
Germany (corrected August 2013)

Summary of Current Shareowner Rights

Percentages cited reflect information gathered by GMI Ratings about 82 companies in Germany as of 31 August 2012.

From a legal standpoint, shareowner rights in the German market are considered strong. However, those rights are affected by the dual-board structure, which consists of both a supervisory board and a management board. Shareowners have no direct influence on the management board, which oversees the operational activities of a company. Supervisory boards, meanwhile, are charged with oversight of the management board. At least half the members of the board of any German company with more than 2,000 employees must be employee representatives. This requirement makes employees of German companies more powerful stakeholders than employees in most other markets.

| Issue | Current Standard or Usual Practice | Level of Practice Adoption, Exceptions to Usual Practice, and Trends (if any) |
|---|---|---|
| What is the average percentage of independent board members on public company boards (% independent board members)? | 37% | |
| What percentage of companies have fully independent audit committees? | 1.2% | |
| What percentage of publicly traded companies have a controlling shareowner (e.g., family, government, majority block holder)? | 36.6% | Companies that have a controlling shareowner are relatively common. |
| Is voting by proxy permitted? | Yes | Always allowed |
| Must shares be deposited or blocked from trading in order to vote? | Rarely | The bylaws of companies that issue bearer shares ¹ contain provisions that shares must be deposited. However, as more companies issue registered shares, this requirement has become less frequent in Germany. |

(continued)

¹Bearer shares are equity securities not registered on the books of the issuing corporation. Such shares are transferred by physical delivery. The issuer disperses dividends to the bearer when a physical coupon is presented to the issuer.

| Issue | Current Standard or Usual Practice | Level of Practice Adoption, Exceptions to Usual Practice, and Trends (if any) |
|---|------------------------------------|--|
| Are there share ownership limitations in this market? | No, usually | Share ownership limitations usually do not exist. Only Lufthansa AG limits ownership of its shares by non-European Union entities. |
| Are there (other) common restrictions on the rights of shareowners to vote in person or by proxy? | No | Proxy voting is unrestricted. |
| Do companies adhere to a majority voting standard in the election of board members? | Yes | Ordinary annual general meeting resolutions, including the election of board members, pass only if they earn a majority of votes cast. |
| Do companies allow for cumulative voting in the election of board members? | No | Cumulative voting is not allowed. |
| Are shareowners able to affect a company's remuneration policy through shareowner approval (binding or non-binding) of the remuneration committee report, the proxy's Compensation Discussion and Analysis section, or something comparable? | Sometimes | |
| Are shareowners able to affect remuneration policy through binding shareowner approval of specific equity-based incentive plans or something comparable? | Mostly | |
| Are shareowners permitted to introduce dissident resolutions (binding or nonbinding) at an annual meeting? | Yes | This right is standard. |
| Do shareowners have a right to convene a general meeting of shareowners outside the annual meeting process (e.g., an extraordinary general meeting or special meeting) if only 10% or less of the shares are represented in the group requesting the meeting? | Yes | This right is standard; 5% of voting stock is required. |
| What percentage of companies include golden shares in their capital structure? | 0% | |
| Are shareholder rights plans (poison pills) allowed in this market? | No | No companies have poison pills. |
| If shareholder rights plans are in use, do they have to be approved by shareowners? | na | |

| Issue | Current Standard or Usual Practice | Level of Practice Adoption, Exceptions to Usual Practice, and Trends (if any) |
|---|------------------------------------|---|
| Do all shareowners have the right to approve significant company transactions, such as mergers and acquisitions? | Yes | This right is a legal requirement. |
| Do companies require a supermajority vote to approve a merger? | Yes | A 75% vote is required to approve a merger or to amend the articles of association. |
| Are companies subject to a fair price provision, either under applicable law or as stated in company documents (such as the charter or bylaws)? | Yes | Suitors must offer minimum prices based on the weighted-average market price over the previous three months and any price paid to possible prior purchasers. |
| Are class action suits commonly used in this market? | No | |
| Are derivative suits commonly used in this market? | No | In Germany, a single shareowner cannot file suit in the name of the company. However, paragraph 147 of the Aktiengesetz (Stock Corporation Act, or AktG) allows minorities representing more than 10% of share capital to pursue a claim for damages for the corporation in their right. In certain conditions, a shareowner can directly sue management and supervisory board members. The shareowners can appeal against resolutions passed at the general meeting in the case of some breaches. Such an action can be brought by a shareowner at any time. |

na = not applicable.

Current Engagement Practices and Shareowner Rights Developments

In Germany, the shareowner engagement process has somewhat improved in recent years. At times, in conjunction with such associations as the Deutsche Schutzvereinigung für Wertpapierbesitz e.V. (DSW), shareowners have been able to exert some influence at shareowner meetings of German companies. The DSW is Germany's oldest and largest association for private investors. It has more than 28,000 members and 7,000 investment clubs, which have recently enjoyed growing popularity with private German investors.

In 2012, a number of investors, including the United Kingdom's Hermes and the German shareowner association VIP, took the rare step of filing a no-confidence motion against Deutsche Bank's supervisory board. Investor complaints included dissatisfaction over the board's succession planning for CEO Josef Ackermann, a misalignment between executive pay and firm performance, and a poor sustainability strategy.

A key limitation on shareowner rights arises from the dual-board structure in Germany. Each company has a supervisory board (*aufsichtsrat*) and a management board (*vorstand*). The supervisory board's main task is to supervise the management board, including appointment and dismissal of management board members. Only the management board can make executive decisions. Additionally, shareowners have no direct means of influencing management board membership. Recently, however, German companies have been able to reorganize as a Societas Europaea (European Company, or SE), which eliminates the dual-board structure and allows companies to form a single board of directors. Because the formation of an SE must be approved by both management and employees, ordinary shareowners have little influence in such cases.

Another issue is the large number of supervisory board members who are employee representatives. The *Mitbestimmungsgesetz* (German Co-Determination Act) requires that if a listed company has between 500 and 2,000 employees, one-third of its supervisory board members must be made up of employee representatives who can be elected only by employees of the company; companies with more than 2,000 employees must have half their supervisory board members elected by employees of the company. This requirement can pose a danger to shareowner rights when shareowner interests conflict with the interests of employees. In case of a tie vote, however, the supervisory board chair, who is elected by shareowners, casts the tie-breaking vote, which gives the edge to shareowners in a disputed situation.

Corporate takeovers are primarily governed by the *Wertpapiererwerbs und Übernahmegesetz* (Securities Acquisition and Takeover Act). Takeovers are both much less common and more difficult to accomplish in Germany than in some other developed markets. Also, mergers between German and other European companies must be approved by the European Commission. The dual-board structure and the Co-Determination Act serve as effective structural devices for fending off hostile bidders, and suitors may be further deterred by the 75% supermajority requirement for approving mergers and amending a company's articles of association. More than 30% of the German companies researched for this manual are majority owned, but studies suggest that up to 80% of German companies have at least one shareowner controlling more than 25% (a blocking minority) of the company. The Securities Acquisition and Takeover Act requires that a group of shareowners own at least 95% of the company before they can "squeeze out" the remaining minority shareowners.

The German Corporate Governance Code (GCGC) was amended in 2013. In addition to trimming down the size of the code itself, the Commission of the German Corporate Governance Code's recent amendments addressed severance pay for management board members and the establishment of a supervisory board nomination committee. Companies can choose to deviate from the recommendations of the code but are then obliged to disclose annually and justify any deviations (the "comply or explain" model). The recommendations include an emphasis on board transparency and advocate greater disclosure about director nominees' personal and business relations with the firm and large shareowners.

Legal and Regulatory Framework

The AktG is the primary law governing German publicly traded companies. The AktG is administered by the Bundesministerium der Justiz (German Federal Ministry of Justice) and contains a majority of the rules and regulations governing shareowner rights. In addition to the Securities Acquisition and Takeover Act and the Co-Determination Act, the Wertpapierhandelsgesetz (Securities Trading Act), the Börsenzulassungsverordnung (Stock Exchange Admission Regulation), the Handelsgesetzbuch (Commercial Code), and the Bürgerliches Gesetzbuch (Civil Code) contain important provisions related to shareowner rights. Criminal enforcement is conducted by the Federal Ministry of Justice. In most cases, listing rules do not require specific corporate governance structures or practices in Germany.

Shareowner engagement or activism in Germany is facilitated through a variety of mechanisms. The Gesetz zur Kontrolle und Transparenz im Unternehmensbereich (Control and Transparency in Business Act) was amended to prohibit multiple and maximum voting rights, and the act requires companies to abide by the one-vote-per-share standard. Non-voting preferred stock may be issued, but it must not make up more than 50% of a company's share capital. Special meetings of shareowners may be called if shareowners owning an aggregate of at least 5% ask for one. Those shareowners may also ask for items to be included in the published meeting agenda. Changes to the corporate charter or articles of association require the consent of at least 75% (in some cases, up to 100%) of the company's registered share capital represented at a shareowner meeting. The supervisory board is not permitted to amend either document without shareowner approval.

Generally, shareowners may exercise their voting rights by proxy without any restrictions. The articles of association for most German companies contain a provision requiring shareowners to deposit their shares before a meeting of shareowners in order to vote. Although this provision is technically not a legal requirement, because companies have the ability to issue registered shares, most German companies have issued bearer shares, which must be deposited in order to vote.

As is happening elsewhere, shareowners in the German market recently have raised concerns about executive compensation levels. The GCGC was amended to recommend that severance pay for both company managers and board members be capped to two years' compensation in the case of termination without cause. The amended GCGC also states that in the case of a change in control, executives should not receive termination benefits exceeding 150% of their annual income.

In Germany, supervisory board members can be removed without cause and are required to gain a majority vote at the annual meeting to continue serving on the board. Board members are elected to serve terms of varying lengths, and those terms may exceed three years in certain cases. Furthermore, sometimes half the supervisory board members are employee representatives who were voted in by the company employees. As a result, shareowners are relatively limited in their ability to influence board membership.

Key organizations with information relevant to shareowner rights in Germany include the following:

Bundesministerium der Justiz (Federal Ministry of Justice) (www.gesetze-im-internet.de)

Bundesministerium der Finanzen (Federal Ministry of Finance)
(www.bundesfinanzministerium.de)

Bundesanstalt für Finanzdienstleistungsaufsicht (Federal Financial Supervisory Authority) (www.bafin.de)

Deutscher Corporate Governance Kodex (German Corporate Governance Code) (www.corporate-governance-code.de)

Deutsche Schutzvereinigung für Wertpapierbesitz e.V. (www.dsw-info.de)

European Commission—Competition (http://ec.europa.eu/competition/index_en.html)

European Commission—Company Law and Corporate Governance (http://ec.europa.eu/internal_market/company/index_en.htm)