DSW's Comments on the EU Action Plan on Corporate Governance

Part I: 'Fostering an appropriate regime for the remuneration of directors'

DSW strongly supports the Action Plan of the EU-Commission on Corporate Governance and here especially the topic of directors' remuneration.

Comments cover the following points of the topic:

4.2 Nature of the Recommendation to the Member States:

In may of 2003, the German Cromme Commission changed the German Corporate Governance Code and included the recommendation that the 'individual remuneration of directors shall be disclosed to the shareholders'.

So far the experience with this recommendation in its first year shows that only 10 out of 30 DAX companies follow it. In DSW's view this is not enough.

If you want to develop a Best Practice you need a strong majority of the large companies, i.e. DAX 30 companies to start with. In a second step also the mid cap and small companies should then follow this Best Practice.

Although this new recommendation probably needs one more year of experience, we can already say, that if by then the rule is not complied with by most publicly noted companies, a law will have to follow.

4.5 Disclosure of Remuneration Policy

DSW strongly supports the idea of disclosing the remuneration policy for directors for the past and the next financial year first in the annual report and secondly it should also be reported to the shareholders at the Annual General Meeting.

As minimum information this should include:

· The remuneration policy in general

· The percentage of fixed and variable parts

· Details on the benchmarks of the variable parts

· Length of the contracts

· Existence of change of control clauses

· Details on pension benefits

· Any severance agreements

As a minimum standard this detailed report on directors' remuneration should be either an explicit item on the agenda or part of the report on the last financial year, which is regularly item no. 1 on a German agenda for an AGM. If it will be an item to vote on, it should be clear what would be the legal consequences connected to a majority vote of the shareholders with 'no'.

4.6. Disclosure of the Remuneration of Individual Directors

DSW agrees completely with the idea of the disclosure of the individual remuneration of directors. As the short experience in Germany makes clear the rule that 'more transparency also leads to more confidence of the investors', is right.

As soon as the shareholders have the impression that there is anything to be hidden they become mistrustful to the directors. Therefore in order to create a trusting relationship between management and investors the most detailed transparency is necessary.

The disclosure of remuneration of individual directors should include minimum information on:

· the fixed and variable parts of remuneration

· share option schemes

· pension scheme agreements etc.

Conclusion:

Each year DSW leads a study on the average remuneration of directors of the DAX 30 companies in Germany.

The study does not only focus on the absolute development of the remuneration, but also covers the development of the earnings per share as an indicator for the company's performance.

In our point of view there should be a direct relationship between the company's performance and the directors' pay. It cannot be that directors increase their salary and the company at the same time performs weak.

Therefore specific weight should be given to the aspect of the benchmark for the variable part of the remuneration. Ideally this should be connected to important financial figures showing the company's performance such as earnings per share, Economic Value Added, EBIT etc.

The dividend on the contrary does not seem adequate to measure the performance of the directors.

Part II: 'Fostering an Appropriate Regime for Shareholder Rights '

DSW, Germany's leading shareholder association strongly supports the EU-action plan which aims on modernising company law and enhancing Corporate Governance in the European Union.

As the DSW European Comparative Study of 1999 has shown there exist a number of legal and practical obstacles for shareholders who want to exercise their rights as shareholders in cross-border transactions. Fortunately the Winter-Commission took up of these issues in their report and developed new proposals to improve this situation.

In general we welcome the proposals of the Commission which should improve investor confidence and strengthen the protection of investors throughout Europe.

In detail we would like to give the following comments:

Main Issues

4. Scope:

Do interested parties agree that the scope of the forthcoming proposal on shareholders' rights should be restricted to companies whose shares are admitted to trading ('listed companies'), and that Member States could be invited to extend these facilities to non-listed companies?

Yes, we do agree that as a first step the scope of the new rules should be restricted to listed companies. As the experience over the last years has shown it could be useful to extend those rules at a later point in time also to non-listed companies, if those rules prove to become minimum standards all over. But this should be left to the development of the markets and to each Member State.

5.1. Cross-border voting:

Do interested parties consider that the forthcoming proposal for a directive should set up a framework to identify the person entitled to control the voting right as the last natural or legal person holding a securities account in the "chain" of intermediaries and who is not a securities intermediary within the European securities holding systems, nor a custodian?

There is definitely a strong need to find a rule for this case first on EU- and then on an international level.

In general the objective should be that the beneficial owner is also the person entitled to control the voting right. Nevertheless there are cases, especially with respect to U.S. shareholders where the beneficial owner is often hard to identify. In those cases a basic rule is needed in order to simplify the whole procedure via several intermediaries.

Should it also provide for a securities intermediary who is not admitted as a participant in a European securities system but holds shares on behalf of clients the possibility to designate his clients in its place as controlling the voting rights? And should it be compelled to designate the identity of its clients at the request of the issuer?

We believe the general rule should be: 'Those persons, who wish to exercise their votes have to disclose their identity themselves'. Therefore we propose an amendment to this proposal, the

securities intermediary should be compelled to ask its clients whether they want to identify themselves in order to be able to exercise the vote.

If the clients choose not to identify themselves then they have to take into account that they will not be able to exercise their votes.

We think this rule would be in the best interest of the shareholder who has the choice to say 'no'.

Do interested parties agree with such provisions to allow the ultimate investor to exercise the entitlement to control the voting rights?

Yes, we agree.

Do they also agree that the ultimate investor should in all cases be offered the possibility, either to provide the financial intermediary with voting instructions or to be given power of attorney by the same financial intermediary?

Yes, definitely. The EU-Commission should expressly rule the different possibilities for the shareholder to exercise his vote, if he cannot do it in person.

Shareholders should have the opportunity to choose between 4 several options:

1. give the financial intermediary voting instructions to exercise the votes for him in a specific case or General Meeting,

2. give a 'general power of attorney' to the financial intermediary in order to exercise the votes for all of his shares, given the possibility to revoke this power of attorney at any time (example from Germany "Dauervollmacht"),

3. instead of a financial intermediary the 'general power of attorney' for all shares can also be given to a national or international shareholder association in order to offer the shareholder an 'independent' alternative.

Of course this power of attorney can also be revoked at any time.

The EU-Commission should explicitly make clear that there is not only the financial intermediary who can exercise the vote, but also shareholder associations such as DSW, the German shareholder association or other institutions.

Do interested parties agree that securities intermediaries should be required to certify to the issuing company who the ultimate investor entitled to control the voting rights is and for how many shares?

What do you think is the best option to allow for such an authentification and certification process?

As proposed before the financial intermediary should be obliged to ask its clients if they want to exercise their votes and for how many shares they want to vote. It is then up to the shareholder to decide upon the exercise of his votes. Taking the two options into consideration the first method

proposed by the Commission seems the easier and the more cost efficient way and is therefore preferable.

Should the forthcoming proposal address the issue of which parties would have to bear the costs in this authentification?

Since the issuing company has the highest interest in achieving a high turnout at the Annual General Meeting in order to avoid accidental majorities, it should also take care of the costs. This should be made clear in the proposal by the Commission.

5.2

Do interested parties consider that the practice of securities lending create problems for the exercise of voting rights, in particular in a cross-border context that should be tackled at EU-level? Should such provisions essentially aim at enhancing transparency and protecting the interests of long term investors?

DSW agrees that stock lending is an important element to maintain market liquidity. Nevertheless we believe that most borrowers are not involved in stock lending because of the voting rights, but have purely economic reasons to borrow these shares. If this is the case, then it appears logical that the EU-Commission should include a rule in its proposal for a directive which determines that in case of stock lending the right to vote maintains with the lender and does not go over to the borrower. This would facilitate the exercise of the vote by large institutional shareholders, who could at the same time lend their stock. The advantage of this rule is its clarity, which will avoid any possible misunderstandings. At the same time this rule would prevent any abuse by the borrower with respect to the votes of the lender.

A solution of such issues by contract clauses only would require each time an agreement between the lender and the borrower of the shares which is not a very practical and efficient solution.

Beyond this very important legal aspect the rules should definitely include provisions in order to improve the transparency and a better protection of the investors. The EU-Commission should consider an obligation of the funds to disclose the extent of stock lending if specific thresholds are exceeded.

5.3

Do interested parties consider that there are problems associated with the holding of depositary rights that should be addressed in the forthcoming proposal for directive?

If so should it allow holders of depositary receipts to be recognised as holding the rights attached to the underlying shares and that any specific exclusion from voting right should be removed?

Yes, obviously there seems to exist problems with certificates in the Netherlands which have to be solved. Also it should be made clear that e.g. in the case of ADRs (American Depositary Receipts), those should give the same rights to its holders as the shareholders have.

Therefore the holders of depositary receipts should be recognised as holding the rights attached to the underlying shares and most important that any specific exclusion from voting right should be removed.

PRE-ANNUAL GENERAL MEETING STAGE

6.1.

Do interested parties consider that the forthcoming proposal should contain provisions regarding the disclosure of GM notice and materials and some standards for the dissemination of such information? What should be these standards?

As the DSW European Study has shown, short notices for meetings of 10 days or even less in some countries can be deterrent to exercising shareholders' voting rights. Because of this fact there is an urgent need to establish minimum standards for notices of meetings valid for all European countries. In general the banks via Clearstream or similar institutions need 2 to 3 weeks to forward the voting ballot to the shareholder.

DSW' s experience over the last 50 years shows that a minimum of 30 days' notice in each member state is required in order to enable cross-border voting.

Such a notice should not be limited to indications on the place and time of the meeting, but should include the single points on the agenda with the resolutions' content at least in a short version.

Also minimum standards for information of the shareholder should take possible language problems into consideration. As soon as a company has a very international shareholder structure it should be obliged to give the same information not only in their mother tongue but also in English.

Should it also require issuers to maintain a specific section on their website where they would have to publish all General Meeting-related information? Should issuers websites or such GM dedicated sections of their websites contain also a description of shareholders' and investors' rights in relation to voting (voting by proxy or in absentia) and with regard to the GM (right to ask questions or table resolutions)?

Yes, the website of the issuer is the best and least cost intensive way to give detailed information on all GM-related information. This should also include a description of shareholders rights in relation to voting. Most important is detailed information on voting alternatives such as voting via a financial intermediary or a shareholder association.

Also details on shareholder rights such as the right to ask questions should be included to facilitate the access for foreign investors who would like to participate.

Information of the shareholder should also take possible language problems into consideration. As soon as a company has a very international shareholder structure it should be obliged to give the same information not only in their mother tongue but also in English.

This detailed information should not only be reserved for shareholders, but open to all interested parties.

Do interested parties consider that the forthcoming proposal for a directive should deal with the way information is 'pushed' by the issuer to the ultimate investor? If so, which of the two approaches (chain or direct) is preferable? Should the possibility be given to the ultimate investor to opt out of such identification system?

There are different possibilities to inform the shareholder of the GM.

In case of registered shares there is a direct way to inform the shareholder.

In case of bearer shares there is no direct contact to the shareholder.

The 'classical' way in Germany to forward information is to go via the financial intermediary, a reasonably functioning system so far. Besides information could also be given via e-mail, if the e-mail addresses of the shareholders are available. But this will not cover all shareholders therefore there is still a need to publish the information on the GM in a large national financial paper and in case of a strong international shareholder structure in international financial papers.

Also the EU-Commission should consider to establish a European Central Electronic Companies Registry, where all company relevant information will be provided for interested parties electronically. In Germany such a Registry for companies will be soon established and it seems a very efficient way for shareholders and cost-effective for the companies.

6.2

Do interested parties consider that share blocking requirements represent a barrier to the exercise of voting rights, especially for cross-border investors?

Yes, therefore any share blocking should be abolished in order to enable cross-border voting without any obstacles.

Do interested parties agree that the forthcoming proposal should require the abolition of share blocking requirements and propose an alternative system to determine which shareholders are entitled to participate and vote at the GM?

Yes, Germany is just introducing the system of a record date. In order to avoid any problems related to shareholder rights such as the right to file claims, DSW recommends to keep the interval between the record date and the GM as short as possible. A 7 days interval would be a fair solution in our view.

7. SHAREHOLDERS' RIGHTS IN RELATION TO THE GM

7.1

Do interested parties consider that Member States should be prevented from imposing requirements on companies regarding the venue of the GM that would act as a barrier to the development of electronic means of participation? Should additional criteria be defined at EU-level to enable shareholders participation to the GM by electronic means?

Yes, any requirement which would act as a barrier to the shareholders' participation via electronic means should be eliminated.

A EU-Directive should include minimum standards to enable the vote, the active participation via internet or videoconference. The status quo in Germany shows a dissatisfactory situation. Although sometimes shareholders can already participate in the general meeting via internet, it is common that only the speech of the company' s CEO can be followed. As soon as the general discussion with the shareholders is opened the transmission to the shareholders will be interrupted.

This has to change. The full discussion at the general meeting should be transmitted, so that those shareholders not present could also exercise their right to ask questions via internet and can also follow the answers.

Also it is very important for the shareholders that the company makes sure that during all of the GM and the following voting procedure they can still change their vote and exercise it in a different manner. It sometimes occurs that new aspects and new information is being disclosed during the GM, then the shareholders and the shareholder representatives need the possibility to vote along with the new information.

These issues should be included in the general standards, further details should then be defined by the Member States.

7.2

Do interested parties consider that the forthcoming proposal for directive should define minimum standards on the way shareholders' questions may be filed and dealt with at the GM? If so what should such minimum standards be?

The GM itself is and should stay the forum for all shareholders to ask questions to the directors and hereby receive more information about the company. Therefore minimum standards should be established regarding the right to ask questions as soon as a person holds one share. Therefore the use of the internet should not lead to the abolition or to the meaninglessness of the GM as it still is an important presence event for the shareholders, on the contrary it could be a good supplement.

Shareholders not present could ask further questions via internet before and even during the GM and could follow the answers given also via internet. In order to keep the GM manageable the rights of the chairman of the GM should be rather strong.

As a pre-GM-standard the Commission should also consider to establish a shareholder forum on the website of each company, so that all shareholders will have the chance to exchange their views

before the GM and even afterwards. This area should be restricted only to shareholders of the company.

7.3

Do interested parties consider that the forthcoming proposal for directive should define certain criteria concerning the maximum shareholding threshold for the tabling of resolutions and placing items on the GM agenda and the timing to file these ahead of the GM? If so, what should these minimum criteria be?

Yes, there should be common criteria. This is a very important issue.

The DSW European Study made clear that each Member State seems to have different thresholds regarding different shareholder rights such as the right to add proposals to the agenda and/or to table resolutions. Therefore it is absolutely necessary that the EU finds a common threshold for all Member States. A threshold which is not unreachably high for the shareholders. Therefore the lowest threshold of all Member States could be taken as an indication. Beyond this harmonisation the EU-Commission should take the union-wide introduction of the right for a 'counterproposal' into consideration, which allows under German law a shareholder with only one share to oppose the directors' proposals.

7.4

Do interested parties consider that the forthcoming proposal should oblige Member States to introduce in their national company law the possibility for all companies to offer shareholders the option of voting in absentia (by post, electronic or other means)?

DSW strongly recommends the introduction to vote in absentia either via electronic means or via a shareholder association as an independent alternative. These options should be part of an EU-directive.

Do interested parties consider that the forthcoming proposal should contain provisions to further facilitate the use of proxy voting across Member States and to lift obstructive local requirements? If so, what should be the minimum criteria that should be defined at EU-level, taking into account the constraints of cross-border voting?

Yes, any obstacles such as restrictions on the person who can be appointed as proxy (e.g. only other shareholders or only family members) prevent shareholders to use the instrument of proxy voting. This is one of the reasons for a constantly decreasing percentage of shares represented at the GM. As a general rule the EU should allow all persons, natural or legal, who already represented other shareholders at the last GM to represent them again by proxy.

An EU-Directive should include rules to simplify the proxy voting procedure. These rules should include the following minimum criteria:

· any natural or legal person should be allowed to exercise the proxy vote without any further restrictions,

· besides financial intermediaries, also shareholder association should be allowed to exercise the proxy votes, since it is one of their major tasks,

· the appointment by proxy should set low formal requirements, i.e. an electronic signature should be sufficient,

· the proxy should be valid until revoked; revocation of the proxy by the shareholder should be possible at any time.

8. POST-GM INFORMATION

8.1

Do interested parties consider that companies should be obliged to disseminate the results of votes and minutes of the GM to all shareholders and/or to post these on their website within a certain period following the meeting?

Yes, the dissemination will give all shareholders, even those, who did not have the chance to follow the GM, the opportunity to receive equal information.

The most cost-effective way for the companies is to put the information on their website. This information should be placed at the website shortly after the GM, at the latest one week after it.

Again the language problem should be taken up in the Directive:

If the company has an international shareholder structure then it should publish the information also in English.

Besides the company should maintain the information for the last 2 GMs, so that the shareholder can also use the information in the archives.

8.2

Do interested parties consider that the non-confirmation of vote execution hinders significantly the exercise of their voting rights? If so, do they consider the forthcoming proposal should address the issue by defining obligations on issuers and securities intermediaries to provide and pass automatic confirmation of vote execution along the chain from the issuer to the ultimate investor?

Yes, e.g. institutional investors, who hold a large number of shares should receive a confirmation in case of doubts if their votes were exercised at the GM and they have a proof in relation to their owners. In case of public pension funds it is even more important that they can prove they exercised their fiduciary duty with all due care.

Also we know of cases such as the Unilever GM, where proxies with voting instructions were given from institutional shareholders, but ‘got lost’ so that they could not been executed. A confirmation by the company would help avoiding these problems.

Of course it would be a great effort for the companies, if they would have to give a confirmation to each single shareholder.

Therefore DSW proposes the following procedure:

· the company should publish on its website the turnout at the GM in percentage of the share capital and in number of shares,

· furthermore it should publish the results of the votes in detail, hereby indicating not only the majority votes in percentage (usually the votes with ‘yes’), but also the votes with ‘no’ and ‘abstain’ in percent and in number of shares,

· finally the company should be obliged together with the financial intermediaries to confirm the exercise of the votes, if a shareholder who gave the instruction to vote with ‘no’ or ‘abstain’ explicitly asks for such a confirmation.