Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

07-Nov-2008

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
STEERING GROUP ON CORPORATE GOVERNANCE

DAF/CA/CG(2008)3/REV1
For Official Use

Shareholder co-operation or acting in concert?

Issues for consideration

19-20 November 2008
OECD Conference Centre
2, rue André-Pascal, Paris 75016

Since discussing the paper at its last meeting in April, the Secretariat has received little additional information, hence the paper is issued as REV1. The Group is invited to derestrict the paper and authorise the Secretariat to request public comments from interested parties.

For further information, please contact Mr. Grant Kirkpatrick, Senior Economist, Corporate Affairs Division (Grant.Kirkpatrick@oecd.org, tel: +33 (0) 1 45 24 75 24).

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1. Background and Purpose of this Note

1. The revised OECD Principles of Corporate Governance states that shareholders should be allowed to consult with each other, subject to exceptions to prevent abuse. The purpose for introducing this principle (II.E) was to facilitate the exercise of shareholder rights by partly resolving the "free rider" problem. It should therefore be seen as complementing principle II.F (*the exercise of ownership rights by all shareholders, including institutional investors, should be facilitated*). In practice, shareholder consultations and co-operation has generated a lively discussion about situations when such practices should be regulated.

2. This note provides a background to the main issues involved and examples of how the issue has been approached in some Member countries. The Steering Group is invited to discuss the note and de-restrict it as a basis for public consultation. The Secretariat foresees that the note would be sent to investors and organisations with a close connection to the topic. This would include regulatory bodies. It would also be put on the website with an open invitation to comment. Following a public consultation, the Steering Group will be able to consider the need for issuing a Commentary on the OECD Principles providing users of the Principles with additional guidance for effective implementation and assessment in this specific area.

2. The Issue

3. The issue of joint shareholder actions has gained in importance as activist shareholders often communicate with each other in mounting campaigns to influence either the composition of the board and/or the decisions of a company. Under certain circumstances – that may vary among OECD jurisdictions – such co-operation may have legal implications. In many jurisdictions, corporate and/or securities legislation provides that persons who form an agreement or understanding with one or more other investors about acquiring, holding, voting or disposing of a company's securities are considered to be "acting jointly", "acting in concert" or a similar term. The consequences may be that the holdings of the "joint actors" are aggregated for the purposes of laws that govern:

- disclosure of significant holdings (including determination of whether or not thresholds for disclosure have been crossed);
- takeover bids and tender offers (including determining whether or not a threshold relating to the definition of a takeover bid or tender offer has been crossed, which could mean that the joint actors become obliged to make a bid or offer or are considered to have illegally acquired securities in breach of takeover bid / tender offer laws);
- insider dealing and insider reporting (*e.g*. persons or companies who, individually, own less than the threshold percentage of shares might be considered to meet the definition of insider if their holdings are aggregated with joint actors); and/or
- control share, anti-greenmail and similar provisions.

4. The obvious challenge that regulators face is to find a workable definition of "acting in concert" that on the one hand allows shareholders to consult with each other and effectively exercise their shareholder rights, and on the other hand inhibits abusive shareholder practices. As indicated above, different approaches have been suggested and it is not surprising that the concept of "acting in concert" has evolved primarily to underpin regulations governing takeovers.[1] In the US, where there are no formal

[1] "Acting in concert" is also used to underpin declarations by major shareholders that are common in most, if not all, OECD countries. For example, in the UK, "concealed ownership is to a great extent handled by the definition of indirect holders of shares which occurs if a person is entitled to acquire, to dispose of or to

mandatory takeover rules, the SEC nevertheless requires those acting in concert to be deemed one person for the purposes of Schedule 13 D disclosure. Given the legal consequences of failing to register it is perhaps not surprising that one study found that that 27 per cent of 13D filings involved multiple activist hedge funds reporting as a single person.[2]

5. The restrictiveness or otherwise of acting in concert rules depends on the definition of "agreement or understanding", and the concept of corporate control. For example, if an "understanding" is to be defined as being implicit from coincidental actions, then the ability of shareholders to consult will be severely limited. Similarly if the concept of corporate control underlying takeover arrangements extends to seeking to change the company's business model or strategy, then the possibilities for cooperation will be severely limited since they might be liable to make a bid for the company.

6. In addition to regulatory requirements, companies themselves sometimes include provisions in articles of incorporation/association, by-laws or shareholder rights plans that are triggered when the holdings of a person or of joint actors exceed a specified threshold percentage of the company's voting securities. Because the consequences of becoming a joint actor can be significant and, at times, adverse, investors often are very cautious about how they communicate with other investors and/or engage in coordinated activities.

7. Against this background, the Steering Group has found a need to review different approaches to regulating shareholder co-operation and to discuss their merits and country experiences.[3] The ultimate objective is to assess the need for issuing a Commentary to the OECD Principles that provides users with additional guidance how to develop and implement effective provisions in this area.

8. Section 3 presents the issues about which the Steering Group is seeking public reaction. Section 4 outlines the relevant principles and the approach of the Assessment Methodology. Section 5 reviews the situation in selected jurisdictions in order to illustrate some of the principal issues involved.

3. Questions for Consultation

- *In your experience, does regulation related to shareholder consultation strike the right balance between facilitating effective use of shareholder rights and preventing abuse? Have you experienced major differences between countries? Please provide examples.*

- *In your experience, is the legal and regulatory framework relating to consultations among shareholders sufficiently clear and predictable when defining "acting in concert"? Please provide examples.*

- *In your view, what should be the guiding principles for defining "acting in concert"?*

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exercise voting rights in respect of the relevant company, for example entering into an agreement with a third party who holds voting rights to exercise the voting rights in some concerted policy towards the management of the company or an agreement which provides for the temporary transfer of voting rights" ([DAF/CA/CG(2007)5/FINAL], pp 9).

[2] Brav et al op cit.

[3] The question of acting in concert during takeovers involving, *inter alia*, insiders such as management, is discussed further in the paper *Conflicts of Interest and the Market for Corporate Control* [DAF/CA/CG(2008)2] in the context of private equity and is not dealt with further in this note.

- *In your view, could the OECD Principles and the Assessment Methodology, described below be improved to provide better guidance on how to define and implement effective regulation relating to consultations among shareholders?*

4. The Position of the Principles

9. Principle II.G of the OECD Principles of Corporate Governance recommends that "*shareholders, including institutional shareholders, should be allowed to consult with each other on issues concerning their basic shareholder rights as defined in the Principles, subject to exceptions to prevent abuse*". The underlying concern is to deal with the free rider problem so as to "*facilitate the exercise of shareholder rights*". The co-ordination problems facing dispersed shareholders are well documented and can result in under-monitoring of boards and management, thereby giving rise to agency costs. The annotations to the principle note that "*shareholders should be allowed and even encouraged to co-operate and co-ordinate their actions in nominating and electing board members, placing proposals on the agenda and holding discussions directly with a company in order to improve its corporate governance. More generally, shareholders should be allowed to communicate with each other without having to comply with the formalities of proxy facilitation*.

10. Shareholder rights are defined, *inter alia*, by principles II.A, II.B and II.C including II.C.2. Principle II.A recommends that "*basic shareholder rights include the right to ... elect and remove members of the board*". Principle II.C.2 recommends that "*Shareholders should have the opportunity to ask questions of the board, .. to place items on the agenda, and to propose resolutions, subject to reasonable limitations",* and II.C.3 "*effective shareholder participation in key corporate governance decisions, such as the nomination and election of board members, should be facilitated..".* In addition, principle II.B states that "*Shareholders should have the right to participate in, and to be sufficiently informed on, decisions concerning fundamental corporate changes such as: ..2) the authorisation of additional shares; and 3) extraordinary transactions, including the transfer of all or substantially all assets, that in effect result in the sale of the company".*

11. The board is expected to fulfil certain key functions including reviewing and guiding corporate strategy (principle VI.D.1), a role in strategy not being listed as a shareholder right. However, this clean divide might be difficult to maintain in practice unless other basic rights of shareholders were to be excessively constrained. As noted above, in practice members of the board might well be nominated and elected by shareholders on the basis of their views about where the company should be headed. Indeed, many shareholder conflicts with boards at AGMs revolve around strategic questions.

12. The Methodology noted that "*shareholder co-operation or co-ordination can also be used to manipulate markets and to obtain control over a company without being subject to take-over regulation. For this reason, in some countries the ability of shareholders to cooperate on their voting strategy is either limited or prohibited. The lack of shareholder and investor groups might indicate that the current system is highly constraining and individuals and organisations should be consulted to see if this is the case. The challenge for the reviewer and for policy dialogue is to ensure that the balance between the two concerns allows sufficient room for legitimate shareholder activity. A well functioning take-over market, with clearly defined rules about what constitutes seeking control, will go a long way to alleviating concerns about undermining take-over rules and market manipulation. The reviewer will need to examine this particular situation"*. The following essential criteria for assessing implementation of the principle were suggested:

1. *The corporate governance framework establishes clear rules for proxy solicitation which are not so encompassing as to prevent shareholders consulting with each other over the use of their basic rights, for example, to elect and remove board members.*

2. *Market trading rules should prevent market manipulation but still be flexible enough to permit and encourage consultations between shareholders*.

5. Measures and experience in selected jurisdictions

13. Active shareholders usually first resort to "engagement" with the board and/or management of a target company. This is often private and will involve a number of meetings and phone conferences[4]. If they are not satisfied with the outcome they may take public action, or at least threaten to take public action, in relation to annual general meetings (AGMs) or extraordinary general meetings (EGMs) covering (a) board elections at AGMs; (b) shareholder proposals at AGMs; (c) proposed mergers, acquisitions and takeovers that require shareholder approval at an EGM. At all stages, actual and/or potential voting strength is important for the active investor and this will involve finding and communicating with allies using the options that are available.

5.1 Rallying support from other shareholders

14. One way of communicating in order to gain allies is simply for the investor to go public and such cases have been observed recently in a number of countries including, Italy, the Netherlands and Japan (Generali, ABM-Amro, J-Power). In other cases, investors might contact other shareholders or analysts as part of a more public and confrontational strategy. The contacts might relate to soliciting; i) public support in connection with a press campaign; ii) votes in a proxy contest; iii) support for a shareholder proposal or to requisition an extraordinary general meeting; and/or iv) support for the investor's opposition to a proposed transaction or takeover. Depending on the laws of the jurisdiction in question, some or all of the activities described above may fall within the scope of corporate and securities regulatory provisions governing proxy solicitations.

15. Public announcements by investors also have the advantage of attracting the attention of proxy advisors who often side with activists and encourage major institutional investors to vote in their favour. According to a recent survey of The Business Roundtable, institutions that follow Institutional Shareholder Services voting recommendations owned 40 per cent of responding members' shares.[5] A study of activist hedge funds reports that in 72 per cent of media reported cases of proxy contests initiated by a fund, proxy advisors have sided with the activist investors and recommended a vote in favour of their proposals.[6]

5.1.1 United States

16. In a number of OECD countries where shareholder powers vis-à-vis a board are important (e.g. UK, Netherlands, Australia), shareholder proposals are often used in order to achieve demands. They are also a widely used method to obtain wider support in the United States but are subject to more restrictions than the usual size and holding period thresholds. SEC Rule 14a-8 enables shareholders owning a relatively small amount of the company's securities to have their proposal placed alongside management's proposals in that company's proxy materials for presentation to a vote at an annual or special meeting of shareholders. It is less expensive for a shareholder to raise issues through a shareholder proposal than to prepare its own proxy solicitation materials and then solicit proxies. A shareholder that has held at least 1% or USD 2 000 worth of the relevant voting securities for at least one year prior to the date of submitting the proposal can submit a proposal. In the Netherlands, there is now a proposal to increase the threshold from

[4] For typical details about conduct see Becht, M et al (2006), "Returns to shareholder activism: evidence from a clinical study of the Hermes UK Focus Fund", *ECGI Finance Working Paper*, 138.

[5] Statement by F.D. Raines to the SEC, 10 March 2004 available at www.businessroundtable.org/newsroom.

[6] Brav.A, et al, 2007, *Hedge fund activism, corporate governance and firm performance*, SSRN

1% to 3% which will make shareholder cooperation even more important for submitting proposals in large companies. In the US, the rule generally requires the company to include the proposal unless the shareholder has not complied with the rule's procedural requirements or the proposal falls within one of the rule's thirteen substantive bases for exclusion. A company that receives a request from a shareholder to include the shareholder's proposal in the company's proxy materials can choose to do so or it can choose to exclude the proposal so long as it files its reasons with the SEC. However, companies generally seek a "no-action letter" from the SEC if they intend to omit a proposal because they can face an enforcement action if they improperly omit a proposal.

17. In the US, more than a thousand shareholder proposals are submitted to companies each year and SEC staff consider several hundred requests from companies for no-action relief. Although available information is incomplete, it appears that although shareholder proposals are a popular tool among traditional institutional investors (*e.g.* pension funds) and individuals. Activist hedge funds, however, seem to use them less frequently. The reasons for this are unknown. One of the reasons could be that some of the bases for exclusion of shareholder proposals deal with the very decisions and processes that activist hedge funds often wish to influence. For example, a company can exclude a proposal that:

- deals with a matter relating to the company's ordinary business operations (when activist investors engage with companies, they often seek to influence decisions about the company's operations);

- the proposal relates to specific amounts of cash or stock dividends (when activist investors engage with companies, they might call for the company to pay an extraordinary cash dividend or to pay regular dividends at a higher rate); or

- relates to an election for membership on the company's board of directors or similar governing body.

18. Even if rejected at an early stage by the company and the SEC, shareholder proposals in the US might constitute a relatively inexpensive way to escalate a public campaign and thereby increase pressure on companies to make the changes recommended by the investor. Such a strategy could backfire, however, if, for example, a company decides to raise the stakes (and likely increase the activist investor's out-of-pocket expenses) by initiating a lawsuit to challenge the request.

19. As discussed below, recent proposals in the Netherlands and in Germany to restrict or hinder shareholder proposals regarding what is termed "corporate strategy" resemble the exclusion powers in tiret one above regarding the company's ordinary business. However, with the power of shareholders in these countries to nominate and elect boards, it is not self-evident that such proposals can be clearly separated from other business and not re-emerge in another form. In the US, the ability of companies to choose not to accept proposals concerning its ordinary business does not necessarily frustrate active shareholders but merely changes how it is done.

20. Obtaining/soliciting support for shareholder proposals including proxy fights can, however, involve the need to comply with proxy solicitation laws. The SEC amended its proxy solicitation rules, effective in 2000, which made it easier for investors to communicate with each other, an outcome advocated by the Principles. Both written and oral communications are permitted before the filing of a proxy statement, provided that:

- all written communications relating to the solicitation are filed on the date they are first used;

- all such written communications contain a prominent note advising security holders to read the proxy statement when it becomes available;

- proxy solicitors make information about participants available by including with written communications a prominent note advising security holders where they can obtain a detailed list of the names, affiliations and interests of the participants in the solicitation; and

- no form of proxy can be furnished to an investor until a definitive proxy statement is filed.

21. The principal difference between the old regime and the new regime is that a person who is considering or intending to solicit proxies no longer has to prepare and pre-clear proxy solicitation materials with the SEC before starting to communicate with investors. It should be emphasised, however, that all written communications under the new regime are subject to the anti-fraud laws in federal securities legislation. Bratton (2007) notes that, under this liberalised regime, "the line separating a proxy threat from a proxy contest is not very clear". It is easier and less costly for an activist investor to attract attention and support among market participants, analysts and the media for its threatened proxy solicitation – without having to go to the significant expense of actually soliciting proxies.

5.1.2 Canada

22. In Canada until relatively recently, the proxy solicitation laws were so strict that shareholder communication with each other was discouraged. It is also said to be the reason why a shareholder group (Canadian Coalition for Good Corporate Governance) to promote good corporate governance was so late in being formed. The *Canada Business Corporations Act* (CBCA) used to provide that, subject to certain limited exceptions, no one could solicit proxies from Ontario security holders of a "reporting issuer" (*i.e.* a company considered to be publicly traded in Ontario) unless the person delivered a proxy information circular to the person whose proxy was solicited concurrently or before the solicitation. The terms "solicit" and "solicitation" were defined very broadly to include, among other things, any request for a proxy, any request to execute or not execute a form of proxy, any request to revoke a proxy, sending a proxy and/or the sending or delivery of "any communication" to a security holder in circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy. This broadly worded definition of solicitation raised concerns among market participants that it was impeding shareholder communications, even communications that simply involved the expression by a shareholder of how they intended to vote and why. Subsequently, the definition of "solicit" was amended in the CBCA to exclude, among other activities: *(a)* a public announcement in prescribed form by a shareholder of how the shareholder intends to vote and the reasons for that decision; and *(b)* a communication for the purpose of obtaining the number of shares required to be eligible to submit a shareholder proposal.

5.2 Acting in Concert in the context of corporate control

5.2.1 UK

23. The most clear cut guidelines concerning acting in cooperation and takeovers concerns rule 9.1 of the UK's Panel on Takeovers and Mergers.[7] The question concerns whether cooperation between shareholders to replace even an entire board would constitute a takeover (of control) and therefore amount to acting in concert. If the latter is determined, then consequences follow including reporting and perhaps also the need to make a mandatory bid offer to other shareholders. The Panel determined that whether a proposal is board control-seeking would be determined primarily by the relationship between the group of activist investors and the potential new board members. If there is a commercial relationship (other criteria

[7] *Shareholder Activism and Acting in Concert*, Consultation Paper Issued by the Code Committee of the Panel, Panel on Takeovers and Mergers, London, March 2002. See also Statement by the Code Committee of the Panel following the External Consultation Process on PCP 10, July, 2002.

are also listed)[8] then the proposal would amount to acting in concert. The statement also deals with situations of concern for this paper. A group of shareholders might propose that the company should sell one of its businesses and return the cash proceeds to the shareholders. The strategy change approach could see such a call as changing strategy and therefore the possibility of acting in concert would arise. Under the approach of the Takeover Panel, the proposal would not amount to control seeking unless the activist shareholders threaten either explicitly or implicitly, to make changes to the board of the company unless their proposals are implemented. Even then, it is the relationship of the new directors to the activist investors that is the decisive factor.

5.2.2 The Netherlands

24. Shareholder activism which might lead to takeover proposals (not necessarily by the proponents) including shareholder proposals and public campaigns involving changes in corporate strategy has led to an intensive debate in the Netherlands. The most recent case concerns ABM Amro but others include Stork. As a result, the Monitoring Committee on Corporate Governance which oversees the Dutch Tabaksblatt code for listed companies called at one stage for a six month notification period for a shareholder proposal that covers corporate strategy, so that the company could mount a defence. They also called for the threshold for requiring a shareholder to disclose their intentions (similar to SEC Schedule 13d) to be reduced from ten percent to five percent. This was rejected by the Dutch Ministry of Finance.

25. In the Netherlands, the interpretation on what it means to act in concert has been clarified recently. Under the current "acting in concert" regime, there are no explicit restrictions against concerted actions. To be sure, case law provides that voting agreements may as such not violate the Dutch Civil Code or any other legal rules or regulations. In particular, a contractual commitment to act in concert does not impact a shareholder's right to pursue its own interest in exercising its voting rights as long as the general principles of corporate law are taken into account. Essentially, the law allows an agreement obliging a shareholder to vote in favour of a particular proposal only where the proposal has been described. An agreement to vote always in respect to the instructions of a third party is prohibited if the circumstances are not foreseeable. Shareholders are allowed, however, to consult with each other prior to a shareholder meeting and subsequently vote at the meeting based on the prior consultation. This is not deemed to be acting in concert.

26. If parties have forged an agreement that provides for a long-term joint policy on voting, each party is deemed to be able to use the votes that are at the other party's disposal. Such an agreement is involved if they have agreed to conduct a long-term policy in relation to the target company, which policy is expressed through the joint exercising of their voting rights. In this regard, the Netherlands Authority for Financial Markets (AFM) has articulated a rule that a long term agreement need not actually be a written agreement. Thus, if a major shareholder makes an announcement regarding the extent of their shareholdings, but does not comport with their disclosures already made in respect of the voting policy, the AFM can investigate. In addition, the AFM can pursue an investigation if a major shareholder makes announcements about other investors in respect of an acquisition or strategy pursued by a company and the parties concerned, but failed to disclose their interest.

[8] In determining the relationship between any of the proposed directors and any of the shareholders proposing or supporting them, relevant factors would include; whether there has been any prior relationship between any of the activist shareholders and any of the proposed directors; whether there are any agreements, arrangements or understandings between any of the activist shareholders and any of the proposed directors with regard to their proposed appointment and; whether any of the proposed directors will be remunerated in any way by any of the activist shareholders as a result or following the appointment.

27. In many of the recent takeover cases in the Netherlands it has been noted that the shareholder base can change rapidly and funds such as event-driven hedge funds and others can gain a substantial stake. A number of provisions have been introduced to mitigate the conflicts of interest that arise under such circumstances. For instance, a recent provision has been added to the Financial Supervision Act (FSA) that provides that if different funds are managed by the same manager, then the manager must notify all voting rights of the same fund. A related provision introduces a duty to notify votes of a third party with whom a shareholder has entered into an agreement which provides for substantial coordination on voting. However, it is unclear to what extent this provision can actually deal with, or need deal with, activist shareholder cooperation. In the main, some say that there is a pervasive problem with such efforts since shareholders are entitled to consult their fellow shareholders to gain support, but there is little justification for the board having an advantageous position unless, pursuant to Article 5:45(5) of the FSA, shareholders have entered into an enforceable agreement how to vote their shares. Conversely, others reply that since this situation is both rare and difficult to prove, arguably this provision is unlikely to serve as an effective tool to increase the disclosure of shareholder coordination of votes.

5.2.3 Germany

28. Acting in concert has been defined under German law as "co-ordinating conduct on the basis of an agreement or in a similar manner"[9]. Sections 30 and 35 of the German Takeover Act (*Wertpapiererwerbs- und Übernahmegesetz*, WpÜG) describe the consequence that a mandatory offer has to be made if the votes of parties acting in concert exceed 30%. Agreements on the exercise of voting rights in individual instances ("*Einzelfälle*") are excluded from the definition[10]. In addition, case law has emerged laying down additional criteria to clarify this legal definition of acting in concert. In a landmark case, (Pixelpark Aktiengesellschaft), the Higher Regional Court of Frankfurt held that the serious legal consequences of acting in concert demanded further clarification and developed the following criteria:[11] parties are acting in concert if they co-ordinate their behaviour with the objective to exercise voting rights in a coordinated and continuous manner and to exert enduring ("*nachhaltig"*) influence. In 2006, the Federal Court of Justice provided for further clarification (Münchener Rückversicherungs-Gesellschaft AG) construing the legal definition of acting in concert narrowly[12]. It held that only coordinated behavior relating to the exercise of voting rights during the AGM can amount to acting in concert. Many activist investors have expressed concern about whether cooperation that is allowed in other jurisdictions might nevertheless be interpreted as acting in concert in Germany, and therefore either be illegal and /or require a mandatory bid for the company, depending on the voting power of the "group".

29. The German federal government has now modified the concept of acting in concert with the Risk Limitation Act (*Risikobegrenzungsgesetz*), the voting rights sections of which will come into force on 1 March 2009.[13] The law envisages the following definition of acting in concert: concerted actions in a manner suitable to influence the corporate strategy (i.e. business model) permanently or substantially. Contrary to what was contemplated in the government draft, shareholders coordinating their conduct in individual cases continue to fall outside the scope of acting in concert. Jointly exercising influence on issuers does not per se constitute acting in concert, as long as it is limited to specific individual cases

[9] Section 30 para. 2 of the German Takeover Act and section 22 para. 2 of the German Securities Trading Law (*Wertpapierhandelsgesetz*, WpHG).

[10] Section 30 para. 2 of the German Takeover Act.

[11] OLG Frankfurt, 20th Zivilsenat, 25 June 2004, ref. no. WpUeG 5/03, WpUeG 6/03, WpUeG 8/03.

[12] BGH, 2nd Zivilsenat, 18 September 2006, ref. no. Az. II ZR 137/05.

[13] For an English language discussion of the law see J. Perlitt et al, 2008, "German risk Limitation Act Provide for investor Transparency and Protection of borrowers", *Euro Watch*, September 15

(*Einzelfälle*). Where the parties acting in concert are deemed to hold more than 30 per cent of the voting rights, a mandatory bid offer must be launched. Any party holding over 10 per cent of the voting rights must declare the source of their financing and their intentions with the investment[14]. This is similar to the SEC's schedule 13d. A loss of voting rights for a lengthy period is foreseen as an enforcement mechanism. The draft bill met with considerable opposition and it remains to be seen whether legal uncertainties will serve to reduce shareholder cooperation and activism.

30. Some commentators have suggested that in both Germany and the Netherlands the approach to the use of shareholder rights in cases concerning "control" is perhaps made more complex by the stakeholder approach to corporate governance. In this view, fundamental questions such as strategy should involve other stakeholders such as through representation on the supervisory board in German companies. However, it is not clear that the rights of one category of stakeholders are necessarily supported by limiting the influence of others. The board is a key player in intermediating competing demands so that it is important that its duties are effectively defined and enforced.

5.2.4 Italy

31. Given the importance of shareholder pacts in Italy, which must be registered, the discipline of acting in concert is somewhat different. Up till recently the three criteria for acting in concert were: subjects who are parties in an agreement, either valid or null, aimed at regulating voting rights at the general meetings of listed companies; managers or CEOs of one same country and; subjects who are connected with each other by control relationships, either a shareholder and the companies he controls (directly or indirectly), or companies controlled by the same shareholder. If the sum of the shares involved exceeds 30 per cent there is an obligation to launch a takeover bid. A recent amendment has added a new criterion to acting in concert as "those subjects who cooperate for the purpose of acquiring the control of the issuing company". One study has noted that it is not entirely clear how such cooperation is supposed to be verified, something which might introduce uncertainty for institutional investors who want to actively participate in company life without acquiring control.[15]

[14] This is also the case in Korea and is similar to declarations under schedule 13D in the US. In Korea, changes were introduced following the activities in the Korean market of an activist investor (Sovereign). See OECD Economic Survey of Korea, 2007. In Japan, there has also been concern to declare the "beneficial investors" if an investment fund is involved. The proposed German law also covers beneficial ownership which would be disclosed to the management board but not to shareholders.

[15] Paolo Santella, et al, *A Comparative Analysis of the Legal Obstacles to Institutional Investor Activism in Europe and in the US,* SSRN, abstract 1137491