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

Sofie Cools
8th ECFR Symposium, Bocconi, Milan
September 27, 2013
I. Introduction

• Varying allocation of decision-making authority to board and shareholder meeting
  o Pendulum swings throughout history
  o 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?
  o (Public) company perspective
  o Legislator’s perspective
II. Company Level (1)

• **General principles**: back to basics
  o Shareholder authority as ultimate agency strategy
  o Criterion: (first) agency costs > decision-making costs

• **First application**: content of decision-making
  o Conflict of interest + Important decisions
  o Objections
    • Second agency problem in case of large stockholdings
    • Absenteeism, private and/or short term interests
  o Example: director remuneration
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 2\(^{nd}\) Directive
  - Shared decision-making on transaction-by-transaction basis: inefficient
    - E.g. financial assistance after simplification 2\(^{nd}\) 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
      Statement March 10, 2011, Green Paper 2011
III. Legislator’s Stance (1)

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

• **National vs. European level**
  o Risk of petrification
  o Subsidiarity
  o Political feasibility
III. Legislator’s Stance (2)

• Macro-economic consequences
  o 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
  o Market for control
    • Authority of shareholders meeting for takeover defenses
    • Cf. 13th Directive
  o Stock ownership patterns
    • General distribution of powers within corporations
IV. Conclusion

• Authority of shareholders meeting as a last resort to avoid (first) agency costs
  o E.g. variable and global director remuneration
  o E.g. certain related party transactions

• Inefficiency of shared competences on transaction-by-transaction basis
  o E.g. financial assistance

• Underestimated importance of the authority of shareholders meeting in proposed 14th Directive

• Questions or comments? scools@sjd.law.harvard.edu