LOYENS LOEFF

CORPORATE
LITIGATION & RISK MANAGEMENT

Trend Report
Recent developments in Dutch loyalty share schemes

What does the future hold for loyalty share schemes in Dutch corporate governance?

Over the past years, the Netherlands has seen growing use of loyalty share schemes, incentivizing long-term shareholdership by granting additional dividend or voting rights to long-term shareholders. In the recent Mediaset ruling, the Amsterdam Court of Appeal rendered an unprecedented judgment in which the Implementation of a loyalty share scheme – as part of a merger – was successfully challenged. In this trend report, we share our thoughts on how this development may impact share loyalty structures in the Netherlands.

Loyalty share schemes in Dutch corporate governance

Loyalty share schemes have been a hot topic in Dutch corporate governance for a number of years. In December 2006, Royal Dutch DSM N.V. was the first Dutch company to announce its intention to implement a loyalty share scheme. This scheme was subsequently challenged by a number of investors, supported by Dutch shareholders' association VEB. In its landmark 2007 ruling, the Dutch Supreme Court sanctioned the use of DSM's loyalty share schemes. While the DSM case related to loyalty dividends, it is generally accepted that the same applies to loyalty voting rights. Since the DSM ruling, a number of companies in the Dutch market have successfully implemented loyalty share schemes. Notable examples include CNH Industrial N.V., Fiat Chrysler Automobiles N.V., Exor Holding N.V. and Ferrari N.V.

In sum, under Dutch loyalty share schemes, shareholders are invited to register their shares in a so-called loyalty registry held by the company. In doing so, shareholders undertake not to transfer their shares. Provided that the shares remain registered to the same shareholder for a set period of time (typically three or five years), that shareholder may be granted certain additional 'loyalty' benefits; typically additional voting or dividend rights. If a shareholder is no longer eligible for the loyalty share schemes, such loyalty shares must be transferred to the company (usually against little or no financial compensation).

These loyalty share schemes may be similar to, but should be distinguished from, dual share class structures in which different classes of shares may have different rights attached to them (*e.g.*, low/high voting stock). Examples of Dutch companies that have included such a dual share class structure include Altice N.V., Trivago N.V. and CNova N.V.

Dutch loyalty share schemes are subject to the principle of equal treatment. Under this principle, shareholders need to be treated equally in equal circumstances. In certain circumstance, a measure causing unequal treatment of shareholders may be permissible, provided that (i) there is a purpose providing an objective justification for such unequal treatment; (ii) this measure provides an equate way to achieve that purpose; (iii) the relevant measure is necessary to achieve that purpose; and (iv) the unequal treatment is proportional to that purpose. If a loyalty share scheme is challenged, a Dutch court will consider all facts and circumstances of a given case, taking into account that Dutch companies have a certain degree of discretion when determining the loyalty share scheme. Traditionally, it would often be assumed that a loyalty share scheme is permitted under Dutch law provided that all shareholders could, in theory, meet applicable criteria to access that scheme.

Recent developments: Mediaset ruling

On 1 September 2020, the Amsterdam Court of Appeal rendered its Mediaset ruling. This ruling relates to a shareholder dispute within Mediaset, an Italian mass media company listed on the Milan Stock Exchange. Mediaset's controlling shareholder Fininvest, holding a 44% stake in the company, and Vivendi, holding a 29% stake in the company, have been in dispute over the acquisition by Vivendi of Mediaset Premium, a Mediaset subsidiary offering PayTV services.

The dispute has led to multi-jurisdictional litigation in which Vivendi has sought to – in short – block a cross-border merger pursuant to which Italian and Spanish Mediaset entities would merge into a newly incorporated Dutch holding entity. This Dutch holding company would apply a tiered loyalty voting right structure pursuant to which, according to the court, Fininvest would effectively be granted full control over the company's general meeting. Vivendi sought to obtain injunctive relief blocking that merger, arguing inter alia that this loyalty voting right scheme would unreasonably prejudice its position.

The Court of Appeal ruled in favor of Vivendi and blocked the merger on the ground that this specific loyalty share structure served solely to secure absolute control over the Dutch holding for Fininvest while unreasonably prejudicing the position of Vivendi and other shareholders. At the same time, the Court of Appeal underlined that, as a starting point, Dutch law in principle permits the use of loyalty voting schemes.

The Mediaset ruling is the first notable judgment to be rendered on loyalty share schemes since the landmark DSM ruling and marks the first time that such a structure is successfully challenged in the Netherlands. While the judgment can be appealed before the Supreme Court, we believe that this judgment may grant further guidance on the implementation of loyalty share schemes in the Netherlands.

The future of loyalty share schemes in the Netherlands

Loyalty share schemes are still permissible, but depending on the specific mechanism could be challenged in court. How will the Mediaset ruling impact Dutch market practice? We have three key take-aways:

1. ***Clear rationale.*** The loyalty scheme needs to serve a certain legitimate (presumably, governance-related) purpose. As such, it is important to substantiate why (for instance) promoting long-term share ownership is important to the continuity of the company or how the loyalty share scheme contributes to the overall capital structure of the company.

2. ***Proportionate measure***. The loyalty scheme needs to be a necessary and appropriate measure to achieve that purpose. In particular, it is important to note whether such purpose could also be achieved through other measures that would have less of a negative impact on the position of the other shareholders. Generally speaking, we believe this means that the mechanics of the loyalty share structure need to be scrutinized, not the use of the loyalty share structure as such.

3. ***Balancing of interests***. Parties should be able to demonstrate that due consideration was given to balancing the various interests involved. This may in particular require an analysis of why the particular loyalty share structure is in the interest of the company itself.

All this considered, the Mediaset ruling should not have a significant impact on the use of loyalty share schemes in the Netherlands, but will expose the rationale for such schemes to higher levels of scrutiny. As such, we expect that Dutch market practice will develop in such a way that Dutch companies seeking to implement a loyalty share scheme will more explicitly set out the rationale for implementing that scheme and how this relates to the (other) shareholder interests involved.

Finally, we note that there are valid arguments to incentivize long-term shareholdership through loyalty share schemes. For instance, long term shareholders help create a stable shareholder base, meaning that a company will be less susceptible to minority shareholder activism and helps foster shareholder engagement. Such governance considerations are in line with the objectives of the revised Shareholder Rights Directive (Directive (EU) 2017/828), which also seeks to encourage shareholder engagement in the long term.

Your Loyens & Loeff contacts

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