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Who is not afraid of being a company director

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General report

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The position of a director/managing director of a company has changed substantially during the past couple of years. Legislative changes, closer monitoring by shareholders and the international economic and financial crisis have contributed to an increased attention towards management of companies. The expectations towards directors and managing directors have become much higher. Last but not least, also the media have developed a particular interest in company management, in particular, the remuneration of top management.

The purpose of this General Report is to provide an overview of the different national regulations in relation to the status of company directors and their changing roles within companies or multinational groups. We don't go too much in detail, because all national reports are available.

We can establish that the different jurisdictions are heavily influenced by the US corporate law model with the introduction of the CEO-CFO title and function, different committees within the company, corporate governance models and alike.

We received the input from 11 countries and would like to thank the national reporters for their excellent work. The following countries and reporters contributed to this WS: the Netherlands (Thea Vlot, Karol Hillebrandt, Jeanette Jacobs), Sweden (Asa Gotthardsson), Germany (Jan-Ove Becker, Philippe Wiesenecker), Denmark (Rikke Line Lyngaae Rasmussen), France (Clémence Colin), Belgium (Tom Claeys), Switzerland (Jérôme Nicolas), Latvia (Indrikis Liepa), Italy (Emiliano Ganzarolli), Hungary (György Wellmann), UK (Hester Jewitt), China (Jun Yang).

Dylan Casaer

1. The legal position/status of a director and/or managing director in the different jurisdictions ?

General

We see that in the different jurisdictions the members of the Board of Directors are appointed by the General Assembly of Shareholders. The managing director (often referred to as CEO) is appointed by the Board of Directors to take the responsibility for the daily management of the company. Obviously differences exist in the different jurisdictions depending on the legal personality of the company.

In France it is possible that the functions of Managing Director and Chairman of the Board are held by the same person, who is then typically referred to as “Président Directeur Général”. Also Switzerland knows and applies this concept.

Until present Latvia does not know the concept of a CEO but this might obviously change in the future.

Interesting is also that Germany has a concept of an independent Supervisory Board (“Aufsichtsrat”) that consists of members appointed by the shareholders as representatives of the employees (one third or even half of the members).

Status of the director or managing director

We see that in the different jurisdictions the status of a director, MD or CEO is considered differently, based on local customs and differences between the jurisdictions.

In *Belgium* a company director cannot be an employee, because this would place him in a situation of dependency towards the company, however for other responsibilities the director carries out within the company he can be – besides his mandate of director – an employee of the company. A managing director however can have the status of employee.

In the *Netherlands* a director can be an employee, including statutory employee protections such as rights in case of dismissal.

In *Sweden* a managing director is exempted from employment protection under mandatory laws, but at the same time benefits from other aspects of the employee status.

In *Denmark* the rights and obligations of a CEO are regulated not by law, but only by contract. He can be either an employee or a self-employed person. Danish Courts developed a number of criteria as guidelines to determine the status.

France knows a similar system to the Belgian system, where directors can only have a employment relationship if this is an “effective job” with a content different from their mandate as director.

Switzerland more or less follows the same concept. Director or managing director are considered to have “a sui generis contract” similar to a mandate.

In *Latvia* a director or managing director can be occupied as employee.

In the *UK* the Board has the freedom to determine the status and contractual terms of the directors they appoint. Any director, including the managing director can be an employee. An executive director will usually be an employee and a non-executive director will not be on employee (normally employed under a contract for services), although exceptions are possible. Whether or not an employment relationship exists will be a question of fact.

In *Germany* different views and opinions exist on the status of a managing director. While the Federal German Civil Court and the prevailing opinion in the legal literature consider the managing director as a self-employed person, the Federal Employment Court constantly holds that managing directors can also be regarded as employees if certain requirements are met. Usually the question is answered by assessing the grade of personal dependence towards the company.

In *China* a director is considered to be an agent of the company, nevertheless in case of termination claims based on employment law might be introduced.

2. What is the impact of corporate governance legislation or soft-law (such as corporate governance codes) for the position of a director / managing director ?

Most jurisdictions adopted a set of guidelines (soft law) as corporate governance codes under the general principle of “comply or explain”. These codes contain non-binding guidelines with regard to the internal matrix structure of the company, rights and obligations of directors, remuneration of directors, etc. These codes mostly apply to listed companies.

In Italy the impact of the corporate governance guidelines seems to be limited and in Latvia no such thing exists.

3. Liability of a company director / managing director ?

The different jurisdictions know similar systems of liability, mostly based on the articles of association, mandatory laws, their capacity as agent of the company. Different countries introduced also specific grounds of liability with regard to environmental and bankruptcy related issues.

Noteworthy cases are the case of Vivendi Universal in France where a former company director was suit for misuse of company’s assets because he granted himself a golden parachute of EUR 18.6 million Euros (without approval of the company bodies) as well as the case of a former CEO of Deutsche Bank in Germany who was held responsible by a media group (Kirch) because his comments during a TV interview would have caused damages to the Kirch group.

4. Are there any recent changes in remuneration legislation / policies for company directors / managing directors ?

Obviously this topics has been “hot” in the different jurisdictions with new guidelines or laws on remuneration, variable remuneration, granting of stock options as well as termination packages (often referred to as golden parachutes).

Belgium adopted legislation for listed companies, the Netherlands for publicly or semi publicly companies, Switzerland adopted legislation on transparency of remuneration,

Hungary adopted rules for state owned companies, the UK adopted rules to force companies to comply with a new reporting and voting regime in relation to directors' remuneration, Germany introduced criteria to assess the appropriateness of board remuneration of publicly owned companies.

5. Has it occurred in your jurisdiction that management decisions were revised after being challenged by stakeholders (e.g. consumers) ?

In the Netherlands the works council has the possibility to challenge the management decisions in court. In France minority shareholders and trade unions adhered courts to influence and change management decisions. In Hungary different actions by consumers lead to revised management decisions. Also in the UK working conditions in foreign subsidiaries as well as environmental issues lead to protests as a result of which company decisions were changed.

6. Has your jurisdiction issued specific legislation on female presence in the board of directors ?

In different jurisdictions the presence of female directors has become an issue the last couple of years.

In *Belgium* at least 1/3 of the members of the Board of Directors should be of the opposite sex as far as it concerns a listed company. Implementation of this obligation is expected for 2017.

In the *Netherlands* a temporary measure (2013-2016) was taken to increase the number of female directors in larger companies to at least 30%.

In *Denmark* larger companies should determine targets for the ratio of men and women in the board of directors.

In *France* large listed companies are expected to have a minimum of 40% of female members in the Board of Directors as from 2017.

In *Hungary* the topic was on the political agenda but did not result in specific legislation yet.

In *Germany* no specific legislation yet but the topic is on the political agenda for larger companies (above 2000 employees) with a target of 30% female presence.

In *Italy* one third of female directors for listed companies as of February 2013.

China has no specific legislation, but the female presence is 20% for listed companies, which is globally better than average.

The European Commission has been taken initiatives to increase the female presence. Figures of 2012 show that on average in the EU only 8.9% women were appointed as executive directors, 15% as non-executive directors and only 2.7% as CEO. In 2012 the Commission prosed EU legislation targeting at 40% female presence for listed companies in non-executive mandates. However these initiatives did not result in legislation yet.

7. Is there in your jurisdiction an obligation to have a minimum of independent and/or non-executive directors in the board ?

In most jurisdictions the corporate governance codes contain rules with regard to this topic, certainly for listed companies. In Belgium however the Company Code requires a number of independent directors both in the remuneration and the audit committee. Netherlands, Switzerland, Denmark, Hungary have legislation on this topic, in the sense that executive directors may not hold the majority of the Board.

In the Netherlands, Sweden, France and Germany unions may in a number of situations appoint or propose directors. In China employee representatives will be part of the Board for state-owned companies.

8. Are there in your jurisdiction certain obligations that are different for private and for publicly owned companies and which are not yet covered by the above topics ?

In the different jurisdictions we see that the government is more severe for itself than for private owned companies, most likely because the political pressure will be heavier. If we refer in this part to “public” companies we mean state owned companies.

In *Belgium* rules exist for public companies with regard to mother tongue obligations (Dutch/French) and remuneration.

In the *Netherlands* obligations with regard to remuneration and severance exist for public companies.

Sweden has specific rules and obligations for compensation of board members of public companies.

In *Denmark* more obligations of transparency and openness exist for public companies.

In *Germany* specific rules for compensation of directors of public companies exist.

Also *Italy* has specific rules for compensation of “Public” Managers.

In *China* employees should be represented in the board of public companies.

9. Position of directors/ managing directors in the event of disposal and/or merger of the company ?

Although no specific legislation exist, in most jurisdictions it is common to include language and provisions in transfer agreements for the position of the management post transfer, possible liabilities (including discharge) as well as restrictive covenants.

Note that *France* offers the possibility of an enlarged Board for a three years period post merger.

10. Are there in your jurisdiction minimum requirements to become a company director ?

Most jurisdictions have no specific obligations or restrictions to become a company director other than that the director should not be convicted etc. Certain countries have also general language in corporate governance codes.

In *Belgium* specific knowledge or degrees is expected for certain industry sectors (construction, insurance, financial institutions).

In *Sweden* obligations exist with regard to residency.

In *Hungary* specific requirements exist for financial institutions and investment firms.

11. Does a company director has specific obligations with regard to non compete and corporate opportunities

In most jurisdictions general obligations with regard to acting in good faith, good care, loyalty and fiduciary obligation exist. From these general principles we can deduce that directors cannot compete with the company they manage and that they have an obligation to reveal corporate opportunities.