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Value preservation and Value recovery: Two sides of the same coin

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- Being an investor means much more than buying, selling and holding shares: investors have **rights and responsibilities** (fiduciary duties)
- The **exercise** of those rights can help investors protect the value of their investments
- Different contexts and different objectives:
 - Value **Preservation**: how to prevent losses from occurring?
 - Permanent (constructive) dialogue and shareholder engagement
 - Exercise of shareholders' rights as a risk management tool
 - Special situations (mergers, takeovers, etc.)
 - Value **Recovery**: how to recover losses when they occurred?
 - Litigation - Collective actions in Europe
- Combination of Value Preservation and Value Recovery: the Fortis case

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- Investors can try to prevent losses while they still can
- Two possible attitudes:
 1. Sell shares
 2. Engage with company and exercise shareholders' rights
- Some losses cannot always be anticipated and/or prevented as fraud or mismanagement is sometimes difficult to detect before the consequences become visible
 - e.g. accounting fraud, misleading information

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NEW PROFILE FOR INVESTORS

THEN:

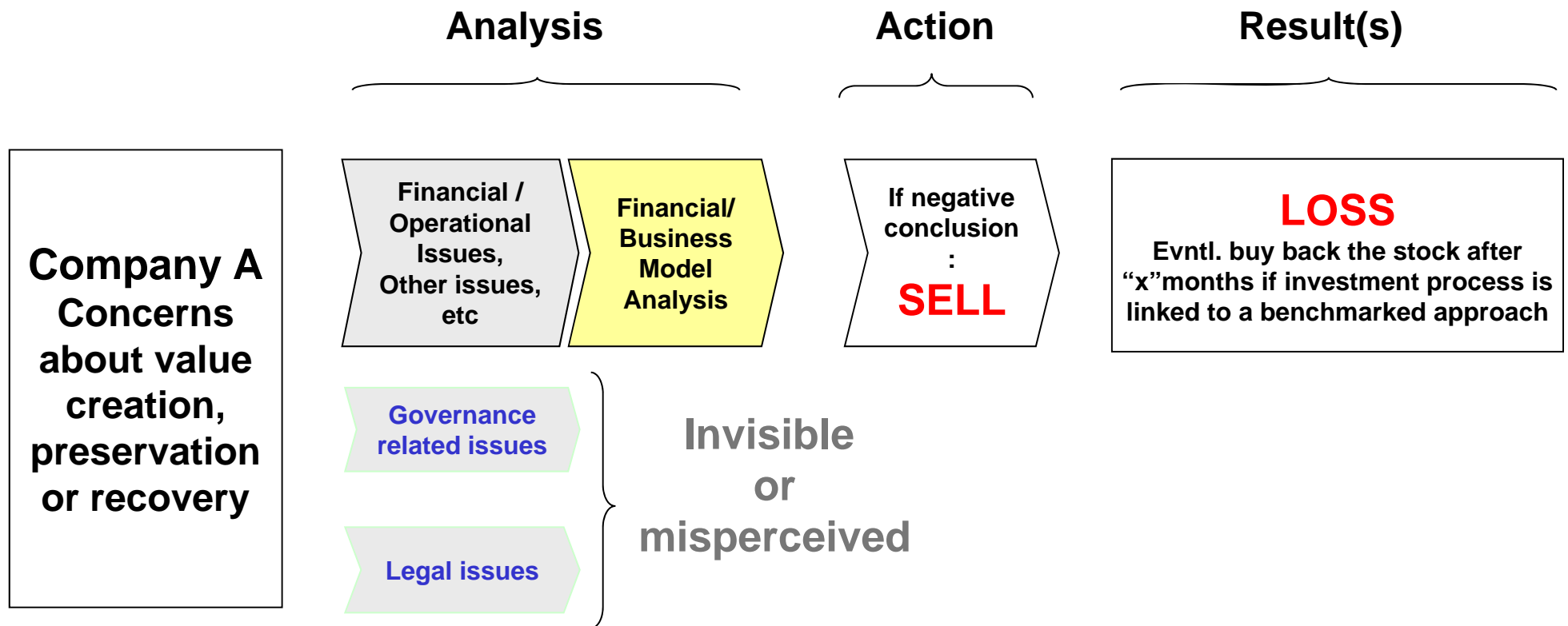
- Reactive
- Risk averse
- Incidentally involved
- 'Treasurer'
- Engagement limited to the AGM only

NOW:

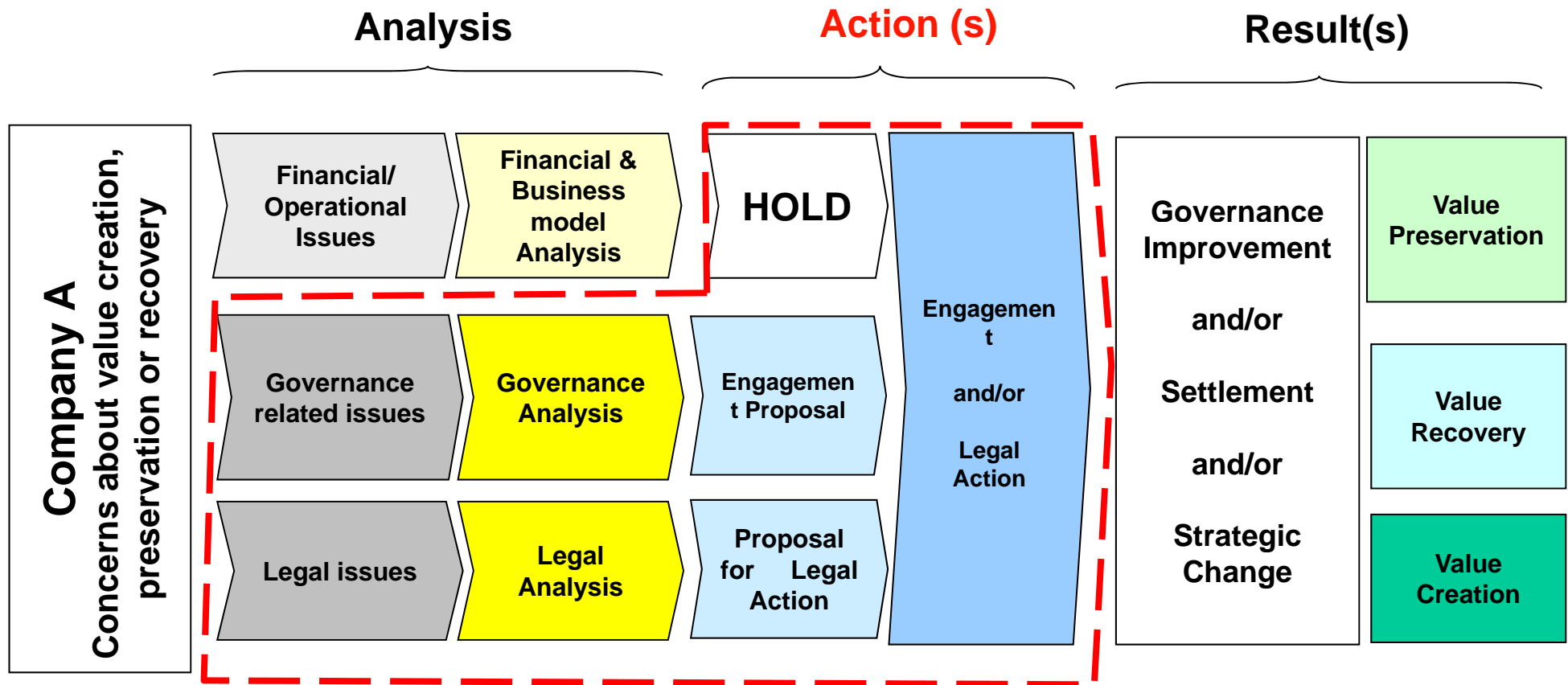
- Pro-active
- Risk managing
- Continuously involved
- Responsible Investor
- Permanent engagement: before, during & after the AGM

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- Topics for engagement:
 - Strategy: disclosure, (quantified) objectives, opportunities and challenges
 - Exposure to risks and risk management
 - Transparency: quantity & quality of information
 - Board composition: experience, diversity, leadership, independence
 - Return for shareholders: dividend policy, share buybacks
 - Use of cash, M&A policy
 - Related party transactions
 - Takeover defences
 - Management compensation: alignment with shareholders' long term interests
- Engagement can take the form of a continuous (constructive) dialogue
- Engagement supplemented with consistent exercise of voting rights at the shareholders' meeting

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- Engagement in case of “special event”:
 - Mergers, takeovers, squeeze-out, etc.
 - Can lead to value destruction:
 - Share exchange ratio
 - Expropriation at a low price
 - Dilution
 - Objective: take necessary steps in order to oppose value-destroying transactions or to obtain better conditions (improve exchange ratio, offer price, etc.)
- Litigation can also be used as an efficient tool to prevent value destruction
 - Summary proceedings
 - Court injunctions
- Individual or collective engagement ?
 - A larger block of shareholders may have a greater impact
 - In a special event (merger, etc.), efficient engagement may require a minimum percentage of the share capital (blocking minority, request for an EGM, etc.) which can be difficult to reach for an individual shareholder
 - How to deal with the issue of “concert party action”?

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- Value preservation may sometimes require an appropriate combination of engagement, exercise of shareholders' rights (proxy fight) and litigation
 - Illustration: the Fortis case
 - Stage 1 – July-September 2008: engagement
 - Launch of public case in Belgium and in the Netherlands
 - Discussions with market regulator and with Fortis
 - Request for an extraordinary general meeting
 - Stage 2 – October 2008-April 2009: proxy fight and litigation
 - Summary proceedings to freeze transactions, call an EGM, appoint experts
 - Several EGMs to appoint new directors and vote on transactions
 - Negative votes led to renegotiation of transactions
 - Stage 3 – since May 2009: litigation
 - Legal procedures against Dutch government and against Fortis
 - Objective: claim damages

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- Rationale behind collective actions may also apply to engagement
 - Representativity
 - Financing of engagement and cost allocation
 - Visibility
 - Incentive to find a constructive solution (settlement)
- Challenges
 - Regulatory issues (e.g. concert party action)
 - Free riding
 - Evolution of mentalities (still too many “passive” investors)
 - Different legislations and different protections for minority shareholders in spite of harmonisation within the European Union

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- Litigation should seriously be considered when
 - Preventive measures (engagement) are not (always) sufficient to avoid or reduce losses
 - Sudden and unexpected losses occur
- Litigation has become part of a responsible management of investments
 - Litigation is no longer disregarded by investors
 - The experience with US class actions has raised European investors' awareness
 - Litigation considered as complementary to public policies (e.g. private enforcement of antitrust regulation)
- Synergies between engagement and litigation
 - Litigation can sometimes capitalize on results achieved by engagement and vice versa (information gathering, analysis, etc.)

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- European legal environment may not be as efficient as in the US...
 - No US-style *class* actions in Europe (not yet)
 - No uniform *collective* action procedure throughout Europe
 - Diversity of judicial systems and legislations
 - Contingency fees may be prohibited in some countries
- ... but practical and legal solutions are available
 - “Bundling” of claims (e.g. Fortis case)
 - Use of internet and new technologies to manage mass tort cases
- Evolution in the US may also have an impact on European investors’ attitude towards collective actions to recover losses
 - US Supreme Court’s decision expected in *Morrison v. National Australia Bank*
 - Will foreign investors still be able to launch or join class actions in the US?

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- Main challenges:
 - Complexity of cases dealing with financial instruments
 - Access to information – Transparency rules and discovery
 - Diversity of jurisdictions and legislations
 - Costs related to legal procedures
- Efficient European collective actions require:
 - Capacity to react quickly
 - Good understanding of the financial aspects of the case
 - Selection of appropriate jurisdiction
 - Identification of relevant legal arguments
 - Appropriate funding of collective actions