DUTIES IMPOSED ON DIFFERENT SHAREHOLDER TYPES AND ENFORCEMENT CHALLENGES
AGENDA

• Introduction to analytical framework
  • The aim of regulating shareholders
  • The legal strategies
• Duties imposed on different shareholder categories
• The purpose of duties imposed on different shareholders
• Enforcement challenges
THE AIM OF REGULATING SHAREHOLDERS (1)

• Why do we regulate shareholders?
  • Company law
    • Aim: to deal with agency problems
      • Majority/minority shareholders
THE AIM OF REGULATING SHAREHOLDERS (2)

- Capital market law
  - Aim: to ensure efficient markets
  - Internalize externalities
  - Shareholders that may affect the welfare of other company constituents
  - Even out asymmetric information
LEGAL STRATEGIES

Legal strategies

• Company law
  • How the law may be used to induce the agent to act in the principal’s interest
• Capital market law
  • How the law may be used to eliminate market failures
• Regulatory strategies
• Governance strategies
• Soft law
DUTIES IMPOSED ON DIFFERENT SHAREHOLDER CATEGORIES

How shareholders differ:

• Age, gender, nationality
• Potential (negative) impact on either company constituents or the market
  • Size
  • Type
SHAREHOLDER CATEGORIES (1)

Duties that are triggered by size:

• Absolute thresholds
  • Disclosure duties
    • Significant shareholdings
  • Duties on parent companies
  • Duty to purchase minority shareholders’ shares

• Relative thresholds
  • Duties in relation to planned transactions depending on relative influence
  • Duties may intensify with size
    • Duties not to abuse rights
SHAREHOLDER CATEGORIES (2)

Duties imposed on certain types of shareholders

- States
  - Duties relating to golden shares
- Institutional investors
  - Shareholder Rights Directive
    - Disclosure duties (comply or explain)
    - Engagement policy
    - Implementation of the engagement policy
    - How they have cast votes
THE PURPOSE OF IMPOSING DUTIES ON DIFFERENT CATEGORIES OF SHAREHOLDERS (1)

Overall purpose to protect the interests of company constituents

- Company law
  - Agency problems
    - Other shareholders
      - Disclosure duties
        - Constrain the behaviour of the shareholder
        - Transform the behaviour of the shareholder
    - Duty to purchase a minority’s shares
    - Duty not to abuse rights
  - The company
    - Disclosure duties
THE PURPOSE OF IMPOSING DUTIES ON DIFFERENT CATEGORIES OF SHAREHOLDERS (2)

Others?
• Duties that are imposed on shareholders in listed companies, but regulated in company law
  • Shareholder Rights Directive → Institutional investors in listed companies
    • Encourage long-term shareholder engagement
      • Disclosure duties
        • Derived positive effect on investor awareness
        • Optimise investment decisions
        • Facilitate dialogue between companies and their stakeholders
        • Strengthen companies’ accountability to civil society
    • Can only partly be explained by agency problems/market failures
  • Institutional investors/large shareholders?
THE PURPOSE OF IMPOSING DUTIES ON DIFFERENT CATEGORIES OF SHAREHOLDERS (3)

- Capital market law
- Ensure market transparency, efficiency and integrity
  - Mitigate externalities
  - Reduce asymmetric information
- Ensure good corporate governance
  - Disclosure
ENFORCEMENT CHALLENGES (1)

Regulatory strategies
• Rely on the ability of an external authority to determine whether or not the shareholder complied with a particular prescription
  • Public entities
    • Disclosure duties
      • Significant shareholders
      • Institutional investors
    • Applicability of disclosure rules?
ENFORCEMENT CHALLENGES (2)

Can enforcement ensure compliance?

- Yes, but only compliance with disclosure
  - Disclosure is a prerequisite for the accomplishment of other purposes
    - Majority shareholders
      - Transform the behaviour of the shareholder
      - Constrain the behaviour of the shareholder
      - Ensure efficient markets
    - Institutional investors
      - Derived positive effect on investor awareness
      - Optimise investment decisions
      - Facilitate dialogue between companies and their stakeholders
      - Strengthen companies’ accountability to civil society
ENFORCEMENT CHALLENGES (3)

Accomplishment of other purposes requires additional action
Disclosure addresses agency problems
  • Shareholder rights in company law
    • Private enforcement
  • Soft law regulation of institutional investors
    • Who is enforcing such provisions?
    • Enforcement measures?
    • Which agency problems are we addressing?
  • Are other measures necessary?
CONCLUSIONS

Imposing duties on specific categories may be necessary to overcome market failure

• Disclosure duties imposed on significant shareholders
• Disclosure duties prior to certain actions

Imposing duties on specific categories may be necessary to address agency problems

• Disclosure cannot stand alone
  • Formal enforcement of disclosure
  • Agency problems are not solved by disclosure alone
    • Rely on shareholder enforcement