DSW

Newsletter

from Germany's No. 1 Shareholders' Association

March 2020

Editorial:

General meetings in times of Corona

Jella Benner-Heinacher

As each year, also 2020 started traditionally with the shareholder meetings of Siemens and Thyssen-Krupp followed by Metro and Ceconomy. Since then we are seeing a major interruption of the season due to the effects of the Corona crisis. **Therefore, our major thoughts are with those whose health has been or will be affected by this virus and we are immensely grateful to all of our system relevant health care workers, pharmacists and doctors who are helping all of us in this very difficult situation. We could not do without them.**

Beyond these really vital issues we also see major consequences on the upcoming General meetings season in Germany:

Currently we expect the postponement of the meetings at least until end of May, so the season might restart in June and could last until the end of August – provided the Corona crisis will fortunately be solved by then.

As the Corona virus does not only hit Germany, China and Italy, but is influencing global economy it is hard to estimate its final effects on the people, the health systems and the companies. From the shareholders' point of view, it becomes clear that even though 2019 was an excellent year for the German industry the **dividend payments** will be strongly influenced by the current Corona crisis. Following German Law, currently a resolution by the shareholders on the dividend is required for its payment. Already now we hear from companies that completely cancel any dividend payment and we expect more companies to at least significantly lower the distribution for the shareholders. Next to dividends, companies will also consider the sense or nonsense of **share-buy-back programs** in times where liquidity is key. And we have to take into consideration that more and more companies will need **capital measures** on their agenda to survive the effects of Corona this year. DSW therefore emphasizes on the design of these capital measures. In case of a **capital increase with preemptive rights** a maximum of 40 % of the share capital should be allowed. In case of the **exclusion of preemptive rights** – this should be limited to a maximum of 10 % to avoid any watering down of the capital to the detriment of existing shareholders.

Major topics this year will include the new rules introduced by the Shareholder Rights Directive II from Brussels finally being transmitted into German Law. In the focus we

Content

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see topics around the new rules and resolutions on **Directors' pay**. As shareholder representatives we expect more transparency and comprehensiveness of the pay systems as well as a clear explanation of changes in the pay structure in €. Also, the **election of board members** will increase in its significance. The issue of **independence** of board members will be in the focus of investors as the new German Corporate Governance Code introduced a catalogue of new criteria. Next to independence, enough time and presence for a board mandate is just as important as the avoidance of "overboarding".

Finally, the topic of **sustainability** is not taken from the agenda – on the contrary: DSW will take a close look at the ESG policies published by the German companies. Do companies act in line with their ESG strategy? How do the major risks deriving from ESG look like? Are these risks part of the risk management system?

As the virus shakes all of us, we can also see that currently the capital markets show major turbulences and we expect these to continue until the Corona virus can hopefully be stopped.

So please stay healthy!!!

Exceptional measures in exceptional times: Online Shareholder Meetings as a possible solution

The German Government reacted fast on the Corona virus crisis with all its effects also on the meetings of shareholders. So far, purely online meetings are possible if the company has this provision included in its articles of association. Except for Munich Re and SAP, most German companies were reluctant in this respect. Now the German government opens the door and proposes substantial simplifications regarding the law in order to make general meetings possible even in these tightened Corona times. These shall exceptionally and only for 2020 include:

1. The convocation of an Online Annual General Meeting without the required provision in the articles of association,
2. Shortening of the deadline for the convocation,
3. An annual meeting until the end of the financial year – 31 of December 2020 instead of 31 of August,
4. Partial/installment payments on the profit without the required provision in the articles of association,
5. A restriction on shareholders' rights, e.g. to ask questions or contest decisions taken in the meeting.

How other countries manage their General Meetings season 2020

UK: In the UK, the Companies House is now granting a two months extension to file company accounts where accounts cannot be filed on time due to a company being affected by Covid-19. UK-incorporated listed companies are permitted to hold "hybrid" or "virtual" AGMs as long as the Articles provide for such an option.

Italy: In Italy, a new law helps Italian companies to deal with the impact of Covid-19 during the 2020 annual general meeting season. Measures allow companies for example to extend the term to convene the annual general meeting to approve 2019 financial statements and facilitate the attendance of shareholders using means other than in-person attendance in compliance with the restrictive measures adopted by the Italian Government to reduce the risk of infection.

Spain: The Spanish Government gives listed companies a break to allow them more time to meet some of their legal obligations. For example, the deadline for listed companies to hold their ordinary general shareholders' meetings this year has been extended until October instead of June. Also, companies can implement distance attendance and voting measures and change the place of the meeting within Spain (before in the local domicile). – In case the AGM cannot be held physically due to Government measures, it is allowed to hold it purely remotely, provided that the company offers the possibility to participate through all these means:

1. remote attendance
2. remote proxy (delegation to the chairman via telematic)
3. remote voting

and there are reasonable guarantees on the identity of the voter/attendee. Board members can also attend by audio/video conference.

France: A new decree enables the company to decide that an AGM will be held virtually. Shareholders would exclusively vote remotely, either by correspondence, via a voting paper form, providing a "blank" proxy to the chairman or online if provided for by the issuer's articles of association and if this voting procedure is provided for by the issuer for the relevant meeting. As a practical matter, all votes will be cast before the AGM. Companies can postpone the AGM up to nine months after the end of the financial year

France's financial regulator AMF recommends that shareholders vote remotely at AGMs to limit the risk of the coronavirus. AMF further recommends that listed issuers broadcast their (virtual) AGM live on their website and urges companies to vigilantly uphold the shareholders' right to ask written questions ahead of the AGM.

Switzerland: In Switzerland, the Government has allowed closed doors AGMs following a ban on events if shareholders can exercise their rights either in writing or through electronic means or alternatively through an appointed company representative acting as proxy.

Shareholder Rights Directive II (SRD II) finally implemented in Germany

Christiane Hölz

1. Directors' Pay – surprising last minute amendments

It seems like yesterday that the newly elected European Parliament (EP) and the Juncker Commission announced important reforms to address the ongoing fallout from the 2008 financial crisis. In the 10 years since the financial crisis, decision makers in Brussels have introduced sweeping new financial rules and regulations, and under Juncker the crucial and ambitious initiative of a "Capital Markets Union" (CMU) was launched. Yet, EU citizens as savers and investors are left with a bitter aftertaste.

The closer the deadline came, the more intense the discussions within the German Government became: How to implement the SRD II into German law without a binding vote on executive pay but by ensuring that shareholders still get a reasonable degree of say on their executives' pay?

But let's take it step by step. The SRD II required Member States to transpose the rules regarding directors' compensation into national law by June 10, 2019. With regard to the remuneration of the executive board of listed companies, SRD II specifies a vote by the general meeting on the remuneration system and a remuneration report disclosing and explaining past payments to executive board members. The draft German transposition law (ARUG II) intended to carefully implement these requirements in the German dualistic system. In particular, it was envisaged that the vote of the general meeting on the remuneration system of the executive board should only be of an advisory nature. This in order to keep the final competence to determine and develop a compensation system clearly with the supervisory board. However, the German Bundestag was not able to timely agree on the rules governing the area of directors' pay. The main question was who should ultimately decide on the remuneration of the executive board: the general meeting or the supervisory board? And should the vote on the remuneration system be advisory or binding? Supporters of keeping the current purely advisory character of the vote argued that the experience in Germany had shown a strong impact on boards and that no remuneration system had been kept in place after having failed at the general meeting. Also, they argued that the decision on executive compensation is the key competence of the supervisory board. Taking away this key competence would significantly weaken the position of the supervisory board towards the executive board. On the other hand, supporters of the binding vote argued that the intention of SRD II, namely to strengthen shareholders' rights would be thwarted with an advisory vote only and that the owners of the company should be entitled to decide on the pay of their directors.

As a compromise and at the very last minute, the Government agreed on keeping the vote on the remuneration system advisory but introduced a new instrument: Shareholders holding minimum 5% or 500,000 EUR nominal of the company's share capital can table a motion to the agenda of the general meeting asking to reduce the maximum compensation of executive directors – against the proposal of the supervisory board.

The new regulation covers general meetings from 2021 on. Until then, the remuneration system must also be approved for the first time. The next season will clarify whether the regular "say on pay" and the determination of a maximum remuneration have the limiting effect desired by the legislator.

And another apparently small detail was changed on the last mile. The previous wording in the draft law, according to which the remuneration structure of executives should be geared towards "sustainable corporate development", has so far been interpreted in practice only as a time requirement. In the final version of ARUG II, the wording has been changed to "sustainable and long-term corporate development".

This clarification should not be underestimated, as it clarifies that sustainability means more than just long-term and that the term sustainability is explicitly about social responsibility and environmental sustainability.

2. Related party transactions – meaningful supplement or alien to the German legal system?

Transactions with related parties may give the related party the opportunity to appropriate value belonging to the company. Thus, adequate safeguards for the protection of companies' and shareholders' interests are of importance and have been foreseen by the SRD II. Member States shall ensure that "material related party transactions are submitted to approval by the shareholders or by the administrative or supervisory body according to procedures that prevent the related party from taking advantage of its position and provide adequate protection for the interests of the company and of the shareholders who are not a related party, including minority shareholders."

German lawmakers had always argued against the need for additional safeguards. So far German Securities Law has been considered as sufficiently protecting minority shareholders, especially as companies under certain conditions are obliged to produce a "dependency report". In such a report, which has to be approved by the company's auditor, companies have to publish actions with related parties together with the annual report. However, it is doubtful how effective a subsequent dependency report indeed protects minority shareholders from detrimental related party transactions. DSW therefore welcomes the additional disclosure requirements stemming from SRD II.

During the legislation procedure opinions diverged significantly about the threshold for "materiality": When does a transaction with a related party have to be considered material and consequently has to be approved by the supervisory board and published to the capital markets? While the draft transposition law proposed a threshold of 2.5% of the balance sheet and numerous exceptions to exclude certain transactions, in its final version, ARUG II, the German transposition law of SRD II, rightfully lowered the threshold from 2.5% to **1.5% of the balance sheet**. By that, a larger number of transactions is expected to be covered by the law – a situation being strongly supported by DSW.

ARUG II kept a list of exemptions for certain types of transactions for which, owing to specific circumstances, special protection of shareholders was not considered to be required or was already ensured by other means. Such transactions include for example:

- transactions with (directly or indirectly) wholly owned subsidiaries,
- transactions that require the approval of the general meeting or are executing such an approval,
- certain corporate agreements – where the German legislator further took into account the complex protective mechanisms contained in German law governing corporate groups formed by contract, which the legislator considered as already sufficiently protective for minority shareholders.

The new rules **came into force on January 1, 2020**. DSW considers the new approval and disclosure requirements as a meaningful supplement to German law that will help to better protect minority shareholders.

3. New transparency requirements for investors and proxy advisors

SRD II requires proxy advisors, which primarily offer voting services and/or advice to shareholders in publicly listed companies, to make certain disclosures about the way in which they conduct their business.

In Germany, the European rules have been coherently transposed into local law. Since January 1, 2020, proxy advisors (covering companies with a registered office in the EEA that are traded on a regulated market in the EEA) with registered office or head office in Germany as well as proxy advisors which provide proxy advisory services through a body in Germany, are required to:

- disclose reference to a code of conduct which they apply, and report on the application of the code.

DSW as proxy agent

As DSW also acts as proxy agent both for private but also for institutional investors it has opted to voluntarily comply with the new requirements for proxy advisors. DSW has published its own code of conduct which already came into force in the late 1990s as well as the legally required information in relation to research, advice and voting policies. All documents can be found at

www.hauptversammlung.de.

Where proxy advisors apply a code of conduct but depart from its recommendations, they must declare the parts of the code from which they depart, why they depart from it and indicate any alternative measures adopted. Where proxy advisors do not apply a code of conduct at all, they must explain why this is the case; and

- disclose information in relation to the preparation of their research, advice and voting recommendations (including quality management, conflicts of interest policy, and voting policies)

This information needs to be publicly available free of charge on the proxy advisor's website.

Where conflicts of interest occur, proxy advisors have to promptly notify their clients about the conflict of interest together with the corresponding countermeasures.

DSW considers the new approval and disclosure requirements as a meaningful supplement to German law that will help to better protect minority shareholders.

4. Sustainability and engagement – new transparency rules for asset managers and alike

SRD II does not only intend to strengthen shareholders' rights but also places certain requirements on **institutional investors (including asset managers) and wealth managers**. Since January 1, 2020, these are required to publicly disclose their engagement policy that describes how they integrate shareholder engagement in their investment strategy. Annually, they have to disclose how their engagement policy has been implemented, including a general description of voting behavior, an explanation of the most significant votes and the use of the services of proxy advisors. Furthermore, institutional investors and wealth managers shall publicly disclose how the main elements of their equity investment strategy are consistent with the profile and duration of their liabilities, in particular long-term liabilities, and how they contribute to the medium to long-term performance of their assets.

The German law, however, follows **the comply or explain approach** and offers the opportunity to deviate in parts or completely from the disclosure requirements. In that case, institutional investors and wealth managers have to explain why they are non-compliant.

Greater involvement of shareholders in corporate governance helps improving the financial and non-financial performance of companies and is an important factor in ensuring a more long-term approach by listed companies that needs to be encouraged. Institutional investors should therefore seek to fully comply with the transparency requirements resulting from SRD II. The European supervisory authority ESMA in its "Findings on potential undue short-term pressures in securities markets" has already suggested the **EU Commission to monitor** the application of the revised SRD II in order to assess whether it effectively encourages long-term engagement. If not, further obligations for institutional investors, even by way of a Regulation, can be anticipated.

DSW Voting Guidelines

The German Corporate Governance Code sets standards for Corporate Governance in Germany. It is at the same time the basis for DSW's voting recommendations. Beyond the official Code, DSW developed its own Voting Guidelines to be transparent towards investors how we exercise voting rights for our members and other investors or representatives.

DSW's Voting Guidelines are updated annually and cover recurring proposals at German General Meetings, like for instance the discharge of management and supervisory board, capital measures, share repurchases or board elections.

If you are interested in the DSW Voting Guidelines, please contact us via E-Mail:

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Launch of ECGS Shareholder Engagement Pool on Sustainable Distribution Policies

ECGS (Expert Corporate Governance Service), the leading European network of Governance Analysts and Proxy Advisory, in which DSW is the German partner, is proud to announce the launch of the ECGS Shareholder Engagement Pool on Sustainable Distribution Policies.

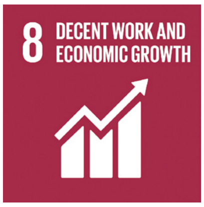
This unique Institutional Shareholder Engagement Pool, for which ECGS acts as the Advisory Firm, aims at promoting sustainable distribution policies (both dividends and share repurchase) in the MSCI Europe universe, by targeting a list of 10 issuers that will be invited through dialogue to deliver progress on this topic.

Companies will be selected for this engagement campaign on dividend and share repurchase policies through a 4-step process:

1. Identification of issuers with alerts on dividends and share repurchases after implementation of ECGS corporate governance principles and voting guidelines on ECGS universe (MSCI Europe, c.440 issuers)
2. Qualitative analysis of the alerts for the 2019 proxy season (top down), coupled with feedbacks from the ECGS network partners (bottom up)
3. Quantitative analysis of selected issuers through data collection over a 4-year period (dividends, share repurchase, net earnings, free cash flows, net debt, shareholder equity)
4. Determination of governance issues (overleveraged core shareholder, non-investment grade proprietary governance rating,…)

Loïc Dessaint

Reporting will consist of 2 semi-annual committees with a detailed report by issuer & executive summary, the second semi-annual committee with the presentation of the Annual Report.



This ECGS Engagement Pool will impact the N°1 (No poverty), N°8 (decent work and economic growth) and N°9 (Industry, Innovation and Infrastructure) UN Sustainable Development Goals and also respect Inclusive corporate principles (All stakeholders approach).

Subscribers will be European Asset Managers & Institutions investing in European Equities. Their commitment to this ECGS Engagement Pool will entitle them to mention it in their annual Shareholder Engagement Report, as defined in the Shareholder Rights Directive II.

If you are interested in more details such as the pricing please contact DSW or ECGS directly.

Imprint

DSW newsletter published by Deutsche Schutzvereinigung für Wertpapierbesitz e.V. (DSW)
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EU citizens for sustainable value for money

BETTER FINANCE, the European association of investors of which DSW is founding member, strongly supports the ambitions, the strong focus and considerable efforts of the EC in sustainable finance.

Guillaume Prache

In particular:

- The so called “taxonomy” which we ask to be fact and science based, not on ideologies, fears or other emotions.
- The ecolabel for retail investment products; this is why BETTER FINANCE has successfully applied for membership of the EU Ecolabel board.
- The Shareholders Rights Directive (SRD II) to improve the governance and long-term engagement of investors.

Here are BETTER FINANCE’s four most important requests:

Firstly, we need to do more against greenwashing: ESG-labeled investment products must be exemplary in complying with investor protection rules, in particular on key information disclosures.

Green investment is a unique opportunity to restore the damaged trust of individual investors. Policy makers must not forget the golden rule of investor protection: “fair, clear and not misleading information” as detailed in the MiFID II Directive, in particular for ESG investment products.

In the upcoming BETTER FINANCE Research on ESG funds, we will specifically take a look at the returns of ESG funds over the long-term. Are they destroying the long-term real value of pension savings? Because of higher fees and commissions, or because of flaws in their ESG approach?

Secondly, there is no rationale for accepting lower long-term returns for ESG retail investment products. Pension adequacy must be part of sustainable finance. They should be benchmarked against clear and simple mainstream capital market indices.

There is no reason why long-term returns of investments into sustainable activities and assets should be lower than the average ones of global capital markets. In fact, there are clear reasons for the opposite to occur. Actually, there is more and more academic evidence that ESG investments are performing better than mainstream ones over the long-term.

A positive long-term performance of ESG products in real terms (after the deduction of inflation) is needed to reach pension adequacy, as pensions are and will more and more rely on pensions savings. Pension adequacy is – and should be – part of the “S” and “G” of ESG approaches. So, for the sake of transparency, intelligibility, trust and integrity, all ESG products aimed at retail savers should benchmark their long-term performance against simple objective capital market indices, not switching to a plethora of complex, non-intelligible and therefore misleading ESG specific indices. The use of those in key information documents should be restricted to professional investors.

Thirdly, ESG investors – “institutional” ones in particular – should switch from issuers screening to impact investing.

BETTER FINANCE is not convinced that merely excluding some issuers (negative screening) or picking only some issuers (positive screening) will have any positive impact on the environment, on social progress and good governance.

For example, dropping Shell shares out of European investment portfolios may end up transferring a major European oil company with a huge long-term investment capacity (free cash flow) to non-European investors at a very advantageous price. This would not guarantee any progress to save the planet form global warming. We strongly believe that – on the contrary – European investors should instead engage much more actively with the management of the company, in particular in the general meetings to obtain an adequate and a quick transition to a more environmentally-friendly business model. To really help to save the planet and mankind, ESG investing needs to switch from issuers screening to impact investing.

This implies fundamental changes:

- In the governance of institutional investors: avoid short-termism and a misalignment of interests. And thereby reach out for more long-term, engaged impact ESG investors.

- In thoroughly facilitating the direct involvement and engagement of citizens as long-term savers (“natural“ long-termists), by prioritizing shareholders rights, MiFID review and CMU policies on the access and protection of the individual end – investors
- In developing independent web comparing tools (like in Norway) to address in particular the desire of many in the younger generations of citizens to become themselves impact investors.

Fourthly, Policy makers must assume their core responsibility to act against “negative externalities”

But all this will not work if Public Policy makers keep avoiding to address “negative externalities” such as GHG emissions: this is their prime responsibility and power. No one else can correct the effect of these externalities.

Where is the so urgently needed and critical EU – if not planet wide carbon tax, or better the greenhouse gases tax (including the even more damaging methane emissions)?

(the article reflects parts of the speech by Guillaume Prache from BetterFinance, from 20 of November 2019)

European Proposal for Financial Transaction Tax (FTT) disproportionately targets EU Citizens rather than Financial Institutions

Back in 2013, BETTER FINANCE clearly expressed its support for a European Financial Transaction Tax (FTT) and its main stated objective “[of ensuring] that financial institutions make a fair and substantial contribution to covering the costs of the recent crisis… and to ring-fence the real economy, SMEs, households, etc.”. At the same time, **BETTER FINANCE did voice major concerns with the proposal for an FTT tabled by the European Commission (EC) in February 2013**, pointing to the fact that the proposal did not meet this objective, and that it would, once again, be EU Citizens who would bear the bulk of this FTT in lieu of financial institutions. Indeed, rather than targeting transactions between financial institutions, as per the commendable objective of the FTT, the current proposal once again targets EU Citizens as Savers and end-investors whilst the financial industry escapes scot-free. A genuine FTT, serious about its intention of co-opting financial institutions in the protection of the real economy and EU Citizens, would need to tax forex transactions, especially forex derivatives, as well as other derivatives, rather than focusing on trades in listed equities and bonds. With over a quadrillion dollar in transactions per year – or more than **$5 trillion** worth of trading every day – the currency market (the majority of which is forex derivatives) is by far the largest financial market in the world, dwarfing all other markets. In comparison, the much better-known world equity market is only worth a fraction – roughly 5% – of the currency market. Yet, the largest financial market of all and privileged playing ground of financial institutions would not be touched by an FTT and, to this day, remains utterly opaque and largely unregulated. The same applies – to a lesser extent – to interest rate derivatives which are not traded by citizens but also mostly by financial institutions. An FTT targeting these mammoth professional markets instead of equity markets would provide much higher tax revenues and ensure that EU Citizens don’t end up footing the bill once again. Six years later, and the FTT file remains blocked in the Council, though renewed discussions took place following a **note from Germany in June 2019**, urging the Council to resume negotiations and use the FTT already in place in France as basis. Unfortunately, none of the issues with the FTT raised by BETTER FINANCE in 2013, are addressed by the German proposal. In short, the FTT proposed would levy a 0.2% tax on all equity trades worth more than €1 billion, leaving forex transactions, bonds, derivatives and high frequency trading unaffected. In the **words of Greens MEP Sven Giegold**, this perverted FTT proposal is “a farce, not a real financial transaction tax” and would end up being paid by “small investors”. Even the proposed threshold of €1 billion does not change this reality, since the tax paid by investment and pension funds will simply be passed onto the end-user: long-term savers and individual investors. With this in mind BETTER FINANCE asks European Authorities to:

- Clearly exempt EU Citizens (i.e. non-professional individual investors) from the FTT;
- Remove the exemption of the world’s largest financial market, i.e. the forex, or currency spot market;
- Ensure the inclusion of all High Frequency Trades (HFT) and Over-The-Counter (OTC) trades, in the scope of the FTT.

Avoid massive regulatory arbitrage and tax evasion by including all EU Member States and all major financial centres in the scope.

Changes in the New German Corporate Governance Code

The completely revised German Corporate Governance Code in the version dated 16 December 2019 entered into force on 20 March 2020 with the publication in the German Federal Gazette. After coming into effect, the new Code forms the foundation for mandatory Declarations of Compliance. “The aim of the comprehensive reform was to create a modern and practically applicable Code in line with international standards. Against this background, the Code stands for appropriate transparency forming the basis for stakeholders being able to form a sound opinion”, says Rolf Nonnenmacher, chair of the Government Commission on the German Corporate Governance Code.

Material changes cover:

- the introduction of principles to inform about material legal requirements on responsible governance;
- the **specification of the independence** requirement regarding shareholder representatives on the Supervisory Board, which is a focus for the Government Commission;
- a catalogue of criteria providing guidance to the question in which cases a shareholder representative in the Supervisory Board can no longer be regarded as independent.
- Another focus is set on the restatement of the recommendations regarding Management Board remuneration.

The new recommendations reflect international best practices and meet the standards of ARUG II. Finally, corporate governance reporting is simplified by placing it exclusively into the Corporate Governance Statement. The recommendations made regarding **Management Board remuneration** were a focal point during consultation. The concept provided for in the new Code still follows a top-down approach. Unfortunately, the model tables to disclose directors’ compensation have been abolished which will reduce transparency for investors and other stakeholders. Second focal point was the specification of requirements for independence of shareholder representatives on the Supervisory Board. Also, the new Code altered the **recommendations relating to the number and duration of supervisory board mandates** but will not contain any new recommendation concerning the term of office of supervisory board members. Furthermore, the Government Commission has decided to simplify corporate governance reporting. The new German Corporate Governance Code in its version dated 16 December 2019 is published on the Government Commission’s website, along with explanatory notes.
https://dcgk.de/en/code.html