

Trend report - New developments on Dutch loyalty share schemes

Over the past years, several listed Dutch companies implemented share loyalty schemes, incentivising long-term shareholding by granting additional dividend or voting rights to long-term shareholders. In our [September 2020 trend report](#), we covered an unprecedented judgment in which the implementation of a loyalty share scheme – as part of a merger – was successfully challenged. Recently, an expert group on the modernisation of Dutch company law published [its advice](#) (in Dutch) on the use of loyalty shares by Dutch companies.

In this trend report, we share our views as to how the expert group's advice may impact the use and development of loyalty share schemes under Dutch law.

Loyalty share schemes under Dutch law

Loyalty share schemes are intended to incentivise long-term shareholding. Provided that the corresponding ordinary shares are held by the same shareholder during a set qualification period (in most cases three or five years), that shareholder may be granted certain additional 'loyalty' benefits; typically, additional voting or in some cases additional dividend rights. Dutch company law allows loyalty share schemes to be structured in such a way that eligible shareholders can participate in the loyalty scheme without having to make any additional payments (on their loyalty shares) and the loyalty shares are transferred back to the company

for no consideration once the entitlement to the loyalty benefits expire. Loyalty share schemes may be similar to, but should be distinguished from, dual class share structures in which different classes of shares have different rights attached to them (e.g., high/low voting shares).

In our [September 2020 trend report](#), we shared our thoughts on the *Mediaset* judgment, marking the first time that a Dutch loyalty share scheme was successfully challenged in court. According to the Amsterdam Court of Appeal, it did not become sufficiently clear that the loyalty share scheme was, under the circumstances of the case, a suitable and proportionate instrument to incentivise and promote long-term shareholding.

In that trend report, we also indicated that we did not expect the *Mediaset* judgment to have a significant impact on the use and permissibility of loyalty share schemes in the Netherlands, but that it would likely expose the rationale of such schemes to enhanced levels of scrutiny.

Statutory basis for loyalty shares?

At the request of the Dutch Minister for Legal Protection, the expert group on the modernisation of Dutch company law assessed the desirability of a statutory basis for loyalty shares. In [his letter](#) of 24 January 2023, the Dutch Minister for legal protection informed the Dutch House of Representatives on the expert group's findings and published its [advice](#).

In that advice, the expert group concluded that it is neither necessary nor preferable to introduce a statutory basis for loyalty shares in the Netherlands. The expert group based that conclusion on three grounds, *i.e.*:

- i. Dutch company law already allows the implementation of loyalty shares;
- ii. research and experience from current practice does not verifiably show that a statutory basis for loyalty shares would (sufficiently) contribute to the creation of long-term value and/or the sustainable success of a company; and
- iii. loyalty voting rights are, in the view of the expert group, mainly used by controlling shareholders to consolidate or increase influence without the need for extra capital contributions.

In addition, the expert group announced that a subsequent advice shall address the use or the need for limitations on loyalty shares.

This upcoming analysis on possible limitations appears to be instigated by the *Mediaset* judgment, which the expert group notes has left significant uncertainty, including on the requirements of an objective justification for the use of the loyalty share schemes (in particular in case of a controlling shareholder) and on the limits of the additional voting rights granted. A multiplier of five was ruled to be impermissible in the specific circumstances of the *Mediaset* case, however the expert group notes that it remains unclear whether such a multiplier could be permissible in other circumstances (and, if so, which), or whether only a lower multiplier would be acceptable as a general rule.

Impact on the future of Dutch loyalty share schemes

The expert group's advice offers a further confirmation on the permissibility of loyalty share schemes under Dutch company law. The advice that there is no need for a statutory basis for loyalty shares in Dutch law should not bring any changes to the current practice. However, the expert group's advice also underlines that it is important to carefully structure and implement loyalty share schemes, especially in companies having a controlling shareholder. Accordingly, due consideration should be given to (i) the purpose of the relevant loyalty share scheme; (ii) its proportionality in view of that purpose; and (iii) balancing of the relevant interests involved.

In our view, the presence of a controlling shareholder itself should not render a loyalty share scheme inadmissible, nor is this evident from the *Mediaset* judgment. Much will depend on the degree of influence a controlling shareholder acquires through the loyalty scheme and the extent to which this is in line with the designated purpose. The degree of progressiveness of the structure, the wider corporate governance structure (including the rights of minority shareholders) and the timing of implementation (*e.g.*, at first admission to listing or mid-stream) also seem to play a determining role in this. In relation thereto, we note that a principle of Dutch company law is that parties are free to determine the governance and capital structure of a company within the confines of (mandatory) law. As such, absent a statutory prohibition, we believe that parties should have significant freedom in how they structure a loyalty share scheme, assuming due disclosure, compatibility with the designated purpose and due observance of investor interests, including those of non-controlling shareholders.

Although the *Mediaset* judgment provided some guidance, much uncertainty remains. The expert group's future advice on potential limitations for loyalty share schemes could provide important guidance in how Dutch courts view such schemes.

Among other things, the expert group could provide additional comfort to Dutch practice by sharing its views as to:

- i. what would be valid or legitimate purposes for a loyalty share scheme;
- ii. key considerations in assessing whether the relevant loyalty share scheme is proportional in view of such purpose; and
- iii. the limits of what would be permissible under a loyalty share scheme in terms of vote ratio and qualification period and under which circumstances.

Your Loyens & Loeff contacts

If you have any questions, please reach out to Bastiaan Kemp, Michel van Agt, Menno Baks, Philippe Hezer and Eline Viersen.

Bastiaan Kemp

Partner - Attorney at law

T +31 20 578 50 46

M +31 6 13 85 43 31

E bastiaan.kemp@loyensloeff.com



Michel van Agt

Partner - Civil law notary

T +31 20 578 52 61

M +31 6 10 89 85 88

E michel.van.agt@loyensloeff.com



Menno Baks

Attorney at law

T +31 20 578 50 42

M +31 6 23 35 83 82

E menno.baks@loyensloeff.com



Philippe Hezer

Attorney at law

T +31 20 578 59 26

M +31 6 23 40 48 03

E philippe.hezer@loyensloeff.com



Eline Viersen

Senior deputy civil law notary

T +31 20 578 55 31

M +31 6 83 11 75 78

E eline.viersen@loyensloeff.com



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