

FROM SHAREHOLDER RIGHTS TO SHAREHOLDER DUTIES

– a transformation of EU corporate governance in a sustainable direction?

AGENDA

- Shareholder duties in EU company law
- Why shareholders?
 - Explaining shareholder duties in a law and economics framework
- Shareholder engagement in the SRD II
- SRD II duties as a driver for transformation?
- Enforcement of shareholder duties
- Beyond the SRD II

SHAREHOLDER DUTIES IN EU COMPANY LAW

‘We have spoken for years about shareholders’ rights.
It is time to also talk about shareholders’ obligations’.

(The then Commissioner for Internal Market and Services, Michel Barnier, 2010)

WHY SHAREHOLDERS? (I)

- Shareholders are not the only group of stakeholders with a strong interest in corporate behaviour
- Still, the discussion (and the regulation) only concern shareholders
- The obvious answer:
 - Shareholders have a unique position in company law
 - Focus of the 2007 Shareholder Rights Directive
 - Shareholder rights are fundamental to the European Corporate Governance Framework

WHY SHAREHOLDERS? (II)

- Most of the duties can be explained by a law and economics framework
 - Agency relationships
 - (Shareholders vs. board of directors)
 - Minority vs. majority shareholders
 - Other contractual company constituents vs. shareholders
 - Externalities
- Disclosure duties
 - May offset an agent's potential information advantage
 - Important to allow the principal to control the agent's behaviour
 - Apply often to specific shareholders or a subset of shareholders

SHAREHOLDER ENGAGEMENT

- An emerging agenda
 - Traditionally, the corporate governance agenda has been optional for shareholders
 - Shareholders' role in corporate governance is primarily defined by shareholders' rights
 - Part of governance strategy where the shareholders are the principals vis-à-vis the directors
- Disclosure duties are imposed on the institutional investors through the amended Shareholder Rights Directive
 - Institutional investors as agents?

THE AMENDED SHAREHOLDER RIGHTS DIRECTIVE

- Engagement policy, Art. 3g
 - 1 (a) Institutional investors and asset managers shall develop and publicly disclose an engagement policy that describes how they integrate shareholder engagement in their investment strategy.
 - 1 (b) Institutional investors and asset managers shall, on an annual basis, publicly disclose how their engagement policy has been implemented, ... They shall publicly disclose how they have cast votes in the general meetings of companies in which they hold shares.
- Disclosure duties

AIM OF ENGAGEMENT DUTIES

- The aim goes beyond disclosure
- ‘... Public disclosure of such information could have a positive impact on investor awareness, enable ultimate beneficiaries such as future pensioners to optimise investment decisions, facilitate the dialogue between companies and their shareholders, encourage shareholder engagement and strengthen their accountability to stakeholders and to civil society.’

ENGAGEMENT DUTIES – WHAT SHOULD WE EXPECT FROM INSTITUTIONAL INVESTORS?

- The rationale behind institutional investors' engagement duties?
 - Constrain behaviour or ensure control by principals
 - Positive change of behaviour
- Do institutional investors have sufficient incentives to engage?
 - Duty of loyalty?
 - Financial incentives?
- Are shareholders' interests aligned with the interests of other company constituents?

ENFORCEMENT OF SHAREHOLDER DUTIES

- Enforcement becomes essential to ensure the impact of SRD II
- Are enforcement mechanisms adequate?
 - Art. 3g (1): Member States shall ensure that institutional investors and asset managers either comply with the requirements or publicly disclose a clear and reasoned explanation why they have chosen not to comply with one or more of those requirements
 - Art. 14b: Member States shall lay down the rules on measures and penalties applicable to infringements of national provisions...
- Who will enforce engagement beyond disclosure?

IMPLICATIONS FOR A TRANSFORMATION BEYOND SRD II

- Transformation initiated by:
 - The company
 - Shareholders use their rights to control and monitor performance
 - The shareholders
 - Can shareholders initiate a transformation?
 - Legislation
 - Enforcement?
 - Scope?
 - Effect and costs



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