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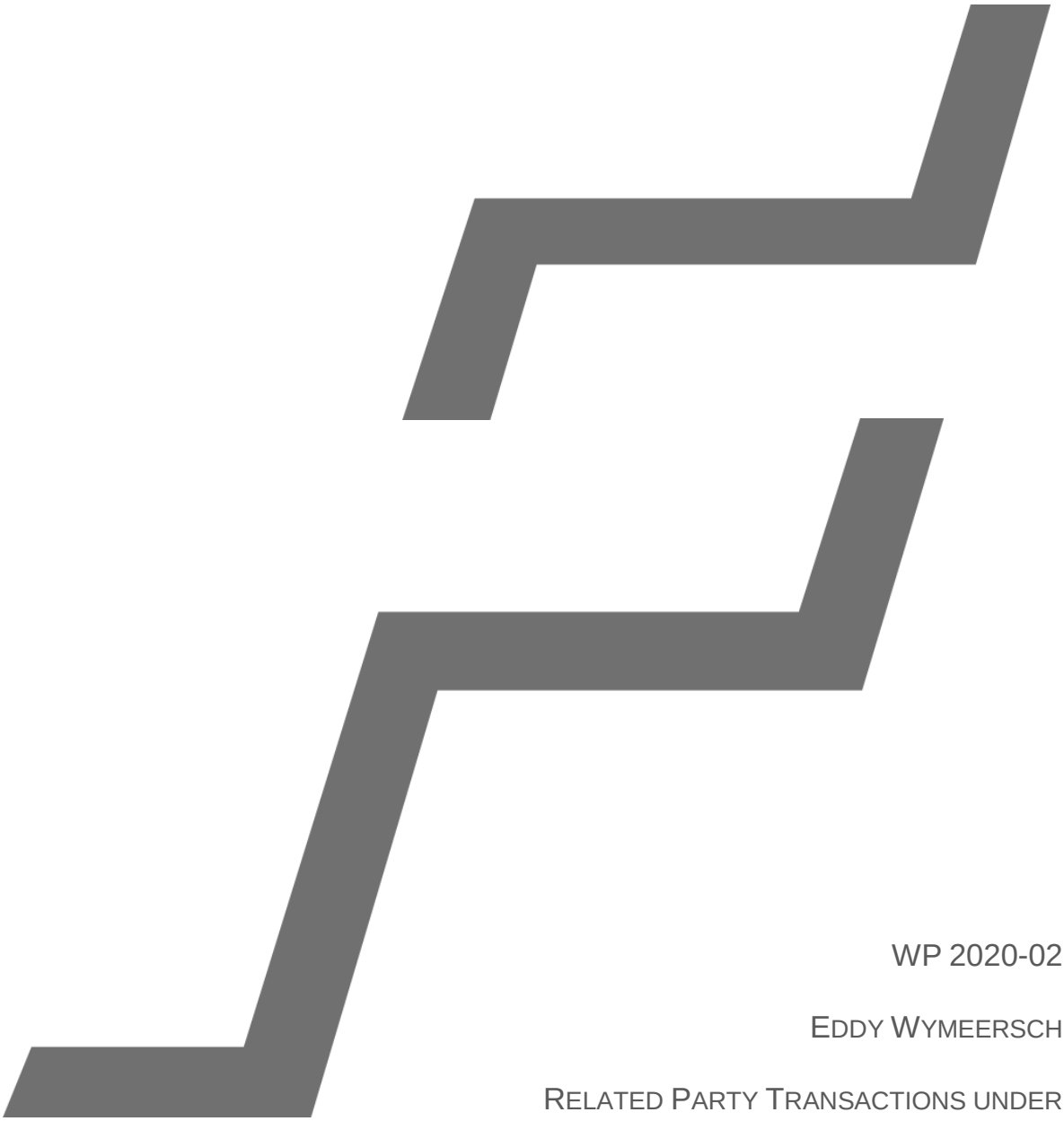

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GHENT UNIVERSITY

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Abstract

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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The Belgian company code of 7 May 1999 has been replaced by a new law dated 23 April 2019, entering into force on the 1st of May 2019.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"[1]. 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

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 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[2], that director has to declare his interest to the other directors and this prior to the decision by the board[3].
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 main legal consequence of the 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 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"[4] .This definition applies to cases in which there is an actual or potential "conflict of interest"[5] 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 'conflicts of interest regime" has to be distinguished from the "related party regime". The latter was already regulated in the previous Code[6] but has now been the subject of a new, more detailed series

[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

[2] 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"[2]

[3] 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.

[4] " 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 «

[5] Strijdig belang – intérêt opposé

[6] Article 524. Company Code 1999.

of provisions introduced in the new Code pursuant to the Shareholders' Rights Directive II [7]. The difference between the two systems is quite consistent. The main difference relates to the scope: RPTs mainly concern relations between companies, and not with individual directors. Therefore, the RPT safeguards have to be applied irrespective, in general whether or not there is a personal financial interest between the parties involved in the transaction. Therefore, this regime is mainly a question of group 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.

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[8]. The new law 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[9]), for the company limited by shares (NV[10]), for the cooperatives[11], for the foundations[12], and the associations[13], for the European cooperative societies.[14] and for the SE[15]. In addition, special provisions address conflicts relating to the activities of liquidators of companies[16], of credit institutions[17] or insurance companies [18] acting as asset managers investing in listed shares, and to the proxy advisors acting for shareholders[19].

In total, 12 provisions of the new code deal with conflict of interest matters. This list 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

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

[7] See article 7:97, Code on companies and Associations pursuant to article 9c Shareholder rights directive II 2017/828.
[8] Article 524, applicable to listed companies.
[9] Article 5:76; article 7:97 also applies to the listed BV.
[10] 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
[11] Article 6:64, Code
[12] Article 11:8 Code
[13] Article 9:8 and 2:129 Code
[14] Article 16:16 Code
[15] Article 15:21 Code
[16] Article 2:98 and 2:129; Code
[17] Article 75/1 L. 25 April 2014, banking law; investing for institutional investors; also, article 44/2, L 25 October 2016, investment managers
[18] Article 72/1 , Code
[19] Article 7:146/2 § 2,7e. Code

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[20].

(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[21]. 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[22]

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. The conflicts regime would be cumulatively applicable to the conflicted director[23]

(b) Transactions and decisions

The new regime applies to "decisions" adopted and "operations" [24] implementing a decision by the board of directors of a listed company, which involve a party "related" to the listed company, in which case the special RPT procedure will have to be applied.

With respect to the application of the RPT requirements, these "decisions or operations" are only taken into account 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.

This formulation raises the question what are these "decisions and "operations". Firstly, if they are management decisions, the RPT regime will not apply: this may be regrettable as abusive practices have been identified in this field, investor protection being rather weak. 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[25].
The meaning of "decisions" or "operations implementing a decision of the board of directors" – the Belgian text does not refer to "transactions" .[26]
– may raise interpretation questions. "Decisions" would rather refer to a declaration of the will by the board, which might lead to a contractual relationship with the related party. Whether the contractual relationship with the related party will be realized, will depend on the other party having subscribed to the same declaration. Decisions may therefore lead to bilateral, or to unilateral outcomes.
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 refer to implementing acts of previously agreed contractual relations would not qualify under this definition.

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

[20] See: Parliament, Adopted Proposal Doc 55-0553/006 of 19 February 2020; The directive had to be implemented by 10 June 2019.
[21] Article 1:11; listed share certificates, or dividend certificates also qualify for the qualification as a listed company.
[22] 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
[23] See article 9:97, § 4
[24] "décision ou opération" – "beslissing of verrichting". No reference is made to" transactions" although the latter term is used in the directive.
[25] See article 9:97
[26] The legislator preferred not to follow the directive ("transactions") but to continue to use the previous terminology , without any further motivation: Expose des motifs, art 31 .

agreement. If no additional agreement is necessary, or if the agreement can be given by the executive management, the RPT regime will not apply.

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 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[27].
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[28].

The directive allowed 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 …."[29].

During the Parliamentary debate, the question of extending the remit of the board of directors 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[30].

The new regime applies to "decisions" adopted and "operations"[31] 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[32]. 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."[33] 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" [34].

The "decisions" refer to agreement of parties which do not result in transactions, at least not at the time of deciding. It can also to refer to unilateral acts whereby a related party realises a legal relationship with a related company as a consequence of his declaration of will. Examples could be the decisions of a third party to acquire assets which were on public sale, or in the financial sector, decisions on options,

[27] See Companies Code, article 7:93
[28] Article 7:93, 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.
[29] See article 9c, (4)
[30] 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.
[31] " decision ou opération" – "beslissing of verrichting"
[32] Commission Regulation 632/2010 of 19 July632/2010.
[33] See IAS 24, § 9 "definitions"
[34] "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.

or to answer to puts or calls. As to "operations", this may refer to actions to be undertaken on the basis of the agreements with the related party. "Transactions" is probably closely related to operations, normally referring to contracts or the resulting obligations leading to rights or liabilities for the company, for the related party, or any third party, mostly a beneficiary. In IAS 24 terminology" it is a transfer of resources, services or obligations between a reporting entity and a related party, regardless of whether a price is charged.

The Belgian law has not restricted the application of the RPT regime to material transactions, the latter not having been defined as requested according to the directive. As a consequence the legal regime is applicable to all transactions with related parties, except those that can be considered as "de minimis"[35]. This approach conveys a very wide remit to the Belgian law, as all transactions beyond the 'de minimis "level would be submitted to the RPT regime.. The directive allows member states to adopt different materiality definitions for the application of certain provisions, but this is obviously not the question as far as the definition in the Belgian law is concerned. Moreover, the Belgian law does not take into account the criteria for defining "materiality", as formulated in the directive[36].

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

The notion of "related party" – "verbonden partij" – "partie liée"- is a new concept in Belgian company law. The new Code contains another provision referring to related and associated companies – "Verbonden en geassocieerde vennootschap"- "sociéties liées et associées" [37] which refers to companies which are part of a group on the basis of control, as defined[38]. Although these companies are also "related" in the sense of the RPT regime, the Code defines them in a different, more extensive way for the purpose of organizing the internal procedure for dealing with relations between related parties, by making reference to the wider definition in Accounting standard IAS 24 dealing with related parties' "disclosures"[39].

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. Underlying to this mark of distrust is the fact that these "decisions or operations" may not be inspired by the best interest 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 aiming 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.[40]

The Code defines the "related party" by referring to the Accounting Standard IAS 24, although the standard is only applicable to related party *disclosures*. IAS 24 requires companies to disclose that

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[35] See infra littera (e)

[36] See article 9 c,(1)" when defining material transactions Member States shall set one or more …..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.

[37] Article 1:20; this definition does not respond to the objectives of the RPT regime under article 9:97., Code.

[38] Control is defined in the Code, article 1:14 .

[39] 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.
Whether the scope of a standard dealing with disclosures is fit to be used for defining the ambit of a standard regulating internal decision

[40] Article 7:97, § 3, Code

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 related party 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 – eg .employee benefits – but without defining the addressee of the disclosure duty. 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[41].

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.

Links between related parties can also be based on family or personal relationships: 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 "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 way the scope of these provisions has been defined is likely to influence decision making and create legal uncertainty.

(d) Exceptions to the RPT regime – subsidiaries

As the RPT regime is mainly addressing potential abuses 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 individual, the law provides a certain number of safeguards where the risk of this type of abuse is remote, or in any case 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

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

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. This may be different in case transactions with a related party are realized, which is different from the listed parent company of the subsidiary. The Belgian law does not apply the safeguards to transactions of subsidiaries with their listed parent. The safeguards will be applied for decisions and operations between a listed parent and its subsidiary, except if the controlling shareholder of the listed parent holds separately from the listed parent a stake in the subsidiary which amounts to at least 25 % of the share capital of the subsidiary. It is considered that due to the overwhelming interest of the listed parent in that subsidiary directly, or indirectly through other companies or other persons, the safeguards are not necessary[42].

A 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. This approval requirement will not apply to transactions with the listed parent itself (also a related party) or a subsidiary of the latter. But it would apply if the controlling shareholder of the listed company holds, directly or indirectly, a stake of at least 25% in the subsidiary's capital. However the prior approval will not be needed if the related party is the listed parent, or a subsidiary of the latter, except if the controlling shareholder of the listed company holds a participation in the subsidiary for at least 25% of the capital of that subsidiary.

It is debatable whether this exception provides sufficient protection to the shareholders or creditors of the subsidiary: these will not be protected against appropriation of assets of the subsidiary by the parent which owns apart from a controlling block as a parent, and in addition can rely of the support of its controlling shareholder, owning less at least 25%.

A similar rationale applies to the restructuration measures – contributions in kind, merger or division, which are subject to the RPT-procedure - where the related party is a subsidiary of the listed company, except in case the controlling shareholder of the listed company holds a significant percentage of the subsidiary's capital. Here too, the percentage has been established at 25% or more.

These exceptions 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, provided that the controlling shareholder owns already a significant stake in the subsidiary. The remaining minority shareholders will not find much protection in these provisions .

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)

(e)Exceptions to the RPT regime – de minimis

The Belgian code contain some exceptions based on the basis of a "de minimis" reasoning.

For both the listed parent and its subsidiaries, the usual decisions and operations concluded at the prevailing market conditions, and at the usual price and guarantees conditions, will be exempted; the board of directors of the relevant company will develop an internal procedure to evaluate whether these conditions have been met.

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

Decisions and operations for a value less than 1% the net assets of the listed company, on a consolidated basis. 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 calculated of the 1% threshold.

(f) 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. This exception 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 exception is based on the predominant public interest. It only applies to an individual credit institution. The financial stability of banks or the financial system are the justification for this exception[43].

The acquisition or disposal of treasury shares, the distribution of interim dividends, capital increases on the basis of the authorized capital, with or without granting existing shareholders a preferential subscription right. This exception somewhat corresponds to the exception provided in the directive for transactions offered to all shareholders on the same terms[44], the Directive's condition[45] of "equal treatment" not having been formulated explicitly in the Belgian law. These exceptions are considered to related to decisions adopted by the general meeting[46]

(g) Extensions of the RPT regime

According to the Belgian Code[47], certain proposals for decisions of the board of directors of a listed company have to be submitted to the procedures and disclosures for RTPs:

1- 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;
2- Proposals for a merger, division or an assimilated transaction by a related party, as referred to in article 12:7[48] 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[49].

4.The company law procedure to be applied to RTPs

[43] It is unclear whether this exception would only be applicable to credit institutions, or more generally; see article 7:97 § 1, (4) (4.), Code
[44] See article 9c, 6) (e), Directive
[45] Article 9c (6) (e) Directive
[46] See expose des motifs in Kamer, *Parlementair Document, 55K0553001*
[47] The directive does not mandate these extensions.
[48] Including transactions" assimilated to restructurations", as a consequence of a transfer of all assets: article 7:97 § 2 (2), Code,
[49] The concern is the same as mentioned supra littera (d)

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

- The RTP transactions have to be identified by the "company" which is the counterparty for the RPT; it is up to its board, or its chairman to call the board meeting; if not the board could convene on its own initiative;
- The process is applicable due to the mere fact that the proposed transaction will be realized by a Related Party, and this even in the absence of a conflicting interest. However, if an individual director of the company involved is effectively conflicted, he will have to abstain [50].
- The board of directors of the company has to initiate an evaluation process by designating a committee of three independent directors. The conditions for independence have been laid down in the Code, and would apply here as well[51].
- The Committee is entitled to call on the assistance of one or several independent experts[52], at least if it considers this to be necessary;
- The Committee delivers an extensive, written report to the full board, developing at least the following items:

  -The type 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, 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 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 will decide on the proposed decision or operation. Individually conflicted directors will have to abstain[53]. The minutes of the board meeting will confirm that the procedure has been followed and if applicable, states the reasons for its diverging decision.

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

[50] Article 7:97, §4, Code

[51] 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.

[52] The directive does not impose the intervention of an independent expert.

[53] Reference is made to article 7:96, If all directors are conflicted the matter will be submitted to the general meeting.

The decision or operation will be publicly announced at the latest on the day in which they have been adopted or entered into[54] . The content of this publication is detailed in the Belgian law, following the directive's provision. [55]

The moment of publication according to the directive 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 adopted decision.

However, this approach may raise interesting questions from the angle of the "market abuse regulation", especially under the heading of insider trading. The Belgian law, following the directive[56] has merely drawn attention to the applicable EU regulation[57] and its transposition in Belgian law [58] according to which listed issuers will have to inform the public as soon as possible of inside information which concerns the issuer[59]. One could argue that the issuer would have to inform the market about the forthcoming transaction, thereby avoiding any further question of insider trading. 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 on the disclosure duties relative to the ongoing process, and hence reduce the insider trading risks. An early disclosure would avoid risks for several parties involved from the angle of insider trading.

It is unclear why the Belgian legislator has not imposed an earlier disclosure duty.

5. Sanctions

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[60]. Shareholders, or other stakeholders do not have the same 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[61]. 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[62].

6. Alternative governance arrangements and conflicts of interest.

The new Belgian Code has introduced several alternative governance arrangements which may be selected by the interested companies; these arrangements require an adaptation of the conflicts of interest regimes. The following governance arrangements are now made available:

- A single director, which is possibly a single company limited by shares[63]

[54] Article 7:79 § 4 / 1; Code; Article 9 c (2) Directive

[55] Article 9 c (2) Directive and article 7:79 § 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, if applicable the motivation for the dissenting opinion of the board.

[56] Article 7:97 § 7, Code

[57] Article 9c , § 9, regulation 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.

[58] See: Law 14 oct 2015 .

[59] See article 17 of the Insider trading directive, 596/2014, calling for informing the public as soon as possible of inside information which directly concerns the issuer.

[60] Article 7:97, § 5, Code

[61] Article 2:44, Code

[62] Article 2:46, Code

[63] Article 7:101, Code

- Two tier board structure, consisting of a supervisory board and a management board.

In each of these cases, a conflicts of interest regulation has been introduced.

The company can be directed by a single director, a physical person. The single director of a listed company can only be a company limited by shares, directed by a collegiate board of directors.

Companies limited by shares may organize their management to be exercised by a single director, possibly appointed in the charter[64]. When this formula is followed by a listed company, the sole director has to be company limited, directed by a college of directors. In that case, the conflict rules relating the companies limited by shares will be applicable to the single director and to the members of the college[65].

In case of a conflict of interest by the single director, the matter has to be submitted to the AGM[66]. When the single director is a company limited, the general rules on company law will be applied. In case of a conflict of interest between the single director and the company, the matter has to be submitted to the general meeting, for faunal decision. In case the sole director is a legal entity directed by a board, a conflict of interest with one of the board members will be dealt with in accordance of the rules applicable to conflicts of interest in unlisted companies by shares[67]. These rules will not be applicable to transactions between companies which hold at least 95% of the shares of the other company.[68]

Companies may also adopt the two tiers structure, which has now formally been introduced in Belgian company law. The supervisory board is a college of at least three members, appointed by the AGM. The board is in charge of defining the general policy and the strategy of the company and of all matters r which have been exclusively reserved to the board in the single board regime[69] including the representation of the company for these matters. He supervises the activities of the management board.

The management board manages all company affairs which have not been delegated to the supervisory board; it represents the company for these matters.

The conflict of interest with respect to these decisions are dealt with along the same lines as applicable in the company limited by shares. If one of the members the supervisory board has a conflict of interest, he will have to notify the matter to the members of that board, allowing the board to decide on the matter, the conflicted member not taking part in the process[70]. The auditor will exercise the same assessment as applicable to the single company[71]. Here again the conflict procedure is not applicable to transactions with 95% owned subsidiaries, or to usual transactions at market conditions.

If the company is listed, a procedure which is largely equivalent to the procedure applicable to related parties will be applied to conflicts of interest at the level of the supervisory board. A committee of three independent members, assisted by independent experts, will be required[72]. Conflicts at the management level will be submitted to the supervisory board; If the company is listed, reference is made to the provisions applicable to the supervisory board.

In case of conflict of interest of members of the management board, the matter will be submitted to the supervisory board acting according to the provisions applicable to conflicts in whether unlisted or listed companies

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[64] Article. 7:101 Code

[65] In fact: Article 7:96 Code

[66] Article 7:102 Code

[67] Article 7:96, Code; if the sole director is also the sole shareholder he will be entitled to decide and act solo.

[68] Article 7:102 § 2 Code

[6969] Article 7:109. The topics including in this delegation have not been mentioned in the Code.

[70] Article 7:115 Code

[71] Article 3:74. Code

[72] See article 7:116 Code

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