



SHAREHOLDERS' RIGHTS AND DUTIES



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THE OWNER RHETORIC

- ▶ Institutional investors accused of being “absentee landlords”.
- ▶ ‘The board and director shortcomings... would have been tackled more effectively had there been more vigorous scrutiny and engagement by major investors acting as owners.’
- ▶ ‘Shareholders do not seem to have fulfilled their role of “responsible owners”’.
- ▶ ‘We have spoken for years about shareholder rights. It is time to also talk about shareholders’ obligations.’



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ROLE OF SHAREHOLDERS?

- ▶ 'Raises questions about the effectiveness of corporate governance rules based on the presumption of effective control by shareholders.'
- ▶ Still the Commission maintain that shareholder engagement is 'one of the cornerstones of listed companies' corporate governance model'.
- ▶ Relevant to discuss the role of shareholders in European Corporate governance

SHAREHOLDERS AS OWNERS?

- ▶ Shareholders own shares (share ownership)
 - ▶ Shares are transferrable
- ▶ Shareholders do not own
 - ▶ The company
 - ▶ The capital
 - ▶ The assets
- ▶ In general ownership does not entail any duties
 - ▶ Proprietary rights

INFLUENCE FROM CORPORATE GOVERNANCE THEORY

- ▶ Different theories emphasize the role of shareholders
- ▶ Financial theory
 - ▶ Shareholders as residual claimants
 - ▶ Agency relationship – agency costs
 - ▶ Shareholders will establish incentives or monitor managers
- ▶ Ownership theory
 - ▶ Because of incomplete contracts, ex-post governance is needed
 - ▶ Ownership
 - ▶ Right to control the company
 - ▶ Right to appropriate net earnings
 - ▶ Allocated to shareholders

But no duties

PROPRIETARY RIGHTS

- ▶ Company law grants shareholders rights that bear a close resemblance to rights given to owners
 - ▶ Right to control
 - ▶ Rights to economic outcome
 - ▶ Right to capital (incl. to transfer the ownership)
- ▶ Securing the interests of the shareholders are necessary to secure the financing of companies through the issuing of shares
- ▶ Historically, the development of company law originate in partnership law

PROPRIETARY DUTIES?



A REGULATORY SHIFT

- ▶ The EU Commission has for years focused on shareholders' rights
 - ▶ Shareholder Rights Directive (Directive 2007/36/EC)
- ▶ Increased focus on shareholders' duties
 - ▶ company law
 - ▶ capital market law
- ▶ Departure from the prevailing view that shareholders have no duties
- ▶ Part of a political agenda
 - ▶ Still, shareholders' duties are already an integrated part of the legal system

VARIETY OF SHAREHOLDERS' DUTIES

- ▶ Interests shareholders' duties intend to protect
- ▶ Sources of shareholders' duties
- ▶ (Enforcement strategies)

INTERESTS TO BE PROTECTED

- ▶ Duties aimed at protecting the investee company or company stakeholders
 - ▶ Financial duties
 - ▶ Reliance on share capital
 - ▶ Duty to pay up share capital
 - ▶ Capital maintenance?
 - ▶ Corporate governance duties
 - ▶ Many interested parties
 - ▶ Transparency requirements
 - ▶ listed/non-listed companies

INTERESTS TO BE PROTECTED (2)

- ▶ Duties aimed at protecting the market
 - ▶ Market efficiency and market integrity
 - ▶ Transparency
 - ▶ Shareholders who may influence the market in a negative way
- ▶ Duties aimed at protecting society's interests
 - ▶ State ownership
 - ▶ Secure public interests
 - ▶ Social and environmental aspects of businesses.
 - ▶ More controversial?

SOURCES OF SHAREHOLDERS' DUTIES

- ▶ Contractual arrangements
 - ▶ Mainly relevant for smaller companies
 - ▶ Contractual aspects can be reflected in company law or in legal principles
 - ▶ e.g. German fiduciary duty
- ▶ Statutes
 - ▶ Important if duties are to be introduced in large companies
 - ▶ A controversial step?
 - ▶ Company law
 - ▶ Capital market law

SOURCES OF SHAREHOLDERS' DUTIES (2)

- ▶ Legal principles
 - ▶ May be included in statutory provisions
 - ▶ Duty not to abuse rights
 - ▶ May have different forms across jurisdictions
 - ▶ May include different aspects

VARIANCE OF SHAREHOLDERS' DUTIES

- ▶ Shareholders' duties vary along three different axes:
 - ▶ Types of companies
 - ▶ Types of shareholders
 - ▶ (Different business situations)

TYPES OF COMPANIES

- ▶ Listed/non-listed companies
 - ▶ Capital market law
 - ▶ Company law rules aimed at listed companies
- ▶ Corporate forms
 - ▶ Partnerships, private limited companies & public limited companies
 - ▶ The larger the company the less freedom to contract (incl. opt out rules)
 - ▶ Partly depending on jurisdictions

CHARACTERISTICS OF SHAREHOLDERS

- ▶ Minority/majority shareholders
 - ▶ Transparency
 - ▶ Fiduciary rules
 - ▶ Threshold?
- ▶ Purpose of shareholding
 - ▶ Investor/entrepreneur
 - ▶ Shortterm/longterm
 - ▶ Problematic
- ▶ Type of shareholder
 - ▶ Institutional or not

DUTIES AS A SOLUTION TO THE CURRENT CORPORATE GOVERNANCE CHALLENGE?

- ▶ Shareholders are not owners and cannot be expected per se to take responsibility in corporate governance
- ▶ Is the prevailing soft law approach in corporate governance sufficient?
- ▶ Listed or also non-listed companies?
- ▶ Company law or capital market law?
 - ▶ Who should enforce the duties?
- ▶ Institutional investors or shareholders in general?

CONCLUDING REMARKS

- ▶ What are the consequences of imposing duties on shareholders?
 - ▶ Transparency duties
 - ▶ Allow companies and stakeholders to respond to the disclosed information
 - ▶ Duties which constrain shareholders
 - ▶ Avoid unwanted or harmful behaviour
 - ▶ Control duties to support a specific behaviour
 - ▶ May empower shareholders



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