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Comparative Corporate Governance: The State of the Art and International Regulation

Law Working Paper N°.170/2011

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Klaus J. Hopt

Max Planck Institute and ECGI

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Abstract

Corporate governance, i.e. the system by which companies are directed and controlled, has become a key topic for legislation, practice and academia in all modern industrial states. The financial crisis has highlighted the problems. Yet one goes astray if one does not understand how the unique combination of economic, legal and social determinants of corporate governance functions in each country. A functional comparative analysis based on reports from 33 countries and with references to economic literature may help. After dealing with the concepts, instruments (including soft law) and sources of corporate governance, the Article analyses the regulation and practice of the various actors in corporate governance: mainly the board and the shareholders, but also labor, gatekeepers (in particular the auditors), the supervisors and the courts. In the end, a great deal of convergence appears, though many pathdependent differences remain.

Keywords: Corporate Governance, Stock Exchange Law, Corporate Governance Codes, Boards, Conflicts of Interest, Gatekeepers

JEL Classifications: K20, K22

Klaus J. Hopt
Max Planck Institute for Comparative and International Private Law
Mittelweg 187
D-20148 Hamburg
Germany
phone: +49 40 41 90 02 05 , fax: +49 40 41 90 03 02
e-mail: hopt@mpipriv.de

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Klaus J. Hopt*

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* Professor of law and Director (em.) at the Max Planck Institute for Comparative and International Private Law, Hamburg/Germany; Dr. iur. (U. Munich 1967), Dr. phil. (U. Tuebingen 1968), M.C.J. (NYU 1965), Habilitation (U. Munich 1973), Dr. iur. h.c. mult. (Bruxelles, Louvain, Paris Descartes, Athens, Tiflis), member of the German National Academy Leopoldina.

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I. INTRODUCTION

Corporate governance as a concept and as a problem area was first discussed in the United States; later, the European debate started in the United Kingdom. From there the issue of corporate governance began its pervasive course through all the modern industrial states, including Australia, China and Japan. Contributions and research projects on the topic abound all over the world.[1] Since 1995 the European Corporate Governance Network in Brussels,

[1] A list of selected literature on corporate governance in general and in various countries can be found in COMPARATIVE CORPORATE GOVERNANCE – THE STATE OF THE ART AND EMERGING RESEARCH 1201-10 (Klaus J. Hopt et al. eds., 1998); CORPORATE GOVERNANCE IN CONTEXT – CORPORATIONS, STATES, AND MARKETS IN EUROPE, JAPAN, AND THE US 731-42 (Klaus J. Hopt et al. eds., 2005); HANDBUCH CORPORATE GOVERNANCE, 931-52 (Peter Hommelhoff et al. eds., 2d ed., 2009) (organized for ten topics by Patrick C. Leyens); Marco Becht et al., *ch. 12, Corporate Law and Governance,* in HANDBOOK OF LAW AND ECONOMICS, VOL. 2, 833 (A. Mitchell Polinsky & Steven Shavell eds., 2007). *Cf. also* the collection CORPORATE GOVERNANCE, CRITICAL PERSPECTIVES ON BUSINESS AND MANAGEMENT, 5 VOLS (Thomas Clarke ed., 2005), and Renée B. Adams et al., *The Role of Boards of Directors in Corporate Governance: A Conceptual Framework and Survey,* 48:1 JOURNAL OF ECONOMIC LITERATURE 58-107 (2010).

now known as the European Corporate Governance Institute and based in Luxembourg,[2] has been carrying out its interdisciplinary work, gathering under its banner academics and practitioners, lawyers and economists, researchers and regulators. Their common aim is to better understand corporate governance and to improve it. In the meantime, corporate governance institutes and research groups have been formed in many countries and universities, including Harvard, Oxford, Cambridge, Hamburg and others. The topic is of particular concern in practice, especially for the shareholders, stock exchanges, listed corporations, banks and financial institutions, industrial associations, regulators and parliaments of many countries. During the last two decades in many of these countries, corporate and capital market law reforms have taken place or are underway with the express or implicit aim of improving corporate governance or particular elements of it.

In a nutshell, the problem of corporate governance is contained in a paragraph from Adam Smith's *An Inquiry into the Nature and Causes of the Wealth of Nations* of 1776:

> The directors of such companies, however, being the managers rather of other people's money than of their own, it cannot well be expected, that they should watch over it with the same anxious vigilance with which the partners in a private copartnery frequently watch over their own . . . . Negligence and profusion, therefore, must always prevail, more or less, in the management of the affairs of such a company.[3]

This problem, known today as the principal-agent conflict between shareholders and managers, has been a challenge for corporate law and legislators since the beginning of the modern corporation in the early nineteenth century. Efforts to minimize this conflict have met with limited success, as the constant law reforms—sometimes exhaustive new codifications, sometimes piecemeal acts—amply illustrates.[4] The history of corporate governance[5] is also a

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[2] ECGI, *see* www.ecgi.org/ with comprehensive information and two working paper series "Law Series" and "Financial Series"; SSRN Corporate Governance Network (CGN), see www.ssrn.com/cgn; International Corporate Governance Network, see www.icgn.org.

[3] Book 5, Ch. 1.3.1.2, 5th ed. London 1789.

[4] Examples of codifications are the Australian Corporation Act 2001, the UK Companies Act 2006 and the plans of the "*grosse Aktienrechtsreform*" in Switzerland, 27CH 2. Germany stands as an example for piecemeal reforms with sixty-eight reforms of the Stock Corporation Act 1965. For France 10RF 1; for Australia 2Austr 5 et s. *Cf.* Jennifer Hill, *Corporate Scandals Across the Globe: Regulating the Role of the Director, in* REFORMING COMPANY AND TAKEOVER LAW IN EUROPE 225 (Guido Ferrarini et al. eds., 2004); id., *Regulatory Responses to Global Corporate Scandals*, 23 WIS. INT'L L.J. 367 (2005); Luca Enriques & Paolo Volpin, *Corporate Governance Reforms in Continental Europe,* 21 J. ECON. PERSP. 117 (2007). *But see also* Lucian A. Bebchuk & Assaf Hamdani, *The Elusive Quest for Global Governance Standards,* 157 U. PA. L. REV. 1263 (2009).

history of crises and scandals, as seen in cases like Enron, WorldCom, Parmalat and others in nearly every country.[6] The international financial crisis that began in 2008 has added additional problem cases, governance and systemic failures, and reform experiments, though one has to keep in mind that the extent to which corporate governance failures have contributed to the coming about of the financial crisis[7] is much debated. On a microlevel the same is true for the relevance of corporate governance for firm performance.[8]

A general problem around the world is the inherent difficulty found in the principal-agent relationship between managers and shareholders.[9] This explains why board reform has come up as a major corporate governance issue in nearly every country. Yet, a closer look at the corporate laws of various countries and the scandals and crises therein reveals that two other relevant principal-agent conflicts can exist as well: first, depending on the different shareholder structures in various countries, between controlling shareholders and their fellow shareholders; and, in a broader sense, between the shareholders as a group and various non-

[5] PAUL FRENTROP, A HISTORY OF CORPORATE GOVERNANCE, 1602-2002 (2002/2003); RANDALL K. MORCK, A HISTORY OF CORPORATE GOVERNANCE AROUND THE WORLD (2005); HISTORY OF CORPORATE GOVERNANCE, 6 VOLS (Robert E. Wright et al. eds., 2004).

[6] JOHN C. COFFEE, GATEKEEPERS (2006); AFTER ENRON, IMPROVING CORPORATE LAW AND MODERNISING SECURITIES REGULATION IN EUROPE AND THE US (John Armour & Joseph A. McCahery eds., 2006); Cecilia Carrara, *The Parmalat Case,* 70 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 538 (2006); Joseph A. McCahery & Erik P.M. Vermeulen, *Corporate Governance Crises and Related Party Transactions: A Post-Parmalat Agenda, in* CORPORATE GOVERNANCE IN CONTEXT, *supra* note 1, at 215. *Cf.* CARMEN M. REINHART & KENNETH S. ROGOFF, THIS TIME IS DIFFERENT, EIGHT CENTURIES OF FINANCIAL FOLLY (2009).

[7] Jacques de Larosière-Report, The High-Level Group on Financial Supervision in the EU, Brussels, 25.2.2009, Nos. 110 et s. (p. 33 et s.); The Walker Review, A review of corporate governance in UK banks and other financial industry entities, Final recommendations, London, 26.11.2009; Financial Services Authority, Effective corporate governance (Significant influence controlled functions and the Walker review), London, January 2010; HANS-WERNER SINN, CASINO CAPITALISM: HOW THE FINANCIAL CRISIS CAME ABOUT AND WHAT NEEDS TO BE DONE NOW (2010); Martin Hellwig, Wolfram Höfling & Daniel Zimmer, Finanzmarktregulierung – Welche Regelungen empfehlen sich für den deutschen und europäischen Finanzsektor? Gutachten E-G zum 68. Deutschen Juristentags, Berlin 2010, Munich 2010.

[8] *Cf.* for example Sanjai Bhagat & Brian Bolton, *Corporate Governance and Firm Performance*, 14 J. CORP. FIN. 257 (2008). As to the problems of corporate governance indices, *cf.* Klaus J. Hopt, *American Corporate Governance Indices as Seen from a European Perspective,* UNIVERSITY OF PENNSYLVANIA LAW REVIEW PENNumbra 158, at 27 (2009).

[9] Oliver E. Williamson, *Corporate Governance,* 93 YALE L. J. 1197 (1984); Jean Tirole, *Corporate Governance,* 69 ECONOMETRICA 1 (2001).

shareholders such as bondholders, labor, other creditors and even the state.[10] The focus of this Article is on internal corporate governance, with emphasis on the three above-mentioned principal-agent conflicts and the major actors involved, i.e., boards, shareholders, labor and auditors, with the supervisors and courts as enforcers.

All countries have experienced and still experience crises and scandals of corporate governance. However, the problems are not necessarily identical, and adequate answers and reforms are even less uniform. While legislators and regulators often tend simply to imitate responses emerging in other countries in the vague hope that they will also benefit their own system, it is rather the characteristic features of the corporate governance system of each country that help to understand its unique crises and scandals. Reform proposals in particular go astray if one does not understand how the unique combination of economic, legal and social determinants of corporate governance functions in each country. A functional comparative analysis of existing methods will help to clarify the similarities and differences of corporate governance systems and therefore provide more useful general conclusions. Such an approach presupposes solid information on corporate governance features of not just a small handful of somewhat arbitrarily selected countries, but rather of a relatively large number of jurisdictions, and among them systems from different continents, legal families, cultures and traditions. Such broad and wide-ranging information will aid our understanding of the different systems and their path dependencies, assist us in developing best practices and bring about meaningful reform on the basis of comparative experience.

II. CORPORATE GOVERNANCE: CONCEPTS AND GENERAL PROBLEMS

A. Concepts of Corporate Governance

1. Various Concepts and Definitions

The term "corporate governance" is relatively new; in most jurisdictions it is not a legal term, and its definition is ambiguous. For the purposes of this comparative study, the broad definition of the Cadbury Commission of 1992, written at the beginning of the modern

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[10] REINIER KRAAKMAN ET AL., THE ANATOMY OF CORPORATE LAW, A COMPARATIVE AND FUNCTIONAL APPROACH 35 et s (2d ed. 2009). *Cf. also* Patrick C. Leyens, *Corporate Governance: Grundsatzfragen und Forschungsperspektiven,* JURISTEN-ZEITUNG 1061 (2007).

corporate governance movement,[11] is best suited: corporate governance is "the system by which companies are directed and controlled."[12] Thus, direction and control are the two cornerstones of a corporate governance system.

More specifically, the use of either shareholder or stakeholder orientation characterizes the system. The classic shareholder-oriented approach prevails in the United States, and also in economic theory. Many European countries, such as Germany and the United Kingdom, have a stakeholder approach instead; in the former, this concept is further strengthened by labor codetermination on the board. In its weaker form, corporate law mandates that the board act in the interest of the enterprise as a whole, a requirement which is of course open to multiple interpretations.[13]

The prevailing shareholder constituency of a country is also of considerable relevance.[14] Examples include the predominance of widely-held public companies with dispersed shareholdings, employing "separation of ownership and control" (Berle-Means corporations),[15] as traditionally found in the United States[16] and in Great Britain,[17] and—a

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[11] Adrian Cadbury, Report of the Committee on the Financial Aspects of Corporate Governance, London, December 1992; Combined Code, *see infra* note 41. For the United States *cf.* AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE (1994).

[12] Cadbury Report, *supra* note 11, para 2.5. *Contrast* Andrei Shleifer & Robert W. Vishny, *A Survey of Corporate Governance,* 52 JOURNAL OF FINANCE 737, at 737 (1997): Corporate governance is the process that "deals with the ways in which suppliers of finance to corporations assure themselves of getting a return on their investment."

[13] See section 76 of the German Stock Corporation Act and an endless amount of doctrinal controversy on this question. As to economic and social science theories, see THEORIES OF CORPORATE GOVERNANCE: THE PHILOSOPHICAL FOUNDATIONS OF CORPORATE GOVERNANCE (Thomas Clarke ed., 2004). *See infra* III A 2 b.

[14] As to the patterns of corporate ownership, see Rafael La Porta et al., *Corporate Ownership Around the World,* 54 JOURNAL OF FINANCE 471 (1999); Mara Faccio & Larry H.P. Lang, *The Ultimate Ownership of Western European Corporations,* 65 JOURNAL OF FINANCIAL ECONOMICS 365 (2001); THE CONTROL OF CORPORATE EUROPE (Fabrizio Barca & Marco Becht eds., 2001); KRAAKMAN ET AL., *supra* note 10, at 29 et s., 305 et s.; ALESSIO PACCES, FEATURING CONTROL POWER (2008).

[15] ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (New York 1932) (Brunswick 1991).

[16] *But see* Ronald Anderson et al., *Founders, Heirs, and Corporate Opacity in the U.S.,* 92 JOURNAL OF FINANCIAL ECONOMICS 205 (2009); Clifford G. Holderness, *The Myth of Diffuse Ownership in the United States,* 22 REVIEW OF FINANCIAL STUDIES 1377, at 1382-85 & tbl.1 (2009). *See also* 32USAI 5 n.16.

[17] BRIAN CHEFFINS, CORPORATE OWNERSHIP AND CONTROL, BRITISH BUSINESS TRANSFORMED (2008).

fact that is less well known—in the Netherlands;[18] or the existence of many blockholdings, family corporations and groups of companies, as found in many continental European countries. In addition, the presence of institutional shareholders, private equity and hedge funds is significant.[19]

2. Internal and External Corporate Governance

Corporate governance is focused on the internal balance of powers within a corporation. The main questions of this internal balance—in contrast to external corporate governance—concern the relationships between the board, be it a unitary or two-tier board; shareholders, both controlling and minority; labor, especially if codetermination is a factor; and of course the audit system.[20]

Forces from outside the corporation exercise a disciplining influence on management as well, in particular various markets such as takeovers,[21] and to a lesser degree the product and services markets and the increasingly international market for corporate directors. Transparency of corporate affairs and disclosure to the shareholders, supervisors if any and the general public are also such external forces. External corporate governance by takeover

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[18] 21Neth 5, 19 et s.: The country with the lowest degree of ownership concentration in Europe.
[19] *See infra* III B 2 b.
[20] The audit system consists of the audit committee of the board and the auditors of the company (*see* III D). In some countries, internal auditors work as organs of the corporation; however, in most countries today the auditors are external professionals. These external auditors are in a hybrid situation between internal and external corporate governance because they are involved in the company's financial reporting but must remain independent.
[21] The takeover market is usually referred to as market for corporate control, i.e., the market in which corporate control is bought, often by public takeover bids by the bidder to the shareholders of the so-called target company. In many countries, the codes as well as the discussions on corporate governance focus on internal corporate governance, takeovers being treated as a separate field. *But see* CAPITAL MARKETS AND COMPANY LAW (Klaus J. Hopt & Eddy Wymeersch eds., 2003). The British "no-frustration" rule aims at upholding the disciplinary force of takeovers, in particular hostile takeovers, that threaten the jobs and perquisites of the existing directors, *cf.* John Armour & David Skeel, *Who Writes the Rules for Hostile Takeovers, and Why? – The Peculiar Divergence of U.S. and U.K. Takeover Regulation,* 95 GEORGETOWN L.J. 1727 (2007); Guido Ferrarini & Geoffrey P. Miller, *A Simple Theory of Takeover Regulation in the United States and Europe,* 42 CORNELL INT. L. J. 301 (2009).

regulation and more generally disclosure and transparency are huge research fields of their own and cannot be covered here.[22]

3. Economic and Societal Environment

The economic, societal and cultural environment of a country leads to path-dependent developments in corporate governance systems.[23] The corporate census shows huge differences between countries as to the number of stock corporations and their listings.[24] Other well-known factors are the attitude of a country toward disclosure and transparency, traditionally more open in the United States, the United Kingdom and possibly Sweden, but much less so in continental European countries; whether preference is given more to shareholder value or stakeholder concerns, the United States and Germany respectively being the main examples; and market orientation or rather an alliance between industry and banks,[25] i.e., the so-called outsider/insider systems, which of course are never pure. More recently some players have gained considerable momentum, though to very different degrees in the various countries: institutional investors, who have become quite prominent in the United Kingdom, somewhat less so in the United States and even less in continental European countries; hedge funds; private equity; and foreign investors, most recently foreign state funds. This has created fears, defense movements and even increased protectionism in many countries.[26] The prominence of either free trade or protectionism is relevant for corporate

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[22] Takeovers in particular have already been the topic of a general report for the International Academy of Comparative Law, CORPORATE TAKEOVERS THROUGH THE PUBLIC MARKETS (P. John Kozyris ed., 1996). For most recent analyses and literature, *cf.* KRAAKMAN ET AL., *supra* note 10, ch. 8: Control Transactions, 225-73, and ch. 9.2.1: Mandatory disclosure, 277-89.
[23] CURTIS J. MILHAUPT & KATHARINA PISTOR, LAW & CAPITALISM (2008), with case studies; VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE (Peter A. Hall & David Soskice eds., 2001); Lucian A. Bebchuk & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance,* 52 STAN. L. REV. 127 (1999). *Cf.* INTERNATIONAL CORPORATE GOVERNANCE, A CASE STUDY APPROACH (Christine A. Mallin ed., 2006).
[24] World Federation of Exchanges Number of Listed Companies, http://www.world-exchanges.org/statistics/annual/2008/equity-markets/number-listed-companies-0; *see also* 32USAI 2.
[25] The standard example for such an alliance between industry and banks is Germany with its traditional so-called Rhenish capitalism, the coal and steel industry having had its center in the Rhineland, *cf. infra* III A 3 a. The term outsider or insider system refers to the control over the company by insiders, i.e., controlling shareholders and banks, or by outsiders, i.e., the market forces.
[26] COMPANY LAW AND ECONOMIC PROTECTIONISM – NEW CHALLENGES FOR EUROPEAN INTEGRATION (Ulf Bernitz & Wolf-Georg Ringe eds., 2010); Klaus J. Hopt, *Obstacles to*

governance because of the effects of competition from abroad and the reaction to it in various countries. Most recently, protectionism has gained additional momentum as a consequence of the financial crisis. According to some observers, additional general political forces and coalitions can explain differences in corporate governance systems.[27]

4. Specific (Corporate) Governances

The focus of this Article is on corporate governance in general, primarily of listed corporations. More recently, however, specific forms of corporate governance have also gained attention, such as the corporate governance of various company forms,[28] family enterprises,[29] public enterprises[30] and of nonprofit organizations and foundations.[31] In the current financial markets crisis, the corporate governance of banks and financial intermediaries has received particular attention.[32] However, the topic here is already so broad

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Corporate Restructuring: Observations from a European and German Perspective, in PERSPECTIVES IN COMPANY LAW AND FINANCIAL REGULATION. ESSAYS IN HONOUR OF EDDY WYMEERSCH 373 (Michel Tison et al. eds., 2009). But one must also see that a fully liberal approach to foreign investment may lead to the economy being controlled by foreign investors, *c.f.* for Hungary, 14Hung 5.

[27] MARK J. ROE, STRONG MANAGERS, WEAK OWNERS, THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE (1994); *id.,* POLITICAL DETERMINANTS OF CORPORATE GOVERNANCE (2003). *Cf.* Stephen M. Bainbridge, *The Politics of Corporate Governance,* 18 HARV. J. L. & PUB. POL'Y 671 (1995) on the first book of Roe.

[28] THE GOVERNANCE OF CLOSE CORPORATIONS AND PARTNERSHIPS (Joseph A. McCahery et al. eds., 2004); CORPORATE GOVERNANCE OF NON-LISTED COMPANIES (Joseph A. McCahery & Erik M. Vermeulen eds., 2008).

[29] For Switzerland 27CH 26; for Belgium 4B 28 et s.; ADRIAN CADBURY, FAMILY FIRMS AND THEIR GOVERNANCE: CREATING TOMORROW'S COMPANY FROM TODAY'S (2000).

[30] MICHAEL J. WHINCOP, CORPORATE GOVERNANCE IN GOVERNMENT CORPORATIONS (2005); J. W. Verret, *Treasury Inc.: How the Bailout Reshapes Corporate Theory and Practice,* 27 YALE J. ON REGULATION 283 (2010). For Germany Jan Schürnbrand, *Public Corporate Governance Kodex für öffentliche Unternehmen,* ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (ZIP) 1105 (2010); for Switzerland 27CH 26. A special case involves the former socialist countries, where in the course of privatization the state has retained control of major blocks. For the grave lack of corporate governance in such (close or limited liability) corporations, see for example 14Hung 19.

[31] F. ex. Swiss NPO Code and Swiss Foundation Code, 27CH 26; COMPARATIVE CORPORATE GOVERNANCE OF NON-PROFIT ORGANIZATIONS (Klaus J. Hopt & Thomas von Hippel eds., 2010).

[32] Peter Mülbert, *Corporate Governance of Banks,* 10 EUROPEAN BUSINESS ORGANIZATION LAW REVIEW (EBOR) 411 (2009); Klaus J. Hopt, *Corporate Governance von Banken, in* ENTWICKLUNGSLINIEN IM BANK- UND KAPITALMARKTRECHT. FESTSCHRIFT FÜR GERD NOBBE 853 (Mathias Habersack et al. eds., 2009); Gottfried Wohlmannstetter, *Corporate Governance von Banken, in* HANDBUCH CORPORATE GOVERNANCE, *supra* note 1, at 905; 12Germ 7; 10RF 27.

that these specific corporate governance forms cannot be discussed beyond occasional remarks.

B. Corporate Governance in the Shadow of the Law

1. Corporate and Stock Exchange Law versus Corporate Governance by Stock Exchange Self-Regulation

Traditionally, corporate governance in most countries has been the domain of corporate and stock exchange law, both mandatory and default rules.[33] In addition to formal law, self-regulation has long been a characteristic principle of stock exchanges, even in those countries where they were, and still are, public law institutions. This is the case in Germany, for example, though there has always been a tension between self-regulation and state regulation.[34] Self-regulation has always been geared toward having institutions and procedures that were attractive for traders, yet also having rules which protected shareholders and other investors who otherwise might have retreated from securities trading.[35]

But with the rise of the corporate governance movement, stock exchanges that competed with each other—no longer only nationally but increasingly internationally as well—began to require the observance of good corporate governance as a listing condition. This was the case, for example, with the London Stock Exchange and the Combined Code of Corporate Governance.[36] Other exchanges did not go quite so far, but still provided for some enforcement as well, sometimes rather hesitantly through the use of recommendations to

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[33] As to these laws, see the national reports. *Cf. also* Klaus J. Hopt, *Comparative Company Law in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 1161 (Mathias Reimann & Reinhard Zimmermann eds., 2006) with further references.

[34] KLAUS J. HOPT, DER KAPITALANLEGERSCHUTZ IM RECHT DER BANKEN 152 et s. (1975); for a concrete case from the United States, see *Note, Informal Bargaining Process: An Analysis of the SEC's Regulation of the New York Stock Exchange,* 80 YALE L.J. 811 (1971). Cf. most recently, Report of the New York Stock Exchange Commission on Corporate Governance, September 23, 2010.

[35] The interests of those who run the stock exchange—originally the merchants, but today most stock exchanges are firms with their own shareholders—are of course usually better served. *Cf.* Oliver Hart & John Moore, *The Governance of Exchanges: Members' Cooperatives versus Outside Ownership*, OXFORD REVIEW OF ECONOMIC POLICY 12(4) 53-69 (1996); Johannes Köndgen, *Ownership and Corporate Governance of Stock Exchanges,* JOURNAL OF INSTITUTIONAL AND THEORETICAL ECONOMICS 154, 224 (1998); Andreas M. Fleckner, *Stock Exchanges at the Crossroads,* 74 FORDHAM L. REV. 2541 (2006).

[36] 31UK 2.

individual companies or a public announcement as in Japan.[37] In most countries, e.g., Australia,[38] they endorsed these recommendations by a "comply or disclose" or "comply or explain" principle. Delisting is a threat in extremis but would hurt the shareholders, and remains theoretical. Of course, such exchange requirements cannot extend to non-listed companies. It is important to stress this because in some countries stock exchange listing remains an exception, or is at least much less frequent than in other countries; this is even true within the European Union if one compares, for example, the United Kingdom with Germany. Sometimes the exchange itself practices additional self-restraint, as for example in the United Kingdom, where the Combined Code was applicable only to listed companies on the Main Market of the London Stock Exchange that had been incorporated in the United Kingdom.[39]

2. Existence and Content of Corporate Governance Codes

More recently, corporate governance in the form of soft law in various forms has gained ground. Prominent examples include the host of corporate governance codes; non-binding recommendations of various sources such as chambers of commerce, business and banking associations, and international committees; best practice standards; and other forms of self-regulation and market discipline.[40] Today most countries have corporate governance codes. These codes are not law and thus lack binding force. The prototype and current international model for these instruments is the UK Corporate Governance Code that goes back to the Combined Code of the Cadbury Committee 1992.[41] In the meantime there has been a whole

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[37] Tokyo Stock Exchange, but the corporate governance rules are under review and the independence requirement for directors and statutory auditors is expected to come, 17Jap 5.

[38] 2Austr 3.

[39] From June 2010, on this has been extended also to overseas listed companies (OLCs) and to UK-incorporated subsidiaries of OLCs. *See* Financial Reporting Council, 2009 Review of the Combined Code: Final Report, December 2009; 31UK 2. On the Combined Code see note 41.

[40] There is a long line of literature on private ordering in economics, political and social science, and law. As to the latter, *cf.* GREGOR BACHMANN, PRIVATE ORDNUNG (2006); GRALF-PETER CALLIES AND PEER ZUMBANSEN, ROUGH CONSENSUS AND RUNNING CODE, ch. 4: Transnational Corporate Governance (2010). On market discipline, see Martin Hellwig, *Market Discipline, Information Processing, and Corporate Governance, in* CORPORATE GOVERNANCE IN CONTEXT, *supra* note 1, at 379.

[41] The Combined Code on Corporate Governance stems from the Cadbury Committee, *supra* note 11, and is today promulgated by the non-governmental Financial Reporting Council, 31UK 2. *See* www.frc.org.uk/corporate/combinedcode.cfm. It is now renamed: Financial Reporting Council, The UK Corporate Governance Code, June 2010, http://www.frc.org.uk/documents/pagemanager/Corporate_Governance/UK%20Corp%20Gov

wave of corporate governance codes, and today practically all relevant countries have one or more of them.[42] These codes stem from various sources, including stock exchanges, business organizations,[43] special governmental or similar public committees,[44] supervisory agencies,[45] and a few from academics and practitioners. Usually these codes address only listed corporations. But there are also specific corporate governance codes for family enterprises, or for businesses in which the state or other public bodies hold an important block of shares.[46] Sometimes particular sectors of the economy such as banking[47] or even individual corporations like, for a while, the Deutsche Bank,[48] have issued special corporate governance codes or similar recommendations.

The content of these corporate governance codes varies considerably. Some are very sophisticated: the UK Code, for example, contains high-level Main Principles, mid-level Supporting Principles and low-level Provisions.[49] Others are shorter, and much less explicit or rigorous. The content of each code depends on financial traditions and the possibility of the individual country and its institutions having and credibly supporting self-regulation. In the City of London, of course, this is much more evident to all participants than in a federal state with diverse economic centers and participants, as is traditional in Germany. In Germany and some other countries the respective corporate governance codes are meant also to inform

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%20Code%20June%202010.pdf. *See also supra* notes 11, 12 & 39. *Cf.* A. CADBURY, CORPORATE GOVERNANCE AND CHAIRMANSHIP: A PERSONAL VIEW (2002).

[42] *See* the Weil, Gotshal & Manges Study for the European Commission, Comparative Study of Corporate Governance Codes Relevant to the European Union and Its Member States, Brussels, January 2002. An index of all corporate governance codes can be found on the ECGI website, *supra* note 2, under codes & principles. *Cf. also* European Corporate Governance in company law and codes, Report of the High Level Group of Company Law Experts, Rivista delle società 2005, 534.

[43] For example, the French AFEP/MEDEF, The Corporate Governance of Listed Companies, October 2003, consolidated with two recommendations on remuneration in 2008, and the Hellebuyck Report as of 2009, 10RF 2 et s. For Switzerland economiesuisse, 27CH 3.

[44] For Germany Deutscher Corporate Governance Kodex, latest revision in June 2010; comments by HENRIK-MICHAEL RINGLEB ET AL., KOMMENTAR ZUM DEUTSCHEN CORPORATE GOVERNANCE KODEX (4th ed. 2010).

[45] Argentina, 1Arg 6.

[46] *Supra* I 1 d.

[47] *Supra* I 1 d.

[48] Deutsche Bank AG, Corporate Governance Grundsätze, Frankfurt, March 2001, before the German Corporate Governance Code came into force in February 2002. The Deutsche Bank Code dealt in an exemplary way with the conflict of interest resulting from bank representatives in corporate boards. *Cf.* Klaus J. Hopt, *Takeovers, Secrecy and Conflicts of Interest: Problems for Boards and Banks, in* TAKEOVERS IN ENGLISH AND GERMAN LAW 33-63 (Jennifer Payne ed., 2002).

[49] 31UK 2.

foreign investors on the national rules on corporate governance, whether stemming from actual formal law or from good corporate governance practice as recommended in the code.[50] In general, corporate governance codes primarily regulate the board and its committees, or in the case of a two-tier board, both boards and the relationship between them. But there are also rules on shareholder rights and auditing practices.[51] All of these corporate governance codes contain provisions concerning internal corporate governance, with particular emphasis on the board. Rules of external corporate governance, especially concerning takeovers, have traditionally developed separately, both in law and under self-regulation. The prime example is the Takeover Code of the Takeover Panel in the United Kingdom, which was formerly fully self-regulatory, but following the EU Takeover Directive now has legislative backing under the Companies Act of 2006.[52] The coexistence of these regimes—corporate governance law and codes and takeover regulation (through takeover law and takeover codes)—can lead to gaps and inconsistencies regarding rules and recommendations.

The rate of adherence to these codes is different—high in the United Kingdom and Germany, for example, but lower in other countries[53]—but a clear link between observance of the codes and the stock price of the corporation has not yet been empirically established.[54] In any case, the relevance of the codes for focusing attention on the practice of good corporate governance and also for research and academic debate is high.

3. Administration and Enforcement of the Codes

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[50] 12Germ 2; similarly the Best Practices for Warsaw Stock Exchange, 22Pol 4. This implies a clear separation between both parts. A further regulatory technique of the German Code is the distinction between formal recommendations (with disclosure, see *infra* II B 3) and mere suggestions (completely voluntary and without disclosure).

[51] See, for example, the German Corporate Governance Code, *supra* note 44, parts 2 and 7. Labor is not addressed despite German labor codetermination in the board, since the Social Democratic goverment at the time excluded this from the task of the Corporate Governance Commission, codetermination being “untouchable.” As to shareholders and auditors as corporate governance actors, see *infra* III B and D.

[52] 31UK 21.

[53] In Germany for 2009, the DAX-listed corporations complied with 96.3% (all listed companies: 85.8%) of the recommendations and 85.4% (63.5%) of the suggestions, Axel v. Werder & Till Talaulicar, *Kodexreport 2010: Die Akzeptanz der Empfehlungen und Anregungen des Deutschen Corporate Governance Kodex,* DER BETRIEB 2010, 853. *Cf. also* for Spain 26Spain 23 et s. But in Denmark according to a 2009 study more than fifty percent of the companies did not comply with more than five of the recommendations of the Code, 8Denm 3.

[54] 12Germ 3 with references.

The administration and enforcement of corporate governance codes differ considerably. In some countries there are no permanent code commissions or similar bodies, with the result that the code remains a mere recommendation; it is not enforced other than by peer pressure and self-interest, and is not regularly revised in light of new needs and insights. A mild form of disclosure is provided for in the countries of the European Union where the mandatory corporate governance statement must indicate whether the corporation is subject to a corporate governance code and, if so, to which one.[55]

Stock exchanges may require more, namely asking companies in their listing conditions to observe the code, as in the United Kingdom and other countries.[56] This is not incompatible with the recent EU reform, according to which the listing decision is taken away from the stock exchanges and given to a special listing authority; an example is the UK Listing Authority, which since 2000 has been the Financial Services Authority (FSA).[57] If observance of the code is a condition for listing, this leaves the corporation and its directors no choice but to agree to those terms. Hence observance of the code is no longer voluntary except for non-listed companies.

In other countries, special corporate governance commissions are in charge of issuing, administering and enforcing the code. Enforcement can be simple self-regulation, i.e., basically by peer pressure or through disclosure, usually on a "comply or disclose" basis. In some countries—such as the Netherlands, Germany, Austria, Denmark, Portugal and Spain[58]—this disclosure, but not the code and its content, is supported by law, for example by a provision in the stock corporation act that listed companies must "comply or disclose" or "comply or explain." This is an interesting technique that lies between self-regulation and regulation by law, and may be described as "self-regulation in the shadow of the law." The

[55] Art. 46a of the European Directive 2006/46/EC of 14 June 2006 L 224/1 (modifying the 4th and 7th directives on annual accounts and consolidated accounts). The corporate governance statement is intended to inform (foreign) investors and potential bidders and goes back to a proposal of the High Level Group of Company Law Experts, A Modern Regulatory Framework for Company Law in Europe, Report to the European Commission, Brussels, 4 November 2002, reprinted with commentaries *in* REFORMING COMPANY AND TAKEOVER LAW IN EUROPE, *supra* note 4, Annex 3, 925-1086.

[56] F. ex. Poland, 22Pol 4. As to the role of the stock exchanges in corporate governance, see already *supra* II B 1.

[57] 31UK 2 et s. The new UK governement intends to transfer the supervisory competences to the Bank of England.

[58] Since 2004 in the Netherlands, 21Neth 4; Sec. 161 of the German Stock Corporation Act; similarly for Austria 3A 1; 8Denm 3; 23Port 2; 26Spain 21.

extent to which non-observance must be explained varies considerably. Some codes do not detail what "explain" means; others distinguish between the main principles and the lower-level principles of the code.[59] Experience shows that such a requirement may lead to thorny legal problems, not only with regard to the reach and content of the rule, but also the responsibility for such disclosure and the legal consequences of non-disclosure.[60] In some countries, courts attach legal consequences to false or omitted disclosure, provided that the corporation has declared that it complies with the code. An example is the voidability of a shareholder resolution on ratification of an action taken by the management board.[61] False or non-disclosure is also a violation of a director's duty that can carry internal and/or legal consequences, including censure by the shareholders, measures taken by a supervisory agency or the stock exchange, and possibly even personal liability.[62]

A further variation concerns the extent to which corporate governance disclosure must be verified or even audited. As seen before, the "comply or explain" disclosure declaration is usually issued by the board as a whole. Yet, if the company is obliged or chooses to publish information concerning it being subject to a corporate governance code, or its observance or non-observance of such a code, and if this declaration is part of its annual report, this declaration is also subject to the annual audit. This is why most companies prefer to issue a separate declaration as an annex to the annual management report that is therefore not subject to the auditing requirement.[63]

4. Code Reform

Simultaneously with the extensive corporate and stock exchange law reforms,[64] there have been numerous corporate governance code enactments and reforms all over the world[65] since 1992 when the Combined Code was promulgated in the United Kingdom. If the

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[59] UK Listing Rule 9.8.6. 31UK 2.

[60] Marcus Lutter in RINGLEB ET AL., *supra* note 44, nos. 1631 et s.; *cf.* Belgian case law when the code has been incorporated in the by-laws of the corporation, 4B 30.

[61] For Germany, see Federal Court of Last Instance (Bundesgerichtshof), 16.2.02009, case Kirch/Deutsche Bank, BGHZ 180, 9 (19 et s.); 29.9.2009, case Axel Springer, ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (ZIP) 2009, 2051 (2054 no.18 et s. concerning nondisclosure of a conflict of interest).

[62] Marcus Lutter in RINGLEB ET AL., *supra* note 44, no. 1634 with further references as to the controversy. *Cf. also* affirmatively for Poland 22Pol 5 et s.

[63] Member State option under the Directive of 14 June 2006, *supra* note 55.

[64] For examples of such reform laws see *supra* note 4.

[65] *Supra* note 42.

administration and further development of such corporate governance codes is the domain of a special corporate governance commission, there is inherent pressure on that institution by the financial press, the investing public and even by legislators to come up with new rules every year. This phenomenon can be observed in Germany[66] where the resultant, fast-paced, code changes have rightly been criticized for having had negative effects. In the United Kingdom reforms are progressing more slowly, both as to corporate law and codes, with the consequence that there is much better reform preparation. A new edition of the Combined Code, now known as the UK Corporate Governance Code, was elaborated by the Financial Reporting Council and became applicable on June 1, 2010; it contains many new requirements for the chairman and the non-executive directors, and for ensuring an appropriate balance between the independence of directors on the one hand and their firm specific knowledge on the other.[67] This latter approach corresponds more fully with different methods and traditions of law reform. This thorough preparation of the the UK Corporate Governance Code as well as, before, the UK Company Act, may be a model for other countries.

C. The Role of Scandals, Financial Crises, and Legal Transplants

1. The Impact of Corporate Governance Scandals on Corporate Governance Rules

Corporate, stock exchange and capital market reform has to a considerable degree been driven by corporate scandals;[68] this is true also for corporate governance. Prominent examples are Enron and WorldCom in the United States, Parmalat in Italy, Vivendi Universal and France Telecom in France, the New Market in Germany, and HIH Insurance and One.Tel in

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[66] The German legislators have repeatedly stepped in with legislation when the Corporate Governance Commission did not go far enough or did not act quickly enough. The three prominent examples are mandatory individual disclosure of remuneration of board members (2005); mandatory agreement of a ten percent deductible if the corporation takes out a D & O policy for the board member (2009); and general prohibition of the direct change-over of a management board member into the supervisory board (2009). In June 2010, the Minister of Justice threatened that a board member quota regime for women will be mandated by law if the boards hesitate too long; *see infra* note 116.

[67] *See supra* note 41; 31UK 8 et s.

[68] HOPT, *supra* note 34, at 15 et s.; more recently Hill, *supra* note 4. For Germany, AKTIENRECHT IM WANDEL, 1807-2002, 2 VOLS. (Walter Bayer & Mathias Habersack eds., 2007).

Australia.[69] Yet all these cases involved more than just corporate governance failures; each included intentional non-observance of mandatory legal rules, and often even fraud and criminal behavior. In the case of Enron, it has been said that its—formal—corporate governance was exemplary, with its requirements for independent directors and all the other modern corporate governance devices. The reality, of course, was different: Enron's highly reputed directors learned of the existence of special purpose vehicles into which many of the risk papers were positioned only after the crisis had broken out.[70] The positive byproduct of scandals is that they show where regulation has lacunae or is not effective. Unfortunately, experience shows that legislators and rule-makers tend to overreact to these events, as scandal-driven legislation often goes a step too far. The Sarbanes-Oxley Act of 2002[71] is only one—albeit prominent—example that has been criticized by some as "quack" legislation.[72]

2. The Impact of the Financial Crisis

The current financial crisis provides further examples of the impact of crises on law-making. As hurried reforms of legislation on directors' remuneration in many countries show, crisis law-making may be carried out too quickly, and may reach too far. In Germany, instead of giving the Corporate Governance Code Commission time to stiffen its recommendations on directors' remuneration in a well-considered and flexible way, as the French legislators did,[73] the German parliament reacted with a hastily prepared, mandatory law reform that resulted in many new legal problems.[74] To be sure, remuneration in the financial sector is different from salary standards in other areas. There the perverse incentives—not only for board members, but for all categories of staff whose professional activities have a material impact on the risk profile of the financial undertaking—needed quick and stringent re-regulation such as set

[69] 2Austr 2 et s. The James Hardie scandal, in which asbestos victims were turned down by a board that claimed its primary duty was to the shareholders, prompted reconsideration of Australia's traditional shareholder-centered approach, 2Austr 5 et s.
[70] As to Enron, *cf.* MILHAUPT & PISTOR, *supra* note 23, at 47 et s.
[71] Sarbanes-Oxley Act of 2002, PubLNo 107-204, 116 Stat. 745, codified in sections of Titles 11, 15, 28 and 29 of the U.S. Code; 32USAI 35 et s.
[72] Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance,* 114 YALE L.J. 1521 (2005). The same argument has been made regarding the Dood-Frank Act, *infra* note 245, see Stephen M. Bainbridge, Dodd-Frank: Quack Federal Corporate Governance Round II, http://papers.ssrn.com/sol3/papers.cfm?abstract_id= 1673575.
[73] 10RF 10.
[74] Sections 87(1), (2), 93(2) of the Stock Corporation Act as of 2009, 12Germ 3 et s.. As to the compensation reforms in the United States, see 32USAI 39 n.158.

forth by the European Commission Recommendation of 30 April 2009.[75] The United Kingdom is an example of dealing with the incentive problem just for the financial sector and not for non-financial corporations in general. The Financial Reporting Council, which is the main corporate governance regulatory body of the United Kingdom, has refrained from implementing the Walker recommendations across the British listed corporate sector as a whole.[76]

3. Reception and Rejection of Foreign Law

Reception of foreign law via transplants is a well-known phenomenon. Examples are the global reception of U.S. securities regulation;[77] the influence the Sarbanes-Oxley Act of 2002[78] had in Europe,[79] Australia[80] and all over the world; and more specifically the Anglo-American term and concept of corporate governance itself,[81] a term that in many countries is not even translated into the national language. Of course, there are also numerous affinities and mutual influences within Europe.[82] Competition between legislators and other national

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[75] Commission Recommendation of 30 April 2009 on remuneration policies in the financial services sector, OJEU L 120/22.
[76] 31 UK 8; see more in detail *infra* III A 4 c on remuneration.
[77] *Cf.* Hopt, *supra* note 33, 1161 at 1179 et s.. Some civil law countries follow the civil law tradition in regulating corporations and U.S. law and practice in regulating their capital market, see 5Brazil 5; similarly in Georgia, 11Georgia 2.
[78] *Supra* note 71.
[79] *Cf.* for the UK Paul L. Davies, *Enron and Corporate Law Reform in the UK and the European Community, in* CORPORATE GOVERNANCE IN CONTEXT, *supra* note 1, at 163; for France, Pierre-Henry Conac, *L'influence de la loi Sarbanes-Oxley en France,* REV. SOCIÉTÉS, 835 (Oct.-Déc. 2003). For Italy, briefly 16RI 2. For Switzerland 27CH 6 et s., 17. For Europe, Klaus J. Hopt, *Modern Company and Capital Market Problems: Improving European Corporate Governance After Enron,* 3 JOURNAL OF CORPORATE LAW STUDIES 221 (2003).
[80] 2Austr 3; also 1Arg 8.
[81] For example Germany 12Germ 1; JAN VON HEIN, DIE REZEPTION US-AMERIKANISCHEN GESELLSCHAFTSRECHT IN DEUTSCHLAND (2008); Holger Fleischer, *Legal Transplants im deutschen Aktienrecht,* NEUE ZEITSCHRIFT FÜR GESELLSCHAFTSRECHT (NZG) 1129 (2004).
[82] Striking examples are the voluntary transfer (autonomous execution) of European law in Switzerland, 27CH 6, and the strong influence of Belgian company law upon Luxembourg law, though Luxembourg is often more liberal, 18Lux 2, but also 19, 20. The Scandinavian countries form a Nordic block, there exists a Nordic style of corporate governance, JESPER HANSEN, NORDIC COMPANY LAW (2d ed. 2007); 20Norway 7, *cf. also* 9Fin 1; influences from German law on Danish corporate law have given way to influence of UK law, 8Denm 4. Implants in Turkey from Switzerland and Germany, 30Turk 5. Quite apart from accepting the European "*acquis communautaire*" the Middle and Eastern European states have drawn heavily on the company and capital market laws of the United States and other European countries, *cf.* f. ex. for Poland Stanislaw Soltysinski, *Sources of Foreign Inspirations in the Draft of the Polish Company Law, in* CORPORATIONS, CAPITAL MARKETS AND BUSINESS IN

rule-makers versus harmonization within the EU plays a role in this.[83] Particular problems exist in Middle and Eastern European countries that are torn between civil and common law transplants—especially in securities regulation—and are often pushed to adopt solutions for whose application their executives and judiciaries are not yet suited.[84]

There are also clear examples of the rejection of foreign external corporate governance models. In the early stages of the European Union, a number of Member States followed the example of the British takeover code, including the anti-frustration rule; however, the influence of Volkswagen on German Chancellor Schröder and the Wallenberg clan's lobbying against the European draft 13th directive on takeovers and the anti-frustration and breakthrough rules contained in it was successful and finally led to the option provision of the 13th directive instead of the original mandatory anti-frustration provision.[85] In the aftermath of the financial crisis, the Berlusconi government repealed the Italian anti-frustration rule that had been shaped after Articles 9 and 11 of the final 13th directive for fear that Italian "champion" companies might not be able to defend themselves against foreign bidders.[86] The inevitable weakening of external corporate governance weighed little in either Germany or Italy as protectionism grew quickly.[87] In the end, a comparative view of corporate governance shows a great deal of convergence, but many path-dependent differences remain.[88]

THE LAW 533 (Theodor Baums et al. eds., 2000). *More generally* CORPORATE GOVERNANCE LESSONS FROM TRANSITION ECONOMY REFORMS (Merritt B. Fox & Michael A. Heller eds., 2006).

[83] *See* European Commission, Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward (Company Law Action Plan), Brussels, 21.5.2003, COM (2003) 284 final, and THE EUROPEAN COMPANY LAW ACTION PLAN REVISITED, REASSESSMENT OF THE 2003 PRIORITIES OF THE EUROPEAN COMMISSION (Koen Geens & Klaus J. Hopt eds., 2010). *Cf. also* STEFAN GRUNDMANN, EUROPEAN COMPANY LAW (2007); MADS ANDENAS ET AL., EUROPEAN COMPARATIVE COMPANY LAW (2009); ADRIAAN DORRESTEIJN ET AL., EUROPEAN CORPORATE LAW, (2d ed. 2009); ANDREW JOHNSTON, EC REGULATION OF CORPORATE GOVERNANCE (2009). As to competition of legislators versus harmonization in the EU there is an extensive literature. It turns on the race to the bottom or race to the top-controversy and cannot be taken up in this context.

[84] Well described for Serbia, *cf.* 24Serb 5 et s.

[85] Rolf Skog, The *Takeover Directive – An Endless Saga,?* EUROPEAN BUSINESS L. REV. 301 (2002).

[86] KRAAKMAN ET AL., *supra* note 10, at 272.

[87] *Supra* note 26; *cf. also* 13Greece 8.

[88] CONVERGENCE AND PERSISTENCE IN CORPORATE GOVERNANCE (Jeffrey N. Gordon & Mark J. Roe eds., 2004) and therein Gerard Hertig, *Convergence of Substantive Law and Convergence of Enforcement: A Comparison,* at 328; CORPORATE GOVERNANCE REGIMES, CONVERGENCE AND DIVERSITY (Joseph A. McCahery et al. eds., 2002) and therein Klaus J. Hopt, *Common Principles of Corporate Governance in Europe?,* at 175.

III. THE ACTORS IN CORPORATE GOVERNANCE

A. The Board

The most prominent actor in corporate governance is the board, which is regulated in the corporation laws of virtually all countries. In addition there is a vast literature in law, economics[89] and more recently also in other fields[90] that deals with the board. The focus of this Article is on comparative law, but in a functional sense ("form follows function") and with references to economic literature where appropriate.[91] When looking at laws and empirical studies, one must be aware that in the aftermath of Sarbanes-Oxley there were significant legal and factual changes to board structure and responsibility, both in the United States and in Europe.[92]

1. Structure

a) One-tier and two-tier boards and the option between them. (1) The most prominent structural characteristic of the board is whether it is a one- or two-tier institution. The members of the one-tier board and of the supervisory board, which is charged with overseeing control of operations, are elected by the shareholders,[93] while the members of the management board are usually elected by the supervisory board. Historically, the supervisory

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[89] According to Adams et al., *supra* note 1, at 63 n.6, more than 200 working papers on boards since 2003. The economic literature is largely empirical, but there is also an important part of general economic theory applicable to the board. Unfortunately most of the literature deals with Anglo-American firms, studies of boards in non-Anglo-American firms and comparisons of boards across countries, is an understudied area, *id*. at 101. As to the pitfalls of economic research on boards, *id.* at 95 et s.

[90] Including accounting, management, psychology and sociology, *id*. at 63 with references.

[91] Relevant questions for economic research are for example, what directors do, how boards are structured, how the board works, and what motivates directors, *id.* at 64 et s., 80 et s., 86 et s., 91 et s.; for areas of future research, *id.* at 99 et s.

[92] *Cf.* for the United States, James S. Linck et al., *The Effects and Unintended Consequences of the Sarbanes-Oxley Act on the Supply and Demand for Directors*, 22(8) REVIEW OF FINANCIAL STUDIES 3287 (2009); Adams et al., *supra* note 1, at 81: larger and more independent boards, more committees, more frequent meetings, generally more responsibility and risk.

[93] In practice, the (one-tier) board may have "subtle powers of influence over its own composition," 2Austr 13; the same is true for the supervisory board. The Finnish Corporate Governance Code recommends the election of all directors by the shareholders, even if the corporation has opted for the two-tier board system, 9Fin 15.

board, i.e. the two-tier system, dates back to the second half of the nineteenth century, when the state withdrew its oversight role from public companies and had to be replaced by another control mechanism.[94] The two-tier board, with separated management and supervisory boards,[95] has been mandatory in the Netherlands—home of the first listed company in the world, the VOC, founded in 1602—since 1619.[96] It is also a requirement in Germany, Austria, Portugal, Poland, China and some other countries;[97] in still others, such as Switzerland, it is mandatory for bank and insurance corporations.[98]

The separation between management and control in countries with two-tier boards is legally prescribed and buttressed by mandatory incompatibility rules, but de facto the supervisory board has rarely limited itself to mere control; instead, it has also traditionally assumed an advisory function. In practice, the division between the tasks of the management board and the supervisory board varies according to business sector, size of the corporation, tradition and, in particular, the presence of strong leaders on one board or the other. Sometimes the chairman of the management board, alone or together with the chairman of the supervisory board, selects the members of the supervisory board without much ado, though formally they must be elected by the shareholders. Sometimes the chairman of the supervisory board is the leading figure on whose benevolence the chairman of the management board depends, and who picks the other supervisory members and proposes them to the shareholders. One reason for the strict maintenance of the two-tier board in Germany is the politically cemented policy

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[94] Klaus J. Hopt, *The German Two-Tier Board: Experience, Theories, Reforms, in* COMPARATIVE CORPORATE GOVERNANCE, *supra* note 1, 227, at 230 et s. *Cf.* JAN LIEDER, DER AUFSICHTSRAT IM WANDEL DER ZEIT (2006).

[95] This is the common definition of a two-tier board; *but see* 17Jap 9 et s.: a corporation with mandatory committees is treated as two-tier board. This would lead to the strange consequence that the United States or the United Kingdom would have to be considered as two-tier board countries. *Cf.* Klaus J. Hopt & Patrick C. Leyens, *Board Models in Europe,* EUROPEAN COMPANY AND FINANCIAL LAW REVIEW (ECFR) 135 (2004).

[96] Ella Gepken-Jager, *Verenigde Oost-Indische Compagnie (VOC)/The Dutch East India Company, in* VOC 1602-2002, 400 YEARS OF COMPANY LAW, 41 at 56 et s. (Ella Gepken-Jager et al. eds., 2005): Committee of Nine; 21Neth 6.

[97] For Portugal 23Port 5. For Poland 22Pol 10. In China for stock corporations as well as for limited liability companies, 6China 4. *Cf. also* for Taiwan 29Taiw 4 et s.

[98] Klaus J. Hopt, *Erwartungen an den Verwaltungsrat in Aktiengesellschaften und Banken – Bemerkungen aus deutscher und europäischer Sicht,* SCHWEIZERISCHE ZEITSCHRIFT FÜR WIRTSCHAFTS- UND FINANZMARKTRECHT (SZW/RSDA), 235, at 237 et s. (2008); 12Germ 8 et s.; 27CH 26.

of labor codetermination,[99] which would hardly be tolerable for the shareholders in a one-tier board.

(2) Internationally, the most prevalent board structure is the one-tier board. It is the system of choice in the United States, the United Kingdom, Switzerland and other countries.[100] The predominance of the one-tier board has historical reasons, too, such as the relative emergence of entrepreneurial ownership in Great Britain that resulted in a lesser role for the state or other institutions to oversee management.[101] Later, the fact that the United Kingdom resisted all attempts to institute labor codetermination on boards may have helped to keep the one-tier system as the "virtually unanimous feature of UK public company governance structures."[102] The one-tier board is also the only board structure considered in the recommendations of the Combined Code viz. the UK Corporate Governance Code, though statutory company law itself does not prescribe the structure of the board. The one-tier board unites the management and control functions that are separated in the two-tier system. Yet two recent developments in one-tier system countries, in particular in the United Kingdom, qualify this observation: they are the movements toward independent directors and toward the division of leadership. Both phenomena, which will be treated in more detail below,[103] lead to a certain functional convergence between the one- and two-tier systems.

While businesspeople and academics of a given country usually hasten to declare that their board system is the best, there is no stringent theoretical—let alone empirical—proof that one of the two systems is better than the other.[104] Both structures have their roots in historical development, are path-dependent and have advantages and disadvantages. The one-tier system may function better in the environment of the United Kingdom, especially if the recent developments mentioned above and the better flow of information between executive and

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[99] *See infra* III C 1.

[100] In the Nordic countries, the one-tier system prevails, *cf.* 28Swed 1, 20Norw 7, though besides the board of directors (*bestyrelse*) the executive management (*direktion*) is prescribed as a mandatory company organ, 8Denm 5, *cf. also* 20Norw7.

[101] 31UK 5; *cf. also* B. R. Cheffins, *Putting Britain on the Roe Map: The Emergence of the Berle-Means Corporation in the United Kingdom, in* CORPORATE GOVERNANCE REGIMES[AUTHOR, PLEASE VERIFY THIS IS CORRECT], *supra* note 88, at 147.

[102] 31UK 5.

[103] *See infra* III A 1 b.

[104] Carsten Jungmann, *The Effectiveness of Corporate Governance in One-Tier and Two-Tier Board Systems*, 3 EUROPEAN COMPANY AND FINANCIAL LAW REVIEW (ECFR) 426 (2006).

non-executive directors in the same board[105] are taken into consideration. It is more cost-efficient as well and may therefore be better for smaller companies. This is also the reason why countries with a two-tier board model, such as Germany, do not make the second board mandatory for the limited liability company (GmbH) unless the conditions for labor codetermination apply.

(3) On the other hand, large international companies may prefer to separate management and control, delegating the latter to a supervisory board. This is indeed what happened in France, where a choice between the two systems has been allowed since 1966.[106] While the overwhelming majority of corporations retain the traditional one-tier system (typically with a *président directeur général*, or PDG),[107] around twenty percent of the mostly large and internationally active CAC-40 companies have chosen the two-tier system (*directoire et conseil de surveillance*).[108] Similarly, in the Netherlands where non-codetermined corporations have a choice between the traditional two-tier board and the one-tier board, only one of the larger listed corporations has adopted the former, namely Unilever N.V.[109] Giving shareholders a choice between two or even more board structures instead of prescribing by law one structure for all corporations therefore seems the best approach. The shareholders know better than the legislators what suits them, and they also bear the risk in a competitive environment if they choose the second-best option. France, the Netherlands, Belgium, Luxembourg, Finland, and most recently Denmark, and some non-European countries[110]

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[105] This is the main advantage of the one-tier system as seen by Paul Davies, *Board Structure in the UK and Germany: Convergence or Continuing Divergence?* 2 INTERNATIONAL AND COMPARATIVE CORPORATE LAW JOURNAL 435, at 448 et s., 455 (2000).
[106] 10RF 4 et s.
[107] Usually corporations stick to what they are used to, in one-tier board countries like Belgium, 4B 4, as well as in two-tier board states, *cf.* Portugal 23Port 6; Croatia, 7Croat 6, and Hungary, 14Hung 6. For Japan see 17Jap 10: 97,7 of the Tokyo Stock Exchange listed corporations stick to the traditional system of a board with an additional internal auditors board, only 2.3% have chosen the committee structure.
[108] MAURICE COZIAN ET AL., DROIT DES SOCIÉTÉS 306 no 646 (22e éd., 2009).
[109] 21Neth 6.
[110] France with two models to choose from, see *supra* notes 106, 108; Serbia followed the French example, 24Serb 8; the Netherlands with legislative proposal to widen the choice, 21Neth 6; Belgium "comité de direction" since 2002 by the law named "Corporate Governance," 4B 4; New Danish Companies Act No 470 of 12 June 2009, 8Denm 1, 4 et s. and Erik Werlauff, *Board of Directors or Supervisory Board: Legal Aspects of the Choice Between One-Tier and Two-Tier Management in Danish Public Limited Companies after the 2009/2010 Company Reform,* 6 EUROPEAN COMPANY LAW 257 (2009); Denmark as well as Luxembourg were motivated by the SE model, 18Lux 8; 11Georgia 3; Poland is expected to introduce two options, 22Pol 10.

allow such a choice; some, including Italy and Portugal, even provide a choice among more than two models.[111] And in the European Union, the founders of a European Company can choose between the one- and two-tier forms, both being offered and regulated in the Statute of the European Company.[112] Apart from escaping the inflexible German labor codetermination, this may be an additional reason for choosing the form of the European Company.[113]

b) Size and composition of the board, in particular non-executive directors (NEDs) and the independent directors. (1) In most countries, the stock corporation act contains numerous provisions regarding the board; they usually concern, for example, its size and composition, the minimum and maximum number of seats, the duration of office,[114] the possibility of a staggered board,[115] diversity and the controversial gender quota[116] and other topics.

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[111] Italy since 2003 with three options, the traditional model with board and collegio sindacale, the one-tier and the two-tier system, Federico Ghezzi & Corrado Malberti, *The Two-Tier Model and the One-Tier Model of Corporate Governance in the Italian Reform of Corporate Law,* 5 EUROPEAN CORPORATE AND FINANCIAL LAW REVIEW (ECFR) (2008); 16I 3, 6 et s.; Portugal since 2006 23Port 5.

[112] SE Statute of 8.10.2001, OJEC L 294/1 Art. 38, 39 et s. (dualistic), 43 et s. (monistic), 46 et s. (common rules for both types)

[113] Ernst & Young, Study on the operation and the impacts of the Statute for a European Company (SE), Final report (for the European Commission), 29.10.2009, ch. 3, 2.2 (p. 246 et s.)

[114] In the United States the usual term is one year, but the shareholders can opt for a staggered board with up to three years terms, Model Bus. Corp. Act Ann. § 8.06, 4th ed. 2008. In Finland it is also one year, staggered boards are permissible, but regarded as against good corporate governance, 9Fin 15 et s. In Norway it is two years, 20Norw 11, staggered boards seem problematic, but permissible; in Japan it is two years, but for executive officers only one year, 17Jap 11; in Australia three years, 2Austr 13; in the Netherlands and Portugal four years, 21Neth 7; 23Port 7. In some countries such as Germany and Austria the term of office can legally be and is usually five years and is renewable, 12Germ 8, 3A 6, but without a staggered board. In Belgium and Greece six years, 4B 5, 13Greece 11. In the United Kingdom the usual period was three years of office on a one-third staggered basis (Combined Code Provision A.7.1). But the formula in the UK Corporate Governance Code is now: B.7.1: “All directors of FTSE 350 companies should be subject to annual election by shareholders. All other directors should be subject to election by shareholders at the first annual general meeting after their appointment, and to re-election thereafter at intervals of no more than three years. Non-executive directors who have served longer than nine years should be subject to annual re-election . . . .” As to FTSE 350 see *supra* note 135.

[115] Having staggered boards is used frequently in the United States for shielding the enterprise from takover. Lucian A. Bebchuk et al., *The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence, and Policy,* 54 STAN. L. REV. 887 (2002); for economic findings see Adams et al., *supra* note 1, at 82 et s.

[116] Since 2003 with reforms in 2004 and 2006, Norway has had a mandatory diversity quota (at least forty percent for both genders) on the boards, with dissolution as the ultimate sanction, 20Norw 10; Hedvig B. Reiersen & Beate Sjåfjell, *Report from Norway: Gender Equality in the Board Room,* 5 EUROPEAN COMPANY LAW 191 (2008); Ina Anne Frost &

Unfortunately, most of these requirements have been introduced by legislators without a basis in empirical data. Only very few countries, apart from certain states in the United States, have cumulative voting;[117] in Italy[118] there is a provision for mandatory representation of minority shareholders on the board, whether two-tier or only one-tier. The supervisory board of large German companies must have twenty seats (twenty-one seats in the coal and steel sector), half of which must be filled by labor;[119] the term of office for management board members is up to five years with the possibility of reelection. In other countries, such as the United Kingdom, there are very few or no statutory prescriptions for the structure of the board, though the listing requirements of the stock exchange and/or corporate governance codes usually mandate or recommend many specifics.[120] In the United Kingdom, boards usually have between ten and fifteen members with a small majority of non-executives;[121] in Japan the average number of directors of all TSE-listed corporations is 8.68;[122] in Australia the average is seven for the Top 300 and nine for the Top 50;[123] and the Netherlands averages from three

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Leena Linnainmaa, *Corporate Governance: Frauen im Aufsichtsrat – Können wir von unseren skandinavischen Nachbarn lernen?,* DIE AKTIENGESELLSCHAFT (AG) 601 (2007). The Finnish Corporate Governance Code recommends that both genders be represented on the board, but without a minimum amount, 9Fin 15. In Germany the Corporate Governance Code Para. 5.1.2, 5.4.1 (as for June 2010) recommends appropriate representation of women and concrete targets to be set by the corporation, *cf. also* 12Germ 8. The UK Corporate Governance Code 2010, B 2 Supporting Principles, recommends "due regard for the benefits of diversity on the board, including gender." In Australia The Corporations and Markets Advisory Committee (CAMAC) supported increased diversity, but rejected mandatory quotas, CAMAC, Diversity of Board, Report 2009; 2Austr 12; similarly the Spanish Unified Code in one of its most controversial recommendations, 26Spain 13. According to the Dutch Parliament a thirty percent quota for women, to be enforced by a "comply or explain" provision in the stock corporation act, is currently under discussion, 21Neth 7.
Cf. all this with the mixed results found by Renée B. Adams & Daniel Ferreira, *Women in the Boardroom and their Impact on Governance and Performance,* 94 J. OF FINANCIAL ECONOMICS 291 (2009). *Cf. also* David A. Carter et al., *Corporate Governance, Board Diversity, and Firm Value,* 38(1) FINANCIAL REVIEW 33 (2003); Kathleen A. Farrell & Philip L. Hersch, *Additions to Corporate Boards: The Effect of Gender,* 11(1-2) JOURNAL OF CORPORATE FINANCE 85 (2005).

[117] For example California, §§ 708(a) (mandatory cumulative voting) and 301.5(a) (authorizing opt-out for listed companies) California Corporation Code, KRAAKMAN ET AL., *supra* note 10, at 90 et s. For Portugal at the request of ten percent (one board member), ten to twenty percent (special election, but not more than a third), 23Port 6 et s. For Poland at the request of a twenty percent shareholder, 22Pol 20; *cf. also* Serbia 24Serb 8 et s.

[118] 16I 2, 7.

[119] As to labor codetermination, see *infra* III C 1.

[120] 31UK 5. Between one and five regular members in Finland, unless otherwise stated in the articles of association, 9Fin 14.

[121] 31 UK 6.

[122] 17Jap 11.

[123] 2Austr 9.

to nine, with larger supervisory boards being rare.[124] Though it is well established in economics, group theory and international practice that in most cases smaller groups function better,[125] vested interests in Germany have up to now prevented the overdue reform. This inflexibility with respect to overly large boards is one of the main reasons for the success of the European Company in countries with codetermined boards.[126]

(2) Independent directors—as distinguished from non-executive directors (commonly called NEDs) and also outside directors, i.e., those not working full time for the corporation, as is common in Germany and Japan[127]—have long been considered an important aspect of corporate governance in the United States. Indeed, some major public corporations had them well before they were required by stock exchange listing rules.[128] The scandals that led to the Sarbanes-Oxley legislation of 2002[129] resulted in increased attention and reform proposals for independent directors. While state corporate law in general does not require independent directors, under the listing rules of the New York Stock Exchange a majority of the directors of listed corporations[130] must now be independent, and the three key committees—the audit committee, the compensation committee, and the nomination or corporate governance committee—must be composed exclusively of independent directors.[131] The Dutch Corporate Governance Code goes even further to recommend that all but one member of the supervisory board and its committees must be independent.[132] In the United Kingdom and other countries. independent directors are a more recent phenomenon, but their number is quickly

[124] 21Neth 7.
[125] Smaller boards seem to monitor the CEO better than larger boards, but this may be different in highly diversified or high-debt firms, Jeffrey L. Coles et al., *Boards: Does One Site Fit All?,* 87(2) JOURNAL OF FINANCIAL ECONOMICS 329 (2008); on the findings concerning board size, see Adams et al., *supra* note 1, at 73 et s.
[126] *See infra* C 1.
[127] 17Jap 14. But reform is under way, see *supra* note 37.
[128] Derek Higgs, Review of the Role and Effectiveness of Non-Executive Directors, Final Report, London 2003; Jeffrey N. Gordon, *The Rise of Independent Directors in the United States, 1950-2005*: *Of Shareholder Value and Stock Market Prices,* 59 STAN. L. REV. 1465 (2007). *See also* Oliver E. Williamson, *Corporate Boards of Directors: In Principle and in Practice,* 24 J. L. & ECON. ORGAN. 247 (2008).
[129] *Supra* note 71.
[130] There is an exception for corporations with a fifty percent or more controlling shareholder. 32USAI n.51.
[131] *E.g.,* NYSE, Listed Company Manual § 303A.02, 04, 05. 06 (2004).
[132] 21Neth 10.

increasing.[133] Traditionally boards have consisted of executives as well as some members who had an essentially consultative role. Even in countries with a separate supervisory board, non-executive members were not required to be independent, and seldom were. In Great Britain the role of non-executive members on corporate governance had already been strengthened by the Cadbury recommendations, but it was not until 2003 that the Higgs Committee, under the influence of the Enron scandal, asked for boards with a majority of independent directors to be recommended in the Combined Code.[134] Under the Combined Code, at least half of the board of British listed companies, excluding the chairman, should be comprised of non-executive independent directors, though for listed companies below FTSE 350 level[135] only two independent non-executive board members are required.[136] The French Corporate Governance Code recommends that independent directors should account for half the members of the board in widely held corporations having no controlling shareholders; in others at least a third; and on the audit committee (*comité des comptes*) two-thirds and with no corporate officers on the committee.[137] The European Commission recommendation of 2005 asks for a sufficient number of independent directors "to ensure that any material conflict of interest involving directors will be properly dealt with,"[138] but concerns only the three above-mentioned board committees and recommends a majority of independent directors on them. Even that would be difficult to prescribe for German codetermined corporations because the subtly specified balance—codetermination at parity on the supervisory boards of major corporations—would be tipped in favor of labor.[139] Some countries go further: for example, the UK Corporate Governance Code expects that the audit

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[133] In Australia in the Top 100 corporations 64.5% of all directors are independent, 2Austr 10. According to the ASC Corporate Governance Recommendation 2.2 the chair should be an independent director, 2Austr 15.

[134] 31UK 6.

[135] The FTSE 350 Index is a market capitalisation weighted stock market index incorporating the largest 350 companies by capitalization which have their primary listing on the London Stock Exchange.

[136] 31UK 5. Now the UK Corporate Governance Code B.1.2.

[137] 10RF 7, 18.

[138] European Commission Recommendation of 15.2.2005 on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board, OJEU L 52/51, section II no. 4.

[139] Klaus J. Hopt, *Europäisches Gesellschaftsrecht und deutsche Unternehmensverfassung,* ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (ZIP) 461, at 468, 473 (2005). As to the problems in codetermined boards, see *infra* III C 1. As to the problems with introducing mandatorily independent directors in Japan, see 17Jap 32 et s. As to FTSE 350 see *supra* note 135.

committees of the FTSE 350 companies be comprised entirely of independent directors and that at least one member of the committee possess recent and relevant financial expertise.[140]

While having independent directors seems to be a general trend, two caveats are in order. First, the fact that independent directors are required is of relatively little significance in and of itself; what is decisive are the criteria for independence and who determines[141] whether a non-executive director should be considered independent.[142] Second, the effectiveness of having independent directors, measured against both predefined control and efficiency in terms of firm performance, has not yet been empirically established.[143]

(3) It has been observed from the beginning of the independent director movement and since established in practical experience that there is a quid pro quo regarding directors' independence and firm-specific knowledge. Therefore, and in particular as a result of the financial crisis, more efforts have been made to have both of these elements on the board. This can be done by recommending or requiring that members collectively have particular knowledge. This is especially important for the audit committee, whose members should together "have a recent and relevant background in and experience of finance and accounting for listed companies appropriate to the company's activities."[144] A tailored induction program should be established for all members,[145] and the particular capabilities of individual directors relevant to their service on the board should be disclosed.[146] The new UK Corporate Governance Code defines the principle of board and board committee competency as an "appropriate balance of skills, experience, independence and knowledge of the company to

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[140] Principle C.3.1 of The UK Corporate Governance Code, 31UK 20. As to the relevance of the requirement of financial expertise for liability, see 31UK 20 et s.
[141] *See infra* III A 3 c.
[142] *See infra* III A 3 c.
[143] Gordon, *supra* note 128, at 1500, 1509; *cf. also* Laura Lin, *The Effectiveness of Outside Directors as a Corporate Governance Mechanism: Theories and Evidence,* 90 NW. U. L. REV. 898 (1996); Ann B. Gillette et al., *Board Structures around the World. An Experimental Investigation*, 12(1) REVIEW OF FINANCE 93 (2008); Ran Duchin et al., *When are Outside Directors Effective?* 96 J. OF FINANCIAL ECONOMICS 195 (2010); Rüdiger Fahlenbrach et al., *Why do Firms Appoint CEOs as Outside Directors?* 97 J. OF FINANCIAL ECONOMICS 12 (2010); Hill, *supra* note 4, at 241 et s.
[144] EU Recommendation of 15.2.2005, *supra* note 138, no. 11.2.
[145] *Id.* no. 11.3. In Germany in 2010 a movement for better and continous education of board members has been started by the German Share Institute (Deutsches Aktieninstitut, DAI), Frankfurt.
[146] EU Recommendation of 15.2.2005, *supra* note 138, no. 11.4.

enable them to discharge their respective duties and responsibilities effectively."[147] The Walker Review of corporate governance in banks and other financial institutions went even further, but the Financial Reporting Council did not take this up for corporations in general.[148] In any case, the professional background of outside or independent directors makes an important difference, as for example findings on the role of bankers on a board suggest.[149]

2. Tasks, in particular within the Shareholder- or Stakeholder-Oriented Approach

a) The shareholder-oriented approach. The classic shareholder-oriented approach prevails in the United States[150] and, judging from the UK Corporate Governance Code,[151] which is focused exclusively on the protection of shareholders from management, de facto also in Great Britain.[152]

Contrary to what is often believed, in particular since the recent financial crisis, this does not imply that labor interests are not well taken care of, since it is in the self-interest of the corporation and management to keep good relationships with labor and the trade unions. But, as will be explained below, in reality, labor interests are better and more precisely taken care of by labor law provisions and work council requirements.[153] This is also true for other stakeholder interests and legal areas beyond company law, such as environmental and tax law. In Great Britain this is the traditional approach of "profit-making with the law."[154]

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[147] The UK Corporate Governance Code Principle B.1. For empirical findings concerning CEOs of other firms as directors, see Adams et al., *supra* note 1, at 85 et s.
[148] 31UK 8. *Cf. also supra* note 7.
[149] A. Burak Güner et al., *Financial Expertise of Directors,* 88(2) JOURNAL OF FINANCIAL ECONOMICS 323 (2008); as to bank representatives *cf.* Ingolf Dittmann et al., *Bankers on the Boards of German Firms: What They Do, What They Are Worth, and Why They Are (Still) There,* 14 REVIEW OF FINANCE 35 (2010); Daniel T. Byrd & Mark S. Mizruchi, *Bankers on the Board and the Debt Ratio of Firms,* 11(1-2) JOURNAL OF CORPORATE FINANCE 129 (2005); Randall S. Kroszner & Philip E. Strahan, *Bankers on Boards: Monitoring, Conflicts of Interest, and Lender Liability,* 62(3) JOURNAL OF FINANCIAL ECONOMICS 415 (2001); JEREMY EDWARDS & KLAUS FISCHER, BANKS, FINANCE AND INVESTMENT IN GERMANY 124 et s., 196 et s. (1994).
[150] Jill E. Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy,* 31 J. CORP. L. 637, 643 (2006); 32USAI 3 n 13.
[151] *See supra* note 41.
[152] 31UK 2. *But cf. also* John Armour et al., *Shareholder Primacy and the Trajectory of UK Corporate Governance,* 41 BRITISH J. OF INDUSTRIAL RELATIONS 531 (2003).
[153] *See infra* III C 2.
[154] 31UK 15.

b) The stakeholder-oriented approach. In many countries this view is considered too narrow, as has long been held in Germany and Austria, and also in the Nordic countries and the Netherlands. There corporation law provides that the management board has to steer the company in the interest of the enterprise as a whole.[155] Since the company law reform of 2006 this is also expressly provided in the United Kingdom,[156] although at least in the takeover context the ultimate decision on the bid rests with the shareholders.[157] This is called the "enlightened shareholder value" principle.[158]

Any evaluation of the stakeholder-oriented approach produces mixed findings. While it might be said that the imposition of a legal duty helps labor, it is doubtful whether it really goes beyond the obvious interest of the corporation and management to maintain good labor relations and avoid strikes. The true effect of such a rule might only be greater discretion by the board to act, which in turn makes it more difficult to hold the board accountable. Labor then seems only to benefit from such a clause if the interests of management and labor coincide.[159] This is different if the legal obligation to manage the corporation in the interest of the enterprise as a whole is complemented by board-level codetermination.[160]

The debate on which approach is preferable dates back many generations. While the traditional legal approach in most countries and the perspective of economics is shareholder-oriented, sociological theory and political science tend more toward stakeholder

[155] 12Germ 14; 3A 6 et s.; 20Norw 13 et s. For the Netherlands Supreme Court 13 July 2007, OR 2007, 178, 21Neth 8. *Cf.* for Australia, *supra* note 69.
[156] Section 172 of the Companies Act 2006. 31UK 1, 15, 22 f. This was already the case under English common law; Article 309 of the Companies Act 1985 defined the company's interest as the welfare of the shareholders as well as the interest of the firm's employees, while section 172 of the Companies Act 2006 broadened that in a pluralistic sense, which according to some has been counterproductive to labor. 31UK 16, 18.
[157] This is indeed a "conceptual ambiguity of the UK's regulatory resonse to the 'shareholder v stakeholder' issue when assessed on the whole," 31UK 30. Yet experience shows that in takeover situations there is often an alliance of interest between the management and labor in frustrating an unwelcome bid more or less irrespectively of what the shareholders might think. As to this controversial UK antifrustration rule 31UK 22 and KRAAKMAN ET AL., *supra* note 10, ch. 8 Control Transactions.
[158] Paul L. Davies *in* GOWER AND DAVIES, PRINCIPLES OF MODERN COMPANY LAW 16-25 et seq. (8th ed. 2008), no balancing of interest, but the "members' interests are paramount." Similarly for Finland 9Fin 3.
[159] KRAAKMAN ET AL., *supra* note 10, at 266. *Cf. also* ROE, *supra* note 27, at 45.
[160] *See infra* III C 1.

orientation.[161] A paradigmatic example of these fundamentally different approaches is the evaluation of, and political approach to, labor codetermination in corporate boards.[162] Though in my view, and in particular under the current economic perspective, the shareholder primacy norm is the better regulatory response, it must be conceded that increasing social inequalities and social unrest, as heightened by the financial crisis and more generally by globalization with its shift of wealth from the old industrial countries to the BRIC countries,[163] put pressure on the legitimacy of this approach.[164] This also shows in the rise of the corporate social responsibility[165] movement, which has gained momentum alongside corporate governance.

3. Functioning, in particular the Work of the Board Committees

a) Management and control. As described before, management and control are two functions that are complementary; however, in financial institutions or even major corporations, they may need a certain degree of separation. This separation can be legally prescribed, as in two-tier board countries, but may just be good practice, as in one-tier board countries with clear separate functions of the executive directors on one hand and the non-executive and independent directors on the other. Even if there is such a separation, the role of the supervisory board or the independent directors on the one-tier board will most often be not just overseeing management, but also advising. In a number of instances, when their consent to important management decisions is legally required, this may even involve taking joint responsibility with management. In some countries the system itself is geared toward such co-steering of the corporation, as in Germany's Rhenish capitalism where banks and major competitors of the corporations concerned held joint directorship on the supervisory board.[166]

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[161] *Cf.* Margaret Blair & Lynn Stout, *A Team Production Theory of Corporate Law,* 85 VA. L. REV. 247 (1999); *cf. also* Amir N. Licht, *The Maximands of Corporate Governance: A Theory of Values and Cognitive Style,* 29 DEL. J. CORP. L. 649 (2004); 32USAI 3 n.12, 44 et s.
[162] *See infra* III C 1.
[163] Recently used term for Brazil, Russia, India and China.
[164] *Cf.* 31UK 30 et s., calling for "a more rigorous examination of the conceptual and empirical bases of th(e) assumption" of the a priori link between shareholder value maximization and social welfare.
[165] *Cf.* DAVID VOGEL, THE MARKET FOR VIRTUE: THE POTENTIAL AND LIMITS OF CORPORATE SOCIAL RESPONSIBILITY (2005); ANDREW JOHNSTON, EC REGULATION OF CORPORATE GOVERNANCE, 356 et s. (2009) on the European Commission's approach; Oliver de Schutter, *Corporate Social Responsibility European Style,* 14 EUROPEAN LAW JOURNAL 203 (2008); 31Austr 3 n.12, 44 et s.
[166] *Cf.* Ralf Elsas & Jan P. Krahnen, *Universal Banks and Relationships with Firms, in* THE GERMAN FINANCIAL SYSTEM ch. 7, 197 et s. (Jan P. Krahnen & Reinhard H. Schmidt eds., 2004); *cf. also* Marc Goergen et al., *Recent Developments In German Corporate Governance*,

While older empirical studies show that directors seem more prone to setting the corporate strategy than to monitoring top management,[167] increased pressure from institutional shareholders and more regulation and litigation have led the board to become more independent and diligent.[168]

In order to fulfill the control function, persons chosen as directors must above all have the necessary qualifications[169] and spend appropriate time on this task. Corporate laws have usually been silent on this, but corporate governance codes—and, in the aftermath of the financial crisis, legal rules as well—have become more precise. These revisions were directed first at banks and other financial institutions, and later extended to include board committees and boards in general. The Walker Review of corporate governance in the United Kingdom recommends for banks and other financial institutions (BOFI) that a majority of non-executive directors (NEDs) should be expected to bring materially relevant financial expertise, though there is still need for diversity; and that for several NEDs, "a minimum expected time commitment of 30 to 36 days annually in a major bank" is necessary.[170] The Financial Services Authority should check this by interviewing NEDs annually.[171] While the

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28 INTERNATIONAL REVIEW OF LAW AND ECONOMICS 175 (2008); Mary O'Sullivan, *The Political Economy of Comparative Corporate Governance,* 10 REV. OF INTERNATIONAL POLITICAL ECONOMY 23 (2003) for Germany and France. This system is slowly disintegrating. *See also supra* note 25.

[167] ADA DEMB & FRANZ-FRIEDRICH NEUBAUER, THE CORPORATE BOARD: CONFRONTING THE PARADOXES at 44 (1992), when asking directors with what description of their job they agree: "set strategy, corporate policies, overall direction, mission, vision" (seventy-five percent of the respondents), "oversee(ing), monitor(ing) top management, CEO" (forty-five percent), serving as a "watchdog for shareholders, dividends" (twenty-three percent). But there have been changes since 1992.

[168] Adams et al., *supra* note 1, at 69-70. As to the hiring, firing and assessment of management, see *id.* at 65 et s. with ample references. Monitoring by a friendly board through incentives may be most effective, Renee B. Adams & Daniel Ferreira, *A Theory of Friendly Boards,* 62(1) JOURNAL OF FINANCE 217 (2007).

[169] See the price-winning recent empirical study on board members' profiles by Harald Hau & Marcel P. Thum, Subprime Crisis and Board (In-)Competence: Private v. Public Banks in Germany, ECGI Working Paper in Finance No. 247/2009 (*supra* note 2): German public regional banks (Landesbanken) did particularly bad in the financial crisis. But under certain circumstances there may be value in having political appointees on the board, Eitan Goldman et al., *Do Politically Connected Boards Affect Firm Value?,* 22(6) REVIEW OF FINANCIAL STUDIES 2331 (2009). As to the selection and functioning of the boards, see the survey of the economic literature on boards by Renee B. Adams et al., *The Role of Boards of Directors in Corporate Governance: A Conceptual Framework and Survey,* 48 J. OF ECONOMIC LITERATURE 58 (2010).

[170] The Walker Review 26.11.2009, *supra* note 7, at 14, 45 (Recommendation 3); 31UK 8

[171] *Id.* at 15, 51 (Recommendation 5); 31UK 8.

Financial Reporting Council did not extend this recommendation to corporations in general, the new UK Corporate Governance Code still contains an explicit statement of the respective governance responsibilities of the chairman and the non-executive directors, the latter having a role in challenging and developing strategy.[172] Under EU law there must be specific knowledge on both the audit committee and the remuneration committee.[173]

b) Committee work, role of the chairman, lead director, evaluation. (1) Board committees play an important role for the work of the board and are therefore provided for under most corporate laws.[174] As generally agreed, at least three board committees are important for good corporate governance: the audit committee, the nominating committee and the compensation committee. These three functions are key and therefore have to be taken care of by committees that prepare their work thoroughly and, as the requirement for independent directors on these committees suggests,[175] without conflicts of interest. The audit committee has been made mandatory for listed companies by the European Directive of 17 May 2006.[176] For small and medium corporations the establishment of such committees may be too costly and burdensome; in such cases these committees are optional, and the whole board must step in to perform the necessary functions.[177] Jurisdictions differ as to whether board committees may have complete decision-making powers in their appointed area, rather than requiring a vote of the entire board. Delegating full power to a committee instead of the board as such is strictly forbidden in France,[178] for example, and, as far as directors' remuneration is concerned, most recently in Germany.[179]

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[172] The UK Corporate Governance Principle A.4.
[173] European Commission Recommendation of 15.2.2005, *supra* note 138, section III 11.2 (audit committee); European Commission Recommendation of 30.4.2009, as regards the regime for remuneration of directors of listed companies, OJEU L 120/28, section III 7.1: "At least one of the members of the remuneration committee should have knowledge of and experience in the field of remuneration policy."
[174] *E.g.* Del.Code Ann. Tit. 8, § 141c (West 2009); 12Germ 13. For empirical findings concerning board committees, see Adams et al., *supra* note 1, at 90 et s.
[175] *Supra* III A 1 b (3), *infra* III A 3 c.
[176] Directive 2006/43/EC of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, OJEU L 157/87.
[177] European Recommendation of 15.2.2005, *supra* note 138, section 7.2.
[178] 10RF 7.
[179] Section 107 subsection 3 of the German Stock Corporation Act as amended by law of 31 July 2009, as a popular measure of the legislators in the aftermath of the financial crisis. In countries with labor codetermination this weakens the role of the chairman of the supervisory board and strengthens labor.

(2) The role of chairman of the board, though very important, is often not addressed by corporate statutes; however, sometimes special duties and legal rights of the chairman are spelled out.[180] In practice, there are both chairman-oriented boards and collegial working boards. This choice depends partly on law and tradition, as the role of the CEO in France shows; it also depends on the structure of individual corporations, which sometimes make a subtle distinction between a mere "speaker" of the board and an actual chairman, as in the case of many large German banks. General statements on which type of board does better in practice are based primarily on anecdotal knowledge. But as spectacular failures in various countries show, it is dangerous if the CEO—who in many legal orders such as France[181] and Japan[182] also chairs the board—is a person with an exaggerated ego that is not balanced by his or her colleagues on the board.

In two-tier board countries, the role of chairman of the supervisory board is also crucial. He or she is the real junction between the management and control sides, usually working closely with the CEO and occupying a place that is nearer to corporate information. Responsible for keeping the necessary flow of such information to the supervisory board, the chair—sometimes together with the CEO—is also very often the one who picks new members for the supervisory board, including those who are to be considered independent.[183]

The financial crisis has led to even greater hopes placed in the chairman. The Walker Review in the United Kingdom recommends that the chairmen of banks and other financial institutions dedicate "a substantial proportion of his or her time, probably around two-thirds"[184] to the task. While the Financial Reporting Council did not apply this standard to corporations in general, still the new UK Corporate Governance Code contains an explicit

[180] In countries with labor codetermination the election of the chairman and of the vice-chairman may be subject to different rules, for example in Germany where there is a two-thirds quorum at the first ballot. If a second ballot is necessary, the chairman is elected by the shareholder representatives and the vice-chairman by the labor representatives, both with simple majority.
[181] COZIAN ET AL., *supra* note 108, nos 502 et s., 528: the old title of P-DG (*président directeur général*) has been retained by French practice, the new legal title is *président du conseil d'administration*. Since 2001 it is legally possible to divide the two functions of President and Director General. The choice is made by the board (*conseil d'administration*).
[182] 17Jap 13: 79.9% of all TSE-listed corporations.
[183] *See infra* III A 3 c.
[184] Walker Review, *supra* note 7, at 15 (Recommendation 7).

statement on the respective governance responsibilities of the chairman as well as of the non-executive directors.[185]

(3) In the United Kingdom a unique system of divided leadership responsibilities has evolved. This is different even from the United States, though the situation there is changing. This development is due to institutional investors, who are the most important players in the United Kingdom; their impact is much greater there than in any other country, even the United States.[186] They were the ones who in their own interest put companies under pressure to divide the roles of the CEO and the chairman of the board. Later the Combined Code provided for separation between the CEO, who is responsible for day-to-day management, and the chairman of the board, whose role is leading and coordinating the board meetings with the aim of fostering constructive dissent and not merely rubber-stamping the views of the management.[187] This function of the chairman is even better fulfilled if he or she is independent.[188] Even if both roles are separated, independence is endangered if—as was common practice in the United Kingdom, Germany, and other countries—the former CEO or chairman of the management board becomes chair of the board or supervisory board immediately after the end of his or her term, or after having given up the position for other reasons. The Combined Code and the new UK Corporate Governance Code hold this to be incompatible with good corporate governance. They insist on "a clear division of responsibilities at the head of the company," and mandate that "no one individual should have unfettered powers of decision."[189] While current practice is still different in many countries, such as France,[190] a similar development has taken place in other lands. A recent German reform ended the traditional practice of the chairman of the management board immediately assuming the chairmanship of the supervisory board by prescribing a two-year waiting period for members of the management board unless the general assembly of the shareholders, upon a motion of shareholders with more than twenty-five percent of the voting rights, permits

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[185] The UK Corporate Governance Code 2010, Principle A.3 and A.4; 31UK 9.

[186] Davies, *supra* note 158, at 426 (at 15-12); Geoffrey Miller, *Political Structure and Corporate Governance: Some Points of Contrast Between the United States and England,* COLUM. BUS. L. REV. 51 (1998); KRAAKMANN ET AL., *supra* note 10, at 83, 108.

[187] 31UK 7; Marc T. Moore, *The End of "Comply or Explain" in UK Corporate Governance?,* 60 NORTHERN IRELAND LEGAL QUARTERLY 85, at 90-91(2009).

[188] *Cf.* Randall Morck, Behavioral Finance in Corporate Governance – Independent Directors and Non-Executive Chairs, Harvard Institute of Economic Research Discussion Paper No. 2037 (April 2007). *But see also* Adams et al., *supra* note 1, at 82.

[189] The UK Corporate Governance Code 2010, A.2.

[190] 10RF 7/8.

this.[191] Because of the low attendance ratio, this quorum will usually be reached only if there is a controlling shareholder or if there are major blockholders. Yet, whether such a mandatory and inflexible rule is really beneficial is questionable, since in some instances the experience and qualifications of these board members may be more valuable to the corporation than actual independence.

The United Kingdom has developed this principle further by installing a third leadership figure or "point of authority" on the board, called a senior independent director.[192] The function of this director is

> . . . to provide a sounding board for the chairman and to serve as an intermediary for the other directors when necessary . . . . Led by the senior independent director, the non-executive directors should meet without the chairman present at least annually to appraise the chairman's performance.[193]

While this system could be found among British public companies prior to the 1990s, today nearly all FTSE 350 boards have adopted it.[194] Other countries, such as Switzerland,[195] have followed the concept of "lead director."

(4) Evaluation of the performance of the board, including the supervisory board, has become part of good corporate governance. Many corporations have taken up this practice by themselves. According to the European Recommendation of 2005, this evaluation of the board should be carried out every year and

> . . . should encompass an assessment of membership, organisation and operation as a group, an evaluation of the competence and effectiveness of each board member and of the board committees, and an assessment of how well the board has performed against any performance objectives which have been set.[196]

Even then, practices vary considerably as to how the evaluation is carried out, i.e., whether it is performed within the board itself, or whether professional outside advice is sought.[197] The tendency toward the latter is clear and may already be a best standard.

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[191] Section 100 subsection 2 sentence 1 no. 4 of the Stock Corporation Act as amended by law of 31.7.2009, 12Germ 12.

[192] 31UK 6 et s.

[193] UK Corporate Governance Code 2010 A.4.1 and A.4.2; formerly Combined Code Provision A.3.3; 31UK 7. *See also* for the USA 32USAI after n.152: "The independent board must meet in executive session without the inside directors."

[194] 31UK 7.

[195] 27CH 9.

[196] EU Recommendation of 15.2.2005, *supra* note 138, No. 8.

[197] The UK Code of Corporate Governance recommends annual evaluation of the board, the committees and individual directors and external facilitation for the FTSE 350 companies

c) Independent directors: definition, role, and performance. Definitions of the meaning of independence[198] and the competence to judge this vary considerably. In the EU, independence is defined as being "free of any business, family or other relationship, with the company, its controlling shareholder or the management of either, that creates a conflict of interest such as to impair his judgement"; but the recommendation goes on to provide far-reaching, though non-binding criteria concerning threats to directors' independence.[199] A similar list of criteria is contained in the UK Corporate Governance Code,[200] the NYSE Listed Company Manual[201] and the codes of other countries.[202]

While in the United States the independence criteria set up in the listing conditions must be complied with,[203] in many other countries the final determination of what constitutes independence remains fundamentally an issue for the board viz. the supervisory board itself to determine. This is the case not only under the European recommendation of 2005,[204] but also in the United Kingdom where it is up to the board to determine whether each director is independent in character and judgment. The above-mentioned criteria are then only non-

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boards (see *supra* note 135) at least every three years, B.6 and B.6.2. Similarly for France, 10RF 8; for Belgium every two or three years at a minimum, 4B 6 et s. In the Netherlands there is a growing practice for boards to have external evaluation at least once every three to four years, 21Neth 9.

198 As to the requirement to have independent directors, *see already supra* III A 1 b (2).

199 EU Recommendation of 15.2.2005, *supra* note 138, no. 13.1. Its Annex II draws attention to the following situations among others: (a) not to be an executive or managing director of the company or an associated company, and not having been in such a position for the previous five years; (b) not to be an employee of the company or an associate company, and not having been in such a position for the previous three years; exception: system of workers' representation; (c) not to receive significant additional remuneration from the company or an associated company, in particular a share option or any other performance-related pay scheme; (d) not to be or to represent in any way the controlling shareholder (control being defined as in the 7th directive); (e) not to have, or have had within the last year, a significant business relationship with the company or an associated company; (f) not to be, or have been within the last three years, partner or employee of the external auditor of the company; (h) not to have served on the board more than three terms or alternatively more than twelve years. Some EU accession countries followed in a nearly identical way, f. ex. Hungary, 14Hung 9.

200 UK Corporate Governance Code 2010 B.1.1; Combined Code Provision A.3.1.

201 NYSE Listed Company Manuals § 303A.02(b) (2009).

202 For example Belgian Code, 4B 7 et s.; Comisión Nacional de Valores (CNV) Rules in Argentina, 1Arg 16.

203 NYSE Listed Company Manual § 303A.02; 31UK 6; but 31USAI n 51.

204 European Recommendation of 15.2.2005, *supra* note 138, no 13.2.

binding guidelines for the board when it is told about circumstances that may threaten the independence of a particular director under the "comply or explain" principle.[205]

The high expectations of independent directors have been only partially fulfilled.[206] Independent directors seem to have had an impact on replacing executive directors, but this was often mainly due to pressures from institutional investors.[207] More recently, independent directors have not been able to prevent huge scandals, e.g., Enron, where the board was composed of a majority of qualified independent directors.[208] Foremost among the factors that reduce the impact of independent directors is that they are usually nominated or selected by the CEO or executive directors who have professional or personal relationships with them that do not fall within the above-mentioned criteria.[209] Unless they are professional non-executive directors, they are working part time and, while being independent, may not have the necessary know-how, either of the business sector or the actual corporation. Furthermore, the flow of information to them is often suboptimal, particularly in the case of supervisory boards.[210] To a certain degree this is a consequence of their role. In the Enron case, prominent and well-qualified independent directors learned of the existence and extent of special purpose vehicles only from the financial press after the scandal had broken out, as corporate insiders had kept control of such relevant information. It is also said that independent directors may have fewer incentives to monitor management activity than other directors because their pay is less and—more recently—has not included stock options. In the end, group-think plays an important role as well.[211]As always, it requires courage to stand up with questions and to voice criticism against the mainstream within the group.

d) Risk management and early detection of difficulties. Corporate law has traditionally refrained from telling management in detail what to do, in particular with regard to risk

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[205] 31UK 6 speaks of "default" regulatory independence criteria.
[206] For example Davies, *supra* note 158, at 409 (at 14-33).
[207] Examples from the United States in the early 1990s included General Motors, Kodak, American Express, Sears, Westinghouse, and IBM, 31USAI n.54; as to the financial institutions in the United States, see ROE, *supra* note 27, at 267 et s.
[208] Antony Page, *Unconscious Bias and the Limits of Directors Independence,* U. ILL. L. REV. 237, at 288 (2009) as to Enron. 32USAI n.55.
[209] This is usually not articulated but is actually the case. *Cf.* for Poland 2Pol 11 et s.
[210] PATRICK C. LEYENS, INFORMATION DES AUFSICHTSRATS 156 et s. (2006).
[211] *Cf.* James A. Fanto, *Recognizing the "Bad Barrel" in Public Business Firms: Social and Organizational Factors in Misconduct By Senior Decision-Makers,* 57 BUFF. L. REV. 1, at 29 (2009).

management and internal control systems,[212] which remain the domain of business administration and auditing, respectively. Though risk management in general has long been part of the board's duty of care, the corporate governance codes, and more recently corporate laws, have spelled it out as a concern for the board, the audit committee and the auditors who have to report on what is done in this regard.[213] Legal protection of whistleblowers—most prominent among them Sherron Watkins of Enron who went to CEO Ken Lay—was instituted in the United States by the Sarbanes-Oxley Act and since then has become increasingly popular in other countries as well.[214]

In the wake of the financial crisis considerably greater attention has been paid to risk management by regulators, legislators and academia. While the focus for the moment is still on banks and other financial institutions—in particular, of course, the so-called systemic ones[215]—these requirements tend to spill over to general corporate law.[216] However, norms that may make good sense for state-supervised institutions and branches with particular and even systemic risks, may be not only unnecessarily burdensome but outright paralyzing if extended to corporations in general.[217]

4. Rights, Duties, and Liabilities

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[212] In Japan, the Osaka District Court for the first time held directors responsible for keeping an appropriate internal control system, Daiwa Bank Case decision of 20.9.2000; similarly under the Financial Instruments and Exchange Act, 17Jap 15.

[213] For Germany section 91 subsection 2 of the Stock Corporation Act since 1998, 12Germ 9 et s., section 317 subsection 4 of the Commercial Code as of 1998 and later, *cf.* Klaus J. Hopt & Hanno Merkt in ADOLF BAUMBACH & KLAUS J. HOPT, HANDELSGESETZBUCH, § 317 comments 9-10 (34th ed. 2010); the UK Corporate Governance Code 2010 C.2 mentions expressly the board's responsibility for sound risk management and internal control systems. In Switzerland expressly since 2008, 27CH 8, 10; Australia since 2003, revised in 2007 by the ASX corporate governance principles, 2Austr 16. For the Netherlands under the Corporate Governance Code , 21Neth 10.

[214] Germany, Daniela Weber-Rey, *Whistle-blowing zwischen Corporate Governance und Better Regulation,* DIE AKTIENGESELLSCHAFT (AG) 406 (2006); in Switzerland legislation is still pending, 27CH 10.

[215] MARTIN HELLWIG, SYSTEMIC RISK IN THE FINANCIAL SECTOR, JELLE ZIJLSTRA LECTURE, NIAS, Wassenaar 2008; *see more generally supra* note 7.

[216] *See* for example section 302 of the Sarbanes-Oxley Act (*supra* note 71), 15 U.S.C. § 7241; 32USAI 37 n.150.

[217] 31UK 8; Daniela Weber-Rey, *Ausstrahlungen des Aufsichtsrechts (insbesondere für Banken und Versicherungen) auf das Aktienrecht – oder die Infiltration von Regelungssätzen,* ZEITSCHRIFT FÜR UNTERNEHMENS- UND GESELLSCHAFTSRECHT (ZGR) 2010, 543.

The rights, duties and liabilities of directors are traditionally the domain of corporate law, whereas the economic literature is interested in what directors actually do.[218] While the corporate governance movement has led to increased emphasis on this area and to the stiffening of requirements, this is not the place to describe this practice in detail. Some brief observations must suffice.

a) Duty of loyalty, regulation of conflicts of interest. The duty of loyalty, and in particular the rules concerning conflicts of interest on the part of directors, have long received a great deal of attention in the United States,[219] the United Kingdom[220] and Australia,[221] but only much more recently in continental European countries such as Germany, Italy, France and Switzerland.[222] Yet while conflict of interest as such may not have been regulated there, in most of these countries there are corporate law provisions or case law that deal with specific instances of conflict of interest. Such conflicts include, but are not limited to, competition with the corporation, self-dealing or use of corporate opportunity.[223] These different developments are due to general differences between case law and statutory law, varying enforcement patterns, and economic and cultural path dependencies.[224] Yet today, both in law and practice, a trend can be observed internationally to be more conscious and rigorous in the treatment of duty of loyalty violations and conflict of interest situations. As a general rule, directors are in conflict if they have a financial interest that might reasonably be expected to influence their judgment.[225] But a bright line test beyond this formula is difficult to find, as the varying American case law shows. The practice of obtaining independent directors' approval for acting in conflict of interest situations and for accepting compensation usually

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[218] Adams et al., *supra* note 1, at 64. *Cf.* DEMB & NEUBAUER, *supra* note 167; WILLIAM G. BOWEN, INSIDE THE BOARDROOM: GOVERNANCE BY DIRECTORS AND TRUSTEES (1994).
[219] 32USAII 3 et s.
[220] Davies, *supra* note 158, at 557-74 (at 16-63 et s.).
[221] With additional provisions for public corporations, 2Austr 17 et s.
[222] For Germany Klaus J. Hopt, *Die Haftung von Vorstand und Aufsichtsrat - Zugleich ein Beitrag zur corporate governance-Debatte - in* FESTSCHRIFT FÜR MESTMÄCKER, BADEN-BADEN 909, at 917, 921 et s. (Ulrich Immenga et al. eds., 1996); for Italy16I 12 et s.; for France 10RF 9, but there are special rules, for example, for transactions between board members and the corporation; as to Switzerland 27CH 10.
[223] *See* Klaus J. Hopt, *Trusteeship and Conflicts of Interest in Corporate, Banking, and Agency Law: Toward Common Legal Principles for Intermediaries in the Modern Service-Oriented Society, in* REFORMING COMPANY AND TAKEOVER LAW IN EUROPE, *supra* note 4, at 51; KARSTEN KREBS, INTERESSSENKONFLIKTE BEI AUFSICHTSRATSMANDATEN IN DER AKTIENGESELLSCHAFT (2002). For Japan, see 17Jap 16 et s.
[224] Accordingly MILHAUPT & PISTOR, *supra* note 23, at 8: "corporate governance is a window into the larger and more complex system of economic governance."
[225] Model Bus. Corp. Act § 8.60(1).

shields the actors from court interference.[226] A clear influence of American law, American and British institutional investors and more generally of globalization can be observed in this context.[227]

b) Business judgment rule, standard of care. In contrast to the duty of loyalty, the duty of care has been at the forefront in continental European countries. The standard of care is still general negligence. In some countries like the United States, this standard can be lowered by shareholder resolution up to gross negligence, but not for breaches of the duty of loyalty and for acts not in good faith.[228] More recently the duty of care has lost some of its relevance under the influence of the business judgment rule. Typically this rule is first introduced by the courts—as in Switzerland[229] and Japan[230]—and only later enacted by legislators, as was the case in Germany,[231] Portugal,[232] Australia[233] and other countries.[234] The business judgment rule gives the board broad discretion and a safe haven from liability, provided the board has fully observed its duty of information. In effect, this amounts to a standard of gross negligence.[235] The business judgment rule, however, is certainly no excuse for failing to follow legal requirements. This is particularly true when the corporation gets into a crisis, as with special rules like the British wrongful trading concept[236] or the French *action en responsabilité pour insuffisance d'actifs.*[237]

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[226] *In re* The Walt Disney Co. Derivative Litig., 906 A2d 27 (Del. 2006); 32USAII 5.
[227] As to institutional investors, see *infra* III B 2 b. *Cf. more generally* Klaus J. Hopt, *Company Law Modernization: Transatlantic Perspectives,* 51 RIVISTA DELLE SOCIETÀ 906-34 (2006); VON HEIN, *supra* note 81.
[228] Section 102(b)(7) of the Delaware General Corporation Law.
[229] 27CH 11, but there is no clear standard. Similarly in Norway, 20Norw 17, 21.
[230] 17Jap 15 et s.
[231] 12 Germ 19.
[232] 23Port 21.
[233] Since 2000, 2Austr 19 et s. with critique and reform proposals.
[234] For Denmark 8Denm 8; for Serbia 24Serb 18 et s.
[235] Smith v. Van Gorkum, 488 A.2 858 (Del.); for the various nuances in U.S. case law as to the business judgment rule and good faith, see 32USAII 1 et s.; *cf. In re* The Walt Disney Co. Derivative Litig., 906 A2d 27 (Del. 2006): "(A)n intentional dereliction of duty, a conscious disregard for one's responsiblities" can constitute a lack of good faith, even if there is no conflict of interest.
[236] Section 214 of the Insolvency Act, see Davies, *supra* note 158, at 217 et s. (9-7 et s.). For a comparative evaluation of the rule, *see infra* III A 4 d.
[237] Formerly *action en comblement du passif*, COZIAN ET AL., *supra* note 108, nos 298 et s. A similar action exists in Belgium. As to evaluation, see *supra* note 236.

c) Remuneration, stock options, other incentives. The remuneration of directors and "pay without performance"[238] has become a prominent topic in the United States, the United Kingdom and more recently, even before the current financial crisis,[239] in many other European and non-European countries as well, such as Germany, France, Italy, Switzerland and Australia.[240] Traditionally, such remuneration rules have been coined in general terms, such as requiring that the compensation be adequate. Today these rules have become increasingly detailed. Regarding disclosure, the traditional rule of revealing just the remuneration of the whole board or perhaps the five top-earning directors has given way to individual disclosure stating the total compensation paid to each director including pension schemes, etc. The effect of this reform has been sobering, if not counterproductive. While it stirred up some jealous discussions in the general assemblies, the overall effect was a general increase in payment, since lower-earning directors pushed to be paid like everyone else. In Europe, the Recommendation of 2004 deals with remuneration policy, the remuneration of individual directors and share-based remuneration; in response to the crisis, two Recommendations were added in 2009.[241]

Traditional accounting standards have tolerated the common practice of mentioning outstanding share options as a mere note on the balance sheet. Only more recently the international and the American accounting systems have changed their attitude; first the IAS/IFRS and then the US GAAP made it a requirement to treat stock options as a cost. This diminishes the distributable profit and thereby is thought to activate shareholders. But pricing

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[238] LUCIAN BEBCHUK & JESSE FRIED, PAY WITHOUT PERFORMANCE (2004); Katherine M. Brown, *New Demands, Better Boards: Rethinking Director Compensation in an Era of Heightened Corporate Governance,* 82 N.Y.U. L. REV. 1102 (2007); Guido Ferrarini et al., *Executive Remuneration in Crisis: A Critical Assessment of Reforms in Europe,* 10 JOURNAL OF CORPORATE LAW STUDIES 73 (2010). For empirical findings, see Adams et al., *supra* note 1, at 92 et s.

[239] *See supra* note 7.

[240] In Germany since 2005, 12Germ 15 et s. As to France 10RF 1 et s., 10 et s. As to Italy 16I 15; in Switzerland a far-reaching citizens' initiative with the aim to fully empower the shareholders is under way to be voted in 2010 ("Abzocker-Initiative"), 27CH 11 et s.; Guido Ferrarini et al., Understanding Directors' Pay in Europe: A Comparative and Empirical Analysis, ecgi Law Working Paper No. 126/2009 (see *supra* note 2). For the discussion in Australia, by 2001 already the country with the third highest paid executives in the world, after the United States and United Kingdom executives, *cf.* Kym Sheehan, *The Regulatory Framework for Executive Remuneration in Australia*, 31 SYDNEY L. REV. 273 (2009). For Australia 2Austr 22 et s., 229. As to Japan 17Jap 18 et seq.

[241] European Commission Recommendation of 14.12.2004, OJEU 29.12.2004 L 385/55. As to the 2009 Recommendations, *see infra* notes 247 and 252.

these stock options is difficult, and the effect on the balance sheet is usually small and hardly relevant for setting dividends.

While the issue of stock options has long been subject to shareholder approval because of its watering-down effect on existing shares, the United Kingdom first came up with "say on pay," i.e., shareholders have a say on remuneration policy, though not binding and not in cases of individual contracts. Others have followed, for example, the Netherlands and Germany[242] and Australia,[243] and, albeit with little success, the European Commission in its 2004 Recommendation.[244] Most recently the United States included a similar say on pay, both for regular remuneration and for golden parachutes, in the Dodd-Frank Act of 21 July 2010.[245] The financial crisis has led to more rules on remuneration, some badly needed for doing away with perverse incentives in financial institutions,[246] and some generally for corporations, as in the EU,[247] the United Kingdom and Germany.[248] The thrust of the latter rules is to balance the variable and non-variable components of remuneration, to define performance criteria in view of long-term value creation, to defer a major part of the variable component for a certain period of time, to have contractual arrangements permitting the

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[242] Martin Conyon & Graham Sadler, *Shareholder Voting and Directors' Remuneration, Report Legislation: Say on Pay in the UK,* CORPORATE GOVERNANCE: AN INTERNATIONAL REVIEW 18(4) 296 (2010); 21Neth 20; for Germany Holger Fleischer & Dorothea Bedkowski, *"Say on Pay" im deutschen Aktienrecht: Das neue Vergütungsvotum der Hauptversammlung nach § 120 Abs. 4 AktG,* DIE AKTIENGESELLSCHAFT (AG) 2009, 677.
[243] 2Austr 24. Also 20Norw 19.
[244] European Commission Staff Working Document, Report on the application by Member States of the EU of the Commission Recommendation on directors' remuneration, Brussels 13.07.2007, SEC(2007) 1022. *But see* for Italy 16I 15 et s.: remuneration is established by the ordinary shareholder meeting.
[245] The Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376 (2010), H. R. 4173 (hereinafter: "The Dodd-Frank Act"), § 951, codified as 15 U.S.C. 78n-1. The say on pay rules are now contained in Sec. 14.A.(a) and (b) of the Securities Exchange Act.
[246] *See* European Commission, Green Paper, Corporate governance in financial institutions and remuneration policies, Brussels, 2.6.2010, SEC(2010) 669 final and accompanying document, COM(2010) 284 final; critical remarks by Peter O. Mülbert, *Corporate Governance in der Krise,* 174 ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT (ZHR) 375 (2010). See also id., *supra* note 32. As to the impact of the financial crisis on large banks' remuneration policies see Guido Ferrarini & Maria C. Ungureanu, *Executive pay at ailing banks and beyond: a European perspective,* CAPITAL MARKETS L. J. 2010 (advance access).
[247] European Commission Recommendation of 30 April 2009 (complementing the Recommendations of 14.12.2004 and 15.2.2005), OJEU L 120/28. See the criticism by Ferrarini et al., *supra* note 238.
[248] The UK Corporate Governance Code Section D and Schedule A; Section 87 of the German Stock Corporation Act as of 31.7.2009.

reclamation of variable components under certain circumstances and to limit termination payments.[249] Remuneration of non-executive or supervisory directors should not include share options.[250] While legislators and rulemakers should not interfere with the details of remuneration, the situation is different and interference is legitimate for the sake of taxpayers if upper limits are set by the state as a condition for assisting banks and corporations on the verge of bankruptcy.[251] This is also true if the remuneration rules limit or take away perverse incentives, especially in systemically relevant institutions of the financial sector.[252] But there is an unfounded and unfortunate tendency, not restricted to remuneration rules, of regulation spilling over from the regulated financial sector into general corporate law.[253]

d) Liability, in particular in crisis situations. Liability of directors[254] is a venerable topic of corporate law and need not be treated here save for two quick remarks. First, in many countries liability of board members is only toward the corporation,[255] with the consequence that the board, or the supervisory board, is in charge of enforcing the claim of the corporation. Unless forced by law,[256] the (supervisory) board will generally be reluctant to do this. In other countries the shareholders and sometimes also creditors and investors can assert direct claims against the director who violated his or her duties. This makes a crucial

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[249] Commission Recommendation of 30 April 2009, *supra* note 247, no 3.1-3.5; Lucian A. Bebchuk & Jesse M. Fried, *Paying for Long-Term Performance,* 158 U. PA. L. REV. 1915 (2010).
[250] Commission Recommendation of 30 April 2009, *supra* note 247, no. 4.4. The UK Corproate Governance Code D.1.3 with details.
[251] Germany Commerzbank 500.000 Euro.
[252] *See* European Commission Recommendation of 30 April 2009 on remuneration policies in the financial services sector, OJEU L 120/22.
[253] 10RF 2. *More generally see* III A 3 d.
[254] As to the steering function of liability in corporate and capital market law, see GREGOR BACHMANN ET AL., STEUERUNGSFUNKTION DES HAFTUNGSRECHTS IM GESELLSCHAFTS- UND KAPITALMARKTECHT (2007).
In some countries the concept of de facto director, i.e., usually a controlling shareholders, who gives instructions to the corporation or in another way acts like a director, is acknowledged in Germany and France, see Klaus J. Hopt *in* KLAUS J. HOPT & HERBERT WIEDEMANN, AKTIENGESETZ, GROßKOMMENTAR § 93 comments 49 et s. (4th ed., vol. 3, 1999/2008); COZIAN ET AL., *supra* note 108, at 131 no 263; also in Japan 17Jap 20, 25South Korea 10. As to own fiduciary duties of the controlling shareholders, see *infra* III B 1.
[255] Unless a shareholders has suffered damage "directly" beyond the damages to the corporation (reflexive damage), *cf.* for Germany Hopt, *supra* note 254, § 93 comments 484 et s.; for Italy see 16I 11.
[256] As to Germany, see the ARAG case, *infra* note 263.

difference.[257] This is why liability under capital market law rules tends to be toward investors, i.e., third parties. In some countries, like the United States, securities regulation even contains strict liability rules for some persons and for certain categories of wrong information.[258]

More generally, it can be observed that jurisdictions differ not so much in their actual regulation of the liability of directors but in their enforcement of such rules. While there is rich case law in the United States and in France, for example, there have traditionally been very few actual liability court cases[259] in Germany,[260] Switzerland[261] and Japan, though this is changing under the influence of the big scandals and the financial crisis.[262] In the landmark case *ARAG*, the Bundesgerichtshof, Germany's federal court of last instance, held that the supervisory board had a duty to bring suit against management board directors who violated their duties and damaged the corporation.[263] This is an improvement, but is not sufficient. A recent reform proposal suggests that the supervisory agency should have the power to bring civil suits.[264]

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[257] *Cf.* PROSPEKT- UND KAPITALMARKTINFORMATIONSHAFTUNG – RECHT UND REFORM IN DER EUROPÄISCHEN UNION, DER SCHWEIZ UND DEN USA (Klaus J. Hopt & Hans-Christoph Voigt eds., 2005); for the UK Paul Davies, Davies Review of Issuer Liability, Final Report, London June 2007; *id., Liability for Misstatements to the Market: Some Reflections,* 9 JOURNAL OF CORPORATE LAW STUDIES 295 (2009). As the controversial discussion in Italy 16I 11.
[258] In the USA section 11(a) Securities Act 1933 for issuers; 17Jap 21 et s.; in Portugal for issuers and offerors, PROSPEKT- UND KAPITALMARKTINFORMATIONSHAFTUNG, *supra* note 257, at 83.
[259] This is in part because in practice, out-of-court settlements, often financed by D & O insurances, are frequent, *cf.* for Switzerland 27CH 12. *Cf. generally* Markus Roth, *Outside Director Liability,* 8 JOURNAL OF CORPORATE LAW STUDIES 337 (2008).
[260] For Germany, see Hopt, *supra* note 254, § 93 comment 16; HORST IHLAS, ORGANHAFTUNG UND HAFTPFLICHTVERSICHERUNG 322 (1997) (more than 500 court decisions, mostly D & O cases), 2d. ed. 2009 with additional statistics.
[261] It is different there for auditor liability cases, 27CH 12, 18 et s. and it is changing also for directors' liability, Peter Böckli, *Die Schweizer Verwaltungsräte zwischen Hammer und Amboss,* SCHWEIZERISCHE JURISTEN-ZEITUNG 106 (2010) 1.
[262] In Germany the financial crisis has led to many damages suits against former directors who had been fired; for Japan 17Jap 19; *see also* for Norway 20Norw 21 et s. Derivative actions are helpful, ARAD REISBERG, DERIVATIVE ACTIONS AND CORPORATE GOVERNANCE (2007). Third-party liability under securities regulation, if claimed by investors, can lead to conflicts with the creditors of the corporation; for case law, see 17Jap 22.
[263] German Bundesgerichtshof, decision of 21.4.1997, BGHZ 135, 244 (ARAG ./. Garmenbeck); *cf.* Hartwig Henze (judge in the 2d senate who rendered the decision), *Prüfungs- und Kontrollaufgaben des Aufsichtsrates in der Aktiengesellschaft,* NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 3309 (1998).
[264] *See infra* E 1 a.

Second, there are special liability provisions for directors in case of a crisis situation. In such circumstances the board of directors may have a duty to inform and convene the general assembly, and/or to file for bankruptcy, and may become liable if this is not done in time. Various jurisdictions—for example, the United Kingdom, France, Belgium, Germany and Australia[265]—have different standards regarding how quickly directors must react in such situations, and to what degree and how long they have discretion to look for rescue. The most timely and highly controversial policy question is how to balance the company's and general public's interest in trying to rescue the corporation against the interest of the creditors not to suffer from delayed bankruptcy. British wrongful trading—i.e., giving the directors broad discretion, but with the risk of liability if rescue does not come about—is a challenging idea, but seems not to have taken hold in practice.[266]

B. The Shareholders

*1. Fiduciary Duties of Controlling Shareholders and Group Law (*Konzernrecht*)*

In widely-held corporations without blockholders, the shareholders as principals are protected against wrongdoing by the board through the classic instrument of company law, i.e., duties and liabilities of the directors.[267] These responsibilities also exist and are relevant in corporations with a controlling shareholder or several blockholders, and usually the stock corporation acts of the various countries do not have different rules for the boards of widely held corporations and others. In practice, however, the real principal-agent problem in corporations with concentrated ownership is not between the shareholders and the board, but between minority shareholders and the controlling or blockholding shareholders.[268] Here corporate law can intervene in two ways: either by imposing general or specific fiduciary

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[265] For wrongful trading and similar actions in France and Belgium, *see already supra* note 237. *Cf.* the comparative report of the Forum Europaeum Group Law, *Corporate Group Law for Europe,* EUROPEAN BUSINESS ORGANIZATION LAW REVIEW I (EBOR) 165-264, at 245-57 (2000), on the UK, France, Belgium and Germany. For the Netherlands with case law 21Neth 13. Australia has been said to arguably be the strictest in the world, 2Austr 18, 45 et s. In Hungary only since 2006, no case law, 14Hung 11. *See also* 8Denm 8 only case law; 18Lux 13 with case law; 15 Ireland 11; 17Jap 20.
[266] Davies, *supra* note 158, at 9-11: litigation under section 214 of the Insolvency Act sparse, few reported cases. *Cf. also* Felix Steffek, *Wrongful Trading – Grundlagen und Spruchpraxis,* NEUE ZEITSCHRIFT FÜR DAS RECHT DER INSOLVENZ UND SANIERUNG 589 (2010).
[267] *Supra* III A 4.
[268] *See already supra* text at note 9 with references.

duties on the agent-shareholder,[269] or by mandating rules of the game between the controlling and controlled members of a group, i.e., parent and direct or indirect subsidiaries. The first approach is the one chosen by some countries without formal group law, such as France,[270] to prevent abuses—in the language of economists: tunneling by controlling shareholders; other countries, such as the United States,[271] Italy[272] and Switzerland,[273] shy away from imposing a fiduciary duty on controlling shareholders, let alone on non-controlling shareholders.

The main protagonist of the second approach is Germany, which has an extensively codified group law (*Konzernrecht*) for stock corporations, besides acknowledging the fiduciary duties of the controlling shareholders and duties between shareholders more generally.[274] A few countries have followed the German example, including Portugal, Brazil and Croatia. Others, like Italy,[275] have recently enacted their own group laws. Details are beyond the scope of this Article, but can be found in the various corporate laws.[276]

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[269] For example 9Fin 18: fiduciary duty of the controlling shareholders towards the company and its other shareholders; 23Port 24; de facto also in the Netherlands, not restricted to the controlling shareholder, 21Neth 15 et s. with case law. Controversial in Poland, 22Pol 12 et s., 18. In countries as Japan, 17Jap 24, where such a fiduciary duty of the controlling shareholder is not (yet) recognized, particular situations may be caught under the duty of loyalty or the doctrine of the de facto director may help for limited cases. *See supra* III A 4 a with text to note 223.

[270] *Abus de majorité* under case law is a widely used remedy, 10RF 16; Pierre-Henri Conac et al., *Constraining Dominant Shareholders' Self-Dealing: The Legal Framework in France, Germany, and Italy,* EUROPEAN COMPANY AND FINANCIAL LAW REVIEW (ECFR) 491 (2007).

[271] Exceptions exist if the shareholders are in a position to use their influence over the board—for example, in transactions between them and the corporation—and according to some courts in close corporations; then a fairness test applies, but approval by a negotiating committee of independent directors or a majority of the minority shareholders may turn the burden of proof. For case law, see 32USAII 5 et s.

[272] Only in case of *abuso della maggioranza,* 16I 17.

[273] 27CH 13, though tunneling (see *supra* III B 1) is illegal. Similarly Denmark 8Denm 8 et s.; Norway 20Norw 22; Argentina, 1Arg 24 et s.

[274] For Germany VOLKER EMMERICH & MATHIAS HABERSACK, AKTIEN- UND GMBH-KONZERNRECHT (5th ed. 2008); BRIGITTE HAAR, DIE PERSONENGESELLSCHAFT IM KONZERN (2006); 12Germ 21 et s. with the case law. For Europe Klaus J. Hopt, *Konzernrecht: Die europäische Perspektive,* 171 ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT (ZHR) 199 (2007); Klaus J. Hopt & Katharina Pistor, *Company Groups in Transition Economies: A Case for Regulatory Intervention?,* 2 EUROPEAN BUSINESS ORGANIZATION LAW REVIEW (EBOR) 1 (2001).

[275] Important parts of the Italian group law are disclosure, holding company liability to minority shareholders, and creditors in case of abuse of power, art. 2497 of the Civil Code, 16I 8; Conac et al., *supra* note 270, at 504 et s.

[276] For a functional comparative analysis of group law, see KRAAKMAN ET AL., *supra* note 10, at 153 et s. on related-party transactions. For multinational groups, see C. Windbichler,

2. Shareholder Rights, Minority Protection, Institutional Investors

a) Shareholders rights and minority protection. Every country with corporate law gives special rights to shareholders, and has more or less detailed minority protection rules in its stock corporation act. The details of these minority protection rules and their impact vary considerably.[277] Some harmonization has been brought about by the European Shareholder Rights Directive of 11 July 2007[278] with its aim of "strengthening shareholders' rights."[279] In non-EU countries, similar discussion and legislation is going on, particularly and very controversially in the United States.[280] Again, details can be found in the various corporation

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Corporate Governance internationaler Konzerne unter dem Einfluss kapitalmarktrechtlicher Anforderungen, in HANDBUCH CORPORATE GOVERNANCE, *supra* note 1, at 825.

[277] SHAREHOLDER VOTING RIGHTS AND PRACTICES IN EUROPE AND THE UNITED STATES, THE HAGUE ET AL., (Theodor Baums & Eddy Wymeersch eds., 1999); RIGHTS OF MINORITY SHAREHOLDERS, GENERAL AND NATIONAL REPORTS (Evanghelos Perakis ed., 2004); INVESTOR PROTECTION IN EUROPE (Guido Ferrarini & Eddy Wymeersch eds., 2006); NIAMH MOLONEY, HOW TO PROTECT INVESTORS (2010); Eilis Ferran, *The Role of the Shareholder in Internal Corporate Governance: Shareholder Information, Communication and Decision-Making, in* REFORMING COMPANY AND TAKEOVER LAW IN EUROPE, *supra* note 4, at 417; Christoph van der Elst, *The Influence of Shareholder Rights on Shareholder Behavior,* REVUE TRIMESTRIELLE DE DROIT FINANCIER/CORPORATE FINANCE AND CAPITAL MARKETS LAW REVIEW (RTDF) 2010, 50 with many facts and tables; KRAAKMAN ET AL., *supra* note 10, at 89 et s., 275 et s; 32USAI 20 et s.
When talking about minority protection, oddly enough there is also a need for majority protection (*abus de minorité*), 4B 17 et s. on the abuse of vote, *cf. also* 22Pol 18. A particularity of Japan is the peak day problem. In order to reduce the problem created by racketeering shareholders (*sokaiya*) who extort money for not disturbing the general assembly, many of the listed companies tend to hold their annual general meeting on the same day and time (in 2007 about 1400 listed companies at ten in the morning on June 28), 17Jap 25 et s. In Germany there is a similar, though not criminally relevant problem: the predatory shareholders who hold up the general assemblies by many questions in order to later start voidability proceedings against major resolutions of the corporation such as mergers and other fundamental changes. There have been several reforms, the latest in 2009, but not yet with clear success, 12Germ 25.

[278] European Directive of 11 July 2007 on the exercise of certain rights of shareholders in listed companies, OJEU L 184/17; Stefan Grundmann, *The Renaissance of Organized Shareholder Representation in Europe, in* PERSPECTIVES IN COMPANY LAW AND FINANCIAL REGULATION, *supra* note 26, at 183; Arthur R. Pinto, *The European Union's Shareholder Voting Rights Directive from an American Perspective: Some Comparisons and Observations,* 32 FORDHAM INT'L L.J. 587 (2009).

[279] *Cf.* European Commission, Company Law Action Plan, *supra* note 83, 3.1.2.

[280] On the debate on the rise of shareholder power in the United States and the role of the SEC in this, Lucian A. Bebchuk, *The Case for Increasing Shareholder Power,* 118 HARV. L. REV. 833 (2005); *id., Letting Shareholders Set the Rules,* 119 HARV. L. REV. 1784 (2006); *contra* Stephen M. Bainbridge, *Director Primacy and Shareholder Disempowerment,* 119 HARV. L.

laws.[281] Suffice it here to make some remarks concerning minority protection through shareholder rights in general, and on the relevance of institutional shareholders for corporate governance.

Apart from financial rights such as dividends and preemptive rights and rights on the convocation of the general assembly, agenda-setting and general voting rules (including proxy voting[282] and the one-share/one-vote issue),[283] the three main types of non-financial rights are basic information rights (disclosure), codecision rights (voice) and withdrawal rights (exit).

Information rights of the shareholders complement various reporting and disclosure rules that range from periodic disclosure, in particular the annual report, prospectus disclosure, instant or ad hoc disclosure of share-price-relevant events, disclosure of shareholdings and of directors' dealings and corporate governance statements.[284] Individual information rights of shareholders are exercised in the general assembly. The special investigation, which can be requested by the general assembly or a minority of shareholders, exists in many countries and is of particular importance.[285]

REV. 1735 (2006); *id.,* THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE (2008); 32USAI 24, 40 n.161.

[281] As to minority protection, see RIGHTS OF MINORITY SHAREHOLDERS, *supra* note 277.

[282] See in particular two innovative steps taken in the Netherlands as to channeling information to the ultimate shareholders and to enable issuers to request information on the ultimate shareholders from financial intermediaries, 21Neth 22. See, for example, the restrictions in Japan (the proxy must be a shareholder), upheld by the Supreme Court, but criticized widely, 17Jap 27 et s. As to bank as proxies as in Germany, see *infra* III B 2 b note 298.

[283] *Cf.* European Commission, Institutional Shareholder Services ISS, Shearman & Sterling, European Corporate Governance Institute ECGI, Report on the Proportionality Principle in the European Union, 18 May 2007; Mike Burkhart & Samuel Lee, *One Share – One Vote: The Theory,* REVIEW OF FINANCE 12 (2008) 1; Renée Adams & David Ferreira, *One Share – One Vote: The Empirical Evidence,* 12 REVIEW OF FINANCE 51 (2008). As to the aftermath since 2007, *cf.* Hopt, *supra* note 26, at 392 et s. As to the use of dual class shares, there is the misunderstanding that all Nordic countries practice this. But this is true only for Sweden (Wallenberg family) and Denmark (the Companies Act 2009 has even done away with the former maximum of a voting difference of 1:10, 8Denm 9). Norwegian practice is different and the Norwegian Code recommends that the company should have only one class of shares, 20Norw 24.

[284] On disclosure, see KRAAKMAN ET AL., *supra* note 10, at 277 et s.; PARTY AUTONOMY AND THE ROLE OF INFORMATION IN THE INTERNAL MARKET (Stefan Grundmann et al. eds., 2001).

[285] As to special investigation see *infra* III D 1 b.

Codecision rights exist in all corporate laws, but the importance of shareholder voting is widely different depending on whether the general approach is board-centered, as in the United States, or shareholder-centered, as in Great Britain. The rules on voting also vary considerably, not only regarding the voting process,[286] but also regarding the weight of the votes, e.g., whether the one-share/one-vote rule is followed, as is typically the case in the United States for publicly traded corporations, or whether voting restrictions or multiple voting rights exist, as in many European countries.[287] Codecision rights of shareholders are common for major transactions, though as a basic rule general management is the task of the board or in the two-tier system the management board. As agents of the shareholders, directors can be removed. In most two-tier board countries, such as Germany, the dismissal of management board members is a matter for the supervisory board only. This board may, but is not bound to, dismiss management board members if the general assembly has indicated its lack of confidence in the management board.[288] In one-tier board systems, the directors can be removed either by a decision of the general assembly—a legally acceptable but rarely exercised method used in the United Kingdom[289]—or by a proxy fight.[290] This is the normal, but very costly,[291] way employed in the United States to fight against defensive actions by the target board which the targeted shareholders oppose.[292] Proxy fights have begun to appear in other countries as well due to the rise of institutional shareholders.

Exit rights are usually given to shareholders only in special cases and under narrow conditions, apart from the mandatory bid exit under takeover regulation.[293] Examples would be cases of very fundamental internal changes and revisions in group law, the fear being that with broader exit rights the corporation would lose its working capital.[294] More recently, a

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[286] As to reforms concerning voting impediments for foreign shareholders in France (e.g., status of registered intermediary, votes by correspondance until three working days before the general assembly) 10RF 17.
[287] *See supra* note 283.
[288] *See* section 84 subsection 3 of the German Stock Corporation Act.
[289] 31UK 12. Section 168 of the Company Act; this is practical only in the most egregious cases, but it still works as a "shotgun."
[290] 32USAI 22 et s.; Jeffrey N. Gordon, *Proxy Contests in an Era of Increasing Shareholder Power: Forget Issuer Proxy Access and Focus on E-Proxy,* 61 VAND. L. REV. 475 (2008).
[291] *Cf.* 32USAI 25 n.100: In the Hewlett-Packard case 2006 over $100 million.
[292] KRAAKMAN ET AL., *supra* note 10, at 243 et s.
[293] *Id.* at 252 et s.; Jeremy Grant et al., *Financial Tunnelling and the Mandatory Bid Rule,* 10 EUROPEAN BUSINESS ORGANIZATION LAW REVIEW (EBOR) 233 (2009).
[294] This is different for investment companies. The suggestion to introduce also a more general exit right for corporations made by GÜNTER H. ROTH, DAS TREUHANDMODELL DES INVESTMENTRECHTS, EINE ALTERNATIVE ZUR AKTIENGESELLSCHAFT (1972), has not been

sell-out right paralleling the squeeze-out right has been introduced in the European Member States, yet it is often restricted to after-takeover situations when ownership by the new controlling shareholder/s has reached ninety percent or more.[295] However, some countries, like Italy, have introduced the withdrawal right more generally, particularly in close corporations where there is no market.[296]

b) Institutional investors. Recent empirical studies suggest that simply altering shareholder power without changing other governance mechanisms is unlikely to lead to widespread changes in corporate governance.[297] This is not to deny that improved disclosure and easier exit rules can foster shareholder protection. But selling shares as a consequence of unfavorable information or via a legal exit mechanism as previously described is not really adding to shareholder power within the corporation. Shareholder codecision rights, in contrast, must be exercised in order to be effective. Yet experience shows that the attendance rate at general assemblies can be very low. In Germany, attendance is occasionally as low as thirty percent, with the consequence of creating ad hoc majorities and a virtual impossibility of reaching qualified majorities of all shareholders. This is true even though under German law banks may vote as a proxy for those shareholders whose shares they have in deposit and who have authorized them to vote.[298] The "absent owner" phenomenon appears not only in corporations with a dispersed shareholdership but also, as far as minority shareholders are

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taken up by the German legislator, though for the limited liabiltiy company exit is recognized more easily.

[295] For details, see the European Directive 2004/25/EC of 21 April 2004 on takeovers bids, OJEU L 142/12, Art. 15 (squeeze-out) and Art. 16 (sell-out), and the European Commission Staff Working Document, Report on the Implementation of the Directive on Takeover Bids, Brussels 21.2.2007, SEC(2007) 268. For an interesting procedure to establish the redemption price (arbitration, special minority shareholders representative), see 9Fin 31 et s.

[296] 16I 9.

[297] Yair Listokin, *If You Give Shareholders Power, Do They Use It? An Empirical Analysis,* 166 J. OF INSTITUTIONAL AND THEORETICAL ECONOMICS (JITE) 38 (2010).

[298] So-called bank depository vote, 12Germ 24 et s. According to some, this possibility increased the so-called power of the German banks, for example ROE, *supra* note 27, at 172 et s. But in reality, due to severe rules as to the exercise of these votes, this was hardly the case. It is true that the banks usually voted with management unless the corporation started to have financial difficulties. Yet the abolishment of the depository votes for corporate governance reasons would be a very doubtful reform, since as a result the attendance rate would drop even further. In the meantime some German and Swiss banks have stopped offering this service because it is too costly. As to more restricted proxy voting rules as in Japan, see *supra* III B 1 note 277.

concerned, in controlled corporations. This can also be seen in China,[299] where the state has become the majority shareholder in many corporations that were formerly mostly state-owned. The attendance rate in some other countries is much higher: in the United Kingdom, for example, attendance in the FTSE 100 firms is regularly as high as seventy to eighty percent, but closer inspection shows that this is due to institutional shareholdership.[300]

Even apart from codecision rights and their exercise when attending the general assembly, institutional shareholders can exert considerable influence on the corporation, the board and corporate governance. The rise of institutional investors has been described at length elsewhere.[301] There are still considerable differences between the United States and Great Britain on one side and most continental European countries on the other. Institutional investors have long been important in the United States[302] and in the United Kingdom. There, the lack of more than minimal state-provided old age and social security systems drive the middle class into becoming shareholders and investors. In the United Kingdom, the country where institutional shareholding is most predominant, such shareholders—i.e., mainly occupational pension funds and insurance companies, as well as mutual funds—constitute about three-quarters of overall market capitalization.[303] In other countries, for example Germany, institutional shareholding is slowly but steadily advancing.

Traditionally these institutional shareholders have simply followed the Wall Street rule, i.e., they sold when they were not satisfied with a corporation. But more recently there has also been an increase in the number of institutional shareholders voting at general assemblies, thereby engaging in internal corporate governance.[304] This is partly so because selling blocks,

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[299] 6China 19 et s. with the consequence that local officers who are dependent on local government instead of higher government levels decide in different ways, *cf.* Donald C. Clarke, Corporate Governance in China: Dilemmas of Reform and the Institutional Environment, unpublished manuscript, at 73 (2006).

[300] 31UK 10. For French CAC 40 corporations the figures of 2008 are 68.3%, 10RF 16.

[301] *Cf.* INSTITUTIONAL INVESTORS AND CORPORATE GOVERNANCE (Theodor Baums et al. eds., 1994); SYLKO WINKLER, DIE VERANWORTUNG INSTITUTIONELLER ANLEGER ALS AKTIONÄRE VON PUBLIKUMSGESELLSCHAFTEN IN DEUTSCHLAND UND DEN USA (2008).

[302] In the United States, institutional investors held 61.2% of total U.S. equities in 2005, The Conference Board, U.S. Institutional Investors Continue to Boost Ownership of U.S. Corporations, Jan. 22, 2007. 32USAI 5 n.17: New York Stock Exchange Fact Book.

[303] 31UK 13.

[304] The classic article is by Bernard S. Black, *Agents Watching Agents: The Promise of Institutional Investor Voice,* 39 U.C.L.A. L. REV. 811 (1992); Randall S. Thomas, *The Evolving Role of Institutional Investors in Corporate Governance and Corporate Litigation,*

even if they most often do not go beyond three to five percent, influences the stock price negatively. Furthermore, there has been a lot of pressure on institutional investors to vote actively, and corporate governance codes such as the Combined Code in the United Kingdom[305] and institutional shareholders' self-regulatory instruments have supported this.[306] In the United Kingdom and the Netherlands, the press has given wide coverage to cases in which a general assembly with active institutional shareholders voted down remuneration proposals of the board.[307] In some countries, the codes impose on institutional investors the duty to disclose and explain their voting behavior.[308]

The voting behavior of hedge funds is somewhat different.[309] Their aggressive shareholder activism has led to considerable repercussions. In the Netherlands, ABN AMRO, at the instigation of the hedge fund TCI, was taken over and dismantled by a consortium of three bidders, including another Dutch bank, Fortis, which later had to be bailed out by the Dutch government.[310] In Germany, hedge funds, again led by TCI, drove out the management and

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61 VAND. L. REV. 299 (2008); REINHARD H. SCHMIDT & GERALD SPINDLER, FINANZINVESTOREN AUS ÖKONOMISCHER UND JURISTISCHE SICHT (2008).
Besides the corporate governance role of institutional investors in other corporations, corporate governance problems exist also for the institutional investors themselves.

[305] 31UK 13. *See now* The UK Corporate Governance Code 2010, *supra* note 41.

[306] 31UK 13, 11 n.40; Myners' Report, Institutional Investment in the UK: A Review, London 2001; Institutional Shareholders' Committee (ISC), Principles on the Responsibility of Institutional Shareholders and Agents, 2007; Financial Reporting Council, The UK Stewartship Code, July 2010.

[307] *See* 31UK 13 with further cases. For the Netherlands Philips, VastNed Retail, Corporate Express and Royal Dutch Shell, 21Neth 20.

[308] 4B 19; this has also been proposed by the High Level Group on Company Law Experts, *supra* note 55.

[309] For the UK John Armour & Brian Cheffins, The Rise and Fall (?) of Shareholder Activism by Hedge Funds, ecgi Law Working Paper No. 136/2009 (see *supra* note 2); 31UK 14 n.42. For the United States Marcel Kahan & Edward Rock, *Hedge Funds in Corporate Governance and Corporate Control,* 155 U. PA. L. REV. 1021 (2007); Bernard Black & Henry T.C. Hu, *Hedge Funds, Insiders, and the Decoupling of Economic and Voting Ownership: Empty Voting and Hidden (Morphable) Ownership,* 13 J. CORP. FIN. 343 (2007); Thomas W. Briggs, *Corporate Governance and the New Hedge Fund Activism: An Empirical Analysis,* 32 IOWA J. CORP. L. 681 (2007). For Germany *cf.* Christoph Kumpan, *Börsenmacht Hedge-Fonds,* 170 ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT (ZHR) 39 (2006); Klaus Ulrich Schmolke, *Institutionelle Anleger und Corporate Governance – Traditionelle institutionelle Investoren vs. Hedgefonds,* ZEITSCHRIFT FÜR UNTERNEHMENS- UND GESELLSCHAFTSRECHT (ZGR) 701 (2007).

[310] 21Neth 19.

supervisory board of the Deutsche Börse in 2005.[311] However, this type of activity is still sporadic.

In summary, institutional shareholders—and, to a lesser degree and more ad hoc, hedge funds—have gained considerable influence on corporations and potentially also on corporate governance.[312] But they do this more via external corporate governance over the market than by internal corporate governance.[313] Even in the United Kingdom, the country with the highest rate and influence of institutional shareholders, it seems that the orthodox institutional shareholders have continued to be reluctant to take the costly route of internal monitoring of corporations.[314] More general changes in overall shareholder involvement cannot yet be observed in British public corporations.[315] In other countries, greater shareholder activism[316] remains even more the exception.[317]

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[311] Joachim Faber, *Institutionelle Investoren (einschließlich Hedgefonds und Private Equity), in* HANDBUCH CORPORATE GOVERNANCE, *supra* note 1, 218 at 228 et s.
[312] Among many *cf.* Roberta Romano, *Less is More: Making Institutional Investor Activism a Valuable Mechanism of Corporate Governance, in* CORPORATE GOVERNANCE REGIMES, CONVERGENCE AND DIVERSITY, *supra* note 88, at 507; *cf. also id.*, 18 YALE J. ON REGULATION 174 (2001). Distinguish the corporate governance of the institutional investors themselves, *supra* note 304.
[313] Robin Greenwood & Michael Schor, *Investor Activism and Takeovers,* 92 J. OF FINANCIAL ECONOMICS 362 (2009).
[314] 31UK 13; Thomas, *supra* note 304, at 300; 32USAI 6 n21.
[315] 31UK 14: "instances of offensive shareholder activism in the UK to date have tended to be relatively sporadic and isolated" and "targeted (and heavily publicised) . . . against individual companies."
[316] The term shareholder activism is used here for private shareholders exercising their rights and for institutional shareholders trying to influence the board and internal corporate governance. Activist shareholders are also those who abuse their information and speaking rights in the general assembly for reaping private benefits. In some countries such as Germany (so-called rapacious shareholders) and Japan (the *sokaiya* phenomenon) this has changed the character of the general assembly and created widespread dissatisfaction, with reforms having been tried but not yet really having been successful, see *supra* note 277. In this context is is worthwhile mentioning that in the Netherlands the Enterprise Chamber and the Dutch Cabinet have taken measures to curb too much shareholder activism, see 21Neth 20 et s.
[317] See for France the cases Eurotunnel in 2004 and Havas in 2005, the ousting of directors in cases like France Telecom and Vivendi in 2002 and Alstom and Rhodia in 2003 was due to the board or the banks; 10RF 17. For the Netherlands 21Neth 19 et s. Cf. 8Denm 9 et s.; 20Norw 27. For Australia see 2Austr 28 et s. In Japan, too, institutional investors start to play a certain but still very limited role, the time of the annual meetings having gone up from twenty-nine minutes in 1996 to fifty-five minutes in 2007, 17Jap 26. Compare this to German general assemblies of DAX corporations where the annual meetings took 7.3 hours in average in 2009 and can take the whole day and sometimes even longer, 12Germ 25 et s. As to a slow rise of the institutional investors in China 6China 22; for Taiwan 29Taiw11.

(3) In many countries, for example the United States, Germany, France, the Netherlands and Argentina, shareholder associations play an important role for shareholder protection and for corporate governance in general.[318] In others, like Switzerland, such organizations do not exist.[319]

C. Labor

1. Codetermination on the Board

In many European countries there is mandatory labor codetermination; as a result, labor usually represents one-third of board membership. Germany is unusual among market economy countries because it goes even further by mandating shareholder and labor membership at parity on the supervisory board.[320] France has recently and cautiously followed this trend by giving labor, under certain circumstances, up to two seats on a board.[321] In some countries, labor codetermination goes together with a mandatory large board size. Germany[322], for example, requires twenty seats for companies with a workforce of at least 2000, and twenty-one seats in large coal and steel companies. The Netherlands has

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[318] Schutzvereinigung für Wertpapierbesitz in Germany, 12Germ 45; Association de défense des actionnaires minoritaires (ADAM) since the early 1990s in France, 10RF 26; VEB and Eumedion in the Netherlands, 21Neth 49; 1Arg 43.
[319] 27CH 15: basically unknown.
[320] *Cf.* Christine Windbichler, *Cheers and Boos for Employee Involvement: Co-Determination as Corporate Governance Conundrum,* 6 EUROPEAN BUSINESS ORGANIZATION LAW REVIEW (EBOR) 50 (2005); Katharina Pistor, *Codetermination in Germany: A Socio-Political Model with Governance Externalities, in* EMPLOYEES AND CORPORATE GOVERNANCE 163 (Margaret Blair & Mark Roe eds., 1999).
[321] For France since 2002, provided employees own more than three percent of the capital, Art. L. 432-6 Labor code; 10RF 18. For Sweden 28Swed 5, appointment not by the employees, but by the unions under collective agreements. For Norway 20Norw 8 et s. For Finland 9Fin 19 et s.: codetermination results from labor law, not corporate law. For Denmark 8Denm 10. The United Kingdom has always resisted introducing labor codetermination, though it was suggested at a certain point by the Bullock report, 31UK 15/16. In Japan mandatory codetermination does not exist, though there is discussion of introducing some of it, 17Jap 28, but in fact directors are very often former top employees of the corporation, so labor interests do play an important role in Japanese corporations. *Cf. also* JAVIER CALVO ET AL., EMPLOYEE REPRESENTATIVES IN AN ENLARGED EUROPE, 2 VOLS. (for the European Commission) (2008); DORRESTEIJN ET AL., *supra* note 83, at 203 et s.; EMPLOYEES' CO-DETERMINATION IN THE MEMBER STATES OF THE EUROPEAN UNION (Theodor Baums & Peter Ulmer eds., 2004).
[322] 12Germ 27 et s.

reduced its special paritary codetermination system but has kept a strong influence of the working force.[323] If this regime applies, the mandatory non-executive or supervisory board appoints, suspends and dismisses executive directors, while the general meeting of shareholders appoints supervisory directors but can only reject candidates who must be nominated by the supervisory board in accordance with a certain profile. As to the composition of the supervisory board, the works council has a special right of recommendation with respect to one-third of the members of the supervisory board.

Shareholders are usually not fond of labor codetermination because it diminishes the power of their own candidates, and seriously weakens their role in the decision-making of the (supervisory) board. Therefore, labor codetermination is introduced very rarely on a voluntary basis, apart from certain state-owned or state-influenced enterprises and companies that are in operational difficulties, rescue situations or other special conditions. Economists consider this an argument against codetermination in principle, because if it were beneficial for the enterprise, shareholders would adopt it without it being mandated by law.[324] Since labor codetermination in Germany and a number of other states is mandatory by law independent of the legal form of limited liability companies and even in groups of companies, corporations have no recourse but to accept it and to come to terms with it. This does not mean that they would embrace codetermination to begin with[325] if they had a choice. Now just such a choice has been opened up in the European Union by the option of a corporation becoming a European Company subject to a more flexible, consensus-based labor codetermination

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[323] This is called the structure regime; for details, see 21Neth 25 et s., also as to further, still pending legislation. There is an exemption to the structure regime for companies with a majority of the workforce of the company or the group being outside the Netherlands. As a result most large listed companies are exempted. *Cf. also* DORRESTEIJN ET AL., *supra* note 83, at 223.

[324] As to the highly controversial economic and political pros and cons of labor codetermination, see Katharina Pistor, *Corporate Governance durch Mitbestimmung und Arbeitsmärkte, in* HANDBUCH CORPORATE GOVERNANCE, *supra* note 1, at 231; Windbichler, *supra* note 320; Klaus J. Hopt*, Labor Representation on Corporate Boards: Impacts and Problems for Corporate Governance and Economic Integration in Europe,* 14 INTERNATIONAL REVIEW OF LAW AND ECONOMICS 203 (1994); *id., New Ways in Corporate Governance: European Experiments with Labor Representation on Corporate Boards,* 82 MICH. L. REV. 1338 (1984).

[325] Once the corporation lives with codetermination, it is very difficult to do away with it even if this were legally possible, since this would have negative repercussions on the working climate, the cooperativeness of the trade unions and, at least in Germany, on the general standing and image of the corporation. *Cf. more generally* HENRY HANSMANN, THE OWNERSHIP OF ENTERPRISE (1996).

system.[326] The best example is the Allianz Corporation, the largest German insurer, which changed its legal form to a European Company and thereby was able to reduce its board from twenty to twelve members, while voluntarily[327] keeping paritary labor codetermination on the board.[328]

Of course, labor codetermination is a powerful instrument of corporate governance, especially if the latter is conceived not only as shareholder-oriented but also stakeholder-oriented,[329] the workers of the company being the most obvious creditors among the stakeholders. Under a more shareholder-oriented concept of corporate governance, however, experiences with labor codetermination are mixed. In theory, labor representatives on the board serve as an additional check on management, not only as far as labor interests are concerned, but more generally to supress excessive risk-taking and other activities that are potentially disadvantageous to the enterprise and therefore to jobs. Yet, experience shows that labor codetermination has not prevented major frauds and scandals, though shareholder-elected representatives did not do much better. As far as external corporate governance is concerned, the interests of management in defending the corporation—not only against possible raiders, but more generally against hostile takeovers—are often paralleled by labor's interest in keeping jobs. Actually, labor codetermination is sometimes considered to be one of the many structural obstacles to the development of a lively takeover market.[330] In some countries, e.g., Germany, decisions about the compensation of directors has been taken away from remuneration committees and mandatorily assigned to the plenum of the board,[331] the

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[326] Council Directive 2001/86/EC of 8.10.2001 supplementing the Statute for a European company with regard to the involvement of employees, OJEC L 294/22. There is a clear relative success of the SE in Member States with extensive employee participation, Ernst & Young-Study for the European Commission, *supra* note 113, at 243 et s. The Directive's flexibility as to labor codetermination has been said to be the most important advantage, Martin Henssler, *Erfahrungen und Reformbedarf bei der SE – Mitbestimmungsrechtliche Reformvorschläge,* 173 ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT (ZHR) 222 (2009), based on interviews.

[327] *See supra* note 325.

[328] Empirical data covering most of the European members states on the SE can be found in Ernst & Young, Study for the European Commission, *supra* note 113. *Cf. al*so Peter Hemeling (chief legal officer of Allianz SE), *Die Corporate Governance der Societas Europaea (SE), in* HANDBUCH CORPORATE GOVERNANCE, *supra* note 1, at 769.

[329] *Supra* III A 2 b.

[330] *See* Annex 4: Overview of the Most Important Barriers to Takeover Bids, in: High Level Group of Company Law Experts, Report on Issues Related to Takeover Bids, Report of the European Commission, Brussels, 10 January 2002, reprinted with commentaries *in* REFORMING COMPANY AND TAKEOVER LAW IN EUROPE, *supra* note 4, Annex 2, 825-924.

[331] *See supra* note 191.

expectation being to install limits on excessive payment. Yet labor seems to be not really interested in whether there are higher or lower pay levels for directors, as the Mannesmann case[332] illustrates. Instead, the labor representatives' natural interest is in having more general influence within the board, and maybe using the remuneration issue as leverage. On the other side, it is also true that labor codetermination may bring problems between labor and capital to the attention of the board at a very early stage. This may be good for the shareholders,[333] and also may enhance cooperation between capital and labor, thereby improving productivity. On yet another front, such corporate governance effects come at a price, since corporate governance activities and possibilities on the shareholder side are correspondingly weakened and the decision-making process is more costly and slow. In the end, the impact of codetermination is an empirical question that still has to be conclusively answered.[334]

2. Other Rights of Labor

Apart from the right to be represented on the board, labor can be protected by other rights or mechanisms enabling it to exercise influence on the internal governance of the corporation. One form of this is the aforementioned constituency clauses, under which the board has to act not only in the interest of the shareholders but also in the interest of labor.[335] Yet, while this is mandatory in certain jurisdictions, there are no corresponding rights of labor to ensure that the board actually does act in the interest of the workforce.

In many cases, corporate, takeover, capital market and labor laws provide for information rights of labor, and sometimes even codiscussion and codecision rights on labor issues. Depending on what information is owed by the board, this can be relevant for corporate governance. For example, the European takeover directive prescribes that the boards of the two companies involved shall inform the labor representative of the bid as soon as it has been made public, and the offer document must inter alia contain information relevant to the bidder's intentions with regard to the future business of the target company and the likely

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[332] MILHAUPT & PISTOR, *supra* note 23, at 69 et s.
[333] From the perspective not of the single company but of the economy in general, labor codetermination has been called an early social monitoring system (*Frühwarnsystem*) for social conflicts, Hopt, *supra* note 324, at 212.
[334] As to empirical research so far, see most recently the report by Katharina Pistor, *Corporate Governance durch Mitbestimmung und Arbeitsmärkte, in* HANDBUCH CORPORATE GOVERNANCE, *supra* note 1, 231, at 245 et s.
[335] *Supra* III A 2 b.

repercussions on employment.[336] Later there must also be information for, and consultation of, the representatives of the employees.[337] More generally and outside of takeovers, there are the Directive 2002/14/EC on the cross-Community establishment of procedures for information and consultation of employees,[338] and the Directive 94/45/EC on the establishment of European Works Councils in Community-scale undertakings, which also give labor certain rights.[339] It is true that the influence labor has under these directives is basically limited to its own interests, and does not ensure a significant influence on strategic decision-making within the corporation.[340] But there is nevertheless an impact on corporate governance, at least as far as labor is concerned. This is even more true if the works council has the right to discuss the general affairs of the company with the board twice a year, or has a mandatory right to advise on the appointment and dismissal of the managing directors and on fundamental decisions, such as change of control.[341] How far this influence actually reaches depends on factors other than just the law—for example, on the existence of strong or less powerful trade unions,[342] and on whether they are more contentious and class-struggle-oriented or more cooperative in the interest of the enterprise and the economy.[343]

D. Gatekeepers, in particular Auditors

1. The Concept of Gatekeepers

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[336] Takeover Directive, *supra* note 295, Art 6 I, III i.
[337] As spelt out in various directives, see *id.,* Art. 14.
[338] European Directive 2002/14/EC of 11 March 2002, establishing a general framework for informing and consulting employees in the European Community, OJEC L 80/29.
[339] European Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, OJEC L 254/64.
[340] This is emphasized in 31UK 18.
[341] 21Neth 23 et s. If the advice is not followed or the works council has not been informed properly, the works council may have the decision reviewed by the court (Enterprise Chamber, *infra* III E 2 a). As to takeovers where the interests of the management and the workforce often run parallel (*supra* note 157), the management may grant the works council the right to institute an inquiry procedure before the Enterprise Chamber, 21Neth 24. In takeovers, trade unions have particular rights under the non-binding Merger Code, 21Neth 27.
[342] In Belgium the rate of affiliation of the workers in unions is higher than generally in Europe, 4B 19 et s. In France trade unions play a minor role in the private sector but are most powerful in the state sector, 10RF 18.
[343] According to 15Ire 14 et s., the corporate governance systems of the United Kingdom and Ireland are a bridge between the free market U.S. and the continental European models of governance; *cf.* IRENE L. FANNON, WORKING WITHIN TWO KINDS OF CAPITALISM (2003).

a) The role of experts. Corporate governance ultimately rests on the cooperation between the corporate actors—i.e., the board, the shareholders and labor—and on the confidence that investors and the market may or may not have in the board and the corporation. This confidence of the investors and the market depends on professionalism and independence. Both elements may be promoted and assured by involving so-called gatekeepers in corporate governance.[344] Gatekeepers such as lawyers, auditors, accountants, investment bankers, financial analysts and credit rating agencies help to evaluate corporate transactions and to determine whether the annual accounts and other disclosures of the corporation are correct. Gatekeepers are usually professionals whose access to the profession is regulated,[345] and who are, depending on their profession and function, under more or less stringent conduct and independence requirements by law. Depending on the profession, these requirements are subject to supervision by state or other regulatory bodies and, if violated, may give rise to liability toward their clients and occasionally toward third parties, in particular investors.[346]

b) The special audit and the investigation of a company's affairs. A particular example of enforcement of corporate law and corporate governance rules with the help of experts is the special audit that exists in a number of countries such as the Netherlands, Belgium, Germany, France, Austria, Switzerland, Italy and Poland.[347] The aim of the special audit is to detect

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344 KRAAKMAN, ET AL., *supra* note 10, at 48 f, 128-30, 298-300. The classical article is Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy,* 2 J. L. & ECON. ORG. 53 (1986).

345 As to the credit rating agencies only more recently, for example in the EU as a result of the financial crisis, EU Regulation No 1060/2009 of 16 September 2009 on credit agencies, OJEU L 307/1. For the United States, *cf.* the Credit Rating Agency Reform Act of 2006 and Arthur R. Pinto, *Control and Responsibility of Credit Rating Agencies in the United States,* 54 AM. J. COMP. L. 341 (Supp. 2006). For an economic evaluation, *cf.* Amir Sufi, *The Real Effect of Debt Certification: Evidence from the Introduction of Bank Loan Ratings,* 22 REVIEW OF FINANCIAL STUDIES 1659 (2009); Brigitte Haar, *Nachhaltige Ratingqualität durch Gewinnabschöpfung? – Zur Regulierung und ihrer Implementierung im Ratingsektor,* ZEITSCHRIFT FÜR BANKRECHT UND BANKWIRTSCHAFT (ZBB) 177 (2009). More generally for financial intermediaries Jill E. Fisch, *Rethinking the Regulation of Securities Intermediaries,* U. PA. L. REV. 158 (2010) 1961.

346 *See* Hopt, et al., *supra* note 257. As to gatekeeper enforcement, see KRAAKMAN ET AL., *supra* note 10, at 298 et s.

347 Forum Europaeum Group Law, *supra* note 265, EBOR I (2000) 165 at 207-16; RONNY JÄNIG, DIE AKTIENRECHTLICHE SONDERPRÜFUNG (2005). For France, *expert de gestion*, see 10RF 16; for the Dutch inquiry procedure (*enquêterecht*) Art. 2:344-359 of Book 2 of the Dutch Civil Code, see Joe A. McCahery & Erik P. M. Vermeulen, *Role of Corporate Governance Reform and Enforcement in the Netherlands, in* PERSPECTIVES IN COMPANY LAW AND FINANCIAL REGULATION, *supra* note 26, 322 at 337 et s.; 21Neth 44 et s.: "most effective mechanism," useful stepping stone for damage suits, rich case law of the Enterprise Chamber

whether there have been violations or abuses in a corporation or group of corporations. The special auditor is appointed either by the general assembly of shareholders or, if this assembly refuses or does not act, by the court upon application by a number of shareholders. It is important that the special auditor be both an expert in the field and independent. The special auditor's task can be limited to the corporation and the activities of its directors or controlling shareholder, but inquiry can—and in practice must—become group-wide if the relevant facts lie beyond the single corporation. The effectiveness of the special audit depends on the rights of the special auditor, the special auditor's report and its availability for the general assembly, as well as the cost-bearing rules. Special audits are rare even where the law allows them, but they may play an important role as a preventive measure for the protection of minorities, the detection of abuses and the preparation of individual damage suits by shareholders.[348] The introduction of the special audit as a means of better corporate governance has been recommended to the European Commission, but upon lobbying from industries in Member States the Commission has not dared go forward.[349]

2. Auditing

a) Mandatory auditing by external auditors. Auditors were the first gatekeepers that were mandatorily involved in corporate governance, and auditing by inside or statutory auditors has long existed under a number of corporate laws.[350] Mandatory review by external auditors was introduced much later, for example, in Germany[351] as a result of the financial collapses of the 1930s. Today practically all jurisdictions require that independent external auditors verify the accuracy of annual accounts and other mandated disclosures. As a consequence, the profession has developed globally. After the collapse of Arthur Anderson in the aftermath of

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as to what amounts to "mismanagement"; for Germany 12Germ 43; for Austria 3A 19; for Belgium 4B 27; for Luxembourg 18Lux 30; for Switzerland 27CH 14; for Italy 16I 27; for Greece 13Greece 57 et s.; for Norway 20Norw 31; for Poland 22Pol 19. Recently Serbia, 24Serb 36 et s.

[348] In Dutch practice, the special audit is a useful stepping stone for damage suits, 21Neth 46.

[349] High Level Group, *supra* note 55, Recommendation III.8 and ch. III 3.4, 57 et s.; for comparative law experiences, *cf.* Forum Europaeum Group Law, *supra* note 265, EBOR I (2000) 165 at 207-17.

[350] For example, in Italy 16It 20 et s.; 17Jap 7 et s., 22 et s. and the critique there.

[351] *Cf. generally* 12Germ 29 et s.

Enron, it is dominated by a tight oligopoly of four big international auditing firms, together with a small number of more national second-level players.[352]

b) Auditors' tasks and the so-called expectation gap. Over time, and in particular as a consequence of the emergence of intricately interrelated corporate groups and multinational corporations, the auditors' tasks have become broader and more difficult. For state-supervised branches such as banks and insurance companies, auditors with specialized knowledge and experience are required and chosen by the supervisory agencies. Even though auditing rules provided both by law and self-regulation of the profession have expanded dramatically over the years, it was still not possible to avoid large scandals and failures such as Enron, WorldCom and similar events which occurred in a large number of countries. This has led to the so-called expectation gap, i.e., the gap between what the public and legislators expected auditors to achieve and the actual results the auditors could reasonably have achieved. Even the best auditing cannot always detect well-hidden manipulations and criminal activities.

More legislation, e.g., in the United States the Sarbanes-Oxley Act of 2002[353] and similar laws in many other countries, and more self-regulation were the consequence. As to corporate governance, it is important to note that, as a matter of law and practice, cooperation between auditors and the supervisory board as a whole, the non-executive directors and in particular the independent[354] audit committee has improved noticeably. Retaining and terminating auditors can be the task of the board or, since it is of key importance, preferably the shareholders. The auditor can terminate an accepted mandate only for cause, i.e., for an important reason which he or she must explain. The goal of this restriction is to reduce the temptation to walk away in case of difficulties with the job or with management. The audit concludes with a report and the certification, refusal or qualification of the financial statements by the board. All this is done under the supervision of state and/or self-regulatory

[352] This creates serious problems not only for prices, but also for the quality of the services (independence, difficulty of changing, no full rotation possible). This also has implications for the liability of the auditors, see European Commission Recommendation limiting the liability, see *infra* III D 2 d.
[353] Sarbanes-Oxley Act, *supra* note 71.
[354] *See supra* III A 1 b, 3 c.

bodies.[355] Although details of this are beyond the scope of this Article two particularly important issues—independence and liability—must be briefly addressed.

c) Independence of auditors. Professionalism and experience are necessary but not sufficient. A key requirement is independence, as acknowledged in most countries.[356] In the words of the EU directive of 17 May 2006,[357] independence requires that there not be "any direct or indirect financial, business, employment, or other relationship—including the provision of additional non-audit services." There must not be a relationship between the auditor, as well as the audit firm and its network, and the audited entity from which an objective and informed third party would conclude that the auditor's independence is compromised. In the directive, this is further specified by a package of criteria that are to be considered threats to independence, as well as by measures through which these threats can be mitigated.[358] Additional independence requirements are provided for companies with securities listed in a regulated market.[359] Among the most controversial issues involving the independence of auditors are the following questions: what other professional services the auditing firm may have rendered to the audited corporation;[360] the amount of the auditing firm's total income that comes from the company (e.g., fifteen percent) or the group (e.g., twenty percent); and whether there must be an internal or even external rotation after a certain number of years (e.g., five years).[361]

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[355] In the United States since the Sarbanes-Oxley Act this is the newly instituted Public Company Accounting Oversight Board, see 32USAI 36; France followed with the Haut Conseil du commissariat aux comptes (H3C), 10RH 19; *see more generally infra* III E 1.

[356] For the United States, *cf.* Sean M. O'Connor, *Strengthening Auditor Independence: Reestablishing Audits as Control and Premium Signaling Mechanisms,* 81 WASH. L. REV. 525 (2006).

[357] Art. 22 II of the Directive of 17 May 2006 on statutory audits, *supra* note 176.

[358] *Cf.* Commission Recommendation 2002/590/EC of 16 May 2002, Statutory Auditors' Independence in the EU: A Set of Fundamental Principles, OJEU 19.7.2002 L 191/22.

[359] See for example Article 319a of the German Commercial Code as reformed by law of 25 May 2009.

[360] Services possibly threatening independence include bookkeeping, preparing the annual financial statement, involvement in internal control, management or financial services, insurance mathematics, or evaluation, which have a substantial effect on the annual account.

[361] Under the Sarbanes-Oxley Act (*supra* note 71) the lead partner on the audit must now be rotated after five years, 32USAI 37; this interal rotation requirement is now rather common, while external rotation (of the firm) is highly controversial and rarely mandated. As to the Austrian experience with external rotation which was introduced by law, but then abolished before the law came into force, *cf.* Peter Doralt, *Die Abhängigkeit des Abschlussprüfers, Gedanken zur externen Rotation, in* STEUERBERATUNG UND WIRTSCHAFTSPRÜFUNG IN EUROPA, FESTSCHRIFT FÜR ALFRED BROGYÁNYI 410 (H. Hammerschmied ed., 2008).

Most recently, there are some interesting new requirements concerning mandatory disclosure of the remuneration to the auditor for audit and non-audit services, which must be made separately in a note to the company's account.[362] Furthermore, the profession itself has come up with a recommendation that audit firms that service more than twenty listed companies must have independent non-executive directors, though most of these firms are not organized as stock corporations but as limited liability partnerships (LLPs).[363] The new Code of the profession further requires that audit firms have a majority of independent non-executive directors on any governance body that oversees public interest matters. These self-regulatory requirements concerning such directors will probably have a more limited effect on auditing firms than they would have on other business enterprises,[364] and while they are enforced only on a "comply or explain" basis, they nevertheless show a basic concern for the direction in which regulation of auditing and auditors will go in the future.

d) Liability. Liability of auditors is a topic that has been discussed for many years and at length; as a consequence of the recent scandals and crisis, it has gained renewed public attention. Liability can exist toward the audited corporation but also toward third parties who rely on the auditing report. There are extensive experiences in various countries concerning third-party liability of auditors that show very different approaches. These reach from total negation to wide acceptance, and they have been subject to considerable legal changes from one extreme to another in certain jurisdictions.[365] The United States and, to a lesser degree, France[366] and Switzerland[367] go quite far in holding auditors liable. In the Netherlands, there is third-party liability without a statutory cap under specific circumstances.[368] By contrast, Germany has set a very low ceiling of one million Euro, or four million Euro in the case of listed corporations, for liability toward the corporation in case of an audit of annual accounts.

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[362] UK Companies (Disclosure of Auditor Remuneration etc) Guidelines 2008, 31UK 19.
[363] Institute of Chartered Accountants for England and Wales, The Audit Firm Governance Code, January 2010; 31UK 20/21.l
[364] For the reasons, see 31UK 20.
[365] A study on systems of civil liability of statutory auditors in the context of a Single Market for auditing services in the European Union, carried out on behalf of the European Commission, Brussels, 15.1.2001. *See also* LONDON ECONOMICS & R. EWERT, STUDY ON THE ECONOMIC IMPACT OF AUDITORS' LIABILITY REGIMES (for the European Commission) (2006).
[366] Cass. Com. 21 jan. 1997, Bull. Joly 1997.417, note Jean-Claude Hallouin: shareholders who would not have invested in the company if the auditors had identified the accounting problems. 10RF 19/20.
[367] 27CH 18 et s.
[368] Dutch Supreme Court, 13 October 2006, JOR 2006/296 (Vie d'Or), 21Neth 31.

German law is also rather restrictive as far as third-party liability is concerned.[369] In view of these path-dependent differences, European attempts to achieve even limited harmonization of auditors' liability rules have failed at a very early stage. Most recently, under the impression of the collapse of Arthur Andersen and the remaining, and disconcerting, oligopoly of the Big Four, the European Commission issued a Recommendation on auditors' liability limitations and in October 2010 a Green Paper on Audit Policy.[370] In other countries, too, there is a trend toward capping auditors' liability.[371] It remains to be seen whether the lawsuits against auditing firms in the aftermath of the financial crisis will be successful, and whether there will be further changes as to the role of auditors in the corporate governance systems of the various countries.

E. The Supervisors and the Courts

1. Capital Market Authority, Stock Exchange, and Self-Regulatory Bodies as Supervisors

a) Competence and regulatory style of imposing sanctions. In many countries, supervision and enforcement of corporate governance rules are the task of the capital market authority—for example, the SEC in the United States,[372] the FSA (in the future, the Bank of England) in the United Kingdom,[373] the AMF in France,[374] the BaFin in Germany,[375] the CONSOB in

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[369] 12Germ 32 et s.
[370] Commission Recommendation of 5 June 2008 concerning the limitation of the civil liability of statutory auditors and audit firms, OJEU L 162, 39; *cf.* Walter Doralt et al., *Auditors' Liability and its Impact on the European Financial Markets,* 67(1) CAMBRIDGE L.J. 62 (Mar. 2008). Green Paper, Audit Policy: Lessons from the Crisis, 13.10.2010, COM(2010) 561 final.
[371] For Austria 3A 13. For Switzerland it is controversial, 27CH 19.
[372] *Cf.* the critique by Jonathan R. Macey, *The Distorting Incentives Facing the U.S. Securities and Exchange Commission,* 33/2 HARV. J. L. & PUB. POL'Y 639 (2010). More generally on enforcement *cf.* John Coffee, *Law and the Market: The Impact of Enforcement,* 156 U. PA. L. REV. 229 (2007); KRAAKMAN ET AL., *supra* note 10, at 294 et s.; Howell E. Jackson & Mark J. Roe, *Public and Private Enforcement of Securities Laws: Resource-Based Evidence,* 93 J. OF FINANCIAL ECONOMICS 207 (2009).
[373] Eilis Ferran, *Principles-Based, Risk-Based Regulation And Effective Enforcement, in* PERSPECTIVES IN COMPANY LAW AND FINANCIAL REGULATION, *supra* note 26, at 427; Freshfields Bruckhaus Deringer, Jonathan Fischer and Julia Black, *Law and regulation for global financial markets: enforcing the new regime – incentive or deterrence?,* LAW AND FINANCIAL MARKETS REVIEW 346 (2010).
[374] Autorité des marchés financiers, 10RF 24 et s. The French AMF resulted from a merger in 2003 of the Commission des opérations de bourse (COB) and two other private bodies.
[375] Bundesanstalt für Finanzdienstleistungsaufsicht, Frankfurt and Bonn.

Italy,[376] the CFBA in Belgium,[377] the ASIC in Australia[378] and the Financial Services Authority in Japan.[379] This is certainly true insofar as corporate governance rules are embodied in stock exchange regulation or where the observance of a corporate governance code is a condition for listing, and if the listing is decided by the capital market authority as agency in charge.[380] The extent to which capital market authorities of different countries supervise and enforce corporate governance rules varies considerably[381] and can also change dramatically over time, as seen in the practices of the Australian ASIC, the primary corporate regulator in that country.[382] Much depends on the competence and the regulatory style of the capital market authority in general, which may be more active or passive, and/or more legalistic or pragmatic.[383] Other factors include whether the rules are binding under the stock exchange or capital market law, or whether they are only corporate governance code recommendations enforced by a mere "comply or explain" approach. In the United States, the powers of the SEC are considerable and reach from rule-making to imposing criminal sanctions. As a consequence of too much leniency before the financial crisis, the SEC is expected to stiffen its enforcement practice considerably. In France, the role of the AMF does not reach as far but is still considerable.[384] In Germany, the BaFin has clearly circumscribed competences and must turn to public prosecutors if it suspects criminal insider trading. More often than not, these public prosecutors prefer to concentrate on more traditional crimes instead of trying to obtain the conviction of a white-collar defendant for financial crimes that are difficult to understand and even more difficult to prove. As mentioned above, a recent controversial reform proposal suggests that the German supervisory agency BaFin should have the power to bring civil suits on behalf of the corporation and possibly of the

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[376] 16I 22 et s.
[377] Commission Bancaire, Financière et des Assurances, since 2004 by merger of the Commission bancaire et binancière and the Office de contrôle des assurances, 4B 2, 26.
[378] 2Austr 43 et s.
[379] For Japan 17Jap 30.
[380] *See supra* II B 3.
[381] KRAAKMAN ET AL., *supra* note 10, at 297 et s. *Cf. also* Jackson & Roe, *supra* note 372, at 207.
[382] 2Austr 38 et s.
[383] The neighboring countries of Austria and Switzerland are good examples. The Austrian Financial Market Authority (FMA) in contrast to the Austrian Takeover Commission is said to be "extremely formalistic and legalistic," 3A 18. The Swiss authorities see themselves sometimes as service providers instead of mere guardians of the law, thus they are accessible to talks, this is mentioned as an advantage of the Swiss system, 27CH 24. *Cf. also* 18Lux 29: "not a strong enforcer"; 13Greece 59 et s.; 14Hung 16.
[384] 10RF 25.

shareholders.[385] Last but not least, the financial and personnel resources allotted to supervisory agencies vary hugely. While the American SEC is often cited as a model, supervisory authorities in most other countries are much less well-equipped. Many are underfinanced and understaffed, and the personnel they have cannot adequately compete with the highly paid and experienced staff of the corporations they face.[386]

Even if the supervisory authority has the necessary powers, it may have to be hesitant for various reasons. One reason could be that a particular sanction is inadequate. In theory, the capital market authority as a listing agency—or a stock exchange, if so authorized—could use the sanction of delisting. But since this would do more harm than good to the shareholders,[387] it is hard to find cases where this sanction has been applied.

In other cases, the supervisory authority may think that enforcement in particular areas is more important than in others, given limited personnel and other resources, or it may fear adverse public reaction if it applies a sanction. For example, in the United Kingdom to date there have been no reported instances of the FSA taking enforcement action against companies for having inadequate explanations for their deviations from Code provisions.[388] In any case, the capital market authority will usually refrain from checking whether the corporate governance statement is accurate since this would not only be a very difficult task but could possibly expose the agency to liability. The FSA, for example, has declared that it is the responsibility of the shareholders to check whether the content of the statement is accurate or adequate.[389]

b) Non-legal sanctions and pressures. (1) Non-legal sanctions for bad corporate governance play a certain role in many countries. Naming and shaming is one of the possibilities.[390] In

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[385] *See supra* III A 4 d.
[386] See, for example, 10RF 28.
[387] Eddy Wymeersch, *The Enforcement of Corporate Governance Codes,* 6 JOURNAL OF CORPORATE LAW STUDIES 113 at 131(2006); 31UK 3.
[388] John Armour, *Enforcement Strategies in UK Corporate Governance: A Roadmap and Empirical Assessment, in* RATIONALITY IN COMPANY LAW: ESSAYS IN HONOUR OF D.D. PRENTICE 71, at 103 (John Armour & Jennifer Payne eds., 2009); 31UK 3.
[389] Wymeersch, *supra* note 387, at 131-32; 31UK 3.
[390] To be distinguished from the role of the financial press, which can have a very important influence, as in the United States, Great Britain, Germany, and the Nordic countries. *Cf.* even for China, Benjamin L. Liebmann & Curtis J. Milhaupt, *Reputational Sanctions in China's Securities Market,* 108 COLUM. L. REV. 929 (2008); 6Ch 38. As to Japan *cf.* ECONOMIC

some countries, e.g., the United Kingdom, Ireland, France, Finland, and Australia, the capital markets authority has the power to inform the market of the violation.[391] This can be a real threat to persons whose reputations may be damaged, and who may lose their credibility in the market and as a result even their jobs. In other countries this sanction is not provided for or not generally used because of privacy concerns.

(2) Self-regulation, if taken seriously, depends largely on peer pressure. In the corporate governance field, peer pressure is at the heart of corporate governance and takeover codes. The best example for effective peer pressure is the Takeover Code of the Takeover Panel in the United Kingdom. For many years this self-regulation worked well, or at least satisfactorily. Later, the legislature considered it necessary to install a state supervisory agency for securities regulation, known as the Financial Services Authority, though the Panel kept its role for takeovers. The Takeover Code example is not necessarily a suitable model for other jurisdictions, since much of its force depends on the particular circumstances in the City of London and on the British self-regulatory tradition. In other countries, the role of peer pressure is much less developed. In Germany, peer pressure did not work in the case of the voluntary Insider Guidelines and the Takeover Code: the former was too hesitant, non-transparent, and without effective enforcement,[392] while the latter was not followed by important German companies despite the clear position of the stock exchanges, the takeover commission and the financial press.[393] As to corporate governance codes, the experience with peer pressure is mixed; in Germany it did not work convincingly for individual disclosure and directors' remuneration, which subsequently were thus regulated by law.[394]

ORGANIZATIONS AND CORPORATE GOVERNANCE IN JAPAN: THE IMPACT OF FORMAL AND INFORMAL RULES (Curtis J. Milhaupt & Mark D. West eds., 2004).

[391] 31UK 23; 15Ire 23: website of the Office of Director of Corporate Enforcement, www.odce.ie; in France the AMF does not do so as a general rule in the annual report, but in its website. French corporations that do not observe the publication deadlines for financial reporting are made public, 10RF 25; public reprimands are allowed in Finland, 9Fin 36; the Austrian Financial Authority (FMA) has been severely criticized because it uses naming and shaming while the proceedings are still pending, 3A 18.

[392] Klaus J. Hopt, *The German Insider Trading Guidelines - Spring-Gun or Scarecrow?*, 8 JOURNAL OF COMPARATIVE BUSINESS AND CAPITAL MARKET LAW 381 (1986).

[393] *See supra* II C 3.

[394] *See supra* II B 4 and note 66; for the United Kingdom, see Davies, *supra* note 158, nos 14-31/32, 405 et s., and with mixed findings Sridhar Arcot et al., *Corporate Governance in the UK: Is the Comply or Explain Approach Working?,* 30 INT'L REV. OF LAW AND ECONOMICS 193 (2010). *Cf. also* Christian Andres & Erik Theissen, *Does the Comply-or-Explain Principle Work,?* 14 J. CORP. FIN. 289 (2008).

(3) Competition, in particular international competition, and the composition of the market players may be such that there are market incentives for good corporate governance[395] beyond mere peer pressure in relatively homogenous environments, such as traditionally the City of London. The institutional investors and hedge funds, especially those of Anglo-American origin, play an important role in corporate governance, not only in Great Britain and the United States but also increasingly on the European continent, as the activities of the ISS or Hermes show. While their corporate governance role today is still more external, its internal side may be slowly increasing.[396]

(4) The financial press can, and occasionally does, play a major role in corporate governance. Major insider trading cases have been detected by the media, and important takeovers and mergers and their consequences for the shareholders are closely followed by the national and international financial press. This role is bolstered if there are guarantees, possibly on the constitutional level, for a free press and specific rules supporting its particular role, e.g., as for example under the European Market Abuse Directive.[397]

(5) Market forces in favor of good corporate governance are enhanced if there is sufficient disclosure and comparability. Instruments like score cards for corporate governance and an active, professional and independent role of financial advisors and rating agencies can be of considerable help. As a result of the financial crisis, there are efforts in many countries, including the European Union Member States, to support this role by appropriate regulation.[398]

c) The experience with and the future of self-Regulatory bodies. Self-regulation has been practiced for a long time, primarily by the stock exchanges, though as a result of various failures it has typically taken place under the review of state bodies. In the United States, for example, the stock exchanges and the National Association of Securities Dealers (NASD,

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[395] *See more generally* Edward B. Rock & Michael L. Wachter, *Norms and Corporate Law: An Introduction,* 149 U. PA. L. REV. 1607 (2001) and the Symposium on "Norms and Corporate Law" there; 15Ire 26.
[396] *Supra* III B 2 (2).
[397] Art. 1 para. 2 (c) of the Directive 2003/6/EC of 28 January 2003 on insider dealing and market manipulation (market abuse), OJEU L 96/16.
[398] For example, as to rating agency regulation, *supra* note 345.

now FINRA[399]) are self-regulatory bodies whose activities are closely reviewed by the SEC. The classic example of a long and impressive record of self-regulation is the British Takeover Panel, which has no parallel in the United States[400] but does have counterparts in Ireland and Australia.[401] For a long time the Panel was fully self-regulatory without legal enforcement competences. Though later it was given the right to go to court if there was failure to comply with an informal sanction it imposed, the situation has not changed very much. The Panel continues to develop the Takeover Code and to apply it very swiftly on an informal basis. The Panel rarely seeks court enforcement; instead, it relies mainly on the threat of public censure by the Panel, which might harm the professional standing of those involved in the takeover, in particular investment bankers and commercial law firms.[402] Yet one also hears that the changing environment in City of London, especially the increasing role of foreign players that are not used to the prevailing etiquette, makes this more difficult than in the past.

In countries without the self-regulatory tradition found in the United Kingdom, self-regulation and self-regulatory bodies may still play an important role as supplements to state regulation. Self-regulation engages the market participants in finding good solutions and trying to establish them as good corporate governance practice. It is particularly important in instances where such practices are not yet established so that legislators cannot then refer to them when they enact corporate governance rules. At this juncture, self-regulation and self-regulatory bodies have a role in experimenting with corporate governance solutions; supplementing existing corporate governance law by more flexible as well as more detailed standards; improving the corporate governance practice in a country; and importing international

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[399] As to the new Financial Industry Regulatory Authority (FINRA), which was formed in 2007 through the consolidation of the NASD and certain functions of New York Stock Exchange, see 32USAI 30 n.119.
[400] On the Takeover Panel and its regulatory and enforcement activities, see 31UK 21 f. On the comparative pros and cons of the UK and the U.S. takeover regulation, see Armour & Skeel as well as Ferrarini & Miller, *supra* note 21.
[401] In Ireland since 1997, 15Ire 18; in Australia since 2000, its constitutionality was upheld by the High Court in 2007, 2Austr 33. In other countries there are takeover panels; however, these have only restricted, mainly advisory competences, *cf.* for the Finnish Takeover Panel since 2005, 9Fin 6, 28 et s., 37.
On the other hand, in the Netherlands the Autoriteit Financiële Markten (AFM) is a private body with public law powers of investigation that may also levy administrative fines for non-compliance, 21Neth 5. In the Netherlands there was discussion on introducing a takeover panel UK-style after the ABN AMRO takeover, but the Ministry of Finance holds this to be unnecessary in addition to the AFM and the Enterprise Chamber, as to the latter see *infra* E 2 a.
[402] 31UK 21.

corporate governance standards into the national sphere. Germany, which was originally rather hesitant to go forward with corporate governance standards, is a good example of how international market pressure can lead to a tightening of old and loosely-structured national corporate governance standards.[403]

As to the merits of self-regulation in general and in the field of financial and capital market regulation in particular, outcomes in various countries are widely mixed, and there is much discussion on the many pros and cons of self-regulation.[404] As a result of scandals like Enron and more recently the financial crisis, self-regulation has been weakened substantially and often been replaced by law.[405] Some have even proclaimed the end of self-regulation in the financial field; this is a clear overreaction. Instead, what is needed is an appropriate combination of state regulation and self-regulation.[406] The history of stock exchanges and their regulation over the centuries provides ample proof of the effectiveness of this interplay.[407] Even in countries with a long and solid tradition of self-regulation such as the United Kingdom, and independently of the financial crisis, there is concern about the future role of self-regulation and the "robustness of the UK's 'private ordering' regulatory model."[408] According to British observers, much will depend on whether the institutional investors responsibly play their role in corporate governance, not only in corporations, but also "between primary (i.e., pension funds and insurers) and secondary (i.e., fund managers) institutional shareholders."[409] In other countries where the institutional investors are less important and management and/or blockholders and family owners play a bigger role, much depends on whether these actors live up to their social and ethical obligations, i.e., whether they act in the spirit of corporate social responsibility, not only to the extent forced by law but

[403] *Supra* II B 2 and note 53.
[404] Klaus J. Hopt, *Self-Regulation in Banking and Finance - Practice and Theory in Germany, in* LA DÉONTOLOGIE BANCAIRE ET FINANCIÈRE/THE ETHICAL STANDARDS IN BANKING & FINANCE 53-82 (1998); PETRA BUCK-HEEB & ANDREAS DIECKMANN, SELBSTREGULIERUNG IM PRIVATRECHT (2010); GREGOR BACHMANN, PRIVATE ORDNUNG (2006).
[405] In the United States, *cf.* Public Company Accounting Oversight Board, *supra* III D 2 b and note 355; for France: end of the relative self-regulation of auditors, 10RF 19.
[406] On the basis of experience with financial regulation, Eva Hüpkes, *Regulation, Self-regulation or Co-regulation?*, J. B. L. 427 (2009).
[407] *Supra* II B 1.
[408] 31UK 29 et s.
[409] 31UK 30.

proactively as well.[410] Of course, this is a huge topic and prognoses inevitably depend on human behavior and social learning.[411]

2. The Courts

a) Different roles and styles of the courts. The role of the courts in corporate governance is multifaceted. It varies primarily according to whether civil, administrative or criminal law sanctions are involved. But there is also a marked difference concerning the role of the courts as such.[412] This was evident, for example, in British resistance to 13th European directive on takeover for fear that the self-regulatory takeover system of the Takeover Panel would be endangered. The idea was to keep courts out of takeovers in order to avoid overly-long procedures as well as judges with inadequate practical experience and understanding. Only when it was ensured that self-regulation would continue in the takeover field did the United Kingdom consent to the 13th directive.[413] The same reason, i.e., delay through court proceedings, caused Australia to shift from the takeover competence of the courts to the Australian Takeovers Panel.[414]

The courts that oversee these matters not only act under very different procedural laws but have also developed extremely different styles.[415] In Delaware, where more than one-half of

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[410] *Cf.* COMPANY DIRECTORS AND CORPORATE SOCIAL RESPONSIBILITY: UK AND AUSTRALIAN PERSPECTIVES (Robert Austin ed., 2007); ANTONY DNES, CORPORATE GOVERNANCE AND SOCIAL RESPONSIBILITY: A LAW AND ECONOMICS PERSPECTIVE (2010); Ann K. Buchholtz et al., *Corporate Governance and Corporate Social Responsibility, in* THE OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY 327 (Andrew Crane et al. eds., 2008); Olivier de Schutter, *Corporate Social Responsibility European Style,* 14 EUROPEAN LAW JOURNAL 203 (2008).

[411] For introductory remarks *cf.* Guido Kordel, *Behavioral Corporate Governance from a Regulatory Perspective: Potentials and Limits of Regulatory Intervention to Impact the Conduct of Corporate Actors,* 9 EUROPEAN BUSINESS ORGANIZATION LAW REVIEW (EBOR) 29 (2008).

[412] *Cf.* Rafael La Porta, Florencio Lopez-De-Silanes, Cristian Pop-Eleches & Andrei Shleifer, *Judicial Checks and Balances,* 112 J. POL. ECON. 445 (2004); John Coffee, *Litigation Governance: Taking Accounting Seriously,* 110 COLUM. L. REV. 288 (2010).

[413] *Cf.* Takeover Directive, *supra* note 295, preamble No. 7.

[414] 2Austr 33. *Cf.* Emma Armson, *Models for Takeover Dispute Resolution: Australia and the UK,* 5 JOURNAL OF CORPORATE LAW STUDIES401 (2005); Simon McKeon & Jonathan Farrer, *Expanding the Jurisdiction of the Takeovers Panel in the Aftermath of Glencore: A New Chapter Begins?* 26 COMPANY AND SECURITIES L. J. 517 (2008).

[415] Quite apart from the level of education and vulnerability to corruption and political pressure, Clarke, *supra* note 299, at 103 et s.; 6China 41. Same for example for Croatia, 7Croat 25; for Serbia, 24Serb 4, 35.

Fortune 500 companies are incorporated, the role, experience and style of the courts in applying and making corporate law and administering and promoting corporate governance are unique.[416] Less well known, but equally impressive, are the expertise and role of the Enterprise Chamber of the Amsterdam Court of Appeal; this court is reported to act quickly, take rigorous action and to be highly influential on corporate governance in the Netherlands.[417] By contrast, when the Ackermann case came up in Germany as the result of bonus payments made after the end of a successful takeover, the highest criminal court construed the defendants' liability extensively and in a way that a civil law court with competence for and experience with corporate law matters would not have endorsed. The court clearly had a very limited understanding of practical needs and international customs.[418] Even more differences appear when one looks at Anglo-American courts on one side and at European continental courts on the other, quite apart from far-reaching differences in procedural law, e.g., notions of discovery or the jury system. A more flexible way of corporate governance enforcement would be the involvement of arbitral tribunals, but it seems that they do not yet play a major role in this field.

b) Cultural differences in litigation. Last, but not least, cultural differences in litigation play a major role. While the culture of the United States is highly prone to litigation, in the United Kingdom a fundamentally non-litigious culture to corporate governance prevails.[419] Yet, from a global perspective it appears that even countries with traditionally less litigation like Switzerland are becoming increasingly litigious as a result of industrialization, globalization and the pressures of modern, more anonymous societies. While Germany seems to be moving in the direction of the United States, Switzerland seems headed toward where Germany currently stands with regard to litigation as a solution to corporate governance issues. This pro-litigation trend can even be confirmed for a traditionally takeover- and litigation-hostile country like Japan. It is undeniable that this development comes at a social and cultural cost. Yet, shareholders, investors and other groups can also benefit from these developments.

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[416] *Cf.* for example ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW (1993); Mark J. Roe, *Delaware's Competition,* 177 HARV. L. REV. 588 (2004); 32USAI 8.
[417] 21Neth 3, 44, 46, in particular in the context of inquiry proceedings, see *supra* III D 1 b at note 347; Joseph A. McCahery & Eric P.M. Vermeulen, Conflict Resolution and the Role of Corporate Law Courts: An Empirical Study, ecgi Law Working Paper No 132/2009, http:/ssrn.com/abstract=1448192.
[418] *Cf.* MILHAUPT & PISTOR, *supra* note 23, at 84: the courts "may become the bulwark against change"; among German corporate lawyers the decision is considered to be a misjudgment, *cf.* UWE HÜFFER, AKTIENGESETZ § 87 comment 4 (9th ed., 2010).
[419] 31UK 27.

Which option to choose is up to each country and society, but transnational regulatory dialogue can help in making the determination.[420]

IV. Conclusions and Theses

1. *Corporate governance* is *the system by which companies are directed and controlled.* This system depends heavily on the prevailing shareholder structure of a country, e.g., dispersed as in the United States and Great Britain, or blockholdings, as for example in Germany. The main principal-agent conflict is then either between the shareholders and the board, or between the minority and the controlling shareholder/s. Protection of labor is usually not the task of corporate law. Internal corporate governance works within the corporation; external corporate governance works via takeovers and other market forces. For banks and other sectors there are specific forms of corporate governance.

2. Corporate governance in the shadow of the law, in particular through soft law, has traditionally played a major role at the stock exchanges. Since the Cadbury report in 1992, *the corporate governance code movement* has swept from the United Kingdom all over the world. The resultant codes usually concentrate on the board and internal corporate governance, including auditing. Enforcement is often by a "comply or disclose/explain" provision that is sometimes bolstered by law.

3. *The board* is a prime actor in corporate governance. Most countries have a one-tier board structure; in two-tier countries, the management board is separated from the supervisory board. Neither of the two systems is inherently better. Modern laws, therefore, let the corporations choose. Smaller boards are more effective than larger ones. The boards are composed of executive and non-executive, preferably independent, directors. As to the overall task of the board, it is debatable whether shareholder or stakeholder orientation is preferable.

4. Corporate governance reform focuses on improving proper *functioning of the board.* Having separate committees for auditing, nomination and remuneration is recommended. The role of the chairman of the board or in the two-tier system the supervisory board is key. More recently, this role has been balanced by a lead director. Regular evaluation of the board and its members, preferably assisted by outside experts, is on the advance. Regarding organization, internal control systems and risk management have gained momentum.

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[420] *Cf.* Hans-Jürgen Hellwig, *The Transatlantic Financial Markets Regulatory Dialogue, in* HANDBUCH CORPORATE GOVERNANCE, *supra* note 1, at 363.

5. The *rights, duties, and liabilities of the directors* are traditionally a domain of corporate law. More recently, there has been a focus on the duty of loyalty and on conflicts of interest. The standard of the duty of care varies. In any case, the business judgment rule opens a safe haven, provided the directors have acted on appropriate information. Most attention is given today to remuneration. The popular battle-cry in this context is "pay without performance." The real task is not to limit remuneration, but to do away with perverse incentives, in particular in financial institutions. Liability is an important incentive, especially for crisis situations, but it is not a panacea.

6. *Shareholder protection* is the major concern of corporate governance. In blockholder systems this protection is needed not so much vis-à-vis the board but vis-a-vis the controlling shareholder. Protection can be achieved either by imposing fiduciary duties on the controlling shareholder or by enacting specific rules for corporate groups as in Germany (*Konzernrecht*). Individual shareholders or minorities can also be given rights to protect themselves. Apart from financial rights, there are rights of information (disclosure), codecision (voice) and withdrawal (exit). Yet, a major concern is the old phenomenon of the rational apathy of shareholders. It remains to be seen whether the rise of institutional investors and of shareholder activism will bring more than an ephemeral change.

7. Corporate governance is also concerned with stakeholder interests, and especially with *labor.* Many European corporate governance systems are characterized by labor codetermination on the board. Germany goes the farthest by legally mandating codetermination at parity in certain corporations. The evaluation of codetermination is highly controversial, and in the end, it is an empirical question. Other means of protecting labor include information rights and codecision on labor issues without membership in the board, e.g., in the works council.

8. Corporate governance needs the help of *gatekeepers such as auditors* and other professionals. The most important instrument is mandatory auditing by external auditors. The auditors' tasks and the accompanying expectations have been constantly increasing, resulting in the so-called expectation gap. Auditors can fulfill their task of confidence-building only if they are independent. The extent of auditors' liability is highly controversial, and varies considerably.

9. Corporate governance rules are only as good as their enforcement. Corporate governance actors need some form of *supervision.* This can be done by capital market authorities as they exist today in most countries, by the stock exchanges or by self-regulatory bodies. Each of

these approaches has advantages and disadvantages. The right mix must be carefully calculated and is path-dependent.

10. The *role of the courts* in corporate governance can vary greatly. Some countries try to keep the courts out or to bring them in only as a last resort. In other countries, nearly every contested corporate governance question ends up in court. Procedural law is fundamentally different in various countries, as are the styles of the courts. In the end, a comparative view of corporate governance shows a great deal of convergence, but many path-dependent differences remain.

Appendix—List of Country Reports

(all on file with the author of this Article, cf. *supra* note #)

1Arg	Argentina: Professor Raúl Aníbal Etcheverry, Rafael Mariano Manóvil (Buenos Aires)
2Austr	Australia: Professor Jennifer Hill (Sydney)
3A	Austria: Professor Susanne Kalss (Vienna)
4B	Belgium: Alexia Autenne, Gilles Collard, Ariane Alexandre (Louvain-La-Neuve/Liège)
5Brazil	Brazil: Dr. Nelson Eizirik, Ana Carolina Weber (Rio de Janeiro)
6China	People's Republic of China: Professor Liu Junhai (Beijing), Dr. Knut Benjamin Pißler (Hamburg)
7Croat	Croatia: Ass't. Professor Dionis Juric (Rijeka)
8Denm	Denmark: Professor Jan Schans Christensen (Copenhagen)
9Fin	Finland: Professor Jukka Mähönen (Turku)
10RF	France: Professor Pierre-Henri Conac (Luxembourg)
11Georgia	Georgia: Professor Lado Chanturia, Dr. George Jugeli (Tbilisi/Bremen)
12Germ	Germany: Professor Hanno Merkt (Freiburg)
13Greece	Greece: Dr. Konstantinos N. Kyriakakis (Athens)
14Hung	Hungary: Péter J. Nikolicza (Budapest)
15Ire	Ireland: Professor Irene Lynch Fannon (Cork)
16It	Italy: Professor Francesco Denozza (Milan), Professor Paolo Montalenti (Torino)
17Jap	Japan: Professor Nobuo Nakamura (Tokyo)
18Lux	Luxembourg: Isabelle Corbisier, Professor Pierre-Henri Conac (Luxembourg)
19Macau	Macau: Professor Augusto Teixeira Garcia (Macau)
20Norw	Norway: Assoc. Professor Beate Sjafjell (Oslo)
21Neth	The Netherlands: Professor Jaap Winter, Jaron van Bekkum, Steven Hijink, Michael Schouten (Amsterdam)
22Pol	Poland: Professor Stanislaw Soltysinski (Warsaw)
23Port	Portugal: Professor Jorge Manuel Coutinho de Abreu (Coimbra)
24Serb	Serbia: Professor Mirko Vasiljevic (Belgrade)
25SKor	South Korea: Professor Young Shim (Seoul)
26Spain	Spain: Professor José Antonio García-Cruces Gonzáles, Professor Ignacio Moralejo-Menéndez (Saragossa)
27CH	Switzerland: Professor Peter V. Kunz (Bern)
28Swed	Sweden: Magdalena Giertz, Professor Carl Hemström (Uppsala)
29Taiw	Taiwan: Wen-Yeu Wang, Wang-Ruu Tseng (Taipei)
30Turk	Turkey: Dr. Asli E. Gürbüz Usluel (Ankara)
31UK	United Kingdom: Dr. Marc Moore (London)
32USAI	United States: Professor Arthur R. Pinto (New York)
32USAII	United States: Frank A. Gevurtz (Sacramento)

As to India cf. J. Paterson, Corporate governance in India in the context of the Companies Bill 2009, (2010) I.C.C..L.R. 44, 89, 131.

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