

DE BRAUW
BLACKSTONE
WESTBROEK

Codes, Directors and Governance

The future of corporate governance in an international perspective

Corporate Accountability Conference
Amsterdam, 3 december 2009

Prof. Harm-Jan de Kluiver

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European developments

- Focus on: (Mc Greevy)
 - "Transparency"
 - "Shareholder empowerment" (Mc Greevy)
- Role of non-executives and independents
 - Recommendation concerning non-executive and independent directors (15 februari 2005)
- 13th Directive: level playing field for takeovers?

United States

- Focus on financial control (Sarbanes-Oxley)
- Appointment of directors still primarily a right of the Board

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	<p data-bbox="477 331 695 363">Four focal points</p> <p data-bbox="1047 310 1198 369">DE BRAUW BLACKSTONE WESTBROEK</p> <ul data-bbox="500 506 943 709" style="list-style-type: none">• Directors and major shareholders• Independence of directors• Role of directors when appointing executives• Role non-execs in case of takeovers
	<p data-bbox="813 947 927 961">Prof. Harm-Jan de Kluiver</p> <p data-bbox="1049 947 1125 961">3 december 2009</p> <p data-bbox="1182 947 1187 961">2</p>

	<p data-bbox="464 1192 889 1224">Directors and major shareholders</p> <p data-bbox="1047 1184 1198 1243">DE BRAUW BLACKSTONE WESTBROEK</p> <ul data-bbox="500 1377 862 1465" style="list-style-type: none">• Contact with major shareholders• Responsibility of major shareholders
	<p data-bbox="813 1818 927 1833">Prof. Harm-Jan de Kluiver</p> <p data-bbox="1049 1818 1125 1833">3 december 2009</p> <p data-bbox="1182 1818 1187 1833">3</p>

	<p>Contact with major shareholders (1): United Kingdom</p> <ul style="list-style-type: none"> • (D.1): The Chairman (and senior independent director and others as appropriate) should maintain sufficient contact with major shareholders to understand their issues and concerns. • (D.1.1): The Chairman should discuss governance and strategy with major shareholders. Other non-executives "should expect to attend if requested by major shareholders". • (A.3.3): one of the independent non-executive directors = 'senior independent director' available to shareholders if they have concerns which contact through the normal channels of chairman, CEO or CFO has failed to resolve or for which such contact is inappropriate • (D.1.2): In the annual report the steps to develop an understanding of the views of major shareholders should be stated. • (A.2.2): if CEO becomes chairman "the board should consult major shareholders in advance" 	<p>DE BRAUW BLACKSTONE WESTBROEK</p>
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	<p>Contact with major shareholders (2)</p> <ul style="list-style-type: none"> • Discussing which issues? By whom? • Dutch Corporate Governance Code (IV.3.1): presentations to (institutional) shareholders should be announced and everybody should be able to observe (webcasting/telephone etc) • Dutch Corporate Governance Code (IV.3.4): Direct talks with shareholders are not to be held prior to publication of "financial information" • Dutch Corporate Governance Code (IV.4): Institutional shareholders should be prepared to entertain constructive dialogue if company wants to deviate from the Code. 	<p>DE BRAUW BLACKSTONE WESTBROEK</p>
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	<p data-bbox="462 344 917 373">Contact with major shareholders (3)</p> <p data-bbox="1047 315 1201 373">DE BRAUW BLACKSTONE WESTBROEK</p> <ul data-bbox="479 478 1226 714" style="list-style-type: none"><li data-bbox="479 478 1226 588">• Italy (12): The chairman and managing directors shall actively endeavour to develop a dialogue with shareholders and (in particular) institutional investors. They shall designate a person (or corporate structure) to be responsible for this.<li data-bbox="479 630 1226 714">• Spain (II.1): The board must ensure a dialogue with institutional investors "so that these may become familiar with and participate in corporate plans, objectives and achievements."
	<p data-bbox="812 947 933 959">Prof. Harm-Jan de Kluijver</p> <p data-bbox="1047 947 1128 959">3 december 2009</p> <p data-bbox="1177 947 1193 959">6</p>

	<p data-bbox="462 1188 755 1247">Responsibility of major shareholders (1)</p> <p data-bbox="1047 1188 1201 1247">DE BRAUW BLACKSTONE WESTBROEK</p> <ul data-bbox="495 1327 1226 1780" style="list-style-type: none"><li data-bbox="495 1327 1226 1381">• Netherlands (IV.4):<ul data-bbox="535 1354 1226 1381" style="list-style-type: none"><li data-bbox="535 1354 1226 1381">- institutional shareholders act primarily in the interest of their investors<li data-bbox="495 1417 1226 1564">• UK (E.1):<ul data-bbox="535 1449 1226 1564" style="list-style-type: none"><li data-bbox="535 1449 1226 1501">- Institutional shareholders should enter into a dialogue with companies based on mutual understanding of objectives<li data-bbox="535 1507 1226 1564">- and inform the company in advance of intention to abstain or vote against a resolution<li data-bbox="495 1600 1226 1780">• Spain (II.3):<ul data-bbox="535 1631 1226 1780" style="list-style-type: none"><li data-bbox="535 1631 1226 1684">- Institutional investors are responsible for making use of their votes in a responsible manner and<li data-bbox="535 1690 1226 1780">- in the event of voting against a resolution they should notify such circumstance in advance and publicly state the grounds for such decision.
	<p data-bbox="812 1816 933 1829">Prof. Harm-Jan de Kluijver</p> <p data-bbox="1047 1816 1128 1829">3 december 2009</p> <p data-bbox="1177 1816 1193 1829">7</p>

Responsibility of major shareholders (2)	DE BRAUW BLACKSTONE WESTBROEK	
<ul style="list-style-type: none">• Belgium (8.12): controlling shareholders should diligently exercise their position and respect the rights and interests of minority shareholders.• Frankrijk (7.2.1) actionnaire majoritaire assume une responsabilité propre à l'égard des autres actionnaires et doit prévenir conflit d'intérêts et a tenir équitablement compte de tous les intérêts.• See also AFG (II.A.1): "Il est recommande que sa stratégie et son action s'inscrivent dans le cadre du developpement durable de l'entreprise.• l'AFG incite les gestionnaires a prêter une attention toute particulière aux aspects sociaux et environnementaux sur un périmètre identique a celui des comptes consolidés. [sic!]		
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Independence of non-executive directors	DE BRAUW BLACKSTONE WESTBROEK	
<ul style="list-style-type: none">• One tier / two tier?• Number• Criteria• Role		
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	<p style="text-align: right;">DE BRAUW BLACKSTONE WESTBROEK</p> <p>One tier or two tier?</p> <ul style="list-style-type: none"> • One tier model seems to become more popular and is facilitated by legislatures (starting with the European Company SE which requires governments to give a choice) • Unclear whether popularity is based on better results or on desire to be more attractive to anglo-saxon investors • Two tier board criticism: supervisory directors <ul style="list-style-type: none"> - are not involved - and not informed (as good as members of a one tier board) • One tier board criticism: non-executives <ul style="list-style-type: none"> - may not be as knowledgeable as necessary - and too much involved to critically oversee decisions by themselves 			
	<table border="0" style="width: 100%;"> <tr> <td style="text-align: right; font-size: small;">Prof. Harm-Jan de Kluijver</td> <td style="text-align: center; font-size: small;">3 december 2009</td> <td style="text-align: right; font-size: small;">10</td> </tr> </table>	Prof. Harm-Jan de Kluijver	3 december 2009	10
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	<p style="text-align: right;">DE BRAUW BLACKSTONE WESTBROEK</p> <p>Number and independence (1)</p> <ul style="list-style-type: none"> • EU Action plan 2003 (3.1.3): in key areas decisions to be made by non-executive directors "who are in the majority independent" • Netherlands (III.2.1.) All members (but one) of the supervisory board must be independent from the shareholders and the company • UK (A.3.2): half the board (+ chairman), should comprise of independent non-executives (smaller companies at least two) • NY SE (Corporate Governance Rules s. 303A; most recent version of 25 november 2009) Listed companies must have a majority of independent directors. (Commentary: "will increase the quality of board <u>oversight</u> and lessen the possibility of damaging conflicts of interest"). • However, the concern is independence from management, NYSE does <u>not</u> view ownership of significant amount of stock as a bar to independence. 			
	<table border="0" style="width: 100%;"> <tr> <td style="text-align: right; font-size: small;">Prof. Harm-Jan de Kluijver</td> <td style="text-align: center; font-size: small;">3 december 2009</td> <td style="text-align: right; font-size: small;">11</td> </tr> </table>	Prof. Harm-Jan de Kluijver	3 december 2009	11
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	<p>Number and independence of non-executives (2)</p> <p style="text-align: right;">DE BRAUW BLACKSTONE WESTBROEK</p> <p>Germany</p> <ul style="list-style-type: none"> • (5.4.2): The Supervisory board should consist of an in its view appropriate number of independent directors (“Aufsichtsrat soll eine nach seiner Einschätzung ausreichende Anzahl unabhängiger Mitglieder angehören”). <p>Spain</p> <ul style="list-style-type: none"> • (1.3): In companies without majority shareholder or controlling group "there must be a majority of independent Directors amongst the external/non-executive directors. In any event the number of independent directors should not fall below <i>one third</i> of the total Board members.
	<p style="text-align: right;">Prof. Harm-Jan de Kluijver 3 december 2009 12</p>

	<p>Number and independence of non-executives (3)</p> <p style="text-align: right;">DE BRAUW BLACKSTONE WESTBROEK</p> <p>France</p> <ul style="list-style-type: none"> • (7.2.2 en 8.2): It is important to have a significant number of independent directors, • which would mean 50% of the board in listed companies • and in other companies at least one third (8.5): • Directors representing major shareholders may be regarded as independent if they do not participate in the control of that holdingcompany
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Number and independence of non-executive directors (4)	DE BRAUW BLACKSTONE WESTBROEK	
Italy		
<ul style="list-style-type: none">• (2.1): number and standing of non-executive directors shall be such that their views can carry significant weight in taking board decisions;• (3.1): An adequate number on non-executive directors shall be independent. Indicating precise criteria would not be helpful in this respect. (3.2)• Formation of an internal control committee made up exclusively of independent directors.• Independent directors may be proposed by the controlling or majority shareholders; independence is an objective quality that cannot be affected by the type of shareholder making the proposal.		
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Independence and its relevance	DE BRAUW BLACKSTONE WESTBROEK	
<ul style="list-style-type: none">• Supervision of management / financial expertise• Advise / strategic aspects• Role external advisors (Merchant Banks)		
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	<h2>Role non-executives in takeovers</h2> <ul style="list-style-type: none">• Strategic fit (perspective bidder or target)• Financial aspects/ Venture Capital• Role/position of managing board upon completion of the takeover	<p>DE BRAUW BLACKSTONE WESTBROEK</p>
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	<h2>Some (provocative) conclusions</h2> <ul style="list-style-type: none">• Essential for non-executives is contact with major shareholders• Major shareholders will be represented in board, or at least will strongly influence appointments• Non-executives will increasingly rely on financial advise of outsiders (merchant banks)• Independent directors will concentrate on financial reporting and internal controls and less on business policies of the company.• All this may justify or even require to strengthen considerably the role and the number of (non-independent) executives on the board.	<p>DE BRAUW BLACKSTONE WESTBROEK</p>
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