

Shareholders' Duties in European Company Law

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Corporate governance discussions in Europe on shareholders' rights have increasingly been replaced by discussions on shareholders' duties.

This apparent shift in focus was accelerated by the financial crisis, which made it clear that the existing corporate governance framework is flawed. In a speech from 2010,

Commissioner Michel Barnier stated

that: '[w]e have spoken for years about shareholders rights. It is time to also talk about shareholders' obligations.' Thus, the traditional perception in company law, where shareholders have no duties, is challenged. There is not only a growing pressure from academia and politicians to see shareholders as holders of rights as well as having duties, shareholders already have a number of duties in company law and capital market law today. Some are imposed on shareholders in general, but the majority is either depending on the nature of the shareholder or the nature of the situation.

The shareholders' duties which are general in nature include the financial duties a shareholder owes to the company. The classical example is the duty to pay up the capital the shareholder has subscribed to. While a general duty of loyalty owed either to the company or to fellow shareholders is found in some Member States in small companies, it is less clear to which extent such a duty of loyalty exists in company law in general. The duty to abstain from abuse of rights may be another general duty if the concept of duties includes obligations that restrict the exercise of rights. A duty not to abuse rights may be imposed not only on majority shareholders but also on minority shareholders depending on the context.

Shareholders' duties may also relate to specific situations. Disclosure duties imposed on shareholders are often a feature in particular in capital market law, where disclosure and transparency are fundamental tools for ensuring the efficient functioning of the market. For instance, for many years we have had rules requiring major shareholders to notify their holdings, and even broader disclosure duties have been imposed in the amendment to the

Transparency Directive adopted in 2013, together with detailed rules on how to enforce the notification duty. Other disclosure duties (admittedly, in the form of a comply-or-explain duty) are proposed for institutional investors, assets managers and proxy advisors in the proposed revision of the Shareholder Rights Directive.

Another situation which may impose duties on shareholders is the transfer of shares. The most debated is probably the mandatory bid in European capital market law, but national company law may also encompass situations where shareholders have a duty to redeem the shares of other shareholders. Moreover, company law may also encompass situations where a shareholder has a duty to give up his shares because of another shareholder's or the company's right to redeem the shares. Another duty imposed in a very specific situation involving the transfer of shares is those requirements a short seller must adhere to before a sale is completed. These duties for short sellers are the result of a heated debate during the financial crisis. Interestingly, the financial crisis is also one of the main reasons for some of the new duties introduced in the amendment to the Transparency Directive and those proposed in the amended Shareholder Rights Directive.

Another trend relevant for the discussion on shareholders' duties is that shareholders are no longer regarded as one homogeneous group. Rather, we see duties being imposed on different kinds of shareholders. At a European level new duties are to be imposed on institutional shareholders, as the proposal to amend the Shareholder Rights Directive includes an initiative on the disclosure of engagement policies as well as voting records by institutional investors. Other types of shareholders may especially be subject to obligations as well. This includes groups of companies where the parent in some jurisdictions has specific duties, either because of the risk of the parent extracting private benefits or because the parent is considered to be in a unique position vis-à-vis shareholders in general. In addition, it should be contemplated whether the state as a shareholder has duties which do not apply to other shareholders. We know from the Golden-share Cases that the state, which has special rights, has a duty to form and exercise these in a way that does not infringe the free

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movement rights. Other duties for the state as a shareholder may be inserted in national law.

This leaves shareholders in a web of duties that may take different forms depending on the context. Moreover, it challenges the general assumption in company law that shareholders have no obligations towards the companies in which they invest or towards

fellow shareholders. Thus, the trend gives rise to a growing need to re-examine the notion of shareholders and the role they play – or should play – in corporate governance. Moreover, more research is needed to conclude whether imposing duties on shareholders will result in better corporate governance or more efficient markets.