

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

} 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



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