



DSW's Survey on Directors' Pay 2005

The regulatory framework – past and future

Germany's public companies were given three years to comply with the voluntary Corporate Governance Code recommending an individual disclosure of directors' pay. But with only 70 percent of DAX-30 companies planning to comply by the end of this year the government has decided it is time to compel the companies to disclose such information.

In July 2005, the German Government approved a Law on Disclosure of Management Board Remune-

ration, the so-called **VorStoG** (see p. 7 for details). The annual reports for the financial year 2006 for the first time have to individually disclose information on board members' pay. This means that investors in 2007 will be informed about the individual remuneration of all management board members. This is what we thought. But unfortunately, the politicians got cold feet when adopting the law. With the so-called opt-out rule the shareholders' meeting may pass a resolution, with a three-quarters majority of the shares present, allowing the company to refrain from publishing board members' remuneration. Erich Sixt, CEO, founder and major shareholder of the Munich car rental company Sixt AG was the first to use this barn door. At the general meeting of Sixt, 98 percent of the present shares voted against an individualised disclosure of board members' pay. And there was no doubt that Mr Sixt would receive the necessary majority. He himself already holds 57 percent of the company's shares.

This case clearly shows the danger of the opt-out rule. Especially at companies with major shareholders it will lead to a two-class society: On the one side the big ones knowing the individual board members' pay anyway – due to their position. On the other side the private shareholders who are not allowed to see behind the curtain.

And Sixt will not remain the only objector. Other transparency opponents already announced to follow the Bavarian example. One of the most inveterate opponents is Porsche-CEO Wendelin Wiedeking. He, too, can be sure that the 75-percent-hurdle will not pose a problem: All of Porsche's common shares are held by the Porsche and Piech families so Porsche will not need to disclose individual

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figures in future. The remaining preference shareholders will still be in the dark.

But even shareholders of some companies which already disclose their directors' pay individually will also be left in the dark. Even when complying, companies have enough possibilities to enhance intransparency when it comes to individual director's pay. For example, the new law refrains from demanding a standardised disclosure. Experience shows, though, that we can only approach the aim of understandable and comparable information if this is specified by regulations. Furthermore, the VorstOG in some passages does not go far enough: With regard to share options, for instance, it only demands to disclose the market value at the time of granting. And for pension payments, compa-

nies are only obliged to inform their shareholders on directors' pension benefits if those benefits considerably differ from the company's overall pension schemes.

The recommendations of DSW

According to DSW, a remuneration report shall individually disclose the following information in a standardised format:

1. fixed fee
2. variable remuneration/cash bonus
3. payments of third parties and affiliated group companies
4. "golden hellos"/termination payments
5. other remuneration/non-cash benefits (e.g. company car)

DSW Survey on Directors' Pay 2005							
rank	company	average pay per director in 2004	average pay per director in 2003	percentage change	Earnings per Share 2004	Earnings per Share 2003	percentage change
1	Deutsche Bank	3,035 mill.	3,726 mill.	-18,54	5,02	2,44	105,74
2	RWE	2,613 mill.	2,164 mill.	20,75	3,80	3,45	10,14
3	DaimlerChrysler	2,588 mill.	2,985 mill.	-13,29	2,43	0,44	452,27
4	Siemens	2,108 mill.	2,060 mill.	2,32	3,83	2,75	39,27
5	E.ON	2,107 mill.	2,800 mill.	-24,76	6,61	7,11	-7,03
6	SAP	2,017 mill.	2,182 mill.	-7,57	4,22	3,47	21,61
7	Metro	1,942 mill.	1,685 mill.	15,26	2,53	2,35	7,66
8	Schering	1,918 mill.	1,953 mill.	-1,79	2,61	2,28	14,47
9	Allianz	1,790 mill.	1,631 mill.	9,75	6,01	5,59	7,51
10	Adidas-Salomon	1,782 mill.	0,943 mill.	88,97	6,88	5,72	20,28
11	BMW	1,763 mill.	1,585 mill.	11,21	3,30	2,89	14,19
12	Henkel ¹	1,713 mill.	1,401 mill.	22,30	3,82	3,65	4,66
13	Deutsche Telekom	1,612 mill.	1,609 mill.	0,20	1,10	0,30	266,67
14	BASF	1,600 mill.	1,261 mill.	26,92	3,43	1,62	111,73
15	Infineon	1,537 mill.	1,078 mill.	42,53	0,08	-0,60	•
16	Deutsche Post	1,532 mill.	1,133 mill.	35,28	1,43	1,18	21,19
17	ThyssenKrupp	1,523 mill.	0,951 mill.	60,17	1,81	1,09	66,06
18	Linde	1,500 mill.	1,100 mill.	36,36	2,30	0,91	152,75
19	VW	1,497 mill.	1,532 mill.	-2,28	1,75	2,54	-31,10
20	Bayer	1,375 mill.	0,935 mill.	47,17	0,83	-1,86	•
21	Münchener Rück	1,325 mill.	1,388 mill.	-4,50	8,01	-2,25	•
22	Deutsche Börse	1,293 mill.	1,325 mill.	-2,42	2,38	2,20	8,18
23	TUI	1,137 mill.	1,012 mill.	12,34	2,74	1,54	77,92
24	Continental	1,118 mill.	1,002 mill.	11,66	4,88	2,37	105,91
25	Altana	0,981 mill.	0,994 mill.	-1,34	2,88	2,53	13,83
26	Hypo-Vereinsbank	0,960 mill.	0,960 mill.	0,00	-3,27	-4,92	•
27	MAN	0,872 mill.	0,618 mill.	40,99	2,09	1,25	67,20
28	FMC ²	0,870 mill.	0,630 mill.	38,13	4,16	3,42	21,64
29	Commerzbank	0,851 mill.	0,915 mill.	-6,94	0,66	-4,26	•
30	Lufthansa	0,851 mill.	0,640 mill.	32,82	0,94	-2,51	•
	average peak	1,594 mill.	1,473 mill.	8,2			

¹Earnings per preference share, ²Earnings per share in USD; remuneration 2004 converted from USD to €

6. share-based compensation with information on
 - a. number and market value of options at the beginning of the fiscal year
 - b. options granted/expired during the fiscal year
 - c. (hypothetical) market value of options (granting and exercise date) exercised during the fiscal year including the number of shares acquired
 - d. number and (hypothetical) market value of outstanding options at the end of the fiscal year
 - e. maximum number of exercisable options together with the (hypothetical) market value
 - f. end of the blocking period
 - g. expiry date
7. pension benefits with information on
 - a. years of service which allow for pension benefits
 - b. existing pension entitlements at the beginning of the fiscal year divided into
 - i. cash benefits
 - ii. other benefits (e.g. company car) including equivalent cash value
 - c. pension entitlements acquired during the fiscal year
 - d. existing pension entitlements at the beginning of the fiscal year divided into
 - i. cash benefits
 - ii. other benefits (e.g. company car) including equivalent cash value
 - e. amount deferred or spent for this purpose
 - f. existing pension entitlements at the beginning of the fiscal year divided into
 - i. cash benefits
 - ii. other benefits (e.g. company car) including equivalent cash value

The neighbours

With such a standardised disclosure Germany would not lead the way. Other countries have a long tradition when it comes to disclosure on director's pay:

In **France**, listed companies have to disclose their individual board members pay since 2001. Though the pressure in France rather came from the AMF (Autorité des Marchés Financières) than from the legislator: The

AMF supervisory demands detailed information on the composition of fixed and variable remuneration.

In **Great Britain**, listed companies have to file a remuneration report which must include details on all parts of the individual managers remuneration (fix and variable remuneration, share options, pension benefits and other benefits). Since 2002 companies even have to disclose their future remuneration policy as well as payments for the following year. The shareholders approve the remuneration report at the general meeting.

Individual disclosure of directors' pay?

Adidas	no
Allianz	yes
Altana	yes
BASF	no
Bayer	yes
BMW	no
Continental	yes
Commerzbank	yes
DaimlerChrysler	no
Deutsche Bank	yes
Deutsche Börse	yes
Deutsche Post	yes
Deutsche Telekom	yes
E.ON	yes
FMC	no
Henkel	no
HypoVereinsbank	only CEO
Infineon	no
Linde	no
Lufthansa	yes
MAN	only CEO
Metro	yes
MunichRe	no
RWE	yes
SAP	yes
Schering	yes
Siemens	yes
ThyssenKrupp	yes
TUI	yes
Volkswagen	only CEO

In the **USA** the disclosure of board members' pay traces back to the Securities Exchange Act 1934. All listed companies are obliged to disclose their directors' pay individually, even pensions, bonus payments or health insurances paid by the company.

The systematics

In our survey, we analysed the average cash salary of the executives in the financial years 2003 and 2004 and compared the development to that of the Earnings per Share (EpS) of the respective company. As in the years before we had to deal with different levels of transparency. On the one hand the companies already individualising the pay of their top management. In 2004 nine more companies for the first time decided to disclose board members pay individually and with that followed the nine transparency pioneers. Three companies at least disclosed the remuneration of the CEO. Nine DAX companies still stick to disclosing the overall pay figure (see p. 3 for details).

The results

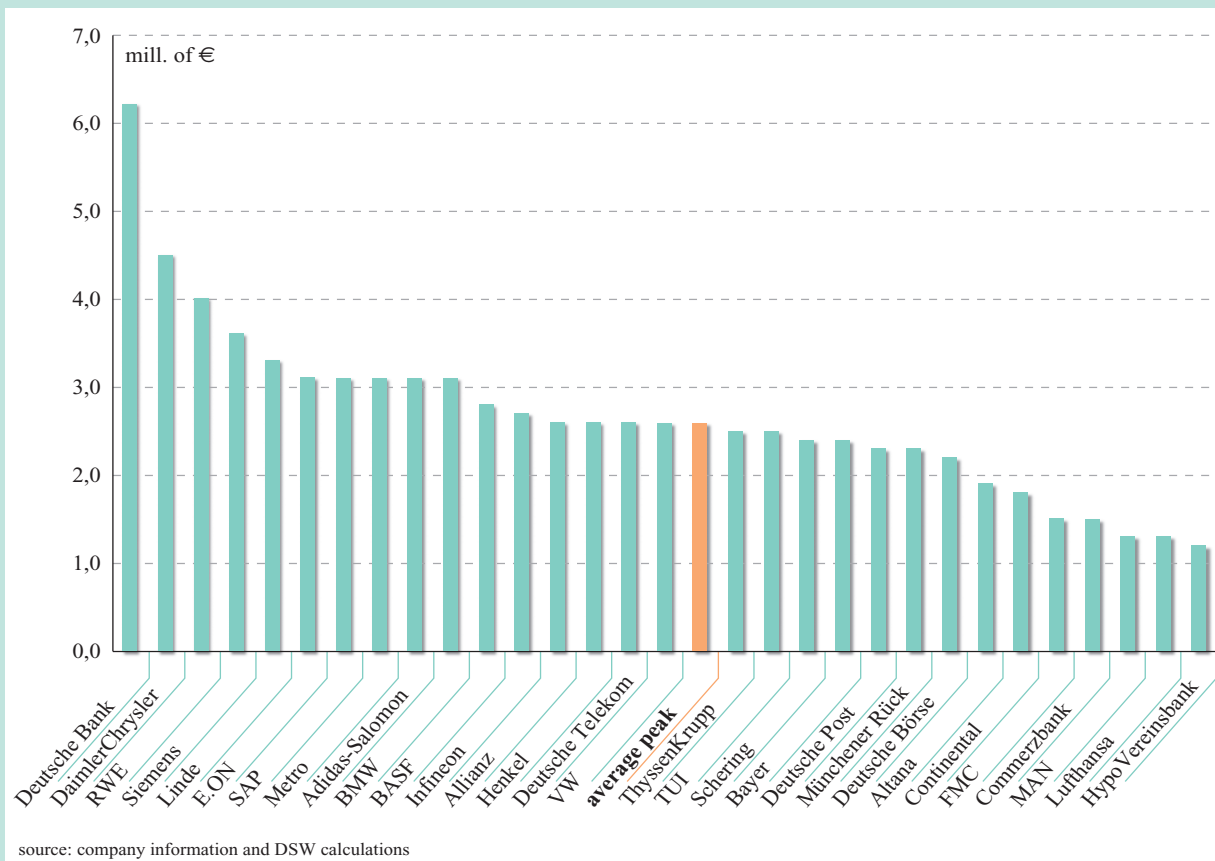
The results of the DSW survey show that directors of the DAX-30 companies earned an average of € 1.6 million in fiscal 2004. In 2003 they received € 1.5 million. This is an increase of about 8 percent.

The strongest pay rise was up to Adidas with an increase of almost 90 percent. The EpS at the same time increase by 20 percent. The disproportionate increase in pay, though, is especially due to accrued expenses for a long term incentive plan in an amount of € 4.55 million.

The second place in pay rise goes to Thyssen-Krupp with an increase of 66 percent. The EpS in the same period of time increased by 60 percent.

E.ON managers had to face the biggest loss in pay: Almost 25 percent less the company transferred to its managers. The EpS decreased by 7 percent. Deutsche Bank's top management had to accept a decrease of 18 percent but with an average pay of € 3.035 million the bank still is the top payer among the DAX-30 companies.

CEO's pay in 2004



source: company information and DSW calculations

The pay range again is very wide although not as wide as in 2003. This year's top payer Deutsche Bank hands roughly € 2.2 million more to each of its top executives than number thirty (Deutsche Lufthansa) on our list.

The absolute amount top executives receive is just one thing. It is also important that the remuneration reflects the respective management performance. Pay should not rise when profit falls! And here, companies seem to have learned from the past. While in 2003 five companies increased the pay for the top managers while the EpS decreased, this development could no longer be viewed in 2004. We hope that this positive development has its grounds in a change of mind and is not due to the fact that only E.ON and Volkswagen decreased their EpS. At Volkswagen we would have wished for a more distinct salary cut than only 2.28 percent as the EpS decreased by more than 30 percent.

Lack of transparency

Although the number of companies individually disclosing their directors' pay has increased since our last survey, shareholders still lack information. This is especially due to the variable parameters which are used by the companies to measure

the success of their directors'. Here, the range is wide and a standardisation is not in sight. EpS and EVA or dividend are used as well as Gross Cash Flow or ROCE. Some companies even use five different variable parameters to measure the success of their directors without disclosing the proportion of the respective parameter to the whole variable part of the managers remuneration. Another problem is that these parameters are usually not underlaid with figures so that shareholders are not able to check whether the variable remuneration has been adequately adjusted to the development of the respective parameter. Especially nebulous are those parameters that are not based on facts but rather on soft factors. Directors of Deutsche Börse, for example, can increase their income with a high 'social and analytic competence', at Adidas 'personal performance' plays a role and TUI managers have a 'personal assessment factor' determining their remuneration.

Unfortunately, the VorstOG will not have an impact on these nuisances because it gives too much leeway to the companies in creating their remuneration reports. So, even in 2007 there will be a large number of German companies with intransparent remuneration models.

Latest Developments in the German Corporate Governance System

In June 2005, the Government Commission, appointed by the Federal Minister of Justice, amended the German Corporate Governance Code (so-called Cromme Code). In the current version, the Code contains a total of 82 recommendations and 19 suggestions.

The **widest changes** are those in section 5.4 on the **composition and compensation** as well as

the **independence of the members of the supervisory board**. Also of key significance is the new section 5.4.4, which states that **it shall not be the rule for the CEO or a management board member to become supervisory board chairman or the chairman of a supervisory board committee**. The Commission also included a new section which recommends that **elections to the supervisory board be made on an individual basis**. Last but not least, the Commission also introduced more precise recommendations in respect of the audit committee.

An overview of all amendments can be found at www.corporate-governance-code.de.

Recent Changes in German Corporate and Capital Market Law

UMAG

In 2003, the German Government unveiled a ten point programme to establish an effective regulatory Corporate Governance framework by improving financial reporting, corporate governance and capital market conditions. With the so-called UMAG which has been approved by the German Federal Council in July 2005, this ten point programme has almost completely been settled. Most parts of the UMAG will come into force on November 1, 2005 and thus effect the upcoming AGM season. The UMAG which will significantly amend the German Stock Corporation Act (AktG) with regard to potential liability of directors centers on the following aspects:

- 1. Business judgement rule:** In future, a management decision will be deemed not to be a violation of duties, if the management board member reasonably believes that he acted for the good of the company and if his decision was based on appropriate information.
- 2. Enforcability of indemnities against board members:** In future, shareholders holding a one percent nominal stake in a company or a pro-rata amount of at least € 100,000 will be entitled to claim company's losses against management board members in their own name. Shareholder lawsuits against board members will be filtered and concentrated through preliminary court proceedings that must allow shareholder litigation. The responsible court will allow claims for damages only if the claiming shareholders held their shares prior to the alleged wrongdoing of the director, the shareholders urged the company without success to litigate the matter on its own behalf, they allege facts that would prove gross negligence of the director and there are no important

reasons which would justify the inadmissibility of shareholder law suits. A newly implemented shareholders' forum in the Federal Gazette (e-Bundesanzeiger) shall facilitate minority shareholders coordinating their claims.

- 3. Implementation of a record date:** In order to facilitate especially foreign institutional investors the exercise of their votes a 'record date' of 21 days before the general meeting will be introduced.
- 4. Limitation of shareholders' rights in the general meeting:** Unfortunately, the UMAG also cuts down the shareholders' rights in the general meeting: From now on, the chairman of the general meeting may not only set an appropriate time limit on the right of a shareholder to speak but also on the right to ask questions in the general meeting. Furthermore, the management board may refrain from answering a question at the general meeting if the answer has been published on the internet site of the company for at least for a period of seven days prior to the meeting and during the meeting. A number of stock listed companies used this years' AGM season to already get a respective amendment to the articles of association approved (see box). DSW voted in all cases against the adoption of such shareholder unfriendly rules. The extent of the questions depends on the agenda. A "standard" general meeting must be viewed differently than a general

Less time for shareholder questions:

During the 2004 AGM season, the following DAX-30 companies already implemented the possibility to limit the shareholders' right to ask questions at the AGM in their articles of association:

- BMW
- Deutsche Telekom
- HypoVereinsbank
- Metro
- RWE
- SAP
- Volkswagen

meeting where for instance important structural measures are on the agenda. Last but not least, the general meeting is the only forum where shareholders have the chance to directly talk with the management which means that the right to ask questions and to talk is already curtailed enough.

KapMuG

The so-called KapMuG, which has been approved in July 2005, introduces the possibility of test case litigation to establish whether market information were falsely given or suppressed: In a claim for damages as a result of wrong or misleading capital information by the company, especially by one of its directors, shareholders have the right to apply for a decision at the Higher Regional Court (Oberlandesgericht) on a premise of the basis for the claim. The court has to decide on this question, if shareholders in at least ten pending proceedings apply for such a decision within four months after the first application was published. The decision of the Higher Regional Court is binding for all claimants. The German Government regards the KapMuG as a 'pilot project' and therefore limited the law in time: until 2010.

VorstOG

In July 2005, the so-called VorstOG has been approved by the German Federal Council. This law is designed to enhance transparency for investors as it obliges stock corporations to individually disclose what their man-

agement board members earn. In future, companies are required to reveal the names and the individual salaries of its management board members and to include an itemisation of the benefits into performance-based and fixed components as well as other incentive compensation (e.g., stock options). Further, the disclosure requirements include benefits payable if a board member's contract is terminated. For this reason, pensions and redundancy payments will have to be included. The required information shall be attached to the notes of the accounts. Listed stock corporations will be required to indicate the management board's salary and benefit structure in the management report. Unfortunately, the German Government made a concession to the industry and included an opt-out rule in the law. Shareholders may allow a company to opt out of disclosure of individual management board remuneration. The requirement for non-disclosure is approval of a resolution to that effect by at least a three-quarter majority at the general meeting. Such a resolution would be effective for a maximum of five years. The law comes into force in time for the 2006 business year, so individual management income and benefits have to be published with the 2006 annual reports.

KapInHaG

The KapInHaG was designed to enhance personal liability of the directors and officers of a company, its auditors and consultants, with regards to all information related to capital markets, including oral statements made during general meetings or during roadshows or informative meetings organised by the company. Due to heavy criticism of the draft law, it is unclear when this law will enter into force.

NEW!!!

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The DSW Voting Guidelines

For the price of € 95 plus tax, you can order the new DSW Voting Guidelines via e-mail: ben@dsw-info.de or just call or fax: 0049-211-669720/90.

Also now available in English:

'Board Evaluation in the German Supervisory Board',

a guide to the German Best Practice in the evaluation of the supervisory boards' work by Germany's leading shareholder association.

DSW newsletter published by Deutsche Schutzvereinigung für Wertpapierbesitz e.V. (DSW), Hamborner Straße 53, 40472 Düsseldorf, Germany (Internet: www.dsw-info.de)

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The European Corporate Governance Service (ECGS)

Founded in 2000, ECGS is a partnership of independent local experts based in the main European markets providing a single source of consistent governance information and proxy voting advice for the main European quoted companies.

An interview with Alan MacDougall, Managing Director of Pension Investment Research Consultants (PIRC), the managing partner of ECGS.

1. What is the idea behind ECGS?

ECGS was established by PIRC and its partners to respond to the growing client demands of institutional investors who were dissatisfied with relying on their fund managers to vote or other US providers who were not thought appropriate for European investors. They wanted a service free from conflicts of interest, able to consult to clients and make voting recommendations in concerning all the major European companies and where local market expertise would be brought to bear. This latter point was very important in a context in which they recognised the value of making their voting decision have an impact on local governance issues. The partner firms are DSW, Proxinvest (France & Belgium), DSR (Netherlands), Avanzi SRI (Italy), ECGS Spain and Sustainable Governance (Switzerland).

2. Why do we need proxy services?

In a global capital market institutional investors need to be able to exercise every shareholder right they can. Global companies today face all sorts of conflicting pressures where the interests of their shareholders can often be marginalized. As owners of these same companies institutional investors must insist on their ownership rights. Voting is a crucial part of these rights and it crucially affects many governance and corporate decisions. It is the exercise of proxy votes that provides a crucial element in accountability to investors, and this keeps management honest. Voting can improve a company's ability to man-



*Alan MacDougall,
Managing Director
of PIRC*

age the businesses in the interests of shareholders. Without voting there can be no accountability, and without accountability there can be no effective shareholder control.

3. What is the difference between ECGS and other competing services?

ECGS is independent of the corporate interests of those companies where it makes proxy voting recommendations, although its partners have dialogue with companies as part of the research process. ECGS does not consult to the companies it monitors. It is a partnership of local market players who have first hand knowledge and experience of the markets and companies it monitors. It has a robust view of the appropriate principles that European companies should be adhering to and these also incorporate best practice as defined by the OECD and the ICGN. In addition ECGS has a wealth of expertise to bring to its clients on the cultures, information and issues affecting governance in the principal European stock markets. All this value goes into the service it provides for its expanding global client base.

4. What about German mutual funds or newly founded pension funds in Germany, would ECGS also be interesting for them?

Wherever institutional investors own shares in European companies, ECGS can add value to their

share-ownership strategies. We see the development of the German mutual fund market alongside the growth in the new pension funds as a key set of players who will need to exercise their rights as owners. Naturally we look to our German partner, DSW, to play a leading role in marketing and advising these growing players.

5. What about a U.S. coverage?

Through its managing partner, PIRC Limited in London, ECGS clients can also exercise their voting rights in the US market too. Special discounts are

available for ECGS clients who wish to use PIRC's US service, which again shares a similar approach to governance in the US market.

6. What about the costs for ECGS services?

ECGS fees are broken down by the type of investor client (Managers and funds) the length of contract clients want. Our fees start at € 10,000 per annum. I look forward to the readers of your publication contacting me asking to subscribe. Please contact AlanM@pirc.co.uk. Interested in more? See www.ecgs.org.

The AGM season 2005 in Germany

The AGM season 2005 draws to a close. How does the balance of DSW look like? Speakers of DSW visited roughly 800 AGMs in Germany and abroad. At 93 companies DSW voted 196 times against the management proposals. Moreover, we filed 59 counter motions at 23 companies in 2005.

Turnouts

The turnouts at German AGMs decreased again: Only 45.87 percent of the share capital (on average) attended the DAX-30 meetings – after an average turnout of 47.19 percent in 2004. In 1998, the German Blue Chips could register an average turnout of 61 percent. This shows that the trend of decreasing turnouts seamlessly goes on.

The scene gets more dramatic with regard to companies with a free float of more than 80 percent: At those DAX companies, only 39.80 percent of the share capital (on average) attended the AGMs in 2005. This means that the danger of a majority by coincidence has boosted.

One reason for the decline surely is the increasing engagement of foreign investors who abstain from exercising their voting rights in

Germany due to expenses and time required. In addition, German savings banks and an increasing number of private banks stopped exercising the voting rights of their customers and refrain from referring to the free of charge proxy service of shareholder associations like DSW. To improve the turnout at German AGMs, DSW offers all interested institutional and private investors in Germany and abroad the possibility to exercise their votes. Since DSW has been engaged for several years in the voting procedure at the general meetings and is always present with one of its speakers, DSW can guarantee that also foreign votes are actually exercised in the way the investor chose it.

Meanwhile, the decreasing turnouts at German AGMs alerts the boardrooms. That comes as no surprise, did the example of Deutsche Börse AG show what could happen to companies with a large cash liquidity and without a protective majority shareholder. Those companies that usually have to deal with a small turnout run the risk of being targeted by hedge fund managers who jump at the chance to plunder the hoards of money with a minimum effort – resignation of management included.

New proposals

It is obvious that minorities should not dominate a company. Consequently, the turnouts have to rise.

And so, a lively discussion has started in Germany to achieve this aim: Ideas vary from a legal duty of banks to exercise the voting rights of their customers to voting restrictions for short-term investors. But all these proposals are either too bureaucratic or infringe the "one share – one vote principle". This is neither desirable nor enforceable.

Currently much-lauded is the idea to pay shareholders a higher dividend when visiting the AGM. From our point of view such a provision cannot be legally prescribed: Companies should be given the chance to fix such a **dividend bonus** in their Articles of Association. Furthermore, DSW demands that such a bonus should not be given for the mere

AGM Turnouts of the DAX 30 companies (2003-2005) in percent

	current listing	2003	2004	2005	3-year-average
Adidas	DAX	23,17	28,25	26,94	26,12
Allianz	DAX	39,97	37,15	34,82	37,31
Altana	DAX	63,00	67,22	64,78	65,00
BASF	DAX	31,31	34,99	34,39	33,56
Bayer	DAX	36,00	32,50	35,91	34,80
Bayerische HypoVereinsbank	DAX	55,56	49,88	53,40	52,95
BMW	DAX	65,84	63,70	55,04	61,53
Commerzbank	DAX	57,31	46,53	39,39	47,74
Continental	DAX	33,57	34,44	23,55	30,52
DaimlerChrysler	DAX	38,84	43,69	37,84	40,12
Deutsche Bank	DAX	38,75	31,98	25,47	32,07
Deutsche Börse	DAX	44,53	31,55	59,76	45,28
Deutsche Lufthansa	DAX	46,37	41,09	41,40	42,95
Deutsche Post World Net	DAX	79,35	72,71	74,19	75,42
Deutsche Telekom	DAX	59,47	63,53	54,47	59,16
E.ON	DAX	31,00	35,00	29,92	31,97
Fresenius Medical Care¹	DAX	64,97	65,00	63,80	64,59
Henkel¹	DAX	79,39	80,22	78,31	79,31
Infineon Technologies	DAX	31,88	17,59	48,19	32,55
Linde	DAX	50,08	50,72	49,75	50,18
MAN	DAX	48,41	45,51	34,31	42,74
Metro	DAX	65,86	65,27	67,40	66,18
Münchener Rück	DAX	57,49	44,89	42,49	48,29
RWE	DAX	39,06	59,03	56,52	51,54
SAP	DAX	58,04	59,53	54,04	57,20
Schering	DAX	34,84	33,29	32,62	33,58
Siemens	DAX	47,51	32,67	32,15	37,44
ThyssenKrupp	DAX	61,60	56,18	54,03	57,27
TUI	DAX	54,18	54,30	37,18	48,55
Volkswagen	DAX	29,01	37,21	33,90	33,37
average peaks		49,14	47,19	45,87	47,40

¹ turnout of ordinary shares

attending of a meeting but for exercising the voting rights.

DSW countermotions

Notwithstanding the high dividend payment, the AGM of **DaimlerChrysler** once again was one of the less enjoyable highlights of the AGM season 2005. Again, DSW filed a countermotion and voted against the discharge of the management board. Our reasons were quite the same as in 2004: Repeatedly missing to reach the own prognoses, failure to create a world enterprise, and a uninterrupted decrease in share price. We hope that the resignation of Jürgen Schrempp as CEO of DaimlerChrysler preserves us from repeating our concerns again at next year's AGM.

With regard to the planned merger of Deutsche Telekom and the internet provider **T-Online** the shareholder meetings of both companies were designed to cause trouble. At T-Online, after a two-day-marathon, DSW opposed the merger agreement between Deutsche Telekom and T-Online and subsequently filed a claim to appeal on the merger process. After years of stagnation the merger was initiated just at a time when concrete results of the strategic alignment became apparent and the broadband business had been identified as being the most important growth segment inside the Telekom Group. The merger deprives T-Online shareholders of the possibility to directly participate in the uptrend of the company via the share price increase. The merger agreement does not respect the interests of the minority shareholders of T-Online: Telekom as the major shareholder of T-Online receives a special benefit from the merger as the benefits from the very important broadband business do no longer have to be shared with external shareholders.

Furthermore, DSW opposed the discharge of those management board members of T-Online, who signed the merger agreement, as they were responsible for signing a contract with detrimental conditions for the minority shareholders.

DSW also opposed to discharge the management board members of **HypoVereinsbank**. Once again, the company had to disclose a bad debt on real estate credits, this time in an amount of € 2.5 billion although the management announced last year that all extraordinary write downs had already been made. This showed that the management is not able to master the high risks of the bank's credit portfolio.

Another example, where DSW filed a countermotion is the DAX company **Fresenius Medical Care (FMC)**. Here, the management proposed to the extraordinary general meeting the conversion from preference to ordinary shares and at the same time linked this proposal to a transformation from a stock corporation (AG) to a partnership limited by shares (KGaA). Here, we opposed the transformation proposal of the management. From the perspective of DSW, the legal form of a KGaA is only suitable to a limited extent for a listed public company. On the one hand the complicated corporate law requires explanation, especially for foreign investors. On the other hand and from the perspective of the free float shareholders, this legal form has some controlling deficiencies that are not in the vested interest of good corporate governance. The Management Board of the KGaA is incumbent to a personally liable partner that in the case of Fresenius Medical Care is in turn another publicly traded stock corporation. In this case, the personally liable partner is FMC Management AG, which is a wholly-owned subsidiary of FMC's parent company Fresenius AG. For the free float ordinary shareholders of FMC this means that the Supervisory Board, which is elected by the free float ordinary shareholders, will not have rights regarding the competency of members of the Management Board of the managing FMC Management AG. With the proposed structure, the right to appoint and recall members of the Management Board according to the German Stock Corporation Act would then not be within the right of the

Supervisory Board of the publicly listed company, but rather within the right of the Management company's supervisory board, which is controlled by the parent company.

And the voting outcomes of the named companies emphasise the importance of DSW's counter motions: At FMC, for example, 9.76 per cent of the present share capital supported our

position by voting against the transformation. At T-Online, more than 6 million shares subscribed to our view and voted against the merger with Deutsche Telekom. And at the AGM of DaimlerChrysler, 5.41 per cent of the present share capital or almost 20 million shares rejected to discharge the management board for the fiscal year 2004.

The outcome of the 10 most strongly supported DSW-oppositions in 2005

company	shares voted no	topic	No.	DSW recommendation
DaimlerChrysler	19.838.874	Approval of the actions of the Management Board Members	3	Oppose
Deutsche Telekom	11.522.426	Amend articles: curtailing shareholders' right to ask questions at the AGM (UMAG)	23	Oppose
Siemens	7.012.585	Repurchase of shares	8	Oppose
HypoVereinsbank	6.247.486	Approval of the actions of the Management Board Members	2	Oppose
T-Online	6.049.318	Approval of the merger with Deutsche Telekom AG	9	Oppose
Deutsche Börse	5.819.647	Allocation of profits	2	Oppose
RWE	4.925.625	Amend articles: curtailing shareholders' right to ask questions at the AGM (UMAG)	9	Oppose
Deutsche Bank	4.428.281	Repurchase of shares	7	Oppose
DaimlerChrysler	3.979.269	Repurchase of shares	6	Oppose
Volkswagen	3.500.143	Repurchase of shares	7	Oppose

EU-Commission: 'Fostering an appropriate regime for shareholders' rights'

Second consultation document of the Services of the Internal Market Directorate General

DSW'S POSITION

DSW, Germany's leading shareholder association welcomes the new document of the EU-Com-

mission for the Second Consultation. If all of these very precise and helpful proposals will become part of an EU-directive then most of the obstacles analysed by DSW in its European Comparative Study (February 1999) would be removed. As a result cross border voting would be much easier as it is today. Despite this very positive impression of the new paper, DSW sees one major weakness and that is the decision of the EU-Commission to postpone or even completely renounce on a clear definition of the 'ultimate investor'. For more details see: www.dsw-info.de.

What can the new German Government do to improve the Capital Market in Germany?

The new German Government has a lot of things to work up when it comes to investors' protection: The most important item on the agenda should be the issue "**direct liability of directors and supervisory board members**". This liability is part of the ten point programme of the former German Government which already released a draft law, the so-called KapInHaG. Due to lobbyists' pressure this law unfortunately has not been adopted yet. Ulrich Hocker, chief managing director of DSW: "Now it is time that investors get the right to claim compensation for damages if they had been deceived by a company's director or supervisory board member."

Besides, **transparency at corporate take overs** is an important point. Investors and directors shall be informed as early as possible about changes in the company structure. A solution could be the reduction of the notification thresholds. Currently, shareholders have to notify the supervising authority (BaFin) and the respective company, if their shares in the company exceed 5 percent. It would be reasonable to lower this threshold to one percent and implement additional thresholds at 3, 5 and 7 percent.

And another threshold should also be put to the test by the new Government: Currently, shareholders holding a combined stake of more than 30 percent of a company are obliged under German Take Over Law to launch a public take over offer for the remaining shares.

In times of decreasing turnouts at German general meetings (see p. 10) it must be questioned why an investor should risk high costs for a public offer if even 15 or 20 percent are sufficient to receive the majority at the general meeting. Therefore, DSW appeals to the new Government to lower the 30 percent threshold to reflect the reality at German general meetings.

Furthermore, the new government should be aware that it is necessary to initiate countermeasures against the decrease in the turnouts at German AGMs. Here, DSW recommends to give companies the possibility to provide shareholders with a **bonus dividend** if they vote at the general meeting. The mere attendance of a meeting on the other hand should not be rewarded.

Another recommendation of DSW is that the so-called **Volkswagen Law** will finally be abolished so that Volkswagen will be able to break off the dependency of the State of Lower Saxony which holds some 18 percent in the company. The Volkswagen Law says that no shareholder can exercise more than 20 percent of his voting rights regardless of how many shares he owns and that codifies the power of Lower Saxony over Volkswagen.

The introduction of a **flat tax** (Abgeltungssteuer) **on capital income** (comparable to Austria or Belgium) would be highly welcomed by DSW. The advantages are obvious: A flat tax in terms of a withholding tax would lead to a simplified tax system, a cutback in bureaucracy and finally to a higher tax income because anonymity would then be guaranteed. As the personal income tax rate would then be irrelevant one of the major reasons for the flight of capital to tax havens would be removed. Last but not least it would make Germany a more attractive financial center.

DSW's SECOND FUND SURVEY

For the second time DSW started a survey at mutual funds in Germany on the importance of Corporate Governance for the German fund industry. Again the survey is a cooperation with the independent Rating and Research Agency Feri Rating & Research GmbH in Bad Homburg. Besides the different Corporate Governance issues as its key points, the survey for the first time also covers the funds' exercise of their votes in the preceding AGM season in Germany and Share Lending as further aspects. DSW will publish the outcome of this years' survey at the end of 2005. The result of the 2004 fund survey is published on the DSW website under www.dsw-info.de.