Improving the Position of Supervisory Directors

LOE SPRENGERS, PROFESSOR OF LABOUR LAW, UNIVERSITY OF LEIDEN, THE NETHERLANDS

In a recent court case in the Netherlands (PCM/Apax) the Enterprise Section of the Amsterdam Court of Appeals appointed experts to investigate the policy and the course of affairs of the publishing house PCM, at the request of two trade unions. In their report of December 2008 the experts state that in the event of a takeover by a private equity fund it is up to the supervisory board in particular to look after the interests of the target company. They conclude that the overriding goal of a private equity fund is to participate with as little equity as possible. As was the case with PCM, the fund often tries to maximize the debts of the target company in order to finance the takeover. Given the fact that the members of the management board are often offered the chance to participate as shareholders in the target company after the deal, creating a conflict of interests at the same time, the supervisory board remains the sole reliable corporate body to safeguard the interests of the target company and all of its stakeholders.

In these times of financial crisis, geared by short-sighted investors and incompetent managers, it should not come as a surprise that the main focus in corporate discussion has turned to the function of internal control and oversight. The independent role of corporate supervisors shows large diversity in the various Member States of the European Union. These differences can be explained mainly by the prevailing choice for either a shareholder-oriented or a stakeholder-oriented model of corporate law. In the first model we often – but not necessarily – find a one-tier board and in the second a two-tier board. Whatever the corporate structure, in my view it is essential that the supervisory directors should have enough countervailing power to prevent the execution of corporate decisions detrimental to the company and/or its main stakeholders. At the occasion of a recent international conference on the Governance of the Modern Firm, organized by the University of Utrecht, different views in connection with the stakeholder-oriented or shareholder-oriented models were advocated. At the same time most attendants agreed that the current global economic crisis required an improvement of the balance of powers within the corporate structure. Of course the key question is how can we realize that? Should we choose a soft law approach and leave it to companies themselves, thereby stimulating corporate social responsibility at corporate level? Or is it unrealistic to expect that companies and corporate executives take into account anything other than their main goal, i.e., to make money for investors, as Robert Reich (2007, Supercapitalism) states. He concludes that it is now up to the legislature to replace 'supercapitalism' by 'democratic capitalism'.

Current developments show that the power of the supervisory directors should be sufficient enough to stand up against executive directors and shareholders where necessary. My feeling is that such a position is better safeguarded in a two-tier board structure. To improve checks and balances within the company and to avoid the negative impact of the old-boys-network, the appointment – and dismissal – of supervisory board members, or non executives on a one-tier board, should not be the exclusive power of shareholders. In order to create a representative composition of the supervisory board the Dutch legislature, in 2004, granted the works council of a large company the right to recommend at least one-third of the members of the supervisory board. A recommendation that can only be put aside under specific circumstances. However, at the same time, in an attempt to maintain consensus at the political front, shareholders were given the power to dismiss the whole supervisory board, including the works council's 'representatives'. Another important problem is the limited ambit of these so-called 'Structure Rules' of Dutch corporate law. Most multinational companies with their corporate seat in the Netherlands are exempt from these Structure Rules, because the Dutch Government did not want to scare off foreign investors.

Recent developments, not limited to financial companies, clearly show that the old system of checks and balances within the company structure has failed. It is a state responsibility to create a new balance as part of an overall strategy to restore trust in corporate life. However, the Dutch 'experiment' described above clearly demonstrates that this requires action on supranational – i.e., European – level. Let us hope we are able to at last overcome our traditional differences in this field.

Sprengers, Loe. 'Editorial'. *European Company Law* 6, no. 2 (2009): 54.
© 2009 Kluwer Law International BV, The Netherlands