POSITION PAPER ON THE CONSEQUENCES OF SYNTHETIC STRUCTURES FOR DUTCH SECURITIES LAW AND COMPANY LAW

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1. Motivation

For a long time institutional investors have been propagating what is known as the proportionality principle; the principle that the control conferred by an equity interest in a listed company should be proportional to the capital contribution on the block of shares. This is also the reason why institutional investors are, in principle, not in favour of the adoption of anti-takeover measures, such as the issue of depositary receipts for shares, priority shares and protective preference shares under "normal circumstances", i.e. when there is no question of a (hostile) takeover situation, since these anti-takeover measures ensure that a certain party can exercise a degree of control that is not in proportion to the economic interest that this party holds in the company in question. Anti-takeover measures are not, however, the only cause of disproportionality between control and capital contribution. A varied range of financial instruments developed in the market, such as equity swaps, contracts for difference, and cash settled options, in addition to market practices like securities lending and short selling, are making it increasingly possible and simple to separate the economic interest in shares in listed companies from the legal interest. This lack of proportionality can compromise all kinds of objectives that are the subject of legislation, which can be to the disadvantage of the shareholder and the company alike, and it poses new challenges for the legislature. This position paper describes and explains the changes that must be made, in the opinion of long-term shareholders that are members of Eumedion. For this purpose, paragraph 2 first outlines the possible negative corporate governance effects of a number of financial instruments and market practices. Paragraph 3 provides a number of practical examples of these negative effects, paragraph 4 contains a number of suggestions to dispel the negative effects as much as possible and paragraph 5, in conclusion, addresses the question of whether possible measures should be considered at European level or at national level (as well).

Box 1: Derivative structures and market practices

Derivatives are financial products which derive their value from another underlying value or asset, which may be shares, bonds, raw materials, currencies or a certain index. Derivatives are generally used to cover certain risks, but they can also ensure that institutional investors achieve a better spread of various types of risks in their total investment portfolios. Normally speaking, therefore, derivatives are instruments that are used for the purposes of risk management. Derivatives can also be used, however, to uncouple the control conferred by a share from the capital contribution of that share. A number of structures of this kind are briefly described below, with the focus on derivatives that relate to shares[1].

- An equity swap is a derivative whereby one party guarantees the counterparty the complete yield of the shares in question (return and dividend, for example). The first party receives fixed compensation for this, which is agreed on in advance, such as payment of the interest (to finance the purchase of the shares in question), plus a fee. It is not unusual, when the equity swap is terminated, for the counterparty to have the opportunity of acquiring the shares directly, but without being able to lay legal claim to this, incidentally. The first party will, after all, often have covered its position by buying the relevant shares. It is also quite usual for the party who holds the shares in the legal sense to conform its voting behaviour to the wishes of the counterparty (since a commercial relationship exists after all). In the United Kingdom, the equity swap is also called a contract for difference (CFD), or a financial contract for the settlement of differences in value.
- An option is a right to buy or sell a share within an arranged period for a price specified in advance. The term cash settled option is used if settlement does not take place through delivery of the underlying share itself, but for money instead.

In addition, there are a number of market practices that may also result in the possibility of separating the economic interest from the legal ownership of shares:

- Short selling is the sale of shares that are not in the possession of the seller at the moment of sale. The short seller will benefit from a fall in the share price and there is a risk that investors will attempt to influence the market in the hope of a drop in price, by deliberately spreading negative reports about a company for example (market manipulation). A short seller should, incidentally, meet his obligations to deliver by temporarily borrowing shares from a third party. If this does not happen, then the term naked short selling applies, which is the sale of shares that the seller does not possess and without the shares being pledged at the same time.
- Securities lending is the lending of shares to a party that needs those shares temporarily (in order to go short, for example, or if a party wishes to exert influence in a general meeting, or for the purposes of dividend arbitrage or a smoother settlement of share transactions). The borrower of the shares will become the owner of the shares in the legal sense. The lender keeps the economic risk on the shares and mostly also has the right to demand the return (recall) of the shares at all times.

The term "synthetic structures" will be used hereafter in this paper to refer to the financial instruments and market practices described above.

2. Possible negative effects of synthetic structures

Securities lending makes it possible for a party to have a legal interest in a company that is not in proportion with that party's capital contribution. In such a situation, the party in question can use the legal rights that attach to the total legal interest, by making use of the voting rights to exert pressure on the management board and board of supervisory directors for example[2]. Shareholders' rights can therefore be used in this way in the situation described, without the borrower bearing the economic risk on the shares in the company in question. This is also referred to as empty voting.

[1] Based on G.T.M.J. Raaijmakers, “Synthetische aandelenbelangen in beursvennootschappen”, in: G.T.M.J. Raaijmakers and R. Abma, *Achter de schermen van beursaandeelhouders*, Preadvies van de Vereeniging ‘Handelsrecht’ 2007. Deventer: Kluwer, p. 1-72.

[2] It can also put forward subjects for the agenda of the general meeting and request the management board to organize an extraordinary general meeting.

The reverse situation can occur as well, i.e. the economic interest is greater than the legal ownership, which is also referred to as hidden ownership. The shareholder may consider this advisable in order to prevent certain obligations from applying to him, while he does actually have the possibility of exerting influence through the underlying shares. That can be done, for instance, on the grounds of the commercial relationship with the party or parties with which a derivatives contract (such as an equity swap or option) has been concluded and which holds or hold the underlying shares, or on the grounds of the possibility of ultimately being offered the underlying shares. The shareholder in question may not want to make a notification of a substantial holding, does not want to be subject to the mandatory bid rules, or wishes to present the company with a fait accompli in due course as a result of a "lighting raid" - by converting the economic interest into a legal interest shortly before the record date, for example.

Various disadvantages are implied by the hidden ownership phenomenon. First of all, no efficient price formation comes about, because the capital market does not have full information on the structure of certain interests, and secondly, there is a possibility that a party whose sole aim is the acquisition of a controlling minority interest will be able to safeguard such an interest relatively inexpensively and simply, by entering into certain derivative contracts. Should this party subsequently issue a public offer for all shares, whether this is mandatory or not, it is relatively cheap for it to do so. The takeover premium has not, after all, been factored into the share prices that are taken as the basis for the calculation of the price to be offered by law (the equitable price), since the market was in fact unaware that a certain party was building up a substantial interest. Minority shareholders are not offered a realistic exit in this way, since they are not eligible for control premium, but are nevertheless saddled with a shareholder who can veto or, alternatively, push through certain decisions in the shareholders' meeting.

In conclusion, synthetic structures can have the following effects:

1) they may undermine the original objective of the disclosure of substantial control, which was intended to provide for the transparency of the control structure of a listed company, of sizeable transactions, possible conflicts of interest, and the free float of the share (the degree to which the shares in a listed company are freely marketable);
2) they may make it possible to bypass the rationale of the mandatory bid rules, which was to offer a realistic exit to shareholders in the event of a certain party acquiring control over the company and to provide shareholders with a part of the control premium;
3) they may make it possible to reach certain thresholds in company law without bearing the economic risk on the interest in question, e.g. the threshold for the right to place an item on the agenda of an extraordinary general meeting, for the right to request that an extraordinary general meeting be convened, and for the right of investigation. The use of derivative structures may also mean that certain resolutions cannot be passed in a general meeting, or that others can be approved more easily (depending on the position of the shareholder with these derivative structures).

3. A number of practical examples

The possibility of uncoupling legal ownership from economic interest (and vice versa) is not a purely theoretical one. Synthetic structures have been used for corporate governance purposes in a number of cases, in the sense that they were used to influence voting in the general meeting or to "surprise" companies and to confront them and the other shareholders with accomplished facts. A number of recent examples are described below, along with the responses of supervisory authorities and policymakers.

Germany: Continental vs. Schaeffler

In the takeover fight between the German companies Schaeffler KG and Continental AG (July/August 2008), Schaeffler proved to have built up a total economic interest of 36 percent in Continental, partly due to concluding equity swaps with a number of banks, before Schaeffler announced a public offer for the shares in Continental. Despite the fact that Schaeffler would, in a legal sense, exceed the threshold for a mandatory bid (which is 30 percent in Germany) after declaring the public offer unconditional, it was not compelled to issue a bid of this kind. Schaeffler was exempted from this because it had issued a voluntary public offering subject to which it paid a price that was at least equal to the price that would have to have been offered in the case of a mandatory bid. This equitable price was lower, however, than it would have been if Schaeffler had not reached the mandatory bid threshold via an equity swap, but via the purchase of shares on the stock exchange instead. In that event, (part of) the control premium would have been factored into the (higher) share price, not only because of the additional demand for shares, but also, first and foremost, because of the upward effect on the share price when it becomes clear on the grounds of the rules for the disclosure of a substantial holding, that a party is in the process of accumulating a sizeable block of shares.

Continental submitted a complaint to BaFin, the German stock market regulator, about the clandestine accumulation of the economic interest by Schaeffler. BaFin stated in a decision of 21 August 2008, however, that the construction of the equity swap was such that it would be settled in cash and not by the delivery of shares, and that accumulation of an economic interest by means of cash settled financial instruments is not subject to disclosure on the grounds of German law. Furthermore, the party with which Schaeffler had concluded the equity swap (Merrill Lynch) was not holding the Continental shares on Schaeffler's behalf, according to BaFin, and there was no proof of a voting agreement between Schaeffler and Merrill Lynch. The banks with which Schaeffler had concluded the derivative contract did actually tender their shares to Schaeffler in response to the public offer. After the BaFin decision, the financial administrators of nine major German listed companies (including Daimler, Munich Re, Deutsche Bank, Siemens and BASF) asked the German legislature to amend the disclosure rules, so that equity swap transactions would also be subject to these rules.

Germany: Porsche vs. Volkswagen

On 26 October 2008 German automobile manufacturer Porsche announced that it had built up a direct equity interest of 42.6 percent in its competitor Volkswagen (VW). Porsche also disclosed an

additional economic interest of 31.5 percent by means of cash settled options and market players had not anticipated an economic interest on such a scale. The free float in VW had in fact been reduced to 5.8 percent by these transactions, because the German federal state of Lower Saxony holds an interest of 20.1 percent in Volkswagen.
Market traders had actually speculated on a fall in the price of VW shares in the days before Porsche's disclosure of the transactions and had gone short on approximately 13 percent of the total number of shares. The publication of Porsche's total economic interest forced these players to rush to cover their short positions in VW, which prompted a meteoric rise in the price of the share. The market value of VW surged by approximately 370 billion euro within a few days and VW briefly became the world's largest company (measured by market value) as a consequence. The failure to make prompt disclosure of the accumulation of a substantial economic interest contributed to this disruption of the market. On 29 October 2008 Porsche announced that, in order to prevent further disruption on the market, it would settle an interest of approximately 5 percent in cash, so that the liquidity of VW shares would increase again somewhat. An additional effect was that Porsche could pocket part of the price gain, thus benefiting from the market disruption it itself had caused.

United States: CSX Corporation vs. TCI and 3G Capital Partners
Hedge funds TCI and 3G Capital Partners waged a proxy contest in 2008 in order to have five board members "of their own" appointed at American railway operator CSX Corporation. The hedge funds jointly held 8.7 percent of the shares in CSX, but did not initially disclose that they had an economic interest of almost 14 percent in the corporation by means of total return equity swaps. Four of the hedge funds' five candidates were ultimately elected. It emerged from the court hearing on this case that, in practical terms, it was possible at all times for the hedge funds to convert these swaps into a direct interest.
CSX took the matter to court to obtain a decision on possible breach of the rules for disclosure of a substantial equity interest and the Federal District Court for the Southern District of New York ruled on 12 June 2008 that shareholders that build up an economic interest of more than 5 percent in an American company by means of derivative structures like equity swaps and use this in an attempt to influence the controlling relationships, must disclose this interest. According to the court, TCI and 3G had violated the Securities Exchange Act by their failure to promptly report their economic interest. The court did not, however, allow CSX's application for suspension of TCI and 3G's voting rights, stating that it had no jurisdiction to do so. This was confirmed on appeal, since an initiative of this kind would have to come from stock market regulator the SEC, or the Public Prosecution Service. The SEC is still considering the consequences of the decision, but structural measures appear inevitable, because the decision has created uncertainty in the market concerning the precise scope of the rules for disclosure and the call for transparency has only grown louder as a result.

United Kingdom: disclosure of CFD positions
There have been a number of controversial affairs involving derivatives in the United Kingdom in recent years. In order to prevent further problems involving hidden ownership, the FSA (the regulator

of the financial services industry in the U.K.) further decided on 2 July 2008 that stakes accumulated by means of CFDs would also be aggregated in connection with reaching the thresholds for disclosing substantial holdings. This rule will probably come into force on 1 September 2009 and complements the existing extensive disclosure regime during public offerings, which was introduced in 2005 and is functioning to the satisfaction of market players and the British Takeover Panel.

Switzerland

It became clear during the 2007 shareholders' meeting of Swiss construction company Implenia that the British hedge fund Laxey Partners held 24 percent of the shares and this stake had never been reported to the Swiss stock market regulator. According to the Swiss press, this interest had probably been concealed by means of derivative structures, such as cash settled options. It was also revealed on 20 April 2007 that the Swiss engineering group Sulzer was dominated by a group of Russian and Austrian investors, who jointly held 32 percent of the Sulzer shares. This interest too had been kept secret in part by a cash settled option structure (14 percent) by the Victory investment vehicle operated by two Austrian corporate raiders, Ronny Pecik and Georg Stumpf. These investors had already been in the news in March 2007, when they had used cash settled options to built up major interests in technology company OC Oerlikon and textiles company Saurer. The accumulation of stakes via cash settled options did not have to be reported to the stock market regulator pursuant to Swiss legislation at that time. In response to these events, Switzerland widened the scope for the disclosure of major holdings at the end of 2007, when the disclosure obligation was extended to the holding of and trading in rights to the sale of shares (acquisition and sale of put options). The obligation to disclose also covers financial instruments that do not confer the legal right to a direct acquisition of shares, but do facilitate the acquisition of shares in the economic sense in connection with a public offer.

Australia

In September 2007 the Australian company Xstrata Coal made a public offer for the shares in Austral Coal. It emerged later that year that Xstrata Coal's competitor Glencore International AG had built up an interest of 6.49 percent in Austral Coal by means of derivative structures and the takeover was impeded as a result. The stake did not have to be made public.

The supervisory authority for takeovers of Australian listed companies decided on 24 April 2008 in a response to these events that derivative structures involving more than 5 percent of the shares in a company for which a public offer has been announced or issued must be disclosed.

Other countries

Supervisory authorities in numerous other countries apart from those referred to above are considering how to tackle these problems. The disclosure rules were extended several years ago in Hong Kong, the question has led to court cases in New Zealand and Italy, and the Irish Takeover Panel recently announced its intention of expanding the scope of the disclosure rules during public offer periods.

The Netherlands

No cases of disputes in which the disclosure or failure to disclose derivative structures is the bone of contention are known in the Netherlands to date. What is known, however, is that at some point in what is known as "the Stork case", the Centaurus hedge fund had an additional holding of 4.1 percent through CFDs as well as a direct equity interest of 16.9 percent[3]. It is also known that in the ABN Amro case, the bidding consortium (Royal Bank of Scotland, Fortis and Banco Santander) did not only have a direct equity interest of approximately 4 percent in ABM Amro at a certain point in the bidding war, but also had an additional economic exposure of more than 4 percent through derivative structures like equity swaps and options[4].

In order to combat the problems of empty voting, Eumedion twice suggested to its members in 2007 that they recall any lent shares in the enterprise in question, in view of the movements in the lending market. This was done in connection with the ABN Amro general meeting in April 2007 and with the extraordinary general meeting of Fortis in August 2007. In Eumedion's estimation, there was a risk at that time that certain borrowing parties would use the voting rights on the borrowed shares to dictate the decision-making process at this shareholders' meeting[5]. According to media reports, institutional investors responded well to this suggestion, particularly where the extraordinary general meeting of Fortis was concerned[6].

Short sellers who contribute to the weakening of financial stability

There were suspicions in September 2008 that short sellers were endangering the stability of the financial sector (a self-fulfilling prophecy). There were also suspicions, however, that a number of parties were deliberately publishing incorrect reports about the financial situation of some financial institutions, causing a further fall in the share prices of the financial institutions. In view of this, a large number of stock market regulators, including the Netherlands Authority for the Financial Markets [Autoriteit Financiële Markten; AFM], temporarily banned the short selling or naked short selling of shares in financial institutions. Some stock market regulators (those of the United States and Australia) went a step further by widening the scope of the ban to cover shares in (a number of) non-financial institutions as well. In this context, supervisory authorities in the Netherlands and elsewhere have also widened the scope of the disclosure rules, precisely in order to guarantee transparency and combat market abuse.

4. Conclusion: possible measures

In the majority of cases, synthetic structures are <u>not</u> used to influence the results of voting at general meetings, or to mount stealth takeovers of listed companies. Synthetic structures contribute in general to efficient price formation on the capital market; they increase the opportunities that professional investors have for diversification and ensure, partly as a result of this, that the risk profile of the entire

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[3] Enterprise Division of the Amsterdam Court of Appeal, 17 January 2007, JOR 2007, 42 (Stork), ground for the decision 2.21.

[4] Filing by the consortium with the SEC. Also see Het Financieele Dagblad, “Trio bezit virtueel 8% van ABN Amro”, 27 september 2007.

[5] Eumedion Annual Report 2007, p. 8.

[6] See the article “Fondsen halen aandeel Fortis massaal terug” in Het Financieele Dagblad of 28 July 2007.

investment portfolio improves. The buying and selling of derivatives are completely legitimate securities transactions.

To the best of our knowledge, no major corporate governance accidents involving synthetic structures have occurred in the Netherlands as yet. As far as we know, not a single Dutch listed company has been raided by a shareholder or bidder as a consequence of derivative structures that have been kept secret, not have minority shareholders in a company been disadvantaged as yet by derivative tactics in the case of a mandatory bid, for example.[7]

Prevention is better than cure of course, and events that have occurred in various countries can also occur in the Netherlands.[8] The examples from other countries show that the corporate governance risks of synthetic structures occur mostly in what are referred to as corporate events; those situations in which there is a great deal at stake for an enterprise (its continuity in the most extreme instance), or when there is a proxy contest. The market, the supervisory authority, the enterprise and the (joint) shareholder would appear to benefit most from more transparency for derivative structures in these circumstances.

A number of targeted measures are suggested below to mitigate the negative effects of derivative structures as much as possible, while taking aspects such as proportionality, effectiveness and bureaucratic burden into account.

4.1 Measures to combat both hidden ownership and empty voting

Disclosure of substantial holdings

The original objectives of the rules for the disclosure of substantial holdings – such as transparency where the control structure of a listed company is concerned and the achievement of efficient price formation on the capital market – can be undermined by the use of new financial instruments. Despite the fact that additional bureaucratic burdens are imposed upon investors when they have to aggregate derivative positions in connection with reaching or not reaching disclosure thresholds, the importance of transparent controlling relationships and efficient price formation prevails where Eumedion is concerned. We have wondered whether the widening of the disclosure obligation should be limited to certain events of importance for the enterprise (public offers for example, or shareholder proposals on the agenda of the general meeting), but a system of that kind would be too complex. Eumedion prefers an unequivocal system and suggests that at least the most common problematic derivative positions, i.e. equity swaps and cash settled options, should be aggregated for the calculation of whether the statutory disclosure thresholds (5 percent or more, therefore, and possibly 3 percent or more in future) have been reached. Hidden ownership would become transparent as a result.

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[7] It is known, however, that Dutch listed companies are regularly approached directly by hedge funds attempting to exert influence (see A. de Jong, P.J.G. Roosenboom, M.J.C.M. Verbeek en P. Verwijmeren, Hedgefondsen en Private Equity in Nederland (RSM Erasmus University Rotterdam 2007)). The extent to which the company has sufficient insight into the size and structure of the interest in these cases is unclear and this was a cause for concern for the FSA in the United Kingdom.

[8] See T. Stevens for example, “Beursoverval ook bij ons mogelijk” in Het Financieele Dagblad of 8 September 2008.

It is important that positive and negative interests should not be set off against each other when calculating the disclosure threshold, since the potential for empty voting is exposed when the structure of the reported holding (shares, derivatives, positive interests and negative interests) is made transparent. The following example will serve to illustrate this. If a party becomes subject to a disclosure obligation due to an equity interest of 5 percent, it then becomes clear to everyone that this party has 5 percent of the voting rights at its disposal. If it is subsequently stated in the notification that a negative holding of 8 percent has been acquired by means of derivatives, it becomes clear that the party has a negative economic interest on balance and will probably be led by this when exercising the voting rights. It is logical to expect that the mere prospect of transparency will prevent parties from building up a position of this kind and exercising the voting rights improperly.

4.2 Additional measures against hidden ownership

Takeover legislation

a) The threshold for a mandatory bid (30 percent) is presently calculated on the basis of voting rights alone and so derivatives like cash settled equity swaps and cash settled options are not subject to this limit. Consideration should be given to including these structures in the calculation, since it is possible that the party holding the underlying shares will conform with the voting behaviour of the counterparty.

b) A party can be exempted from the mandatory bid rule if it acquires control as the consequence of a voluntary bid, but the Netherlands does not apply the additional condition of issuing the voluntary bid for an equitable price in order to be eligible for exemption, and consideration should be given to the introduction of a condition of this kind. The exemption is already conditional to an equitable price in Germany, but events there have shown that a party whose goal is the "mere" acquisition of a strategic minority interest is nevertheless able to acquire this interest for an artificially low price by concluding a swap transaction with a number of banks and the minority shareholder is still not offered a realistic exit as a consequence. The legislature should take this into account when defining what constitutes an equitable price.

c) On the grounds of section 13 paragraph 1 of the Public Takeover Bids Decree (Netherlands), bidder and target company must disclose all transactions in the shares in the target company during the bidding process and this disclosure also refers to the agreements concluded with regard to those transactions. The legislature should make it clear that these "agreements" also include cash settled equity swaps and cash settled options, so that there is transparency concerning the actual extent of the bidder's interest. Efficient price formation is safeguarded as a result and the target company and any competing bidders are given the opportunity to respond in good time.

4.3 Additional measures against empty voting

Thresholds for placing an item on the agenda, convening a general meeting, right to institute an inquiry

In the case of the statutory thresholds that require proof that a party is the legal owner of the shares, it is possible for the party in question to reach a threshold of this kind by borrowing shares temporarily, without bearing the economic risk on this position, therefore.

Eumedion is in favour of legal regulations that stipulate in the event of an application for a certain subject to be placed on the agenda, for an extraordinary general meeting to be convened, or that an inquiry be instituted/immediate provisions be made, that the applicant must disclose its whole position (legal and economic interests) to the enterprise and to the public. On the grounds of section 5:58, paragraph 3 of the Act on Financial Supervision (Netherlands), the AFM should designate as market abuse any transactions (including short transactions) that the applicant concludes after making the application and which have the objective of winding down its net economic interest to below the statutory threshold for making use of the shareholders' rights referred to above. The AFM could issue a line of policy to this effect, whereby the characterization of transactions of this kind lapses immediately after the record date for the relevant general meeting and the ruling of the Enterprise Division on the application.

Short selling/securities lending

- Eumedion is not in favour of a generic ban on going short on shares or on securities lending. Short selling can contribute to efficient price formation on the financial markets, since it increases the market's liquidity and overvaluation of shares can be dealt with more quickly by the market. Eumedion can well imagine that going short or naked short on shares in enterprises that are of vital importance for financial stability is forbidden temporarily in exceptional circumstances, in order to prevent the self-fulfilling prophecy from taking its course, but it must emphasized that this should be a temporary measure, in view of the above-mentioned useful function of short selling in general. Institutional investors have their own responsibilities to consistently make cost-benefit analyses in order to ascertain what the best interests of the beneficiaries are in a certain situation. A distinction should be made, incidentally, between the simple banning of short selling and the requirement for more transparency with regard to short selling, since it is conceivable that the latter can contribute to efficient price formation and supervision of market abuse.
- Hedge funds have already announced that they will no longer vote borrowed shares, as part of the code of conduct agreed on by hedge funds in January 2008. The extent to which hedge funds that have endorsed the code also actually comply with its provisions should be monitored, by the FSA for example. Institutional investors could make endorsement of the code of conduct in question a precondition for a decision to invest in certain hedge funds or to lend securities.
- Eumedion already took the position in 2006 that securities lending by institutional investors should be discouraged in event-driven situations for the listed company. There is a risk that certain borrowing parties will use the voting rights on the shares borrowed to dictate the decision-making

process at the general meeting, while the voting behaviour of these parties can be diametrically opposed to the voting policy of the parties that bear the economic risk on these shares (the institutional investors). If it is possible that a certain general meeting will produce an event-driven situation of this kind, Eumedion brings this to the attention of its members and suggests that they recall any lent shares before the record date.

- Furthermore, Eumedion supports the Securities Lending Code of the International Corporate Governance Network, which was published in July 2007 and which summarizes the points for the attention of institutional investors with regard to the lending of securities.

5. Measures at European or at national level?

Care should be taken to ensure that the Dutch capital market does not become less competitive by imposing rules on investors that go further than the European directives. As a consequence, we are in favour of effecting the measures referred to above at European level, insofar as these are rules that originally arise from European directives (disclosure of substantial holdings, public bids, sell-out rights and mergers).

If it becomes clear, however, that the European Commission does not intend to develop initiatives in this sense, the Dutch cabinet should then shoulder its specific responsibilities and put forward initiatives of its own. The position of the shareholder in Dutch listed companies is at too much risk if no measures are implemented to increase transparency, although such initiatives should then be aligned as closely as possible with the rules and practices that apply to the biggest capital market in Europe, which is that of the United Kingdom.