

# The Protection of Minority Shareholders: One More Principle Denied?

JAN MAARTEN SLAGTER, MANAGING DIRECTOR OF THE DUTCH INVESTORS' ASSOCIATION VEB



## 1. INTRODUCTION

By way of reference for a preliminary ruling, the Luxembourg Court of Cassation requested the European Court to give its opinion on the question if some references to the equality of shareholders and the protection of minority shareholders<sup>1</sup> manifest a general principle of community

law on which basis a dominant shareholder is obliged to offer the minority shareholders to buy their shares under the same conditions as it acquired its control of the company.

By judgment of 15 October 2009,<sup>2</sup> the Court of Justice of the European Union ('European Court') denied a general principle of Community law of equality of shareholders under which minority shareholders are protected by an obligation on the dominant shareholder, when acquiring or exercising control of a company, to offer to buy the minority shareholders' shares under the same conditions as those agreed when a shareholding in that company conferring or strengthening the control of the dominant shareholder was acquired.

## 2. FACTS

Audiolux SA (Luxembourg) and the other applicants (hereinafter collectively 'Audiolux') in the dispute in the main proceedings before the Luxembourg Courts are minority shareholders in RTL Group SA (Luxembourg), the shares of which were listed on regulated stock exchanges in Luxembourg, Brussels, and London. In

2001, shareholder Bertelsmann AG (Germany) acquired dominant control over RTL Group with 89% of the shares. RTL Group thereafter 'delisted' its securities from the London Stock Exchange with effect from 31 December 2002.

Before the Luxembourg District Court, Audiolux challenged the validity of the transactions based upon failure of Bertelsmann to comply with the obligation to offer the claimants the opportunity to exchange their shares in RTL Group for shares in Bertelsmann under the same conditions as those agreed with other RTL Group shareholders. By judgment of 8 July 2003, the Luxembourg District Court dismissed the claims brought by Audiolux on the ground that they were not based on any legal rule or principle recognized by Luxembourg law. Recommendation 77/534<sup>3</sup> has not been implemented in Luxembourg law.

Audiolux also filed complaints on the delisting of RTL Group from the London Stock Exchange at the Luxembourg District Court. The Court, however, dismissed the claims by its judgment of 30 March 2004, in particular the obligation to increase the availability of RTL's securities to the public and not to delist those securities.

The Luxembourg Court of Appeal joined both cases and denied (the basis for) a general principle that minority shareholders of a listed Luxembourg company may claim the right to equal treatment by the majority shareholders when a major shareholding in that company is transferred.

In its appeal at the Luxembourg Court of Cassation, Audiolux claims a breach of the general principle of equality of shareholders and argues that it should be treated in the same way as shareholder Groupe Bruxelles Lambert SA (Belgium) was treated when it transferred its shareholding in RTL Group to Bertelsmann in return for a control premium.

<sup>1</sup> More in specific in Arts 20 and 42 of the Second Company Directive 77/91, in the third general principle and Supplementary Principle 17 of Recommendation 77/543, in Schedule C, point 2(A) annexed to Directive 79/279 carried over in Directive 2001/34, and in Art. 3(1)(a) of Directive 2004/25 in the light of Recital 8 in the preamble thereto.

<sup>2</sup> Court of Justice of the European Union, 15 Oct. 2009, EC C-101/08. The judgment is published in JOR 2010/55, annotated by G.-J. Vossestein.

<sup>3</sup> European Commission Recommendation 77/534 of 25 Jul. 1977 concerning a European Code of Conduct relating to Transactions in Transferable Securities, which refers in its third principle to the equality of treatment for shareholders. Supplementary Principle 17 mentions equality of treatment for other shareholders where a controlling holding is transferred.

### 3. EUROPEAN COURT

Despite the obligation of the Member States according to Article 42 of Directive 77/91, to ensure equal treatment of all shareholders who are in the same position, the European Court denied such general principle for minority shareholders who find themselves trapped in a process where a large shareholder acquires or strengthens a controlling stake of a company. Although Supplementary Principle 17 to the aforementioned European Code of Conduct states that 'it is desirable that all the shareholders of the company whose control has changed hands should be offered the opportunity of disposing of their securities on identical conditions, unless they have the benefit of alternative safeguards which can be regarded as equivalent',<sup>4</sup> the European Court stated that secondary Community legislation, which lays down certain provisions relating the protection of minority shareholders, is not sufficient in itself to establish the existence of such general principle. Not even from the Directive 2004/25/EC on takeover bids,<sup>5</sup> who introduces in Article 5a a requirement that a shareholder who has acquired control of a (listed) company must launch a mandatory bid, the European Court deducts such general principle. The European Court closes its judgment with the remark that the principle proposed by Audiolux is characterized by a degree of detail requiring legislation to be drafted and enacted at Community level by a measure of secondary Community law.

From the point of view of the minority shareholder, whose interests the VEB represents, this clearly is a disappointing result. However, in our view this judgment does not deny the existence of a general principle of an equal treatment of shareholders neither does it undermine such principle. The mere fact that in this specific case minority shareholders cannot claim an equal treatment and a connecting right on a sell-out on the same conditions from a controlling shareholder only shows that there is an urgent need for a swift implementation of Recommendation 77/534/EEC.<sup>6</sup>

4 Further reference is made to Art. 4(2) of Council Directive 79/279/EEC of 5 Mar. 1979 coordinating the conditions for the admission of securities to official stock exchange listing *jo.* Schedule C, para. 2(A) to that Directive *jo.* Art. 65 of Directive 2001/34 (presently deleted) *jo.* Art. 17 of Directive 2004/109, para. 1.

5 Directive 2004/25/EC of the European Parliament and of the Council of 21 Apr. 2004 on takeover bids (OJ 2004 L 142).

6 Recommendation 77/534/EEC of 25 Jul. 1977 concerning a European code of conduct relating to transactions in transferable securities. Principle 3 states: 'Equality of treatment should be guaranteed to all holders of securities of the same type issued by the company; in particular any act resulting directly or indirectly in the transfer of a holding conferring *de jure* or *de facto* control of a company whose securities are dealt in on the market should have regard to the right of all shareholders to be treated in the same fashion.'