

## APPROACH TO CORPORATE GOVERNANCE AND SUPPORTING SHAREHOLDERS' INTERESTS

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### Abstract

Shareholders interests play a relevant role in corporate governance. Notwithstanding the different legal regimes across the globe, there is a trend towards converging mechanisms protect shareholders through disclosure and other instruments. Simplification of voting process and procedures to ease the taking into account of shareholder preferences are matters still to be resolved.

**Keywords:** Shareholders, Disclosure, Conflict of interests, Corporate decisions, Corporate Governance

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### 1. Introduction

Corporate governance deals with different conflicts of interests which appear and are related to the way companies are managed. From a comparative perspective, laws vary considerably in their attitude to resolving these Corporate Governance challenges<sup>1</sup>. Answers can be found in internal governance mechanisms (By-Laws and self regulation), and external governance instruments (regulation, supervision, etc.)<sup>2</sup>. The ways how those conflicts are debated and resolved have a great impact over countries business, over how investors are attracted to companies and over capital markets structures.

Traditionally, European countries (with the exception of UK) are said to have less attractive capital markets than Anglo-American countries; this has been explained frequently by cultural and regulatory elements including corporate governance structures and different points of view in relation with Companies aims and shareholders' interest. The relatively rapid convergence of some aspects of Corporate governance standards around the world which has occurred during the last 30 years is limiting the impact of pre-existing country-specific cultural values that impact upon the way how companies protect their shareholders.

Among the consequences brought in by the turning of the Century, we find that Companies, Investors, Regulators and society in general claim for more transparency, and are prone to promote more accountability of business. This transparency is claimed particularly on behalf of investors and shareholders.

Generally speaking and in particular within the field of Big Corporations, Shareholders are owners of such Companies. However, they do not possess much direct decision-making authority<sup>3</sup>. In order to determine the relevance of shareholders within the Company, it is necessary to differentiate among types of share ownership and its political significance

- *Majority control holders.* They hold more that a 50% of shares in the Company (what is extremely unlikely in listed companies) they control the decision making process and appointments to the Board.
- *Shareholders with a minority control.* They are able to exercise power over company decisions above their percentage holding, -given the lack of internal opposition able to balance their influence. Some of these minorities commit themselves to the long-term development of the company, and are known as "inner circle" shareholders. They are particularly active in continental European countries, with a tradition for block controlling shareholders (families, banks, etc.).
- *Other long term minority shareholders.* They do not belong to the inner circle but remain in shareholding to obtain a return to their

<sup>1</sup> Mäntysaari, P , Comparative Corporate Governance (Shareholders as a Rule - maker), Heidelberg, 2005.

<sup>2</sup> Kordel, G. "Behavioural Corporate Governance from a Regulatory Perspective: Potential and limits of Regulatory Intervention to Impact the Conduct of Corporate Actors", *European Business Organisation Law Review*, 9, 29-62, (2008)

<sup>3</sup> Friedman, M *Capitalism and Freedom*. University of Chicago Press, 1962.

investment. They help in granting stability to the company.

- *Other minorities –long term private investors or sort term private investors-* have extremely reduced power to intervene or influence management.
- *Institutional Investors.* Institutional investors hold substantial financial resources obtained from their own private investors, and they trade in different corporations. They are not a homogeneous category on their own<sup>4</sup>.

Significant changes in the structure and composition of shareholdings in big corporations have taken place over the last years. In particular, private shareholding is in decline, whilst control of equity by institutional funds has increased –particularly after 1970<sup>5</sup>. One relevant reason behind this trend is that small equity investors face many risks which have been made evident during the XXth Century. They may be taken advantage of in a number of ways by those in control of the Company (Boards or largest shareholders). They are likely to be subject to waste of corporate resources without either benefiting themselves, nor having a real possibility of influencing decision making processes.

In parallel with a lesser purely private investment, institutional investment has growing influence in Corporations. After the 2ndWorld War they have progressively acquired bigger proportions of capital and the potential for a leading role in management control. This has been facilitated by low transactions costs and by the increased level of direct contact with companies. During the latter years of the XXth Century there has been another trend: more concentration of investment as more liquid Institutional Investors and Funds that focus their portfolios in a fewer number of corporations. Concentration leads to closer contact with companies and their boards, and this, in turn allow Institutional Investors some of the mechanisms needed to optimise their investments, without a need for disinvesting or *voting with their feet*. Being better informed and having greater shareholders influence, investment risk is effectively reduced. Fund managers may concentrate their investments in companies they favour, in order to benefit from the resources that they are able to apply and they gain power in the field of corporate oversight. Largest fund managers have acquired the power to influence management, although their interest in doing so remains limited: Only when the size of their investment forces direct involvement; large Institutional shareholders are likely

to participate rather than doing the *wall street walk*<sup>6</sup>. Still to date, most companies are not subject to Institutional Investors' interference into management by them.

Together with differences in shareholder's percentages in the company's stock, there are mayor differences related to the legal systems where they develop their investment activities:

- In USA, Corporations' decision processes are generally dominated by Board of Directors and by top management, the so called, Officers. Company law is a state competence, with a growing influence from federal regulations, the Model Business Corporations Act and its reforms. One of the states has an overall impact over the rest: Delaware, whose laws and judicature's prestige and experience play a relevant role in harmonising other states Corporate rules<sup>7</sup>. As a result there is a fairly harmonised corporate system. Also, in USA centralised decision making processes, and disperse shareholdings have contributed to the creation and development of big multinational Corporations. Large independent shareholders blocks have been rare in US corporations. According to Berle, America's dispersed ownership arose as a consequence of the development of large capital-intensive industrial companies that required large investments<sup>8</sup>. Furthermore, the need for diversification among single investors contributed to the modern separation of ownership and control. Reasons for this are embedded in the particular corporate culture, agency problems and free raider problems. If shares are widely dispersed among numerous owners, agency problems are increased by collective action problems. Fearing that all other stakeholders will free-ride other's efforts to exercise their collective right, each shareholder will avoid investing in actions. As a result, they rather disinvest or stay inactive than actively participate in Corporate decisions or try to influence board appointments. Shareholder's ability to affect the election of directors is perceived as the factor that determines their degree of influence over the Corporation. But in America, dispersion of investments together with the complexity of the proxy regime under Securities Exchange Act section 14(a) discourage large shareholders from seeking to

<sup>4</sup> Romano, R. "Less is More: Making Institutional Activism a valuable mechanism of Corporate governance" *Yale Journal of Regulation* 18, 2001.

<sup>5</sup> Graved, *M Ownership and Influence*, Interdisciplinary Institute of Management, LSE, London, 1995, page 8.

<sup>6</sup> The size of a holding is a key influence on a fund manager's approach to its role in a company. The smaller a stake of a company's issued capital, the less likely it is that a fund manager will commit internal resources to the making o a strategic or management changes, and the bigger stake in a company, the more likely it is that the fund manager will commit resources to making changes.

<sup>7</sup> Cary W, Federalism and corporate law: reflections upon Delaware, *Yale Law Journal* 83 (1974), pp. 663–705

<sup>8</sup> Berle, A. "For Whom Corporate Managers Are Trustees" *Harvard Law Review*, num. 44, (1931), 1365,1372

replace incumbent directors. As a result, generally speaking, USA Corporation shareholders have little power over Corporations management, their behaviour and appointment. Even quite substantial shareholders are relatively powerless.

- Corporate governance regimes in Europe are intimately linked to the nature of shareownership of shareholdings in the different countries. Notwithstanding differences, both in continental traditionally two-tier board systems like Germany; as in European Anglo-Saxon one-tier board Companies such as the UK, the most important formal powers of shareholders relate to share capital and structural change. Many of the Capital rules, and some structural have been harmonised at EU level in order to protect creditors and shareholders<sup>9</sup>. Throughout Europe (particularly in the Continent and especially in countries like Germany and Sweden), shareholdings are more concentrated and there is a stronger presence and influence of banks than in North America. Shareholders role in the decision making is mostly related to monitoring, and not so much to decision making, although certain questions such as changes in company incorporation usually require their support and they are to agree on certain takeover defences<sup>10</sup>. There are some national “specialities”. In countries with a more concentrated shareholding such as Germany or Spain, shareholders can have the power to control management, particularly due to the existence of a supervisory board (Germany) where the interests of shareholders are represented<sup>11</sup>. On the other hand, in the UK,

the legal powers of controlling shareholders are stronger and the position of minority shareholders is weaker than in Germany where minority shareholders enjoy longer rights safeguarded by mandatory statutory rules<sup>12</sup>. Furthermore, It has been affirmed that social and ethical restraints, as well as worker representatives in supervisory boards, limit European managers’ and majority holders’ propensity to exploit minority shareholders. Both in Germany and in the UK, as in other European countries the main powers of shareholders over listed companies decision-making processes are the *de facto* powers of influence of effecting appointments to Boards<sup>13</sup>. European countries’ corporate governance reforms in the last two decades were led by two objectives: developing strong capital markets<sup>14</sup> and a European Single Market for financial services. However, recent reforms did not go clearly towards a purely shareholders or “USA-like” model<sup>15</sup>. Changes were also motivated by international events such as the array of scandals (both within and outside Europe) such as Enron, Parmalat, etc.; and by non European reforms such as the Sarbanes-Oxley Act in USA that demanded adjustments of Governance rules in all jurisdictions, particularly in those with national Companies which are listed in American exchanges<sup>16</sup>.

<sup>9</sup> Andenas, M, “EU Company Law and the Company Laws of Europe”, *International and Comparative Law Journal*, vol 6, issue 2 2008, pp 7-39: The Second Directive, provides for equal treatment of shareholders who are in the same position, (Art 25-1) , that any increase in the subscribed capital must be decided upon by the General Meeting, and (Art 29-4) that pre-emption rights of existing shareholders may not be restricted or withdrawn without the consent of the General Meeting. Reduction of Capital is subject to similar rules. The Third Directive (art 7) requires the consent of the GM of each of the merging companies, the Sixth Directive (Arts 5 and 6) demands such permission in case of division of the company. More recently, the take over Directive, Directive 2004/25/EC provides “squeeze-out” rights of the majority shareholders and “sell out” rights of minority shareholders in the contexts of takeover bids.

<sup>10</sup> Euroshareholders Guidelines, Recommendation 2 : “Major decisions which have a fundamental effect upon the nature, size, structure and risk profile of the company, and decisions which have significant consequences for the position of the shareholder within the corporation, should be subject to shareholders’ approval or should be decided by the General Meeting” See also, in relation with close and cooperative companies Fernández-Albor Baltar, A “Estatuto Jurídico dos socios”, *Cooperativismo y economía social*, n 16, 1997, pp 51-67.

<sup>11</sup> Hopt, KJ, “The German Two-Tier Board: Experience, Theories, Reforms, in Hopt KJ, Kanda H, Roe MJ, Wymeersch E, Prigge S (eds.), *Comparative Corporate*

*Governance- The State of the Art and Emerging Research* . Oxford University Press, Oxford 1998, pages 232-233.

<sup>12</sup> Cheffins BR, “Mergers and Corporate Ownership Structure: The United States and Germany at the Turn of the 20th Century, *American Journal of Comparative Law* (2003) pp 499.

<sup>13</sup> The required balance and necessary respect between block shareholders and minority shareholders has been underlined in some European Codes of Good Corporate Governance . See for instance European Association of Securities Dealers, EASD Principles and Recommendations “*Controlling shareholders should give due consideration to the interests of minority shareholders. Minority shareholders should not unreasonably restrain corporate action*”. (Principle IV; EASD Principles and Recommendations. Also García Vidal, A, *Las instrucciones de la junta general a los administradores de la sociedad de responsabilidad limitada*, Cizur Menor, 2006.

<sup>14</sup> Hierro Anibarro, S “El nuevo Mercado Paneuropeo de valores tecnológicos: del EASDAQ al NASDAQ Europe, *Noticias de la Unión Europea*, n 213, 2002, pp 27-37.

<sup>15</sup> Hierro Anibarro, S “Empresa: El concepto comunitario de pequeña y mediana empresa”, *Noticias de la Unión Europea*, n. 255, 2006, pp 69-79

<sup>16</sup> Hernández Rodríguez, F “Gobierno Corporativo y protección del inversor. Nuevas perspectivas en la Unión Europea”, en Pérez Carrillo, EF, *Gobierno Corporativo y Responsabilidad Social de las Empresas* Madrid, 2008, pp 155-171. Hierro Anibarro, S “El nuevo Mercado Paneuropeo de valores tecnológicos: del EASDAQ al NASDAQ Europe, *Noticias de la Unión Europea*, n 213, 2002, pp 27-37.

Market for corporate control offers a residual form of shareholder control<sup>17</sup>

- Widely dispersed ownership allows for that market to develop better. In the United States, both company law and federal securities laws developed ways to respond to it, by implementing legislation such as the Williams Act in 1968<sup>18</sup>, which amended the Securities and Exchange Act of 1934, and which protects shareholders via disclosure and procedures.
- In Europe, this market developed later and finally the Takeover Directive<sup>19</sup> was passed introducing a mandatory bid upon the purchase of a certain percentage of shares, which insures that all shareholders can opt to be bought out from the company. Generally under U.S. law partial bids are permissible<sup>20</sup>. This difference reflects more protective environment to minority shareholders in the EU. But even taking into account market control measures, shareholders powers remain limited.

## 2. Interests and obstacles to decision making by shareholders

The general landscape that we have just described shows that shareholders exercise only minor powers over decision making. This is particularly so in Anglo American legal Systems, but even in Europe –unless the said shareholders have are block holders.

Public Companies can be seen as means by which capital is raised from a large number of public savers. Under that focus, corporate governance may focus on the suppliers of capital (creditors and shareholders), leaving directors and managers to control the business. While other interests have also been recognized, still to date they are generally considered as external to the core of Corporate Governance.

In the last ten to fifteen years, concerns about shareholder protection and involvement has increased across the globe<sup>21</sup>. There is a growing debate, particularly in USA and Europe, on whether Corporate Governance systems are advancing in a way towards convergence, or whether in the future we shall see

greater divergence in the ways how shareholders' rights are dealt with. The answer to this question is not easy. Path dependency will possibly always remain, however legal systems can learn from each other, particularly in a globalised world. Each legal system will need to evolve and to adapt their Corporations' decision making processes to achieve a better balancing of evolving interests; and they need to do so in a way that allows for sustainable growth. Notwithstanding path dependency, the need to grant shareholders, including minor investors a stronger position within Corporations seems to be up in all legal Agendas across the globe. The mayor challenges of balancing interests to improve shareholders role on Corporate decisions comprise at least the following issues:

### 2.1 Lack and misuse of information

Asymmetry in information impedes the development of organisations to their optimal point<sup>22</sup>. For Corporate systems to function correctly it is necessary to prevent asymmetries and also to offer incentives for gathering information. Many aspects of modern regulation over the globe are oriented precisely to limiting or reducing asymmetries of information.

The primary legal doctrine for avoiding conflict issues is that of fiduciary duties of Officers and Directors to the Company and its shareholders. Within those, the duty of loyalty, requires the directors not pursue their own interests over those of the company and its shareholders. It covers a very wide range of issues.

Central concerns of shareholders that suffer lack of information is self-enrichment by those in control. This type of behaviour is possible due to the position that some (managers, Directors, inner circle shareholders, related parties, etc.) hold in relation with the Corporation: its business opportunities, information, etc.

Although information has generally a positive effect it can be used as an instrument to unduly benefit certain market agents by opposition to others. As we have seen, there are various types of shareholders. There are relevant asymmetries between big/block investors, and small investors in relation with their access to information. The possibility also exists for board members to abuse their positions.

#### 2.1.1 Information and insiders

Top management, Board members, large block holders, or inner circle shareholders frequently have greater access to non-public information than others. When large shareholders have board representation, this becomes unavoidable. Even where the large holder lacks formal board representation, it may often benefit from selective disclosures by management. In

<sup>17</sup> Coates, J C (IV) Measuring the Domain of Mediating Hierarchy: How Contestable Are U.S. Public Corporations?, 24 *J. Corp. L.* 837, 850-51 (1999).

<sup>18</sup> Pub. L. No. 90-439, 82 Stat. 454 (1968) (codified as amended at 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (2008)).

<sup>19</sup> Council Directive No. 2004/25, O.J. L 142/12 (2004).

<sup>20</sup> These differences can be perceived as granting more protection to minority holders in Europe. Davies, P L. Davies, The Notion of Equality in European Takeover Regulation, in *Takeovers in English and German Law* 9-32 (Jennifer Payne ed., 2002);

<sup>21</sup> Siems, MM "Shareholder protection around the world (Leximetric II), *Delaware Journal of corporate Law*, vol 33, 2009, 111-147.

<sup>22</sup> Akerlof, G A., "The Market for Lemons: Quality Uncertainty and the Market Mechanism", *Quarterly Journal of Economics*, Vol 40, 477-501, 1970.

either case, disclosure of information to large block shareholders raises serious insider trading concerns.

Insiders' access to information puts them in a position to extract (for themselves or for others') undue benefits through conducts such as insider trading, whistle blowing, taking advantage of corporate opportunities, etc. A deeper analysis of these conducts leads to their definition as an offense against the corporation or/and to the market. Also this gives way to rules such as the "disclose or abstain" to create a levelled playing field in a way that outsiders and insiders can access the same information.

International diversity in insider's regimes is often attributed to cultural traditions. In USA, insider practices were usually legal in history at common law. Today some of these practices are not perceived as entirely negative in some legal systems.

In USA, Federal authorities took over some regulation of insider trading in 1933 and 1934, and the ambit of that regulation expanded greatly in the 1960s. USA model relies to a high degree in strong control by Securities Exchange Commission (SEC). Nowadays, it is said that American hostility towards insider trading is a reflection of American "egalitarianism and obsession with the appearance of fair play",<sup>23</sup> whilst other countries still take less strict view and take into account possible positive effects of some of these circumstances<sup>24</sup>. Today, insider trading regulation is among the subjects which underwent a strong convergence process as part of the internationalization of securities markets. Within the last 20 years, EU members, Japan, and other countries have prohibited insider trading in similar circumstances to the United States, in order to improve the performance of their nation's capital markets. A good example of this trend is the European Union Council Directive on market abuse<sup>25</sup>. Although there had been pre-existing

European insider trading regulations of significance-reforms followed the American model<sup>26</sup>. By the change of the Century, most developed nations have USA.-style insider trading laws<sup>27</sup>.

The main reason behind this convergence is the need to attract investment to listed Corporations.

### 2.1.2 Disclosure

Disclosure to the shareholders and to the market is a key mechanism to improve Company Law and Corporate Governance. Disclosure to all stakeholders is less developed and, in some instances may even be prohibited (trade secrets, patents, etc.). Disclosure rules are designed primarily to provide the capital markets with financial information about firm performance, and they are also effective to avoid conflict of interest transactions.

Corporate governance and disclosure regimes are closely related, as disclosure is a powerful means for fighting agency and conflict of interest problems. Accounting standards and Securities regulation play a central role in determining the scope of disclosure in this regard.

The first clearly mandatory disclosure regulation was approved in 1907 by the New York Stock Exchange, at a time when disclosure did not occupy a preeminent space<sup>28</sup>.

In USA, Federal legislation had a strong influence in the disclosure of information by public companies since 1933 and 1934 (Securities Act and Securities Exchange Act), but the Sarbanes Oxley Act of 2002 federalised a reinforced duty of management towards greater transparency. Also, some states such as the influential Delaware's legislator firmly opened the door to General Meeting's participation exclusively via electronic-Internet means. In Europe, the Winter Report of November 2002 placed transparency and information to shareholders at the heart of the criteria which were to lead reforms in EU Corporate

<sup>23</sup> Langevoort, DC "Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review", 51 *Vanderbilt Law Review* 1499 (1998).

<sup>24</sup> For instance, it is suggested that access to inside information by block holders is beneficial to attract investment. See Hansen J L "Is the insider trading ban becoming a barrier for investors?", in *Company Law and Finance*, P K Andersen, K E Sorensen (eds), pp 37-62 (2008).

<sup>25</sup> These Directives include Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse), and implementing measures: Commission Directive 2003/124/EC of 22 December 2003 as regards the definition and public disclosure of inside information and the definition of market manipulation, Commission Directive 2003/125/EC of 22 December 2003 as regard the fair presentation of investment recommendations and the disclosure of conflicts of interests; Commission Directive 2004/72/EC of 29 April 2004 as regards accepted market practices, the definition of inside information in relation to derivatives on commodities, the drawing up of lists of insiders, the notification of manager's transactions and to the notification of suspicious transactions; and Commission Regulation (EC) 2273/2003 of 22 December 2003 as regards

exceptions for buy back programmes and stabilisation of financial instruments.

<sup>26</sup> Memminger, P M The New German Insider Law: Introduction and Discussion in Relation to United States Securities Law, 11 *Florida Journal of International Law* 189, 193-94, 1996.

<sup>27</sup> Nowadays we are likely to find laws, which prohibit insider trading in many countries. They use quite a similar language. USA's Securities Exchange Commission and the International Organization of Securities Commissions have facilitated convergence of insider trading regulation based on the USA's model. Convergence will never be complete, due to Cultural differences and Path dependencies but, at present it is already quite substantial. See Licht, A M "International Diversity in Securities Regulation: Roadblocks on the Way to Convergence", 20 *Cardozo Law Review*. 227, 233 (1998).

<sup>28</sup> At the time, federal legislator and also the exchanges saw State laws as deficient. In fact, Berle's influential writings pointed very much by that perception. Disclosure to current shareholders (not just to external buyers) was federalized by the 1934 Act. See Mahoney, P G, The Exchange as Regulator, 83 *Vanderbilt Law Review* 1453, 1470 (1997).

governance and Company Law reforms. The Financial Services Action Plan of 1999; the Action Plan to Modernise Company Law of 2003 and the recommendations of the SLIM working group for the simplification of EU legislation imposed / recommended a number of measures leading eventually to reforms in mayor EU securities legislation. To cite some examples, whilst the first Company Law Directive (1968) had harmonised disclosure and publicity requirements of Companies; its 2003 reform served to make more efficient the filling and disclosure of company documents through the incorporation of modern technologies<sup>29</sup>. Also the adoption on 2002 of International Accounting Standards was implemented with the aim of introducing greater transparency, disclosure and comparability of EU Company accounts. The EU regulation introducing these standards makes compulsory for EU companies listed on a regulated market to use IAS from 2005 and allows Member States to extend this requirement to all types of Companies<sup>30</sup>. Other Directives impact upon the information which is to be published by security issuers (Directive 2001/34/EC on the admission of securities to official stock exchange listing and on information to be publishes; modified by Directive 2003/71/EC). All in all, these are a number of initiatives which impact upon a greater degree of disclosure in EU securities, and Company law.

Nowadays, Companies are required to disclose information beyond financial statements (forward-looking information, immediate disclosure of material events, breakdown of top-management remuneration, identity and intentions of shareholders who cross certain holding thresholds, etc.<sup>31</sup>). Disclosure issues

are critical to Corporate Governance and to empower shareholders to strengthen their position. It is widely recognised that *Corporate Governance is an issue of concern to a wide audience since it relates to the exercise of power and the success of business and the wider economy that involves consideration of the range of relationships entered into by companies*<sup>32</sup>.

## 2.2 Shareholder voting and interests in the decision making processes

Shareholder voting is an integral component of corporate governance. From a managerial perspective, active shareholder involvement in corporate decision making could be perceived as a breach to the authority in the Board of directors. However, shareholder activism does not necessarily mean eroding Boards' power. It simply implies that management decisions can be reviewed. The core of shareholders' activism is shareholders' vote and the right to propose issues to the General Meeting.

Shareholder voting can serve distinct purposes. In closely held corporations with a small number of shareholders, all of whom have ready access to information about the business, voting is close to effectively exercising managerial power. In public corporations in which there are controlling shareholders, a model typical of European big Corporations, those controlling shareholders have substantial access to information as well as incentives to vote exercising oversight functions.

In corporations with disperse ownership, typical of USA, shareholders have diverse preferences, and usually lack both the knowledge and the incentives necessary to exercise an informed vote. The difficulty for achieving consensus among thousands of actors makes it harder for shareholders to adopt an active role. Also, it may occur that only some accrue direct benefits from activism: this is a classic example of a situation in which free riding is highly likely. However, good corporate governance depends on appropriate frameworks which encourage the

commercial and political life. Any regulatory or statutory breaches of professional conduct should be reported in full; The main terms of each director's service contract or other contractual terms or letters of appointment. (Part 2: Directors). Pensions Investment Research Consultants (UK), PIRC Shareholder Voting Guidelines (1993 and regularly revised).

<sup>32</sup> Corporate governance is an issue of concern to a wider audience.... since it relates to the exercise of power and the success of business and the wider economy. PIRC considers that corporate governance involves consideration of the range of relationships entered into by companies. Although the prime focus is on the board and accountability to shareholders, directors should identify their key stakeholders, and should report on and be held accountable for the quality of these relationships since they underpin long-term business success. (Part 4: Audit and Reporting). Pensions Investment Research Consultants, (UK) PIRC Shareholder Voting Guidelines (1993 and regularly revised).

<sup>29</sup> First Council Directive of 9 March 1968 on coordination of safeguards for the protection of the interests of members and others with a view to making such safeguards equivalent through the Community (68/151/EEC). It was amended by Directive 2003/58/EC of the European Parliament and Council.

<sup>30</sup> Regulation EC, 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of International accounting standards.

<sup>31</sup> It is generally acknowledged that (among other questions) Shareholders should have proper notice of resolutions and be able to vote on all substantive issues.....Shareholders should have adequate information on all directors and resolutions. , and that ...disclosure about the directors and the board is critical in enabling shareholders to form a proper judgment when voting. ....Areas of full disclosure include: The cycle of board and committee meetings; The availability of the terms of reference for the board and the committees; Directors' attendance record at board and committee meetings held during the year; Training provided and required for directors, and a record of who has completed this; Procedures and responsibilities for succession planning; Full biographies for all directors including dates of appointment, ages, career history prior to and in the company (in the case of executive directors), current and recent other directorships as notified to Companies House, and significant positions in public,

shareholders to exercise their rights and use their influence resulting in the management protecting the interests of the shareholders as best as possible<sup>33</sup>. It is widely recognised that *basic shareholder rights include the right to obtain relevant information on the corporation on a timely and regular basis; to participate and vote in general shareholder meetings; to elect members of the board; and to share in the profits of the corporation; and that Shareholders have the right to participate in, and to be sufficiently informed on, decisions concerning fundamental corporate changes; as well as they should have the opportunity to participate effectively and vote in general shareholder meetings and should be informed of the rules, including voting procedures, that govern general shareholder meetings. (in person or in absentia)*<sup>34</sup>. In USA the annual proxy solicitation is controlled by SEC regulation, whilst state law occupies a secondary role. In the 1950s, serious proxy fights became a major corporate law issue. State decisions favoured insurgents, but federal authorities regulated proxy contests. Proxy rules were widely viewed as responses to managerial pressure that limited insurgent shareholder's actions<sup>35</sup>.

In Europe the Directive on Cross border voting eases the exercise of such rights<sup>36</sup>. There are a number of different reasons behind the enactment of this Directive. In much of Europe there is no long tradition of proxy voting by shareholders, and this Directive enhances that voting in particular in relation with shareholders that do not reside in the same country where the Company has its seat. It was passed after other securities directives granted shareholder protection through disclosure. It contains principles, mandatory rules and rules that offer options. Its main provisions are: Equal treatment of shareholders as to participation and voting in the general meeting (Art 7); mandatory notice of general meeting<sup>37</sup> of at least 30 days and certain required information<sup>37</sup>; right to put

items on the agenda of the general meeting and table draft resolutions<sup>38</sup>; removal of requirements of any blocking mechanism such as share deposits that restricted shareholder participation in the general meeting<sup>39</sup>; right of shareholders to ask questions on agenda items which must be answered<sup>40</sup>; allowing and facilitating proxy voting<sup>41</sup> individually and through securities accounts<sup>42</sup>. It also deals with the potential of the internet and removes all legal obstacles to electronic participation in general meetings."<sup>43</sup>.

### 2.3 Other interested parties in empowering shareholders

Different to shareholders activism, but related to the relationship with other constituencies holding interests in Good Corporate Governance, Corporate Social Responsibility matters seem to be acquiring growing interest in European's Legal Systems and in North America.

European binding laws in employment, labour co determination, product labelling or environment provide for compulsory taking into account of some stakeholder's interest. Over and above binding laws, Corporate Social Responsibility practices are high on the EU agenda<sup>44</sup>. Also, European Codes of Conduct

meeting; and (4) the forms to be used to vote by correspondence and by proxy (or where and how the forms can be obtained) (Art 5(4)).

<sup>38</sup> Member States can require a minimum stake in the share capital of the issuer in order to exercise this right, but the minimum cannot exceed five percent of the share capital. Art. 6(2),

<sup>39</sup> The right to participate may be subject to a record date prior to the meeting as are necessary to ensure the identification of shareholders. Art. 7(2),

<sup>40</sup> Art 9

<sup>41</sup> Art 10 (1) and 11 (2). Proxies can be appointed by electronic means (Art 11 (1))

<sup>42</sup> Art. 13

<sup>43</sup> Electronic participation and voting was not made obligatory (Art 8 (1)), however the Directive calls for the posting of some information on the internet, such as meeting notice, number of shares and voting rights, text of proposed resolutions and related documents and forms that can be used to vote (Art 5 (3-e)) Questions can also be asked by electronic means prior to the meeting and response can be given if the relevant information is available on the company's internet site (Art 9) Proxy holders may be appointed by electronic means (Art 11-1) and Member States shall prohibit requirements, which hinder the exercise of voting rights by electronic means except if necessary for shareholder identification (Art 11-2)

<sup>44</sup> European Commission. Promoting a European framework for Corporate Social Responsibility. Green Paper, Brussels, 18.01.2001. COM (2001) 366 final. "Communication from the Commission concerning Corporate Social Responsibility: A business contribution to Sustainable Development", Brussels 02.07.2002, COM (2002) 0347 final. "Implementing the partnership for Growth and Jobs: making Europe a pole of Excellence on Corporate Social Responsibility" Brussel 22.03.2006. COM (2006) 136 final

<sup>33</sup> Nørby Report & Recommendations (Denmark)

<sup>34</sup> OECD Principles of Corporate Governance (April 1999). [www.oecd.org/daf/governance/principles.htm](http://www.oecd.org/daf/governance/principles.htm)

<sup>35</sup> SEC Rule 14a-7 requires the company to mail insurgents' proxy statements, or to furnish them a list of shareholders. The SEC's 1992 proxy amendments require that the "proxy provide for a separate vote on each matter presented."

<sup>36</sup> Directive No. 2007/36/EC O.J. L 184.

<sup>37</sup> This required information includes (1) a precise indication of the place, time and draft agenda of the meeting; (2) "a clear and precise description of the procedures that shareholders must comply with in order to be able to participate and to cast their vote in the general meeting"; (3) the applicable record date; (4) a clear and precise description of the available means by which shareholders can participate in the general meeting and cast their vote (or, alternatively, where such information may be obtained); and (5) how to obtain the unabridged text of the resolutions and the documents intended to be submitted to the general meeting for approval. See Directive No. 2007/36, art. 5(3). Also companies must post on their internet sites (1) the meeting notice; (2) the total number of shares and voting rights; (3) the texts of the resolutions and the documents for the

“widely recognise that corporate success, shareholder profit, employee security and well being and the interests of other stakeholders are intertwined and co-dependent. This co-dependency is emphasised even in codes issued by the investor community”.

American managerial system and shareholder theories are of paramount relevance, particularly in the Federal Corporate regulations level. However, a number of mechanisms exist that allow both for shareholders activism and for taking into account stakeholders interest within the Corporations’ decision making processes. Share and Stakeholders interests are taken into account at least through three different mechanisms: a) Through the implementation of Federal labour and environment Laws (RICO, ERISA, etc); b) Through non constituencies state regulations and their interpretation by courts<sup>45</sup>; c) thorough the powers granted to shareholders. USA’s Federal regulation recognises shareholders have the right, subject to various exclusions, to propose shareholder vote on certain issues. Section 14(a) of the Securities Exchange Act of 1934 empowers the SEC to regulate the shareholder proxy solicitation process, and exclusions. One of the most controversial substantive bases for exclusion is Rule 14a-8(i)(7), which allows management to exclude a proposal if it deals with “a matter relating to the company’s ordinary business operations” (by way of underlining the separation between management and shareholders), and Rule 14a-8(i)(4), which permits an exclusion if “relates to the redress of a personal claim or grievance against the company or any other person, or if it is designed to result in a benefit to [the shareholder, or to further a personal interest, which is not shared by the other shareholders at large]<sup>46</sup>” (used to exclude vote on Corporate Social Responsibility related matters).

Both SEC and Courts have been called to interpret this Rule in many occasions. In *Medical Committee for Human Rights v. SEC*<sup>47</sup>, the Court ordered SEC not to bar a shareholder proposal to cease manufacturing and selling napalm, because although “... it clearly ... is primarily for the purpose of promoting a general political, social or similar cause” shareholders should be able to put before fellow co-owners “the question of whether they wish to have their assets used in a manner which they

believe to be more socially responsible but possibly less profitable than that which is dictated by present company policy”. In 1976, the SEC changed this provision. The new test “allowed management to exclude shareholder proposals from management’s proxy materials if the proposal (1) involved ‘business matters that are mundane in nature’ and (2) did not involve any substantial policy or other considerations”. SEC’s application of this new test was rather inconsistent, by way of example in 1991 in *Amalgamated Clothing and Textile Workers Union*, a proposal was submitted asking a Company to report on its equal employment opportunity initiatives. SEC expressed that issues of affirmative action and equal employment opportunity “involve policy decisions beyond those personnel matters that constitute the Company’s ordinary business”<sup>48</sup>. However, one month later the SEC permitted *Wal-Mart Stores, Inc.* to bar a virtually identical proposal saying that “affirmative action, are, by their very nature, practices which directly relate to the conduct of the Company’s ordinary business operations”<sup>49</sup>.

In a case involving the announcement of a Company<sup>50</sup> not to hire gay or lesbian workers, and the New York City Employees’ Retirement System wish putting forth a proposal to implement a non-discrimination hiring policy with respect to sexual orientation; the SEC permitted the proposed exclusion and, after a long process, although the court ruled in favour of the claimant<sup>51</sup>, this decision was reversed by the U.S. Court of Appeals<sup>52</sup>. Soon after, a task force was formed to examine the proposal process and the results showed that 91% of companies preferred the rule allowing exclusion of employment-related proposals, while 86% of shareholders preferred to be able to include them<sup>53</sup>.

### 3. Concluding remarks

I.- Corporate Governance involves organising and prioritising a variety of interests. Disperse ownership of Company shares such as that prevailing in USA brings

<sup>45</sup> Perez Carrillo, E F “Gobierno corporativo en Europa como instrumento de atracción de inversiones y de responsabilidad social”, *Revista Criterios*, Instituto de Estudios Políticos y Sociales, vol. 5 2005. Pages 81-102. Also at *Gobierno Corporativo y Responsabilidad Social de las Empresas*, Madrid, 2009

<sup>46</sup> The earliest version of this Rule was promulgated in 1942. It required management to include any shareholder proposals that pertained to “proper subjects for action by ... security holders”. In 1952, the SEC specifically included management’s power to stop a proposal “submitted ... for the purpose of promoting general economic, political, racial, religious, social or similar causes.”

<sup>47</sup> *Medical Committee for Human Rights v. SEC* 432 F.2d 659 (D.C. Cir. 1970), vacated as moot, 404 U.S. 403 (1972).

<sup>48</sup> Dayton Hudson Corp., SEC No-Action Letter, 1991 SEC No-Act. LEXIS 428 (Mar. 8, 1991).

<sup>49</sup> Wal-Mart Stores, Inc., SEC No-Action Letter, 1991 SEC No-Act. LEXIS 572, at \*13 (Apr. 10, 1991). See Dhir, AA “Realigning the Corporate Building proposals as a vehicle for achieving corporate social and human rights accountability” *American Business Law Journal*, 43, summer 2006 at 365-412. Also, Ruiz Miguel, C “Derechos Fundamentales: Responsabilidad Social Corporativa y eficacia transnacional” Pérez Carrillo, EF, *Gobierno Corporativo y Responsabilidad Social de las Empresas*, Madrid, 2009, pp 263-282.

<sup>50</sup> Cracker Barrel Old Country Store, Inc.

<sup>51</sup> *New York City Employees’ Retirement Sys. v. SEC*, 843 F. Supp. 858 (S.D.N.Y. 1994).

<sup>52</sup> *New York City Employees’ Retirement Sys. v. SEC*, 45 F.3d 7 (2d Cir. 1995).

<sup>53</sup> *Shareholder Proposal Handbook* § 20.01[A] ( Morley et al. eds., 2002)

a primary need to balance owners and managers rights and powers. Concentrated shareholdings as are found in Europe imply certain misbalances between big owners and minority shareholders.

II.- Disclosure and cooperation can be perceived as the key elements for future developments of Corporate Governance. Difficulties for shareholders to participate in corporate decisions have been described at length over the years by many analysts. Some of them relate to the privileges of insider's, lack of disclosure, costs of activism, etc.

III.- Over the world, insider abuses have been prohibited and disclosure practices have become compulsory. Governments, legislators and regulators in their quest to strengthen their capital markets embrace this evolution. This is the way corporate governance seems to be evolving.

IV.- Another trend in nowadays Corporate governance is easing shareholders exercise of voting rights. This enables them to care for their interest and to priorities any other interests which they choose.

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