LOYENS & LOEFF

CORPORATE
LITIGATION & RISK MANAGEMENT

Trend Report

Shareholder disclosure requirements and related party transactions in privately held companies

How to deal with shareholder disclosure requirements when entering into related party transactions in privately held Dutch companies?

Recent Dutch case law has clarified the scope of shareholder disclosure requirements in the context of related party transactions. In this trend report, we flag this development and provide practical guidance to help mitigate exposure to litigation and prevent related party transactions from being challenged due to shareholder disclosure requirements not being met. This trend report specifically focuses on privately held companies so does not take into account the market abuse regulation (as implemented in Dutch law) in relation to related party transactions

Developments in the clarification of shareholder disclosure requirements

Dutch law only provides limited information rights to individual shareholders. Notably, contrary to certain other jurisdictions, shareholders of Dutch companies do not have a right to inspect the company's books and records and cannot invoke visitation rights, unless such rights are granted in a shareholders' agreement or the company's articles of association (the latter being relatively uncommon). While there is a body of case law suggesting that shareholders may need to be informed of (among other things) related party transactions, these judgments provided limited guidance and were not entirely consistent.

Recently, however, the Enterprise Chamber of the Amsterdam Court of Appeal, a specialized court handling certain corporate disputes, rendered several judgments offering important clarifications to disclosure requirements for Dutch companies towards their shareholders outside of shareholders' meetings. These cases mostly concerned related party transactions in private companies.

In sum, the Enterprise Chamber has held that a company's duty of care towards its shareholders may require that such shareholders are duly and timely informed of conflict transactions. This may require that the company must proactively inform its shareholders prior to entering into the relevant transaction, even if the shareholders have not (yet)

posed any questions. These cases related to transactions concluded between the company and its majority shareholders(s), which majority shareholder(s) were represented at board level. The duty of care applied by the Enterprise Chamber was intended to protect minority shareholders without board representation, who otherwise would not – or, at least, not timely – be informed of these transactions that could arguably prejudice their position.

Developments on conflicted directors when undertaking related party transactions

Related party transactions may lead to conflicts of interests between the company and one or more of its directors. If it is established that a director is conflicted, as a matter of Dutch statutory law, such director is prohibited from participating in the deliberation and decision-making on the conflicted items.

Additional standards of care have been established in consistent case law, including (i) exercising due transparency towards fellow directors and, potentially, shareholders; (ii) clearly demonstrating that the interests involved are separated; and (iii) if appropriate, seeking advice from outside experts on the related party transaction (*e.g.*, by means of a fairness opinion or valuation report to support the terms of the transaction). Dutch statutory law provides that a conflict of interests may arise when a director has a direct or indirect personal interest that is contrary to the interests of the company.

That criterion is further set out in landmark Supreme Court case law, providing that such a conflict is deemed to arise if, in all reasonableness, given all relevant facts and circumstances, it is considered doubtful whether a director could be deemed to be guided solely by the interests of the company. However, in recent years, the Enterprise Chamber has sought to further broaden the scope of the conflict of interests doctrine beyond these statutory boundaries, including in relation to related party transactions. In these cases, heightened standards of care have also been imposed on such (potentially) conflicted directors.

Furthermore, additional limitations on director conduct may apply, such that conflicted directors not only need to abstain from the deliberation and decision-making on conflict items, but should also not be involved in the preparation of such decision-making and the implementation thereof, despite this not being strictly required by statutory law.

Considerations when dealing with related party transactions

What would a Dutch board need to consider when dealing with related party transactions and the position of the resulting (actually or potentially) conflicted directors? As the tendency is shifting towards broadening the scope of conflict of interests doctrine regarding related party transactions, generally a more prudent approach should be taken. Failing to do so could lead to the relevant resolutions being challengeable and could expose the company and its directors to litigation. In relation thereto, we suggest taking into account:

i. **Due board disclosure**. Directors should inform their fellow board members of conflicts of interests with regard to the related party transaction. This matter may then be discussed amongst board members to establish whether or not the transaction constitutes a (sufficiently material) conflict.

ii. **Due shareholder disclosure**. In case of a related party transaction, it is generally advisable to proactively inform (minority) shareholders (in particular in case of shareholders without board representation) of the transaction prior to implementation thereof. This may also require the board to answer certain clarifying questions posed by shareholders regarding that transaction. The company does not need to disclose information if that would cause serious harm to the company, for instance where it concerns competitively sensitive information.

iii. **Abstain from involvement**. In case of an actual conflict of interests, conflicted director(s) should in any case abstain from the deliberation and decision-making on any relevant topic. While not strictly required by Dutch statutory law, it is generally also advisable to, where possible, abstain from other involvement on such topics, including in the preparation and implementation of resolutions adopted, or at least adopt clear internal procedures that provide at which point in the decision-making the conflicted director

steps out. Especially when dealing with sensitive matters, the same also applies in case of a *potential* conflict of interests.

iv. **Expert advice**. It may be advisable to obtain expert advice. Such expert advice is typically used to support the terms of related party transactions (*e.g.*, through fairness opinions, valuation reports or market research), but could also be sought to help establish whether a given situation constitutes a (potential) conflict of interests and how to deal with it accordingly.

v. **Due documentation**. Finally, it is especially important to duly document the full board considerations with regard to the related party transaction. Such documentation should demonstrate that appropriate care was observed, in particular to the items listed here, for instance by setting out the nature of any (potential) conflicts of interests and how they were addressed, how the relevant interests involved were kept separated and why the related party transaction is in the interests of the company and its business.

Your Loyens & Loeff contacts

For more information, please reach out to Bastiaan Cornelisse, Mijke Sinninghe Damsté, Michel van Agt, Bastiaan Kemp or Philippe Hezer.

Bastiaan Cornelisse
Partner / Civil law notary
T +31 10 224 65 28
bastiaan.cornelisse@loyensloeff.com

Mijke Sinninghe Damsté
Partner / Attorney at law
T +31 20 578 56 66
mijke.sinninghe.damste@loyensloeff.com

Michel van Agt
Partner / Senior deputy civil law notary
T +31 20 578 52 61
michel.van.agt@loyensloeff.com

Bastiaan Kemp
Attorney at law
T +31 20 578 50 46
bastiaan.kemp@loyensloeff.com

Philippe Hezer
Attorney at law
T +31 20 578 59 26
philippe.hezer@loyensloeff.com