

## COMMENTAAR OP CONCEPTCODE COMMISSIE CORPORATE GOVERNANCE

Ik begrijp dat de ontwerp code van de commissie Tabaksblad uitnodigd tot commentaar.

Mag in dit verband aandacht vragen voor beursgenoteerde vennootschappen met een 'groot' aandeelhouder. Posities die in contentaal Europa veel voorkomen, ook in Nederland, en waar met name Angelsaksische investeerders een groot wantrouwen tegen hebben.

Op een recente bijeenkomst van The Conference Board hebben we over dit onderwerp gediscussieerd en zijn met een paar aanbevelingen gekomen, die kort gezegd op het volgende neerkomen:

1. De onafhankelijke (de niet door de groot-aandeelhouder benoemde) commissarissen moeten in het jaarverslag rapporteren over de relatie met de groot-aandeelhouder en met diens vertegenwoordiger(s) in de raad van commissarissen. Indien zich een 'conflict of interest' heeft voor gedaan, wordt uitleg gevraagd hoe daar mee is omgegaan. Waar relevant wordt toelichting gevraagd hoe de groot-aandeelhouder bijgedragen heeft aan de vennootschap.
2. De groot aandeelhouder moet bereid zijn een 'standstill' overeenkomst met de vennootschap te sluiten met betrekking tot zijn aandeel en/of een verklaring afgeven met betrekking tot zijn intenties.
3. De vertegenwoordiger van de groot-aandeelhouder moet participeren in de communicatie van de vennootschap met de andere aandeelhouders en in ieder geval zich beschikbaar houden voor het beantwoorden van vragen door de klein aandeelhouders.

Ik realiseer mij dat dit slechts een eerste aanzet is om het bestaande wantrouwen via transparantie te verminderen. Het valt mij op dat dit zeer verbreide fenomeen van groot aandeelhouder in Europa tot nu toe geen aandacht in corporate governance code's heeft gekregen, misschien daarom een suggestie voor uw commissie?

Voor de goede orde doe ik hierbij ook een kort verslag van onze Londense conferentie en hoop u daarmee van dienst te zijn geweest.

Met vriendelijke groet,

**Folkert Schukken**

## **Bijlage: Summary of meeting of European Council on Corporate Governance and Board Effectiveness, June 19<sup>th</sup>, 2003 in London, hosted by Hermes**

Council Chairman Folkert Schukken opened the meeting by welcoming the large number of institutional investor guests in attendance including representatives from The Association of British Insurers, The National Association of Pension Funds, ISIS Asset Management, Railpen Investments, Schroder Investment Management and The Universities Superannuation Scheme (USS).

Chris A. Plath, the newly appointed Associate Director of The Conference Board's Global Corporate Governance Research Center, made a presentation on investor ownership patterns in the U.S. and the Continent. He emphasized how much more concentrated ownership is in Europe versus the United States and how much cross border investment has increased for companies in Europe.

The discussion for the remainder of the day then revolved around the following issues:

### **Investor Trading Patterns**

- There are substantial differences between trading patterns of various types of investors, some of whom take very long-term positions while others, especially money managers, tend to trade more actively in the short term.
- Long term block holders will often tend to take an interest in the performance of the company versus the shorter term value of the shares.

### **The Role of the Strategic Investor and Protection of Minority Shareowner Rights in the Presence of Large Block Owners**

- There are significant differences between the "strategic" investor who will generally buy and hold compared with the "financial" investor who will trade more actively.
- While it is recognized that a strategic investor will have a larger ownership share, that investor's role in company affairs was hotly debated through discussion of several case studies. One presentation was made by the CEO of a bank who was accompanied by the representative of a major block holder with greater than 50% share in that bank. Other examples were discussed including an investment company which wished to buy a long term block in a London company.

- A strategic investor will often have considerable in-depth knowledge of the company and take one or more seats on the board, depending on the ownership share. This knowledge as well as a focus on the strategic direction of the company was seen as helpful to the company. Also helpful was the ability of the strategic investor to work with management to insist upon and effect change within the company.
- Concerns, however, were raised about how to protect the rights of the minority financial investor, both on a routine on-going basis and in change of corporate control situations, especially if a company is contemplating going private. The position was advanced that control should be proportional to the risk in the company represented by the percentage of shareholdings, yet there are some corporate governance regimes which frustrate these goals through unequal voting rights. Some participants noted that, when corporate governance is not strong, investors will devalue a company when compared with another company with better corporate governance, although many agreed that data proving this point were hard to come by.

### **Communicating the Value of a “Good” Strategic Investor to the Other Investors**

- Many agreed that a “good” strategic investor can add value in many ways, but it is essential to communicate this to the minority investors. Some best practice recommendations were suggested including:
  - In companies where there are substantial block holders with seats on the board, the independent members of the board should report to investors that there are no conflicts of interest in dealings with the block holder owners or director representatives.
  - Were such conflicts to have arisen during the reporting period, they would be reported upon and an explanation of how they were dealt with provided.
  - The independent directors would report on what contribution the bloc shareholder had made to the company, if any.
  - This transparency, which would in most cases be above and beyond what is required by country law, would give comfort to the other investors.
  - Some participants noted that such a report would require legal input and perhaps directors would not have time to construct this type of report. If management were to be the constructing agent, the report could be put before the board for their approval

(although some noted that management might be put in a difficult and possibly “career ending” position to make such disclosures).

- Another suggestion was for the block shareholder to agree to a standstill or to communicate intent with regard to holding, increasing or decreasing ownership. Some jurisdictions (such as the U.S.) require that investors with stakes of 5% or more give notice that they are holding for investment purposes, rather than for takeover purposes.
  - Many agreed that the representative of the bloc shareholder should participate in the communications of the company with its minority shareholders, or at least be available to answer questions.
- Having “successful” block ownership while protecting minority rights hinges on providing effective transparency that block owners do, in fact, operate in the best strategic interests of the company and for the good of all the shareholders without conflict of interest.