
EUROPEAN COMPANY LAW SERIES VOLUME 1

# European Company Law in Accelerated Progress

*Edited by*
Steef M. Bartman

KLUWER LAW
INTERNATIONAL

# European Company Law in Accelerated Progress

Edited by

Steef M. Bartman

KLUWER LAW
INTERNATIONAL

A C.I.P Catalogue record for this book is available from the Library of Congress.

ISBN 90 411 2529 9

---

Published by:
Kluwer Law International
P.O. Box 316
2400 AH Alphen aan den Rijn
The Netherlands
Email: sales@kluwerlaw.com
Website: http://www.kluwerlaw.com

*Sold and distributed in North, Central and South America by:*
Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America

*Sold and distributed in all other countries by:*
Turpin Distribution Services Ltd.
Stratton Business Park
Pegasus Drive
Biggleswade
Bedfordshire SG18 8TQ
United Kingdom

*Printed on acid-free paper*

© 2006 Kluwer Law International

All Rights Reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, mechanical, photocopying, recording or otherwise, without prior written permission of the publishers.

Permissions to use this content must be obtained from the copyright owner. Please apply to: Permissions Department, Wolters Kluwer Law & Business, 76 Ninth Avenue, Seventh Floor, New York, NY 10011, USA. E-mail: permissions@kluwerlaw.com. Website: www.kluwerlaw.com.

# European Company Law in Accelerated Progress

# European Company Law series

VOLUME 1

*Series Editors:*
Steef M. Bartman
John Birds
Andreas Cahn
Adriaan F.M. Dorresteijn
Marco Lamandini
Michel Menjucq
Christiaan A. Schwarz
Erik Werlauff
Jaap Winter

The CECL-bookseries on European company law is closely linked to the bimonthly journal *European Company Law* ('ECL'), also published by Kluwer Law International. The persons comprising the ECL's editorial board and the editors of the CECL-bookseries are one and the same. The aims and objectives of CECL can be found at http://www.cecl.nl. The series covers subjects of company law in a broad sense, including insolvency, co-determination and securities law. The editorial board sees to it that all parts of this series are well written, of sufficient scientific depth and at the same time useful for legal practitioners and academics alike. The board's credo is that international and comparative law should never degenerate into a theoretical *l'art pour l'art-exercise,* but must always be subservient to the requirement of practical applicability and a further development of the law.


The realization of this book and the CECL-conference of 23 September 2005 were co-sponsored by the Ius Commune Research Program (see: http://www. rechten. unimaas.nl/ozic/).

此为试读,需要完整PDF请访问: www.ertongbook.com

# Foreword

*Steef M. Bartman**

It gives me great pleasure to present this book as the first part in a new series of books published by Kluwer Law International, under the aegis of the Centre for European Company Law (CECL).[1]

This book contains the lectures, updated and written in a more elaborate form, that were delivered during a CECL-conference in Leiden, the Netherlands, on 23 September 2005, under the title *European Company Law in Accelerated Progress,* plus two additional articles. You will find descriptions of the conference and of the discussions introduced and inspired by questions posed by Professor Jaap Winter in *European Company Law*,[2] and in the Dutch journal *Ondernemingsrecht.*[3]

Although from time to time there may be hiccups in the process of reaching the desired – minimum – level of political consent among the European Union Member States in general, there can be hardly any doubt that the economical integration within the European Union will continue at an ever growing pace. Hence the need for further regulatory harmonization in the field of company and securities law. The Commission's activities have shown that, when necessary, the European Union is capable of taking adequate initiatives in this respect. Of particular importance have been the adoption of the *Financial Services Action Plan* in 1999 and of the *Company Law and Corporate Governance Action Plan* in 2003.

The results of these initiatives, e.g. the SE-regulation, may not always have been designed to win a beauty contest on legal drafting, the conclusion is justified that they, in combination with case law by the ECJ, have caused the national

---

* Professor of Company Law, Faculty of Law, Leiden University, and coordinating director of the Centre for European Company Law, the Netherlands.

1. For more detailed information on the aims and activities of this centre please visit http://www.cecl.nl.
2. As reported by Odeaya Uziahu-Santcroos, 'Report on the CECL Conference on European Company Law in Accelerated Progress', *European Company Law*, Vol. 3, No. 1 (2006), p. 18 *et seq*.
3. No. 16 (2005), p. 550.

barriers for free cross border traffic of legal entities within the European Union to crumble down over the last decade. This *combined* process of legislative and judicial action recently culminated in the *Sevic*-ruling of 13 December 2005, acknowledging a legal merger between a German and a Luxembourg company on the basis of freedom of establishment. In my eyes this is an important milestone in a development that not only triggers the national European Union legislatures to enter into a regulatory competition to a certain extent, but it also – and perhaps foremost – underlines the need for harmonization on crucial issues, such as shareholders' rights, cross border voting, corporate governance, disclosure and corporate restructuring, in order to make the European Union *as a whole* as attractive as possible for investors compared to other economical powers like the United States and China. The European Union simply cannot afford continuing large and substantial differences between the Member States on these issues, on pain of losing even more territory in this global competition. In my opinion this is the basic rationale for further European Union harmonization in the field of company and securities law.

However, completely opposite opinions are being expressed as well, e.g. by Professor Luca Enriques in his rather provocative contribution to the CECL-conference, published in this book. He takes the view that harmonization on company law has already gone too far and advises that, at least for the time being, the European Union should do better just by doing nothing. In contrast with Professor Enriques a very optimistic view is expressed by Professor Erik Werlauff, who stands up as a firm 'believer' in the Societas Europea (SE) and gives valuable and practical advises on the use of this corporate vehicle in the European banking sector in particular. Fortunately – for the conference – also the other contributors to the conference generally expressed optimism as to the European Union's capability to really improve its corporate regulatory infrastructure and thereby to attract more investors and business activities within its territory as a whole, irrespective of the position of a single Member State. I trust that you will appreciate all articles published in this book as valuable contributions to further the realization of this perspective.

# Table of Contents

此为试读,需要完整PDF请访问: www.ertongbook.com

# Chapter 1
# The EC Directive on Takeover Bids: Opting in as a Token of Good Corporate Governance

*Steef M. Bartman**

## I. INTRODUCTION

After a political and legal struggle that lasted almost twenty years, the European Parliament, in its session of 16 December 2003, finally approved a proposal for a directive on the public bid on listed shares, the Takeover Directive, at an earlier stage named the 13th Directive (the 'Directive').[1] Member States must have adapted their national legislations ultimately on 20 May 2006 (Article 21 Directive). For an overview of the history of the Directive with references to sources, I refer to the Report of the Winter Committee of 10 January 2002, to be referred to in this contribution as the 'Winter Takeover Report'.[2]

The fact that the eventual Directive deviates essentially from what it had in mind in its last proposal was hard to swallow for the European Commission, in particular for former Commissioner Frits Bolkestein. The option arrangement of Article 12 leaves Member States completely free to decide whether or not to subject listed companies in their jurisdiction to the two key provisions of the Directive.

The first key provision is the so-called 'Anti-Frustration Rule', also called the 'Neutrality Rule', laid down in Article 9. Since under this rule a company's management[3] is not so much required to observe a neutral attitude towards the bid,

---

* Professor of Company Law, Faculty of Law, Leiden University, and coordinating director of the Centre for European Company Law, Leiden, the Netherlands.

1. Directive 2004/25/EG. About the Directive see Vanessa Edwards, 'The Directive on Takeover Bids – Not worth the Paper It's Written On?', *European Company and Financial Law Review*, Vol. 1, No. 4 (December 2004), p. 416 *et seq.*
2. Report of the High Level Group of Company Law Experts on Issues Related to Takeover Bids, Brussels, 10 January 2002, p. 13 *et seq.*
3. In a two tier structure, this is composed of the board of directors and the supervisory board; see Article 9(6) of the Directive.

S.M. Bartman (ed.), *European Company Law in Accelerated Progress*, pp. 1-8.
© 2006 Kluwer Law International. Printed in the Netherlands.

but rather forbidden to frustrate the bid before the general meeting of shareholders has had the chance to express an opinion on it, I prefer the former name. Pursuant to Article 11(3), last sentence, the principle of one-share-one-vote applies at this general meeting, hereinafter referred to as the 'Reaction Meeting'.

The second key provision in the Directive is the so-called 'Breakthrough Rule', laid down in Article 11. This rule intends to achieve that all kinds of contractual instruments – both among shareholders and among shareholders and the company – and provisions in the target company's articles of association that could still frustrate a bid after the Reaction Meeting was held, are rendered inoperative. This applies in particular to share transfer restrictions, restrictions on voting rights, special rights of appointment and multiple voting rights. Once an offeror has acquired 75 per cent of all outstanding shares following a public bid it can call a general meeting of shareholders aimed at amending the articles of association and/or the appointment or dismissal of board members. Hereinafter I shall refer to this as the 'Realization Meeting'. In this meeting too share transfer restrictions and restrictions on voting rights are rendered inoperative in accordance with the Breakthrough Rule of Article 11(4). The same applies to special rights of shareholders concerning the appointment and removal of directors. Other special rights of shareholders, e.g. concerning the amendment of the articles of association, are outside the scope of this rule. However, if and as far as these provisions hinder the free transfer of voting rights attached to shares in the target company they are set aside by the Breakthrough Rule, both in the Reaction Meeting and in the Realization Meeting.

This system effectively undermines many so-called pre-bid defences.[4] The pain was precisely in the mandatory application of this Breakthrough Rule during the Realization Meeting, not only for Germany, but also for France, Sweden and Spain.[5] By rendering both the Anti-Frustration Rule and the Breakthrough Rule optional on the basis of a compromise text under the Italian presidency of the European Union, the European Union succeeded in making the Directive acceptable to all Member States.

However, at the same time this political result seems to undermine the very essence of the Takeover Directive. It is at the Member States' free discretion to decide whether or not they impose an open corporate regime on listed companies within their jurisdiction, i.e. receptive to – in the eyes of the board – hostile takeovers or not. Should we therefore now conclude that the Directive is, like the SE Regulation, the typical result of an agreement to disagree within Europe, and results in a hotchpotch of national legislations instead of the level playing field strived for?

In my opinion, there are various reasons that justify a more optimistic conclusion. The Directive can be regarded as the highest attainable middle step in a development of increasing convergence between the Member States, or at least between listed companies in Europe. The Directive is set up to make the necessary

4. *Cf.* the Winter Takeover Report, p. 26.
5. See on the background of this matter Klaus J. Hopt, 'Takeover Regulation in Europe – The Battle for the 13th Directive on Takeovers', *Australian Journal of Corporate Law*, Vol. 15, No. 1 (2002), 15.

contributions to this desirable convergence by way of 'bottom up harmonization.' It does so be clearing the way for market forces and – at the same time – by linking the protection status of a listed company to the requirements and principles of enforceable good corporate governance. I shall discuss this in more detail below.

## II. PRIMACY OF THE SHAREHOLDERS AS THE LEADING PRINCIPLE

The first reason for my predominantly positive attitude towards the Directive is the simple fact *that* it was accepted by the Member States, implying the acceptance of the general principles at the heart of the Directive. I do not only mean the principles formulated in Article 3, but also – and perhaps most importantly – the two leading principles described in the Winter Takeover Report, which the Directive demonstrates almost everywhere. The Winter Takeover Report can be regarded as the Explanatory Memorandum to the Directive, in supplement of the Recitals. These are the principles of (1) shareholder decision-making, and (2) proportionality between risk bearing and control.[6] The heart of the matter is that the eventual power of decision making on a takeover bid lies with the shareholders, and that each shareholder's voting power must be pro-rated to its actual risk. In summary I refer to this as the 'Primacy of the Shareholders Rule'. Political negotiations may have seriously influenced the Directive's content and character; its original underlying principles were left unafffected by the – as usual – rather short-sighted policy makers.

Although Article 1 (c) of the Directive reads that, influenced by the company interest-concept as applied in Germany and the Netherlands, 'the board of an offeree company is to act in the interests of the company as a whole', the Primacy of the Shareholders Rule is nevertheless dominant throughout the Directive.[7] This fact, in combination with the conscious and completely free choice of a Member State or an individual enterprise, pursuant to the system of Article 12, to apply the Anti-Frustration Rule and/or the Breakthrough Rule, in my view compels us to interpret any existing or newly designed protection construction as closely as possible in conformity with the Directive's rationale. In other words, courts should take the scope of application of the Directive as widely as possible when judging protection devices that may not be covered by the Directive to the letter.

To illustrate this I refer to the popular practice in the Netherlands of placing preferential shares in a foundation affiliated with the target company. If a call option was granted to the foundation before the takeover bid, or if the shares were placed on the condition precedent of a hostile bid, it can be argued that further cooperation of the management of the company is not required to realize the

6. Winter Takeover Report, p. 18 *et seq.*
7. This is beautifully illustrated by the sentence directly following the quoted passage from Article 3(1) under c: '(...) and must not deny the holders of securities the opportunity to decide on the merits of the bid'.

此为试读,需要完整PDF请访问: www.ertongbook.com