

Asymmetry?

BY ADRIAAN F.M. DORRESTEIJN, PROFESSOR OF INTERNATIONAL COMPANY LAW, UTRECHT UNIVERSITY, THE NETHERLANDS

The corporate world has recently seen that rules may change while the games are still being played. Shareholders' rights have been strengthened and boards of listed companies have made efforts to improve investor relations only to see a 'new breed of institutional investors' emerge.¹ They challenge the basic assumption of company law that those providing the company's capital should have voting power proportional to their economic ownership. Financial innovation has undermined the traditional link between voting rights and economic ownership. Phenomena like 'empty voting' and 'hidden ownership' are used on a globalized financial market. This may lead to shareholders who are actually no more than 'vote holders'. The decoupling of voting rights and economic ownership changes the pattern and impact of shareholders' activism. 'Vote holders' may even have a negative economic interest in the company.²

The question raised is whether the new activist funds must be curbed and the recently reinforced shareholders' rights be reduced again.³ Whatever the answer may be, the operations of activist funds certainly have contributed to the reluctance of Member States to lift takeover barriers in the course of implementing the Takeover Directive. A Commission working document states that the number of Member States implementing the Directive in a 'seemingly protectionist way is unexpectedly large'.⁴ This trend is exemplified by the French implementation measures as can be read in this issue of *ECL*.

Furthermore, it will be interesting to observe the role of the judiciary in relation to takeover battles in an era of renewed shareholder activism. A striking example of court intervention is the case of ABN AMRO which is debated in this issue of *ECL*. The Amsterdam Enterprise Chamber based its ruling firmly on the statutory requirement that corporate bodies and their members comply with standards of reasonableness and fairness. According to Lambert in this issue of *ECL*, such a standard is similar to the requirement that directors of US corporations be careful, informed and loyal in decision making or bear the burden of proving the entire fairness of the transaction. To what extent this conclusion holds against the background of different

models of company law (shareholders versus stakeholders) remains to be seen.

Finally, recent developments have induced regulators to introduce stricter transparency rules and information requirements for investors. Much of company law and securities regulation is designed to diminish the information gap between boards and investors. Now the asymmetry seems to be reversed. Boards and other corporate bodies need the help of regulators to know more about the new breed of investors.

1 Eddy Wymeersch, Shareholders in Action: Towards a New Company Paradigm?, *ECL* 2007/2, p. 50 *et seq.*

2 Henry T.C. Hu and Bernard Black, The New Vote Buying: Empty Voting and Hidden (Morphable) Ownership, in: *Southern California Law Review*, Volume 79, May 2006, no. 4, p. 811 *et seq.*

3 Kid Schwarz and Bas Steins Bisschop, Piercing the Myth of Management Control. The Ius Commune of the Shareholders' and Stakeholders Models, *ECL* 2007/2, p. 58 *et seq.*

4 *Report on the implementation of the Directive on Takeover Bids*, Commission Staff Working Document, Brussels 21 February 2007, SEC(2007) 268, p. 10.