CONFLICTS OF INTEREST WITHIN THE BOARD OF A COMPANY

written by Yannick Lauwers | October 15, 2024

A conflict of interest for a director of a company occurs sooner than one might think. Several situations are possible. For example, when the director is also a director in another company with which one wants to enter into an agreement. Or when the director wants to enter into an agreement with himself as a natural person.

The legislator has worked out a regime so that a director cannot let his own interest take precedence over the interests he should represent as a director of a company.

Specifically, the problem arises when the governing body of a company has to take a decision or make a ruling on a transaction under its jurisdiction, and it turns out that one or all of the directors have an interest that conflicts with it. In this article, we set out how to legally approach these conflicts of interest.

1. Conflict of interest: concept

It follows from the relevant provisions of the Companies and Associations Code (*"Wetboek van Vennootschappen en Verenigingen", hereinafter "WVV")* that a conflict of interest is the situation where a director or governing body has a direct or indirect interest of a patrimonial nature that conflicts with the company's interest.[1]

The requirement of "patrimonial" means that a material benefit is obtained or a material disadvantage is avoided. A potential patrimonial interest is sufficient. It need not be established that by making the decision the conflicted director obtains a material benefit or avoids material prejudice, if there is a possibility that this is the case, it qualifies as a patrimonial interest covered by the conflict of interest rule.

An example of such a conflict of interest is when the director wants to sell a property to his company. As a private seller, he will try to ask the highest possible price, as a director-buyer he should try to strive for the lowest possible price in the company's interest.[2]

2. Duty to report and prohibition on participation

The BV and CV can be managed by one or more directors who may or may not form a collegiate body. If the governing body does not form a collegiate body, each director is individually authorised to manage and represent the company.[3]

When a conflict of interest arises in a BV or CV, and there are several directors who are each individually authorised to manage and represent the company, the conflicted director should notify the other directors. They will then take the decision or carry out the transaction. The director concerned may not participate in the deliberation or vote by the other directors in this regard.[4]

If the articles of association of a BV or CV provide that the governing body is a collegiate body, the decision is taken or the transaction is carried out by the governing body. In collegial decision-making, a majority of directors must meet or be represented to decide by a simple majority of votes.[5] Accordingly, the director with the conflict of interest may not participate in the deliberations or vote.[6]

In an NV, when a board member has a conflict of interest in a decision or transaction within the board's competence, the director concerned must notify the other directors before the board takes a decision. The board may not delegate this decision.[7] Such as, for example, to the daily governance. As in the BV and CV, the conflicted director may not participate in deliberations or vote.[8]

Within a dual governance in an NV, the conflicted director on the supervisory board must also report it before the board takes a decision. It may not delegate this decision either.[9] The director concerned may again not participate in the other director's deliberation or vote on such decision or transaction.[10]

When the executive board has to take a decision, or decide on a transaction within its competence, and a conflict of interest arises, the executive board refers

the decision to the supervisory board. The board then acts as set out above.[11]

3. Intervention general meeting

When all the directors have a conflict of interest, the power to take the decision or carry out the transaction shifts to the general meeting. If it approves the decision or transaction, then the governing body can still execute it. This regulation applies to the directors in the BV and CV, the board of directors in an NV with a monistic governance and the supervisory board in an NV with a dual governance.[12]

4. Sole director

This submission to the General Meeting also happens when there is only one director in the BV, CV or NV.[13] This is because in that case there are no other directors who can take the decision or carry out the transaction. In the NV, the general meeting can approve the decision or transaction, allowing the sole director to carry it out.[14] If the sole director is also the sole shareholder, he or she may take the decision or carry out the transaction.[15] This can only be done in the BV and NV, as for the CV the WVV requires at least three founders.[16]

If the sole director of the NV is an NV with a collegiate management body, the rules relating to the board of directors in a monistic governance, or the executive board in the case of a dual governance, apply. If all members of the governing body of the sole director who has to rule on the conflict of interest have a conflicting interest, the decision or transaction is submitted to the general meeting. If the general meeting of the governed company approves the decision or transaction, the governing body, or, in the case of a dual board, the executive board, may implement it.[17]

5. Exceptions

There are two exceptions where the above procedure should not be applied: when there are close links or when the acts are in conformity with the market.

As a first exception, the conflict-of-interest rule is not applied when the decisions

or transactions were made between companies that are closely related. That is when one company directly or indirectly holds at least 95% of the votes attached to the whole of the securities issued by the other company. Or companies of which at least 95% of the votes attached to the whole of the securities issued by each of them are held by another company.[18]

This ground for exemption does not apply when the sole director in the BV or NV is also the sole shareholder.[19] After all, there is no one whose interests he can harm.

The second ground for exception is when the decisions of the governing body relate to customary transactions that are done under the conditions and at the collateral usually prevailing in the market for similar transactions. In that case, the conflict of interest rule should not be applied either.[20]

6. The permanent representative

Article 2:55 of the WVV now also legally enshrines the majority view in case law. The rules on conflicts of interest for directors and members of the governing body apply to the permanent representative where applicable.[21]

7. Publicity

The conflicted director must make a statement explaining the nature of the conflicting interest. That statement is recorded in the minutes of the meeting of the other directors, the board of directors in a monistic NV or the supervisory board in a NV with dual governance.[22] The sole director in a NV does not have this obligation.

The other directors or the general meeting shall describe in the minutes the nature of the decision or transaction for which the conflict exists and its patrimonial consequences for the company. They also justify the adopted decision.[23] If in the BV or NV the sole director is also the sole shareholder, he shall also include in his special report the agreements concluded between him and the company.[24] This part of the minutes or this report should be included in its entirety in the annual report or in a document filed together with the financial

statements.[25] If the company has appointed an auditor (*"commissaris"*), the minutes of the meeting or report shall be communicated to him.[26]

8. Nullity

The conflict of interest procedure in the WVV provides for the explicit additional possibility for the company to claim the nullity of the decisions or transactions taken in violation thereof if the other party to those decisions or transactions knew or should have known about them.[27]

9. Conclusion

After more than two decades of absence, the ban on participating in deliberations has been reintroduced. The director with a conflict of interest must always report this to the other directors before the governing body takes a decision. The management board in the dual governance of a NV refers this decision to the supervisory board if necessary.

If the full board or the sole director has a conflict of interest, the WVV provides for a shift of power towards the general meeting. If it gives its approval, the governing body may still implement the decision or transaction. If the sole director is also the sole shareholder, he can of course decide on this himself.

One situation that the legislator did not take into account in 2019 is what to do if several, but not all, board members have a conflict of interest. There is a possibility that, as a result, the governing body may not achieve the required quorum to deliberate and decide.[28] A power shift to the general meeting is only possible if all board members have a conflict of interest. A statutory regulation of this remains outstanding for now.

One suggestion from legal doctrine is to formulate a provision in the articles of association for this purpose.[29] This way, you can provide for different attendance rules and possibly majority rules for deliberation in your company's articles of association themselves. Another possibility is to include the shift of power towards the general meeting itself. Or the temporary appointment of a proxy to achieve the required number of attendees for deliberation and voting.

As such, there are some opportunities to provide a procedure for this yourself.

We will be happy to assist you in working out a regime tailored to your company, and with any other questions or concerns regarding the operation of your governing body.

You can contact us via e-mail at joost.peeters@studio-legale.be or by telephone at 03/216.70.70.

Bronnen

Wetboek van Vennootschappen, *BS* 6 augustus 1999.

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ERNST, P., "Belangenconflicten revisited, 25 jaar later. De nieuwe regels in het WVV over belangenconflicten van bestuurders in de niet-genoteerde NV en BV en hun ruimere impact" in HOUBEN, R., GOOSSENS, N. en LEUNEN, C. (eds.), *JPB. Liber amicorum Jean-Pierre Blumberg*, Antwerpen, Intersentia, 2021, 177-212.

[1] Art. 5:76, §1, lid 1; 6:64, §1, lid 1; 7:96, §1, lid 1; 7:102, §1, lid 1; 7:115, §1, lid 1, 7:117, §1 WVV.

[2] H. BRAECKMANS en R. HOUBEN, *Handboek vennootschapsrecht*, Antwerpen, Intersentia, 2020, 278. (hierna: H. BRAECKMANS en R. HOUBEN, *Handboek vennootschapsrecht*)

[3] H. BRAECKMANS en R. HOUBEN, *Handboek vennootschapsrecht*, 82, nr. 136.

[4] Artt. 5:76, §1, lid 1 en 6:64, §1, lid 1 WVV.

[5] H. BRAECKMANS en R. HOUBEN, *Handboek vennootschapsrecht*, 272, nr. 576.

[6] Artt. 5:76, §2 en 6:64, §2 WVV.

[7] Art. 7:96, §1, lid 1 WVV.

[8] Art. 7:96, §1, lid 4 WVV.

[9] Art. 7:115, §1, lid 1 WVV.

[10] Art. 7:115, §1, lid 4 WVV.

[11] Art. 7:117, §1 WVV.

[12] Artt. 5:76, §1, lid 2; 6:64, §1, lid 2; 7:96, §1, lid 4 WVV en 7:115, §1, lid 4 WVV.

[13] Artt. 5:76, §3; 6:64, §3 en 7:102, §1, lid 1 WVV.

[14] Art. 7:102, §1, lid 1 WVV.

[15] Artt. 5:76, §4 en 7:102, §1, lid 3 WVV.

[16] Art. 6:3 WVV.

[17] Art. 7:102, §1, lid 2 WVV.

[18] Artt. 5:76, §5, lid 1; 6:64, §4, lid 1; 7:96, §3, lid 1; 7:102, §2, lid 1 en 7:115, §3, lid 1 WVV.

[19] Artt. 5:76, §5, lid 1 en 7:102, §2, lid 1 WVV.

[20] Artt. 5:76, §5, lid 2; 6:64, §4, lid 2; 7:96, §3, lid 2; 7:102, §2, lid 2 en 7:115, §3, lid 2 WVV.

[21] Art. 2:55, lid 1 WVV.

[22] Artt. 5:76, §1, lid 1; 6:64, §1, lid 1; 7:96, §1, lid 1 en 7:115, §1, lid 1 WVV.

[23] Artt. 5:77, §1, lid 1; 6:65, §1, lid 1; 7:96, §1, lid 2; 7:103, §1, lid 1 en 7:115, §1, lid 2 WVV.

[24] Artt. 5:77, §1, lid 1 en 7:103, §1, lid 1 WVV.

[25] Artt. 5:77, §1, lid 2; 6:65, §1, lid 2; 7:96, §1, lid 2; 7:103, §1, lid 2 en 7:115, §1, lid 2 WVV.

[26] Artt. 5:77, §1, lid 3; 6:65, §1, lid 3; 7:96, §1, lid 3; 7:103, §1, lid 3 en 7:115, §1, lid 3 WVV.

[27] Art. 5:77, §2; 6:65, §2; 7:96, §2; 7:103, §2 en 7:115, §2 WVV.

[28] P. ERNST, “Belangenconflicten revisited”, 202.

[29] H. BRAECKMANS en R. HOUBEN, *Handboek vennootschapsrecht*, 285; P. ERNST, “Belangenconflicten revisited”, 203.