

**OPINION<sup>1</sup> 2019/10 OF THE BOARD OF THE INSTITUTE OF REGISTERED  
AUDITORS**

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**Subject: Interruption – Early termination of the auditor’s mandate**

This opinion is an update of opinion 2012/04 of 7 January 2013 on the dismissal or resignation of the statutory auditor in place and the appointment of his successor, further to the approval of the Law of 7 December 2016 on the organisation of the profession and the public oversight of registered auditors. It also provides more clarity about the revocation of auditor’s mandate by the audited company.

**1. Applicable legal provisions**

Article 135 of the Companies Code<sup>2</sup> reads as follows:

*“§ 1 In accordance with Article 132/1, the statutory auditors are appointed for a renewable period of three years.*

<sup>1</sup> Through opinions, the Institute develops a legal doctrine on auditing techniques and the proper application by registered auditors of the legal, regulatory and standardsetting framework governing the profession (Article 31, § 7 of the Act of 7 December 2016 on the organisation of the profession and public oversight of registered auditors); only the standards and recommendations are binding.

<sup>2</sup> Once the new Code for Companies and Associations applies, reference will need to be made to the articles of this new Code in accordance with the table of equivalence / correspondence:

Companies Code	Code for Companies and Associations
135	3:66
136	3:67
140, paragraph 2	3:71
144 § 1, 9°	3:75 §1, 9°
159, 2nd paragraph	3:91, paragraph 2

*Under penalty of compensation, their mandate can only be terminated during their assignment on proper grounds by the general meeting<sup>3</sup>. More specifically, a divergence of opinion about the processing of the accounts or an audit procedure is not a proper ground for termination.*

*In the event of a statutory audit of a public interest entity referred to in Article 4/1, a request for early termination of the statutory auditor's mandate, if there are valid reasons for this, may be submitted to the commercial court by:*

- 1° any shareholder who represents at least five per cent of the voting rights or of the capital;*
- 2° the Belgian Audit Oversight College of registered auditors, referred to in Article 32 of the Act of 7 December 2016 on the organisation of the profession and the public oversight of registered auditors.*

*Except for serious personal reasons, statutory auditors may only resign during their mandate at the general meeting and after having informed the latter in writing of the reasons for their resignation.*

*§ 2. The audited company and the statutory auditor inform the Belgian Audit Oversight College, referred to in Article 32 of the Law of 7 December 2016 on the organisation of the profession and the public oversight of registered auditors, of the dismissal or the resignation of the auditor during his mandate and explain the reasons for this adequately, irrespective of whether the early termination of the mandate has been mutually agreed."*

Article 136 of the Companies Code reads as follows:

*"When the general meeting has to rule on the dismissal of an auditor, the interested person is immediately informed of the fact that this matter is put on the agenda. The statutory auditor can inform the company in writing of his comments. These comments are announced on the agenda and made available to the partners in accordance with Articles 269, 381 and 535. A copy of these comments is also sent immediately to those who have fulfilled the formalities required for admission to the general meeting.*

*By means of a petition of which the auditor [...] is informed in advance, the company can request authorisation from the president of the court [of enterprises] not to inform the partners of the comments that are not relevant to the case or that could unjustifiably harm the reputation of the company. The president of the court [of enterprises] hears the company and the statutory auditor [...] in chambers and pronounces judgement at a public hearing. There is no possibility of objection or appeal to a higher court against this decision."*

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<sup>3</sup> general meeting of shareholders

## 2. Early termination of the statutory auditor's mandate (before the end of the three-year period)

Auditors are in principle appointed for a mandate of three years. The legislator chose this period to enable the statutory auditor to carry out his audit assignment entirely independently. The three-year period is intended to give the auditor the possibility of certifying the annual financial statements of three successive years.

As the certification of the annual financial statements justifies the term of the assignment, it is logical to link these two elements to one another. The aim is to enable the statutory auditor to carry out his assignment for three financial years. These financial years usually each last one year, but may be extended or shortened in exceptional cases.

It is important to stress that the basic principle is that the early termination of the statutory auditor's mandate before the end of the three-year period should be the exception and this must therefore be strictly interpreted.

### 2.1. Voluntary resignation of the statutory auditor in place

The assumption here is that the statutory auditor takes the initiative to interrupt his mandate, which means that he submits his resignation before the end of his mandate (three years).

The following hypotheses are possible:

#### i. Resignation during his mandate for serious personal reasons

##### - *Reasons for the resignation*

Except at a general meeting, the statutory auditor can only hand in his resignation during his mandate in the case of a serious personal reason, that is only in exceptional and clearly defined cases.

'Serious personal reasons' for a registered auditor who is an individual, may often be health reasons, such as a long-term or serious illness<sup>4</sup>, as a result of which he can no longer carry out his assignment.

Other 'serious personal reasons' may also be cited, such as non-availability for ethical reasons (*cf.* impossibility of being independent).

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<sup>4</sup> B. TILLEMANN, *Het statuut van de commissaris*, ICCI, 2007/2, Bruges, Die Keure, p. 94, No. 168.

In case of a joint audit, it may happen that one of the registered auditors becomes unable to pursue his assignment. However, the other registered auditors cannot involve the resignation of a colleague as a 'serious personal reason' to resign themselves<sup>5</sup>.

Serious personal reasons may also occur in an audit firm that carries out the statutory audit. Please note that the health of the permanent representative of the audit firm is not a serious personal reason for the audit firm (which has been appointed as statutory auditor), as this firm can appoint another representative to carry out the assignment.

It may happen that an audit firm has a mandate of statutory auditor in an entity for which a license is required and no other partner in this audit firm has that specific license.

If an audit firm cannot declare itself independent, this also constitutes a serious (legal) personal reason on its part.

The withdrawal of the capacity of registered auditor by the College or the sanctions commission of the FSMA, or by the IBR/IRE (Belgian institute of registered auditors), or the (temporary) suspension of the registered auditor by the College or the sanctions commission of the FSMA for permanent audit assignments can also constitute a serious personal reason.

We should not forget, however, that a divergence of opinion with the audited company can never be a serious personal reason.

The existence of a conflict relating to the level of the fees is not a serious personal reason either for the auditor to terminate his assignment during his mandate. In this case, the auditor can always hand in his resignation during a general meeting after having issued his written report on the reasons for this resignation (see point ii below).

The statutory auditor should set his fees when he accepts the assignment. His fees must be approved by the general meeting before the assignment carried out.

Should additional activities prove necessary (which were not provided for in the original mandate), for example in the event of additional activities required by the prudential authorities or a modification in the structure of the company, the

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<sup>5</sup> Follows from B. TILLEMANS, *Het statuut van de commissaris*, ICCI, 2007/2, Bruges, Die Keure, p. 111, No. 198 and IBR, *Vademecum, Deel 1: Rechtsleer*, Antwerp, Standaard Uitgeverij, 2009, p. 567.

statutory auditor must submit them for approval – in total transparency – by the audited company.

The Board of the Institute wishes to make it clear that non-payment of all or part of the fees or a possible disagreement regarding the amount of the fees can be settled by means of legal action, but that this is not a serious personal reason that allows the statutory auditor to terminate his mandate prematurely (not during a general meeting).

In addition, a statutory auditor cannot terminate his mandate prematurely if he does not receive or does not have access to documentation or information that he needs for his audit assignment. In such a case, the statutory auditor will formulate a qualified opinion or a disclaimer.

Moreover, if he has knowledge of a transaction performed or a decision taken in breach of the articles of association or of the Companies Code, the statutory auditor must in any case comply with the provisions of Article 140, paragraph 2 of the Companies Code. If, after analysis, he believes that the non-compliance must be made public, he must indicate this in the section on 'Other declarations' in the audit report, in accordance with Article 144, § 1, 9° of the Companies Code. However, the statutory auditor may not consider these violations committed by the company as a serious personal reason.

It should also be pointed out that the mere fact that a statutory auditor requests the withdrawal of his capacity of registered auditor on his own initiative is not a serious personal reason.

It is important to explain that the statutory auditor has a responsibility to do everything possible, in the general interest, to ensure that his assignment can be taken over by the colleague appointed by the company, even in the event of serious personal reasons which have led to a resignation during the mandate.

- *How should the decision to resign be announced?*

One specific feature of resignation for serious personal reasons is that it becomes effective immediately – not during a general meeting – and that the statutory auditor can therefore resign without having to serve a period of notice.

In this case the Companies Code does not provide for any specific formalities that have to be complied with. It is, however, recommended that the auditor informs the management body of his resignation by registered letter, since this body then

has to provide for his replacement. This letter shall contain the explanation of the serious personal reasons for his resignation<sup>6</sup>.

If the statutory auditor resigns voluntarily for serious personal reasons in a company with a works council, he must also inform the works council in writing beforehand of the reasons for his resignation (Article 159, paragraph 2 of the Companies Code).

The Board of the Institute believes that in the absence of this notification of the works council, the resignation incurs the risks to be declared invalid.

- *Does compensation have to be paid?*

The law does not provide expressly for compensation in this context.

ii. Resignation during a general meeting after having submitted a written report on the reasons

- *Reasons for the resignation*

Although early termination of the mandate before the expiry of the usual three-year period must remain the exception, it is nevertheless generally accepted that the reasons for resignation at a general meeting (if applicable, an extraordinary general meeting) are broader than serious personal reasons.

However, since the early termination of a mandate must remain the exception, the Board of the Institute believes that it is not conceivable that the mandate is terminated prematurely without a report being issued on the financial statements of the preceding financial year, if the statutory auditor was still in office at the end of the financial year.

An ongoing dispute concerning the amount of the fees or the payment of the fees can be a reason for the statutory auditor to submit his resignation during the general meeting.

It must also be pointed out that a change of auditor at the level of the umbrella structure of the group can be a reason why the statutory auditor may agree to hand in his resignation during the general meeting. We would like to point out, however, that in this case the statutory auditor is under no obligation whatsoever

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<sup>6</sup> I. DE POORTER, 'Article 135 Companies Code' in *Artikelsgewijze commentaren vennootschappen en verenigingen*, Antwerp, Kluwer, 2010, p. 12, No. 20.

to hand in his resignation. If he does not wish to do so, the audited company can dismiss the statutory auditor (see point 2.2. below). However, it should be pointed out that if the statutory auditor agrees to submit his resignation further to a change of auditor at the level of the umbrella structure of the group, he *de facto* waives the right to claim compensation for the termination of his mandate.

In the case of early termination at the general meeting, the statutory auditor will, moreover, do everything possible - in the general interest - to ensure that his assignment is taken over by the colleague appointed by the company.

- *How to announce the resignation?*

In this case, the statutory auditor must submit his resignation during the general meeting and explain the reasons for this in writing (duty to explain). If necessary, the statutory auditor can even call a general meeting to submit his resignation.

It is not up to the general meeting to rule on the validity of the reasons put forward by the statutory auditor.

In any case, the voluntary resignation of the statutory auditor may not be submitted at an inappropriate time and certainly not between the end of the financial year and the general meeting that has to decide on the annual financial statements. The Board of the Institute believes that the term 'not at an inappropriate time' is in certain circumstances (for example, in the event of continuity problems) more stringent than 'after the end of the financial year'. A resignation should not be given either when the financial year is almost at its end<sup>7</sup>.

The statutory auditor must carefully weigh the consequences of his resignation for the company, in particular the negative impact on the continuity of the auditing within the company, against his own reasons<sup>8</sup>.

The lack of appropriate motivation for the resignation of the statutory auditor at the general meeting gives rise to the risk that the resignation is deemed to be unlawful. This fact can lead to liability on the part of the statutory auditor (compensation from the auditor) and possibly administrative measures and

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<sup>7</sup> IBR, *Vademecum, Deel 1: Rechtsleer*, Antwerp, Standaard Uitgeverij, 2009, p. 545; IBR, *Jaarverslag*, 1986, p. 74.

<sup>8</sup> I. DE POORTER, 'Article 135 Companies Code' in *Artikelsgewijze commentaren vennootschappen en verenigingen*, Antwerp, Kluwer, 2010, p. 13, No. 23.

pecuniary sanctions for failure to fulfil the mandate properly<sup>9</sup>. There is, however, no consensus in legal doctrine on the question of whether this unlawful voluntary resignation could lead to the resignation being declared invalid<sup>10</sup>.

If the statutory auditor resigns voluntarily (without serious personal reasons) in a company with a works council, he must inform the works council in writing beforehand of the reasons for his resignation (Article 159, paragraph 2 of the Companies Code).

The Board of the Institute believes that the lack of notification to the works council gives rise to the risk that the resignation is declared invalid.

- *Does compensation have to be paid?*

The law does not provide expressly for compensation in this context.

## **2.2. Dismissal of the statutory auditor at the initiative of the audited company**

There are cases where the decision to terminate the mandate prematurely is taken by the audited company.

Technically, this is a dismissal. There are two possible cases:

### *i. Dismissal during the assignment on proper grounds*

- *Reasons for the dismissal*

The situations in which the audited company can terminate a mandate 'with reasonable cause' are very limited.

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<sup>9</sup> IBR, *Jaarverslag*, 1985, p. 52; Explanatory note to the 'draft legislation on the reform of the profession of registered auditor', *Parl. St.* Chamber 1982-83, No. 552/1, p. 18; VERHAEGEN REPORT, *Parl. St.* Chamber 1982-83, No. 552/35, p. 49; R. VAN ASBROECK and P. DE BOCK, *Zoeklicht op de commissaris-revisor*, Antwerp, Kluwer, 1986, p. 12.

<sup>10</sup> B. TILLEMANN states that a resignation without justification can also be declared invalid at the demand of any stakeholder (before the courts) because the duty to explain is mandatory. I. DE POORTER points out, however, that the legal obligation as regards enforced resignation is also mandatory but that no provision is made for invalidity as a penalty (B. TILLEMANN, *Het statuut van de commissaris*, ICCI, 2007/2, Bruges, Die Keure, p. 98, No. 178 versus I. DE POORTER, 'Article 135 Companies Code' in *Artikelsgewijze commentaren vennootschappen en verenigingen*, Antwerp, Kluwer, 2010, p. 15, No. 28).



Examples are serious shortcomings in the fulfilment of the mandate due to illness, impediments, incompatibility or being struck off the public register of the IBR/IRE.

An error made by the statutory auditor in the context of the fulfilment of his mandate which is so important and the impact of which is so significant that the confidence that the company must have in the capability of the auditor to fulfil his assignment is definitely and irrevocably undermined can be a proper ground.

In order for the situation to be considered an error, the shortcomings put forward by the audited company must be substantiated by demonstrable facts and examined by the judge to prove that the continuation of the mandate is impossible.

A mere lack of confidence in the statutory auditor is in itself insufficient.

A divergence of opinion regarding an accounting operation or an audit procedure is never a lawful reason for termination.

The fact that the company no longer meets the criteria which obliges a company to appoint a statutory auditor cannot be considered a proper ground (*cf.* ruling of the Court of Appeal in Liège of 23 November 1989, *RPS* 1990, p. 178); Commercial Court Dendermonde (2nd chamber), 16 June 2011, *TRV*, 2013, p. 274; Commercial Court Dendermonde (2nd chamber), 27 June 2013, *DAOR*, 2013/3 No. 107, p. 277).

- *How to announce the termination?*

The termination can only be carried out by the general meeting (either an ordinary general meeting or an extraordinary general meeting).

Article 136, paragraph 1 of the Companies Code states that: *“When the general meeting has to rule on the dismissal of a statutory auditor, the interested person is immediately informed of the fact that this matter is put on the agenda. The statutory auditor can inform the company in writing of his comments. These comments are announced on the agenda and made available to the partners in accordance with Articles 269, 381 and 535. A copy of these comments is also sent immediately to those who have fulfilled the formalities required for admission to the general meeting.”*

- *Does compensation have to be paid?*

The existence of proper grounds constitutes an exception as regards the payment of compensation to the statutory auditor whose mandate has been terminated.

ii. *Termination during the assignment without proper grounds*

- *Reasons for the termination*

This is the situation in which the audited company does not have any 'proper grounds' to support its decision to terminate the mandate of its statutory auditor.

This is the case when the audited company bases its decision to terminate the mandate on a divergence of opinion with the statutory auditor, which is not a proper ground.

The matter of the change of auditor at the level of the umbrella structure of a group requires further analysis.

The parliamentary work explains that *"The decision to 'terminate' the mandate of its statutory auditor [...] is also possible in certain circumstances even though the statutory auditor appointed meets the expectations of the audited company. This is the case, for instance, when the company implements a decision taken by its parent company to entrust the auditing of the financial statement of all entities in the group to the national representatives of the same international structure."*

In this context, it is our opinion that the change of auditor at the level of the umbrella structure can be considered to be a 'valid reason' to terminate the mandate of the statutory auditor in Belgium, even if he meets expectations. We believe, however, that it does not constitute a 'proper ground' within the meaning of Article 135, § 1 of the Companies Code. So if the general meeting of the audited company wishes to terminate the mandate further to a change of auditor at group level, such termination may lead to the payment of compensation for severance to the statutory auditor whose mandate has been terminated.

### **2.3. Comments about the early termination of the mandate by common agreement**

The Companies Code does not provide for the early termination of the mandate by common agreement. A 'common agreement' is only possible if it falls into one

of the categories mentioned in this opinion, more specifically a dismissal or a resignation.

The 'common agreement' cannot, however, be considered to be a termination on proper grounds. It cannot be considered to be a resignation for serious personal reasons either. It can take the form of the resignation of the statutory auditor at the general meeting after written notification of the reasons. Otherwise, it constitutes a dismissal during the assignment without proper grounds.

### **3. Notification to the College**

The law states that both the audited company and the statutory auditor must inform the College of the resignation or the dismissal of the statutory auditor during his mandate and explain the reasons for this adequately, irrespective of whether the early termination of the mandate has been mutually agreed.

This duty of information to the College is incumbent upon the statutory auditor and the audited company separately.

If the College is of the opinion that the reasons put forward (either by the audited company or by the statutory auditor) may result from non-compliance with the law or auditing standards by the statutory auditor, it will take the appropriate measures.

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Further to the adoption of this opinion, opinion 2012/04 is repealed.