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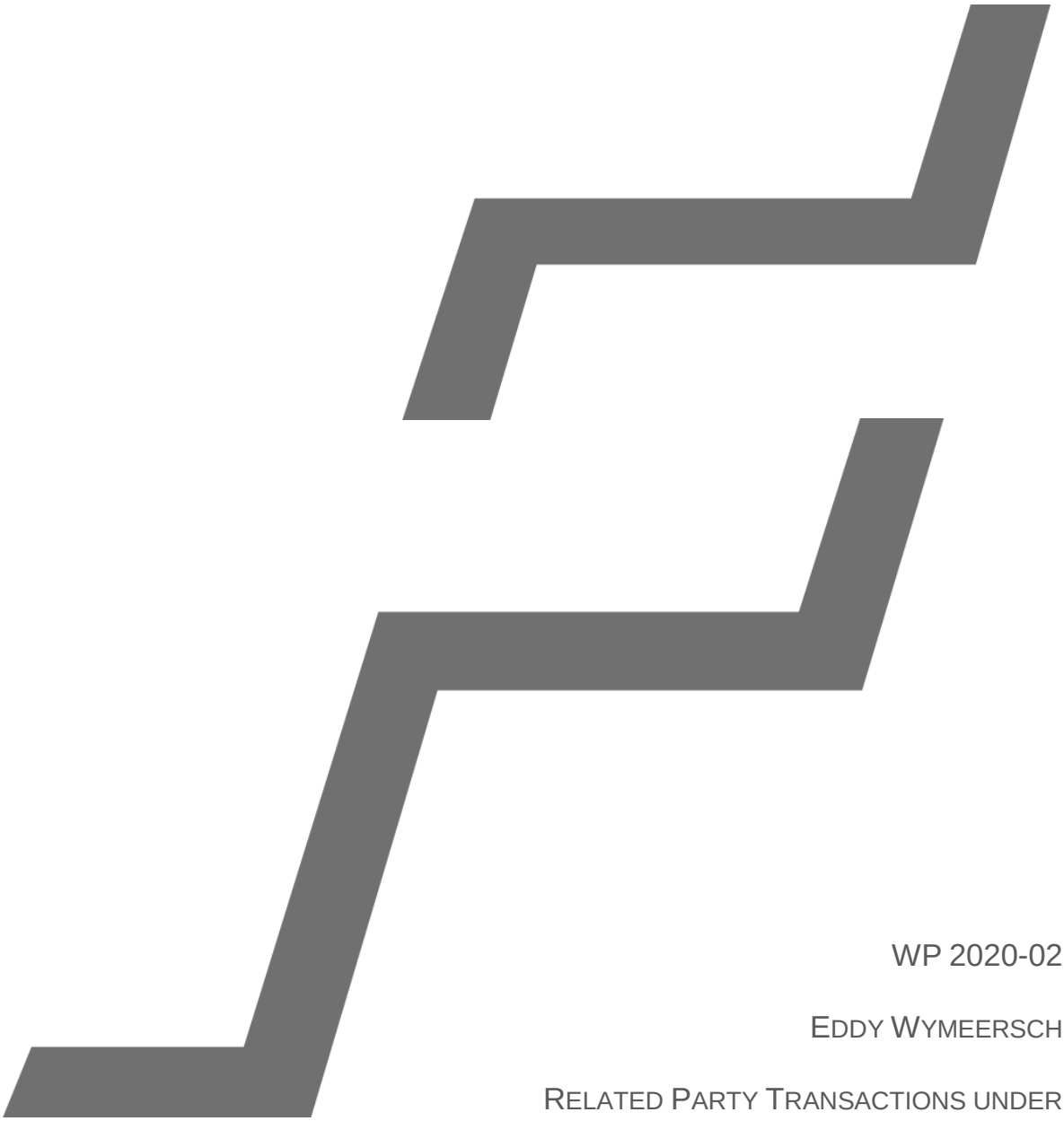

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RELATED PARTY TRANSACTIONS UNDER THE NEW BELGIAN COMPANY LAW

GHENT UNIVERSITY

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Abstract

The Belgian company code of 7 May 1999 has been replaced by a new law dated 23 April 2019, entering into force on the 1st of May 2019.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" . This law has been the subject of amendments which have not been adopted by the Parliament, due to an extended government crisis.

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 preference for the Naamloze Vennootschap (NV/SA) to the largest entities. The number of previously available company forms has been somewhat reduced, although less than what was originally intended.

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.

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Related Party Transactions under the new Belgian Company Law

Eddy Wymeersch

The Belgian company code of 7 May 1999 has been replaced by a new Code dated 23 April 2019, entering into force on the 1st of May 2019.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 the subject of amendments which have recently been adopted by the Parliament.

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 preference for the Naamloze Vennootschap (NV/SA) to the largest entities. 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 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

[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 » It can be downloaded from http://www.ejustice.just.fgov.be/eli/loi/2019/03/23/2019040586/moniteur; For the Parliamentary documents, see Chambres des representants de Belgique, Doc 55 0553/009, 23 March 2020, and related documents : K0553/001-0/2019-1

The present contribution will be limited to an aspect of the conflicts of interest issue, this is the "related party transactions" (RTPs), a widely accepted format under which the intercompany conflicts of interest are dealt with. This subject has been adapted several times in the Belgian company law. The Belgian law of 28 April 2020, implementing the European Directive on Shareholder Rights II (SRD II) , which deals with the encouragement of long-term shareholder engagement [2], has introduced a formal regime for dealing with RPTs. Transposing this provision has taken the form of an amendment to the Companies Code.

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

The Code builds further on the preexisting 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 company[3], this director has to declare his interest to the other directors and this prior to the decision by the board[4].
The conflict is only taken into account 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 conflicts 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 board[7]. This definition applies to cases in which there is an actual or potential "conflict of interest"[8] between the company and a person taking part in the decision-making body, such as the board of directors, the supervisory board, or the management board. 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 Code[9] 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 II [10]. 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

[2] Shareholder Rights Directive 2017/828 of 17 May 2017, amending Directive 2007/36. Hereafter referred to as Directive, or SRD II
[3] Defined in article 7:96 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] Strijdig belang – intérêt opposé
[9] Article 524. Company Code 1999.
[10] See article 7:97, Code on companies and Associations pursuant to article 9c Shareholder rights directive II 2017/828.

relations, often concerning intragroup transactions, and mainly applies to their objective relationships termed "related parties" .

2. The scope of 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.

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 of groups on companies[11]. 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 (BV[12]), for the company limited by shares (NV[13]), for the cooperatives[14], for the foundations[15], and the associations[16], for the European cooperative societies.[17] and for the SE[18]. In addition, special provisions address conflicts relating to the activities of liquidators of companies[19], of credit institutions[20] or insurance companies [21] acting as asset managers investing in listed shares, and to the proxy advisors acting for shareholders[22].

The conflicts of interest regime is based on some principles some of which are also found in the conflicts 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.

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[11] Article 524, applicable to listed companies.
[12] Article 5:76; article 7:97 also applies to the listed BV.
[13] Article 7:96 and 7:97 for the RPT; separate provisions apply in the of duality of the board: article 7:115 for the Supervisory Board; article 7:117 for the management board
[14] Article 6:64, Code
[15] Article 11:8 Code
[16] Article 9:8 and 2:129 Code
[17] Article 16:16 Code
[18] Article 15:21 Code
[19] Article 2:98 and 2:129; Code
[20] Article 75/1 L. 25 April 2014, banking law; investing for institutional investors; also, article 44/2, L 25 October 2016, investment managers
[21] Article 72/1 , Code
[22] Article 7:146/2 § 2,7e. Code

The list of legal provisions illustrate 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. Amendments were developed but have not been adopted up to this day, due to the Belgian political crisis[23].

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 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 securities[24]. 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 market[25]

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 director[26] The law specifies that if all directors are conflicted, the decision will be submitted for decision to the general meeting[27]

(b) Transactions and decisions

The new regime applies to "decisions" adopted and "operations [28] implementing a decision by the board of directors " 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 applicable criterion for the interpretation of the directive.

It is striking that the Belgian law has not adopted the Directive's terminology of related party "transactions". A "related party *transaction*" is defined in IAS-24 as "a transfer of resources, services

[23] See: Parliament, Adopted Proposal Doc 55-0553/006 of 19 February 2020; The directive had to be implemented by 10 June 2019.
[24] Article 1:11 ,Code; listed share certificates, or dividend certificates also qualify for the qualification as a listed company.
[25] Defined pursuant to article 1:11, Code referring to L, 21 November 2017, on financial markets infrastructures. The regime can be extended by royal degree to shares traded on multilateral trading facilities
[26] See article 9:97, § 4, Code
[27] See article 9:97, § 4, Code.
[28] "décision ou opération" – "beslissing of verrichting". No reference is made to" transactions" although the latter term is used in the directive.

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 the definition of "related party" without linking it to the definition of "transaction" [30].

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. According to the general principles of company law, this remit may include matters which have been added by the company charter to the description of the remit of the board, what would constitute an additional safeguard for the protection of certain, e.g. minority, interests[31].

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" , where applicable exceeding the threshold of 1% of the consolidated net assets of the listed company[32]. These could be 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 e.g. 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. 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.[33] 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 board[34]. 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. A contract negotiated with a third party by the management which is subject to the board's approval would lead to an approval decision, which would qualify for the RPT regime if the counterparty qualifies as a related party. Would this also apply if a member of the executive is a related party? Strictly speaking not, even if he has been material in negotiating the proposal. The decision may be a unilateral confirmation by the board of an agreement reached by a director outside the board: the confirmation is the legal basis for the decision. It can also to refer to a unilateral act whereby the company realises a legal relationship with a related party as a consequence of the declaration of will of the related company. Examples could be the decisions of a

[29] See IAS 24, § 9 "definitions in Commission regulation 632/2010 of 19 July 2010 endorsing IAS 24 ; 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.

[31] 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.

[32] 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,

[33] See Expose, p. 21, explicitly excluding the general meeting

[34] See article 9:97 § 1 (3)

third party to acquire assets which the listed company has put on public sale, or: in the financial sector, decisions on options, or to answer to puts or calls. Comparable is the position of a director who may have been contributing to the preliminary opinion or consensus, the proposal being submitted to the board: his intervention in the board would not be decisive, but could he attend the formal board meeting? [35]. In many cases "decisions" will lead to a contractual relationship, to an understanding, but in other cases the decision may merely determine the legal position of the parties, as outlined on the basis of the law, or of another, previous agreement. "Decisions" may also refer to a declaration of the will by the board, which might at a later time result into a - contractual -relationship with the related party. Or in the reverse case where a third party grants the company the right to conclude a contract, on the unilateral declaration of the third party. Whether the relationship with the related party will be realized, depends on the company having accepted the same declaration, which in the specific conditions would require the company to follow the RPT procedure. Decisions may therefore be unilateral or bilateral and have bilateral or unilateral outcomes, e.g. by granting or exercising an option right, or giving termination notice. If the other party qualifies as a related party, the procedure will have to be applied, even if that party has not taken the initiative.

The "*operations* implementing a decision of the board of directors" would rather refer to the declaration of the will of the company implementing 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, or the additional financing to 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 implementing a board decision, unless this operation goes beyond the implementation of that board decision. Often, these subjects will qualify as "usual", in accordance with the standard procedure established by the board, allowing them to be an exception under the RTP regime[36]. 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 some of these procedures. The law exempts from the RTP procedure "usual" decisions for the company, or its subsidiary,

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, or if the agreement can be given by the executive management, the RPT regime will not apply.

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

The law provides that 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 RPT regime applicable[37]. This reasoning may also apply to the qualification of the series of implementing acts pursuant to the original transaction.

(c) "Material" transactions

[35] 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.

[36] 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 relate party should not take part in the assessment.

[37] Article 7:97 § 1 (3), Code

The Belgian law has not restricted the application of the RPT regime to "material" transactions, the latter not having been defined as indicated in the directive[38]. As a consequence, the legal regime is applicable to all transactions with related parties, except the transactions that can be considered as "de minimis"[39]. This approach conveys a very wide remit to the Belgian law, as all transactions beyond the 'de minimis' level of 1% of net assets would be submitted to the RPT regime. The directive allows Member states to adopt different materiality definitions on the basis of quantitative ratios, but the Belgian legislator has adopted a more radical approach, without taking into account the directive's substantive criteria for defining materiality[40], being "the influence of the transaction on the economic decisions of shareholders" or "the risk created for the company and shareholders … including minority shareholders".

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

The RPT regime only applies to "decisions" or "operations" which belong to the competence of the board of directors of that company, excluding its application to matters which have to be submitted to the general meeting, in which the generally applicable majority applies. Therefore, by submitting the matter to the general meeting, or to the executive management, the safeguards provided by the Code could be circumvented. Technically the question comes down to 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 charge[41].

The company's charter may have limited the competences of the board, in which case the charter may have declared the general meeting in charge. These restrictions are only valid internally within the company[42]. In the reverse case, delegating certain matters to the executive management is only valid for matters which the law has not reserved to the general meeting. In this case the RTP regime would technically not apply being a delegation to the management, but it may be doubted whether this exemption is compatible with the mandatory nature of the directive. The Directive contains a general criterion according to which it requires member states to introduce a regime reflecting its provisions. 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"[43]. The rationale is clear: one can shift the attribution of competences but not to the detriment of the parties to be protected. A delegation to the executive would not be admissible for matters for which the directive has declared the board of directors responsible, i.e. for related party matters. The Belgian law does not allow delegation to the executive for "conflicts of interest" matters[44], and it seems logical to apply the same rationale to decisions about "related party" transactions.

[38] 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 "materiele", in German "wesentliche Geschaefte".

[39] See infra 3(h)

[40] See article 9 c (1) Directive" when defining material transactions Member States shall set one or more ….quantitative 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, p 23, iii.

[41] See article 7:93 Code.

[42] Article 7:93 Code, The company's charter may however restrict the powers of the board of directors. These restrictions are purely internal and cannot be upheld against third parties.

[43] See article 9c, (4) Directive (n.2) ; comp. the analysis in the Expose, p. 21-22

[44] Article 7:96 § 1, Code

During the Belgian Parliamentary debate, the question of extending the remit of the board of directors to the general meeting was raised, but the government stated 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 meeting[45]. Therefore, delegating certain "related party" matters to the general meeting would not be in line with Belgian law. The Company law confirms this analysis: for certain matters to be submitted to the general meeting, the RTP procedure would only apply to the preparatory decisions of the board, to be submitted for approval to the general meeting[46].

The directive allows material transactions 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 …."[47].

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The new regime applies to "decisions" adopted and "operations"[50] being the implementation of a decision by the board of directors of a listed company. If these involve a party "related" to the listed company, the special RPT procedure will have to be applied. It is striking that the Belgian law has not adopted the 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 2010[51]. A "related party *transaction*" is there defined as "a transfer of resources, services or obligations between a reporting entity and a related party, regardless of whether a price is charged."[52] Although 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 the reference in article 7:97. The Belgian code only refers to the definition of "related party" without linking it to the definition of "transaction" [53].

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

The notion of "related party" – translater 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"- "sociéties liées et

[45] See Comment sub article 31, Expose des motifs, citing a list of decisions which belong to the competence of the AGM. No further action was not 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.
[46] See article 7:97 § 2, Code
[47] See article 9 c, (4) Directive
[48] See Comment sub article 31, Expose des motifs, citing a list of decisions which belong to the competence of the AGM. No further action was not 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.
[49] See article 7:97 § 2, Code
[50] " decision ou opération" – "beslissing of verrichting"
[51] Commission Regulation 632/2010 of 19 July 632/2010.
[52] See IAS 24, § 9 "definitions"
[53] "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.

associées" [54] which refers to companies which are part of a group on the basis of control, as defined[55]. Although these companies are also "related" in the sense of the RPT regime, the Code defines the latter in a different, more control-focuses way for organizing group- internal decision making. The Directive and the Belgian law contain no definition of related parties, in the context of transactions with a listed company, but refers to the Accounting standard IAS-24, dealing with related parties' "disclosures"[56].

The notion of "related party" is technically not linked to any specific conflict of interest, 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 parties, 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.[57]

Both the directive and the Belgian Code define the "related party" by referring to the Accounting Standard IAS -24, which standard is only applicable to related party *disclosures*. IAS-24 requires all companies to disclose that their financial position may have been influenced by transactions with related parties which calls for an adaptation of the accounting outcome. The disclosure would affect both the individual company's financial statement and its consolidated position.

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": the close members of the family or a person with strong influence over the entity - allows to define the perimeter of disclosures by the listed company. 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 and in group policy making or mechanisms, a such as a common interest in employee benefit scheme, 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 liabilities. Comparable criteria have been used for defining group influence in competition cases, and in the case law on banking[58].

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

[54] Article 1:20; this definition does not respond to the objectives of the RPT regime under article 9:97., Code.
[55] Control is defined in the Code, article 1:14 .
[56]See the indirect reference 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 the Regulation 1606/2002. See Commission regulation of 19 July 2010, 632/ 2010. See reference in SRD II, article 2 (h). The legislative proposal oriioginally did not make this reference: Expose, 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 decision
[57] Article 7:97, § 3, Code
[58] See ECJ, 10 September 2009, C-97/08 P, Akzo Nobel and Others v Commission; 12 July 2019, Case T-419/14, Goldman Sachs v. Commission

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 RPT 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 RPT 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: e.g. the purchase of assets from a member of the key management personnel of the group[59].

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 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" criteria may be easy to use in the field of financial reporting for which they initially were developed. Their use for company law purposes is likely to raise interpretation issues, leading to an extensive application of the RPT regime, - although being partly also a disclosure-based system- which will have a strong influence on internal decision making and on the subsequent contractual relationships.

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, etc .

The way the scope of these provisions has been defined is likely to influence decision making and create legal uncertainty[60]. 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".

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[59] See IAS 24, Definitions, (b) (vii)

[60] IAS 24.9 defines as a related party

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

Are not related entities : simply because they have no common director or manager

Venture with joint control over a joint venture

Joint controllers of a joint venture

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

(f) the RTP regime applicable to subsidiaries: exceptions

As the RPT regime is mainly addressing potential consequences of intercompany decisions, and inform shareholders about the possible advantages or risks which may result from these often defining transactions. At the same it also aims at avoiding or restricting abuses flowing from by company decision-making, advantaging companies, or individuals with whom the leading or controlling shareholder has privileged relationship, or which can be realised at conditions which benefit that party. The law provides a certain number of safe heavens where the risk of this type of abuse is remote, or in any case the effects would be marginal. These cases have been 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 unlisted. The general regime exempts from the regulatory obligations the Related transactions with a subsidiary of the listed parent: indeed in this case the interests of both parties should be largely parallel. The definition of subsidiary is related to the notion of control, as laid down in the Companies Code[61]. It 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 of the subsidiary, e.g. resulting from a participation of less than 100%, even less than 50%. The Belgian law does apply the RPT safeguards to transactions of any subsidiary with its listed parent on the basis of the control relationship, irrespective of the percentage of control exercise by the parent[62]. As according to Belgian company law, control can be exercised 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 subsidiary[63], the application of these widely defined criteria may lead to very considerably extending the scope of application of the RPT regime, whereby not only legally controlled subsidiaries should be included in the analysis but also many minority-owned entities, where the power is shared with other, more or less significant shareholders. This dividing line between legally controlled subsidiaries less firmly controlled subsidiaries has not been adopted in the Belgian law, nor in the directive, and is therefore let to the appreciation of the parties, on the basis of "influence" being de facto often equivalent to control.

The 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 subsidiary[64]. 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 25% ! - is a justification for rendering the RPT regime applicable[65].

In case both the parent and the subsidiary are listed, the RPT regime would apply to decisions or operations if one of the entities would qualify as a related party of the other in accordance with the criteria laid down in IAS- 24. The parent would be the entity initiating the transaction with a party which is related, in accordance of the broad IAS-24 criteria and would be responsible for the RTP

[61] See Article 1:15 Code, as the company which is subject to a controlling power, as defined in article 1:16.
[62] The Directive requires the subsidiary to be wholly owned: article 9 (c) 6.1a. The Belgian law would refer to the criteria for defining a "related party" in IAS 24.
[63] 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. See also the cases cited in nt. 51.
[64] Or is entitled to receive 25% of the profits distributed by the subsidiary.
[65] See article 7:97 § 1, as amended

process. If one of the companies involved would qualify as a subsidiary of the other, the RPT regime would not apply. If the controlling shareholder of the other, parent company, owns 25 % of the "subsidiary" company, this will lead to the application of the RTP process, but not trigger the approval requirement.

The Belgian law does not apply the RTP safeguards to transactions of subsidiaries with their listed parent: both are considered as one single center of business. This approach applies to fully owned subsidiaries. But very often the control position of the parent may be based on lower percentages, allowing third parties to also exercise considerable influence. This may be misleading as subsidiaries often are owned by a parent at percentages below the majority level, with other shareholder – e.g, the public – holding lower percentages, but not being protected according to the RTP regime. The Code declares the RTP safeguards applicable if another party holds 25% of more of the subsidiary shares but only if these shares are owned by the controlling shareholder of the listed parent. The rationale was probably that if these shares are owned by the controlling shareholder of the parent, the absolute majority owned by both parties may leave the other minority shareholders too much exposed.[66].

The RTP regime which mainly results in a disclosure and assessment procedure, has been supplemented by the Belgian legislature by requiring a *prior group approval*, a stronger tool for the controlling party. This regime is not part of the directive. This stricter regime applies to the unlisted subsidiaries of a listed parent: they cannot adopt decisions or operations with related parties, except with the prior *approval* of the listed parent. Even if the listed parent was fully in control of its unlisted subsidiary, formal approval remains applicable.Is this an indication that that the parent may not have been in full control of that subsidiary? This approval requirement will not apply to transactions with the listed parent itself (also a related party) or a direct subsidiary of the latter. But here again approval will be necessary if the controlling shareholder of the listed company holds, directly or indirectly, a stake of at least 25% in the subsidiary's capital.

The requirement applies to the transactions of the unlisted subsidiary with any related party, except with the parent and with its subsidiaries, unless the controlling shareholder of the parent holds has given its approval. Here too the approval will not be necessary for transactions with a subsidiary in which the controlling shareholder of the parent directly or indirectly holds a stake of 25% or more in the unlisted subsidiary[67]. The formulation of the law makes this approval requirement applicable all related parties, probably meaning to the parties related to the listed parent company[68].

The approval requirement grants the parent a fargoing control over group-internal relations. The approval only affects the specific transactions with the related party, but does not include not the entire management of the subsidiary.

This approval requirement is a significant change in the parent-subsidiary relationship, implying a lower degree of autonomy of the subsidiary for transactions within the parent, or even with the wider group. 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

[66] See article 7:97 § 1, Code, as amended

[67] Article 7:97 § 2, Code, as amended

[68] The question whether also the related parties of the subsidiary are viewed is open : it would convey an extreme wide application to the approval requirement.

that the parent in not involved in the decision making, e.g.in a transaction between subsidiaries as the text of the law seems to refer to. Possibly non-implementation of the rule may lead to liability of the parent or of the other companies concerned, or approvals which were abusive or contrary to the law. The approval only affects the specific transaction with the 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.

The fact that the approval regime would not apply does not exclude the RTP provisions to be applicable: the general RTP rules do not distinguish between listed and unlisted entities, and the non-application of the approval regime, does not eliminate the need for the protective RTP regime to be applicable. This matter has not been addressed in the directive nor in the Belgian law.

By way of extension, the RPT regime has been declared applicable to certain restructuration measure mostly adopted in the general meeting and which are especially sensitive from the point of view of minority protection[69]. This extension relates not to the decisions of the general meeting as such, but to decisions to be submitted by the board of directors of the listed company, to have its *general meeting* decide on certain structural measures:

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 company[70];
2- Proposals for a merger, division or an assimilated transaction by a related party, as referred to in article 12:7 [71] or transfer of an industry department in a related company. [72]

These transactions will be subject to the RTP regime if they take place at a listed company, while the party who intervenes in the transaction for their realisation – e.g. for the contribution in kind, or as merger party - is a party with the status of a "related party" of the listed entity, not necessarily a fully owned subsidiary.

These operations should apparently 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 and 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 subsidiary[73]. In that case the RTP procedure will have to be followed. The exceptions as to the usual character, or the limited volume of 1% will be applicable, although it is unclear whether that could effectively apply, considering the structural nature of these decisions and the likely volume involved. The Directive expressly allows transactions to be approved by the general meeting to be excluded from the RTP regime[74], implying that the national law can limit the exemption for shareholders with more than 25%[75]

The exceptions from the RPT regime seem to be motivated by the possibility for the controlling listed company to engage in group transactions with its subsidiaries, without complying with the protective procedures, being based on the control position of the parent. However, this rule applies irrespective of the level of ownership of the parent in the subsidiary: if the subsidiary is wholly owned, the rule applies the full control criterion, and additional safeguards would not contribute much to the

[69] Article 7:97 § 2 Code, as amended
[70] See article 12:7 Companies Code for transactions assimilated to merger by absorption
[71] Including transactions" assimilated to restructurations", as a consequence of a transfer of all assets: article 7:97 § 2 (2)
[72] See article 12:7 Companies Code for transactions assimilated to merger by absorption
[73] The concern is the same as mentioned supra sub f, where the 25% holding in the subsidiary is the trigger for applying the RTRP/approval procedures.
[74] See Article 9 c (6)(b), Directive
[75] Article 7:97 § 2, 2nd.

protection of the shareholders of the subsidiary is concerned[76]. At lower levels of control, the risks are higher. The directive logically exempts from the RTP regime the wholly owned subsidiaries[77], but broadens this exemption to 'independent' subsidiaries in which no other related party has an interest, but also for subsidiaries where no adequate protection for the subsidiary and its shareholders is available according to national law[78]. The risk for these shareholders is not significantly increased, except if the controlling shareholder of the listed entity owns 25% or more of the shares of that subsidiary, where he could determine the decisions. One could analyse this provision as implying that beyond 25% this shareholder holds sufficiently strong influence in the decision making that this safeguard becomes necessary.

(g) Exceptions to the RPT regime – de minimis

The Belgian code contain some exceptions based \\of a "de minimis" reasoning. 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 as 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.

(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 exception to 'directors' .

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 exception[79]. The exception could be quite significant for the transaction – as merger, capital increases - which have been added to the list of regulated transactions.[80].
Another exemption relates to some transactions with essentially internal effect: it is based on the provision of the directive for "transactions offered to all shareholders on the same terms"[81]. 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

[76] The condition that no other related parties would hold shares in the subsidiarity has not been included in the law, although it was mentioned in the explanatory memorandum (p 24)
[77] Article 9 c 6 (a)
[78] Article 9 C(6) a Directive
[79] It is unclear whether this exception would only be applicable to a credit institution, or more 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
[80] It is unclear whether this exception would only be applicable to credit institutions, or more generally; see article 7:97 § 1, (4) (4.), Code
[81] Article 9 c (6) e Directive.

waiving or limiting the preferential subscription right of existing shareholders. The Directive's condition of "equal treatment" has not explicitly been included in the Belgian law.
Some of these exceptions are considered to relate to decisions adopted by the general meeting[82] or in the case only the board is involved, on the directive's exemption for transactions offered to all shareholder on the same terms[83].

(i) Extensions of the RPT regime

According to the Belgian Code[84], certain proposals for decisions of the board of directors of a listed company have to be submitted to the procedures and disclosures for RTPs:

3- Contribution in kind to a listed company by a related party; this also applies to a contribution of a branch of activity or an industrial branch;
4- Proposals for a merger, division or an assimilated transaction by a related party, as referred to in article 12:7[85] or an industry department in a related company.

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 subsidiary[86].

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; c
- 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.[87]
- 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.
- 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 interest. [88].

[82] See expose des motifs p,21 ; see article 9 c, § 6 (2) or (5) Directive
[83] See 9 c (6) e, Directive.
[84] The directive does not mandate these extensions.
[85] Including transactions" assimilated to restructurations", as a consequence of a transfer of all assets: article 7:97 § 2 (2), Code,
[86] The concern is the same as mentioned supra littera (d)
[87] See for the definition of independent directors Art. 7:87. **§ 1. 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.
[88] Article 7:97, §4; However, if an individual director of the company involved is effectively conflicted, he will have to abstain from taking part in the deliberation and the vote in the board

- The Committee will deliver a detailed, written report to the full board, dealing at least with the following items[89]:
  - -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 operation[90]. 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 abstain[91]. 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 into[92] . The content of this publication is detailed in the Belgian law, following the directive's provision[93]: 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 consulted[94].

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 directive[95] has merely drawn attention to the applicable EU regulation[96] and its transposition in Belgian law [97] according to which listed issuers will have to inform the public as soon as possible of price sensitive

[89] See article 9:79 § 3

[90] 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

[91] Reference is made to article 7:96, If all directors are conflicted the matter will be submitted to the AGM

[92] Article 9:79 § 4 / 1; Article 9 c (2) Directive

[93] Article 9 c (2) and article 9:79 § 4/1: 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, if applicable the motivation for the dissenting opinion of the board.

[94] Article 7:97 § 4/1

[95] Article 7:97 § 7

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

[97] See: Law 14 oct 2015

information which concerns the listed company or the related party if it is also a listed company[98]. One could argue that on that basis, the 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.

5. Sanctions

The Belgian law contains an express reference to the specific company law sanction regime[99].
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 rules[100]. 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 respected[101]. In urgent cases, the president of the tribunal may order the suspension the transaction if prima facie evidence is presented which is likely to justify the cancellation[102]. 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, not 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.

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 code[103]. The Belgian Code has introduced a cap on director's liability which for large companies [104] would be limited to 12 m. euro [105]

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. As the latter is a minimum harmonization directive, these differences could be viewed from the point of view that the Belgian legislature referred to a stricter regime. If this is not the case, there may be doubts about the correct implementation of the directive.

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 quantitative ratios. The Belgian law has not followed this approach but has considered all transactions material, with the exception of transactions which have

[98] 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. Art17 (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
[99] Article 7:97,§ 5
[100] Article 7:97, § 5
[101] Article 2:44
[102] Article 2:46
[103] See article 2:56, § 3
[104] Total balance sheet of 43 m and turnover of 50 m. euro
[105] Article 2:57 Code

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 nature[106], in other words which can be expressed in financial terms. The RPT 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 should be at the latest this would be the moment in the process leading to the conclusion of the transaction[107]. 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 directive[108], as well as the release of the full report of the independent committee.[109] 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 RPT 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 to the choice of the member state. A double procedure may not be preferable, as it may trigger a revolt against 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. 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

[106] Giving access to a material benefit
[107] Article 9c 2.
[108] Article 9 c 3, which defines at the same time the authorship and part of the content of this report.
[109] Article 9 c.7

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 of 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 article[110] 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 directors[111]. The Belgian law only provides for the agreement of the board, and this would seem to exclude 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 procedur [112].

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, provided fair treatment of non-related shareholders and minorities are adequately protected [113]. 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 meeting[114]. 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 protected [115]. 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 transaction mentioned above)[116].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

[110] 7:97 § 4 , Code
[111] 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 §
[112] See Expose des motifs, p 21 where the involvement of the general meeting was expressly refused.
[113] See Article 9 c 6 b , Directive
[114] Article 9(c) § 2, Directive
[115] Article 9 c (6) b.
[116] Article 9 c § 2, 2.

with more than 25% of the shares of the subsidiary. [117] 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 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 indemnify the companies for the negative burdens they have imposed on group companies. 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 Rozenblum[118] 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 duty[119].

7. Conclusion

The implementation of the SRD II in the Belgian legal system will raise numerous changes. In the field of relations between companies, the Related party transactions is probably one of the more substantial ones. The subject raises considerable interest in Belgium, in other EU member states and around the world, evidencing quite significant differences in the way the EU directive has been transposed or how 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 lead to a better protection of the shareholders in listed companies and support public confidence in the way these companies are managed. There 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.
- 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 insure the correct application of these provisions, contributing not only to investor protection but also to the reputation of Belgium company law.

[117] Except if the controlling shareholder of the listed company holds 25% or more in the subsidiary

[118] 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. Jeandidier ; D. 1985, jurispr. p. 478, note D. Oh

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

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