We all want to go to heaven but nobody wants to die

BY JAAP WINTER
PROFESSOR OF COMPANY LAW, UNIVERSITY OF AMSTERDAM, THE NETHERLANDS

1

This saying epitomises the 13th Directive's original objective, the process of its negotiations and the end result as agreed by Member States after a decade and a half of negotiations. The objective was to create rules for takeover bids on listed companies, offering a mechanism for consolidating and integrating Europe's industry in order for European business to make optimal use of the EU's single market. That is one of the cornerstones of the transformation of the EU into the most competitive market, which Member States in Lisbon said they wished to achieve by 2010. The proposals specifically provided that the board of a target company could not unilaterally frustrate a takeover bid that has been announced or is imminent, but needs specific shareholder approval for putting up defensive measures against a bid (Art. 9, the non-frustration rule). Fourteen out of fifteen Member States agreed to this proposal in 2001, but the proposal was rejected in the European Parliament through a curious and unique blocking vote (273 against 273). The key argument against the proposal was that it did not create a level playing field, as the proposal would only restrict post-bid defences, but would not affect pre-bid structures already in place in a company's constitution way before any bid is announced or becomes imminent. These pre-bid defences are part of the company law arrangements in almost all Member States. The High Level Group was called to provide a solution for this problem. It suggested a breakthrough rule as a mechanism that could effectively deal with pre-bid defensive structures after a substantially successful bid.

The Commission's proposal of October 2002, the following negotiations between Member States and the end result of the adopted Directive, showed what the whole debate was really about. A number of Member States went out of their way to ensure that their national industries would not become subject to a takeover regime that could actually result in a succesful takeover by others. The outcome is a takeover regime where the two basic provisions that can ensure that takeover bids can be made successfully, the non-frustration rule and the breakthrough rule, have become optional only: Member States do not have to impose these rules on their companies, but must offer them the ability to elect to be subject to these rules. This opt-out/opt-in system is combined with a reciprocity rule that ensures that even companies that have voluntarily chosen to be subject to rules that allow for a successful takeover bid, can put up defences against a bidder that is not itself subject to these rules. As a consequence national regimes can continue as they are.

So how should we judge the Directive? Assuming that most if not all Member States will not impose the takeover facilitating rules on their companies, the merit of the Directive largely depends on whether the Directive contains sufficient incentives for companies to voluntarily subject themselves to the takeover facilitating rules. If economic theory becomes practice, then investors should generally tend to prefer to invest in companies subject to these rules, as they expect higher returns from those companies and the potential for a premium in case of a takeover bid. This is reinforced by elements of the Directive such as the requirement to disclose and therefore justify defensive mechanisms (Art. 10) and the reciprocity rule, of which the inverse effect is that companies that want to be players on the takeover market rather than targets must first accept the takeover facilitating rules to apply to themselves. All of this will take place against the background of explicit takeover facilitating rules that will have to be included in national legislation as an optional regime in all Member States and a revision of the effects of the Directive after five years of implementation, in 2011. I do not expect these incentives to have similar effects everywhere. It will depend on factors such as national sentiments as well as the characteristics of the economic sectors in which companies operate whether these incentives will create a noticeable move to application of the takeover facilitating rules. An example where the incentives may already have some effect may be the Swedish telecom company Ericsson, which has recently announced it will reduce the voting rights of its multiple voting right class A shares from 1,000 votes per share to ten votes per share (as opposed to the class B shares with only one vote per share). This will reduce the voting block of its key shareholder Investor (controlled by the Wallenberg family) from 28 per cent to thirteen per cent. Most of the country reports in this first issue of European Company Law, as well as the analysis of Editor Steef Bartman, express similar expectations as to a development towards application of takeover facilitating rules in the EU.

Getting to heaven generally is a difficult and painful process. The 13th Directive process and outcome are only exemplary of a general struggle to redefine national interests in an EU single market perspective. For now the 13th Directive takes us one step closer, albeit a small and uncertain step.