

SESSION III: MECHANISMS FOR EQUITABLE TREATMENT

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EASD AND EASDAQ - A PAN-EUROPEAN EXAMPLE¹

I. INTRODUCTION

1. EASD is a non-profit organisation assembling representatives of the professions concerned with the development of equity stock markets in Europe – banks, brokers, lawyers, accountants, investor relations specialists, etc.
2. Formed in 1995 in the wake of the recent European "Investment Services Directive", its first objective was to set up a truly cross-border pan-European stock market called EASDAQ. This independent electronic market opened in 1996. On it, shares of growth companies are listed and traded, in particular IT, bio-tech and other fast growing companies – many in their first stages of development.
3. Owners of such companies are often founder-entrepreneurs, unfamiliar with the requirements of outside shareholders. This lack of familiarity is quite similar to the situation largely prevailing in emerging markets. At a certain stage, founder-entrepreneurs require additional equity (for example to bring their inventions to the commercial market) at a level needed to make their companies viable and healthy, a sound basis for future growth. To obtain these additional funds, they obviously have to learn and respect what new outside shareholders demand to accept investing their money.
4. With this in mind, EASDAQ and EASD have each worked to create the right framework within the legal setting in which the market and its actors operate.
5. Many of the matters to be solved - including the equitable treatment of shareholders of the companies listed - must be compatible not only with local law, but also with local custom and especially with some fundamental views that are held on society and the role which companies play in them. Here differences can be far reaching. In particular some believe that a company's single main goal is to maximise value for its shareholders. Others place equal emphasis on the role of other stakeholders in the company, i.e. personnel, providers of credit (banks), suppliers and clients, not to mention the communities in which the company is active.
6. What is sure however is that the shareholders are owners who bear the ultimate risk of the company: if it fails, the creditors will get paid back first and only if there is anything left – which is often not the case – will shareholders receive something back. So shareholders deserve due recognition ensuring that they are treated fairly and adequately protected. Unless they enjoy appropriate rights, or if these are not respected, they will refrain from investing – or from investing again! – and the market and the economy as a whole will suffer.

II. THE LEGAL AND REGULATORY ENVIRONMENT

7. Many of the rights and protections of shareholders stem directly from imperative provisions of the law – company law, securities law, etc. – as well as regulation – stock-exchange rules, accounting rules, etc.

¹ The views expressed in this paper are those of the author and do not necessarily represent the opinions of the OECD or its member countries. This paper is subject to further revisions.

8. European legislation does not apply *directly* to companies or markets: the directives that the European Union produces must first be transposed into the individual legislation of each member state, which is done with many variations.

9. EASDAQ had to choose a home in one of these states and it elected Belgium. Even if its market must abide by Belgian legislation and regulation, some facets of its activities - which are Pan-European in scope and reach - must also take into account the laws and rules of other countries. For example, if a resident of Italy wants to buy shares of a Dutch company through a London broker on the EASDAQ market, or if a French company wants to take over an Austrian EASDAQ-listed company, different aspects relating to these transactions and indeed to the companies involved will be regulated by different rules.

10. In addition to national regulations, EASDAQ has published its own market rulebook (approved by the authorities in Belgium, its home state) in respect of its listed companies and of those involved in listing, placing and trading the securities. This rulebook was elaborated and is regularly updated with the help of the professionals at EASD. It contains imperative rules, including some on corporate governance and shareholder rights in particular.

11. Now different companies can find themselves in very different situations that cannot all be accommodated in a uniform set of compulsory rules. On its part, EASD has also worked on best practices in corporate governance. EASD has thus prepared recommendations based on universal underlying principles. These can be applied anywhere in Europe, whatever the local prevalent societal models and legislation, much in the spirit of the OECD guidelines, but perhaps a little more concrete in its specific approach to practical questions. EASD's Corporate Governance Principles and Recommendations have been under preparation for three years and are due to be published two months from now.

12. EASD's Recommendations are by definition not mandatory, but EASDAQ has decided to append them to its rulebook with the expectation that companies seeking listings will accept and follow them. Nevertheless, if a company feels that its particular situation warrants deviations from the recommendations, it can do so but will then be required to disclose what those deviations are and why it is believed they are justified. It will then be up to the market to judge whether these explanations are satisfactory. If not, it is likely that the share price will suffer, and this would increase the cost of capital to the company - an appropriate sanction.

13. In this combined system, different situations can be flexibly taken into account: differences in the power structure of companies (for example with either one-tier or two-tier boards, with or without staff representation); differences in sizes of companies; differences in stages of development - small start-up situations do not command the same type of governance provisions as large mature companies. So this obviates the "one-size-fits-all" problem as it is called.

III. SHAREHOLDER QUESTIONS COVERED BY EASD-EASDAQ RULES, PRINCIPLES AND RECOMMENDATIONS.

14. The phrase "equitable treatment of shareholders" implies that shareholders can be treated unfairly, which leads to the question: how and by whom?

15. To simplify, let us consider three angles from which the question is viewed by EASDAQ's imperative rules as complemented by EASD's recommendations:

16. the company and its organs

17. other shareholders

18. the market and financial intermediaries

1. The company and its organs: the board, the management and, accessory, the auditors.

19. Shareholders buy into companies that are run according to its internal rules (by-laws) by boards and managers who act as shareholders' agents in pursuing the companies' objectives. Since the boards and managers are composed of human beings who have their own interests – and may suffer from weaknesses such as greed, the lust for power or vainglory – and since they have more knowledge about the companies' affairs than most shareholders ever can, they are in an excellent position to abuse the shareholders if they are tempted to do so.

20. A first protection for shareholders is to be assured of being recognised as such once they have bought the shares, by appropriate proof of transfer and ownership.

21. A second protection concerns the possibility for shareholders to be regularly and properly informed. They must be told about the affairs and performance of the company, past and projected. They must also be kept abreast of who are in charge of running the company, how much they are paid, how they discharge their duties, how "independent" they are and what conflicts of interest they may have. Shareholders must also know about the internal rules of the company and their rights as shareholders. To add credence to the information disclosed, it must be verified professionally and independently according to recognised standards. As Brandeis, a celebrated economist, already wrote in 1914 in *Other People's Money*, in a parody of the advertising world, "sunlight is the best disinfectant, electric light is the best policeman."

22. A third protection is the prohibition of insider trading on the part of boards, management (and their advisers and confidants) privy to information undisclosed to the public. This only works of course if the authorities investigate and sanction infractions.

23. A fourth protection is the right of shareholders to intervene effectively and without excessive cost or difficulty at general meetings of shareholders in decisions of direct concern to them. Such decisions include: the appointment and dismissal of their agents (board members), the modification of the internal rules of the company, especially those that alter their respective rights such as dilution from capital increases - including stock-option plans - and major events like mergers or liquidation that have a direct impact on the nature and value of their holdings.

2. Other shareholders

24. Typically, if the company has a controlling shareholder or group of shareholders, there exists the possibility for them to extract personal benefits to the detriment of other shareholders that are too weak to make themselves heard or respected.

25. In EASDAQ's rules and EASD's recommendations, some shield from abuse is offered by the following mechanisms: the disclosure of who the large shareholders are (acting individually or in concert, for example directly through shareholder agreements, or through ownership pyramids), the existence of appropriate internal rules of the company on the conduct of general shareholders meetings and voting procedures, the mandatory disclosure of conflicts of interest and related party transactions, and the presence on the board and its committees of directors really independent of both the controlling shareholders and management.

26. On the other hand controlling shareholders can themselves be subjected to abusive tactics used by some minority shareholders who intentionally prevent the proper process of general meetings.

27. Another case of abuse can occur during take-over bids: when the buyer of shares has amassed enough shares to give him control over a company and paid the necessary premium for them, he can stop buying - leaving the other shareholders in a minority position with shares suddenly worth much less. This is one of the areas where laws and rules of various countries can come into conflict, and EASD has issued recommendations (separate from its

corporate governance recommendations) as to what it considers best practice in this field – on the basis that all shareholders in the same position need to be treated equally.

3. The market and financial intermediaries

28. Specific market rules include measures to promote fair treatment of investors in shares by various methods:

29. First EASDAQ's Market Authority only accepts the listing of those companies who are deemed to comply with predetermined standards of structure, governance, behaviour, accounting, auditing and disclosure. An admission procedure with considerable due diligence is imposed at the outset, but thereafter the company must also be seen to conform to continuing obligations in respect of the elements under scrutiny.

30. Second, the Market Authority limits market access to intermediaries by a similar screening process, in order to determine whether they are considered fit and proper to engage in the securities business.

31. Third, the Market Authority imposes dealing codes and rules of conduct on trading in the market which intermediaries undertake to follow. Compliance with these rules are the object of surveillance, and if need be investigation, prosecution and sanction.

32. The same applies to the marketing of securities and the way in which the information is conveyed to investors. The objective here is to prevent gullible investors from being subjected to unscrupulous sell tactics. It is also to place shareholders on an equal footing regarding the information that is made public, on which they base their investment or divestment decisions, thus avoiding the abuse of insiders. It should be noted that insiders are not limited to company staff and their advisers, or closely connected shareholders. They also include financial analysts of banks and brokers who in the course of their normal business get to know certain elements of the company's affairs and financial condition before they are made public.

IV. CONCLUSIONS

33. The problems of equitable treatment of shareholders are far from new. But they are complex, and in practically all jurisdictions had not been treated thoroughly enough until quite recently: abuses and scandals have revealed big holes in protective mechanisms.

34. Because capital markets are essential for the cycle investment-growth-jobs-prosperity, governments everywhere have over the past two decades revised legislation. At the same time, private and public financial circles - institutional investors, the auditing profession, and stock exchanges - have reconsidered business practices, inventing the name if not the concept of corporate governance.

35. This has been true at the national level and during the last few years, in the wake of increased globalisation of markets and the economy, at the international level as well. EASD and EASDAQ are no exceptions. And if their experience is admittedly recent, they can help others benefit from it².

² EASD's Corporate Governance Principles and Recommendations can be downloaded from its website www.easd.com. Hard copies can be obtained by writing to EASD, 56 Rue des Colonies, bte 15, B-1000-Brussels, or by e-mailing to ead@ead.com.

EASDAQ's Rule-book can be downloaded from its website www.easdaq.com.