

Companies' law
ECJ, 15 October 2009, Audiolux
Rights of Minority Shareholders – Equality of Treatment

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INTRODUCTION

The ECJ Audiolux decision was long-awaited in the field of European corporate law, and more particularly in Luxembourg. For a number of years, the RTL- Audiolux litigation had been one of the most debated pending Luxembourg case-law and it was therefore anxiously anticipated how the ECJ would respond the questions submitted to it by the Luxembourg Court of cassation by preliminary ruling. The ECJ Audiolux decision is important and is particularly interesting with regard to minority shareholders' rights.

1. LEGAL SOURCES

1.1. COMMUNITY LAW

- Second Council Directive 77/91/EEC of 16 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (“**2nd Companies Directive**”)
- Commission Recommendation 77/534/EEC of 25 July 1977 concerning a European code of conduct relating to transactions in transferable securities (“**Recommendation 77/534**”)
- European Code of Conduct (the “**Code of Conduct**”), annexed to Recommendation 77/534
- Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC (the “**Transparency Directive**”)
- Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids (the “**Take over bids Directive**”)

1.2. NATIONAL LAW

- Law of 10 August 1915 on commercial companies, as amended (“**LSC**”)

1.3. CASE- LAW

- ECJ, 15 October 2009, case C–101/08, Audiolux and others v. GBL and others, Bertelsmann AG and others (the “**ECJ Audiolux Judgment**”)
 - Tribunal d’arrondissement (District Court) de et à Luxembourg, 8 July 2003
 - Tribunal d’arrondissement (District Court) de et à Luxembourg, 30 March 2004
- Court of appeal of Luxembourg, 12 July 2006 (together with the 2 above mentioned decisions, the “**Luxembourg Litigation**” and “**Luxembourg courts’ Position**”)
- Court of cassation Luxembourg, 21 February 2008 (reference for a preliminary ruling to the ECJ)

2. LEGAL QUESTION: IS THERE 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 THE CONTROL OF THE DOMINANT SHAREHOLDER WAS ACQUIRED?

2.1. THE UNDERLYING LUXEMBOURG LITIGATION: THE RTL TAKE OVER LITIGATION

- Audiolux SA and the other applicants (collectively “**Audiolux**”) in the Luxembourg Litigation were minority shareholders in the Luxembourg company RTL Group SA (“**RTL**”), the shares of which were listed on regulated stock exchanges in Luxembourg, Brussels and London. Pursuant to those transfers, Bertelsmann became the RTL majority shareholder, and have effective control.
- Pursuant to several transactions which took place in 2001, other RTL's minority shareholders, namely GBL and the UK group Pearson Television transferred their respective 30 % and 22 % RTL participations to Bertelsmann, in exchange for shares in the Bertelsmann group.
- Before the Luxembourg courts and based on an alleged violation of Luxembourg law, Audiolux challenged the validity of the transfer of the RTL holding and claimed compensation for loss caused by failure to comply with the obligation to offer the claimants the opportunity to exchange their shares in RTL for shares in Bertelsmann under the same conditions as those agreed with GBL.

2.2. THE LUXEMBOURG COURTS' POSITION

- According to the Luxembourg courts' Position, Luxembourg companies law, as it stands, has no provision, where one major shareholder transfers its shares to another, for any right of minority shareholders to dispose of their shares under the same conditions. Likewise, Luxembourg Stock Exchange rules cannot serve as a legal basis for the claims at issue. The Luxembourg courts' Position states, in particular, that no provision of Luxembourg law has been enacted to implement into Luxembourg law Recommendation 77/534 and that therefore, there was no general principle of equality of shareholders in the law as it stood, nor could such a principle serve as a legal basis for the appellants' claims.
- Upon cassation's summons, the Court of cassation of Luxembourg decided to stay the proceedings and referred the following questions to the ECJ for a preliminary ruling:
 - 1) Are there references in Community law to the equality of shareholders and, more specifically, to the protection of minority shareholders, which would evidence a general principle of Community law?

- 2) If so, is that general principle of Community law to be applied only to the relations between a company and its shareholders or, to the contrary, does it also apply to the relations between majority shareholders exercising or acquiring control of a company and the minority shareholders of that company?
- 3) If questions (1) and (2) are affirmatively answered, was that general principle of Community law be regarded as already applicable in the litigation at hand, which occurred in 2001?

2.3. THE ECJ AUDIOLUX JUDGMENT

2.3.1. THE ECJ ANALYSIS

- The ECJ conducted its legal analysis and interpretation pursuant to a detailed examination of the provisions of the secondary Community legislation which was invoked by the Luxembourg Court of cassation:
 - i. Articles 20 and 42 of the 2nd Companies Directive
 - ii. General principle 3 and Supplementary principle 17 of the Code of Conduct
 - iii. Transparency Directive
 - iv. Take over bids Directive, read in the light of Recital 8 in the preamble thereto
- As a general principle of interpretation, the ECJ emphasizes that the mere fact that secondary Community legislation lays down certain provisions relating to the protection of minority shareholders is not sufficient in itself to establish the existence of a general principle of Community law, in particular if the scope of those provisions is limited to rights which are well defined and certain, as well as being vested with binding effect.
- Based on that general guideline for interpretation:
 - i. Code of conduct: does not expressly mention the existence of a general principle of Community law relating to the protection of minority shareholders. It sets out that it is merely 'desirable' to offer to all shareholders the opportunity to dispose of their securities, but only in so far as the minority shareholders do not have the benefit of equivalent safeguards;
 - ii. the 2nd Companies Directive and the Transparency Directive are limited to well-defined situations (increase or reduction of share capital), which are not covered by the specific case at hand and any references therein to the protection of minority shareholders are not conclusive in that respect of the erection of a general principle applicable to all situations. In that respect, the ECJ case-law has already ruled out that the restriction of the right of pre-emption was not contrary to such legislation (Case C-338/06 *Commission v Spain* [2008]);
 - iii. Transparency Directive, while referring to the equal treatment for all shareholders who are in the same position, only addresses the obligation to provide information to the holders of securities;
 - iv. Take Over Bids Directive: that directive effectively introduces a requirement that a shareholder who has acquired control of a company must launch a mandatory bid and is subject to the right

of sell-out. However, (i) that provision does not state, expressly or implicitly, that such specific mechanism derives from a general principle of Community law; (ii) the mandatory bid and right of sell-out apply only to companies listed on the stock exchange; and (iii) the right of sell-out applies only to specific situations in which a shareholder acquires, in a takeover, more than 90% of the capital carrying voting rights.

- It flows from that detailed examination of the alleged secondary Community legislation that those provisions are essentially limited to regulating very specific company law situations by imposing on companies certain obligations for the protection of all shareholders. They do not therefore possess the general, comprehensive character which is otherwise naturally inherent in general principles of law. The provisions of secondary Community law to which the Luxembourg Court of cassation refers do not provide conclusive evidence of the existence of a general principle of equal treatment of minority shareholders.
- In addition to the textual analysis detailed above, the ECJ conducted an approach based on the effectiveness/practical implementation of the general principle of equal treatment:
 - i. According to the ECJ settled case-law, the general principle of equal treatment requires that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified (e.g. Case C-127/07 *Arcelor Atlantique and Lorraine and Others* [2008])
 - ii. Based on the above, the question is whether the general principle of equal treatment can in itself either give rise to a particular obligation on the part of the dominant shareholder in favor of the other shareholders or determine the specific situation to which such an obligation relates
 - iii. Such a decision would presuppose first the weighing of the interests of the minority shareholders and those of the dominant shareholder
 - iv. In case it is assumed that minority shareholders require special protection, various means of ensuring such protection can actually be envisaged and a choice between them is required. However, the general principle of equality as set forth in the secondary Community law cannot and do not determine the choice between various conceivable means of protection for minority shareholders
 - v. Such a choice (if any), would presuppose legislative choices, based on a weighing of the different interests at issue and the fixing in advance of precise and detailed rules. Such political choices cannot be inferred from the mere general principle of equal treatment. In that respect, The general principles of Community law have constitutional status while the generalization of the sell-out right would be characterized by a degree of detail requiring legislation to be enacted at Community level by a measure of secondary Community law.

2.3.2. THE ECJ RULING

- Questions 1° and 2° combined: (1°) Are the references in Community law to the equality of shareholders and, more specifically, to the protection of minority shareholders, which would evidence a general principle of Community law? (2°) If so, is that general principle of Community law to be applied only to the relations between a company and its shareholders or, to the contrary, does it also apply to the

relations between majority shareholders exercising or acquiring control of a company and the minority shareholders of that company?

ECJ Ruling:

Community law does not include any general principle of law 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 their shares under the same conditions as those agreed when a shareholding conferring or strengthening the control of the dominant shareholder was acquired.

- Question 3°: If questions (1) and (2) are affirmatively answered, was that general principle of Community law be regarded as already applicable in the litigation at hand, which occurred in 2001?

ECJ Ruling:

Questions 2° and 3° having been answered negatively, there is no need to reply to the third question.

CONCLUSION

Following the legal analysis which had been primarily decided by the Luxembourg courts pursuant to Luxembourg law, the ECJ Audiolux decision is a useful guiding light on some of the most intricate corporate legal issues.

In addition, the ECJ interpretation can be regarded as consistent with the general principle of contractual freedom in Luxembourg corporate law.