

4. Controlling the market for corporate control; conflicting public and private interests in listed companies

Maarten Verbrugh, Professor of European and comparative corporate law

Kid Schwarz, Professor of Company law

Marnix van Ginneken, Professor of International corporate law, in particular international corporate governance

Introduction

Thinking about the Research Theme, the protection of public interests by private actors, translated in terms of the field of company law in a broad sense, brings to mind a range of research themes that share a common base, namely the influence of business activities on public interests and, *vice versa*, the influence of the design of public interests on developments that are desirable under private law.

With regard to whether or not enterprise in the private sector serves public interests, the overall theme can be found in the classical approach to corporate social responsibility (CSR). The CSR policy of companies has high social relevance, as the circle of the partial interests involved at those companies is large. This could range from the interests of shareholders via those of employees and (other) parties contracted to the enterprise to persons involuntarily involved in the effects of the business. The last category of stakeholders is also large and very diverse, ranging from the interests of residents of the earthquake zone in Groningen, to those of farmers who are not only held responsible for environmental pollution but who also, like construction companies, face harm to their interests through environmental problems, and to the interests of wineries in France, polar bears and the Inuit. In the field of tension between public and private interests, there are important themes that lend themselves to research involving the study of: i) the role that companies voluntarily accept in sustainable corporate policy, ii) the role that financiers play, such as institutional shareholders, and iii) the role of national and European government in enforcing CSR, less with a view to the activities of listed companies but mainly in relation to financing and production among small and medium-sized enterprises (SMEs). This study can take place both through classical legal research and through empirical research.

By setting requirements for monitoring of financing structures and production chains in relation to, for example, central procurement policy, both central government and local authorities contribute towards institutionalisation of a control mechanism that, among listed companies and other prominent producers, is formed by the 'Courts of Public Opinion', which are encouraged in their opinion-forming or are even influenced by the provision of information by NGOs and other activists that raise potential abuses by these type of companies. When SMEs operate outside the line of fire of these activists, it appears that the government has an important task in that regard. An interesting point in this connection is the fact that the stakeholder approach used in continental Europe for the definition of what the interests of the company entail is now increasingly also being embraced in Anglo-American

thinking, leading to a clearly visible convergence between the stakeholder model and the shareholder model.

Stimulating the involvement of the CSR aspect is not only related to the monitoring of and empirical research into the activities developed in the business and the board room dynamics, but also affects areas such as the broad field of socially responsible financing. With regard to the organisation of financing in private companies, in which reference is made to sustainable financing, this not only concerns the question of the financing of activities that are regarded as the opposite of socially responsible (such as the tobacco industry or the arms industry), but also the need to realise engaged shareholdership, possibly through formal or informal regulation, of institutional investors, for example, which are the most important shareholders in listed companies world-wide. In relation to the control of equity partners in listed companies, a discussion has been running for some time on the design of engaged shareholdership which, with regard to institutional investors, implies that control as shareholders should also be actually used, on the basis of carefully formulated investment policies. According to economists, it has been established that when the meeting of shareholders actually exercises its shareholder power in a responsible manner, the performance of the company improves in terms of scale and quality. Engaged shareholdership is also an aspect that plays a role in stabilising the business climate in a legal order, partly to avoid takeover bids from financiers that do not have the support of the company management because this is contrary to the interests of the company, as formulated in the policy, which therefore involves all interests of all stakeholders. From that point of view, protective structures can be regarded as being aimed at protection of corporate interests and thus also of the aforementioned stakeholders, even though they stand at a considerable distance from the (undertaking of the) company. Think of the view taken by Paul Polman of his tasks as CEO of Unilever when a bid was announced for the company by Kraft Heinz, which was primarily focused on financial results. Engaged shareholdership is therefore also interpreted as actual engagement with the corporate policy, which in fact entails a voting obligation for institutional investors, which in theory will lead to improvement of the corporate management. The implementation of the amended Shareholders Directive, which relates to these themes, also comes to mind in that regard.

Another important point for attention for research lies in the relationship between on the one hand the corporate interest, which, after all, in essence corresponds with the government aim to stimulate prosperity and well-being, and on the other hand the internal relationships and positions of authority within companies. After all, a buoyant economy is of major importance from the governance perspective of government authorities, which at the same time are required to keep their distance from influencing entrepreneurs and corporate structures. In this field of tension, there is much to savour. For example, the question that is receiving growing attention at present is whether the government should intervene in, for example, the market for corporate control.

Economists believe in an important role of that market, because the possibility of realising a hostile takeover of a target company can have a beneficial effect on optimising the performance of the management of larger companies. At the same time, a free takeover market makes it possible for bidders to acquire vital enterprises. This calls to mind the shock caused by the takeover of the German Kuga (robotics) company by the Chinese Midea group, when it suddenly became evident that leading technology is simply for sale and leaks away into the sphere of the acquiring company. In a free takeover market, the position of the shareholders will be a determining factor in their response to the bid, with the fact that the financial interests of those shareholders will often be decisive playing an important role here. This is why the view is sometimes defended that it would be better if the choice of whether to accept a takeover bid does not rest with the shareholders but with independent third

parties, such as directors of protective foundations, which could block a takeover bid by making use of the possibilities of placing (preference) shares with the foundation. Another question in that regard is how government regulation should be designed in relation to corporate interests. At present, a debate is in progress on the question of whether the government should be able to intervene in a takeover process in which vital knowledge or activities will 'leak away' to foreign parties. It is interesting to see how in this way, new life has been breathed into the debate on 'protective measures', which has continued since as long ago as the 1920s. We should be aware that protective measures arose because importance was attached to defending against involvement of foreign parties in Dutch companies. The question of whether national governments or, for instance, the European legislators should intervene as part of the creation of a global level playing field is also relevant here. Recently, there have been a growing number of calls for government intervention against the takeover possibilities of foreign businesses in the Netherlands or Europe, while similar takeover processes are not possible (factually or in practice) in those other legal systems. These calls have been sharpened by the fact that foreign parties with takeover plans are also funded by governments, or at least by local sovereign wealth funds. A crucial aspect in this regard is also the potentially necessary government involvement in the realisation of company acquisitions by foreign parties when the formation of the party that is now threatened was largely financed with government resources, such as subsidies or other support measures using public funds, including, for example, start-ups born through publicly funded university research. In that regard, the question arises of discounting of those investments in the takeover price of the shares, in which reference is now being made to 'true pricing'.

Many of these aspects may potentially be involved in the following PhD research project, with which the theme study of the sector plan in Company Law could begin.

PhD project

The takeover market is perceived as a control and steering mechanism that is essential for the protection of risk-bearing capital providers in the company. This study considers factors that influence the effectiveness of this mechanism. In the Netherlands there are at least three, which lead to interesting research questions concerning the role of public interests in private companies.

Firstly, the 'own' corporate interest plays a role in the Netherlands as a legal guide for the functioning of management and supervision. According to established Supreme Court jurisprudence, the strategy pursued in the realisation of that interest is determined by the management. This gives the management substantial power as a gatekeeper, a position that is strengthened still further by recent actions of the legislators and regulators, for example in the 'Statutory Cooling-Off Time' Bill now before parliament and in the definition of corporate interests in the Corporate Governance Code 2016. A question that plays a role with this second factor is whether government intervention in shareholder activism is desirable or not. It is quite possible to defend the view that the introduction of a statutory cooling-off period could severely frustrate the dynamism in the Dutch market, where institutional parties predominate on the side of the investors, but at the same time have no activism tendencies. This absence of activism among institutional parties (which is assumed, if used in moderation, to have a stimulating effect in terms of the quality of management and, therefore, also on the profits of the company) can be explained in different ways, such as a tendency to not want to invest in greater shareholder engagement at global companies alone, because the other institutionals would then also benefit from the price effects (free-riding). The problem here is the fact that the performance of institutionals is assessed in relative terms, which does not encourage the managers of individual institutional investors to invest in greater shareholder

engagement. After all, with a relative performance assessment, such investment by definition leads to a negative score for the investing fund, which helps to improve the performance of non-investing funds. In that regard, activist shareholders such as hedge funds are seen as a catalyst for positive stock market developments, since these investors, after careful targeting, select a company at which they will direct their activist arrows in order to realise strong results in the short term for investments in that fund, which in practice usually involve less than 10 to 15% of the shares. In practice, such activists operate with the tacit support of a number of institutionals that, once things have been shaken up, can simply support the proposed policy of the activist as a group and so generate price gains. An interesting question here is whether proposed legislative plans in that regard would not be deadly to these market developments, in particular the Bill on a statutory cooling-off period, which would, after all, make it impossible for activists to play their role, since shareholders do not have the agenda rights during that cooling-off period which, in practice, are used to create the shake-up.

Finally, a clear tendency can be seen for increasing government control of merger processes in which foreign parties are involved. Motives relating to national security in a broad sense play a role here, with reference being made to protection of 'vital businesses', and the desire to create a global level playing field must also be considered. Lastly, the problem of sovereign wealth funds is an issue in this regard, where there is state involvement in takeover attempts by foreign parties.

This project focuses on the following potential sub-themes and research questions:

- Sub-theme 1. The role of corporate interests in hostile takeover bids
To what extent does the authority to determine the strategy contribute to the power of the management to block an unwanted takeover and what is offered in return?
- Sub-theme 2. Regulation of shareholder activism
How should government involvement in the market for corporate control be optimised, taking account of the stimulation of that engagement in relation to the stability of businesses, including in view of takeover threats, while at the same time avoiding excessive restriction of shareholder activism.
- Sub-theme 3. State influence on the acquisitions market
What are the vital interests that the government must and may serve and what are the possibilities for intervention in unwanted takeovers?

These themes concern the tensions that the seepage of public interests into the private corporate environment entail. The inclusive approach to such themes in a single study is highly innovative and affords ample opportunities to combine empirical research methods with classical legal research.

Link to existing expertise

Kid Schwarz (professor in Company Law) has published research that is relevant to this project, in which lines of research in this field were recently combined in his Rotterdam inaugural speech entitled 'The impact of the corporate interest' (2018).

Maarten Verbrugh (professor in European and comparative company law) has published on the stakeholder model and restructuring, for example in his *dissertation Herstructurering bij kapitaalvennootschappen en de positie van schuldeisers* ('Restructuring in stock companies and the position of creditors'), in the Dutch journal 'Ondernemingsrecht' ('Company law') and in a contribution to the Springer book series 'Studies in European Economic Law and Regulation'.

Marnix van Ginneken (professor in International company law, in particular international corporate governance) has published research relevant to this project, for example in his dissertation *Vijandige overnames: de rol van de vennootschapsleiding in Nederland en de Verenigde Staten* ('Hostile takeovers: the role of company management in the Netherlands and the United States'). He is also a member of the Board of Directors, Executive Vice President and Chief Legal Officer of Koninklijke Philips N.V.