



European Private Equity &  
Venture Capital  
Association

International Meeting on Corporate Governance  
of Non-listed Companies  
*Istanbul, 19-20 April 2005*

ACCESS TO CAPITAL AND IMPLICATIONS  
FOR CORPORATE GOVERNANCE

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# Introduction :

## What is EVCA ?



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- Represents the private equity industry in Europe :
  - ✓ more than 1,000 members
  - ✓ In more than 20 countries
- Private Equity in 2003 :
  - ✓ € 29,1 billion invested
  - ✓ in 7,466 companies
  - ✓ 60% of these companies have less than 1,000 employees

# Introduction : EVCA's role in the CG debate



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- CG is essential for the growth of companies.
- EVCA has played an important role in developing CG good behaviors for 20 years.
- That role has changed a lot of habits including in NLC's which were not concerned by private equity investments.
- That justifies that EVCA has its saying in the worldwide CG debate.



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# INTRODUCTION

## Implications for CG

- *"Corporate Governance is one key element in improving economic efficiency and growth as well as enhancing investor confidence"* (OECD Principles of Corporate Governance, 2004)
- Successful investment requires well-informed decision making at all level and by all parties

# PLAN



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1. Should the regulators impose CG rules for NLC's ?
2. Conduct of the private equity and venture capital investor in the investee company



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1. Should the regulators  
impose CG rules for NLC's?

1.1 Distinction between LC's and NLC's

1.2 Why should they be treated  
differently ?

1.3 General principles

## 1.1 Distinction between LC's and NLC's

- There are more NLC's than LC's ;
- NLC's have very different structures :
  - They may be bigger than LC's ;
  - They may have only one shareholder ;
  - They may have a board or not.

## 1.2 Why should they be treated differently ?

Different purposes of CG rules in LC's and in NLC's explain why they should be treated differently :

### a) Purpose in LC's :

Protection of capital market and particularly, of investors (in particular private individuals).

That purpose justifies the adoption of rules that apply to all LC's.

## 1.2 Why should they be treated differently ?



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### b) Purposes in NLC's :

- Better running of NLC's

Each company is unique and is legally using one of the many possible structures existing for the NLC. It is therefore extremely difficult to rule for all types of companies, without trying to address each situation.

## 1.2 Why should they be treated differently ?

- Risk of counter-productive laws

Ex. : Protection of minority shareholders

At the same time, the law gives rights to minority shareholders and tries to limit potential abuses. However, it often results in better protecting majority shareholders (legally, minority shareholders without blocking minority have almost no right).

## 1.2 Why should they be treated differently ?

- There is a risk that the law :
  - refrains imagination and freedom which are essential for success and growth of NLC's.
  - creates new burdens which will have a negative effect on the dynamism of the NLC's.

Cf. Statistics :

Big NLC's owned by families are more profitable than certain LC's.

- Respect of interests of stockholders and not only of shareholders



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## 1.3 General principles

EVCA has defined 6 general principles of good CG in NLC's :

- a. Law and regulations
- b. Integrity
- c. Long term view
- d. Respect for stakeholders
- e. Transparency
- f. Confidentiality



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## a. Law and regulations

The Private Equity and Venture Capital Investor will act in accordance with applicable laws and regulations of the jurisdictions in which the business takes place.



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## b. Integrity

The Private Equity and Venture Capital Investor will :

- act with integrity towards the investee company and its stakeholders, and
- seek to ensure that the investee company conducts its business with integrity



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## c. Long term view

The Private Equity and Venture Capital Investor aims to create value by :

- taking a long term view of investment, and
- supporting management in the achievement of long term objectives and strategies.



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## d. Respect for stakeholders

The Private Equity and Venture Capital investor will :

- respect interests of stakeholders (investment fund providers, the fund manager, the board of directors, company management, employees, customers suppliers...), and
- appropriately manage conflicts of interest.



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## e. Transparency

Clear disclosure and timely communication of relevant and material information will facilitate high quality decision-making.

## f. Confidentiality



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Investee company information are confidential and shall not be used in a way that is detrimental to the investee company.

## 2. Conduct of the investor within the investee company



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### Preliminary remark :

The conduct of the private equity and venture capital investor in the investee company is set out in an agreement at the time of the investment :

- in the *by-laws* of an investee company (French SAS), or
- in a *shareholders' agreement*.



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## 2. Conduct of the investor within the investee company

2.1 Principles of conduct as shareholder

2.2 Principles of conduct as board member

## 2.1 Principles of conduct as shareholder



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- a) Influence on the investee company as shareholder
  
- b) Duties as shareholder

## a) Influence on the investee company

The degree of activism of the Investor will depend on :

- the size of the fund investment,
- the Investor's capacity to add value to the investee business, and
- the level of influence that the Investor considers to be appropriate.

# a) Influence on the investee company



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By requiring :

- More frequent and detailed information than required by law,
- Quorum for shareholder's decisions / Veto.

## a) Influence on the investee company



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Risk of being deemed to be *de facto* manager if the investor manages the company instead of the proper legal representative

In such a case, the Investor will have the same liability as a *de jure* manager.



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## b) Duties as shareholder

1. Duties to other shareholders in the same or other classes of shares and to bondholders
2. Duties in relation to strategy
3. Duties in relation to performance information

## 2.2 Principles of conduct as board member



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- a) Directors' duties
- b) Directors' responsibilities
- c) Appointment of an observer to the board

## a) Directors' duties

- Obligation to act in the best interest of the investee company
- Investors should ensure that :
  - board appointees are individuals of appropriate authority and experience who can provide value to the investee company,
  - board appointees understand their responsibilities both to the Private Equity and Venture Capital Investor and as an individual member of the board.

## b) Directors' responsibilities

Risk of being held to be jointly and severally liable to the company or third parties for :

- breach of corporate law,
- breach of the company's article of association, or
- Mismanagement.

**NB**: Directors' liability increases in the event of insolvency of the company.

## c) Appointment of an observer

- This position allows access to board meetings without having :
  - voting rights, and
  - any of the other obligations and liabilities of a director.
  
- Such observer shall have the same rights as directors in relation to the supply of information to the investors.

# Conclusion



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Private equity and venture capital investments are characterized by a great deal of shareholder involvement in the strategy and direction of the investee company.

Undeniably, private equity and venture capital investors contribute to promote good corporate governance in NLC's.

# Conclusion



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It has been noticed that companies in which private equity and venture capital investors have invested experience fewer financial difficulties than others thanks to the efficiency of the corporate governance standards that they develop in unlisted companies.