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In This Issue: German Capital Markets and Corporate Governance

Law and Corporate Governance: Germany within Europe	8	<i>Klaus J. Hopt, Max Planck Institute for Comparative and International Private Law, Hamburg, Germany</i>
Corporate Governance in Germany: Recent Developments and Challenges	16	<i>Marc Steffen Rapp, Philipps Universität Marburg, and Christian Strenger, HHL Leipzig Graduate School of Management</i>
The Survival of the Weakest: Flourishing Family Firms in Germany	35	<i>Julian Franks, London Business School, Colin Mayer, Saïd Business School, University of Oxford, Hannes F. Wagner, Bocconi University</i>
The Bug At Volkswagen: Lessons in Co-Determination, Ownership, and Board Structure	27	<i>Charles M. Elson, University of Delaware, Craig K. Ferrere, Harvard Law School, and Nicholas J. Goossen, University of Delaware</i>
Corporate Finance in Germany: Structural Adjustments and Current Developments	44	<i>Wolfgang Bessler, Justus-Liebig University Giessen and Wolfgang Drobetz, Hamburg University</i>
The Cross-Listing and Cross-Trading of German Companies in the U.S. and of Foreign Companies in Germany	58	<i>Wolfgang Bessler, Justus-Liebig University Giessen, Fred R. Kaen, University of New Hampshire, and Colin Schneck, Justus-Liebig University Giessen</i>
Stock Liquidity and the Cost of Equity Capital in Global Markets	68	<i>Yakov Amihud, New York University, Allaudeen Hameed, National University of Singapore, Wenjin Kang, Renmin University of China, and Huiping Zhang, JCU Singapore</i>
Cash Equity Markets in Germany	75	<i>Peter Gomber, Goethe University</i>
Bund for Glory, or It's a Long Way to Tip a Market	81	<i>Craig Pirrong, University of Houston</i>
Derivatives and Repurchase Markets in Germany	88	<i>Thomas Book, CEO, Eurex Clearing</i>
Transaction Costs for German Institutional Investors: Empirical Evidence from Stock Markets	96	<i>Lutz Johanning, WHU—Otto Beisheim School of Management, and Marc Becker and Arndt Völkle, XTP GmbH</i>
International Evidence on Value Creation in Private Equity Transactions	105	<i>Benjamin Puche, Reiner Braun, and Ann-Kristin Achleitner, Technische Universität München, Center for Entrepreneurial and Financial Studies</i>

Law and Corporate Governance: Germany within Europe

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German Corporate Governance: An Insider System on the Path to a More Open and International Outsider System The Traditional German Insider System

Corporate governance as a concept and as a branch of academic study in its own right got its start in the United States and the United Kingdom. The UK Cadbury Commission Report of 1992 set the tone and provided the classic definition of corporate governance as “the system by which companies are directed and controlled.”¹ Since then, corporate governance has been on the agenda of economists, lawyers, regulators, and legislators all over Europe and, indeed, throughout the world.² But, as I will show in this article, the corporate governance system of a specific country cannot be understood without reference to the relevant economic, social and institutional environment.

For more than a century and a half, German corporate governance was what has been described as an “insider system.”³ It was characterized by family- or parent-controlled stock corporations, very few of which were ever listed on a stock exchange. The dispersed shareholdings that are the rule in the American and British public companies were thus an exception in Germany, where the usual form of a company was either the limited liability company or the commercial partnership. Most German public corporations were in close relationships with their “house banks” (*Hausbanken*) as well as other companies within the same network, an arrangement commonly referred to as “Deutschland AG,” or Germany Inc. The influence of the house banks was based on four pillars: the extension of credit, bank seats on corporate boards,⁴ block holdings of company stock by the house banks, and the exercise of the voting rights by the banks on behalf of their share depositors. External corporate governance in the form of a takeover market did not exist. German stock exchanges and capital markets remained underdeveloped. And thus it is hardly surprising that until the 1990s there was no serious discussion of “corporate governance” in Germany.

Features of an Outsider System Driven by Globalization and Europeanization

But since then the situation has changed considerably.⁵ The concentration of ownership has been reduced and dispersed shareholdings have become common, at least in the DAX 30 and other major corporations. And so has the ownership of international shareholders. At the same time, the house bank system has disappeared for large corporations, though it continues to play an important role in smaller firms.

What’s more, the banking industry itself has been experiencing a period of upheaval. Thanks in part to a change in tax law⁶ that allowed the divestiture of their equity holdings in client companies without being taxed at present market values, banks are reducing their traditional equity participations to a large degree. And bank representation on industry boards, especially as board chairs, has fallen sharply. Partly as a result of the financial crisis, German banking is in a structural crisis, in particular investment banking and the large state-owned banks (*Landesbanken*). And with banks on the sideline, the use of industry bonds and other forms of debt financing supplied by the capital markets has been rising. These developments pose a challenge to the traditional German pension fund system, which has relied on the state pension system and neglected capital market financing.⁷

Along with these developments, far-reaching legislative changes have been adopted in Germany as well as in the European Union generally. Internal corporate governance reforms undertaken since the 1990s have increased the requirements on directors and boards. Comprehensive securities regulation has been introduced. Banking has been regulated—many observers would say “overregulated”—since the financial crisis. The capital markets today play a greater role in external corporate governance. Although “friendly” M&A continue to be the rule—and thus far more common than public takeovers—a number of hostile takeover battles have taken place,⁸ but they are still rare. Some of the legislation described above has been driven by populism, and some by competition, or imitation, among legislators. But

1. Cadbury Commission 1992, para 2.5. Full citations are contained in the References at the end of the article.

2. Hopt 2011 Am. J. Comp. L.; Fleckner/Hopt 2013.

3. On the German corporate governance system see (in English) Merkt 2013; Roth 2013; du Plessis et al. 2012; Goergen et al. 2008; Hopt 2003; Prigge 1998.

4. Dittmann/Maug/Schneider 2010.

5. Ringe 2015; cf. also Krahn/Schmidt 2004.

6. Ringe 2015; Schön 2008.

7. Roth 2010.

8. Moellers 2015.

although made possible in part by legislative and regulatory reform, most of the changes in German corporate governance discussed in this article are a consequence of globalization and increasingly open and better-functioning capital markets within the European Union.⁹

The Main Actors: Boards, Shareholders, Banks, Labor, Gatekeepers, Supervisors, and Courts

The main actors in German corporate governance are similar to those in other countries, though with some notable differences with their counterparts in U.S. and U.K.¹⁰ In German companies, the primary responsibility for overseeing corporate management rests with the supervisory board, with German stock corporations having a mandatory two-tier board structure that provides formal representation by labor, as discussed below. The shareholders, by contrast, play a relatively minor role, though there are signs of change thanks to the growing prominence of institutional shareholders, rating agencies, and proxy advisers.

Standard accounts of corporate governance in the U.S. and U.K. focus on the duties and efforts of corporate boards to manage conflicts of interest between a company's management and its shareholders. German corporate governance, however, is generally viewed as addressing not just one, but *three* major principal-agent conflicts: between the (dispersed) shareholders and the board; between the (minority) shareholders and the controlling shareholder or parent; and between the shareholders and the stakeholders, in particular labor.¹¹ In Germany the first conflict is mitigated by strict duties on the board,¹² the second by minority protection and group law,¹³ the third by the management board's stakeholder perspective and labor codetermination in the supervisory board.¹⁴ Since German boards are relatively strong, shareholder rights are not sufficient, and additional help by "gatekeepers" is needed.¹⁵ As economists have long recognized, banks everywhere are "special" and, as empirical studies after the financial crisis have made clear, in need of special corporate governance. Corporate governance for banks is different¹⁶, and because of the systematic risk of banking and capital markets bank regulators and the courts must exercise an oversight function and be prepared to step in when necessary. More generally, the courts, the judicial system, and enforcement—all topics that had often been neglected in the corporate governance discussion—have recently gained attention in both practice and research.¹⁷ Last but not least, corporate governance has also been discovered to be a problem in other sectors, such as

family enterprises, state enterprises, nonprofit organizations, and foundations.¹⁸

Special "Path-dependent" Features of German Corporate Governance

As already mentioned, there are a number of features of German corporate governance that distinguish it from not only the U.S. and U.K. systems, but also in some respects from governance in continental European and Asian companies as well.

Two-tier Board System, Stakeholder Orientation, and Ongoing Board Reform

The most distinctive structural characteristic of German corporate governance is the "two-tier" board—that is, the mandatory division in stock corporations between the "management board" and the "supervisory board." Internationally, the most prevalent board structure is the one-tier board as found in the U.S., the U.K., Switzerland and other countries. In Germany the two-tiered board was introduced in 1870 as a replacement for the then-abolished state allowance system.¹⁹

According to the legislation that gave rise to it, the main functions of the supervisory board were oversight and control of the management board. But contrary to the expectations of the legislature, the supervisory board has traditionally also assumed an advisory function, especially during the period commonly referred to as "Deutschland AG," or "Germany Inc." And even today, after the erosion of Deutschland AG,²⁰ many boards continue to play both roles.

One reason for strictly maintaining this two-tier system is labor "codetermination," a practice that will be explained later. Labor codetermination is also the main reason why the German legislature does not give German public companies the option to choose between single-tier and two-tier systems. What's more, the German legislature continues to maintain this position even though the right to choose a single-tier board structure is mandatory for the European Company (*Societas Europaea*) under European law—and despite the fact that such choice, which has been demonstrated by studies to have clear economic benefits,²¹ has long been the norm in many other EU countries such as France and Italy.

German management boards are required by law to run companies in the interests of not just the shareholders, but of "the enterprise as a whole."²² This means that German management boards are bound by law to take into consider-

9. Ring 2015; Hopt 2011, 16 et seq.; idem 2003, 313 et seq.

10. See the comprehensive discussion of the board, the shareholders, labor, the gatekeepers (in particular auditors and supervisors) and the courts in Hopt 2011, 19-69.

11. Kraakman et al. 2009, 35 et seq.

12. These duties are set forth in *infra* II 1.

13. II 2, 4.

14. II 3.

15. II 5.

16. Hopt 2013; III 1, 2.

17. Merkt 2013, 563 et seq.; Roth 2013, 342 et seq.

18. Thomsen 2014; Hopt/von Hippel 2013.

19. Roth 2013, 276 et seq.

20. Andres/Betzer/van den Bongard 2011

21. Roth 2013, 280 et seq.; Davies/Hopt 2013, 315 et seq.; Belot et al. 2014, 364 et seq.

22. Art. 76 of the Stock Corporation Act; Hopt 2011, 28 et seq.; Roth 2013, 332 et seq.

ation the interests of labor, creditors, and “the public interest.” But such a stakeholder-oriented approach is by no means unusual among EU countries. It is effectively mandated by law in countries like Austria, Sweden, Norway, and the Netherlands—and it has been the official policy of the U.K. since 2006. The stakeholder perspective is likely to continue to carry weight in Germany for the foreseeable future if only because of the European Commission’s continuing commitment to the social responsibility movement.

Nevertheless, a growing number of economists and policy makers have raised questions about the economic consequences of such an approach, and what the approach amounts to in practice. For many well-run companies, it may mean no more than the interest of even (long-run) value-maximizing corporate managers in maintaining good relations with labor, creditors, and the social environment in which the company operates. For companies that are not well run, however, the result of the wider discretion of the board in decision-making is likely to be a reduction in accountability to outside shareholders and, as a consequence, reductions in efficiency and value.

On the positive side, board reform in Germany and other EU countries has continued to move forward since the second half of the 1990s. As noted earlier, the leader in this effort has been the U.K. with its Cadbury Report of 1992,²³ which in turn has provided the impetus for similar actions taken throughout Europe. This European-wide board and governance reform movement has been driven by factors that include the rise of the European common market, globalization, and even, to a certain degree, competition among legislators. The net result has been that, although the two-tier system and stakeholder orientation remain largely untouched, board reform has succeeded in raising the law and practices of German management and supervisory boards to the level of international corporate governance standards.

More specifically, the reforms have imposed strict organizational duties on German management boards, such as installing a risk control system charged with early recognition of developments that could endanger the survival of the corporation. Most recently, the German courts have become insistent in requiring organized compliance in German groups of companies worldwide,²⁴ with the particular aims of deterring money laundering and foreign bribery. Strict rules have also been enacted that limit the remuneration of board members. The former belief in compensation tied to company performance, traditionally in the form of stock options, as providing an effective incentive has been obscured by general concern about excessive pay.²⁵

Moreover, although the German legislature has introduced the business judgment rule, it is much less far-reaching than the U.S. counterpart that inspired it. Much of the confidence about immunity from legal prosecution that the rule is supposed to give business leaders has been sacrificed by the extensive information requirements imposed by the courts. As just one example, the liability risk faced by German directors has become much more acute than in the past, due in large part to the recent financial crisis. Indeed, the Federal Court has begun holding supervisory board members personally liable for failure to bring actions against management board members who have violated their duties toward the corporation.

As for the supervisory boards, Germany has followed the U.K. example of having independent directors,²⁶ though for the time being only on a voluntary basis as recommended by the German Corporate Governance Code. Since 2009, moreover, in stock corporations that are oriented towards the capital market, the supervisory board must have at least one independent member with specialized knowledge of accounting or auditing.²⁷

Nevertheless, the concept of director independence has remained controversial, especially as it concerns the relationship of board members with controlling shareholders. Yet in a country like Germany, where family enterprises and groups of companies remain the rule, strict independence requirements specified in terms of minimum percentages of independent board members—not to mention the definition of such independence—are much more problematic than in countries with dispersed shareholders like the U.S. and the U.K. Since the experiences of the financial crisis have brought down the high-flying hopes for independent directors, expertise and experience now rank high again among the qualities sought in corporate directors, both in Germany as well as much of Europe.²⁸

In terms of controlling conflicts of interest, German law has traditionally been more lenient than U.S. and U.K. corporate law, in part because it does not rely on the “trust” analogy for directors as developed by courts in those countries. But there has been change on this front as well. Consider, for example, the once widespread practice of the retiring chairperson of the management board taking over the chair of the supervisory board. German law bearing on this practice is now even stricter than U.K. law, imposing a two-year waiting period for all management board members of listed corporations unless the new member of the supervisory board is elected on the basis of a motion made by 25 percent of the shareholders. What’s more, in 2015, the German legislature followed the international trend initiated by the Norwegian mandatory gender quota by imposing a diversity require-

23. Cadbury Commission 1992.

24. Neubürger case 2014. Landgericht Munich, decision of December 10, 2013, *Zeitschrift für Wirtschaftsrecht* (ZIP) 2014, 570.

25. Merkt 2013, 538 et seq.

26. Roth 2013, 303 et seq., 356 et seq.; Davies/Hopt 2013, 317 et seq.; Hopt

2011, 23 et seq., 35 et seq.

27. Art. 100 section 5 of the Stock Corporation Act.

28. Drobetz/Schmid/Oesch/von Meyerinck 2014.

ment on German corporations that are listed and subject to codetermination.

The Limited But Growing Role of Shareholders, Particularly Institutional Shareholders

The primary principal-agent conflict mentioned before is that between shareholders and directors. This conflict is most acute if the shareholder base is dispersed, since at least in the end the controlling shareholder will have his way.

In Germany, where most listed companies have been either family-owned or parts of a group of companies, the legislature has given the management board a strong position that may make it less dependent on the controlling shareholder. The management board is not elected directly by the shareholders, but by the supervisory board, which in turn is elected by the shareholders. The election is usually for a period of five years; dismissal by the supervisory board is possible only under special circumstances. This is very different than in the U.S. and the U.K., where board appointments are usually for only one year, and election and dismissal is performed directly by the shareholders.

More generally, in Germany the role of shareholders is limited, though not so much as in the “board-centric” United States. Instead of extended participation rights, the shareholders of German companies enjoy considerable minority protection, particularly under group law.²⁹ Furthermore, under case law, controlling shareholders owe a far-reaching duty of loyalty to the minority. For example, there was a long-running and vigorous debate in Germany in which most recently even the legislator found it necessary to step in and determine whether the corporate “delisting” decision—that is, the decision of the corporation not to have its securities listed any longer at the stock exchange and so effectively become a “private” company again—should be up to the management board alone, or whether the general assembly of shareholders should have a say, or whether minority shareholders should at least be protected by a mandatory bid of the delisting company at a fair price. In general, the assembly is forbidden by law from participating in management decisions unless the management board specifically asks it to do so.

In practice, the general meetings of large DAX companies in Germany are not attractive for shareholders.³⁰ Such meetings have tended to become extremely long and to provide a protracted forum for shareholders owning only a few shares to propagate their political and social views or ask many dozens of questions hoping that management may fail to give full answers—which could lead to the voiding of meeting decisions and provide an opportunity for extracting settlement money. The German legislature has not yet been able to fully curb these minority abuses.

But there have been signs of constructive change. Traditionally the legislature has tried to balance the relatively weak position of shareholders primarily by granting substantial minority protection. In the meantime there have also been efforts to improve the standing of minority shareholders—and possibly even of single shareholders—that would allow the suing of directors. Most recently, German lawmakers have strengthened the power of the general assembly by a providing a mandatory—and controversial—“say on pay” that is modeled on and even goes beyond the U.K. example. At the same time, the European Commission has declared its aim to further empower shareholders³¹—and the pending European Shareholders Rights Directive, once enacted, is expected to do so.

But more important than these legal developments are the actual changes in corporate practice that have taken place during the past decade. Institutional shareholders, mostly from the U.S. and the U.K., have succeeded in gaining considerable influence in the decision-making process of German corporations—and they have used their influence and, in some cases, their voice to weigh in on matters of corporate governance. Hedge funds, too, have been active in German companies, sometimes in more or less concerted action, often urging management to pay out excess cash to shareholders and, in some cases, threatening to change management and the board. In one notable example, the Deutsche Börse was forced in 2005 by a British hedge fund to oust the chairmen of both the supervisory and management boards and abandon its plan to take over the London stock exchange.³²

Labor Codetermination on Boards

Labor codetermination is quite common in continental Europe, certainly at the plant level, where it takes the form of works councils, but often also at the board level, though usually only with seats up to a one third of the board.

In Germany, however, the practice of labor codetermination is both older and more extensive than in other countries of continental Europe. Originating after World War I, the practice was expanded after World War Two, when capital and labor had to join forces to rebuild the country. German labor codetermination is unique in requiring that half of the supervisory board members be labor representatives in companies with workforces of at least 2,000. In order to leave the shareholders a slight voting edge, the chairman of the supervisory board, who is elected by the shareholders, has a double vote that can be exercised in the event of a stalemate. Codetermination at parity is therefore legally only at quasi-parity, but in practice the double vote is almost never used for fear of undermining labor relations.

29. Merkt 2013, 545 et seq. As to group law see *infra* II 4.

30. In 2008 for example, 59 percent of the share capital was on average represented at the general assembly, Merkt 2013, 547. Consequently German takeover law has set the control threshold for a mandatory bid to 30 percent, cf. Hopt 2014 EBOR.

31. See *infra* III 2.

32. As to institutional investors, hedge funds and shareholder activism in Germany see Bessler/Drobtz/Holler 2015; Davies/Hopt 2013, 366 et seq.; du Plessis et al. 2012, 59 et seq.; Hopt 2011, p. 48 et seq.

Studies of the effects of such codetermination are at best mixed. For German labor unions, codetermination is a sacred cow that no legislature has dared to touch. But if most German companies have learned to live with it, a number of enterprises, under the auspices of the EU law, have recently chosen to avoid labor codetermination by adopting one of two other corporate forms: the European Company (*Societas Europaea*, SE), a new legal form that was produced by a (much-protracted) process of EU negotiations and has been chosen by Allianz, the largest German insurance corporation; or the public limited company (plc) of English law, which Germany is required to recognize under European law and which has been chosen by many smaller corporations. These recent changes are consistent with the many recommendations—indeed, “pleas”—by academic economists and financial practitioners to allow German companies more generally the additional flexibility provided by the European Company—a form that reflects a compromise solution resulting, as just mentioned, from negotiations among EU countries.

But given the mixed experiences with and empirical findings on the effects of German quasi-parity codetermination,³³ what is the case for maintaining it in its current form? From a stakeholder perspective, it is useful to give labor a voice. Furthermore codetermination might help consensus-building in difficult situations, as proved to be the case, for example, in Eastern Germany after German reunification, or during a financial crisis experienced by the economy or the corporation. On the other hand, codetermination has had negative effects on boards by leading to a division between two camps in the board. And since labor usually sits with the management in defending the company and the workplace, codetermination has clearly been an almost insurmountable obstacle to the takeover market and other forms of outside corporate governance and control.³⁴

Codetermination as practiced in Germany has also proved, indeed for decades, to be a stumbling block for European harmonization of company law, virtually isolating Germany within the European Union. To see the extent of such isolation, consider that the European Company has, after many years of discussion and negotiation, been made possible only by an uneasy compromise. The option of allowing companies to relocate abroad to avail themselves of a different corporate structure or governance system without the requirement of new incorporation and the ensuing tax consequences has been decisively blocked by Germany. Most recently, plans for a European Private Company that had strong advocates in practice as well as in academia have had to be abandoned.

And thus from a European point of view, the conclusion seems unavoidable: Despite the wishful thinking of German trade unions and politicians, the institution of quasi-parity German labor codetermination is not an export article.

Law Governing Groups of Companies

Another distinctive feature of German corporate governance is corporate group law. It is set down in the Stock Corporation Act, and has been developed through case law less stringently for limited liability companies. Internationally, German group legislation is quite distinctive, though some countries have followed this model. Group law is meant to solve what amounts to a principal-agent conflict between the minority and the controlling shareholder—more precisely, the conflict between the parent company on the one side and the minority shareholders and the creditors of the subsidiaries on the other.³⁵

German group law is special for three reasons. First, it follows a substantive group concept—namely, actual or effective control, as opposed to a formal concept based on 51 percent of the capital or votes. Second, it offers the instrument of a contractual group by which the parent company gets full legal control over the subsidiary. In exchange the parent must make good any losses of the creditors of the subsidiary at the end of the year, and outside shareholders of the subsidiary have a right to periodic compensation payments and an exit right. Third, in a *de facto* group, the parent may not use its influence to induce the subsidiary to enter into disadvantageous transactions unless compensation is provided, usually within the same fiscal year.

Like German labor codetermination, German group law has for decades been a stumbling block for harmonizing core company law at the European level. Since 2000 there have been various proposals for harmonizing the core principles of group law, starting with those made by the Forum Europaeum Group Law and the High Level Group of Company Law Experts, and continuing, most recently, with those of the European Commission in its Action Plan of 2012.³⁶ But it is doubtful whether this harmonization will ever be achieved. As long as it is not, German group governance remains regulated to a considerable degree by statutory law, much more so than in other countries where corporations are governed by fairness standards operative under case law. This is true with an important proviso: Even today there is a far-reaching convergence in the regulation of financial groups and, more generally, in the accounting for groups, thanks to the detailed European harmonization in the form of IFRS standards.

33. A comprehensive survey of recent empirical research on codetermination on Germany is given by Jirjahn 2011.

34. Roth 2013, 332 et seq., 358 et seq.; Davies/Hopt 2013, 344; Hopt 2011, 54 et seq.; more positive du Plessis et al. 2012, 197 et seq. On the approach of labor representatives in the board as to management remuneration (Mannesmann case) cf.

Milhaupt/Pistor 2008.

35. Kraakman et al. 2009, 35 et seq., protection of minority shareholders 176 et seq., of creditors 141 et seq.

36. See *infra* III 2.

Importance of Auditors and Other Financial Intermediaries

Corporate governance depends to a high degree on confidence. This presupposes transparency, disclosure, and control by independent experts, including, notably, auditors. Furthermore, in the financial markets, public confidence is promoted by financial intermediaries and other gatekeepers such as rating agencies, financial analysts, and proxy advisors.³⁷

Traditionally, the approach of Germany and other continental European countries toward disclosure has been very different from the transparency advocated and, in most cases, practiced in the U.S. and other Anglo-Saxon countries. Over the years, the combined forces of globalization and European harmonization have brought about a certain degree of convergence in corporate accounting and disclosure practices.³⁸ Today the requirements for auditing and auditors are to a high degree uniform in the European Union. Most recently the bad experiences with auditing during the financial crisis led to a far-reaching European auditing law reform in 2014. Listed corporations must now have an audit committee of the (supervisory) board that cooperates closely with the auditors, which promises considerable improvement in internal corporate governance.

German Corporate Governance under the Influence of European Law

The Prevalence of European Securities and Banking Law

The governance of German corporations is firmly embedded in securities regulation and banking law, with the discretion of bank boards narrowly confined by regulation and supervision. Today both fields have become domains of European Union law.

In the case of securities regulation—or what in most of Europe is known as “capital markets law”³⁹—the process of European harmonization has taken decades. By contrast, the European Banking Union reflects a fairly recent response to the financial crisis.⁴⁰ And work toward a European Capital Market Union has been launched in 2015. But one common theme in both European securities regulation and banking law has been the importance of corporate governance reform. As just one example, in July 2015, the Basel Committee on Banking Supervision, the key player internationally for banking, has once more taken the lead with its revised Guidelines on “Corporate governance principles for banks.”⁴¹

Limited But Growing Role of European Corporate Law and Takeover Law

At the same time, progress on the harmonization of European corporate and takeover law has been slower. But what

progress has been achieved cannot be considered trivial⁴² and, apart from harmonization, there has been considerable convergence of the law and practice of European boards.⁴³ With its Action Plan of December 12, 2012,⁴⁴ the European Commission has made a new effort to promote European corporate law. The initiatives envision and work toward, among other objectives, the empowerment of shareholders and the strengthening of incentives for institutional investors to participate in corporate governance, rules for limiting potential abuses by controlling shareholders and corporate groups, and the creation of new European corporate forms. Also on the agenda are improvements in corporate governance both before and in corporate insolvency as well as harmonizing insolvency and bankruptcy law more generally as part of a European Capital Market Union.

As for the German and European market for corporate control, so-called external corporate governance, the EU continues to be guided by the European Directive on Takeovers of 2004. This reflects the understandable reluctance of national lawmakers to give up their grip on takeover regulation for fear of allowing or even encouraging foreign competitors to take over their national champions. Populist legislation and protectionism continue to be forces to reckon with in Germany, as well as and even more so in Italy, France, and throughout the European Union.⁴⁵ And it is thus little wonder that the process of revising the Directive in 2012 and 2013 has largely come to a halt. One of the most difficult questions confronting policy makers concerns the market for corporate control and its disciplinary force on directors: Which rule is better suited for Europe, the American “just say no rule” of the Delaware courts, or the British passivity rule imposed on the board of the target—that is, the obligation not to frustrate a bid?⁴⁶

Corporate Governance by Soft Law:

The Case of the German Corporate Governance Code

But if Germany and the EU appear to have reached an impasse in resolving questions about hostile takeovers and the market for corporate control, there may be cause for optimism in what might be described as “corporate governance by soft law.” As I mentioned at the outset of this article, the Cadbury Committee Code of 1992 set the tone for Europe, not only for corporate governance in general, but also by holding up a model that enabled companies to profess their commitment to a form of self-regulation—a commitment that, potentially at least, goes well beyond mere compliance with corporate law. Germany followed suit in 2002 when it promulgated the German Corporate Governance Code,

37. Kraakman et al. 2009, 128 et seq.; Hopt 2011, 56 et seq.; on accounting and corporate governance du Plessis 2012, 275 et seq.

38. On disclosure and transparency of corporations see Merkt 2013, 561 et seq.

39. Veil 2013.

40. Binder 2015.

41. Basel 2015; Hopt 2013.

42. Grundmann 2012.

43. Davies/Hopt 2013.

44. European Commission 2012; Hopt 2015.

45. Humphery-Jenner 2012; Dine/Erel 2013.

46. Hopt 2013 Colum. J. Eur. L.

which is supported by a mandatory “comply or explain” provision in the Stock Corporation Act. The rate of adherence to the Code since 2002 has proved to be high, though industry complaints about tendencies toward overregulation have been heard, including those prompted most recently by the imposition of gender quotas on supervisory boards of major companies. But the overall experience with the Code has been quite positive in the sense that such self-regulation is much more flexible than corporate law, encourages standard-setting by the industry itself, and allows for experimentation and quick repeal if the costs associated with a recommendation turn out to exceed the benefits.

Conclusion

The traditional German insider system of corporate governance is on a path to a more open, modern, and international outsider system. In particular German banking has very much changed. These developments can be attributed to globalization as well as the financial crisis and the accompanying reform legislation. For this reason, many of the older descriptions of German corporate governance are dated.

Nevertheless, Germany continues to retain a number of

special path-dependent features that characterize the German corporate governance system, in particular the two-tier board, labor codetermination, and a codified law of groups. Yet the influence of European law is strong. In securities law and banking it is overwhelming, especially as it bears on internal corporate governance.

But even more important than these changes in European and German law are the increasing role and effects of global capital markets. As the ownership of listed German companies continues to become more dispersed, and foreign investors continue to take larger stakes, the shareholder participation and governance practices observed in such companies may well start to look more like those in their U.K. and U.S. counterparts.

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