

European Company Law Experts (ECLE)

Analysis of the Belgian Law on Related Party Transactions

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“Related Party Transactions under the new Belgian Company Law”

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The Belgian company code of 7 May 1999 has been replaced by a new Code dated 23 April 2019, entering into force on the 1st of May 2019. The new law is entitled: “Code on companies, associations and divers provisions”¹. This law has been amended by L. 28 April 2020, implementing the Shareholder rights directive².

The new Company code has introduced some substantial changes, such as incorporating the legal regime of the non-profit associations and of the foundations in the Code. It has also changed the regime applicable to the Besloten Vennootschap or BV (previously the BVBA/SPRL) and shifted the legislative preference for the largest entities to the Naamloze Vennootschap (NV/SA). The number of previously available company forms has been somewhat reduced, although less than what was originally intended. The nationality of the Belgian legal persons will be determined by their statutory seat, not anymore by the centre of their activities.

The new law has modified the applicable legal regime in a considerable number of other matters. The present contribution will be limited to the subject of conflicts of interest between a company and its directors, managers or other related parties, and the conflict between a company and other companies to which it is related. These are the “related party transactions” (RPTs), a widely accepted format under which the intercompany conflicts of interest are dealt with. This subject has been adapted several times in Belgian company law.

¹ 23 March 2019. – « Loi introduisant le Code des sociétés et des associations et portant des dispositions diverses : ; « Wet tot invoering van het Wetboek van vennootschappen en verenigingen en houdende diverse bepalingen » « Code ». It can be downloaded from <http://www.ejustice.just.fgov.be/eli/loi/2019/03/23/2019040586/moniteur>; For the Parliamentary documents relating to the Law of 28 April 2020, , see Chambres des représentants de Belgique, Doc 55 0553/009, 23 March 2020, and related documents : K0553/001-0/2019-1 (“expose des motifs”)

² Shareholder Rights Directive 2017/828 of 17 May 2017, amending Directive 2007/36. Hereafter referred to as “Directive”, or SRD II

1. Conflicts of interest v. Related party transactions according to the new legislation.

The Code builds further on the pre-existing provisions by formulating a set of rules applicable to the situation of conflict of interest and differently to that of a related party transaction. Where the “Conflict of interest” relates to the position of a director who takes part in a decision of the board, and has an interest which may be contrary to the interest of the company³, this director has to declare his interest to the other directors and this prior to the decision by the board in which he cannot take part⁴. The conflict is only considered if it relates to a conflict of a financial or proprietary nature which runs against that of the company, and hence would not be applicable to other conflicts e.g. relating to the hiring or position of a person, related to the director.

The different legal provisions refer to a “direct or indirect interest of a director relating to “property related” – usually: financial - matters which conflict with the company’s interests”⁵. This definition applies to cases in which there is a direct or indirect, “conflict of interest”⁶ between the company and a person taking part in the decision-making body, especially the board of directors. Similar provisions apply to decisions of the supervisory board in companies with a dual board structure, or in the management board⁷. The main legal consequence of the potential conflict is that the director has to abstain from the deliberation of the board, and of course cannot take part in the vote. If the procedure is not followed, the transaction can be declared void.

The ‘conflicts of interest regime’ has to be distinguished from the “related party regime”. The latter was already regulated in the previous Code⁸ but has now been the subject of a new, more detailed series of provisions introduced in the new Code pursuant to the Shareholders’ Rights Directive II⁹. The difference between the two systems is quite consistent. The main difference relates to the scope: RPTs mainly concern relations between companies, one being a listed company, and not with individual directors, although the latter may play a role in the definition of “related party”. Therefore, the RPT safeguards have to be applied irrespective, whether or not there is a personal financial interest between the parties involved in the transaction. Therefore, this regime is mainly a question of intercompany relations, often concerning intragroup transactions, and mainly applies to their objective relationships termed “related parties”.

2. The Conflicts regime in the new Belgian Company Code

It is striking that the new law has dealt with the subject of conflicts of interest in not less than 12 articles. Many of these present similar features, although sometimes with slight but not negligible differences. Generally, one could distinguish two main types of provisions: those addressing the closely held companies and the more complex regimes applicable to the listed companies. These provisions have always received much attention in Belgian legal practice and legal writing.

³ Defined in article 7:96 Code, as ““direct or indirect interest of a director relating to “property related” – usually: financial - matters which conflicts with the company’s interests”³

⁴ Article 7:96 of the Code; this regime is not applicable to transactions between companies which are 95% owner of the other, or are 95% owned by another company. Transactions between companies for usual transactions at usual conditions are also exempted.

⁵ “ rechtstreeks of onrechtstreeks belang van een bestuurder van vermogensrechtelijke aard heeft dat strijdig is met het belang van de vennootschap,”; in French: “Un intérêt direct ou indirect de nature patrimoniale qui est opposé à l’intérêt de la société «

⁶ “direct or indirect interest of a director relating to “property related” – i.e. usually: financial - matters which conflicts with the company’s interests”¹

⁷ See for the supervisory board; article 7: 115; article 7: 102, Code.

⁸ Article 524. Companies Code 1999.

⁹ See article 7:97, Code on companies and Associations, pursuant to article 9c Shareholder rights directive II 2017/828.

The previous law already contained some important provisions which conceptually formed the basis for the new legislation, and played an important role in the development of the law on groups of companies¹⁰. The new Code does not deal with the groups of companies as such, but its provisions on conflicts, including “related party transactions” will have a significant impact on group law.

On the other hand, the new law has introduced several provisions dealing with conflicts of interest situations for all of the company law types. There are specific provisions for the limited liability company (BV¹¹), for the company limited by shares (NV¹²), for the cooperatives¹³, for the foundations¹⁴, and the associations¹⁵, for the European cooperative societies¹⁶ and for the SE¹⁷. In addition, special provisions address conflicts relating to the activities of liquidators of companies¹⁸, of credit institutions¹⁹ or insurance companies²⁰ acting as asset managers investing in listed shares, and to the proxy advisors acting for shareholders²¹.

The conflicts of interest regime is based on some principles some of which are also found in the conflict regimes applicable to the direct legal entities, and in the RPT regime as well:

- It is only applicable to conflicts relating to financial or property aspects, whether direct or indirect;
- The conflict opposes the interests of the company, and are those of a director
- Only decisions belonging to the competence of the board of directors are subject, and not of the general meeting, or the day-to-day management
- The conflicted director must inform his co-directors of the potential or actual conflict before the meeting;
- In companies where an auditor or an accountant has been appointed, he describes the financial consequences of the conflicted decision;
- The conflicted director cannot take part in the discussion nor in the vote on the subject of the conflict. If all directors are conflicted, the matter will be submitted to the AGM.
- The conflicts regime is not applicable to decisions or operations between parent and subsidiary companies, owned at 95% by the former, or both owned at 95% by a third company.

The list of legal provisions illustrates the attention paid to the subject of conflicts of interest, and the legislator’s greater awareness about the impact of conflicted transactions and indirectly their effect on minority interests. The strictest regime is the one laid down in the Companies Code, applicable to the companies limited by shares, especially the listed ones. It is the subject of the present analysis.

3. The “Related party” regime according to the Law of 28 April 2020

As part of the revision of Belgian company law, the Belgian legislator developed a new legislative regime, which entered into force on 1st of May 2019. However, as the formulation in the Code did not reflect the SRD II, the law had to be amended what took place by the law of 28 April 2020²².

¹⁰ Article 524, applicable to listed companies.

¹¹ Article 5:76; article 7:97 also applies to the listed BV.

¹² Article 7:96 and 7:97 for the RPT; separate provisions apply in the case of duality of the board: article 7:115 for the Supervisory Board; article 7:117 for the management board

¹³ Article 6:64, Code

¹⁴ Article 11:8 Code

¹⁵ Article 9:8 and 2:129 Code

¹⁶ Article 16:16 Code

¹⁷ Article 15:21 Code

¹⁸ Article 2:98 and 2:129; Code

¹⁹ Article 75/1 L. 25 April 2014, banking law; investing for institutional investors; also, article 44/2, L 25 October 2016, investment managers

²⁰ Article 72/1, Code

²¹ Article 7:146/2 § 2, 7e. Code

²² See: Published in the Belgian Official Journal of 6 May 2020 ; Parliament, Adopted Proposal Doc 55-0553/006 of 19 February 2020; The directive had to be implemented by 10 June 2019.

The “related party regime” requires listed companies to apply to decisions and operations between the listed company and other parties, which meet the conditions for being a related party, a special decision-making procedure, aimed at revealing whether the decision is beneficial to the company and fits with its policy, or if not, fits with other policy elements, or as the case may be, is manifestly prejudicial to the company. The regime is mainly intended to limit the discretionary powers of the controlling or dominant shareholders

(a) Scope: listed companies

The new regime on RPTs corresponds to the formulation of the SRD II, in the sense that it is only applicable to companies the shares of which are listed, being traded on a regulated market for securities²³. The law contains a definition of “listed” company, being a company the shares or “certificates of shares” of which are admitted for trading on a regulated market²⁴.

The RPT regime can be applicable cumulatively with the conflicts of interest regime, i.e. in case a related company is directed or represented by a person who has a personal interest in the transaction. In this case the conflicted director will not take part in the deliberation and in the decision making, the conflicts regime being cumulatively applicable to the conflicted director²⁵. The law specifies that if all directors are conflicted, the decision will be submitted for decision to the general meeting²⁶

(b) Transactions and decisions

The new regime applies to “decisions” adopted and “operations implementing a decision by the board of directors”²⁷ of a listed company, in which case the special RPT procedure will have to be applied, if the other party to the transaction qualifies as a “related party”. The law does not indicate which action results in “decisions” or “operations”, concepts also used in the previous legislation. The Belgian law does not refer to “transactions”, which is the criterion applicable for the interpretation of the directive.

It is striking that the Belgian law has not adopted the Directive’s terminology of related party “transactions”, although the latter has been defined in the accounting standard IAS-24, which is applicable in the EU pursuant to Commission regulation 632/2010 of 19 July 2010²⁸. A “related party transaction” is defined in IAS-24 as “a transfer of resources, services or obligations between a reporting entity and a related party, regardless of whether a price is charged.”²⁹ It is debatable to what extent this definition would also be applicable for the interpretation of the Belgian law concepts “decisions” or “operations”, as referred to in article 7:97 of the Code. The Belgian code only refers to IAS-24 for defining “related party” without linking this to the definition of “transaction”³⁰, although in most cases a “decision” or “operation” will result in or refer to a “transaction”. This terminological difference was justified by referring to the previous legislation

²³ Article 1:11, Code; listed share certificates, or dividend certificates also qualify for the qualification as a listed company.

²⁴ Defined pursuant to article 1:11, Code, referring to L, 21 November 2017, on financial markets infrastructures. The regime can be extended by royal decree to shares traded on multilateral trading facilities

²⁵ See article 9:97, § 4, Code

²⁶ See article 9:97, § 4, Code.

²⁷ “décision ou opération” – “beslissing of verrichting”. No reference is made to “transactions” although the latter term is used in the directive.

²⁸ Endorsed by Commission Regulation 632/2010 of 19 July 632/2010.

²⁹ See IAS 24, § 9 “definitions in Commission regulation 632/2010 of 19 July 2010; reference is made in the amended article 2(h) Directive.

³⁰ “Verbonden partij” “partie liée”; According to IAS 24, “A *related party* is a person or entity that is related to the entity that is preparing its financial statements”, further elaborating on the criteria for qualifying that party as related. In IAS 24 terminology, a transaction “is a transfer of resources, services or obligations between a reporting entity and a related party, regardless of whether a price is charged.

which also used this terminology. Whether this would contribute to the clarity of these legal requirements is open for discussion.

With respect to the application of the RPT requirements, these “decisions or operations” are only considered to the extent that they belong to the category of matters which belong to the remit of the board of directors of a company which is listed. Relations between non-listed entities would in principle not be subject to the RPT regime³¹. According to the general principles of company law, this remit may include matters which have been added to the description of the remit of the board according to the company charter, what would constitute an additional safeguard for the protection of certain, e.g. minority, interests³².

Which type of items would qualify to be the subject of related party transactions has been left open, both in the directive as in the Belgian law: the only indication indirectly refers to decisions or operations with a certain “value”, exceeding the threshold of 1% of the consolidated net assets of the listed company³³. These could be the subject of contracts relating to substantive property items, or immaterial items such as IT programs, or service contracts, or tax or accounting services. The potential impact on the company’s business could also be considered: non-competition clauses or exclusive distribution or supply clauses may also have a significant value, but are not material ‘property’ in the traditional sense, as required for the application of the conflicts of interest provision. This lack of clarity may seem regrettable as these instruments are frequently used for the transfer of profits to other group entities, raising valuation concerns. Decisions for the appointment, or removal of a person who qualifies as a related party would certainly not be included.

This formulation raises the question what are these “decisions and “operations”. Firstly, only board decisions are subject to the RPT regime: for decisions by the executive management, the RPT regime will not apply: this may be regrettable as abusive practices have been identified in this field, investor protection is largely lacking. Decisions for which the general meeting is competent will be excluded as well.³⁴ The exemptions from the regime may also be based on the usual character of the transactions, or their limited financial value, even if normally they would belong to the remit of the board³⁵. These will often be delegated to the executive management.

“Decisions” would rather refer to a declaration of the will by the board, after an exchange of views between board members, due consideration and concluding. Most of the time, decisions will be adopted on the basis of a proposal by the management, or by a committee of directors. Decisions relating to contracts negotiated with a third party will result in a decision adopting the proposed action, which would qualify for the RPT regime if the counterparty qualifies as a related party. In some cases, the decision of the board will be the unilateral confirmation by the board of a tentative agreement reached with the third party: the confirmation is the legal basis of the decision, not the proposal. The RPT process will have to be prepared once the tentative agreement has been submitted to the board for adoption of the proposal to be concluded with the related party. It is upon the adoption that the legal process has to be secured.

In some cases, decisions of the board will result from unilateral declaration by the company: the listed company has put on public sale some of its assets, for which a related party wanted to make a bid: upon acceptance of this proposal by the listed company, the acceptance will result in a decision

³¹ See however, some cases under Belgian law, sub littera (g)

³² See Expose des motifs, relating to the government proposal, nt. p. 22-24 The government preferred not to submit certain transactions to the general meeting.

³³ The directive refers to “material” transactions, referring to the impact on the company’s business, not to the object of the transaction: see article 9 c, (1) Directive. In this respect the RTP regime differs from the “conflicts of interest” regime where a conflict has to relate to material, financial or property interests.

³⁴ See Expose, n.1, p. 21, explicitly excluding the general meeting

³⁵ See article 9:97 § 1 (3), Code.

which would qualify as an RPT although initiated by the “related party”. The listed company will have to ensure that the RPT process is respected and this to avoid the contract to be nullifiable. The activity deployed by directors in bringing about these contracts will only call for the application of the RTP procedures if that director triggered the qualification of the contracting party as a ‘related party’. In some circumstances he may be held to respect the rules on the conflicts of interest if he had a personal interest in the contracting party³⁶.

The “operations implementing a decision of the board of directors” would rather refer to the declaration of the will of the company based on previously adopted decisions. Board resolutions merely referring to implementing acts of previously agreed contractual relations, would not qualify under this definition: they consist of further providing a certain service, e.g. the additional financing of a third party, based on acts initially qualified as a “decision” but not implying an additional agreement on the action due on the basis of the original contract. Also, it would not be logical to resubmit operations to the RTP procedure – essentially a board matter – for operations or the implementation of board decisions as long as this action stays within the limits of the original agreement. Often, these subjects will qualify as “usual”, in accordance with the standard procedure established by the board, allowing them to qualify for an exception under the RTP regime³⁷. This would not be the case if the operation created a new contractual relation, or adopted different conditions, although established on the framework of the original decision. A clause to that extent in the original decision might avoid triggering the RTP procedure.

Simplifying this semantic exercise, one may summarise “decisions” as referring to the creation of new relations while “operations” are implementing acts, to which the company has to give its additional agreement. If no additional agreement is necessary, if the agreement stays within the limits of previous decisions, the RTP regime will not apply.

In order to avoid repetitions, the present analysis will also refer to them under the standard terminology of “transactions”.

Usual or successive actions will be exempted from the RTP regime if they remain within a limited volume: if the transaction results in periodic payments within 12 months, these have to be accumulated to determine whether the threshold of 1% of the consolidated net assets of the parent, has been crossed rendering the RTP regime applicable³⁸. This reasoning may also apply to the qualification of the series of implementing acts pursuant to the original transaction.

(c) “Material” transactions and ‘de minimis’ exemptions.

The Belgian law has not restricted the application of the RTP regime to “material” transactions, the latter not having been defined as indicated in the directive³⁹. In other jurisdictions, this has led to quite complex provisions to determine “materiality”. The directive allows Member states to adopt different materiality definitions on the basis of quantitative ratios, but the Belgian legislator has

³⁶ He may qualify as “key management personnel” under IAS 24 but as he has no personal or direct interest in the transactions his participation in the board deliberation is not decisive. The French version of the text mentions “ implique” which indicates a certain legal involvement.

³⁷ Article 7:97 § 1(3), giving the board the right to establish an internal procedure to assess whether these transactions meet the conditions of the law. The related party should not take part in the assessment.

³⁸ Article 7:97 § 1 (3), Code

³⁹ See the criteria mentioned in article 9 (c) 1 Directive. where “materiality” is defined as 1. The influence of the transaction on the economic decisions of shareholders; or 2. the risk created for the company and shareholders ... including minority shareholders.” The English version “material” has been translated in French, as “importantes” in Dutch “Materiële”, in German “wesentliche Geschaefte”.

adopted a more radical approach, without considering the directive's substantive criteria for defining materiality⁴⁰.

The Belgian legal regime is applicable to all transactions with related parties, except those transactions that can be considered as "de minimis"⁴¹, standing for the "usual" transactions or those which do not exceed 1% of the consolidated net assets of the listed company. It applies both to the RTP regime and the approval system for unlisted subsidiaries.

For both the listed parent and its subsidiaries, the decisions and operations concluded on a usual basis at the prevailing market conditions, and at the usual price and guarantees, will be exempted; the board of directors of the relevant company will develop an internal procedure to evaluate whether these conditions have been met. The risk of prejudice of the shareholders of parent and subsidiary is quite minimal if the conditions are met.

Decisions and operations for a value less than 1% the net assets of the listed company, on a consolidated basis are also exempted. Both the parent and the subsidiaries could avail themselves of this exception; transactions within the last 12 months and with the same related party will be added up for the calculation of the 1% threshold.

As a consequence, the Belgian legal regime is applicable to a very broad range of transactions⁴², even to transactions which do not meet the directive's criteria for materiality defined as "the influence of the transaction on the economic decisions of shareholders" or "the risk created for the company and shareholders ... including minority shareholders"⁴³. By adopting a very expansive threshold of materiality – i.e. determined by way of a low percentage of net assets – the Belgian law would convey a wider range of protection to shareholders and investors than originally considered in the directive. Whether this would lead to an additional administrative burden for the companies involved is difficult to predict: the exceptions will therefore become more important.

(d) Decisions for the general meeting or for the board of directors.

The Directive contains a general criterion according to which it requires member states to introduce a regime reflecting the division of competences within companies. It states: the directive allows material transactions with related parties to be "approved whether by the general meeting, or by the administrative or supervisory body of the company according to procedures which prevent the related party from taking advantage of its position ... and provide adequate protection for the interests of the company and of the shareholders who are not a related party including minority shareholders"⁴⁴. The Belgian does not provide for the submission of RTP decisions to the general meeting.

The Belgian RPT regime only applies to "decisions" or "operations" which belong to the competence of the board of directors of the listed company, not including matters which have to be submitted to the general meeting in which the generally applicable rule of majority of shareholders majority applies. Differently from the directive, the RPT regime under Belgian law only applies to board decisions, including some that will be submitted to the general meeting for final decision. The latter

⁴⁰ See article 9 c (1) Directive" when defining material transactions Member States shall set one or morequantitative ratios based on the impact ...". as "the influence of the transaction on the economic decisions of shareholders" or "the risk created for the company and shareholders ... including minority shareholders". The Belgian legislator has considered that by exempting transactions for less than 1% of the net assets, it has met the criterion defining "material" transactions. See; Expose,nt. 1, p 23, iii.

⁴¹ See article 7:97, § 1(3) ,Code

⁴² See article 7:97, § 1(3) ,Code

⁴³ See article 9 c (1) Directive" when defining material transactions Member States shall set one or morequantitative ratios based on the impact ...". The Belgian legislator has considered that by exempting transactions for less than 1% of the net assets, it has met the criterion defining "material" transactions See Expose, n.1, p 23, iii.

⁴⁴ See article 9c, (4) 1, Directive; comp. the analysis in the Expose, n 1, p. 21-22

case is quite significant as the Belgian law lists a number of subjects which will necessarily be subject to decisions of the general meeting, such as:

- 1- Contribution in kind to the listed company by a related party; this also applies to a contribution of a branch of activity or an industrial branch, by a party related to the listed company⁴⁵;
- 2- Proposals for a merger, division or an assimilated transaction by a related party, as referred to in article 12:7⁴⁶ or transfer of an industry department in a related company.⁴⁷

One should however not be misled: it is only the decision of the board of the listed company to submit the motion to the general meeting which will qualify for the RTP procedure, not the proposed decision of the general meeting.⁴⁸

These operations would normally not be addressed under this regulation, belonging to the competence of the general meeting. However, the Belgian law refers not to the decisions of the general meeting but to the proposals relating to these decisions, as these are prepared and adopted by the board of directors to be submitted to the general meeting. The extension does not apply to operations between a listed company and its subsidiary, except if the controlling shareholder of the listed company holds a participation of at least 25% of the subsidiary⁴⁹.

Further analysing the scope of the RTP regime from the angle of the distribution of powers to the board v. the general meeting, or to the executive management, one may wonder whether certain subject matters may not be shifted from the general meeting to the board, or vice versa submitting board decisions to the general meeting, thereby circumventing the RTP procedure applicable to the board. Technically the question comes down to the changes in the allocation of competences to whether the board or to the general meeting.

The Belgian companies act only states that the board is entitled to deal with all matters which are necessary or useful for the realization of the company's objective, except those for which the law declares the general meeting to be in charge⁵⁰. This provision would exclude to transfer competences from the general meeting to the board. Transferring competences to the general meeting was discussed during the Parliamentary debate, the question of extending the RPT procedure to the general meeting was raised, the government stating that according to Belgian law, the residual powers belong to the board of directors, not to the general meeting which intervenes only in the subject matters clearly identified as belonging to the remit of the general meeting⁵¹. Therefore, according to this statement, delegating certain "related party" matters to the general meeting would not be in line with Belgian law. However, the Code also provides that restrictions to the competences of the board, which might be introduced by the company's statutes, would be valid but only have an internal function⁵². These restrictions would submit certain matters to the general meeting, but i.a. third parties, the decisions would still be presented as board decisions, their invalidity on the basis of the attribution of competences to the general meeting could not be raised against a third party. Whether this provision would prevent a company to submit certain matters to

⁴⁵ See article 12:7, Code for transactions assimilated to merger by absorption.

⁴⁶ Including transactions "assimilated to restructurations", as a consequence of a transfer of all assets: article 7:97 § 2 (2), Code

⁴⁷ See article 12:7, Code for transactions assimilated to merger by absorption

⁴⁸ See article 7:97, § 2 Code.

⁴⁹ Article 7:97, § 2; The concern is the same as mentioned littera (f)

⁵⁰ See article 7:93 Code.

⁵¹ See Comment sub article 31, Expose des motifs, n 1, citing a list of decisions which belong to the competence of the AGM. No further action was considered necessary under Belgian law: the honest treatment of all shareholders and of the company, and of shareholders who are not related parties, including the minority shareholders are expressly mentioned in the law and are adequately protected.

The government argued that according to Belgian law, the residual powers belong to the board of directors, not to the general meeting. The latter intervenes only on the subject matters clearly identified as belonging to the remit of the general meeting article 7:124, Code, subject to statutory extension. The latter cannot be invoked against uninformed third parties.

⁵² Article 7:93, § 1, Code

the general meeting, including the application of the RTP process as part of an internal decision making, seems not incompatible with the Code, and cannot be held contrary to the statement that “the board is in charge of all company matters, except for the matters belonging to the competence of the general meeting” even if this competence is only a company internal matter⁵³.

With respect to the delegation of certain powers to the executive, the Code contains an overall limitation on the power of the board to delegate to the executive management: only matters motivated by the needs of day-to-day management or actions of minor importance, but also urgent actions may be so delegated⁵⁴. Applying the RTP regime to minor matters, including day-to-day decisions seems excessive as the Code itself allows these decisions to be exempted from the RTP procedure. Unless otherwise provided in the statutes, it would be excessive to require an RPT process for these types of matters⁵⁵. As to urgent actions, there may be some doubts whether these, when delegated to the executive could be validly exempted from the RTP regime: much will depend on the degree of urgency and the impact of the transaction on the interest to be protected⁵⁶.

(e) The Related party - “verbonden partij” – “partie liée”.

The notion of “related party” – translated as “verbonden partij” – “partie liée”- is a not a specific concept in Belgian company law. The new Code contains another provision referring to related and associated companies – “Verbonden en geassocieerde vennootschap”- “sociétés liées et associées”⁵⁷ which refers to companies which are part of a group on the basis of control, as defined⁵⁸. Although these companies are also “related” in the sense of the RPT regime, the Code defines the latter in a different, more outcome-focused way for organizing group-internal decision making. The Directive and the Belgian law contain no own definition of related parties, in the specific context of transactions with a listed company, but refers for these to the Accounting standard IAS-24, dealing with related parties’ “disclosures”⁵⁹.

The notion of “related party” is technically not linked to any specific conflict of interest context, but to the mere fact that the counterparty for a certain decision or operation is another company with which the listed company or its directors or shareholders have a certain relationship which may influence the objectivity of decision-making between the listed entity and that other company, even in the absence of any indication of a conflict of interest. Underlying to this mark of distrust is the fact that these “decisions or operations” may not be inspired by the best interests of the shareholder or investors, but rather inspired by the interest of the related party, therefore calling for certain safeguards. In order to combat this type of bias, a procedure has been developed aimed at situating the decision in the overall policy of the company, and identifying whether the decision is prejudicial to the company’s interest, or has been compensated by other elements, or may be even manifestly wrongful.⁶⁰ This broad yardstick allows to include in the RTP regime decisions which may be prejudicial to the company, but not necessarily to the advantage of that related party. In that

⁵³ Article 7:121, Code

⁵⁴ See 7:121 (1), Code

⁵⁵ Article 7:96 § 1, Code

⁵⁶ See article 9 c, (4) Directive, referring to “procedures which prevent the related party from taking advantage of its position”

⁵⁷ Article 1:20; Code; this definition does not respond to the objectives of the RPT regime under article 7:97. Code.

⁵⁸ Control is defined in the Code, article 1:14 .

⁵⁹ See the reference to IAS-24 in article 7:97(1) of the Belgian Code, as modified by L. 28 April 2020. IAS-24 is part of the EU accounting standards, having been endorsed by the EU Commission, in application of Regulation 1606/2002. See Commission regulation of 19 July 2010, 632/ 2010. See reference in SRD II, article 2 (h). The Code’s legislative proposal originally did not make this reference: Exposé, p 20 Whether the scope of a standard dealing with disclosures is fit to be used for defining the ambit of a standard regulating internal decisions is debatable.

⁶⁰ Article 7:97, § 3, Code

respect too, the RTP regime should be distinguished from the “conflicts of interest” approach, where the conflicted party is necessarily a direct or indirect beneficiary.

Both the directive and the Belgian Code define the “related party” by referring to the Accounting Standard IAS -24, the latter standard being only applicable to related party *disclosures*, a much broader field of application. IAS-24 requires all companies to disclose that their financial position may have been influenced by transactions with related parties which may call for an adaptation of the accounting outcome. The disclosure would affect both the individual company’s financial statement and its consolidated position.

For the present purposes, the reference to IAS-24 allows to identify the related party from the point of view of the listed company, and the ways followed to exercise significant influence over the decision-making in the other, related company. These techniques are first the traditional company law tools to define “controlling influence”: subsidiaries and other controlled entities are related parties, irrespective of the percentage of ownership. The Belgian law does not differentiate between subsidiaries which are wholly owned, and those where a lower percentage of ownership, or other techniques of control resulting in the controlling party to take into account certain activities of that subsidiary.

According to IAS-24, a “related party is a person or entity that is related to the entity that is preparing its financial statements (the reporting entity): in RPT terms, this would be the listed company. The definition of a related party according to IAS-24 is much broader than what usually be considered part of the group relationship: The IAS-24 standard extends the perimeter by including physical persons as vectors of the influence in transactions with the listed company on the basis of their family or personal relationships: here we find the close members of the family, including children or dependents, persons with a strong influence over the entity, or persons who have parallel financial interest in group policy making or mechanisms, such as a common interest in employee benefit schemes, compensation, employee benefits including pensions, retirement, life insurance benefits, termination benefits, etc. These elements have a streamlining influence on internal decision making, including on the subsequent contractual relationships, and the legal liabilities⁶¹. Comparable criteria have been used for defining group influence in competition cases, and in the case law on banking⁶². The reference to IAS-24 requires detailed analysis about the existence of a related party relationship, especially as ignorance of the relationship may lead to sanctions for the listed company in terms of nullity of the transaction.

The related party concept according to IAS -24 refers to “entities and persons” the first ones being legal persons, while the persons - e.g. the close members of the family or a person with strong influence over the entity - allows to define the perimeter of disclosures – e.g. employee benefits – but without defining the addressee of the disclosure duty. Here the family of a person, and the close members of his family who may be expected to be influenced by that person in its dealings with the company, will also qualify as a related party. They would include the person’s spouse, children and dependents.

The same reasoning could be followed for the interpretation of the perimeter under SRD II: the RTP regime is applicable to legal entities, but includes in its definition of the “relation,” physical persons with significant influence over the legal entities, such as family members, children or dependents. In some cases, the RTP regime might include relations not only with legal entities, but also with a physical person, if the latter has influence in the group or on decision making:

⁶¹ See for the different cases, § 9 of IAS-24;

⁶² Compare: ECJ, 10 September 2009, [C-97/08 P](#), Akzo Nobel and Others v Commission; [\Users\eddywymeersch\legal-content\EN\AUTO](#) ECJ, 12 July 2019, Case T-419/14, Goldman Sachs v. Commission

e.g. the purchase of assets from a member of the key management personnel of the group⁶³. Would the RPT procedure be applicable, or also the conflicts of interest rules: probably both as the content of each of these is different.

To define a "related party", the accounting standard first uses a number of concepts of company law, mainly using group law techniques to define the relationship between companies as leading to a "relation" between companies. In this group of cases one finds relations between companies based on control, on significant influence, or of "significant influence" through members of the key management. In a rather vague criterion, the entities may also be related because they are members of the "same group", being related by control-based links. Companies in joint ventures or participating in a third-party joint venture are also considered as related to each other or to the third joint venture party. The presence of a sole shareholder, controlling the entity, or having significant influence on the entity, including the key management personnel also establish related party links.

The related party concept according to IAS-24 refers to further criteria related to the benefits persons obtain from their association with the "related party". This is the case for benefit schemes, commercial representation, compensation schemes, etc.

The way the scope of these provisions has been defined is likely to influence decision making and create legal uncertainty⁶⁴. The "related party" criteria may be appropriate to use in the field of financial reporting for which they initially were developed and are used under the responsibility of the company auditor. Their use for company law purposes is likely to raise interpretation issues, leading to an extensive application of the RPT regime, - although the latter is also partly based on a disclosure-based system - which will have a strong influence on prudent internal decision making. Moreover, they may trigger issues about the validity of certain transactions, including liability of directors for not applying the legal procedures. It would have been preferable if the directive had adopted a more substantive approach to the definition of "related party".

(f) The RPT regime as applied to subsidiaries: exceptions

The RPT regime is mainly addressing potential consequences of decisions with related parties and informing shareholders about the possible advantages or risks which may result from these often-defining transactions. At the same time, it aims at avoiding or restricting abuses flowing from company decision-making, by advantaging companies, or individuals with whom the company or its leading or controlling shareholder has a privileged relationship, or which can be realised at conditions which benefit that party to the detriment of the company. The law provides a certain number of safeguards where the risk of this type of abuse is remote, or in any

⁶³ See IAS 24, Definitions, § 9, (b) (vii)

⁶⁴ IAS 24.9 defines as a related party, i.a.

1. a person or a close member of his family with control, joint control, significant influence over the reporting entity, member of key management personnel;
2. the entity and the reporting entity are members of the same group; one entity is an associate or joint venture of the other entity;
3. both entities are joint ventures of same third party
4. post-employment defined benefit plan for employees of any of these entities
5. entity controlled or jointly controlled by person sub 1
6. Key management personnel services to both entities
7. Venture with joint control over a joint venture
8. Joint controllers of a third party

Are not related entities : simply because they have no common director or manager
Joint controllers of a joint venture

A Single customer with significant business volume with another entity, exclusively due to economic dependence

case the effects would be marginal. These cases will be described in terms of “exceptions” to the RPT regime.

Several of these exceptions relate to “decisions or operations” in which a subsidiary of the listed company is involved. For outright transactions with subsidiaries the Belgian law distinguishes the subsidiaries in general, and those which are unlisted⁶⁵. The general regime exempts from the regulatory obligations the related transactions between a listed parent and its subsidiary: the subsidiaries with their listed parent as both are considered as one single centre of business, the interests of both parties being supposed to be largely parallel. The definition of subsidiary is related to the notion of control, as laid down in the Companies Code⁶⁶ and relates to both Belgian and foreign companies. This parallelism may be weaker in case transactions are realised with a related party which is economically or financially different from the listed parent company, e.g. resulting from a participation of less than 100%, even less than 50%, but still affording control. According to the Belgian law, the RPT standard does not apply to transactions of any subsidiary with its listed parent irrespective of the percentage of control exercised by the parent⁶⁷. The Belgian law adopts this broader approach exempting any subsidiary relationship from the RPT requirement as their interests are closely related. This approach applies to fully owned subsidiaries⁶⁸. But very often the control position of the parent may be based on lower percentages, allowing third parties to also exercise some, although not a decisive influence.

The directive does not clearly allow for this approach: if not wholly owned subsidiaries may be excluded, this can only be on the basis that “national law provides for an adequate protection of interests in the company, of the subsidiary and of their shareholders who are not related parties...”

The Belgian law adopts this broader approach exempting any subsidiary relationship from the RPT requirement: on the one hand, it does not require to apply the RPT safeguards to transactions of subsidiaries with their listed parent as both are considered as one single centre of business. This approach applies to fully owned subsidiaries⁶⁹. But very often the control position of the parent may be based on lower percentages, allowing third parties to also exercise some, although not decisive, influence. Belgian law allows not to apply the RPT regime to the relations of a listed company with its subsidiaries. Subsidiaries are defined as entities on which the parent exercises control, being control at law, or de facto, this is: by the exercise by one party of the majority of the voting rights at the last two general meetings, or de facto: being based on a more complex relation leading to a significant influence of the subsidiary⁷⁰. The application of these widely defined criteria may lead to a very considerable limitation of the scope of the RPT regime, allowing to exempt not only legally controlled subsidiaries but also many minority-owned subsidiaries, where the power is shared with other, less significant shareholders. The directive allows Member States to exclude, or companies to exclude from the RPT regime in very wide terms, not only wholly owned subsidiaries, of in case no other related party has an interest in the subsidiary. As an equivalent, the exemption also applies if the national law provides for adequate safeguards. The Belgian law has more simply exempted all related party transactions with all subsidiaries, probably on the basis that an adequate regime of safeguards is available. It thereby restricted the scope of the RPT regime to transactions with entities outside the control perimeter.

⁶⁵ Dealt with separately in article 7:97 (1) 1st and second §.

⁶⁶ See Article 1:15 Code, as the company which is subject to a controlling power, as defined in article 1:16.

⁶⁷ The Directive requires the subsidiary to be wholly owned: article 9 (c) 6.a. But the directive’s exemption extends to transactions with a subsidiary in which no other related party has an interest, or which is subject to national law providing adequate protection of the interests of that subsidiary. The Belgian law might have referred to these criteria for defining a “related party” in IAS 24.

⁶⁸ See Directive article 9 c 6(1)

⁶⁹ See Directive 9 c 6(1)

⁷⁰ See: for the different criteria of control: article 1:14; de facto control is based on “other factors” than control based on ownership or contract”; it will be presumed on the basis of the factual majority voting rights : article 1:14 § 3 of the Company Code.

This principle that the RPT safeguards would not be applicable to decisions and operations between a listed parent and its subsidiary does not extend to the case where a third factor intervenes: this is the controlling shareholder of the listed parent holding - separately from the listed parent – owning a stake in the subsidiary which amounts to at least 25 % of the share capital of the subsidiary⁷¹. It is considered that the considerable influence of that controlling shareholder, both in the listed parent and in the subsidiary of the listed parent — at least at the 25% threshold! - is a justification for rendering the RPT regime applicable⁷². The practical view might have been that this shareholder might abuse its power to subtract assets from the subsidiary or impose detrimental transactions. But the same reasoning could be applied to any other subsidiary which is not fully owned. This exception can be based on a specific definition of control, linked to the strong position of that shareholder as controlling the parent company: the directive does not refer to a comparable criterion, but merely limits the exception to the case where another related party has “an interest in that subsidiary”.⁷³

This exemption applies to all subsidiaries, even to the listed ones: in case both the parent and the subsidiary are listed, the RPT regime would not be applicable as the transaction would relate to a subsidiary. If an unlisted parent was the controlling shareholder of a listed subsidiary, the RTP regime would be applicable to transactions between these two entities: a related party would hold a participation in the subsidiary listed company. If two independent legal entities would enter into negotiation e.g. for the sale of a plant, or of significant assets, the RTP would not apply as none of these companies are listed. If both were listed, the RTP regime would not apply as they did not control each other: but if the assets belonged to a joint venture of any of these, the RTP regime might be applicable, as partners in the joint venture are related parties⁷⁴.

(g) The approval regime for unlisted subsidiaries

The Belgian law has supplemented the RTP regime by requiring transactions *of unlisted* subsidiaries of a listed parent company involving related parties of that subsidiary to the prior *approval* of the parent company⁷⁵. The prior approval will apply to all transactions of the “unlisted subsidiary” with the parent company or with a party which is related to the parent or to that subsidiary. As the approval requirement is a stronger tool for the controlling party, the application of the RTP procedure was obviously not further considered to be necessary. Without approval, the transaction could not be realized. This special regime relating to unlisted entities is a Belgian addition and is not part of the directive.

In this context again, the approval requirement applies irrespective of the level of control exercised on the subsidiary, but here also with the exception of transactions with the listed company itself – also a related party -, or with another subsidiary of the listed company, but with the exception of transactions with a subsidiary which is at least 25% owned by the controlling shareholder of the listed entity.

The text of the law is unclear as to its application to transactions between subsidiaries of the same listed parent⁷⁶. The regime to be applied to these unlisted subsidiaries of a listed parent is

⁷¹ Or is entitled to receive 25% of the profits distributed by the subsidiary. This is a supplementary criterion for all provisions dealing with the 25% holding in the subsidiary.

⁷² See article 7:97 § 1, as amended, Code

⁷³ Perhaps in IAS 14. The 25% criterion is not a generally accepted threshold for defining control: It is not mentioned in IAS-24. Only in very exceptional circumstances could control be assumed if apart from the 25% shareholder, no other significant shareholder were present, and while de facto that shareholder exercised leadership powers which are not contested by the other shareholders.

⁷⁴ As defined in IAS-24

⁷⁵ Article 7:97 § 1, (2), Code

⁷⁶ The French text mentions: “qui concernent leurs relations avec une partie liée”, meaning that both the relations of the parent or those of the subsidiary are referred to. The Dutch text states “die verband houden met hun betrekkingen met een verbonden partij” which may

more severe than the RPT regime: these unlisted subsidiaries cannot adopt decisions or operations “concerning their relations with a related party”, except with the approval of the listed company. The text of the law is explicit as to its application to related transactions with the parent but not to transactions with other subsidiaries of the same listed parent. In the latter case, this would broaden the approval right to horizontal transactions of the subsidiary with another party, which qualifies as a related party. It would introduce some form horizontal control.

The approval requirement does not apply to transactions between the unlisted subsidiary and the listed parent company, or any other subsidiary of the latter. Here again an exception applies to the case in which the controlling shareholder of the parent also holds at least 25% of the shares of the subsidiary. Here also, the same remark should be made about the broad criteria applied for defining a subsidiary, as the rule applies to minority controlled or de facto controlled subsidiaries.

Differently from the RPT regime – mainly consisting of the assessment of the fairness of the transactions, the pro and cons of it, after due consideration by a committee of independent directors and the decision of the board - the approval regime is not further qualified. It grants the parent a fargoing control over group-internal relations although only to the extent that these concern unlisted entities.

This approval requirement is a significant change in the parent-subsidiary relationship, implying a lower degree of autonomy of the unlisted subsidiaries for transactions with the parent, or even within the wider group. It will be a powerful instrument in disciplining these subsidiaries, putting decision making directly in the hands of the parent. Applying the principle that the subsidiary is a separate legal entity, it derogates from the rule that the parent does in principle not give specific instructions to the subsidiary, while these may trigger the parent’s liability. The law does not outline how this approval will be granted, especially in the case that the parent is not involved in the decision making, e.g. in a transaction between subsidiaries as the text of the law seems to imply. The approval requirement does not amount to control in the traditional sense; it only affects the specific transaction with a related party, not the entire activity of the subsidiary. But it may affect the parent’s control over these subsidiaries, which may avoid engaging with other related parties, except on the terms as approved by the parent. Although the entire management of the subsidiary will not be affected, in certain cases one may fear that this approval right and its use could be considered as an element in qualifying the position of the parent as a de facto director of the subsidiary.

The fact that the approval regime applies would does not necessarily exclude the RTP provisions to be applicable: non-application of the approval regime does not eliminate the need for the protective RTP regime to be applicable even in case the listed parent has given its approval. This matter has not been addressed in the directive nor in the Belgian law.

(h) Other exceptions to the RPT regime

Decisions and operations relating to the *remuneration* of the directors, the executives in charge of directing the company and the day-to-day managers, are also exempted. This exemption corresponds to the formulation followed in the directive, except that the directive limits the

refer to both the parent or the subsidiary . The approval is required” for transactions concerning their relations with a related party” other than the parent, or a subsidiary of the parent.

exception to ‘directors’. The directive introduced separate requirements addressing voting policies with respect to remuneration⁷⁷.

Decisions or operations imposed by the financial authorities with a view of preserving *financial stability* of the institution, or of the financial system in general: this exemption not only applies to an individual credit institution, but to a group of institutions designated by the financial authorities. This exception is based on the predominant public interest: the financial stability of the bank or the wider macroprudential risk to the financial system are the justification for this exception⁷⁸. The exception could be quite significant for some transactions – as mergers, capital increases - which have been added to the list of regulated transactions.⁷⁹

Another exemption relates to transactions with essentially an *internal effect*: it is based on the provision of the directive for “transactions offered to all shareholders on the same terms”⁸⁰. Equal treatment of all shareholders but also the protection of the company’s interest are the objectives. The Belgian law has declared this exemption applicable to the acquisition or disposal of own shares, the distribution of interim dividends, capital increases on the basis of the authorized capital, without waiving or limiting the preferential subscription right of existing shareholders. The Directive’s condition of “equal treatment” has not explicitly been included in the text of the Belgian law, but could be invoked on the basis of general principles of Belgian company law. Some of these exceptions are considered to relate to decisions adopted by the general meeting⁸¹ or in the case only the board is involved, on the directive’s exemption for transactions offered to all shareholder on the same terms⁸².

4. The company law procedure to be applied to RTPs

The RTP regime as introduced in the Belgian Code pursuant to the SRD II directive is based on some general principles:

- The transactions subject to the RTP procedure have to be identified and the process initiated by the “listed company”, for a decision or an operation which qualifies as an RTP;
- A standard procedure has to be adopted before initiating the board procedure for the adoption of a specific decision or operation;
- The board of the listed company will initiate the RTP process, by designating the members of the assessment committee. The committee will be composed of three independent members of the board. The conditions for their independence have been laid down in the Code, and would apply here as well.⁸³
- The committee can request the assistance of one or several independent experts of its choice, at least if it considers this to be necessary, the costs being borne by the company. It is logical that the company would support the committee for secretarial services.

⁷⁷ See article 9 a and 9 b, Directive. And 7:97 para 1(3) of the Code. This exemption would include indirect salaries paid through subsidiaries, from the angle of the RPT regime.

⁷⁸ It is unclear whether this exception would only be applicable to one credit institution- as the text indicates- , or generally to several institutions or more widely to the financial markets; see article 7:97 § 1, (4) (4.) Code; Comp. article 9 (c) 6 (d), Directive

⁷⁹ It is unclear whether this exception would only be applicable to one credit institution, or more generally; see article 7:97 § 1, (3) (4.), Code

⁸⁰ Article 9 c (6) e Directive.

⁸¹ See expose des motifs p,21 ; see article 9 c, § 6 (2) or (5) Directive

⁸² See 9 c (6) e, Directive.

⁸³ See for the definition of independent directors Art. 7:87. § 1. Code. Previously article 526 ter, Companies Code. Independence is defined by the lack of relationship with a significant shareholder which might jeopardize his independence. The independence criteria contained in the Belgian Corporate governance code, principle 6 , as determined in a royal decree. This decree has not yet been adopted. See further the Corporate Governance Code 2020 § 3.5.

- The process is applicable due to the mere fact that the proposed transaction will be realized with a Related Party, and this even in the absence of any specific conflicting interest⁸⁴.
- The Committee will deliver a detailed, written report to the full board, dealing at least with the following items⁸⁵:
 - *The type of the decision or operation;
 - *Description and estimate of the financial consequences and description of other possible consequences of the proposed transaction;
 - *The advantages and disadvantages of the proposed transaction for the company, and possible other consequences on the short or on the longer term.
 - *The committee indicates whether the proposed transaction fits in the context of the policies pursued by the company. In case it would be prejudicial to its interests, it indicates if applicable, whether the prejudice is offset by other policy elements, or whether it is manifestly prejudicial.
 - *If applicable, the remarks formulated by the expert are included in the Committee's opinion, or are attached as an annex to its advice.

On the basis of the Committee's opinion, the Board of directors deliberates on the proposed decisions or operation⁸⁶. It states in the minutes that the legally prescribed procedure has been followed and states its reasons for diverging from the Committee's opinion on the proposed decision or operation. Individually conflicted directors will have to abstain⁸⁷. The minutes of the board meeting will confirm that the procedure has been followed and if applicable, states the reasons for its decision to diverge.

The company auditor will determine whether there are material inconsistencies in the financial and accounting data mentioned in the boards' minutes or in the committee's opinion, comparing with the data he disposes of as an auditor. His opinion is attached to the minutes of the board.

The decision or operation will be publicly announced at the latest on the day in which they have been adopted or entered into⁸⁸. The content of this publication is detailed in the Belgian law, following the directive's provision⁸⁹: it will contain i.a. all information necessary to assess whether the transaction is fair and reasonable. The conclusion of the Committee, and if applicable the reasons why the board diverged from opinions of the committee and of the auditor will be included in the communication. The publication will take place on the company's website, which is mandatory for all communications by listed companies. The company's annual report will contain the list of communications released during the year, indicating where these can be consulted⁹⁰.

The moment of publication seems relatively late: it is the moment the decision has been adopted, and no further discussion is possible. Opposing parties may not have been informed and could not oppose the future decision. This choice was made in the directive.

However, this approach may raise interesting questions from the angle of the "market abuse regulation", also under the heading of insider trading. The Belgian law, following the MAD

⁸⁴ Article 7:97, §4 Code. However, if an individual director of the companies involved is effectively conflicted, he will have to abstain from taking part in the deliberation and the vote in the board

⁸⁵ See article 9:79 § 3 Code.

⁸⁶ The Code reminds the abstention duty for conflicted directors. If all directors are conflicted, the matter will be submitted to the General meeting, whose decision will be executed by the board: article 7:97 §4, Code

⁸⁷ Reference is made to article 7:96, Code. If all directors are conflicted the matter will be submitted to the AGM

⁸⁸ Article 9:79 § 4 / 1, Code; Article 9 c (2) Directive

⁸⁹ Article 9 c (2) Directive and article 9:79 § 4/1: Code: the identity of the related party; the type of relationship with the related party; date and value of the transaction; all information useful to determine the fair character of the transaction from the point of view of the company and the not-related shareholders, including the minority shareholders; the opinion of the Committee, and if applicable, the motivation for the dissenting opinion of the board.

⁹⁰ Article 7:97 § 4/1, Code

directive⁹¹ has merely drawn attention to the applicable EU regulation⁹² and its transposition in Belgian law⁹³ according to which listed issuers will have to inform the public as soon as possible of price sensitive information which concerns the listed company or the related party if it is also a listed company⁹⁴. One could argue that on that basis, the listed issuer would have to inform the market about the forthcoming transaction, thereby avoiding any further risk of market abuse. As the transaction will be dealt with solely at the board level, the risk that it will be challenged by shareholders, or third parties is relatively limited. A timely announcement of the forthcoming transaction will also avoid questions as to the disclosure duties relative to the ongoing process, and hence reduce the insider trading risks.

It is unclear why the Directive has decided for the publication of the decisions and operations at the latest upon the adoption of the decision, or of the realisation of the operation. For important transactions, the fear for the activist investors may have played a role. On a voluntary basis, earlier disclosures should be allowed, even encouraged for reasons of fair pricing.

5. Sanctions

The Belgian law contains an express reference to the specific company law sanction regime⁹⁵.

The company is entitled to sue for the annulment of decisions or operations – or their suspension - which have been adopted in violation of the RPT regime, but only in case the counterparty was aware or should have been aware of this violation of the rules⁹⁶. The company, or its liquidator could sue in annulment of the transactions. Shareholders, minority shareholders or other stakeholders have not been mentioned among the beneficiaries of this legal right. However, on the basis of a general clause of the Code, other parties are entitled to sue in cancellation of the RPT if they have an interest in having the RPT rule respected⁹⁷. In urgent cases, the president of the tribunal may order the suspension of the transaction if prima facie evidence is presented which is likely to justify the cancellation⁹⁸. There is no comparable provision in the directive.

The enforcement of this standard is left to the initiative of the prejudiced parties. The directive does not contain any reference to the legal position of the investors, nor to the tools they could use to defend their position. There is also no mention of the role of the securities regulator, although the subject directly involves listed companies; where applicable, he could act by requiring the necessary information to be published.

If the board has not complied with the provisions on the RTP, the directors would be civilly liable for infringing the provisions of the company code⁹⁹. The Belgian Code has introduced a cap on director's liability which for large companies¹⁰⁰ would be limited to 12 m. euro¹⁰¹

6. Comparison between the Belgian law and the SHR II directive.

On several points the Belgian law has not followed the path indicated but the directive, which contains only a handful of binding provisions. These provisions mainly introduce the principle of a

⁹¹ Article 7:97 § 7, Code

⁹² Article 9c, § 9, Directive 596/2014, article 17 dealing with mandatory disclosure; "Public disclosure of inside information": An issuer shall inform the public as soon as possible of inside information which directly concerns that issuer.

⁹³ See: Law 14 October 2015

⁹⁴ See article 17 of the Market abuse regulation 596/2014, calling for informing the public as soon as possible of inside information which directly concerns the issuer. Article 7 (4) lists the cases in which publication can be delayed among which "the legitimate interest of the issuer". Article 9 C (9) of the directive merely makes reference to the Market Abuse Regulation

⁹⁵ Article 7:97, § 5, Code

⁹⁶ Article 7:97, § 5, Code

⁹⁷ Article 2:44, Code

⁹⁸ Article 2:46, Code

⁹⁹ See article 2:56, § 3, Code

¹⁰⁰ Total balance sheet of 43 m and turnover of 50 m. euro

¹⁰¹ Article 2:57 Code

procedure for related party transactions, their public announcement, the overall objective of the procedure – avoiding the related party from taking advantage of its position¹⁰² - but otherwise do only introduce provisions opening options for the Member states, and defining the exceptions to the principles. These provisions are introducing a harmonization regime of a very limited binding nature and substantive content. The Belgian law therefore has developed a stricter regime, although still with flexibility due to its rather unclear formulation.

Transactions have to be material, in the sense that they would have a significant influence on the listed company as approved. This criterion is further detailed in article 9(c) (1) of the directive, allowing Member states to set other alternative quantitative ratios. The Belgian law has not followed this approach but has considered all transactions as material, with the exception of transactions which have a value of less than 1% of the consolidated net asset value of the listed company. Other EU Member states have followed a similar technique, often at a higher percentage. This may however lead to an overload of RTP procedures.

There is no reference in the RTP section of the particular party which will trigger the RTP procedure: the mere fact that a transaction is planned by the listed company with a related party, as defined, will trigger the procedure. But the related party itself may have an interest in having the procedure followed in all strictness. This is quite different from the provision on personal conflicts of interests where the parties have to decide on a direct or indirect interest of a proprietary nature¹⁰³, in other words which can be expressed in financial terms. The RTP rule is applicable irrespective of the nature of the subject opposing the listed company and the related party, and theoretically even in the absence of any such subject. One can fear that this approach will render the procedure less substantive, more mechanistic.

The question can be raised to what extent “immaterial” interests of the parent company may trigger the procedure, e.g. reputational interests, or commercial interests, moral or religious interests. More likely to fit with the context of this directive, one could mention non-competition clauses, or the transfer of intellectual property, IT licenses, and other commercially relevant interests, which are not necessarily represented by material assets, but are valuable from a business point of view. The only reference in the law to the value of the transaction at stake is the exemption for 1% net assets value: it will be difficult to compare the value of an immaterial interest with the 1% net assets value.

The moment of announcement of the transaction would be at the latest the moment in the process leading to the conclusion of the transaction¹⁰⁴. The Belgian law follows here the directive, specifying the information which has to be disclosed. Whether the announcement has to contain the report of the independent committee is made optional by the directive¹⁰⁵, as well as the release of the full report of the independent committee.¹⁰⁶ The Belgian Code is somewhat more explicit, requiring the disclosure to contain the necessary information to assess the fairness of the decision, but also containing the conclusion of the committee. It is up to the Member states to decide whether the full report of the committee will be disclosed. There is no mention on the way this information has to be disclosed. As the company is a listed one, for which the use of a website is mandatory, it is logical that the information should be published on its website.

The transaction which is the subject of the RTP procedure will be approved by the company, normally by the administrative or supervisory body, exceptionally by the general meeting. But whether shareholders will have the right to vote on the transaction, as approved by the board, is left

¹⁰² See 9 c (4), Directive

¹⁰³ Giving access to a material benefit

¹⁰⁴ Article 9c 2. Directive

¹⁰⁵ Article 9 c 3, Directive which defines at the same time the authorship and part of the content of this report.

¹⁰⁶ Article 9 c., Directive

to the choice of the member state. A double procedure may not be preferable from the governance point of view, but may allow shareholders to oppose the board's decision. The Belgian law exclusively empowers the board to vote on these RP transactions, excluding any opposition at the level of the board's decision.

An essential part of the RPT procedure is the production of a report by a committee, which should be an independent committee. The directive also allows this report to be produced by an independent third party, by the audit committee or by an alternative committee composed of independent directors. The Belgian legislator has made the latter option mandatory: the committee will be composed of three independent directors, members of the board. In previous legislation, an independent expert, e.g. an auditor had to give his opinion: this requirement has been omitted from the directive and from the Belgian law as well. The closest approach to an independent opinion will be the report delivered by this committee of independent directors. The lower degree of independence of directors appointed by the leading shareholders in the listed company will be harmful to the confidence in the Committee's report. The directive allows that Member States require the report to include an assessment of the proposed transaction, and whether it is fair and reasonable, explaining the assumption and the methods on which the report was based. This assessment will analyse the proposal from the angle of the company, and from that of the shareholders who do not qualify as a related party.

The Belgian law by and large follows the directive by requiring a report from a committee of independent directors, if needed assisted by one or more independent experts of their choice. The committee should give its opinion before the board of directors approves the transactions. The content of the report is defined in the law, identifying the extent to which the transaction may be beneficial to the company or not.

The role of the auditor in this process deserves some attention: normally he should be involved from the outset, giving assurance on the accounting data on which the proposed transaction will be based and the fairness of the evaluations. The directive does not make any reference to the role of the auditor as the accounting expert. The Belgian law makes the intervention of the auditor, as an independent expert assisting the independent committee, optional at the level of the decision making in the Committee. But he will have to give his opinion *ex post* on the data which have been made available to the Committee, and whether there are "material inconsistencies" in the committee's financial and accounting data in comparison to the data under his control. His opinion will be attached to the board's minutes article¹⁰⁷ The role of the auditor is quite limited, he does not enter into the substance of the decision, and offers only limited guarantees for shareholders.

The competence for agreeing with the proposed RPTs also presents some diversity: the directive offers the choice between a decision by the board of directors, or as an alternative, to have the transaction approved by the shareholders, after it has been approved by the Board of directors¹⁰⁸. The Belgian law only provides for the agreement of the board, and this excludes the intervention of the general meeting. With respect to the subjects to be submitted to the general meeting, the Belgian law does not provide in an RTP procedure at the level of the general meeting. One could assume that the articles of incorporation could complement with including an appropriate procedure¹⁰⁹.

Certain decisions necessarily belong to the competence of the general meeting; the Directive allows Member states or companies to exclude from the RPT regime, "clearly defined types of transactions,

¹⁰⁷Article 7:97 § 4, Code

¹⁰⁸ See article 9 c (4) 1st § Directive ; see also article 9 c 4, allowing for a double procedure, one in the board, the other in the general meeting, a conflicted director or shareholder having to abstain from the meeting and not vote. But Member States may provide differently; see article 9 c (4) 3rd §

¹⁰⁹ See Expose des motifs, p 21 where the involvement of the general meeting was expressly refused.

provided fair treatment of non-related shareholders and minorities are adequately protected¹¹⁰. The Belgian code requires for these subjects the application of the RTP procedure with respect to the preparatory decisions of the board of directors, without requiring a special procedure before the general meeting¹¹¹. A specific exemption from the RTP regime allows Member States to exclude transactions offered to all shareholders on the same terms, provided that non-related shareholders and minorities are adequately protected¹¹². In the Belgian law, transactions to be submitted to the general meeting will not be exempted: these are decisions in matters which touch on significant changes in the structure of the company (contributions in kind, see: mergers, divisions, contributions to the capital, and similar transactions mentioned above)¹¹³. The exemption is limited to transactions with the subsidiaries, the RTP procedures taking place at the preparatory board level. Once more, the exception will not apply if the controlling shareholder of the listed parent is present in the subsidiary with more than 25% of the shares of the subsidiary.¹¹⁴ Fairness and protection of minorities may explain this stricter regime of the Belgian law.

A provision which has received little attention is laid down in the § 6 of article 7:97 the Belgian law: the listed companies have to mention in their annual report the significant restrictions or burdens which have been imposed on them by their controlling shareholder, or which he has continued to apply. This approach is comparable to the German group law view according to which companies which are part of a group have to report and indemnify for the negative burdens they have imposed on group companies¹¹⁵. In the Belgian context, this provision would oblige listed companies to identify the restrictions which the controlling shareholder has imposed on them, making intragroup relations more transparent. When the balance of burden and advantages has been considerably unbalanced, these data may constitute the basis for an action on the basis of the Rozenblum¹¹⁶ case law, opening a right to indemnity under the rules of groups of companies, if the overall balance of charges and benefits is out of synch, leading to an indemnification duty¹¹⁷.

7. Conclusion

The implementation of the SRD II in the Belgian legal system will imply numerous changes in actual practice especially of the larger companies. In the field of relations between companies, the legal regime of related party transactions is probably the most significant one. The subject raises considerable interest in Belgian and in other EU member states, evidencing quite significant differences in the way the directive has been transposed or the law has developed in the national legal orders. The Belgian regime is largely in line with the directive, but strikes as being relatively mild in many aspects. Also, there may be some questions as to whether the directive has been implemented in the right way.

The fundamental question is whether these new provisions will lead to a better protection of the shareholders in listed companies and introduces stronger instruments to avoid, or combat abusive conduct. The answer is more nuanced, as for several reasons;

- The directive provisions are generally optional for the Member States, Belgium has often chosen the more clement approach.

¹¹⁰ See: Article 9 c 6 b, Directive

¹¹¹ Article 9(c) § 2, Directive

¹¹² Article 9 c (6) b. Directive

¹¹³ Article 9 c § 2, 2. Directive

¹¹⁴ Except if the controlling shareholder of the listed company holds 25% or more in the subsidiary

¹¹⁵ Comp in German group law, the "Abhängigkeitsbericht", AktG para 312-316

¹¹⁶ See Rozenblum case; Cass. crim., 4 February 1985, Juris-Data n° 1985-000537; Bull. crim. 1985, n° 54 ;, Juris-Data n° 1985-000537 ; Bull. crim. 1985, n° 54 ; Rev. sociétés 1985, p. 688, note B. Bouloc ; JCP G 1986, I, 20585, note W. Jeandier ; D. 1985, jurispr. p. 478, note D. Oh

¹¹⁷ See ECLE, Proposal for reforming group law in the European Union - Comparative Observations on the way forward, October 2016, <https://europeancompanylawexperts.wordpress.com/publications/>

- The companies themselves may introduce some instruments reducing their risks with respect to RTP.
- As their rules will be applicable to listed companies, it will be very important that the market watchdog insures the correct application of these provisions, contributing not only to investor protection but also to the reputation of Belgium company law and of its listed companies.