INSTITUUT VAN DE BEDRIJFSREVISOREN
INSTITUT DES RÉVISEURS D'ENTREPRISES

OPINION[1] 2021/04 OF THE BOARD OF THE INSTITUTE OF REGISTERED AUDITORS

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Subject: Civil professional liability – in replacement of opinion 2019/05

This opinion is intended to clarify the system of limitation of the professional civil liability of the registered auditor in the light of recent legislative developments, including the Law of 7 December 2016 on the organisation of the profession and the public oversight of registered auditors (hereinafter referred to as the "Law of 7 December 2016") as amended by the Law of 30 July 2018 containing various provisions regarding the Economy (Belgian Official Gazette of 5 September 2018).

1. Legal provisions

The liability regime for the registered auditor is described in Articles 24 and 25 of the Law of 7 December 2016:

"***Art. 24. § 1***. *Registered auditors are liable, in accordance with the general principles of law, for the performance of engagements entrusted to them by or pursuant to the law. Except in the case of an offence committed with fraudulent intent or with the intention to harm, this liability is limited to an amount of three million euros for the performance of one of these engagements with a person other than a public interest entity, increased to twelve million euros for the performance of one of these engagements with a public interest entity. The King may amend these amounts by a royal decree adopted after deliberation in the Council of Ministers.*

[1] 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 Law of 7 December 2016 on the organisation of the profession and public oversight of registered auditors); only the standards and recommendations are binding.

Registered auditors are prohibited from exonerating themselves from this liability, even partially, by entering into a special agreement.

§ 2. *They are obliged to have their civil professional liability covered by an adequate insurance contract that meets the following requirements:*

1 ° a cover of at least three million euros per year; this amount is increased to € 12 million for engagements carried out within public interest entities;

2 ° the policy covers at least all engagements that are reserved by or pursuant to the law to registered auditors.

§ 3. *The provisions referred to in paragraph 1 shall also apply to engagements entrusted to the statutory auditor by or pursuant to the law and to the engagements entrusted to him in his capacity as statutory auditor and signed as such or, in the absence of a statutory auditor, to a registered auditor or to an accountant, including those cases where such engagements are carried out by an accountant.*

Art. 25. *The registered auditors shall be liable, in accordance with the general principles of law, for the performance of their professional engagements other than those entrusted to them by or pursuant to the law.*
Registered auditors are prohibited from exonerating themselves from this liability, even partially, by entering into a special agreement in the event of an infringement committed with a fraudulent intent or with the intention to harm.".

2. Civil professional liability

2.1 *Engagements entrusted by or pursuant to the law*

According to Article 24, § 1 of the Law of 7 December 2016, registered auditors are liable, in accordance with the general principles of law, for the performance of the engagements entrusted to them by or pursuant to the law.

Except in the case of an offence committed with fraudulent intent or with the intention to harm, this liability shall be limited to:

- three million euros for the performance of engagements, entrusted to them by or pursuant to the law, with a person other than a public interest entity;
- twelve million euros for the performance of one of these engagements, entrusted to them by or pursuant to the law, with a public interest entity.

2.1.1 Terminology

a) *"Engagements entrusted by or pursuant to the law"*

According to a generally accepted position, the term "law" also encompasses the legislative texts of the Communities and Regions, in particular decrees and ordinances.

In addition, it concerns engagements that are entrusted both by Belgian law and, by virtue of a reference to it, by a foreign law.

In commercial law, the law as a legal source also encompasses customs that have the force of law.

b) *"Public interest entities"*

The term "public interest entity" referred to in Article 24 of the Law of 7 December 2016 (limitation of twelve million euros) is defined in Article 1:12 of the Code for Companies and Associations, which clarifies that by "public interest entity" is meant:

- the listed companies referred to in Article 1:12 of the Code for Companies and Associations, i.e. companies whose shares, profit shares or certificates relating to these shares are admitted to trading on a regulated market within the meaning of Article 3, 7 ° of the Law of 21 November 2017 on infrastructures for the markets in financial instruments and implementing Directive 2014/65/EU;
- companies whose securities referred to in Article 2, 31 °, b) and c), of the Law of 2 August 2002 on the supervision of the financial sector and financial services, are admitted to trading on a regulated market referred to in Article 3, 7 °, of the Law of 21 November 2017 on infrastructures for the markets in financial instruments and implementing Directive 2014/65/EU;
- the credit institutions;
- the insurance or reinsurance undertakings;
- the settlement institutions as well as institutions assimilated to settlement institutions.

2.1.2 Scope of the public policy provisions

The Board of the IBR-IRE considers that the provision regarding the limitation of the liability of Article 24 of the Law of 7 December 2016 is a public policy provision .[2] Consequently, it is impossible to derogate from the thresholds of three and twelve million euros as defined in the above-mentioned Article 24, *neither upwards nor downwards.*

In this respect, the ruling of the Court of Cassation of 15 March 1968 clarifies: "*Only the law which concerns the essential interests of the State or of the community or which, in private law, determines the legal basis on which the economic or moral order of society rests, is of public policy*.".[3]

The comment on the former Article 17 of the Law of 22 July 1953 establishing an Institute of Registered Auditors, included in the explanatory memorandum of the Law of 23 December 2005 containing various provisions, that introduced a limitation of liability which is now included in Article 24 of the Law of 7 December 2016, shows that this statutory provision defines the legal basis on which the economic order of society rests. Its main aim is to safeguard the continued existence of the function of external auditing of financial statements, of which no one disputes the fundamental role in the functioning of our economy. The absence of this provision would jeopardise the profession of registered auditors. In this context, the comment on the Article clarifies:

"*The unlimited civil liability does not reinforce the quality of the audit. A certain level of liability is justified but it is not reasonable to expect the registered auditors to carry the full cost arising from fraud by the board of directors/the managers or from an accounting error within a company. This threatens the continuity of the activity of statutory auditors, natural persons and audit firms.".*[4]

The public policy nature of the provision implies that a registered auditor should not waive the statutory limitation of the liability, not even *a posteriori* or in the context of a transaction. Such a waiver would indeed breach the system of protection *of the profession as such* that the legislator intended to establish. If applicable, such a waiver will therefore have to be considered as an ethical misconduct.

[2] See also H. Braeckmans, "De wettelijke beperking van de aansprakelijkheid van de bedrijfsrevisor", *R.W.* 2005-06, p. 1657, nr. 17.
[3] Cass. 15 March 1968, *Pas.*, p. 884.
[4] *Parl. St.* Chamber 2005-06, draft law no 2020/01, 11 October 2005, p. 37.

2.1.3 Specific case of the audit engagement

a) Statutory audit of annual accounts

Article 24, §1 of the Law of 7 December 2016 relates to the engagements entrusted by law to the registered auditor, including the statutory audit engagement.

Article 24, §1 of the Law of 7 December 2016 therefore applies if a registered auditor or an audit firm registered in the public register (represented by a registered auditor-natural person registered in the public register) is entrusted with a statutory audit engagement in accordance with Article 3:55 of the Belgian Code for Companies and Associations.[5]

b) Contractual engagements that are a natural extension of the statutory auditor's engagement

Article 24, § 3 of the Law of 7 December 2016 was amended by article 82 of the Law of 30 July 2018.

Accordingly, Article 24 § 3 now specifies: *"The provisions referred to in paragraph 1 shall also apply to engagements entrusted to the statutory auditor by or pursuant to the law and to the engagements entrusted to him in his capacity as statutory auditor and signed as such* […]".

The Board is of the opinion that this new wording is intended to also make the liability regime of article 24, § 1 of the Law of 7 December 2016 applicable to the engagements that are a natural extension of the statutory auditor's engagement.

Consequently, the legal framework implies that the limitation of the liability of the statutory auditor with regard to the legal amounts of 3 and 12 Million euros is compulsory when engagements are entrusted to the statutory auditor because they are a natural extension of his mandate, since he must rely on the work performed within the framework of his statutory audit engagement (existence of

[5] Article 3:55 of the Belgian Code for Companies and Associations states: *"The statutory audit of annual accounts" means an audit of the annual financial statements or of the consolidated financial statements, insofar as this audit: 1° is prescribed by European Union law; 2° is required by Belgian law as regards small companies; is voluntarily carried out at the request of small companies, when this engagement is accompanied by the publication of the report referred to in Article 3:74 or 3:80 of this Code.", a similar definition applies to (I)NPOs and foundations, in accordance with articles 3:98 and 3:99 of the Code for Companies and Associations.'*

an audit base). The limitation of liability only applies insofar as the report is signed in his capacity as statutory auditor. It would also be useful to mention in the engagement letter that the engagement falls within the scope of article 24, § 3 of the Law of 7 December 2016.

Engagements that are entrusted to the statutory auditor within the framework of the natural extension of his mandate are, for example, the following:

- carrying out an audit or a review of a reporting package for the attention of the statutory auditor or the auditor of the parent company of the audited company;
- carrying out an audit or a review of interim financial statements;
- issuing a comfort letter;[6]
- issuing a report within the framework of information to be provided in a prospectus in accordance with the European Regulation No 1787/2006 of 4 December 2016 (initial public offering of the audited company's securities);
- etc.

The Board is of the opinion that the statutory auditor to whom the engagement was entrusted that constitutes a natural extension of his mandate, cannot hide behind the mere argument that this engagement is carried out on a contractual basis, so as to limit his liability to a multiple of the fees anticipated for its execution. After all, to be able to carry out these engagements, the statutory auditor must make use of the insight he has gained into the audited company in the course of his statutory audit engagement. It is therefore wrong to assume that such engagements are not carried out in his capacity as statutory auditor.

However, the statutory auditor and his client are free to set a limitation of liability on a purely contractual basis in respect of the performance of contractual engagements which do not require reference to the statutory audit engagement (i.e. without an audit base) and which therefore do not fall within the natural extension of the statutory audit engagement. This will be the case, for example, within the framework of a due diligence engagement related to a target company that the audited company intends to acquire.

[6] It should be noted that comfort letters usually state that:
a) they are provided within the framework of the audit engagement of the registered auditor; and
b) their content is at least partially based on the audit work of the statutory auditor within the framework of the audit of the (consolidated) financial statements of the company concerned.

2.1.4 Specific case of engagements carried out by a registered auditor or an accountant

According to article 24, § 3 of the Law of 7 December 2016, the provisions concerning the liability of the registered auditor also apply to cases where these engagements, in the absence of a statutory auditor, are entrusted to a registered auditor or an accountant by or pursuant to the law.

The main focus is on the engagements that, in companies without a statutory auditor, are entrusted by the Code for Companies and Associations to a registered auditor and/or an accountant.

The registered auditor may also perform activities of an accountant, except for the engagement referred to in article 3:101 of the Code for Companies and Associations, including the engagements concerning the verification, correction and expertise shared by the registered auditor and certified accountants pursuant to article 5 of the Law of 17 March 2019 on the professions of accountants and tax advisers. However, since these engagements are not statutory engagements reserved to the statutory auditor, they do not fall within the scope of article 24, §3 of the Law of 7 December 2016 and therefore the limitations of 3 and 12 million euros do not apply to them.

2.2 Other professional engagements than those entrusted by or pursuant to law

Pursuant to Article 25 of the Law of 7 December 2016, registered auditors shall be liable, in accordance with the general principles of law, for the performance of their professional engagements other than those entrusted to them by or pursuant to the law.

In this context, we refer to the so-called "contractual" engagements.

Article 25 also clarifies that registered auditors are prohibited from exonerating themselves from this liability, even partially, by entering into a special agreement in the event of an infringement committed with a fraudulent intent or with the intention to harm.

While it is absolutely prohibited for registered auditors to exonerate themselves from their liability when carrying out statutory engagements, this prohibition, in the context of contractual engagements, is only intended to cover cases in which this liability arises from an infringement ommitted with a fraudulent intent or with

the intention to harm. Except for these two cases, a registered auditor carrying out contractual engagements can, in principle, exonerate himself from any liability[7].

Furthermore, the maximum threshold mentioned in Article 24 of the Law of 7 December 2016 has not been included in article 25. Within the framework of contractual engagements, the liability of registered auditors may therefore be unlimited [8].

Even if there is no ethical requirement to limit the liability of registered auditors for contractual engagements, the Board of the Institute believes that it would be useful for this liability to be contractually limited to reasonable amounts in order to safeguard the continued existence and insurability of the profession of registered auditor.

The Board also draws the attention of the members to the non-contractual liability that may arise from the possible issuance of a contractual report to third parties, to whom the engagement letter is not enforceable. In this context, it may be useful to consult the Technical Note of 20 March 2018 ("*La responsabilité du réviseur d'entreprises à l'égard d'un tiers dans le cadre des missions contractuelles*"). This note describes the options that belong to the auditor to protect himself against a liability claim of a third party.

Following the adoption of this opinion, Opinion 2019/05, Professional civil liability, is hereby repealed.

Yours sincerely,

Tom MEULEMAN
Chairman

[7] Within the framework of other than statutory engagements, the parliamentary documents of the Chamber of Representatives stipulate: *"the civil liability of the registered auditor within the framework of engagements other than statutory engagements may be determined at the will of the parties and determined in accordance with common law" (Parl. St.* Chamber 2005-06, draft law No 2020/01, 11 October 2005, p. 39.

[8] With regard to the contractual liability limitation, see also P. DE WOLF, "De aansprakelijkheid van natuurlijke personen die hun beroep uitoefenen in eigen naam of in het kader van een rechtspersoon", in *De nieuwe aansprakelijkheidsregeling voor economische beroepen – Rechtspersonen en natuurlijke personen*, seminar organised by the IEC, the IPCF and the IRE in Brussels on 30 September 2010, Antwerp, Intersentia, 2012, p. 39-40.