

# INDEPENDENCE OF THE REGISTERED AUDITOR – SPECIFIC PROVISIONS FOR THE STATUTORY AUDITOR OF NON-PUBLIC-INTEREST ENTITIES (NON-PIES)<sup>1</sup>

*DISCLAIMER: The English version is a translation of the original version issued in Dutch/French for information purposes only. In case of a discrepancy, the original will prevail.*

## **1. General principle of independence**

Article 3:62 of the Code for Companies and Associations contains the general principle according to which a statutory auditor may be appointed provided that he is not in a position that could compromise his independence. This principle is similar to the principle mentioned in Article 12 of the Law of 7 December 2016.

The Law of 7 December 2016 has added to Article 3:62, § 1 that the independence of the statutory auditor is required at a minimum both during the period covered by the annual accounts to be audited and during the period in which the statutory audit is carried out.

This document has been updated to take into account the changes made by the Law of 2 December 2024 (hereinafter the 'CSRD Law 2024').

## **2. Prohibited non-audit services**

The Law of 7 December 2016 combines the seven prohibited services since 2003 and the prohibitions of the European Regulation No 537/2014 on specific requirements regarding statutory audit of public-interest entities (hereinafter "PIE Regulation") while ensuring consistency between PIE mandates and non-PIE mandates.

Paragraph 1 of article 3:63 of the Code for Companies and Associations contains the general prohibition for the statutory auditor to provide certain non-audit services to the company (hereinafter, "audited entity") in which he performs the statutory audit of the annual accounts.

In accordance with article 3:63, § 2 of the Code for Companies and Associations, the following non-audit services are prohibited for the statutory auditor of non-PIEs (and PIEs), as well as for any member of his network referred to in article 3:56 of the Code for Companies and Associations:

*1° services that involve playing any part in the management or decision-making of the audited entity;*

The Explanatory Memorandum ("*Memorie van Toelichting*" / "*Exposé des Motifs*") of the Law of 7 December 2016<sup>2</sup> – which repeats the recital (8) of the PIE Regulation – states that "*The services that involve playing any part in the management or decision-making of the audited entity might include working capital management, providing financial information, business process optimisation, cash management, transfer pricing, creating supply chain efficiency and the like.*" Services linked to the financing, capital structure and allocation, and investment strategy of the audited entity should be prohibited.

However, due diligence services, issuing comfort letters in connection with prospectuses issued by the audited entity and other assurance services are permitted.

<sup>1</sup> This note was developed within the Independence Coordination Cell of the Institute of Registered Auditors.

<sup>2</sup> Explanatory memorandum of the Law of 7 December 2016, *Parl. St.*, Chamber, 2016-17, no. 54K2083/001, p. 69.

Moreover, the Explanatory Memorandum states in this context: *"In view of the double task that the Belgian statutory auditor fulfils in the presence of a works council ("Ondernemingsraad" / "Conseil d'entreprise"), both carried out in the public interest, one in regard of the general meeting of the shareholders, the other in regard of the works council, it must be considered that advice on the restructuring of companies is another example, according to the High Council for the Economic Professions, of interference in the management of the audited entity in the light of the Belgian context (HREB/CSPE opinion of 22 December 2015, marginal number 48).*

*This can be considered as a service in which the statutory auditor is involved in the management or decision-making of the audited entity and is therefore incompatible for the statutory auditor and his network.*

*After all, it cannot be the intention that the statutory auditor suggests to the management body how the company in question could be restructured; This would undoubtedly compromise his independence in relation to the stakeholders (including the members of the works council).*

*However, there is nothing to prevent the statutory auditor from providing punctual and technical advice, provided that the client is given a choice between reasonable alternatives and that the advice is supported by transparent and objective analyses which the management body will examine before taking a decision.'*

*2° bookkeeping and preparing accounting records and financial statements as well as preparing sustainability reporting;*

The prohibition is rather broad in that it covers all services connected with bookkeeping and the preparation of accounting records and financial statements, including, in particular, the recording of transactions in the general accounts, the accounting processing and all preparatory work for the submission of a financial reporting or financial statements or the preparation of financial statements.

The CSRD Law 2024 has expanded this ban to include the preparation and publication of sustainability reporting. The above explanation applies *mutatis mutandis* to this new expansion.

*3° the design and implementation of internal control or risk management procedures related to the preparation and/or audit of financial information, as well as the preparation and disclosure of sustainability reporting or the design and implementation of financial information technology systems;*

The prohibition was extended to the implementation of internal control and risk management procedures related to the preparation of financial or sustainability reporting.

Providing recommendations does not necessarily imply the design and implementation of the controls themselves. This depends on the way in which the advice and recommendations are provided, as well as on the client and the context in which the recommendations are made.

*4° valuation services, including valuations performed in connection with actuarial services or litigation support services;*

Valuation services in non-PIEs are permitted under the following three conditions (art. 3:63, § 4 Code for Companies and Associations):

- 1) these services have no direct effect or have immaterial effect, separately or in the aggregate on the audited financial statements;
- 2) the estimation of the effect on the audited financial statements is comprehensively documented and explained in the additional report to the audit committee; and
- 3) the statutory auditor complies with the general principles of independence.

5° *services related to the audited entity's internal audit function;*

6° *services with respect to:*

- a) *negotiating on behalf of the audited entity;*
- b) *acting in an advocacy role in the resolution of litigation;*
- c) *representation of the audited entity, in the settlement of tax or other disputes.*

The statutory auditor is prohibited from representing the audited entity in the settlement of tax or other disputes.

It is also specified, as provided in the PIE Regulation, that the statutory auditor may not negotiate on behalf of the audited entity or act in an advocacy role (advocacy vs. advice & counsel) in the resolution of litigation.

7° *human resources services with respect to:*

- a) *management in a position to exert significant influence over the preparation of the accounting records or financial statements which are the subject of the statutory audit, where such services involve:*
  - i. *searching for or seeking out candidates for such a position; or*
  - ii. *undertaking references checks of candidates for such positions;*
- b) *structuring the organisation design; and*
- c) *cost control."*

The statutory auditor may not suggest to the management body how the company concerned should conduct its personnel policy in terms of the structure of the organisation and cost control. This would undoubtedly jeopardize his "independence in appearance" with regard to the stakeholders (including the staff).

Specific and punctual advice, for example in connection with *ex-pats* or stock option plans - which cannot be considered as a personnel service with regard to structuring the set-up of the organisation and cost control - is not covered by the prohibition<sup>3</sup>.

It is important to note that the above-mentioned prohibited non-audit services under 1°, 5° and 6°a) and c) are specifically related to and thus limited to the audited entity.

When a statutory auditor finds himself in one of the situations described above, he is irreparably prevented from declaring himself independent, regardless of the safeguard measures that may be applied.

### **3. Scope/duration of the ban**

The prohibition applies to the statutory auditor and to all members of his network worldwide.

As regards the services provided, the prohibition applies to the audited entity, to its parent undertakings (established in an EU country) and to its audited undertakings (established in an EU country).

The prohibition on providing directly or indirectly prohibited non-audit services shall cover the following periods:

- 1° *the period between the beginning of the period audited and the issuance of the audit report; and*
- 2° *the financial year immediately preceding the period referred to in paragraph 1°, for the services referred to in paragraph 2, 3° (the design and implementation of internal control or risk management procedures related to the preparation and/or audit of financial information as well*

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<sup>3</sup> Explanatory Memorandum of the Law of 7 December 2016, *Parl. St.*, Chamber, 2016-17, no. 54K2083/001, p. 72.

as the preparation and disclosure of sustainability reporting or the design and implementation of financial information technology systems).

The issue of subsidiaries in third countries is discussed in section 4 below.

#### **4. Belgian non-PIE audited undertakings of public-interest entities and effects outside the European Union<sup>4</sup>**

Some of the provisions included in the PIE Regulation will apply to the audited undertaking that is not a PIE, through its relationship with the PIE, in particular the restrictions on the non-audit services imposed on the statutory auditor of the PIE, as well as on the members of its network.

Furthermore, with regard to external and internal rotation, the parent undertaking could impose an external and internal rotation on the statutory auditor of the non-PIE audited undertaking, although the audited undertaking of a PIE will never be considered as a PIE if they themselves do not meet the defined criteria.

Finally, paragraph 6 of article 3:63 of the Code for Companies and Associations relates to the provision of non-audit services to a undertaking incorporated in a third county (outside the European Union), regardless of whether it is a PIE or a non-PIE. This paragraph provides: "*When a member of the network referred to in Article 3:56 to which the statutory auditor belongs, provides any of the non-audit services referred to in paragraphs 2 or 3 to an undertaking incorporated in a country that is not part of the European Union or the European Economic Area which is audited by the audited entity, the statutory auditor shall assess whether his independence would be compromised by such provision of services by the member of the network.*

*If his independence is affected, the statutory auditor shall apply safeguards where applicable in order to mitigate the threats caused by such provision of services in a country that is not a member of the European Union. The statutory auditor may continue to carry out the statutory audit only if he can justify that such provision of services does not affect his professional judgement nor the audit report.*

*For the purposes of this paragraph:*

- a) *being involved in the decision-making of the audited entity, and the provision of the services referred to in paragraph 2, 1° to 3° shall be deemed to affect such independence in all cases and to be incapable of mitigation by any safeguards;*
- b) *provision of services other than those referred to in paragraph 2(1) to (3) shall be deemed to affect such independence and therefore to require safeguards to mitigate the threats caused thereby.'*

#### **5. Quantitative limitation of the non-audit services authorised: one-to-one rule**

Where a non-audit service is not prohibited, it may in principle be provided by the statutory auditor, provided that the conditions relating to the independence of the statutory auditor are respected and the "one-to-one" rule (= 100%) is not exceeded.

Under this rule, fees for non-audit services may not exceed the audit fees (art. 3:64 Code for Companies and Associations). This restriction applies only to companies (non-PIEs) that are part of a group that prepares and publishes consolidated financial statements.

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<sup>4</sup> For the purpose of determining the scope of the prohibited services, it can reasonably be inferred from the combined reading of Article 3, 30° and 31° of the Law of 7 December 2016 and Article 3:63, § 6 of the Code for Companies and Associations that when referring to the European Union, the countries that are members of the EEA (Iceland, Norway and Liechtenstein) should also be targeted.

The acquisition audits and due diligence assignments are an exception to the rule (art. 3:64, § 5 Code for Companies and Associations).

The restriction also does not apply to the assignments prescribed by European or national legislation (art. 3:64, § 3 Code for Companies and Associations) (= legal assignments) such as contribution in kind, merger, etc.

The following derogations (art. 3:64; §3 Code for Companies and Associations) are possible:

- 1) following a favourable decision by the audit committee of the audited entity or its parent undertaking (BE/EU or OECD);
- 2) in the event of the appointment of joint statutory auditors ("college van commissarissen"/"collège de commissaires") (this case only applies if the company is not required by law to set up an audit committee); and
- 3) if, at the request of the statutory auditor, the Belgian Audit Oversight Board ("College van toezicht op de Bedrijfsrevisoren"/"Collège de supervision des réviseurs d'entreprises") exceptionally allows the statutory auditor to be exempted from the prohibition for a period of up to two financial years.

The reference to one of the above derogations and the justification thereof shall be included in the notes to the consolidated financial statements or, in the absence of consolidated financial statements, in the notes to the financial statements. If the entity does not disclose this information in the notes to the financial statements, the statutory auditor will include this information in his audit report.

The audit fees are compared with the fees for non-audit services invoiced by the statutory auditor (art. 3:64, § 5 Code for companies and Associations) to the audited entity, to the parent undertaking(worldwide) and to the audited undertaking (worldwide) of the audited entity.

The calculation is carried out globally at the level of the whole consisting of the entity, its parent undertaking and audited undertakings.

Furthermore, the total fees are calculated over three financial years, which corresponds to the statutory term of office of the statutory auditor, and not according to the European calculation method (comparison of the non-audit services provided during a period of three or more consecutive financial years with the average fees paid for the statutory audit of the annual accounts in the last three consecutive financial years).

For the calculation of the "one-to-one" rule, only the services provided by the statutory auditor are taken into account. It does not take into account the non-audit services that may be provided by the statutory auditor's network.

## **6. Financial independence**

In accordance with paragraph 6 of article 3:65 of the Code for Companies and Associations, the statutory auditor's fees may not be affected by the provision of additional services to the audited entity.

Apart from these fees, the auditors may not receive any benefit in any form whatsoever from the entity. The entity may not grant them any loans or advances, nor may they provide or give guarantees for their benefit.

In addition, the general prohibition applies with regard to contingent fees. This prohibition relates to the assignments carried out by the statutory auditor or by a member of his network for the audited entity, its parent undertaking or audited undertakings within the European Union. There are no safeguards.

## **7. Cooling-off period**

In accordance with article 3:62 §3, 1° of the Code for Companies and Associations, the statutory auditor does not, before a period of two years has elapsed since they ceased to act as statutory auditor, take up a director, management or any other position in the audited entity, nor in an affiliated undertaking or person as defined in article 1:20 of the Code for Companies and Associations. The prohibition on taking up a director, management or any other position in the audited entity or in an affiliated undertaking or person is subject to a criminal sanction according to Article 3:96, 1° and 1°/1 of the Code for Companies and Associations<sup>5</sup> and applies to the statutory auditor and, where applicable, to the registered auditor charged with the assurance of sustainability reporting.

In addition, the second paragraph of the same article provides that registered auditors who were directly involved in the statutory audit or the assurance of sustainability reporting as partners, executives or other employees (but who do not sign the audit report themselves) must also comply with a "cooling-off" period of at least one year before they can take up a director, management or any other position in the audited entity (or in an affiliated undertaking).

## **8. "Cooling in /pre-cooling off" period of 2 years**

In accordance with Article 3:62, § 5, 1° of the Code for Companies and Associations, during the two years preceding the appointment as statutory auditor, neither the registered auditor nor the members of the network referred to in Article 3:56 to which the registered auditor belongs, may perform any services that could compromise his independence as a statutory auditor.

In addition, Article 3:62, § 5, 2° provides that, except in exceptional duly justified cases, the registered auditor may not be appointed as statutory auditor if, during the two years prior to the appointment as statutory auditor, he or a member of the network to which he belongs has regularly provided assistance or has participated in the bookkeeping or in the preparing of accounting annual or consolidated records of the concerned entity, of a Belgian parent undertaking or one of its significant Belgian or foreign audited undertaking or has intervened in the recruitment of persons who are part of a body or of the management staff of the company concerned, of a Belgian parent undertaking or of one of its significant Belgian or foreign audited undertakings.

The cooling-in period referred to in Article 3:62, § 5 of the Code for Companies and Associations also applies to sustainability assurance.

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<sup>5</sup> The following shall be punished with imprisonment of one month to one year and with a fine of fifty to ten thousand euros or with one of these penalties alone: 1° persons who, in the course of a period of two years, commencing from the end of their mandate as a supervisory director, take up a mandate as a director, manager or any other position in the company that was subject to their supervision or in an affiliated company or person