

Corporate Governance

CG-responsibility of
shareholders in Germany

Law and Reality

by

VIP eV - Association of
Institutional Shareholders
Cologne - Germany

Aktiengesetz

- Since 1965 the Companies Act has provided that shareholders should exercise their rights in company affairs in the
General Meeting - AGM

Bodies of the company - two tier board

- AGM
 - organ of decision making
- Executive and Supervisory boards
 - organs of action

Incoherences

- *“Automatic” passage from CEO to Chief of Supervisory Board - without cooling-off period*
- *Consequent conflict of interest*
- *CG-Code still defines two former CEOs on the SB as "best practice"*

Decisions of the AGM

- the appointment of the Supervisory Board
- the utilization of balance-sheet profit
- discharge to members of the boards
- capital measures
- auditors
- charter amendments
- special audits
- the dissolution of the company
 - if the executive board so requests:
- questions of the conduct of business

Co-determination

- *German Co-determination Act provides that members of staff should be elected to the Supervisory Board.*
- *Only German employees of world wide operating firms elect representatives to the Supervisory Board,*
- *Unavoidable conflicts of interest on the Board (Lufthansa, Bsirske – 2003*

Voting rights

- According to the face value of shares
and with individual share certificates
- according to their number
on the principle
“one share – one vote”.

Voting rights

- *Still some critical points in relation to preference shares*
- *No “golden share” situation*
- *Dominating position of a minor shareholder, namely the State*

Shareholder's rights and duties at the AGM

- Attendance of the AGM
- Information about company matters (Q&A session)

(Any information made available to a single shareholder even outside the AGM must be made accessible to every other shareholder)

German AGM!

- *Intensive, and not all the time qualified Q&A session*
- *Important for a good performance and for reaching a timely conclusion and efficiency:*
 - ◆ *Sensitive handling by the chair of the meeting,*
 - ◆ *Quality of highly-equipped back office*
 - ◆ *unambiguous self-presentation by the firm*

Guideline

- "Perseverance" in doing business and the "social responsibility of entrepreneurship" (laid down in the Basic Law – "property has its obligations" – Art. 14 of the Constitution) are explicit guidelines for German capital investors

Beneficial owner

- *Investment companies still misjudge the link between “active AGM involvement” (personally or through professional proxy agents), corporate governance and value creation.*
- *A causal factor for the underdeveloped debate on the role of the BENEFICIAL OWNER is probably the fact that a UK/US-type pension system – in which the pension money is collected and managed outside the firm – does not (yet) exist in this form in Germany.*

Shareholder Associations

- Associations of people set up with an eye to permanence, with the chief objective of exercising shareholder rights in organized form
- Proper adoption of the OECD Principles in fact presupposes that all shareholders, especially those investing third parties' money should monitor the conduct of issuers and through joint commitment take greater account of their responsibility towards the ultimate owners of the shares, the beneficial owners.

Long tradition

- *While shareholder associations have a great tradition in Germany, their capital importance nonetheless remains minor. At any rate, they are active regularly and in standard fashion at AGMs.*
- *Recently, if still rather, coalitions of minority shareholders pursuing common goals are forming.*

Something is moving...!

- Lufthansa AGM 2003 - exemplary instance of the emergence of a new self-awareness by minority shareholders: 59% spontaneously supported the proposal put forward by one shareholder representative not to give discharge.
- IWKA 2004 - case provided the example of the formation of an opposition coalition of Institutionals.

Two very important steps versus conscious CG-responsibility of shareholders!