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Promoting long-term shareholder engagement

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In this edition

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1. Introduction

Modernising the Corporate Governance of listed companies, and in particular the long-term shareholder engagement, has long been on the European agenda. According to the European Commission, the financial crisis has shown that shareholders often do not sufficiently supervise listed companies and are too strongly focused on short-term returns. This can lead to less optimal Corporate Governance and lower financial performance in the long term. For this reason the European Commission amended the Shareholders' Rights Directive.

The Commission has identified five key issues that need to be addressed to achieve better corporate governance, namely:

1. Remuneration of directors of listed companies;
2. Supervision of shareholders on transactions with related parties;
3. Identification of shareholders;
4. Exercise of shareholder rights; and
5. Transparency for institutional investors, asset managers and voting advisors.

The Dutch Bill implementing the revised Shareholders' Rights Directive entered into force on 1 December 2019. This publication starts with a brief overview of the main implications of the Bill for listed companies in the field of remuneration policy and related party transactions. These themes will then be addressed in more detail. The other topics will be briefly discussed at the end of this publication.

2. Overview of implications for listed companies

The following is an overview of the main implications of the Bill for listed companies in terms of remuneration policy and related party transactions.

Remuneration policy and remuneration report

1. The remuneration policy must be expanded to include a number of subjects, including the contribution of the policy to the strategy, the long-term interests and the sustainability of the listed company (insofar as this is not yet provided for).

2. The performance of management and supervisory board members should be assessed not only against financial targets but also against non-financial targets.

3. If the company wishes to be able, in exceptional cases, to temporarily derogate from the remuneration policy in order to serve the long-term interests and sustainability of the company as a whole or to ensure its viability, the procedural conditions for the application of the derogation and the elements from which derogations can be made must be included in the policy.

4. The revised remuneration policy must be submitted to the first annual general meeting after the entry into force of the Bill (*i.e.* the annual general meeting in 2020).[2]

5. At companies to which the Dutch 'large company regime' applies (*structuurvennootschappen*), supervisory board members recommended by the works council will form part of the remuneration committee if the articles of association provide that the supervisory board determines the remuneration of individual management board members.

6. The remuneration policy must be put on the agenda for adoption by the general meeting at least every four years with a majority of at least 3/4 of the votes cast (unless the articles of association provide for a lower threshold). If the current remuneration policy already complies with the new regulations, this four-year period starts from the date on which this policy was adopted.[3]

7. The works council may render its advice regarding the proposal of the remuneration policy. Such advice will be submitted to the general meeting together with the

1 This publication reflects relevant changes to the bill implementing the Directive following the publication of the Dutch version of the Quoted "Genoteerd – Bevordering langetermijnbetrokkenheid aandeelhouders" in January 2019.

2 Explanatory Memorandum, p. 6. It is unclear what should apply if the Bill entered into force after the annual general meeting had already been convened but not yet held. In that case, it is justifiable to postpone the inclusion of the revised remuneration policy as an item for the agenda of the annual general meeting in 2021.

3 Explanatory Memorandum, p. 6.

proposal to adopt the new remuneration policy and a substantiation of any deviations from this advice.

8. In addition to the information that prior to the implementation of the Bill had to be included in the notes to the annual accounts on the implementation of the remuneration policy, the remuneration report must also address a number of other topics of the remuneration policy.

9. The management board is responsible for the preparation of the remuneration report. Breach of the duty to draw up and publish a remuneration report may lead to liability of management board members and supervisory board members for improper performance of their duties.

10. The general meeting will have an advisory vote on the remuneration report. The remuneration report for the following year must explain how the outcome of the vote or discussion has been taken into account.

11. The remuneration report must be drawn up for the first time for the current financial year at the time the Bill entered into force.[4] With a financial year ending on 31 December 2019, the first remuneration report for the general meeting will therefore have to be included as an item on the agenda in 2020.

12. The applicable remuneration policy and the remuneration reports must be published on the website of the listed company. The remuneration reports must be available for ten years.

Related party transactions

1. Material transactions with related parties not entered into in the normal course of business or not under normal market conditions must be approved by the supervisory board or the board of directors in case of a one-tier board.

2. A management board member, supervisory board member or shareholder[5] of the listed company who is in any way involved in the transaction with the related party may not participate in the decision-making process of the listed company regarding this transaction. We feel it is advisable to also exclude such management board member or supervisory board member from the preceding deliberations.

3. Listed companies must establish an internal procedure on the basis of which the supervisory board or the board of directors in case of a one-tier board periodically assesses whether material transactions with related parties that have not been approved as referred to under 1. have been carried out in the ordinary course of business and in accordance with normal market conditions.

4. The internal procedure referred to under 3. must also ensure that (a) there is an up-to-date overview of all related parties of the listed company and (b) all intended material transactions with these related parties are reported to an internal officer, including whether or not the transaction (i) will or will not be entered into in the normal course of business and (ii) will or will not be carried out under normal market conditions (if so, supported by documents in accordance with IAS 24.23), so that approval can be requested in good time in the process.

5. Material transactions with related parties that are not concluded in the normal course of business or that are not in accordance with normal market conditions must be made public on the website of the listed company at the time they are concluded.

6. The obligations referred to under 1., 2. and 5. do not apply to transactions between the listed company and its subsidiaries and with regard to the remuneration of management board members and supervisory board members which has been awarded or is due in accordance with the law.

4 Explanatory Memorandum, p. 14 and *Parliamentary Papers I*, 2018/19, 35 058, C, p. 6.

5 The term shareholder was included in the second version of the Bill because the Bill now also provides that the general meeting must approve material transactions with related parties as referred to under 1. in case there are no supervisory or non-executive directors. The latter was included because it is not a legal requirement for listed companies to install a supervisory board or a one-tier board with non-executive directors, unless the listed company qualifies a company under the 'large company regime' (*structuurvennootschap*). The Code simply presumes that there is a supervisory board (or that there is a one-tier board with non-executive directors). The inclusion of shareholders lacks relevance for listed companies as there will, in practice, always be a supervisory board (or a one-tier board with non-executive directors). However, the exclusion of shareholders who are a party to a related party transaction has a much broader impact (see paragraph 4.4).

3. Remuneration policy

3.1 Introduction

The New Directive aims to strengthen the relationship between the remuneration and the performance of board members (including non-executive directors and supervisory board members). In view of the crucial role of board members in listed companies, the Commission considers it important that the remuneration policy is adopted in an appropriate manner and that shareholders have the opportunity to express their views on this policy.

To this end, the New Directive requires listed companies to 'draw up a clear and comprehensible remuneration policy that contributes to the corporate strategy, the long-term interests and the sustainability of the listed company'. In order to improve shareholders' ability to supervise the remuneration of board members, listed companies should draw up a remuneration report containing a comprehensive overview of the remuneration awarded or owed to individual board members during the most recent financial year in accordance with the remuneration policy.

The Commission has adopted guidelines for a standardised presentation of the information in the remuneration report.

3.2 Old provisions and main changes

The new regulations relating to the remuneration policy and the remuneration report are implemented in the Bill in Section 2:135(1) and (9) of the Dutch Civil Code (**DCC**) and two new Sections 2:135a and 2:135b DCC. These provisions apply to listed companies[6] and are also declared applicable to the remuneration of supervisory board members of listed companies.[7]

3.2.1 Remuneration policy

Old/existing provisions

Under existing Dutch law, the general meeting of a public limited company already had the authority to adopt the remuneration policy for management board members.

The remuneration policy had to cover at least the subjects that must be included in the notes to the annual accounts, namely:

(1) the amount and composition of the remuneration, including the variable elements of remuneration,
(2) the share-based remuneration, and
(3) the possibility of recovering variable remuneration (claw back).

In principle, the general meeting also determines the individual remuneration of management board members, unless a different body has been designated under the articles of association. In case of listed companies, this task is generally assigned to the supervisory board.[8] The general meeting may also grant a remuneration to supervisory board members. This division of powers remains unchanged.

New provisions

The new regulations for the content of the remuneration policy are extended and more detailed. The remuneration policy must be clear, comprehensible and include at least the following subjects:

1. an explanation of how the remuneration policy contributes to the strategy, long-term interests and sustainability of the company;
2. an explanation of how the remuneration policy takes into account the wage and employment conditions of the company's employees (pay ratio);
3. an explanation of how the remuneration policy takes into account: (a) the identity, mission and values of the company and the related enterprise, (b) the remuneration ratios within the company and the related enterprise, and (c) the public consensus;
4. a description of the various components of the fixed and variable remuneration, stating their relative share;
5. with regard to any variable remuneration: (a) the financial and non-financial targets and the way in which they contribute to the targets referred to under 1., (b) the methods to be used to determine the extent to which these targets have been achieved, (c) the period within which the remuneration is payable and

6 Through a new mutatis mutandis provision in Section 2:187 DCC, the relevant provisions for listed public limited companies are also declared applicable to listed private limited liability companies.

7 Through a new mutatis mutandis provision in Section 2:145(2) DCC, the provisions for the remuneration of management board members of listed companies are also declared applicable to the supervisory board members of these companies. A number of responses from the consultation noted that the full application of these provisions to supervisory board members was not in keeping with the Dutch system and the division of powers between the bodies. This will not be addressed further.

8 This also follows from the Code. According to principle 3.2 of the Code, the supervisory board determines the individual remuneration of management board members on the proposal of the remuneration committee and within the remuneration policy adopted by the general meeting.

(d) a description of the possibility of recovering the remuneration (claw back);

6. with regard to any share-based remuneration: (a) a description of the remaining vesting period and/or the remaining exercise period[9], (b) a description of the period during which the management board member may not transfer the acquired shares (lock-up), in so far as applicable and (c) an explanation of the way in which the share-based remuneration contributes to the objectives referred to under 1.;
7. with regard to the agreements with management board members: (a) the term and applicable notice periods, (b) the principal characteristics of supplementary and early retirement schemes, and (c) the conditions and payments associated with termination;
8. a description of the decision-making process with regard to the adoption, revision and implementation of the remuneration policy.

It should be noted that a number of the above subjects must under the old rules also be described in the context of the justification of the implementation of the remuneration policy (see paragraph 3.2.2).

The remuneration policy must be adopted by the general meeting at every material change and in any case at least every four years. If the remuneration policy is changed, the revised remuneration policy must explain how the votes and views of the shareholders and the remuneration reports since the previous vote on the remuneration policy at the general meeting have been taken into account.

Under exceptional circumstances and if the remuneration policy so provides, the listed company may temporarily derogate from the remuneration policy, and at the latest until a new remuneration policy is adopted. To this end, the policy must specify the procedural conditions under which the derogation can be applied and which parts of the policy can be derogated from. According to the Bill (in line with the New Directive), exceptional circumstances only apply if the derogation from the remuneration policy is necessary to serve the long-term interests and sustainability of the company as a whole or to guarantee its viability.

The remuneration policy and the date and outcome of the vote on the remuneration policy must be published on the company's website immediately[10] after the general meeting and must remain available on the website at least as long as the remuneration policy applies.

A number of remarks

It is not clear whether the reference to the relative share relates to the fixed part versus the variable part of the remuneration or to all components of the remuneration (see previous sub-paragraph, point 4). The Proposal for a Directive stipulated that the relative share of the various components should be shown. Now that this item has been deleted from the New Directive, we believe that it is sufficient to indicate the relative share of the fixed part and the variable part of the remuneration.

The ratio to employees' wage and employment conditions had yet to be explained in the Proposal for a Directive, stating why this ratio is appropriate. In our view, the explanation pursuant to the Bill does not have to include a statement of the pay ratio as a result of the amendment to the New Directive (see previous sub-paragraph, point 2). This means that the new regulation does not impose any further reaching requirements than the Code.

3.2.2 Accountability for remuneration policy

Old/existing provisions

The notes to the annual accounts of public limited companies had to provide an insight into the level and composition of the remuneration of individual management board members and supervisory board members at the expense of the company or the consolidated companies during the financial year. Bonuses that are wholly or partly based on the achievement of certain objectives set by the listed company were stated separately, including whether or not these objectives were achieved in the financial year. Also, any adjustment or claw back of a bonus had to be stated. Finally, an overview had to be included of the options granted, the shares acquired from options and the conditions associated with them.[11]

9 The Bill defines this as 'the remaining term of the rights not yet exercised'.

10 In this instance, within a period of 15 days (see Explanatory Memorandum, p. 49).

11 Sections 2:383c and 2:383d DCC. Pursuant to Section 2:383e DCC, a statement also had to be made of loans, advances and guarantees granted to management board members and supervisory board members. Since this is not remuneration, we do not mention this statement here. Sections 2:383c to 2:383e DCC do not apply to private limited liability companies.

All these subjects had to be placed separately on the agenda prior to the adoption of the annual accounts. In doing so, the implementation of the remuneration policy was submitted to the general meeting for discussion. This has been elaborated further in the Code. The Code requires the supervisory board to account for the way in which it has implemented the remuneration policy for the management board members by means of a remuneration report.[12] In addition to the aforementioned, the following must also be reported in the remuneration report on the basis of the Code for financial years as from 1 January 2017:

- the way in which the implementation of the remuneration policy contributes to the long-term value creation by the listed company;
- that scenario analyses have been taken into account;
- if a management board member receives a variable remuneration, the way in which this remuneration contributes to the long-term value creation by the listed company, the predetermined and measurable performance criteria on which the variable remuneration is dependent and the relationship between the remuneration and the performance;
- the pay ratios within the company and the related enterprise and (if applicable) the changes in these ratios compared to the previous financial year.[13]

In addition, the management report of the listed company had to explain how the remuneration policy was put into practice during the financial year.

New provisions

Under the new rules, listed companies must draw up a remuneration report containing an overview of all remuneration awarded or due to individual management board members and supervisory board members in the previous financial year. The remuneration report must in any event include the following subjects in respect of each management board member and supervisory board member of the listed company:

1. all the information that already had to be included in the notes to the annual accounts (see previous sub-paragraph 'Old/existing provisions');[14]
2. the relative share of fixed and variable remuneration;
3. the way in which the total amount of the remuneration (a) is consistent with the remuneration policy and (b) contributes to the long-term performance of the company;
4. the annual change in remuneration over at least five financial years, the development of the company's performance and the average remuneration of employees (not board members) of the company during this period in a manner that makes comparison possible;
5. any derogation from (a) the decision-making process for the implementation of the remuneration policy and/or (b) the remuneration policy with an explanation of the nature of the exceptional circumstances.

The statutory provisions referred to in the previous sub-paragraph ('Old/existing provisions') with regard to the accountability for the implementation of the remuneration policy in the notes to the annual accounts and the management report ceased to apply for listed companies in order to prevent duplication of information.

Under the new provisions, auditors must verify that the remuneration report contains the required information. This is a more limited test than the one that applies to the audit of the management board report.[15]

The old regulation on the submission to and the addressing of the implementation of the remuneration policy at the general meeting is replaced by a new provision requiring that the remuneration report be submitted to the annual general meeting for an advisory vote. A negative advisory vote by the general meeting on the remuneration report does not affect the remuneration paid to individual management board members.

12 The Monitoring Committee's reviews show that there is relatively poor compliance with the best practice provisions of the 2008 Code concerning the report on the implementation of the remuneration policy (including the contribution to the long-term objectives) and the overview of remuneration elements.

13 Best practice provision 3.4.1 of the Code.

14 The Bill also refers to Section 2:383e DCC (statement of loans, advances and guarantees granted), whereas this does not concern remuneration and need not be included in the remuneration policy either.

15 The auditor must also examine whether the management board report is compatible with the annual accounts and whether it contains substantial inaccuracies in the light of the knowledge gained during the audit and the understanding of the legal entity and its environment (Section 2:393(3) DCC).

Each remuneration report must be published on the website of the listed company and must be available for ten years.[16]

A number of remarks

Neither the New Directive nor the Bill specifies which body is responsible for drawing up the remuneration report. In this respect, the Explanatory Memorandum mentions both the management board and the supervisory board. Based on the statutory division of tasks between the two bodies, this means that the management board must draw up the remuneration report and the supervisory board must ensure that this is done and that the content of the report complies with the statutory requirements pursuant to the new provisions and is consistent with existing provisions on the remuneration report as set out in the Code.

The Bill stipulates (in line with the New Directive) that the remuneration report must explain how the total remuneration amount is consistent with the adopted remuneration policy (see previous sub-paragraph ('New provisions'), point 3(a)). The provisions on the remuneration policy do not, however, contain the requirement to include the total remuneration amount, so that this cannot be accounted for in the report. The Proposal for a Directive stipulated that the policy should include the maximum amounts of total remuneration. This requirement did not make it to the New Directive, so in our view the provision to explain this in the remuneration report can be disregarded.

The comparison between the remuneration policy of management board members and the employment conditions of other employees seems limited to employees of the listed company itself (see previous sub-paragraph ('New provisions'), point 4). This would make this comparison of little value, because in many cases the employees are employed by one of the group companies of the listed company. In order to make the comparison between the remuneration of management board members and (other) employees meaningful, the employees of the entire group should be included in the comparison. This is in line with the best practice provisions in the Code on this subject.[17]

Neither the New Directive nor the Bill stipulates *what* shareholders must vote on. According to recital 28 of the preamble to the New Directive, shareholders should be given the right to vote on the remuneration report in an advisory capacity in order to ensure that the remuneration policy is properly implemented. The right to vote is worded in a broader sense in recital 33 of the New Directive. According to this recital the publication of the remuneration report to shareholders is necessary to enable them to assess the remuneration of management board members and to express an opinion on the *manner* and *amount* of the remuneration, as well as on the relationship between the remuneration and the performance of each individual management board member, in order to remedy possible situations in which the level of a management board member's remuneration is not justified on the basis of his individual performance and the performance of the company. There is an important difference between the two approaches. If the general meeting votes on the remuneration report to ensure that the remuneration policy is properly implemented, the emphasis will be on the explanation by the (chairman of the) supervisory board of the variable components of the remuneration and the performance in relation to the set financial and non-financial targets. If, on the other hand, the general meeting is asked to give a substantive opinion on the level and composition of the remuneration of each individual management board member in relation to the realisation of the strategy, the long-term interests and the sustainability of the listed company, this is a completely different story. This (broad) interpretation is inconsistent with the Dutch corporate governance system in which the supervisory board is the appropriate body to align the remuneration of management board members with the long-term objectives of the listed company.[18] The Commission also recognises this responsibility of the supervisory board. Taking this into account, the first (limited) explanation is, in our view, most defensible.

16 Unlike the remuneration policy, this provision does not include the term 'without delay'. In practice, the remuneration report will be posted on the website at the time of the convening of the general meeting and will remain available there after the general meeting (see Explanatory Memorandum, p. 52).

17 Best practice provisions 3.2.1 under iii on the remuneration policy and 3.4.1 under iii on the remuneration report.

18 In legal literature the focus is on the second (broad) explanation and the provision is criticised. See T.C.A. Dijkhuizen, 'Het richtlijnvoorstel tot wijziging van de Aandeelhoudersrechtenrichtlijn', *Bb* 2015/23 (repeated in his articles, 'De herziene Aandeelhoudersrechtenrichtlijn: een eerste reflectie', *MvO* 2017, no. 5-6 and 'Een eerste stap in de implementatie van de herziene Aandeelhoudersrichtlijn', *MvO* 2018, no. 4); C.F.J. van Tuyll of Serooskerken, 'Een bespreking van enkele beloningsinitiatieven. 'Say on pay' of 'less is more'?', TAO 2014/2.

Finally, the question is what the impact is of the advisory vote on the remuneration report by the general meeting. Based on the limited explanation advocated above, the added value will mainly lie in the explanation in the next remuneration report of how the voting by the shareholders' meeting and the views of the shareholders have been taken into account.

4. Related party transactions

4.1 Introduction

The New Directive aims to increase the transparency and supervision of material transactions between listed companies and related parties. Such transactions may harm the listed company and (other) shareholders, as the related party may be given the opportunity to appropriate the assets i.e. 'value' that belong(s) to the listed company. According to the Commission, (minority) shareholders did not sufficiently supervise related party transactions and did not have the means to prevent such material transactions. For this reason, the New Directive introduces a number of provisions aimed at protecting the interests of listed companies and (minority) shareholders.

Member States may define themselves what is meant by 'material transactions'. They should take into account:

(a) the impact that the information about the transaction may have on the economic decisions of shareholders, and
(b) the risk that the transaction entails for the listed company and its (minority) shareholders who are not related parties.

In this context, Member States must either set one or more quantitative ratios based on the impact of transaction on the financial position, revenues, assets, capitalisation, including equity, or turnover of the company, or take into account the nature of the transaction and the position of the related party.

4.2 Old/existing provisions

Dutch legislation already included provisions to prevent abuse in transactions between the company and its management board members, supervisory board members and major shareholders. For example, management board members and supervisory board members may not participate in the deliberations and decision-making process if they have a direct or indirect personal interest that conflicts with the company's interests.[19] The Code also stipulates that all transactions between the company and its management board members, supervisory board members and major shareholders should be concluded on terms customary in the market and that decisions to enter into these transactions require the approval of the supervisory board if they are of material significance to the listed company and/or the related party involved.[20]

In addition, IAS 24 requires listed companies to provide information in the notes to the consolidated annual accounts and semi-annual accounts on all controlling relationships with related parties (even if no transactions were performed with such related parties during the financial year) and all transactions with related parties (specifying the minimum information to be provided). This also applies to transactions entered into under normal market conditions; the company may include this qualification in the notes, provided this can be substantiated. The definition of 'related party' includes - in short - a natural person or close relative or family member of the natural person who controls or jointly controls the listed company, has significant influence, or is part of the senior management personnel of the listed company or its parent company. Legal entities, such as group companies, joint ventures or associates, may also qualify as related parties. Supervisory board members are not considered to be related parties in IAS 24.

4.3 New provisions

The provisions regarding related party transactions are included in the new Sections 167 to 170 of Book 2 DCC.[21]

A material transaction is a transaction in which information about the transaction qualifies as inside information[22] and is entered into between the listed company (or

19 Section 2:129(6) DCC and Section 2:140(5) DCC.

20 Best practice provisions 2.7.4 and 2.7.5 of the Code.

21 Through a new mutatis mutandis provision in Section 2:187 DCC, the relevant provisions for listed public limited companies are also applicable to listed private limited liability companies.

22 See Article 7(1) Market Abuse Regulation (EU) No 596/2014 (**Market Abuse Regulation**).

its subsidiary)[23] and a related party. The following are considered to be related parties in any event:
one or more holders of shares representing alone or jointly at least 10% of the issued capital,
a management board member of the company, or
a supervisory board member of the company.

Material transactions that the listed company enters into with a related party and that are not entered into in the normal course of business or under normal market conditions, must (i) be approved in advance by the supervisory board, or the board of directors in case of a one-tier board, of the listed company and (ii) be made public at the time they are entered into. If such a transaction is entered into by a subsidiary with a related party, only the disclosure obligation of (ii) applies.

The aforementioned obligations do not apply to transactions between the listed company and its subsidiaries and to the remuneration of management board members and supervisory board members which has been awarded or is due in accordance with the law. Transactions offered under the same conditions to all shareholders are also exempt if the equal treatment of all shareholders and the interests of the company and its business are safeguarded.

A management board member or supervisory board member of the listed company who is involved in the transaction with the related party may not participate in the decision-making regarding this transaction. If as a result of this no decision can be taken by the management board, the decision will be taken by the supervisory board. If the supervisory board is unable to take a decision because of this, a resolution will be passed by the general meeting, unless the articles of association provide otherwise.[24] In the last revision of the Bill, it was added that any shareholder who is involved in the transaction with the related party should also abstain from participating in the decision-making process.

The public announcement must contain at least information on: (a) the nature of the related party relationship, (b) the name of the related party, (c) the date and value of the transaction and (d) other information necessary to assess whether the transaction is reasonable and fair from the perspective of the listed company and the unrelated shareholders. This could include the reason for entering into the transaction or the conditions with which the related party must comply on the basis of the transaction documentation.[25]

Non-material transactions entered into with the same related party in the same financial year are aggregated to determine whether a material transaction is involved.

For material transactions between the listed company (or its subsidiaries) with related parties that are concluded in the normal course of business and under normal market conditions, the supervisory board, or the board of directors in case of a one-tier board, must establish an internal procedure to periodically assess whether the qualification ‘normal business operations’ and ‘normal market conditions’ have been met.[26]

4.4 A number of remarks

A management board member or supervisory board member or shareholder who is involved in the transaction with the related party may not participate in the decision-making process regarding this transaction.[27] It is not specified what is meant by ‘involvement’. This is in any event the case if the management board member, supervisory board member or shareholder himself qualifies as a related party. It can be deducted from the Explanatory Memorandum that the legislator has a broader concept in mind.[28] Without further clarification of the concept of ‘involvement’, in practice any form of involvement will require exclusion from participation in decision-making.

Participation in the deliberations prior to the decision-making is not prohibited. The following may however, be

23 This follows from Section 2:170 DCC in conjunction with Section 2:169(1) DCC.

24 Section 2:129(6) DCC second and third sentences and Section 2:140(5) DCC second sentence. The articles of association of most listed companies stipulate that the supervisory board remains competent.

25 Explanatory Memorandum, p. 57.

26 The wording of Section 2:168 DCC is deficient and should be read in conjunction with the Explanatory Memorandum, p. 55 and further. and Article 9c(5) of the New Directive.

27 Section 2:169(4) DCC declares Sections 2:129(6) and 2:140(5) DCC to be applicable mutatis mutandis. Non-compliance with the decision-making rules therefore renders a decision voidable on the grounds of Section 2:15(1)(a) DCC.

28 The New Directive is also not explicit on this point. This is in contrast to the provision regarding shareholders involved, which refers to ‘the shareholder who is a related party’ (Article 9c(4), fourth sub-paragraph of the New Directive).

noted in this respect. If the engagement of a management board member or supervisory board member in the transaction implies a direct or indirect personal interest that conflicts with the company's interests, such a management board member or supervisory board member may also not take part in the deliberations (see paragraph 4.2). The Enterprise Court (*Ondernemingskamer*) applies a broader concept of conflict of interest: even if there is no statutory conflict of interest, careful decision-making may require that the management board member or supervisory board member involved in the transaction does not take part in the deliberations and decision-making on the matter.[29]

The new provision that shareholders may also not participate in the decision-making process regarding material transactions with a related party that are not concluded in the normal course of business or under normal market conditions if they are involved in such transaction has consequences for legal practice. For instance, if a major shareholder of a listed company wishes to effect a legal merger with another company specially set up by it for that purpose, this provision would prevent such shareholder from voting at the general meeting on the merger proposal. This seems an unintended consequence of the new provision requiring shareholder approval in related party transactions for the theoretical situation that a listed company has not installed a supervisory board or a one-tier board with non-executive directors that can approve these related party transactions.

Material transactions with related parties that are not concluded in the ordinary course of business or under normal market conditions must be disclosed at the time they are concluded. It has been clarified in the Explanatory Memorandum that publication on the website of the listed company is sufficient.[30] In addition, the rules of the Market Abuse Regulation on the publication of inside information will continue to apply.

5. Other topics

5.1 Identification of shareholders

In practice, shares in listed companies are often held through complex chains of intermediaries. According to the preamble to the New Directive, this may complicate the exercise of shareholders' rights and hinder shareholder engagement. Listed companies are often unable to identify their shareholders, even though it is a prerequisite for direct communication between the shareholders and the company. The New Directive therefore requires Member States to ensure that listed companies have the right to identify their shareholders so that they can communicate directly with them. Intermediaries will be required to provide information on the identity of their shareholders at the request of the listed company.

The Securities Bank Giro Transactions Act (*Wet giraal effectenverkeer*) already allowed listed companies[31] to identify shareholders in a closed period prior to the general meeting. Listed companies are now under the new rules also given the opportunity to identify their shareholders at other times of the year. The period of sixty days up to the day of the general meeting, at which an identification request can currently be made, is abolished. If several intermediaries in the custody chain (in short a central institute, banks and other domestic and foreign financial intermediaries) are involved, they must pass on the request of the listed company to the successive intermediary until this request reaches the intermediary who has the details of the shareholder(s) to be identified. The company can therefore suffice with one shareholder identification request addressed to a Dutch intermediary.

The Commission has published, through a Regulation (**Implementing Regulation**), minimum requirements concerning the form of the identification request and the response to this request.[32] The Implementing Regulation will enter into force on 3 September 2020.

29 Amsterdam Court of Appeal (*Ondernemingskamer*) 22 December 2017, *JOR* 2018/210 with commentary from Bulten (Intergamma) and Amsterdam Court of Appeal (*Ondernemingskamer*) 31 August 2017, *JOR* 2018/41, with commentary from Leijten (Staphorst Ontwikkeling). In the last judgment, the Court ruled that the management board member concerned should not have been involved in the preparation and execution of the transaction either. These statements have been critically received, partly because they lead to legal uncertainty.

30 Or in another easily accessible way, which is in line with recital 44 of the New Directive (see Explanatory Memorandum, p. 57).

31 Under the current regulation, these are public limited companies and foreign companies that have issued securities that are traded on a regulated market or other trading facility located in the Netherlands, with the exception of investment institutions. In the Bill, the regulation is extended to private limited liability companies with listed securities and the territorial restriction is removed.

32 Article 3 of the Implementing Regulation (EU) 2018/1212 of 3 September 2018 implementing Article 3a(8) New Directive.

5.2 Facilitating the exercise of shareholder rights

The actual exercise of shareholders' rights depends largely on the efficiency of the chain of intermediaries holding the securities accounts on behalf of shareholders or other intermediaries. It is furthermore important that shareholders who exercise their voting rights on shares in listed companies can check whether their votes have been correctly taken into account.

In the Securities Bank Giro Transactions Act and the DCC a number of provisions are added to promote the transfer of information from the listed company to the shareholders through the custody chain and to entitle the shareholders to certain information from the listed company.

Dutch listed companies will be obliged to provide a party in the custody chain in a timely[33] and standardised manner with the information necessary to enable shareholders to exercise their shareholders' rights and which is addressed to all holders of shares of that class (i.e. the notice convening the general meeting and other so-called 'corporate events'). If this information is available on the website of the listed company, a notice stating where this information can be found on the website may suffice. These provisions do not apply to listed companies that provide this information directly to their shareholders (or a third party designated by them).

Dutch listed companies must send an electronic acknowledgement of receipt to shareholders who have cast their votes electronically.[34] At the request of a shareholder (or a third party designated by the shareholder), the listed company must provide confirmation after the general meeting that the votes cast by the shareholder have been validly registered and counted. A request to that effect must be made to the company no later than three months after the end of the general meeting.[35] This information will be sent through the custody chain if the company does not communicate directly with its shareholders.[36]

Intermediaries will be obliged to immediately pass on to the listed company the information they receive from shareholders regarding the exercise of their shareholders' rights in accordance with the instructions of the shareholders. In addition, intermediaries must enter into arrangements which enable shareholders (or third parties designated by them) to exercise their shareholders' rights themselves or which enable the intermediary to exercise those shareholders' rights for the benefit of shareholders with the express authorisation and instruction of the shareholder.

If several intermediaries in the custody chain are involved, they must pass on the above information to the next intermediary until it reaches the intermediary holding the shares for the listed company.

In the Implementing Regulation the Commission has published minimum requirements regarding, inter alia, the form and content of (i) the notice convening the general meeting, (ii) the invitation to participate in other corporate events, (iii) the acknowledgement of receipt of electronically cast votes, (iv) the confirmation and registration of votes.

5.3 Transparency for institutional investors, asset managers and proxy advisors

Institutional investors and asset managers are often important shareholders in listed companies. They can therefore play an important role in the corporate governance of these companies and influence their strategy and long-term performance.[37] Recent years have shown that institutional investors and asset managers are often not involved in the listed companies in which they are shareholders and that they only focus on the short term,

33 At the latest on the same working day as the announcement of the *corporate event* (Article 9(1) of the Implementing Regulation).

34 This obligation also applies to non-listed companies that facilitate electronic voting. An acknowledgement of receipt is provided immediately after the votes are cast (Article 9(5) of the Implementing Regulation).

35 Section 2:120(6) DCC. Section 2:187 DCC (mutatis mutandis provision for listed private limited liability companies) mistakenly does not refer to this paragraph.

36 Section 49db(2) DCC . The listed company must provide confirmation of the registration and counting of votes no later than 15 days after the general meeting or no later than 15 days after the request, if submitted after the general meeting, unless the information is already available (Article 9(5) of the Implementing Regulation).

37 In legal literature it is questioned whether the New Directive has been formulated sufficiently sharply to actually have the intended impact in the Netherlands on the important role and influence of shareholders, and in particular institutional investors. See B. Elion, 'De herziene Nieuwe Richtlijn Aandeelhoudersrechten in Nederland - Tijd voor heroriëntatie op de bevoegdheidsverdeling binnen Nederlandse beursgenoteerde vennootschappen?', *MvO* 2018 , issue 1-2 and H.M. Vletter-van Dort, 'De aandeelhouder als hoeksteen van de beursvennootschap', *Ondernemingsrecht*, 2018/45.

which can jeopardise the long-term performance of listed companies. Institutional investors and asset managers often use the voting advice of proxy advisors.

The provisions implementing the New Directive are laid down in a new chapter 5.6A in the Financial Supervision Act (*Wet op het financieel toezicht*). This chapter applies to Dutch life insurers and pension funds (collectively referred to as institutional investors) and Dutch asset managers who invest in shares traded on a regulated market, as well as to Dutch proxy advisors who provide services to shareholders of Dutch listed companies.[38] These provisions require institutional investors and asset managers to disclose on a 'comply or explain' basis, inter alia, the engagement policy with regard to the listed companies in which they are shareholders and the manner in which voting rights are exercised on their website. Proxy advisors should, inter alia, provide detailed information on their research, advice and voting advice on their website.

38 The definition of asset manager is limited to asset managers investing on behalf of *institutional* investors (see also Explanatory Memorandum, p. 33), while the italicised term is missing in the New Directive (see Article 1(6)(b) New Directive). The scope of the new provisions is extended to institutional investors and their asset management companies (in line with the New Directive) to include listed companies with their registered office outside the EU and whose shares are traded on a regulated market.

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