Appointment and Decision Rights

GOVERNANCE STRUCTURE SHAREHOLDERS V. MANAGERS

The legal blend between regulatory and governance strategies depends on the ownership structures

In comparative perspective, ownership structures determine which agency conflict dominates: managerial agency costs in dispersed-ownership jurisdictions, and the risk of private benefits extraction by controlling shareholders in concentrated-ownership systems. This distinction explains why legal strategies vary so widely across the U.S., UK, Germany, Japan, and civil-law jurisdictions.

Institutional investors' activism is revaluating governance rights in jurisdictions with dispersed ownership structures.

Since the 1990s, the increasing institutionalization of share ownership—particularly through pension funds, mutual funds, and insurance companies—has significantly reduced shareholder coordination costs and expanded the potential for informed voting. This shift has transformed institutional investors into central actors in corporate governance.

How to address the shareholders/managers agency conflicts?

a) when ownership is concentrated ⟹ Appointment/decision

b) when ownership is dispersed ⟹ Incentives/standards/affiliation

Delegated management - Corporate boards

a) -Very few decisions left to shareholders

b) -Delegated management provides for decision-making assigned to a board of directors in order to economize costs for shareholders

c) -Directors also to supervise managers

d) The prevalent board structures (one tier – two tier)

The dual monitoring–management function is central to corporate law, which relies on non-executive directors to temper managerial discretion. Comparative studies show that jurisdictions differ significantly on how strongly they separate managerial and monitoring functions, but all acknowledge the board's pivotal role in balancing executive power

US-Japan-UK use 1 tier board: a single board manage and supervise managers through internal committees

Germany- Brazil use 2 tier board: separation between managing and monitoring functions: supervisory board and management board

In Germany, the supervisory board must also include worker representatives pursuant to codetermination laws, which further distinguishes the monitoring function and embeds employee interests directly into corporate governance. The strict separation of roles enhances oversight but may slow down strategic decision-making

Italy-France allow 1 and 2 tier board

US – France allow the accumulation of the offices of board chairman and CEO, while in Germany supervisory board members cannot have management powers

The importance of the board size: small is better !

Empirical evidence demonstrates that smaller boards are more effective in both monitoring and advisory tasks because they reduce collective-action frictions and improve deliberation quality. Larger boards tend to suffer from diffusion of responsibility and a higher risk of free-riding.

APPOINTMENT RIGHTS and DECISION RIGHTS

- once again it is up to the shareholding structure
- the controlling shareholder can easily monitor managers (fixing the agency problem), but the controlling shareholder may divert corporate value to itself to the detriment of the minority shareholders (causing a new agency problem)
- this “principal–principal” conflict is particularly salient in civil-law jurisdictions with controlling shareholders. Legal systems address it through mandatory rules on related-party transactions, enhanced disclosure, and minority veto rights, which aim to mitigate the extraction of private benefits.
- effects of the aggregation of shares in the portfolios of asset managers and institutional investors. Need for protection of their ultimate clients; institutional intermediaries often vote on behalf of dispersed retail investors, raising concerns about whether voting outcomes effectively reflect the preferences of the ultimate beneficiaries. Stewardship codes and fiduciary obligations attempt to close this accountability gap.

APPOINTMENT of DIRECTORS AND SYSTEMS OF VOTING

Such power is more effective if shareholders have also the right to select the candidates and not only to appoint

- usually the board presents a slate of nominees (apart Italy and Brazil)

- a qualified minority can present new candidates in the agenda of the shareholders meeting; minority nomination rights significantly enhance board contestability; in Italy, the *lista di minoranza* mechanism ensures that at least one director represents minority shareholders, while Brazil's cumulative voting system similarly facilitates minority presence on the board

- in US minority shareholders have to solicit their own proxies or apply for a "proxy access"

- the "short slate" as mean to support shareholders activism. The short-slate technique is particularly relevant in U.S. proxy fights, allowing activist shareholders to place a limited number of nominees without seeking full board control. This enables incremental governance reforms and targeted monitoring improvements without destabilizing the company. With a short slate an insurgent may solicit to vote in favor both of its nominees (a minority) and nominees of the company (a majority).

Majority vs. Plurality voting

- majority vote = the winning candidate must receive more than 50% of all votes cast

- plurality vote = the candidate with the most votes win

Majority voting is adopted in most jurisdictions, while the United States—especially Delaware corporations—traditionally relied on plurality voting, although many large public companies have voluntarily adopted majority voting standards.

SYSTEMS OF VOTING

Voting systems:

- one share/one vote
- ban circular voting structures (subsidiary)
- no vote buying
- no voting caps (Germany, Italy, Japan)
- limits on dual class shares

- separation of control from economic interest: “empty voting” phenomenon: empty voting arises when investors decouple voting rights from economic exposure, often through derivatives or share lending. This practice may distort shareholder incentives and undermine the principle that control should correspond to economic risk-bearing

REMOVAL OF DIRECTORS

- dropping their names from company's slate
- long term of directorial office is critical!
- directorial terms
  - UK, also for life!
  - 2 years Japan
  - 1-4 US
  - 5/6 Germany + France
- removal rights

Length of appointment is critical! Longer terms reduce board turnover and may insulate directors from shareholder pressure, but they also weaken accountability. Staggered boards, common in U.S. corporations, exemplify this tension by making removal more difficult and thereby stabilizing managerial power.

- *removal without cause* (UK, France, Italy, Japan and Brazil) non waivable right, such removal without cause aligns with the principle that directors serve at the pleasure of shareholders, reinforcing accountability. Jurisdictions such as Germany depart from this by requiring supermajority votes for removal of shareholder-elected supervisory board members and prohibiting removal of worker-elected members. In the US (board centric system) the law weakens removal rights

- *removal for* (good) *cause*

DECISION RIGHTS

Generally only in few cases: conflicted decisions, changes in governance structure, fundamental changes. Comparative analysis reveals that U.S. law grants shareholders the narrowest range of mandatory decision rights, reserving most decisions to the board under the business judgment rule. By contrast, European jurisdictions frequently require shareholder approval for a wider array of transactions with strategic significance.

But : distribution of dividends, class 1 operations, appointment of auditors, executive pay etc. Say-on-pay" has emerged as a prominent governance tool, mandated in the EU Shareholder Rights Directive II and adopted in various forms across the UK and U.S., aiming to enhance transparency and align remuneration policies with long-term shareholder interests.

SHAREHOLDERS COORDINATION

Board-centric v. shareholders centric law

US

Rest

+ **collective action** - Collective-action problems stem from dispersed ownership, limited incentives to become informed, and high coordination costs. Institutional investors help mitigate these obstacles by aggregating voting power and professionalizing governance engagement.

- proxy + mail + distance voting systems

- Japan
- France
- Germany
- Italy

Reforms across Europe and Japan increasingly allow electronic voting, online participation, and secure transmission of voting instructions, reducing logistical barriers and facilitating higher participation rates among dispersed shareholders.

- only proxy - UK+US

- institutional investors aggregate control rights and reduce coordination costs

In US institutional investors have a fiduciary duty towards clients and must use the voting rights in order to guarantee a correct corporate governance of the corporation

In practice:

- mutual funds, trusts, insurance = support shareholders

- custodial institutions (banks) = support company nominees

This pattern reflects institutional incentives: custodian banks often maintain commercial relationships with corporate clients, which may bias their voting behavior toward management. Conversely, asset managers with fiduciary obligations tend to be more independent and increasingly activist.

In Europe (UK) see the Stewardship Code which mandate institutional investors to be active and engage in corporate governance in the interests of their beneficiaries. Soft law i.e. comply or explain rule .....

The UK Stewardship Code is considered a global benchmark for soft-law governance, emphasizing long-term engagement, disclosure of voting policies, and accountability to beneficiaries. Similar initiatives have since emerged in Japan, the Netherlands, and other EU jurisdictions.