

Germany

Summary of Current Shareowner Rights

Percentages cited reflect information gathered by GMI about 95 companies in Germany as of 15 May 2008.

Legally, shareowner rights in the German market are considered strong. Those rights are affected by the dual-board structure, however, 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 are charged with oversight of the management board. At least half of the members of the board of any German company with more than 2,000 employees must be employee representatives. This makes employees of German companies more powerful stakeholders than are 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)?	46%	
What percentage of companies report significant related-party transactions (1% of revenue or more) within the last three years?	7%	
What percentage of publicly traded companies have a controlling shareowner (e.g., family, government, majority block holder)?	30%	For companies to have a controlling shareowner is relatively common.
Is voting by proxy permitted?	Yes	Always allowed
Must shares be deposited or blocked from trading in order to vote?	Often, yes	The bylaws of companies that issue bearer shares ⁷ contain provisions that shares must be deposited. As more companies issue registered shares, however, this requirement has become less frequent in Germany.
Are there share ownership limitations in this market?	Usually, no	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 election of board members, can be passed only with a majority of votes cast.
Do companies allow for cumulative voting in the election of board members?	No	Cumulative voting is not allowed.

⁷Bearer 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 shareowners able to affect a company's remuneration policy through shareowner approval (binding or nonbinding) of the remuneration committee report, the proxy's Compensation Discussion and Analysis section, or otherwise?	Sometimes	51% of the companies researched for this manual allow this ability.
Are shareowners able to affect remuneration policy through binding shareowner approval of specific equity-based incentive plans or otherwise?	Mostly	84% of the companies researched for this manual allow this.
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%	Volkswagen AG's Golden Share Law was overturned by the European Court of Justice in October 2007.
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	
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 3 months and any price paid to possible prior purchasers.

Issue	Current Standard or Usual Practice	Level of Practice Adoption, Exceptions to Usual Practice, and Trends (if any)
Are class action suits commonly used in this market?	No	Class action suits have not been allowed. On 1 November 2005, however, Germany enacted the <i>Kapitalanleger-Musterverfahrensgesetz</i> (Act on Model Case Proceedings in Disputes under Capital Markets Law), which allows sample proceedings to be brought before the courts in litigation arising from mass capital market transactions. It does not apply to any other civil law proceeding. The allowed suits are not like class actions in other markets: The law applies only to parties who have already filed suit, and it does not allow a claim to be brought in the name of an unknown group of claimants. The effects of the new law will be monitored over the next 5 years. It contains a sunset clause, so it will automatically cease to be in effect on 1 November 2010 unless the legislature prolongs it or extends it to other mass civil case proceedings.
Are derivative suits commonly used in this market?	No	In Germany, a single shareowner cannot file suit in the name of the company. Paragraph 147 of the <i>Aktiengesetz</i> (Stock Corporation Act or AktG), however, 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 managing and supervisory board members. The shareowners can appeal against resolutions passed at the general meeting in case of some breaches. Such an action can be brought by each shareowner at any time.

Current Engagement Practices and Shareowner Rights Developments

In Germany, the shareowner engagement process has somewhat improved in recent years. At times, in conjunction with associations such 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 heads 7,000 investment clubs, which have recently enjoyed growing popularity with private German investors.

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 employee representatives, who can be elected only by employees of the company; companies with more than 2,000 employees must have half of their supervisory board members elected by employees of the company. This requirement can be a particular problem for 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 an effective majority representation for 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 percent supermajority requirement for approving mergers and amending a company's articles of association. Not only are more than 30 percent of the German companies researched for this manual majority owned, but studies suggest that up to 80 percent of German companies have at least one shareowner controlling more than 25 percent (a blocking minority) of the company. The Securities Acquisition and Takeover Act requires that a group of shareowners own at least 95 percent of the company before they can "squeeze out" the remaining minority shareowners.

The *Deutscher Corporate Governance Kodex* (German Corporate Governance Code, or GCGC), published by the Cromme Commission, was last amended in June 2007. Although companies are not required to adhere to the GCGC, the number of German companies reporting voluntary compliance with the code has increased substantially in the past few years. The GCGC consists of recommendations and suggestions, and companies usually report only on compliance with recommendations of the code. Key recent amendments to the GCGC address mainly severance pay for management board members and the establishment of a supervisory board nomination committee.

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. Nonvoting preferred stock may be issued, but it must not make up more than 50 percent of a company's share capital. Special meetings of shareowners may be called if shareowners owning an aggregate of at least 5 percent 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 percent (in some cases, up to 100 percent) 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.

Shareowners generally 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 both company managers' severance pay and board members' severance pay be capped to two years' compensation in 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 percent 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, however, that may even exceed three years in certain cases. Furthermore, sometimes half of 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)
(<http://bundesrecht.juris.de/index.html>)

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/comm/competition/index_en.html)

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