one calendar year; and
(C) a right to purchase stock which has accrued under one option granted pursuant to the plan may not be carried over to any other option; and

(9) under the terms of the plan, such option is not transferable by such individual otherwise than by will or the laws of descent and distribution, and is exercisable, during his lifetime, only by him.
For purposes of paragraphs (3) to (9), inclusive, where additional terms are contained in an offering made under a plan, such additional terms shall, with respect to options exercised under such offering, be treated as a part of the terms of such plan.
(c) Special rule where option price is between 85 percent and 100 percent of value of stock.--If the option price of a share of stock acquired by an individual pursuant to a transfer to which subsection (a) applies was less than 100 percent of the fair market value of such share at the time such option was granted, then, in the event of any disposition of such share by him which meets the holding period requirements of subsection (a), or in the event of his death (whenever occurring) while owning such share, there shall be included as compensation (and not as gain upon the sale or exchange of a capital asset) in his gross income, for the taxable year in which falls the date of such disposition or for the taxable year closing with his death, whichever applies, an amount equal to the lesser of--
(1) the excess of the fair market value of the share at the time of such disposition or death over the amount paid for the share under the option, or
(2) the excess of the fair market value of the share at the time the option was granted over the option price.
If the option price is not fixed or determinable at the time the option is granted, then for purposes of this subsection, the option price shall be determined as if the option were exercised at such time. In the case of the disposition of such share by the individual, the basis of the share in his hands at the time of such disposition shall be increased by an amount equal to the amount so includible in his gross income. No amount shall be required to be deducted and withheld under chapter 24 with respect to any amount treated as compensation under this subsection."