The German Law of and Experience with the Supervisory Board

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Abstract

Together with a number of other countries including China Germany has a two-tier board system, i.e. its stock corporation law provides for the division between the management board and the supervisory board. This is different from most other countries, for example the USA, the United Kingdom, Switzerland and others. Both board systems have their assets, yet in principle both fulfill adequately the task of control over management; there is no clear superiority of one of the two of them. The national board systems are highly path-dependent. Germany has had the supervisory board ever since the late 19th century when the state gave up its concession system, i.e. the approval and supervision of corporations by the state, and introduced a mandatory supervisory board to take over this task from the state. Germany strictly refuses to give shareholders the option to choose between the two systems. Labor codetermination in the supervisory board may be one of the reasons for this refusal. While European legislators have been rather prudent in regulating board matters, there has been a considerable de facto convergence between the two systems. Yet path-dependent divergences remain, as to Germany this is true particularly in respect of quasi-parity and full parity labor codetermination in the board of corporations, but also as regards stakeholder orientation and a codified law of groups of companies featuring corresponding board duties for both parent and subsidiary companies. The German Stock Corporation Act and the German Corporate Governance Code contain extensive provisions on both the management board and the supervisory board. The provisions on the supervisory board have been considerably reformed since the late 1990s. Today, German corporate governance under the two-tier board system is more or less in line with international good corporate governance. In Germany there are considerable controversies concerning (i) the diversity requirements of 2015, (ii) the definition of independence for supervisory board candidates, (iii) the pros and cons of mandatory quasi-parity and full-parity labor codetermination and (iv) the role of the nonbinding German Corporate Governance Code. The article pursues two goals: It informs a non-German audience on the regulation of the supervisory board in Germany, both by law and code, highlighting major current problems and controversies, and it undertakes a functional assessment of the experience with and the functioning of the supervisory board in a comparative perspective.

Keywords: Board, supervisory board, one- and two-tier systems, convergence, labor codetermination, German Stock Corporation Act, German Corporate Governance Code, European harmonization, liability, independent directors

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Abstract

Together with a number of other countries including China Germany has a two-tier board system, i.e. its stock corporation law provides for the division between the management board and the supervisory board. This is different from most other countries, for example the USA, the United Kingdom, Switzerland and others. Both board systems have their assets, yet in principle both fulfill adequately the task of control over management; there is no clear superiority of one of the two of them. The national board systems are highly path-dependent. Germany has had the supervisory board ever since the late 19th century when the state gave up its concession system, i.e. the approval and supervision of corporations by the state, and introduced a mandatory supervisory board to take over this task from the state. Germany strictly refuses to give shareholders the option to choose between the two systems. Labor codetermination in the supervisory board may be one of the reasons for this refusal. While European legislators have been rather prudent in regulating board matters, there has been a considerable de facto convergence between the two systems. Yet path-dependent divergences remain, as to Germany this is true particularly in respect of quasi-parity and full parity labor codetermination in the board of corporations, but also as regards stakeholder orientation and a codified law of groups of companies featuring corresponding board duties for both parent and subsidiary companies. The German Stock Corporation Act and the German Corporate Governance Code contain extensive provisions on both the management board and the supervisory board. The provisions on the supervisory board have been considerably reformed since the late 1990s. Today, German corporate governance under the two-tier board system is more or less in line with international good corporate governance. In Germany there are considerable controversies concerning (i) the diversity requirements of 2015, (ii) the definition of independence for supervisory board candidates, (iii) the pros and cons of mandatory quasi-parity and full-parity labor codetermination and (iv) the role of the non-binding German Corporate Governance Code. The article pursues two goals: It informs a non-German audience on the regulation of the supervisory board in Germany, both by law and code, highlighting major current problems and controversies, and it undertakes a functional assessment of the experience with and the functioning of the supervisory board in a comparative perspective.

Survey

I. The German Two-tier Board System in a Comparative Perspective

1. One-tier and Two-tier Boards Systems in Comparative Law

a) Two-tier Board Systems and their Assets

Germany has a two-tier board system.[1] This system separates the board into a management board and a supervisory board. The function of the former is as its name says the encompassing management of the company, management of course including delegation to and the help of senior management. The function of the latter is primarily the supervision and control of the management board. The basis for this is the right of the supervisory board to appoint and, under certain conditions, to dismiss the members of the management board as well as to fix their remuneration,[2] a power which does not exist in some other two-tier board countries such as China and makes a fundamental difference.[3] The separation between both boards is mandatory. The major asset of the two-tier board system is this clear separation between the management function and the control function, a separation that in Germany is bolstered by strict incompatibility. This system applies only to corporations; in the limited liability company (GmbH) there is no mandatory supervisory board unless the company is codetermined by law.

Traditionally the supervisory board has not confined itself to its control function but has acted as an advisor of, and sometimes as a co-leader with, the management board. More recently German supervisory boards have tended to concentrate more on their control function. The traditional Rhineland capitalism ("Germany Inc.") in which industry and banks closely cooperated in the supervisory boards of major companies by interlocking directorates is quickly fading away.[4] Yet in many corporations the supervisory board is still very powerful,[5] certainly in family-controlled corporations, but sometimes also in other major corporations, in particular if they are in financial difficulties or face an important reorientation, as for example the Deutsche Bank.

b) One-tier Boards Systems and their Assets

Internationally, the one-tier board system prevails, as for example in the United States, the United Kingdom, Switzerland and other countries. The two-tier board system exists in Germany, Poland, France, Italy, the Netherlands[6] as well as other countries such as China.[7]

The emergence of either one, the one-tier or the two-tier board system, had historical reasons. In the United Kingdom independent entrepreneurial ownership developed at an early stage without the state or another institution having a function in overseeing management. In Germany the origin of the mandatory supervisory board was in the 1870s when the state gave up supervision of stock corporations and entrusted supervision to a separate supervisory board instead. Later the emergence of labor codetermination in German supervisory boards petrified the two-tier structure while the United Kingdom, never having had such codetermination, stayed with its one-tier board system.

The major asset of the one-tier board is that all members of the board have easy access to information about the company and its management.[8] At the same time, at least more recently, the control function is exercised primarily by independent directors who are full members of the same unitary board. Yet contrary to the widespread opinion under each of the two systems,[9] comparative law and experience does not show a clear superiority of one of the two models.

2. The German Two-tier Board System and its Particularities: A Legal Survey

a) The Regulation of the Supervisory Board in the Stock Corporation Act

The two-tier board system is regulated in some detail in the German Stock Corporation Act of 1965. This Act and also the provisions on the two boards were frequently reformed, in particular by the introduction of (quasi-)parity labor codetermination in the supervisory board in 1976 and after the rise of the corporate governance movement in the nineties of the last century, for example by the Law on Control and Transparency in Enterprises of 1998. The provisions on the supervisory board in §§ 95-116 of the Stock Corporation Act regulate the size and the composition of the board particularly in view of labor codetermination. They contain rules on the personal qualification of supervisory board members, their appointment, term of office and removal. The maximum number of supervisory board mandates which a member may hold is ten (details in § 100). Strict incompatibility is prescribed by § 105. Several provisions concern the internal organization, the resolutions and the meetings of the supervisory board. Four key provisions set out the duties and rights of the supervisory board members (§ 107) and lay down restrictive rules on remuneration (§ 113), contracts between the company and supervisory board members beyond their supervisory position (§ 114) and the granting of credits of the company to them (§ 115). At the end there is a provision on the duty of care and responsibility of supervisory boards members (§ 116). According to the latter provision the same rules apply as for the duty of care and responsibility of management board members, but in 2009 a populist addendum was made: Supervisory board members are in particular personally liable for damages if they set unreasonable remuneration of the management board members. According to the Equality Act of 2015,[10] in listed companies with parity or quasi-parity labor codetermination, the supervisory board shall comprise at least 30 per cent women and at least 30 per cent men. In the other companies covered by the Equality Act the supervisory board shall determine targets for the share of women. The enactment of gender equality in its very demanding form, i.e. a 30 per cent threshold to be reached by stock-exchange traded companies with parity or quasi-parity labor codetermination from 1 January 2016 on for any new election, has been highly controversial.[11]

These rules in the Stock Corporation Act contain just the bare skeleton of the law concerning the supervisory board. There is extensive case law and even more extensive legal literature, in particular in the typically German "Kommentare", i.e. many volumes of comments on the law. The Großkommentar zum Aktiengesetz deals with §§ 95-116 in 1,450 pages.[12] German law is known for not just being codified law and case law but for being very much "academic law". The two leading law reviews in the field are the ZGR and the ZHR; specialized law reviews include Die Aktiengesellschaft and NZG.

b) The Regulation of the Supervisory Board in the Corporate Governance Code

The German Corporate Governance Code as of May 2015 [13] contains non-binding recommendations for German stock exchange-traded corporations. It aims at making German corporate governance transparent and better understandable and therefore also sets out in a nutshell the law concerning management and control in the corporation. While also containing recommendations regarding shareholders, the general assembly and the reporting and audit of the annual financial statements, the main parts of the Code deal with the two boards. As to the management board the remuneration is regulated in considerable detail. As to the supervisory board the tasks and responsibilities of the board and its chairman, the formation of committees, composition and compensation, and conflicts of interest are regulated. The emphases here are on setting up committees (most importantly the audit committee, but also the nomination committee), independent directors (in the supervisory board only) and conflicts of interest. According to the Code members of the management board of a listed company shall not accept more than a total of three supervisory board mandates in non-group listed companies. The Code states expressly that the task of the supervisory board is to advise regularly and supervise the management board and that it must be involved in decisions of fundamental importance to the enterprise.

The 2015 amendments adapt the Code to the Equality Act as to gender equality, instruct the supervisory board to make sure that new candidates for the supervisory board can devote the expected amount of time required and recommend transparency where a supervisory board member took part in only half or less of the meetings of the board and of the committees to which he belongs (participation by telephone or video conference counts). All these amendments were very controversial and added to the criticism of the Commission and the Code in general.[14]

3. Giving Shareholders a Choice Between the Two Systems

a) The International Trend

The international trend is clearly towards giving shareholders a choice between the one-tier and the two-tier systems.[15] This is the case for example in France, the Netherlands, Belgium, Luxembourg, Finland and most recently Denmark as well as in some other non-European countries. Some other countries, including Italy and Portugal, even provide for a choice among more than two models. The European Union as well has provided for a choice between the one-tier and the two-tier systems in the European Company (Societas Europaea, SE).

b) German Conservatism

Germany is an outlier in this respect. It has consistently refused to give shareholders a choice between the two systems, even though pleas for such a reform have long since been on the table.[16] Most recently the German Lawyers Association has also recommended such an option to the German legislator by a large majority of the votes.[17] As described before, both systems have developed for historical reasons, are path-dependent and have their pros and cons. The shareholders know better than the legislators what suits them, and they also bear the risk in a competitive environment if they make the second-best choice. The restraint of Germany is even less justified since the European companies in Germany do have this choice. The real reason for the restrictive attitude is, besides sheer traditionalism and conservatism, the fact that the trade unions do everything possible to preserve (untouched) labor codetermination in the boardroom at parity or quasi-parity, and they know very well that such codetermination would be much less acceptable in a one-tier board. Thus they shy away from having the flexible negotiation system in force for the European Company under European law extended to German corporations.

4. The European Dimension of Board Regulation

a) Low-key Harmonization by Three EU Recommendations

The European Union has done very little as concerns board regulation. This is understandable, because the far-fetched harmonization plans laid down in the Draft Fifth Company Law Harmonization Directive failed completely. Yet two recommendations of the European Commission were quite influential, also in Germany, not as far as legislation was concerned, but as to recommendations in the German Corporate Governance Code. The Recommendation of 14 December 2004[18] dealt with the remuneration of directors of listed companies and was revised by the Recommendation of 30 April 2009.[19] The Recommendation of 15 February 2005[20] related to the role of non-executive or supervisory directors and the committees of the (one-tier) board or the supervisory board. For both Recommendations there is also an Implementation Report.[21] Furthermore, as already mentioned, the Statute on the European Company of 2001 extends an option right to the founders and shareholders to choose between the one-tier board and the two-tier board and contains some basic provisions on the board. Labor codetermination in the European Company is extensively regulated in a directive that introduces a compromise that is much more flexible and leaves room for negotiation between capital and labor. More generally it has been complained in Germany that the focus of the European Commission when dealing with the board has been on the unitary board, and in so doing extending the same rules to the two-tier board without taking into consideration its specificities and possibly different problems and needs. In reaction to this criticism the European Commission has stated several times that it has not taken sides in the discussion on the pros and cons of the two systems.

b) The European Commission's Action Plan and its Failure to Address Board Reform

The European Commission's Action Plan on European Company Law and Corporate Governance of December 2012[22] picked up on the popular topic of remuneration policies and individual remuneration, though not by imposing more rules on the board (viz. the supervisory board) but by proposing a remuneration report and, more far-reaching, shareholder say on pay. As to this a draft directive is pending in the legislative process and may be enacted by winter 2015/16. Yet as to many other reform proposals brought forward in the Member States the Commission has remained silent. The emphasis on independent directors that was still preponderant in the Recommendation of 2005 has given way to a more nuanced view on the composition of the (supervisory) board. In the end the financial crisis has taught the lesson that while independence is good to have, supervision and control by persons who have lengthy experience and are experts in the field is a necessity. An important point for this re-evaluation may also have been the insight gained after the financial crisis that banks are special and so is corporate governance of banks.[23] Empirical evidence has been found that companies and boards of those financial institutions that were more inclined to look after corporate governance and the interests of the shareholders – i.e. that were perfectly complying with good corporate governance standards as developed for companies in general – actually did worse during the financial crisis.[24]

5. Convergence and Divergence

a) Signs of Convergence

As to the two board systems, a recent comparative study of boards in Europe[25] found that there is considerable convergence of the two systems and gave four reasons for the phenomenon. First, the one-tier board to a large degree makes use of delegation to the management and considers as its main task monitoring the exercise of the delegated powers. Secondly, both boards depend on the management and the information given to the board by management. Even the decisions the board (viz. the supervisory board) takes must usually be prepared by management. Thirdly, the movement toward independent directors that has started in the USA and the United Kingdom is leading to a sort of de facto separation within the unitary board. Furthermore, the separation between the CEO and the chairman that has started in the United Kingdom has subsequently become a good corporate governance requirement and is accepted, even in stricter regulation, by German legislators. Finally, convergence tendencies exist also in the exercise of certain functions such as strategy, risk management and internal control.

b) Path-dependent Divergence

The American theory that corporate law and more specifically the law on boards will ultimately converge has not been matched by corporate reality,[26] certainly not in its extreme form of “the end of corporate law”.[27] This is not the place to go into this extensive international discussion. It suffices here to point to the specific path-dependent characteristics of German corporate law, including the law on the supervisory board.[28] In respect of the board, these path-dependencies include: the two-tier board system, stakeholder orientation, labor codetermination on the supervisory board and the law on groups of companies which comprises specific duties for the boards of both the parent company and the subsidiaries.

II. The German Law of the Supervisory Board: Problems and Experiences

1. The Composition of the Board, in Particular Labor Codetermination and the Stakeholder Perspective

a) Quasi-parity Labor Codetermination in German Boards

The primary characteristic of the boards of major German stock corporations is labor codetermination.[29] Labor codetermination in the boardroom is quite common in Europe, but only up to one third of the supervisory board members as in China[30]. According to the Codetermination Act of 1976, corporations with more than 2,000 employees are subject to quasi-parity labor codetermination. Quasi-parity means that both capital and labor have an equal amount of seats in the supervisory board, but in cases of deadlock the chairman of the supervisory board has a double vote. About 280 stock corporations and altogether 700 companies are subject to quasi-parity labor codetermination.[31] Besides quasi-parity labor codetermination, there are still two other forms of codetermination. About 695 stock corporations and altogether 1,500 companies are subject to one-third-parity codetermination, this codetermination with a third of the seats of the supervisory board going to labor is mandatory for companies with more than 500 employees. But there is also full parity labor codetermination. This is mandatory on coal, iron and steel companies and, upon pressure by the trade unions, was kept by the legislature even for those companies that are no longer active in these sectors. In full parity codetermination the law provides for an additional independent member, the 21st, who casts the decisive vote in case of a deadlock. The number of companies under full parity codetermination is small, but altogether around 1,000 stock corporations in Germany are subject to labor codetermination in their boards. Labor codetermination is in principle limited to the supervisory board, but in companies with more then 2,000 employees a “labor director” (Arbeitsdirektor) must be appointed in the management board. Usually he is a member of a trade union which is represented in the company.

b) The Experience with Labor Codetermination

To begin with one should realize that quasi-parity amounts in most cases to full parity since the chairman of the supervisory board will be very reluctant to make use of the second voice in order not to spoil labor relations in the corporation. In nearly all cases compromises will be found before the double vote comes into the play. Furthermore, under German law the influence of labor interests are further strengthened by the fact that the stakeholder perspective is mandatory for the management board. Under the predecessor of the Stock Corporation Act of 1965 this was stated expressly in the Act. The 1965 Act says only that the management board has direct responsibility for the management of the company.[32] Yet it is generally understood that this does not amount to a change, instead meaning that the management board has to manage the company not just in the interest of the company's shareholders, but also has to take into consideration the interest of labor and the public good and to weigh these interests.[33]

More generally the consequences of labor codetermination on the corporation and on the economy are very much disputed, the debated opinions, arguments and standpoints being very often politically motivated. The empirical studies are for the most part contradictory, and there is a full break between the evaluation by most economists on the one side and the sociologists on the other side.[34] The latter emphasize the contribution of labor codetermination to compromise solutions and the appeasement of capital and labor, and indeed in the reorganization process of Eastern German companies after reunification, labor codetermination definitely helped. This is also true in cases of financial difficulties, when lay-offs and other major cuts in labor conditions are necessary for the survival of the company. On the other side there are considerable disadvantages such as the slowing down of the decision-making process, less readiness to agree to a restructuring of the company having consequences for labor, no openness to (hostile) takeovers, in particular if the bidder comes from abroad, and a strong reluctance to accept new management board members if they have a record of restructuring and of investments abroad and if there are fears that the workforce at home will be diminished. All this carries consequences and costs not only for the single enterprise but also for the economy as a whole, though right now the German economy does not fear this in terms of competitiveness. But on the European level it cannot be disputed that German labor codetermination was one of the major stumbling blocks for the harmonization of company law in the European Union (for which opinions differ as to the pros and cons). The European Company came about only after many decades and under a very difficult, costly and burdensome compromise. The European Private Company had to be abandoned by the European Commission, primarily due to German labor codetermination. Consequently, industry and academia proposals providing solutions more flexible than fully mandatory labor codetermination have been brought forward, but up to now without any prospects of being accepted by legislators. In any case, German (quasi-)parity labor codetermination is not welcome in most of the other Members States of the European Union, a fact that is even conceded by foreign labor lawyers.[35]

2. The Internal Structure of the Supervisory Board and its Relation to the Management Board

a) The Internal Structure and Functioning of the Supervisory Board

Germany has by far the largest boards in Europe.[36] This is mostly due to labor codetermination. For companies subject to quasi-parity codetermination the board must comprise 12, 16 or 20 supervisory directors, depending on the number of employees in Germany (only in Germany and not abroad – this being an issue which is pending before the courts). In companies subject to full parity codetermination the board has 21 members. It is generally understood that a smaller size would be preferable for the work of the board. This is one of the reasons why German companies sometimes choose the legal form of a European Company, under which there is more flexibility.[37]

Traditionally, independent directors are not mandatory under the German Stock Corporation Act, neither in the management board nor in the supervisory board. But since 2005, in the case of companies that are oriented toward the capital market,[38] at least one member of the supervisory board must have expert knowledge in the fields of accounting or annual auditing. In the reform discussion it has been claimed that expert knowledge not only in one, but in both fields should be required. Yet under the German Corporate Governance Code independent directors are deemed appropriate.[39] It is controversial whether labor representatives in the supervisory board who are employed by the corporation can really be considered as independent as the trade unions and the government maintain.[40] As to union members in the supervisory board the law and experience in the Netherlands is interesting, there only members of unions that are not dealing with the corporation are admitted. But it must be kept in mind that since the financial crisis the pendulum has swung back from too much reliance on independent directors to emphasizing more the competence and experience of supervisory board candidates. According to the Code the supervisory board has to be composed in such a way that its members as a group possess the knowledge, ability and expert experience required to properly complete its tasks.

German law allows only natural persons to be member of the supervisory board. This is in contrast to the law in other countries and has been criticized also in Germany. Several further personal qualifications in the law are of a negative nature.[41] First, as mentioned before, the supervisory board member may not have more than 10 supervisory board mandates in other commercial enterprises which are required by law to form a supervisory board. In the reform discussion, allowing only five has been considered more appropriate and the German Corporate Governance Code recommends only three (with an exception for groups of companies).[42] Then the law provides for incompatibilities between a seat in the supervisory board and being the legal representative of a controlled enterprise of the company, and it prohibits certain interlocking directorships. The most recent provision dating from 2009 provides that a person may not be a member of the supervisory board where he or she was a member of the management board of the same listed company during the past two years, unless he is elected upon nomination by shareholders holding more than 25 per cent of the voting rights of the company. This provision stopped the former widespread practice of changing over from the management board into the chair of the supervisory board, but it is generally criticized for being excessively broad and inflexible.[43]

As to the internal organization of the supervisory board, the law addresses the formation of committees but is very lenient and, without mandating, merely allows the supervisory board to appoint among its members one or more committees, in particular for purposes of preparing deliberations and resolutions or for supervising the execution of its resolutions. Not even an audit committee is mandatory by law, but if an audit committee is set up in a company which is oriented towards the capital market at least one member of it has to be independent and have the above-mentioned expertise in the fields of accounting or annual auditing.[44] But the German Corporate Governance Code recommends the formation of three committees: for audit, nomination and compensation, the audit committee of course being the most important among them. Nearly all major stock corporations have these three committees, in financial institutions even more, in particular a risk committee. According to the Code the chairman of the supervisory board shall not be chairman of the audit committee.

Further requirements concern the compensation of supervisory board members and contracts with them. The compensation must be determined either in the articles or be set by the shareholders meeting. It shall bear a reasonable relationship to the duties of the members of the supervisory board and the condition of the company.[45] Contracts entered into by a supervisory board member on the provision of professional services in addition to his services as such a member or on undertaking a special assignment require the consent of the supervisory board in order to be valid.[46] This has led to a considerable change of the former board practices under which supervisory board members received additional compensation, which called their independence into question.[47]

b) The Relations Between the Supervisory Board and the Management Board: Control Ex Ante and Co-decision in Fundamental Affairs

The conception of the Stock Corporation Act is that while the two boards have clearly separate functions and the main task of the supervisory board is the control of management, the two boards should cooperate in running the corporation, not only in daily business but also in strategic decision-making. The supervisory board has been characterized as a "co-deciding control organ".[48] It is not questioned that the advice of the supervisory board is considered to be important for the management board, despite the fact that management is legally reserved to the management board. Under the impression of the scandals and failures in the early 1990s, the emphasis as to the function of the supervisory board has moved from mainly ex post control to also control ex ante with a preventive function. This implies that the supervisory board also has, though limited, a right of entrepreneurial initiative.[49] Under certain circumstances the law goes further and empowers the supervisory board with important entrepreneurial tasks, for example as to those management tasks for which the consent of the supervisory board is necessary under the articles of association. Under a reform act of 2002, the articles or the supervisory board is even obliged by law to determine that specific types of transactions may be entered into only with the consent of the supervisory board.[50] According to some voices the consent requirement should apply to all fundamental decisions in the company, yet this would go too far.[51] Among other instances of legally mandated co-decision of the two boards,[52] one should be mentioned specifically. The Takeover Act allows the management board to take frustrating actions against a (hostile) takeover bid if the supervisory board gives its consent.[53] With this provision the German legislature has made use of the right given by the Takeover Directive to opt out of the anti-frustration rule. It is quite obvious that the legislators, under the influence of German industry and not-so-independent academics, expect that a coalition of the two boards and labor will fight off unwelcome takeovers, in particular if they come from abroad.[54]

3. The Tasks, Rights and Duties of the Supervisory Board, in Particular Control Over the Management Board

a) The Tasks, Rights and Duties of the Supervisory Board

The supervisory board has several rights that enable it to control management. The primary right has already been mentioned, namely the right to nominate and possibly to dismiss the members of the management board for cause as well as the right and sometimes the duty to sue members of the management board in the court. This strong position of the German supervisory board is different in some other two-tier systems such as China. [55] The supervisory board has extensive rights of inspection and information in order to fulfill its control function.[56] The information right of the supervisory board is essential and goes very far. Usually the supervisory board gets its information from the management board, but under special circumstances also directly from key function holders in the corporation, for example from the compliance officer or the heads of the corporation's risk management and internal audit. The supervisory board may also commission individual members or, with respect to specific assignments, special experts to carry out the inspection and examination of the books and records of the company as well as the assets of the company. The supervisory board shall instruct the auditor as to the annual financial statements and consolidated financial statements. The supervisory board represents the company both in and out of court as against the management board. This is particularly relevant if one or more members of the management board have violated their duties. In such cases the supervisory board is usually under a legal obligation to enforce the liability claim of the company before the courts.[57] Further rights of the supervisory board against the management board and its members concern, *inter alia*, remuneration, the competition of management board members with the company, the extension of credit to them and in particular the information duties of the management board towards the supervisory board.

b) The Experience with the Control of the Supervisory Board over the Management Board

Overall the prevailing opinion in Germany unlike in China[58] seems to be that the experience made with the control of the supervisory board on the management board, while by no means being perfect, is still more or less satisfactory, though there are of course cases where this control has failed. This has particularly been the case with the German state banks during the financial crisis.[59] Yet the financial crisis and the situation of the German state banks were exceptional, and the experience made there cannot be easily transposed to corporations in general.[60] As a consequence the regulation and supervision of banks after the financial crisis have stiffened dramatically, and rightly so since the corporate governance of banks is very special and cannot be equated with the corporate governance of non-banks.[61] Yet also as to the latter there is a discussion whether the liability provisions need to be improved, as will be discussed in the next section.

4. The Liability of the Supervisory Board

a) The Legal Situation

The members of the supervisory board are liable if they violate their duties of care and of loyalty in the same way as management board members.[62] This means that the extensive, well-established doctrine and case law on such liability[63] are applicable by analogy to supervisory board members too. The members of the supervisory board are liable individually. In case of illegal actions by other members or the board as a whole they must not only abstain from voting, but take the necessary action including informing the chairman of the board or, if need be, the shareholders and in the case of banks in extreme cases even the bank supervisory agency. The analogous application encompasses also the business judgment rule, according to which directors are not deemed to have violated their duties if, at the time of taking the entrepreneurial decision, they had good reason to assume that they were acting for the benefit of the company on the basis of adequate information.[64] Furthermore, by the same analogy supervisory board members bear the burden of proof in the event of a dispute as to whether or not they have employed the care of a diligent and conscientious director.[65] Yet this rule has become subject to serious criticism, in particular regarding cases in which a director has already left the corporation and has no more access to the corporate files.[66]

b) The Experience: Growing Risk of Liability After the Financial Crisis

The German liability regime for directors, both management and supervisory board members, is rather far-reaching and strict when one looks solely at the Stock Corporation Act. But traditionally there has been little enforcement, though a number of cases have arisen, in particular as to limited liability companies (GmbH) and small cooperative banks. This is in line with international findings on the liability or rather non-liability of outside directors and seems also to be the case in China[67]. Yet the ARAG/Garmenbeck decision of the German Federal Court of Appeals (Bundesgerichtshof)[68] and the financial crisis have led to an important change; under the former the supervisory board is required to bring an action against a management board member who has violated his duties, and the financial crisis has evidenced gross management mistakes with enormously high damages. Now many cases are brought, both under civil law and under criminal law.[69] As a consequence there is an ongoing, controversial discussion on the reform of the liability regime for directors, yet most recently the German Lawyers Association has sought only minor reforms (including changing the burden of proof on the side of the director) while leaving the system as such untouched.[70] Up to now there are no signs that German legislators will step in, after having ceded in 2010 to populists claims in favor of prolonging the limitation period for liability claims to 10 years if the corporation is listed at the stock exchange.[71]

5. Concurring Control by Shareholders, Auditors and the Markets

a) Control of the Shareholders over the Board

The control of the supervisory board over the management board works fairly well, but as we have seen is by no means perfect. It is therefore important to consider whether there are other persons, institutions and mechanisms that also exercise control. These are first of all the shareholders, i.e. the principals who have entrusted the supervisory board to exercise for them the control function over the management board. The shareholders control the supervisory board directly by electing and, if necessary, revoking its members.[72] Revocation is possible before expiration of the term of office, which is usually up to five years,[73] but only with a qualified majority of three-fourths of the votes cast. The shareholders also have an indirect influence on the revocation of management board members by the supervisory board. Normally the supervisory board members are elected for five years and may not be dismissed earlier unless for cause. Yet such cause is also deemed to be a vote of nonconfidence by the shareholders' meeting, unless such vote of no-confidence was made for manifestly arbitrary reasons.[74] Furthermore the shareholders meeting may adopt a resolution whereby claims of the company for damages against certain management board members shall be asserted and, if the facts are unclear, that special auditors shall be appointed. In both cases the resolution is adopted by a simple majority and, if this majority is not reached, there are special rights for a minority with a share capital of one per cent or shares of at least 100,000 Euros (nominal value).[75] The experience made with these rights shows, however, that they are rarely exercised due to the rational apathy of small shareholders; a controlling shareholder, by contrast, will have his way, at least in the end, through his influence on the supervisory board members. Yet more recently the rise of institutional shareholders may lead to more control, at least indirect control, over the management board.

b) Transparency and the Role of Auditors and Other Gatekeepers

Transparency and disclosure are well-known means of corporate governance and help also to discipline management.[76] Transparency and disclosure requirements, both by corporate law and even more so by capital market law, have become increasingly strict, partly because of the influence of European law. Traditionally the most important part of transparency and disclosure is the annual accounts, but they come only ex post, while capital market law requirements on disclosure usually function ex ante. Control by transparency and disclosure presupposes, of course, reliability, as well as control by independent external agents such as auditors. The law on auditing and auditors has been reformed most recently by the European Union in reaction to the financial crisis and is now rather strict.[77] Other gatekeepers like rating agencies, financial analysts and proxy advisers help by evaluating the companies and the performance of the management. They are becoming increasingly regulated, again mostly as a consequence of European law.[78]

c) The Control of the Markets Over the Board, in Particular of the Market for Corporate Control: Limited Experience

Apart from internal corporate governance there is external corporate governance exercised by the markets. Markets that are relevant for disciplining management are the product market, the labor market (market for corporate directors) and the market for corporate control. The product market functions well, though of course varying according to the relevant sector; the market for corporate directors functions well too, albeit more nationally as foreign directors on German boards are still the exception, though recently their number is increasing. While M & A is blossoming also in Germany, the actual market for corporate control, i.e. via public takeover, has traditionally not been very developed, hostile takeovers being very rare.[79] One reason for this is the fact that German shareholdership is for the most part not dispersed, with families and groups of companies most frequently in control. Another reason is the fact that German law did not adopt the anti-frustration rule British style, but rather allows management to take defensive actions without asking the general assembly for its consent. Under the German takeover act it is sufficient if the supervisory board agrees.[80]

III. Summary

1. Together with a number of other countries Germany has a two-tier board system, i.e. its stock corporation law provides for a (mandatory) division between the management board and the supervisory board. This is different from most other countries, for example the USA, the United Kingdom, Switzerland and others that have a one-tier or unitary board. Both board systems have their assets: the two-tier system offering the clear division of management and control function, the one-tier system providing the direct information flow within the board, also to independent directors. Yet in principal both fulfill adequately the task of control over management; comparative law and experience does not show a clear superiority of one of the two systems.

2. The national board systems are highly path-dependent. Germany has had the supervisory board ever since the late 19th century when the state gave up its concession system, i.e. the approval and supervision of corporations by the state, and introduced a mandatory supervisory board to take over this task from the state. More recently, the traditional Rhineland capitalism ("Germany Inc.") in which industry and banks closely cooperated in the supervisory boards of major companies by means of interlocking directorates has been quickly fading away.

3. Germany has stuck to the two-tier system ever since and strictly refuses to give shareholders the option to choose between the two systems. This is so despite the fact that the European Company that exists under German law does have such an option as required by European law. Labor codetermination in the supervisory board may be one of the reasons for this refusal.

4. While European legislators have been rather hesitant in regulating board matters, there has been a considerable de facto convergence between the two systems. Still, path-dependent divergences remain; as to Germany this can be seen in particular in quasi-parity and full parity labor codetermination in the board of corporations, but also in stakeholder orientation and a codified law of groups of companies with corresponding duties of the board of both the parent company and the subsidiaries.

5. The German Stock Corporation Act and the German Corporate Governance Code contain extensive provisions on the management board and the supervisory board. The provisions on the supervisory board in the Act have been considerably reformed since the last quarter of the 1990s, and the provisions in the Code have been continuously reformed, most recently in 2015. Today German corporate governance under the two-tier board system is more or less in line with modern international corporate governance.

6. In Germany there is considerable controversy concerning the diversity requirements of 2015, the definition of independence for supervisory board candidates, the pros and cons of quasi-parity and full-parity labor codetermination in the board, and the role of the German Corporate Governance Code.

[#] Klaus J. Hopt, Professor and Director (emeritus) at the Max Planck Institute for Comparative and International Private Law, Hamburg. The article benefits from the experience made by having been a member of the European Commission's High Level Group of Company Law Experts and of the Stock Exchange Experts Commission at the Federal Ministry of Finance as well as being a member of the European Company Law Experts (ECLE). The article goes back to a lecture at a conference held at the Tongji University in Shanghai on 23 and 24 October 2015. As to the occasional comparisons with the Chinese two-tier system the presentation by Professor Guo Li and Mr. Matsuo Takayuki from Peking University Law School was helpful.

[##] The article pursues two goals: It informs a non-German audience on the regulation of the supervisory board in Germany, both by binding statutory law and nonbinding corporate governance code rules, highlighting major current problems and controversies, and it undertakes a functional assessment of the functioning of the supervisory board in a comparative perspective. The article uses the English translation of the Stock Corporation Act as of 1 December 2011 by Norton Rose.

[1] Cf. (apart from a host of German language contributions) *K. J. Hopt,* Comparative Corporate Governance: The State of the Art and International Regulation, The American Journal of Comparative Law LIX (2011) 1 at 21 et seq. with references to the board systems of many European and other countries; *P. Davies/K. J. Hopt,* Corporate Boards in Europe – Accountability and Convergence, The American Journal of Comparative Law LXI (2013) 301 and with a more detailed version *idem et al.,* Boards in Law and Practice: A Cross-Country Analysis in Europe, in: P. Davies/K. J. Hopt/R. G. J. Nowak/G. van Solinge, eds., Corporate Boards in Law and Practice, A Comparative Analysis in Europe, Oxford 2013, p. 3; *M. Roth,* Corporate Boards in Germany, in: *idem,* p. 256; *H. Merkt*, Germany, Internal and external corporate governance, in: A. M. Fleckner/K. J. Hopt, eds., Comparative Corporate Governance, A Functional and International Analysis, Cambridge 2013, p. 521; *J. J. du Plessis/B. Großfeld/C. Luttermann/I. Saenger/O. Sandrock/M. Casper,* German Corporate Governance in International and European Context, 2d ed., Berlin/Heidelberg 2012; *K. J. Hopt,* The German Two-Tier Board (Aufsichtsrat), A German View on Corporate Governance, in: K. J. Hopt, E. Wymeersch, eds., Comparative Corporate Governance - Essays and Materials, Berlin, New York 1997, p. 3; *idem,* The German Two-Tier Board: Experience, Theories, Reforms, in: K. J. Hopt/H. Kanda/M. J. Roe/E. Wymeersch/S. Prigge, eds., Comparative Corporate Governance – The State of the Art and Emerging Research, Oxford 1998, p. 227; *Prigge,* A Survey of German Corporate Governance, in: idem, p. 943.

[2] § 84 of the German Stock Corporation Act.

[3] Cf. *Guo Li/M. Takayuki,* The Chinese Board of Supervisors System: An International Comparison, lecture at the conference held at the Tongji University in Shanghai on 23 and 24 October 2015.

[4] *W.-G. Ringe,* Changing Law and Ownership Patterns in Germany: Corporate Governance and the Erosion of the Deutschland AG, The American Journal of Comparative Law LXIII (2015) 493. It is controversial to what degree German banks exercised supervision and control of the stock corporations, but it certainly was the case when financial difficulties of the corporation were looming.

[5] There were and are of course also cases in which the supervisory board is rather a „retirement house". Cf. as to China *G. Li/M. Takayuki* (note 3).

[6] *Davies/Hopt,* Boards in Law and Practice: A Cross-Country Analysis in Europe, in: Davies/Hopt/Nowak/van Solinge (note 1) 1 at 9 et seq.
[7] Cf. *G. Li/M. Takayuki* (note 3). For understanding the Chinese legal system three articles were particularly helpful: *F. Jiang/K. A. Kim,* Corporate governance in China: A modern perspective, Journal of Corporate Finance 32 (2015) 190 and *Qingxiu Bu,* Will Chinese Legal Culture Constrain Its Corporate Governance-Related Laws? Journal of Corporate Law Studies 2015, 103; *C. J. Milhaupt,* Chinese Corporate Capitalism in Comparative Context, Columbia Law School Working Paper No. 522, October 13, 2015.
[8] *P. L. Davies,* Board Structure in the UK and Germany: Convergence or Continuing Divergence? (2001) 2 International and Comparative Corporate Law Journal (ICCLJ) 435.
[9] The academics and practitioners participating in the 1997 conference on comparative corporate governance at the Hamburg Max Planck Institute for Comparative and International Private Law (for the publication see note 1), both from Germany and the UK and USA, were convinced that their respective system was the better one.
[10] Law on Equal Participation of Men and Women in Private-Sector and Public-Sector Management Positions, German Federal Gazette I 2015, 642; Section 25 subsection 1 of the Introductory Law of the German Stock Corporation Act, German Federal Gazette I 2015, 656.
[11] *C. H. Seibt,* Geschlechterquote im Aufsichtsrat und Zielgrößen für die Frauenbeteiligung, Zeitschrift für Wirtschaftsrecht (ZIP) 2015, 1193.
[12] *K. J. Hopt/M. Roth* in Großkommentar Aktiengesetz, 4th ed., Berlin et al. 2006, vol. 4.
[13] Available on the website of the German Corporate Governance Code Commission.
[14] See *K. J. Hopt,* Der Deutsche Corporate Governance Kodex: Grundlagen und Praxisfragen, in: Festschrift für Hoffmann-Becking, Munich 2013, p. 563.
[15] *Hopt* (note 1), Am. J. Comp. L. Law LIX (2011) 1 at 22 et seq.
[16] For example *K. J. Hopt/P. C. Leyens,* Board Models in Europe, Recent Developments of Internal Corporate Governance Structures in Germany, the United Kingdom, France and Italy, ECFR 2004, 135 at 163 et seq. with further references.
[17] German Lawyers Association, 69th Biannual Meeting (Deutscher Juristentag), Munich 2012, Resolutions of the Commercial Law Division, Resolution 19: "The legislature should give all stock corporations as in the European Company (SE) the choice between the two-tier and the one-tier board system." The vote was 53 in favor and 26 opposed, with 5 abstentions.
[18] Commission Recommendation 2004/913/EC of 14 December 2004 fostering an appropriate regime for the remuneration of directors of listed companies, OJEU L 385/55, 29 December 2004.
[19] Complementing Recommendation 2009/385/EC of the Commission from 30 April 2009, COM(2009) 211 final.
[20] Recommendation 2005/162/EC of the Commission from 15 February 2005, OJEU L 52/51, 25 February 2005.
[21] European Commission, Implementation Report from 2 June 2010, COM(2010) 285 final.
[22] European Commission, Action Plan: European Company Law and Corporate Governance – A Modern Legal Framework for More Engaged Shareholders and Sustainable Companies, Brussels, 12 December 2012, COM(2012) 740/2. *See K. J. Hopt,* Corporate Governance in Europe, A Critical Review of the European Commission's Initiatives on Corporate Law and Corporate Governance, New York University Journal of Law & Business, forthcoming.
[23] *K. J. Hopt,* Corporate Governance of Banks and Other Financial Institutions After the Financial Crisis, Journal of Corporate Law Studies (J. Corp. L. Stud.) 13 Part 2 (2013) 219. On corporate governance of banks see *K. J. Hopt/G. Wohlmannstetter,* eds., Handbuch Corporate Governance von Banken, München 2011,
[24] *Idem* (note 23), J. Corp. L. Stud. 13 Part 2 (2013) 219 at 239 et seq.
[25] *Davies/Hopt* (note 1), Am. J. Comp. L. LXI (2013) 301 at 310 et seq.
[26] *Idem* (note 1), Am. J. Comp. L. LXI (2013) 301 at 356 et seq.

[27] *H. Hansmann/R. Kraakman,* The End of History of Corporate Law, (2001) 89 Georgetown Law Journal 439; cf. *H. Hansmann,* How Close is the End of Corporate Law? (2006) 31 Journal of Corporate Law 745.
[28] Most recently *K. J. Hopt,* Law and Corporate Governance: Germany within Europe, Journal of Applied Corporate Finance, forthcoming.
[29] See the comprehensive commentary by *P. Ulmer/M. Habersack/M. Henssler,* Mitbestimmungsrecht, 3d ed., Munich 2013. For a comparative evaluation see *Davies/Hopt* (note 1) Am. J. Comp. L. LXI (2013) 301 at 339 et seq.
[30] *G. Li/M. Takayuki* (note 3).
[31] For these and the following figures see *M. Roth* (note 1), p. 256 at 288 et seq. with further references.
[32] § 76 subsection 1 of the Stock Corporation Act.
[33] *U. Hüffer/J. Koch*, Aktiengesetz, 11th ed., Munich 2014, § 76 with many references.
[34] *K. Pistor,* Corporate Governance durch Mitbestimmung und Arbeitsmärkte, in: P. Hommelhoff/K. J. Hopt/A. v. Werder, eds., Handbuch Corporate Governance, 2d ed., Cologne 2009, p. 231; *idem,* Codetermination: A Sociopolitical Model with Governance Externalities, in: M. M. Blair/M. J. Roe, eds., Employees and Corporate Governance, Washington D.C. 1999, p. 163; *E. McGaughey,* The Codetermination Bargains: The History of German Corporate and Labour Law, LSE Law, Society and Economy Working Papers 10/2015.
[35] *P. Davies,* Efficiency Arguments for the Collective Representation of Workers: A Sketch, Oxford Legal Studies Research Paper No. 66/2014.
[36] *Heidrick & Struggles,* Challenging board performance, 2011, p. 37; *M. Roth* (note 1), p. 256 at 285 et seq.
[37] *M. Roth* (note 1) p. 256 at 286.
[38] § 100 subsection 5 of the Stock Corporation Act. See the definition in § 264d of the Commercial Code: companies that are listed at an organized market in the sense of § 2 subsection 5 of the Securities Act (WpHG) or that have applied to be listed. Cf. *H. Gesell,* Prüfungsausschuss und Aufsichtsrat nach dem BilMoG, Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR) 2011, 361 at 383 et seq.; *E. Vetter,* Der Prüfungsausschuss in der AG nach dem BilMoG, ZGR 2010, 751 at 780 et seq., and briefly *Hüffer/Koch* (note 33), § 107 comment 26.
[39] German Corporate Governance Code (note 13), no. 5.4.2: "The Supervisory Board shall include what it considers an adequate number of independent members." No. 5.3.2: The chairman of the audit committee shall be independent.
[40] Similarly in China the employee-supervisory system is criticized because employees are under the control of the managers whom the board of supervisors should monitor.
[41] § 100 subsection 2 of the Stock Corporation Act.
[42] *Hopt/Roth* (note 12) § 100 comment 48; German Corporate Governance Code (note 13), no. 5.4.5.
[43] Cf. *E. Sünner,* Die Wahl von ausscheidenden Vorstandsmitgliedern in den Aufsichtsrat, Die Aktiengesellschaft (AG) 2010, 111; *Hüffer/Koch* (note 33), § 100 comment 16 with further references.
[44] § 107 subsection 4 of the Stock Corporation Act. See also *supra* note 39.
[45] § 113 subsection 1 of the Stock Corporation Act. Cf. also German Corporate Governance Code (note 13), no. 5.4.6.
[46] § 114 of the Stock Corporation Act. § 115 regulates the grant of credit to a supervisory board member.
[47] The case law is rather strict and strikes down attempts of corporate practice to evade the requirement of consent. See the recent decision of the Bundesgerichtshof, BGHZ 194, 14 = Neue Juristische Wochenschrift (NJW) 2012, 3235, Fresenius-case.
[48] *Hopt/Roth* (note 12) § 111 comments 52 et seq.

[49] *Hopt/Roth* (note 12) § 111 comments 84 et seq.
[50] § 111 subsection 4 sentence 2 of the Stock Corporation Act; *Hopt/Roth* (note 12) § 111 comments 595 et seq.
[51] *Hopt/Roth* (note 12) § 111 comments 608 et seq.; yet the formula used in the German Corporate Governance Code (note 13), no. 3.3, seems to cover all transactions of fundamental importance.
[52] See the list in *Hopt/Roth* (note 12) § 111 comment 67 et seq.
[53] § 33 subsection 1 sentence 2 (at the end) of the German Takeover Act (WpÜG).
[54] As to the decisive influence of German lobby on the watering down of the Takeover Directive under Gerhard Schröder while he was still sitting in the board of Volkswagen as presiding minister of Lower Saxony, cf. *K. J. Hopt,* La treizième directive sur les OPA-OPE et le droit allemand, in: Aspects actuels du droit des affaires, Mélanges en l'honneur de Yves Guyon, Paris 2003, p. 529 at 538; *R. Skog,* The Takeover Directive. An endless saga?, European Business Law Review 13 (2002) 301.
[55] *G. Li/M. Takayuki* (note 3).
[56] See in detail § 111 of the Stock Corporation Act.
[57] See *infra* II 4 a.
[58] *G. Li/M. Takayuki* (note 3): Chinese scholars give very low marks to the Chinese board of supervisors.
[59] *H. Hau/M. Thum,* Subprime Crisis and Board (In)Competence: Private v. Public Banks in Germany, INSEAD Working Paper No. 2010/45/FIN (21 June 2010).
[60] *D. 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.
[61] *Supra* I 4 b.
[62] § 116 of the Stock Corporation Act refers back to § 93 on the liability of the members of the management board.
[63] See most recently the extensive comments by *K. J. Hopt/M. Roth,* Großkommentar zum Aktiengesetz, 5th ed., Berlin 2015, § 93 with many references;
[64] § 93 subsection 1 Sentence 2 of the Stock Corporation Act. As to the business judgment rule see *R. Veil*, Business Judgment Rule, lecture at the conference held at the Tongji University in Shanghai on 23 and 24 October 2015. *Hopt/Roth* (note 12), § 93 comments 61-131; *K. J. Hopt,* Die business judgment rule, Ein sicherer Hafen für unternehmerische Entscheidungen in Deutschland und in der Schweiz, in: R. Waldburger et al., eds., Law & Economics, Festschrift für Peter Nobel zum 70. Geburtstag, Bern 2015, p. 217.
[65] § 93 subsection 2 sentence 2 of the Stock Corporation Act.
[66] See *infra* note 70.
[67] *Tang Xin,* Directors' liability in Chinese stock corporations – deficiencies and the need for a reform, lecture at the conference held at the Tongji University in Shanghai on 23 and 24 October 2015.
[68] This landmark case ARAG/Garmenbeck is a decision by the Bundesgerichtshof, 21.4.1997, BGHZ 135, 244 = Zeitschrift für Wirtschaftsrecht (ZIP) 1997, 883.
[69] See the references given by *K. J. Hopt*, Die Verantwortlichkeit von Vorstand und Aufsichtsrat, ZIP 2013, 1793 at 1793 et seq.
[70] German Lawyers' Association (note 17), 70th Biannual Meeting, Hannover 2014. Cf. *K. J. Hopt,* Die Reform der Organhaftung nach § 93 AktG – Bemerkungen zu den Beschlüssen des 70. Deutschen Juristentages 2014, in: Festschrift für W.-H. Roth, Munich 2015, p. 225.
[71] § 93 subsection 6 of the Stock Corporation Act as of 1998. This has been criticized by most commentators and also by the German Lawyers' Association.
[72] §§ 101, 103 of the Stock Corporation Act.
[73] See more precisely § 102 of the Stock Corporation Act.
[74] § 84 subsection 3 second sentence of the Stock Corporation Act.

[75] §§ 147 et seq. of the Stock Corporation Act on the assertion of damage claims and §§ 142 et seq. on the special audit.

[76] On the role of disclosure there is vast legal and economic literature, see e.g. *R. Kraakman/J. Armour/P. Davies/L. Enriques/H. Hansmann/G. Hertig/K. Hopt/H. Kanda/E. Rock,* The Anatomy of Corporate Law, Oxford 2009, p. 277 et seq.; *S. Grundmann/W. Kerber/S. Weatherhill,* eds., Party Autonomy and the Role of Information in the Internal Market, Berlin/New York 2001.

[77] See K. *J. Hopt,* Abschlussprüfung in Deutschland und Europa nach der europäischen Reform von 2014, Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR) 2015, 186 and further contributions to issue 2 of this law review, p. 186-324; *H. Merkt*, Die Zusammenarbeit von Aufsichtsrat und Abschlussprüfer nach der EU-Reform: Mut zur Erwartungslücke, Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht (ZHR) 179 (2015) 601.

[78] *P. C. Leyens,* Informationsintermediäre des Kapitalmarkts – Private Marktzugangskontrolle durch Abschlussprüfer, Bonitätsrating und Finanzanalyse, Professor thesis at Hamburg University Faculty of Law May 2015.

[79] But cf. most recently the hostile takeover activities of the Chinese Uni Fosum against the BHF-Bank, cf. Tai-Chi gegen deutsches Investmentbanking, Frankfurter Allgemeine Zeitung, 31.7.2015, No. 175, p. 22.

[80] For a detailed criticism of German takeover law in this respect cf. *K. J. Hopt*, Takeover Defenses in Europe: A Comparative, Theoretical and Policy Analysis, Columbia Journal of European Law (CJEL) 20 (2014) 249.

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