

The new director's service agreement

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The recently enacted Companies Act Amendment (Corporate Governance) Act 31/2014 of 3 December, which will enter into force generally on 24 December, introduces some important changes that affect different aspects of corporate life, such as the regulation of a new director's service agreement, which is the subject of this memorandum.

1. The new article 249(3) of the Companies Act (CA) provides that **commercial company directors with executive functions** (i.e., managing directors, members of executive committees or directors who have otherwise been assigned executive functions) must sign a director's service agreement **previously approved by** a two-thirds majority vote of **the company's board of directors**.
2. This agreement must describe in detail **all items of remuneration** to be earned by the director for **the performance of executive functions** (apart from any remuneration he receives, as the case may be, for the performance of the supervisory and control functions inherent to the position of director). The new text of art. 249(4) CA expressly provides that "*the director may not receive any amounts not envisaged in the agreement for the performance of his executive functions*", so that any such amounts received shall be regarded as unlawful (i.e., they are not deductible as a company expense and must be returned by the receiver at the request of any entitled party).
3. There is no need to sign a director's services agreement if one is already in place (whatever it may be called, for example, a senior management agreement or service agreement), as long as such agreement provides for the director's remuneration for the performance of executive functions, although in these cases the ratification by the board of directors as indicated in paragraph 1 above will be necessary.
4. Although article 294(4) CA only mentions the need to detail the items of the directors' remuneration for the performance of executive functions, the director's service agreement can be useful in any organisational structure (executive or non-executive directors, sole director and joint and several or joint directors), even in those cases in which the position of director is not remunerated, in order to define certain terms and conditions of the relationship between the director and the company which in practice tend to be disregarded, such as details of the provision of services, duties of confidentiality, the prohibition of post-contractual competition, retention clauses in the event of change of control, reinforcement of the competition prohibition, use of company property, etc.
5. Although the new regulation is not retroactive and in principle does not affect directors appointed prior to the entry into force of the amendment, the substantial risk in terms of the tax deductibility of remuneration makes it advisable to adapt all situations to the new law.

6. The changes to the CA regarding directors' remuneration do not require, *per se*, an alteration of the articles of incorporation, given that the current remuneration system remains unaltered. Nevertheless,

we recommend revising the relevant article in order to verify that, if the position of director is remunerated, the articles of association reflect all remuneration items payable to the directors.

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