Session 3 – Keynote speech

Antonio Borges
Chairman, European Corporate Governance Institute;
Vice-Chairman, Goldman Sachs International
We begin with a keynote speech from Eddy Wymeersch, and it is my pleasure and honour to introduce him. He is the top European financial regulator, as the chairman of CESR, which stands, for the Committee of European Securities Regulators. This is the top level regulation of financial markets in Europe.

He came to this position after a very long and distinguished career in Belgium and throughout the world. He started as a lawyer - he studied law at Ghent University and then at Harvard Law School. He was an academic, as a professor at Ghent University School, and then he became involved in financial regulation at many different levels. He was for many years the chairman of the Belgian Commission of Banking Finance and Insurance. He's been a regent of the National Bank of Belgium. He's in the Council of State, a legislative branch of the Council of State in Belgium. He's also been an advisor to the Belgian government, to the European Commission, to the World Bank, to the IFC, to other stock exchanges throughout the world.

But, perhaps more important, I think he's a terrific regulator because, unlike others that we know throughout Europe, he's one of those who believes that his authority should be backed by a great deal of knowledge and information. He is never shy of asking for advice and interacting with those he intends to regulate by getting first as much information from them as possible and together discovering the ideal solutions. I think this is a great quality. Many other regulators prefer an arm's length relationship and one in which they feel compromised if they interact too much with those they regulate; Eddy, on the other hand, is of this new breed of people who believe that their authority will only be enhanced if they are as competent or even more competent than those they regulate.

So, I think we can expect great thoughts from him, and it is with enormous pride and honour that we will listen to you, Eddy.

Eddy Wymeersch
Chairman, Committee of European Securities Regulators (CESR)
After all this praise, I think the only thing I can do is disappoint you. And I will try not to do it, but it's very difficult after the very high-standing discussions that took place this morning.

I am going to talk to you about the status – at least what I think is the status - of the debate about corporate governance in Europe. I would like to deal with two main subjects: on the one hand, the boards, and on the other hand, the shareholders. Indeed, these are the two main components of governance in private firms.

On the boards, I will very briefly dwell on questions of laws and codes, to deal more specifically with the issue of the shareholders, as I think that is the topic that is going to keep us busy for the next couple of years.

On law and codes, let me first explain to you where we stand in Europe. You know that all European jurisdictions have a mix of laws and codes, voluntary codes, guidelines, recommendations, and so on. By the way, I'm not advertising ECGI, but if you want to consult a code, the best place I can advise you is the website of ECGI. They are all there, and it's incredible what a nice collection that is, and how useful it is.

What we find, is that these codes as they have been developed, perfected, and so on, are now increasingly being judificated. That means that they are increasingly incorporated in laws. You see it in the UK; you also notice it in France, and in other jurisdictions. In France, in fact most of the corporate governance rules are in the law itself, and less and less in the codes. More generally about the codes, the question may be raised- and that's a point for discussion – whether the time is right to start for thinking about a European initiative. I know that this approach has been refused so far, but one may wonder whether we would be able to formulate something like very high principles of corporate governance such as "boards should have independent directors", "you should have an audit committee", an effort that, among others, could also be used for reviewing the existing codes.

I know that I'm making a large step here and that many people will certainly consider it premature, and even a little bit dangerous. On the European side, Pierre Delsaux is going to talk about that more in detail. Let me just briefly review what has been going on in corporate governance land. There are numerous developments, but they are not always named "corporate governance".

Firstly, one has the takeover directive, which contains a very important governance tool: that's the mandatory bid rule - less known in this country. According to this rule if someone acquires 30% - more or less depending on the jurisdiction- of a listed company, he has to make a bid for all the remaining shares. This is a very powerful tool for the protection of minority shareholders, and we can see that it has shaped certain features of the markets in Europe. We can certainly discuss about this rule's effective influence but nevertheless one should point out that it is a real corporate governance instrument. I won't say very much about the impact of the directive on auditors. Of course, there you find the principle of their independence and the rule mandating to set up an audit committee or an equivalent body.

Another interesting point which is relatively new, is the provision of the fourth directive - article 46(a) for the specialists among you – whereby the national laws oblige the listed companies to designate a corporate governance code, whether of their free choice, or designated by a national provision. This is an interesting mix between statutory law and self-regulation. The law does not say that you have to apply these codes. No, the companies have to designate a code and publish a corporate governance statement, in which they explain whether and how they apply the code. If they do not apply, they have to explain why they do not. This model originated from the Netherlands and from Germany, and it will now be applicable throughout Europe. Here again, this is an original mix between public and private regulation.

Also a word about the financial directives. Directives on banking and insurance contain very specific rules on corporate governance. This mainly concerns "internal" governance i.e. the way the banks have to organise themselves, individually or as a group in terms of composition of the board and conflicts of interest, independence of directors of parent and subsidiaries, in terms of compliance, internal audits, audit committees, and so on. This more sophisticated development is taking place in the field of prudential especially banking regulation. Sometimes, there seems to be some contradiction between banking law and corporate law, e.g. on the use of own funds at the subsidiary level for meeting the group own fund requirement. I think that the draughtsmen of the banking law did not know exactly what company law was, and therefore we have this little problem of contradiction.

In addition there are also some – non-binding - recommendations on remuneration, independence and so on. Perhaps just to mention one body, which is increasingly important, that's the European Corporate Governance Forum. Antonio (Borges – ECGI's Chairman), Jaap Winter and myself, are a member of that forum. The intention of the

Forum is to develop high-level principles of corporate governance. And we have just published, in September, a statement on proportionality of voting rights, to be translated as "one share, one vote" to which I'll come back immediately.

About the monitoring of the codes, one question would be, do the securities regulators monitor the codes? And the answer is generally, no. There are several reasons for this attitude. Some are afraid of being involved in monitoring self-regulatory instruments, for which they have no responsibility from the outset. There are at least two exceptions, Spain and Portugal, where the securities supervisors were actively involved in drawing up the codes, and only undertake action to ensure the implementation of the codes. But I understand from my colleagues in these states that this kind of reviewing is quite formal and does not go into the depths of the corporate governance practices. Codes are generally well implemented, at least from the statistics I see. Most of these statistics measure the number of companies that have published something about their implementation of a particular provision of the code: so many companies have audit committees; so many companies have split the function of CEO and chairman. In general the findings are quite positive, but are they not purely formal, based on box ticking? Are they better implemented that the governmental laws and regulations? If we compare, with respect to the corporate codes, by how many companies these are implemented, in comparison to the laws in general, where we have no similar figures, we cannot be sure that said laws are better implemented than the codes.

The role of the Committee of European Securities Regulators or CESR – which coordinates the actions of the 27 national securities supervisors - in corporate governance is very limited. In fact, this is a consequence of the attitude of the securities regulators not to get involved in corporate governance in general. CESR has a working group for observing the practices and exchanging the views on these. One thing is however very clear: there is no intention to develop regulation in the working group. It's merely a forum for the exchange of experiences and information, and I think it's a wise decision not to start to regulate in this field, and at least not to start to regulate in detail.

So the **second** part of my presentation is not dealing with the codes as such, but with the changing interest in the role of the shareholders. In the last couple of years, one notices a shift in the corporate governance discussion from issues related to the boards to questions about the shareholders, especially as a number of very fundamental changes in the position of the shareholders are taking place. The shareholders in European companies were traditionally viewed as controlling shareholders. Since a couple of years, one pays more attention to the activist shareholders, and in some cases to their direct links to the market of corporate control.

Traditionally, we knew shareholders as professional financial investors from some Western country, investment funds, insurance companies, private equity funds etc. Increasingly, we now see non-European investors: Russians, Indians, Chinese, Saudis and other Gulf states residents. Most, but no means all of them – think about Mr. Mittal, taking over the core of the French steel industry – are industrial investors, but more recently we see more financial investors, the hedge funds, private equity funds, but also specialised governance funds and the most controversial, the sovereign wealth funds. These investors engage sometimes in activism, contesting the company's policies, decisions, boards, and so on. Often they start to act on their own, but after a while, traditional Western investors join them in their criticism: here we witness what some would call unholy alliances between activist funds, insurance companies, or even steady state pension funds. This was especially the case in the Netherlands, where activism has been successful after Dutch companies reduced their anti-takeover protections. The world is changing, I would say.

Another change that's striking is the renewed role of the states. Some states are intervening increasingly actively in all kinds of control transactions. They want to create national champions, sometimes by trying to avert foreign takeovers. In some cases they tried to rely on existing laws, although these had not been designed for that purpose, like the banking law, which essentially is designed to pursue prudential purposes. In other cases outright protective laws were enacted, submitting certain transactions in politically sensitive fields to state authorization. And you can certainly put some names on that.

The new breed of activist investors often acts with small percentage holdings but avails themselves of all the existing tools using these in a very aggressive way. In the Netherlands the Amsterdam Enterprise Chamber, came to the conclusion that the legislation, which originally aimed at protecting the firm, is now being used by sharp shareholders to unseat the management, or even to split up the company. . Can I just remind you, for those that are not familiar with the recent developments, that the number one Dutch bank, ABN-Amro, is being split into three parts - indeed, the decisions will be final today or tomorrow - as a consequence of the initiative taken by one shareholder, a hedge fund with a mere 1% of the shares, calling for a general meeting with the split of he bank n its agenda. So based on this narrow leverage, that shareholder broke up the entire bank, assisted by an institutional investors and even Dutch pension funds. The Enterprise Chamber played a significant role in this battle, but was finally overruled by the Supreme Court. Ultimately the price decided. But this battle left behind much uneasiness, much political, social, economic and financial instability.

Regulatory responses. There have been several regulatory responses to these developments. One of them is the Takeover Directive. The mandatory bid provisions constitute a central feature of the market for corporate control in Europe, and notwithstanding the criticism I and others have formulated, it has become a standard element of all control discussions. But the other provisions of this directive, i.e. the company law provisions, are generally considered as worthless, as the directive allows states to opt out of these. What they have of course done massively, some of them even strengthening their anti-takeover regime. The directive will be revised, it seems, in 2011, and it will be interesting to see what will happen then. There's another directive forthcoming on shareholder rights just now.

Some regulatory responses are based on very traditional tools: the main one is disclosure. In this respect, there are a few points which perhaps are less known. There is work being undertaken to move to a Europe wide “company register”, which is an instrument to provide you - electronically, of course, and using advanced Internet search engines - access to all officially filed company documents all over Europe. But it is not fully operational at the present moment. You would be able to identify e.g. all the directors, and probably also the shareholders, and that on the basis of a search across several jurisdictions. Suppose that you want to know all the shares owned by, say, Antonio Borges. You type into your search list, “Antonio Borges”, and you will get the whole list of companies in which he officially is a shareholder in the company. It would be the same with directorships, although directorships are less sensitive, being already public information. No need to say that this raises very serious privacy questions, which are now being investigated.

Another point with regard to disclosure which we are working on, is the so-called OAMs or “officially appointed mechanisms”, meaning an instrument for the central data storage of financial information. According to one of the directives, the member states are obliged to organise a centralised storage mechanism, something what would be comparable to EDGAR. However, we do not know yet how exactly to organise it, and originally the Commission mainly said it should be “centralised”. But looking at the meaning of centralisation, it may be a full and big database, like the one you have in the US, or it may be a linkage system, whereby you link the existing databases of the national authorities - one possibility - or the different websites of the issuers, on the basis of a centralised search system.

So, the decision is still not taken, and I personally hope that the simplest decision will be adopted. That means - what Chairman Cox explained to me this morning - a linkage between the websites of the companies, and not a big body where everything is centralised. We plan to use XBRL, of course, like they already do in the banking field. The solution is by far the least expensive one and allocates the cost to the directly concerned market participants. It raises of course the question of calibrating the information and protecting its integrity.

So there we are still waiting for the position of the Commission, but as the Commission does not know exactly what to do, it might be saying: CESR, you will do it. And we see that very often: after they have not been able to make an agreement at the political level; not at the Commission level; and then they will say to CESR: you will do it. And we do it.

Shareholder Rights. To reflect further on the position of the shareholder, it is useful to mention that the European shareholder is in a strong position, probably a stronger position than his American counterpart.

*He can appoint the board, contribute to the appointment of the board (in some cases you will find board members that have been appointed directly on the proposal of the shareholders), vote in the general meeting,, dismiss the board, what in some systems even goes to the level of the managing directors

* He approves the remuneration. Of course, this is done in a rather delicate way: the approval is given in an indirect way, e.g. saying that the remuneration is the same as last year, without giving the detailed figures. But legally, he approves the remuneration at a general meeting.

* The approval of the accounts; and sometimes accounts are refused, leading to special procedures before the courts.

* the general meeting institutes liability suits at the behest of the shareholders - that means by the general meeting - with certain percentages, of course, not every shareholder individually,

* the shareholders must approve decisions about a number of significant transactions as mergers, significant asset deals, both acquisitions and disposals.

That means that the shareholder, as a member of the general meeting, has quite a lot of powers. And indeed the sociological explanation is simple: European companies have very often controlling shareholders, who have managed to preserve their powers in the general meeting over time. Managers have been weaker and are at the mercy of the shareholders, or more precisely, of their representatives, the board members who represent the controlling shareholders.

Another aspect are the individual rights of shareholders. These, too, are increasingly important, both at law and de facto: remember the 1% hedge fund that started the break up of ABN-Amro

* Right to propose directors, call general meetings, at certain percentages, and propose the agenda.

* The right to ask questions and to receive answers. Both of them are often mentioned in the law.

* The right to have investigating experts appointed. Especially in the Dutch system, a shareholder can apply to the court for an official investigation, for instance on the annual accounts, or on the policies developed by the company. Often an expert is appointed, whose report may lead to further legal action, whether for liability or for any other remedy. The range of remedies the court can apply is not determined in the law, and therefore extremely large, leading up to the winding up of the company. A large part of the Dutch company law comes from that provision.

Most of these instruments are not European but national. But nevertheless, they are very powerful and, once more, are linked to the position of the shareholders.

Recently the EU approved a directive on shareholder rights. I will go very rapidly over it, as Pierre Delsaux will explain it more directly. It consolidates the existing rules – e.g. rules on distance voting. Proxies, by the way, are regularly used, although we have no proxy statements in most European jurisdictions.

Much discussed is the provision that for calling a general meeting, shareholders have to be informed 20 days in advance and that all the documents have to be available. Technicalities as these will be harmonised all over Europe. Although I do not think that these are very crucial matters, they are a step forward towards the more efficient functioning of the company.

“One share, one vote”

One of the issues that have been keeping us busy for the last few years is “one share, one vote”. “One share, one vote” was very well known in the US in the 1970s, but the discussions finally resulted in nothing, at least in terms of regulation. You will see that the world is not different on the other side of the ocean. One share, one vote is very much the core discussion about the takeover directive, because anti-takeover defences have been put very often under the denominator of “one share, one vote”. But in the takeover regime, although the directive contains some clear rules, no change was introduced as the directive contained a broadly framed opt-out clause, and almost all member states opted out, and some even strengthened their defences.

Several jurisdictions have “one share, one vote” in their laws: with some nuances, it applies in Germany, Belgium and with some specific features Italy as well. Strikingly, states with “one share, one vote”, seem to prefer pyramids, which stand for an equivalent protection instrument. If you cannot do it directly, some do it indirectly.

“One share, one vote” is often presented under the label of “shareholder democracy”. I don’t know very well what that means. Democracy normally means that you vote one-by-one, but here it is the democracy of the capital, the democracy of the number of shares, and that's not necessarily the same. The discussion is now under way, as Charlie McCreevy, the European Commissioner for the Internal Market declared two years ago, probably in a moment of euphoria, that Europe should introduce “one share, one vote”. This statement aroused considerable interest, especially in the English press. Later on, Mr McCreevy had afterthoughts, and became aware that the subject was much more complex, and that his idea was perhaps not the best one. The question was: how to solve the problem, also politically. Wisely, he ordered several studies: a fact-finding study by ISS, two academic studies, a theoretical and an empirical one. These studies concluded that there is no clear evidence that disproportional voting rights have an overall negative economic effect. A certain number of so-called control-enhancing mechanisms were investigated: voting agreements, multiple voting rights, voting caps, pyramids, etc. The study contains very detailed information about the use of these CEMs in each of the EU member states. As to pricing, the ISS study estimated that the use of control-enhancing mechanisms would affect the market price, and lead to a discount of about 15% to 30%.

The study also surveyed the position of the institutional investors. They clearly expressed their dislike of the CEMS. However, the crucial question was: what do you do if you want to invest in a company that has a control-enhancing mechanism? Do you invest, or not? And here, the answer was: we look at it case-by-case. That means that the refusal of these mechanisms is not so strong; if they can make up a good investment, they will go for it.

The academic studies were undertaken under the aegis of ECGI, and both studies came to the conclusion that there is no real conclusive evidence that the one share, one vote would be very destructive of company value.

But in the meantime the discussion has evolved in another direction, namely is this price differential due to disproportional voting rights, or rather to other factors, especially to private benefits of control. And indeed, if one looks at mandatory bids or at takeover bids in general; one often sees a takeover premium of about 20% -30%. Part of this premium may stand for private benefits, that the bidder must pay the former control holder, and which he is now due to offer to all shareholders under the mandatory bid provisions. So the question is, rather than dealing with one share, one vote, should we not be dealing with the question of the private benefits? And there are some ideas in that direction, but, before I come to these, I like to conclude as on 3rd October, which is almost a week ago, Mr McCreevy declared in the European Parliament - and I will quote him literally - that "there is no economic evidence of a causal link between deviations of the so-called proportionality principle and the economic performance of companies". That was the end of the present political life of "one share, one vote". Whether it is the end of the discussion is to be doubted. It may also be that action is needed, even at the European level, but not on "one share, one vote" but about the consequences of the phenomenon.

In the first place, more disclosure about ownership is needed because, at present, with disclosure of ownership at the level of 5%, this is way too high. Moreover there is a need for simplification, linked again with this "know your shareholder" issue. This is also linked with this vexing question of empty voting.

A proposal that is already laid down in the takeover directive, would be that the states have to report on control enhancing mechanisms. I think we should work on conflict of interest; I may be coming back to that.

A point which is increasingly worrying, is the role of the states as a shareholder, because we find that the states are still shareholders in quite a lot of businesses and, of course, if the states act, they often are not acting as a shareholder - that means on financial criteria - but on political criteria. And that's this whole discussion about the golden shares. By the way, we will have the Volkswagen decision, I think, two weeks from now, and it will be very interesting to see what the European court is going to decide on this golden share, technique.

I find it very striking that companies that have listed shares traded on the markets do not know who their shareholders are. They know their controlling shareholders – al least those who have notified at the 5% level - but all the rest are totally unknown. Should we not be working and devising techniques to make sure that the companies are informed of the identity of the shareholders so that not only they know who owns them, but they also can get in contact with them. Electronically this does not seem to be so difficult. And so that in case it is needed, in case that there is, for instance, an activist shareholder opening a debate about the company, that they can at least exchange arguments, something what they can't do today. They have to do it through the press. So I think there is a role here for the custodians, because why do the companies not have the names of their owners? Because these shares are registered in the accounts, and these accounts are held by the banks, the custodian banks. But the banks know this. Even if there is a whole system of multi-tier accounts, somebody must have it, and I think it would make sense that you ask the banks, asking being a very polite term to say that you would require the banks to have the identity of the shareholders sent at least once a year for the general meeting to the company so that the company can act on that basis. But this is still very controversial, and we will, we will see how we handle it.

On private benefits, a few ideas. I think we should be focusing more on preventing private benefits. At last year's corporate governance conference in Helsinki Ron Gilson identified different private benefits according to the jurisdictions. According to his figures, private benefit represent 1% of the value of shares of Swedish companies, that most of the time have dual voting shares. The effect of a real control-enhancing mechanism was only 1%, but taking the same phenomenon in Italy, you would come out at 29% for Mexico even 35%. I suppose that these figures are reliable, but even if not fully reliable, they are very impressive. Therefore something has to be done against these private benefits in those jurisdictions where they reach very high figures. We could enact laws or rules curbing private benefits. And in fact, there are already a few ones. For those of you who are familiar with the German Konzernrecht, this is the purpose of this important body of laws In a nutshell, in the context of a parent - subsidiary relationship, the advantages and charges in their respective relationships have to be identified, evaluated and offset at the end of each year. Similar rules on private benefits and conflict of interest exist in France, Italy, the Netherlands and Belgium: these conflict of interest rules should be applicable not only at the board level, but also at the level of the shareholders. Extensive disclosures are the minimum but scrutiny by the independent directors and an assessment by an external, independent expert as is the case in Belgium would usefully supplement the disclosure. In France, any contract entered into between a board member and the company, or by a controlling shareholder and the company, has to be approved by the general meeting.

The UK goes even further: it has to be approved by vote of the general meeting, with the exclusion of the shareholders who have a conflicting interest. Here one sees that different systems for dealing with private benefits are already in force.

The role of activist and other shareholders in Europe has recently been confronted with a very clear change in the business climate: company law matters have become clearly politically sensitive. The role of foreign companies are the centre of these concerns. One remembers the previous French prime ministers bold statement about "patriotisme économique". This is a very strange expression more than 50 years after the Treaty of Rome. One also remembers the discussion about the locusts in Germany, essentially referring to private equity.

At the same time one sees governments repeatedly meddle with takeovers or restructuring of business sectors. To mention a few ones: Italy and a banking take-over that finally brought down the previously highly respected governor of the Banca d'Italia. In Italy a takeover on Autostrade was blocked by the government, and in Spain, attempts to keep Endesa, a major power supplier in Spanish hands lead to a yearlong battle and a politically acceptable solution. The discussion about Suez - triggered by an activist investor – finally lead to a merger with the state owned Gaz de France, creating a French energy champion, whereby the state would hold a significant bloc in the merged entity. Renationalisation? I think state intervention is a real problem for the future. In the Central European states: one meets a very strong nationalist feeling, for instance in Poland, some companies urged to refuse shareholders from other EU states, or even non Polish board members. The EU Treaty freedoms have not yet reached that part of the Baltic shore.

The activist shareholders have awakened many business leaders. Deutsche Börse is one example in which activist shareholders prevented on the one hand a merger with another European stock exchange, while trying to dictate the merger with another one. Both attempts failed, leading to considerable turmoil at the management level, and finally to a stand alone position. History will show that it was probably thanks to the stubborn position of these shareholders that Euronext merged with the New York Stock Exchange, definitely shaping the European securities trading business, and this without any policy intervention of the European authorities. If these activist investors would not have been there, a totally different landscape might have emerged. In the case of Shell, the double headed structure of Shell Royal Dutch has been terminated as a consequence of the pressure of the markets, with the intervention of an activist shareholder as the driving symbol. And this same Knight Vyncke is now stepping up pressure on HSBC, claiming this bank, one of the largest of the world, to be split up. In the case of ABN-Amro, activist investors succeeded in convincing other banks to drive for a split of the bank. In all these changed, the shareholders and not the management are in the driving seat.

Globalisation has lead to the strong presence of Indian shareholders. The European steel industry, which was centralised around Arcelor, a Luxembourg based group with entities in France, Luxembourg, Spain and Belgium was taken over by Indian Mittal, without much ado from the political class. Striking as much of French steel was thereby landing in foreign hands. The Luxembourg board tried to block the takeover, but without success. Traditional cross border integration between US and EU has not become really global.

The latest arrival in the class of shareholders is the Sovereign Wealth Fund: how to deal with these extremely powerful and rich players on the capital markets, that may be driven by other considerations than a pure financial investment. The political class is worried, as any action would cut across the freedom of capital movement, while investments in our industry, and especially in the financial sector are highly welcome. Should we develop

specific instruments for some sectors: defence, media, high R&D firms? And what about the more general concern about the origin of some of these funds that may find its origin on illegal activities. If action has to be undertaken, it should be extremely cautious, and only aim at the political use of voting power. Perhaps that here too corporate governance instruments may be put to work: independent directors could identify unacceptable – political - intervention of the shareholder, and take action, as specified in the law.
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To conclude, the corporate governance debate, as I have seen it in Europe, has shifted from the position of the board to the position of the shareholders. Some issues could be qualified as conflict of interests, and dealt with on that basis. Corporate governance is being determined by the public or political agenda and even in private companies, public policy issues are coming more and more frequently to the forefront.

Shouldn't we not make a room for these concerns within the transatlantic agenda? May I try to answer as an academic. In my view, there is a need for making a detailed and precise comparative study of the position of the shareholder in the US versus the EU. I am not sure that I fully understand the position of the shareholder in the US and even in Europe, with its great diversity, the system and the tradition may be quite different in each of the Member states.

So there is some need for further investigation, and also to determine what is the relevance of these differences, and, maybe, whether there is room for convergence.

Thank you very much.

Questions & Answers

Antonio Borges
Well, thank you very much, Eddy. I was listening to this extraordinary list of issues on your plate right now - all these fronts on which there is a lot of action going on - and I couldn't help going back to this morning's session and how, apparently, the European markets have been taking market share away from the American markets. Maybe if all these things are enacted, that market share will double.

Fianna Jesover Senior Policy Analyst, OECD
I was solicited, finally, to say a couple of words, since you mentioned globalisation several times, Mr Wymeersch, and also this morning, Mr Cox talked about how it's difficult to go at all of this alone, and we are watching all of these developments very closely at the OECD, including the sovereign wealth fund issue which came up recently in one of our working group meetings on privatisation and corporate governance of state enterprises. And a lot of these issues you're discussing this morning, also in terms of the regulatory impact assessment, we'll be looking at that globally. And, finally, you mentioned throughout this morning as well, and now again, the importance of global economies like China, India, and so forth, and we are now enhancing engagement with these countries which we've been dealing with, and we very much welcome your view on, both from Europe and the US, on what priorities you see emerging there in terms of corporate governance.

Eddy Wymeersch
Well, there are many questions which you raised. Mainly I take up the last one on priorities. I am not talking about priorities for China, India, and Russia: I think that's beyond my horizon, but let's look at the priorities in the West.

I see that one of the most vexing questions at the moment is this question of the sovereign wealth funds. What to do about it, I'm afraid I don't know, but some are thinking about different traditional corporate governance tools, such as voting caps.. We should not bar the access to our markets to these sovereign wealth funds because, if we do that, we will create a "fortress West", or a fortress Europe, and that's - of course - very detrimental to our own interests. And so we have to find other techniques. Perhaps we have to think about adapting our corporate governance instruments: if it appears that some of these shareholders are behaving according to political imperatives, they should be dealt with differently. As long as they are shareholders in the pure financial sense of seeking a return on their investment, I don't see any problem. But if they use their influence, their financial muscle, to implement political decisions or objectives, then it might become necessary to limit their influence. How that has to be done, is a matter of further debate.

Andrew Clearfield President, Investment Initiatives

Many of my clients in my own practice are very concerned about an issue which has to do with their right to consult with one another. It's very well for investors to have some of the rights that they have in Europe, which they don't enjoy in the United States, but if a court can intervene, or a company can act, and say that they're acting in concert - we had an example of this in France a few months ago, and now we have this proposed legislation in Germany, which would radically change the playing fields there - if investors aren't allowed to consult with one another without it being deemed that they're acting in concert, or in some cases they just aren't allowed to vote the same way without being deemed to be acting in concert, then what good are those rights? And I'd like to hear your comments on that.

Eddy Wymeersch

This is, once more, a very difficult and vexing question. Acting in concert is a very elusive concept, as we all know. Looking at it from the other side of the bench one sees, from time to time, shareholders behaving in a very consistent manner: officially they will never admit to be acting in concert. In a recent case in France, concerning Eiffage, which is not being the subject of a takeover by a Spanish firm Sacyr Villehermosa, the general meeting was taking place with that officially announced Spanish shareholder, but all of a sudden 80 or so other Spaniards came in and were voting in the same direction as that important Spanish shareholder. The chairman of the board suspended the voting rights of the Spanish shareholder, and the case is now pending before court in France. Acting in concert is the trigger, and it's used for applying a certain number of rules, especially to extent the scope of a rule and avoid parties evading the law. However, a mere discussion among shareholders may be or may not be, depending on the case, acting in concert, but, if you want to be on the safe side, do not appear to act together, do not consult each other.

Georgia Sambunaris Senior Financial Markets Specialist, USAID

My question deals with the role of corporate governance, and shareholders, as well as board members, in dealing with globalisation, because the one thing that you discussed was what will be the role of shareholders in the future. In dealing with globalisation, the new corporate social responsibility is something that I'd appreciate your views on, because in the United States we're struggling with share returns and dividends. On the other hand, there's this social responsibility of the BRIC countries, as well as the next 11 emerging markets, and their role in helping to develop countries such as in Africa. And I was wondering what your views are in terms of the role of shareholders and boards in directing companies towards corporate social responsibility.

Eddy Wymeersch

On the one hand, one sees very clearly that companies that do not act in a socially responsible way, are going to be harmed by their bad reputation. It is in the intelligent interest of the company to act in a socially responsible way, and many do that voluntarily. You see it increasingly in the annual reports. Take Shell, the petroleum company, declared one of the most socially responsible companies. It's not necessarily the most likely candidate for the first prize, but that's the way it is. Whether this is it because they have been stronger in public relations or not, I leave that to your judgment. Another question relates to the incorporation of CSR into their business objectives: it seems to me that this should not be done indirectly, by making companies non profit entities, but by tracing their room for action in the law itself. If you want companies to deploy a socially responsible, e.g. with respect to labour relations, environmental issues, the law should trace the limits. One should not divert companies from making profits. That's their role, and that's what keeps them alive, and without a sufficient return, they would be unable to sustain CSR. But just to say that companies are non-profit organisations will weaken the companies, and prevent them from realising their CSR objectives.

David Schraa, Director, Regulatory Affairs Department, Institute of International Finance
You said something to the effect that the 5% large shareholder declaration point was raised too high, and I think you implied, at least, that there ought to be a continuous transparency of shareholders across the board. I wonder if you could elaborate a little bit on that. There are a number of dimensions of that. One is the corporate governance dimension; the other is simply the quality of regulation dimension whereby there are a lot of different thresholds, different definitions. It's difficult for the firms to manage these thresholds around the world, and there's some desire to see a convergence of such standards through IOSCO or whatever. How, how would you advise the industry to push for that kind of convergence?

Eddy Wymeersch
Well, let us look at the objectives, and these are clear. Up to 10 or 15 years ago, we did not know who the important shareholders were and in cases of a takeover this often was the critical factor. We saw From time to time, all of a sudden, we saw somebody coming out of the woods and said, look here, I have 25%, and this without anybody knowing it. That was not good practice, and it created the image that the securities were battlefields where everything was allowed. So we introduced the 5% ceiling, which companies very often put at a lower level. But today, with the new activist shareholders and the new governance techniques, it seems we should go further, and require disclosure at a lower threshold. The question is how far you go, and I would propose that we go right to the bottom - that means all shareholders have to be known - provided this is practicable, as mentioned above. This would effectively eliminate the notification requirement. It would also clarify the voting mechanism: it would be the issuer who organises the voting process, not the bank were the shares are deposited. It would also avoid confusion as to the number of votes to be cast: US practices are very confusing in this respect. I refer here to an SEC document illustrating overvoting, double voting and what have you.

In Europe, the votes are cast by the shareholder, or by the bank on his instructions. As a result, and in absence of instructions, a large number of the votes are not exercised. This issue should not be put on the shoulders of the banks, but on the issuers'. The banks should give the names of the shareholders directly to the issuer, and he will take care of the voting process, for his shareholders. As a consequence, we have to introduce mechanisms that allow to organise voting efficiently. As to disclosure, I'm not talking about a continuous disclosure, as it seems that this would be too expensive. It would be a disclosure once a year, e.g. before the general meeting.

Antonio Borges
Eddy, thank you very, very much. You gave us an extraordinary overview of what's happening in Europe, of all the issues that confront us. There will be a great deal of progress if these all go forward; so we just wish you good luck. Thank you.