



Defining the Optimal Scope of Decision-Making Authority of the Shareholders Meeting

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I. Introduction

- Varying allocation of decision-making authority to board and shareholder meeting
 - Pendulum swings throughout history
 - Recent European (and national) initiatives grappling with power allocation on ad hoc basis
- Increasing importance as ownership concentration seems to be slowly diminishing
- Which general principles should guide allocation of decision-making authority?
 - (Public) company perspective
 - Legislator's perspective

II. Company Level (1)

- **General principles:** back to basics
 - Shareholder authority as ultimate agency strategy
 - Criterion: (first) agency costs > decision-making costs
- **First application:** content of decision-making
 - Conflict of interest + Important decisions
 - Objections
 - Second agency problem in case of large stockholdings
 - Absenteeism, private and/or short term interests
 - Example: director remuneration
 - Action Plan 2012, EP Resolution March 29, 2012, ECGF Statement March 23, 2012, Commission Recommendation 2004/913

II. Company Level (2)

- **Second application:** Type of decision-making
 - Autonomous decision-making: efficient
 - E.g. capital movements, mergers, divisions...
 - Standing authorization: efficient
 - E.g. acquisition of own shares after simplification 2nd Directive
 - Shared decision-making on transaction-by-transaction basis: inefficient
 - E.g. financial assistance after simplification 2nd Directive

II. Company Level (3)

- **Relation to conflict of interest provisions**
 - Difference: conflict not inherent to subject matter
 - not all directors conflicted other strategies possible
 - Similarity: tackling first agency problem
 - similar criteria re importance and stage of decision-making
 - E.g. related party transactions
 - Action Plan 2012, EP Resolution March 29, 2012, ECGF Statement March 10, 2011, Green Paper 2011

III. Legislator's Stance (1)

- **Form of intervention**

- Coase theorem: transaction costs role for law in allocation of decision-making authority
- Contracting failures not remedied by discipline of markets in case of conflicting interests mandatory law for powers of shareholders meeting

- **National vs. European level**

- Risk of petrification
- Subsidiarity
- Political feasibility

III. Legislator's Stance (2)

- **Macro-economic consequences**
 - Regulatory competition
 - Authority of shareholders meeting for transfer of seat beneficial not only at company level: can also steer regulatory competition
 - Member states face collective action problem
 - Additional argument to resume work on proposed 14th Directive
 - Market for control
 - Authority of shareholders meeting for takeover defenses
 - Cf. 13th Directive
 - Stock ownership patterns
 - General distribution of powers within corporations

IV. Conclusion

- Authority of shareholders meeting as a last resort to avoid (first) agency costs
 - E.g. variable and global director remuneration
 - E.g. certain related party transactions
- Inefficiency of shared competences on transaction-by-transaction basis
 - E.g. financial assistance
- Underestimated importance of the authority of shareholders meeting in proposed 14th Directive
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