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Labor and Comparative Corporate Governance in Times of Pension Capitalism. Independent Directors, Shareholder Empowerment and Long-Termism: the Transatlantic Perspective

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Cover Page Footnote

Professor of Law, University of Marburg, Chair for Private Law, Labour Law, German and European Commercial and Business Law; Senior research fellow, Max Planck Institute for Comparative and International Private Law, Hamburg (2002–08); Visiting fellow, University of Cambridge, 2008. This article is based on lectures at the University of Kyoto and Fordham University School of Law (Eugene P. and Delia S. Murphy Conference on Corporate Law, 2012) and in parts on a German article in the Zeitschrift für Unternehmens- und Gesellschaftrecht, 40 ZGR 516 (2011). I thank the participants of the conferences for their helpful comments, Martin Wilhelm for translation and language revision, and the team of the Fordham Journal of Corporate & Financial Law.

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INTRODUCTION

Correctly understood, the effects of labor and pensions are not only central to the corporate governance debate; as the United States, United Kingdom, the Netherlands, and Switzerland show, pension systems largely make up capital markets.[1] Other continental European countries, such as Germany and Austria, illustrate that a lack of significant pension assets corresponds with a lack of deep capital markets. While pension assets in the United States, the United Kingdom, Switzerland, and the Netherlands exceed their gross domestic product ("GDP"), occupational pension assets account for less than a quarter of GDP in Germany and Austria.[2] Germany and Austria provide for quasi-parity or third-parity

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1. Markus Roth, *Private Altersvorsorge als Aspekt der Corporate Governance*, ZEITSCHRIFT FÜR UNTERNEHMENS- UND GESELLSCHAFTSRECHT [ZGR] 516, 527 (2011) (Ger.) [hereinafter Roth, *Private Altersvorsorge* 2011].

2. *See* TOWERS WATSON, GLOBAL PENSION ASSETS STUDY 7 (2013), *available at* http://www.towerswatson.com/en/Insights/IC-Types/Survey-Research-Results/2013/01/Global-Pensions-Asset-Study-2013 (finding the following ratios of pension assets to GDP: Netherlands 156%, Switzerland 118%, United Kingdom 112%, United States 108%, Germany 15%). The ratio of private pension assets, including individual (private or personal) pension assets, is higher than the ratio of occupational pensions to GDP. *See* OECD PRIVATE PENSIONS OUTLOOK 44 fig.1.2, 61 fig.2.5 (2008): Netherlands 149.1 versus 132.2%, Switzerland 151.9 versus 119.4%, United Kingdom 96.4 versus 86.1%, United States 124.0 versus 74.3%, Austria 18.8 versus 4.7%, Germany 17.9 versus 4.1% (data for 2007); for more recent data for occupational pensions, see OECD, PENSIONS AT A GLANCE 2011 173 (2011), *available at* http://www.oecd—ilibrary.org/docserver/download/8111011e.pdf?expires=1359327528&id=id&accname=guest&checksum=A3F306006CF6843EB837A73326C37B31 (a higher ratio of pension assets to GDP exists when individual (personal) pensions are included).

board-level co-determination of employees,[3] which is unknown to the United Kingdom, the United States, and Switzerland, and not mandatory for international holding companies in the Netherlands.[4] Although the Netherlands does provide for third-parity co-determination for national companies, international holding companies like EADS, the parent company of Airbus, are co-determination free.

Reflecting the great importance of occupational pensions and public pension funds in the United States, Peter Drucker popularized the phrase "pension-fund socialism" shortly after the introduction of the Employee Retirement Income Security Act ("ERISA") in the 1970s.[5] This concept captures the overwhelming importance of the pension fund industry in the U.S., and of employees as ultimate beneficiaries.[6] In the United Kingdom, the term "pension-fund capitalism" was coined at the height of the stock market around the new millennium.[7] Until then, countries that lacked, or had only a minor presence of, occupational pensions tended to have a blockholder corporate governance system, while dispersed ownership was the common form in countries focused on occupational pensions.[8] The ownership structure has evolved, at

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3. *See* Klaus J. Hopt, *Labor Codetermination in Europe*, 6 J. COMP. BUS. & CAPITAL MARKET L. 203, 216–22 (1984).

4. Markus Roth, *Employee Participation, Corporate Governance and the Firm: A Transatlantic View Focused on Occupational Pensions and Co-Determination*, 11 EUR. BUS. ORGANIZATIONAL L. REV. 51, 70–72 (2010) [hereinafter Roth, *Employee Participation*].

5. *See* PETER F. DRUCKER, THE UNSEEN REVOLUTION: HOW PENSION FUND SOCIALISM CAME TO AMERICA 68 (1976); *see also* William H. Simon, *The Prospects of Pension Fund Socialism*, 14 BERKELEY J. EMP. & LAB. L. 251 (1993) (noting that Drucker popularized the term).

6. *See* DRUCKER, *supra* note 5 at 1 (Through their pension funds, employees of American business today own at least 25% of its equity capital; pension funds of the self-employed, of the public employees, and of school and college teachers own at least another 10%.).

7. GORDON L. CLARK, PENSION FUND CAPITALISM (2000). Focusing on defined benefit schemes, DAVID BLAKE, PENSION SCHEMES AND PENSION FUNDS IN THE UNITED KINGDOM 575 (2d ed. 2003), stated that in 2000, through their pension funds, companies in Britain owned about one-third of one another. For a comprehensive analysis of the evolution of the British Corporate Govenance System from a company law perspective, see BRIAN R. CHEFFINS, CORPORATE OWNERSHIP AND CONTROL: BRITISH BUSINESS TRANSFORMED (2008).

8. For an early comparison of the United States and Germany, see Richard M. Buxbaum, *Institutional Owners and Corporate Managers: A Comparative Perspective*, 57 BROOK. L. REV. 1 (1991), and Friedrich K. Kübler, *Institutional Owners and*

least in Germany, leaving many blue chips in dispersed ownership and most with a majority of foreign shareholders.[9] In a separate worldwide trend, occupational pension schemes changed from defined benefits ("DB") to defined contributions ("DC"), thereby shifting the investment risk from the employers to employees, and investment from pension funds to investment companies.[10] Therefore, the term "pension capitalism" is more accurate and will be used in this contribution on comparative corporate governance from the transatlantic perspective.

Different levels of reliance on occupational pensions correlate with total market capitalization of the respective countries and, *inter alia*, different funding levels of financial supervisory agencies.[11] This correlation is more significant than the civil law/common law country explanation.[12] The importance of private pension assets may better explain such differences than investor protection as measured by La Porta et al.[13] This approach has been criticized for failing to consider all relevant mechanisms of investor protection.[14] The shareholder

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Corporate Managers: A German Dilemma, 57 BROOK. L. REV. 97 (1991). Since the United States and United Kingdom pension funds shifted their investment strategy towards foreign equity, institutional investors are now the most important class of investors in countries with a minor presence of private pensions.

9. *See infra* Part I.C.3.

10. At the end of 2011, a majority of pension assets were in the form of DC plans in the United States, Australia and Switzerland, (57%, 81% and 60%, respectively). *See* TOWERS WATSON, GLOBAL PENSION ASSETS STUDY 36–37 (2012), *available at* http://www.towerswatson.com/en/Insights/IC-Types/Survey-Research-Results/2012/01/Global-Pensions-Asset-Study-2012. Data in the following study is slightly revised and Switzerland is excluded for the peculiarity of the Swiss occupational pension system. In the seven most important markets, DC assets rose to 43% in 2011 from 38% in 2001. Also, in countries where DC was of minor importance or even non-existent in 2001, DC assets rose: in Canada from 3% to 4%, in Japan from 0% to 2%, and in the Netherlands from 2% to 7%. The most significant increase was in the United Kingdom, from 8% to 39% (In 2012, the level stood at 26%).

11. Roth, *Employee Participation, supra* note 4, at 56–58.

12. *Id.*

13. *See* Howell E. Jackson & Mark J. Roe, *Public and Private Enforcement of Securities Laws: Resource-Based Evidence*, 93 J. FIN. ECON. 207 (2009). For a review of La Porta et al. investor protection categories, see La Porta, et al., *Law and Finance*, 106 J. POL. ECON. NO. 6. 1113, 1122–25 (1998).

14. John Armour et al., *How Do Legal Rules Evolve? Evidence From a Cross-Country Comparison of Shareholder, Creditor and Worker Protection*, 57 AM. J. COMP. L. 579, 611 (2009) (showing weaker shareholder protection from the board and other shareholders in the United States than in Germany, the United Kingdom, France and India).

empowerment debate in the United States highlights this critique.[15] In continental Europe, nominating directors is a common mechanism for investor protection.[16] This mechanism is now available in the United States as well—it is procedurally and economically feasible—with pension funds having played a critical role in the political process.[17] Interestingly, the United States played a central role in implementing director primacy in German corporate governance.[18] However, director primacy has not gone so far as to exclude shareholders from nominating directors.[19]

Besides the balance of shareholder rights and director primacy in corporate governance, this article focuses on independent directors and long-termism in times of pension capitalism. The independent director paradigm was the first principle promoted by the Council of Institutional Investors ("CII"), and was later accepted.[20] On its website, CII stresses that shareholders in the 1980s "had little say in most corporate decisions,"[21] suggesting that CII promoted and successfully launched shareholder empowerment. Independent directors and shareholder empowerment are linked insofar as director accountability is provided by independent directors that, *inter alia*, are channels for expressing concerns.[22]

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15. *See* Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 188 HARV. L. REV. 833, 847 (2005) (pointing to the United Kingdom); *see also* Lucian A. Bebchuk, *Letting Shareholders Set the Rules*, 119 HARV. L. REV. 1784, 1784–85 (2006) (replying to Stephen M. Bainbridge, *Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735 (2006) and Leo E. Strine, Jr., *Toward a True Corporate Republic: A Traditionalist Response to Bebchuk's Solution for Improving Corporate America*, 119 HARV. L. REV. 1759 (2006)).

16. Sofie Cools, *The Real Difference in Corporate Law Between the United States and Continental Europe: Distribution of Powers*, 30 DEL. J. CORP. L. 697, 745–46 (2005).

17. For the Dodd-Frank Act, see *infra* Part III.A.1.

18. *See infra* Part III.B.

19. Aktiengesetz [AktG] [Stock Corporation Act], Sept. 6, 1965, BUNDESGESETZBLATT [BGBL] I at 1089, last amended by the German Restructuring Act (Restrukturierungsgesetz), Dec. 9, 2010, BGBL. I at 1900, art. 6 (Ger.), *available at* http://www.nortonrose.com/files/german-stock-corporation-act-2010-english-translation-pdf-59656.pdf (explicitly providing for such a nomination right).

20. *See* Markus Roth, *Unabhängige Aufsichtsratsmitglieder*, ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT [ZHR] 605, 611 (2011) (Ger.).

21. *See About Us*, COUNCIL OF INSTITUTIONAL INVESTORS (CII), http://www.cii.org/about_us (last visited Jan. 20, 2013).

22. *See infra* Part II.

A third main feature of corporate governance principles promoted by both pension funds and pension fund associations is long-termism.[23] This principle is not yet established. As the European Commission highlighted in a recent Green Paper on corporate governance, pension money does not lead to long-term investment.[24] Long-termism is nevertheless promoted in some company law principles, such as the discharge of directors (backing of director actions) instead of mandatory reelection, thereby incentivizing long-term strategies.[25] Remuneration in Germany is also now linked to the sustainable development of the company.[26] An issue that is yet to be discussed is whether different levels and methods of pension funding contributed to global imbalances, a matter of growing concern since the financial crisis. Due to international diversification of assets and short-termism of asset managers, sustainable development might be hindered; a detailed analysis of this issue is beyond the scope of this contribution.

Part I of the article begins by discussing labor and pensions as determinants of the firm in a comparative perspective. While in the United States and the United Kingdom labor plays a minor role in the corporate governance of firms, in continental Europe co-determination is not restricted to pension funds such as Hermes Fund Managers (UK) or Californian Public Employees Retirement System ("CalPERS") (US).[27] Moreover, while strict quotas for women on boards have been implemented in some countries such as Norway, the Netherlands, Spain, and France, the UK Corporate Governance Code introduces a more flexible model.[28] Other corporate governance principles correlate with the rise of institutional investors; these investors are largely based in the United Kingdom and the United States, but relevant in most industrialized countries.[29] Parts II and III of this article address the already implemented features, such as independent directors and shareholder empowerment. These principles continue to spread worldwide due to investments abroad; according to the US Treasury, US

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23. *See infra* Part IV.

24. European Commission, *Green Paper: The EU Corporate Governance Framework*, COM (2011) 164 final (Apr. 5, 2011) [hereinafter *Green Paper*].

25. *See infra* Part IV.B.2.

26. *See infra* Part IV.B.1.

27. Roth, *Employee Participation*, *supra* note 4, at 70–75.

28. *See infra* Part I.A.3–4.

29. For an early description, see Ronald J. Gilson & Reinier Kraakman, *Reinventing the Outside Director: An Agenda for Institutional Investors*, 43 STAN. L. REV. 863 (1991).

portfolio holdings account for more than 10% of market capitalization in Germany, Japan, South Korea, and France; up to 19% in the United Kingdom; and 26% in Switzerland.[30] Like long-termism, the core corporate governance feature which is yet to be established—independence and the balancing of shareholder rights with director primacy—will be discussed in Part IV. This feature will be assessed in the global perspective, taking into account country-specific peculiarities.

I. LABOR AND PENSIONS AS DETERMINANTS OF THE FIRM IN THE COMPARATIVE PERSPECTIVE

A. LABOR IN GERMANY AND THE UNITED STATES

1. Industrial Relations in Germany and the United States

Protection against dismissals is a central feature of German labor law.[31] In plants with more than ten employees and for employment contracts lasting at least six months, dismissals require good cause and are subject to judicial review.[32] By contrast, the United States is one of the very few countries still subscribing to the employment-at-will doctrine; restrictions concerning dismissal must be incorporated into the employment contract.[33] However, "business affairs" are considered good cause for dismissals in Germany. Business judgment was first

30. DEP'T OF THE TREASURY ET AL., REPORT ON U.S. PORTFOLIO HOLDINGS OF FOREIGN SECURITIES: AS OF DECEMBER 31, 2010, at 12 tbl.7 (2011) [hereinafter PORTFOLIO HOLDINGS REPORT], *available at* http://www.treasury.gov/resource-center/data-chart-center/tic/Pages/fpis.aspx.

31. The legal basis is the Kündigungsschutzgesetz [KSchG] [Protection Against Dismissal Act], Aug. 10, 1951, BGBL. I at 1317, as amended (Ger.); *see generally* ULRICH PREIS, PRINZIPIEN DES KÜNDIGUNGSRECHTS BEI ARBEITSVERHÄLTNISSEN (1987).

32. Protection Against Dismissal Act §§ 1, 23. If employment contracts were in force before January 1, 2004, a plant with more than five employees would be subject to the rule. *Id.* § 23(2).

33. MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW 671–72 (Hornbook Series 2d ed. 1999).

introduced in Germany in this context,[34] and only in 2005 was the German business judgment rule adopted for director liability.[35]

In Germany, collective bargaining is performed, in principle, industry-wide.[36] This reflects the business structure in Germany, which relies heavily on the concept of "Mittelstand" (small and medium family-owned firms), as well as on large family-owned firms.[37] Large enterprises in particular, such as Volkswagen ("VW"), have enterprise-specific collective agreements. International studies show a correlation between industry-wide collective bargaining and board-level co-determination.[38]

2. Employee Participation via Board Representatives in Germany

In Germany, a unique system of employee co-determination on boards prevails.[39] Stock corporations employing more than 2,000 within Germany are subject to quasi-parity co-determination,[40] while those

34. Markus Roth, *Die betriebsbedingte Kündigung zwischen freier Unternehmerentscheidung und Arbeitnehmerschutz*, 30 ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT [ZIP] 1845, 1849 (2009) (Ger.).

35. Klaus J. Hopt & Markus Roth, *in* AKTIENGESETZ: GROßKOMMENTAR § 93 Abs. 1 Satz 2 (Klaus J. Hopt & Herbert Wiedemann eds., 4th ed. 2005) (Ger.); Markus Roth, *Outside Director Liability: German Stock Corporation Law in Transatlantic Perspective*, 8 J. CORP. L. STUD. 337 (2008) (U.K.) [hereinafter Roth, *Outside Director Liability*].

36. For data, see Peter Ellguth & Susanne Kohaut, *Tarifbindung und betriebliche Interessenvertretung—aktuelle Ergebnisse aus dem IAB-Betriebspanel 2009*, 63 WSI-MITTEILUNGEN 204 (2010). For recent trends towards enterprise-specific collective agreements and flexibility, see WOLF DIETER HEINBACH, TARIFBINDUNG, LOHNSTRUKTUR UND TARIFVERTRAGLICHE FLEXIBILISIERUNGSPOTENZIALE (2009).

37. Even among the hundred largest German enterprises, only in twenty-one are the majority of shares in dispersed ownership. German Monopolies Commission, *Neunzehntes Hauptgutachten der Monopolkommission 2010/2011*, German Parliamentary Papers 17/10365, at 165, ¶ 326.

38. *See* Gregory Jackson, *Employee Representation in the Board Compared: A Fuzzy Sets Analysis of Corporate Governance, Unionism and Political Institutions*, 12 INDUSTRIELLE BEZIEHUNGEN 252 (2005).

39. Markus Roth, *Die unternehmerische Mitbestimmung in der monistischen SE*, 35 ZEITSCHRIFT FÜR ARBEITSRECHT [ZfA] 431, 432 (2004) (Ger.).

40. Gesetz über die Mitbestimmung der Arbeitnehmer [Mitbestimmungsgesetz] [Act on Co-determination by Employees (Co-Determination Act)], May 4, 1976, BGBL. I at 1153, last amended by the Act, Mar. 23 2002, BGBL. I at 1130 (Ger.), *available at* http://www.bmwi.de/English/Redaktion/Pdf/__Archiv/labour-law/act-on-co-determination-by-employees.

employing more than 500 are subject to third-parity co-determination.[41] For the coal, steel, and mining industries, a special parity co-determination regime was introduced shortly after World War II,[42] laying the foundation for post-war employee participation at the board level.[43] The British government of the German industrial heartland of Rhein/Ruhr established employee representation in part as an insurance device against the re-militarization of Germany.[44] Therefore, the political dimension of co-determination is key;[45] the same is true for the objectives of progress in European company law.[46]

For German stock corporations, three models of employee representation can be distinguished: third-parity co-determination, introduced in 1952,[47] and now under the One-Third Participation Act in companies with more than 500 employees;[48] quasi-parity co-determination under the Co-Determination Act of 1976 with a decisive vote of the supervisory board's chairman in companies with more than 2,000 employees;[49] and parity composition of the board with an

41. Gesetz über die Drittelbeteiligung der Arbeitnehmer im Aufsichtsrat [Drittelbeteiligungsgesetz] [One-Third Participation Act], May 18, 2004, BGBL. I at 974 (Ger.).

42. Gesetz über die Mitbestimmung der Arbeitnehmer in den Aufsichtsräten und Vorständen der Unternehmen des Bergbaus und der Eisen und Stahl erzeugenden Industrie [Co-Determination Act for the Coal, Steel and Mining Industry], May 21, 1951, BGBL. I at 347 (Ger.).

43. For the development of German board-level co-determination, see Hartmut Oetker, *Vorbemerkung zur Mitbestimmung der Arbeitnehmer im Aufsichtsrat [Foreword on Co-Determination]*, *in* AKTIENGESETZ: GROßKOMMENTAR COMMENT NO. 12 (Klaus J. Hopt & Herbert Wiedemann eds., 4th ed. 1999) (Ger.).

44. Roth, *Die unternehmerische Mitbestimmung in der monistischen SE*, *supra* note 39, at 432–33.

45. *See* MARK J. ROE, POLITICAL DETERMINANTS OF CORPORATE GOVERNANCE: POLITICAL CONTEXT, CORPORATE IMPACT (2003).

46. For an example of the political dimension in European private company law, see Jan Bremer, *Kompromissvorschlag zur Europäischen Privatgesellschaft (EPG) vorgelegt*, 2011 NEUE ZEITSCHRIFT FÜR GESELLSCHAFTSRECHT [NZG] 695 (discussing a proposal for compromise regarding the Societas Privata Europaea (a European statute for close corporations)).

47 Introduced in 1952 as part of the Betriebsverfassungsgesetz [BetrVG] [Works Council Constitution Act], Oct. 11, 1952, BGBL I at 681 (Ger.).

48. Section 1 (1) One-Third Participation Act, May 18, 2004, BGBL. I at 974 (Ger.).

49. *See* Co-Determination Act, May 4, 1976, BGBL. I at 1153, last amended by the Act, Mar. 23 2002, BGBL. I at 1130, § 29(2) (Ger.). The chairman is typically a shareholder representative. *See* Co-Determination Act § 27(1)–(2).

independent member pursuant to the special co-determination regime in the coal, steel and mining industries.[50] The German co-determination system allows only for the representation of workers employed in Germany,[51] which is strongly criticized.[52] Supervisory board employee representatives are required not only on the supervisory boards of companies which themselves employ more than 500 employees, but also on those of companies incorporated as stock corporations or limited liability companies with subsidiaries employing more than 500 employees.[53] In 2009, about 1,500 companies (695 stock corporations) were subject to third-parity co-determination[54] and about 700 companies (280 stock corporations) were subject to quasi-parity co-determination.[55] Thus, about 1,000 stock corporations in Germany are subject to co-determination.

Recent studies on the legal regimes in France and Portugal show significant effects from basing labor protection on productivity and firm

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50. In 2002, 45 companies reported having such a structure. *See* Klaus J. Hopt & Markus Roth, *in* AKTIENGESETZ: GROßKOMMENTAR, *supra* note 35, § 96, ¶ 13.

51. For a reform proposal, see G. Bachmann, T. Baums, M. Habersack, M. Henssler, M. Lutter, H. Oetker and P. Ulmer, *Entwurf einer Regelung zur Mitbestimmungsvereinbarung sowie zur Größe des mitbestimmten Aufsichtsrats* (Arbeitskreis Unternehmerische Mitbestimmung), 30 ZIP 885 (2009).

52. NICO RAABE, DIE MITBESTIMMUNG IM AUFSICHTSRAT: THEORIE UND WIRKLICHKEIT IN DEUTSCHEN AKTIENGESELLSCHAFTEN 333 (2011); Hans-Jürgen Hellwig & Caspar Behme, *Gemeinschaftsrechtliche Probleme der deutschen Unternehmensmitbestimmung*, 54 DIE AKTIENGESELLSCHAFT [AG] 261 (2009); Hans-Jürgen Hellwig & Caspar Behme, *Zur Einbeziehung ausländischer Belegschaften in die deutsche Unternehmensmitbestimmung, Stellungnahme zum Entwurf des Arbeitskreises "Unternehmerische Mitbestimmung"*, 30 ZIP 1791 (2009); Hans-Jürgen Hellwig & Caspar Behme, *Gemeinschaftsrechtswidrigkeit und Anwendungsvorrang des Gemeinschaftsrechts in der deutschen Unternehmensmitbestimmung*, 31 ZIP 871 (2010); Volker Rieble & Clemens Latzel, *Inlandsmitbestimmung als Ausländerdiskriminierung bei Standortkonflikten*, 4 EUROPÄISCHE ZEITSCHRIFT FÜR ARBEITSRECHT [EuZA] 145 (2011). Many German companies are reincorporating as European companies to bypass this regime. *See* Roth, *Employee Participation, supra* note 4, at 72.

53. One-Third Participation Act § 2 (more than 500 employees); Co-Determination Act § 5 (more than 2000 employees).

54. Walter Bayer & Thomas Hoffmann, *AG-Report: Aktienrecht in Zahlen, Drittelbeteiligung der Arbeitnehmer im Aufsichtsrat*, *in* SONDERTEIL DER ZEITSCHRIFT *DIE AKTIENGESELLSCHAFT* 151, 153 (2010).

55. *Statistiken zur Mitbestimmungslandschaft*, HANS-BÖCKLER-STIFTUNG, http://www.boeckler.de/38347.htm (last visited Oct. 21, 2012).

size.[56] The effects of co-determination on the legal form chosen by companies have become apparent with hindsight: after limiting mandatory co-determination for newly-founded stock corporations to companies with more than 500 employees in 1994, the number of registered stock corporations in Germany rose from under 3,000 to about 17,000.[57] According to the statistics of labor representatives, the number of stock corporations, as well as the overall number of companies subject to quasi-parity co-determination, is in decline.[58]

3. Shifting Demographics: Participation of Older People and Women in the Labor Market

Globally, the first wave of the so-called "baby boomers" is retiring, and in many countries birth rates are lower than needed for the replication of age cohorts.[59] Due to greater life expectancy and lower fertility, demographics are shifting in Germany even more than in the United States, though they may be more heavily discussed in the latter.[60] Life expectancy grew more or less linearly in prior decades, leading to added years in retirement, even considering prospected rises in pension age.[61] To counteract the surge of public debt without further reforms,[62] state pensions designed as pay-as-you-go schemes in Germany, as well

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56. Luis Garicano, Claire Lelarge & John Van Reenen, *Firm Size Distortions and the Productivity Distribution: Evidence from France* (London Sch. Of Econ., Ctr. of Econ. Performance, CEP Discussion Paper No. 1128, 2012); Serguey Braguinsky, Lee G. Branstetter & Andre Regateiro, *The Incredible Shrinking Portuguese Firm* (Nat'l Bureau of Econ. Research, Working Paper No. 17,265, 2011).

57. Walter Bayer & Thomas Hoffmann, *AG-Report: Aktienrecht in Zahlen, Statistiken zur AG – eine kritische Bestandsaufnahme*, *in* SONDERTEIL DER ZEITSCHRIFT *DIE AKTIENGESELLSCHAFT* 283, 286 (2010) (finding 16,998 registered stock corporations in Germany as of June 1, 2010). At the end of 1993, 3,085 stock corporations were reported. *See* Deutsche Bundesbank, Kapitalmarktstatistik, März 2012, *available at* http://www.bundesbank.de/Redaktion/DE/Downloads/Veroeffentlichungen/Statistische_Beihefte_2/2012/2012_03_kapitalmarktstatistik.pdf?__blob=publicationFile

58. *See* HANS-BÖCKLER-STIFTUNG, www.boeckler.de.

59. OECD, PENSIONS AT A GLANCE: 2011, *supra* note 2.

60. *See, e.g.*, RICHARD A. POSNER, AGING AND OLD AGE (1995); LAWRENCE A. FROLIK & RICHARD L. KAPLAN, ELDER LAW IN A NUTSHELL (5th ed. 2010).

61. OECD, Pensions at a Glance 2011, *supra* note 2, at 34.

62. STANDARD & POOR'S, GLOBAL AGING 2010: AN IRREVERSIBLE TRUTH 33 tbl.3 (2010), *available at* http://www.apapr.ro/images/stories/materiale/COMUNICATE/2010/2010%2031%20attach.pdf (estimated German net government debt as a percentage of GDP of 400% in 2050).

as slightly improving birth rates for women born in 1969 or later[63]—and expected by the United Nations[64]—are of great importance. The European Commission responded by launching Europe 2020,[65] which aims to improve participation of women and older people in the labor market.[66] Both participation rates have already risen; in particular, there might be a correlation between the participation rates of women and early steps of legislation concerning the right to work part-time[67] and the provision of paternity leave.[68]

The much-discussed female quota in boardrooms, a central feature in European corporate governance,[69] should be viewed against this backdrop. European Commissioner Viviane Reding regularly announces a quota as part of the Agenda 2020. In 2004, Norway imposed a quota of 40% for women on boards, with others such as Spain and France following suit.[70] The glass ceiling is well documented in U.S. economic and social literature,[71] but neither the United States nor

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63. Joshua R. Goldstein & Michaela Kreyenfeld, *Has East Germany Overtaken West Germany? Recent Trends in Order-Specific Fertility*, 37 POPULATION & DEV. REV. 453, 464 (2011).

64. OECD, PENSIONS AT A GLANCE: 2011, *supra* note 2, at 163 (expecting fertility rate to increase to 1.69 in 2045-2050 from 1.32 in 2005-2010). For fertility rates from 1960 to 2010, determined based on a tempo-adjusted method, see Marc Luy, *Tempo Effects and their Relevance in Demographic Analysis*, 35 COMP. POPULATION STUD. 415, 431 (2010); Marc Luy & Olga Pötzsch, *Estimates of the Tempo-adjusted Total Fertility Rate in Western and Eastern Germany, 1955–2008*, 35 COMP. POPULATION STUDIES 605, 621 (2010) (finding a tempo-adjusted total fertility rate of 1.65 in 2007).

65. *See Communication from the Commission: Europe 2020 – A Strategy for Smart, Sustainable and Inclusive Growth*, COM (2010) 2020 final (Mar. 5, 2010).

66. *Id.* at 10 ("The employment rate of the population aged 20-64 should increase from the current 69% to at least 75%, including through the greater involvement of women, older workers and the better integration of migrants in the work force.").

67. Teilzeit- und Befristungsgesetz [TzBfG] [Part-Time and Fixed-Term Employment Act], Dec. 21, 2000, BGBL. I at 1966, last amended by Gesetz [G], Dec. 20, 2011, BGBL. I at 2854 (Ger.).

68. Bundeselterngeld- und Elternzeitgesetz [BEEG] [Federal Parental Allowance and Parental Leave Act], Dec. 5, 2006, BGBL. I at 2748, last amended by G, Sept. 10, 2012, BGBL. I at 1878 (Ger.).

69. See Katja Langenbucher, *Zentrale Akteure der Corporate Governance: Zusammensetzung des Aufsichtsrats, Zum Vorschlag einer obligatorischen Besetzungserklärung*, ZGR 314, 322 (2012) (Ger.).

70. For an early discussion of the reform movement, see Poonam Puri, *The Future of Stakeholder Interests in Corporate Governance* 48 CANADIAN BUS. L.J. 427, 442 (2010). In France, the quota of 40% has to be fulfilled by companies in 2017.

71. *See* FEDERAL GLASS CEILING COMMISSION, GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL (1995), *available at*

the United Kingdom has imposed a binding quota. In the United States, the SEC has called for policy statements from issuers.[72] Meanwhile, in the United Kingdom, the U.K. Corporate Governance Code will be amended in 2012 to require a special section on diversity in a company's Annual Report.[73] Early U.S. studies showed positive results for diverse boards,[74] and recent economic literature suggests that radical gender shifts in the composition of boards can cause financial harm to companies without women on their boards.[75]

4. Introduction of a 40% Quota with (Quasi-) Parity Co-determination?

Diversity is currently the hottest debate in German corporate governance.[76] In its response to the Report of the Government Commission on German Corporate Governance, the government

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http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1118&context=key_workplace.

72. *See* Proxy Disclosure Enhancements, Securities Act Release No. 9089, Exchange Act Release No. 61,175, Investment Company Act Release No. 29,092, 74 Fed. Reg. 68,334, 68,364 (Dec. 16, 2009) (codified at 17 C.F.R. § § 229.407 (2012)) (disclosure on diversity, strategy and implementation by the nomination committee).

73. FIN. REPORTING COUNCIL, FEEDBACK STATEMENT: GENDER DIVERSITY ON BOARDS 5 (2011) (announcing to amend provision B.2.4 of the UK Corporate Governance Code in 2012 as follows (in italics): "A separate section of the annual report should describe the work of the nomination committee, including the process it has used in relation to board appointments. *This section should include a description of the board's policy on diversity, including gender, any measurable objectives that it has set for implementing the policy, and progress on achieving the objectives.* An explanation should be given if neither an external search consultancy nor open advertising has been used in the appointment of a chairman or a non‑executive director.").

74. David A. Carter et al., *Corporate Governance, Board Diversity, and Firm Value*, 38 FIN. REV. 33 (2003).

75. For Norway: Kenneth R. Ahern & Amy K. Dittmar, *The Changing of the Boards: The Impact on Firm Valuation of Mandated Female Board Representation*, 127 Q. J. ECON. 137 (2012).

76. Gregor Bachmann, *Zur Umsetzung einer Frauenquote im Aufsichtsrat*, 32 ZIP 1131 (2011); Langenbucher, *supra* note 69; Julia Redenius-Hövermann, *Zur Frauenquote im Aufsichtsrat*, 31 ZIP 660 (2010); Claudia Schubert & Gönke Jacobsen, *Personelle Vielfalt als Element guter Unternehmensführung - die Empfehlung des Corporate Governance Kodex und die Rechtsfolgen ihrer unzureichenden Berücksichtigung*, 2-3 ZEITSCHRIFT FÜR WIRTSCHAFT UND BANKRECHT [WM] 726 (2011); Daniela Weber-Rey & Friederike Handt, *Vielfalt/Diversity im Kodex - Selbstverpflichtung, Bemühenspflicht und Transparenz*, NZG 1 (2011).

stressed that politicians expect improvement in the participation of women in supervisory and management boards.[77] However, the way in which stronger participation of women in the boardroom should be implemented is not yet clear. Leading German company directors, politicians, and even the government are split over the question of whether a legal rule, as in Norway, the Netherlands, and France, should be enacted.[78] Some commentators have questioned whether the Corporate Governance Commission had a mandate to include diversity in the German Code,[79] and whether a legal quorum for women would be in line with the German Constitution[80] and the European anti-discrimination rules.[81]

For a better understanding of the German discussion on diversity, one needs to consider that the German supervisory board is already highly politicized.[82] Taking into account quasi-mandatory co-determination in big companies, implementing a 40% quota, as advocated by the Green Party,[83] Social Democratic Party,[84] and in September 2012[85] by the upper house of the German parliament

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77. STELLUNGNAHME DER BUNDESREGIERUNG ZUM BERICHT DER REGIERUNGSKOMMISSION DEUTSCHER CORPORATE GOVERNANCE KODEX [OPINION OF THE FEDERAL GOVERNMENT ON THE REPORT OF THE GOVERNMENT COMMISSION ON GERMAN CORPORATE GOVERNANCE] 1 (2010).

78. For discussion, see Katja Langenbucher, *Frauenquote und Gesellschaftsrecht*, 66 JURISTENZEITUNG [JZ] 1038 (2011).

79. Peter O. Mülbert & Alexander Wilhelm, *Grundfragen des Deutschen Corporate Governance Kodex und der Entsprechenserklärung nach § 161 AktG*, 176 ZHR 286, 321–23 (2012).

80. Gerald Spindler & Kathrin Brandt, *Verfassungsrechtliche Zulässigkeit einer Gleichstellungsquote im Aufsichtsrat der börsennotierten AG*, 2011 NZG 401, 404–05; more flexible in this regard is Hans-Jürgen Papier & Martin Heidebach, *Die Einführung einer gesetzlichen Frauenquote für die Aufsichtsräte deutscher Unternehmen unter verfassungsrechtlichen Aspekten*, 2011 ZGR 305.

81. Jobst-Hubertus Bauer, *Gesetzliche Quote: Verfassungsrechtlich kaum haltbar!*, BETRIEBSBERATER [BB] I (2001:48); more flexible in this regard is Kathrin Brandt & Alexander Thiele, *Zulässigkeit einer Gleichstellungsquote im Aufsichtsrat unter Berücksichtigung der Rechtsprechung des EuGH*, 2011 AG 580.

82. For co-determination, see ROE, *supra* note 45, at 29–37; *see also id.* at 71–82 (country analysis).

83. Deutscher Bundestag: Drucksachen und Protokolle [BT] 17/3296 (Ger.).

84. SPD-Entwurf eines Gesetzes zur Förderung der Chancengleichheit von Männern und Frauen in Wirtschaftsunternehmen (ChGlFöG) [Equal Opportunities Draft Bill of the Social Democratic Party], BT 17/8878 (Ger.).

85. For further developments in 2013, see *infra* text accompanying note 112.

(Bundesrat),[86] would only allow shareholders to freely choose three out of ten directors. This might explain why the industry took the German Corporate Governance Code itself off the agenda—to hinder future action.[87] Even if a repeal of the German Corporate Governance Code was highly unlikely due to this industry pressure, 2011 was the second year since the German Corporate Governance Code's 2002 enactment in which it was not amended. However, a broad discussion of a quota for women on boards switched to a discussion of introducing a legal quota. On the basis of a report by Mathias Habersack on state and parastatal interventions in corporate governance ("Habersack Report"),[88] the German Jurist Forum recommended an evaluation of experiences in other European countries, but not an introduction of a legal (binding or flexible) quota for German boards.[89]

While the German discussion has largely neglected European initiatives,[90] issues such as shortcomings in the compatibility of family life with a woman's career, as well as better conditions in neighboring countries, have been stressed.[91] Empirical research shows a correlation

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86. Entwurf eines Gesetzes zur Förderung gleichberechtigter Teilhabe von Frauen und Männern in Führungsgremien (GlTeilhG) [Promotion of Gender Equality in Management Bodies], BUNDESRAT DRUCKSACHEN [BR] 330/12 (Beschluss).

87. Kremer, who comments on the Code, *see* HENRIK-MICHAEL RINGLEB, THOMAS KREMER, MARCUS LUTTER & AXEL V. WERDER, KOMMENTAR ZUM DEUTSCHEN CORPORATE GOVERNANCE KODEX (4th ed. 2010), and published an article on the Code, *see Thomas Kremer*, *Der Deutsche Corporate Governance Kodex auf dem Prüfstand: bewährte Selbst- oder freiwillige Überregulierung?*, 32 ZIP 1177 (2011), is chief compliance officer of ThyssenKrupp.

88. MATHIAS HABERSACK, STAATLICHE UND HALBSTAATLICHE EINGRIFFE IN DIE UNTERNEHMENSFÜHRUNG, GUTACHTEN E ZUM 69. DEUTSCHEN JURISTENTAG, MÜNCHEN 34–43 (2012).

89. 69. DEUTSCHER JURISTENTAG MÜNCHEN 2012: BESCHLÜSSE [69TH GERMAN JURISTS FORUM, MUNICH 2012: DECISIONS], Abteilung Wirtschaftsrecht [Business Law Section], *Staatliche und halbstaatliche Eingriffe in die Unternehmensführung*, Resolution I.3, at 17 (Ger.) [hereinafter GERMAN JURISTS FORUM, MUNICH 2012].

90. *See Green Paper*, *supra* note 24, at 6–7 (concerning strategy for equality between women and men); *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, at 7, COM (2010) 0491 final (Sept. 21, 2010) (concerning initiatives to improve gender balance in decision-making); *see also* the comparative overview in European Commission, *Commission Staff Working Paper: The Gender Balance in Business Leadership*, SEC (2011) 246 final (Mar. 1, 2011).

91. Martin Peltzer, *Der Bericht der Corporate Governance Kommission an die Bundesregierung*, 2011 NZG 281, 283 (Ger.).

between the absence of women on supervisory boards and their exclusion in German supervisory board networks; it also shows that supervisory board networks that do have a woman on a supervisory board tend to place more women on other boards.[92] Since the literature on positive economic effects of women in boardrooms is predominately from the United States,[93] where only about 17% of the independent directors are women,[94] a more cautious and evolutionary approach might be appropriate for European lawmaking on diversity. At the moment, a self-binding declaration of larger companies seems to be the most feasible policy option.[95] Whether there will be a legal duty to make such a declaration is not yet clear. In October 2011, the DAX 30-companies declared that they were aiming to enhance the proportion of women in higher management;[96] all but two made self-binding declarations, which generally aimed for significant future improvement. Quotas in individual companies currently range from 7.6% to 28.5%; however, quota increase goals aim to raise this range from over 10% to 32% between 2015 and 2020; the company with the highest ratio today plans to increase its quota by between 1% and 2% per year.[97]

In March 2012, the parliamentary group (Fraktion) of the German Social Democratic Party ("SPD") introduced a legislative initiative proposing a quota for supervisory boards of 30% female in 2013 and 40% in 2015.[98] Within the German government, three ministers, all of whom are women, are involved in this issue. The Minister of Labor (Mrs. Von der Leyen) supports a quota,[99] the Minister of Family (Mrs. Schröder) proposes a flexible quota (*Flexiquote*) set by the companies

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92. Michael Wolff et al., *Der Einfluss der Aufsichtsratszusammensetzung auf die Präsenz von Frauen in Aufsichtsräten*, 2010 ZEITSCHRIFT FÜR BETRIEBSWIRTSCHAFTLICHE FORSCHUNG [zfbf] 503, 523 (Ger.).

93. *See, e.g.*, Carter et al., *supra* note 74.

94. SPENCER STUART, 2012 SPENCER STUART BOARD INDEX 16 (2012) (finding 17% of independent directors are women, up from 12 % in 2000).

95. A study for the Ministry for Family, Elder, Woman and Youth is presented by Marc-Philippe Weller (University of Freiburg), see FRANKFURTER ALLGEMEINE ZEITUNG 19 (Aug. 6, 2011) (on file with author).

96. Florian Gathmann & Christian Teevs, *Zwei Ministerinnen im Quotenkampf*, SPIEGEL ONLINE (Oct. 17, 2011, 6:57 PM), http://www.spiegel.de/politik/deutschland/0,1518,792261,00.html (Ger.).

97. *Id.*

98. Equal Opportunities Draft Bill, BT 17/8878 (Ger.).

99. *See Gesetz geplant*: *Von der Leyen will Frauenquote bis 2013 durchboxen*, SPIEGEL ONLINE (June 16, 2011, 11:07 PM), http://www.spiegel.de/wirtschaft/soziales/gesetz-geplant-von-der-leyen-will-frauenquote-bis-2013-durchboxen-a-768884.html.

themselves, and the Minister of Justice (Mrs. Leutheuser-Schnarrenberger) rejects a quota outright.[100] The Prime Minister, Mrs. Merkel, is said to swing towards the promoters of a mandatory quota.[101] In December 2012 the German conservatives agreed to the introduction of a flexible quota.[102] Consequently, the German Government at least initially rejected the European proposal for a strict quota.[103]

The details of the legislative proposal are as follows: from 2013, supervisory boards shall consist of 30% women and management boards shall consist of 20% women.[104] From 2015, management boards with four managing directors shall consist of 25% women and management boards with at least nine members shall consist of (at least) 40% women.[105] For supervisory boards, women shall make up at least 40% of the board (if the number of directors greater than three).[106] The quota for the supervisory board would apply to both shareholder and employee representatives.[107] Due to the separate counting of men and women for employee and shareholder representatives,[108] the 2013 quotas will effectively already be higher. The sanctions for failing to comply are important, as elections for supervisory board members shall only be

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100. *See* Kerstin Schwenn & Hendrik Kafsack, *Schröder will ein Gesetz zur flexiblen Frauenquote*, FRANKFURTER ALLGEMEINE ZEITUNG (June 14 , 2012), *available at* http://www.faz.net/aktuell/wirtschaft/gleichbehandlung-schroeder-will-ein-gesetz-zur-flexiblen-frauenquote-11786059.html; *Justizministerin will Konzernen bis 2013 Zeit geben*, SPIEGEL ONLINE (Oct. 17, 2011, 8:42 AM), http://www.spiegel.de/politik/deutschland/gesetzliche-frauenquote-justizministerin-will-konzernen-bis-2013-zeit-geben-a-792124.html.

101. Merkel bei Frauenquote auf Schröders Seite**,** HANDELSBLATT, (July 23, 2012, 3:01 PM) (Ger.), http://www.handelsblatt.com/politik/deutschland/fuehrungspositionen-merkel-bei-frauenquote-auf-schroeders-seite/6910712.html.

102. *See* Christlich Demokratische Union, 25. Parteitag der CDU Deutschlands, *Beschluss: Starkes Deutschland. Chancen für Alle!*, Kompetenzen von Frauen besser nutzen 7–8 (Dec. 2012), *available at http://www.cdu.de/sites/default/files/media/dokumente/antrag-starkes-deutschland-chancen-fuer-alle.pdf*.

103. *"Einsatz für Frauenquote war nie mehr als Schamschlägerei"*, SÜDDEUTSCHE ZEITUNG, Mar. 6, 2013, at 5. For later developments *infra* note 112.

104. Equal Opportunities Draft Bill, BT 17/8878, art. 1, 13 no. 1.

105. *Id.*, art. 2, 13 no. 2 (to be codified at German Stock Corporation Act § 76(4)).

106. *Id.*, art. 2, 13 no. 2 (to be codified at German Stock Corporation Act § 96 (4) 1).

107. *Id.*, art. 1, 2, 13 (to be codified at German Stock Corporation Act § 96 (3) 1, (4) 1).

108. *Id.*, art. 1, 13 no. 1 (to be codified at German Stock Corporation Act § 96 (3)).

possible if the quotas are met.[109] If the election fails for this reason and it is not resolved during the next annual general meeting, another proposed provision will apply: if the supervisory board does not satisfy the quota provided for by law or the articles of association, it will no longer be able to take resolutions.[110] According to the proposal of the German Upper House of September 2012 and the current proposal by the Social Democratic Party and the Green Party, a 40% quota for larger supervisory boards shall be introduced until 2023.[111] Shortly before the German Bundestag rejected that proposal in April 2013, the German conservatives agreed to implement a call for a 30% quota in 2020 in its programme for the elections in September 2013.[112]

The United Kingdom contributes to the debate in another way by amending the UK Corporate Governance Code to provide for a flexible quota. Transparency is also to be provided due to a proposed European directive amending the European Audit Directives.[113] Economists studying the Norwegian experience showed that companies with less than two women on their boards suffered from having to implement the high quota of 40% all at once.[114] In 2012, the German government published the Eighth Family Report[115] calling for part-time employment for senior employees as well, which may lead to more qualified women in the future.

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109. *Id.*, art. 1, 13 no. 1 (to be codified at German Stock Corporation Act § 101 (1a)).

110. *Id.*, art. 1, 13 no. 1 (to be codified at German Stock Corporation Act § 108 (2) 5).

111. Entwurf eines Gesetzes zur Förderung gleichberechtigter Teilhabe von Frauen und Männdern in Führungsgremien (GlTeilhG), *supra* note 88. See also DEUTSCHER BUNDESTAG: GESETZENTWURF [BT] 17/11139, Art. 2, 16, providing tax-consequences for non-compliance with Art. 13.

112. The conservatives overruled the party resolution of December 2012. *See Gender Gap: Germany Rejects Law Requiring Board Quotas*, SPIEGEL ONLINE (Apr. 18, 2013, 6:51 PM), http://www.spiegel.de/international/germany/germany-rejects-law-requiring-board-quotas-a-895238.html.

113. *Commission Proposal for a Directive of the European Parliament and of the Council amdending Council Directives 78/660/EEC and 83/349/EEC as regards disclosure of non-financial and diversity information by certain large companies and groups*, at art. 1 (2), COM (2013) 207 final (Apr. 16, 2013).

114. *See* Ahern & Dittmar, *supra* note 75 at 162–69, 192–94.

115. BUNDESMINISTERIUM FÜR FAMILIE, SENIOREN, FRAUEN UND JUGEND, ZEIT FÜR FAMILIE, FAMILIENZEITPOLITIK ALS CHANCE EINER NACHHALTIGEN FAMILIENPOLITIK, ACHTER FAMILIENBERICHT DER BUNDESREGIERUNG (2012).

B. PENSION SYSTEM IN GERMANY AND THE UNITED STATES

1. The German Focus on State Pensions and Life Insurance

In the nineteenth century, Germany introduced the well-known Bismarck pension laws.[116] Less known is the academic foundation for introducing social security. Viewed from a twenty-first century perspective, German social security might be seen as an early result of law and economy.[117] Early German economists promoted the introduction of social security. Corresponding to the Austrian "Nationalökonomie," the German "Verein für Socialpolitik" (German Economic Association) promoted a solution for the "soziale Frage" (social question).[118] Heavy critique resulted in the phrasing of "Kathedersozialist" (lectern-socialist), which is still rooted in German language.[119] At that time, German social security was capital-funded, providing disability as well as pension insurance.[120] The retirement age was 70,[121] equal or even greater to the average life expectancy at the time.[122] Capital-funded state pensions were later given up due to the First World War and hyperinflation in the 1920s.[123] Today, the German

116. Gesetz betreffend die Invaliditäts- und Altersversicherung [Disability and Old-Age Insurance Act], June 22, 1889, RGBL. at 97 (Ger.).

117. Kristoffel Grechenig & Martin Gelter, *Divergente Evolution des Rechtsdenkens – Von amerikanischer Rechtsökonomie und deutscher Dogmatik*, 72 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT [RabelsZ] 513 (2008) (Ger.); Kristoffel Grechenig & Martin Gelter, *The Transatlantic Divergence in Legal Thought: American Law and Economics vs. German Doctrinalism*, 31 HASTINGS INT'L & COMP. L. REV. 295 (2008).

118. In the nineteenth century, up to 40% of the German Economic Association's members were lawyers. For the economic analysis of German labor law up until the Weimar Republic, see Markus Roth, *150 Jahre Recht des Handlungsgehilfen: Vom ADHGB 1861 zum Arbeits(vertrags)gesetz(buch)*, 2012 RECHT DER ARBEIT [RDA] 1, 5–6.

119. *See Informationen über den Vfs*, VEREIN FÜR SOCIALPOLITIK (Apr. 2011), http://www.socialpolitik.org/vfs.php?mode=informationen&lang=1.

120. Gesetz Betreffend die Invaliditäts- und Altersversicherung [Disability and Old-Age Insurance Act], June 22, 1889, RGBL. §§ 20(2), 21 (Ger.).

121. *Id.* § 9(5).

122. For commentary on the development of life expectancy, see Jim Oeppen & James W. Vaupel, *Broken Limits to Life Expectancy*, 296 SCIENCE 1029 (2002).

123. For a criticism of the concept of investment in assets of insurance companies analogous to the legal rules for guardians in light of hyperinflation, see MARKUS ROTH,

state pension is a pay-as-you-go scheme and and provides for most of Germany's retirement income—this is the real first pullar.[124] Since the so-called Riester-reform, the second and third pillars (private pensions such as occupational pensions and individual pensions, respectively) have gained momentum.[125] The fact that the third pillar occupies a greater role in society than the second pillar causes widely-accepted cost efficiency problems.

2. *Employee participation Via Private Pensions in the United States*

In the United States, more emphasis is placed on occupational pensions;[126] social security is not as close to the insurance principle as it is in the German system. Unlike in Germany, US state pensions were never expected to provide a full retirement income for large parts of the population.[127] United States pension assets are therefore by far the greatest asset in US capital markets and account for almost half of the world's occupational pension assets.[128] This is attributed to both state pension funds and a 'union pension premium.'[129] As of 2008, state pension funds were said to hold one-fifth of US-listed equity.[130] Even if they hold only one-tenth of US equity,[131] state pension funds play a

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PRIVATE ALTERSVORSORGE: BETRIEBSRENTENRECHT UND INDIVIDUELLE VORSORGE 296–98 (2009) [hereinafter ROTH, PRIVATE ALTERSVORSORGE 2009].

124. OECD, OECD PENSIONS OUTLOOK 2012, at 207 (2012).

125. Ulrich Becker, *Staatliche Alterssicherung*, *in* RECHT DER ÄLTEREN 321, 325 (Ulrich Becker & Markus Roth eds. 2013).

126. *See* JOHN H. LANGBEIN ET AL., PENSION AND EMPLOYEE BENEFIT LAW (5th ed. 2010); DAN M. MCGILL ET AL., FUNDAMENTALS OF PRIVATE PENSIONS (9th ed. 2010).

127. MCGILL, *supra* note 126. On the role of social security in the US Retirement System, see *id.* at 45–85.

128. TOWERS WATSON, *supra* note 2, at 7 (In 2012, total pension assets in the US accounted for $16.851 trillion out of the $29.754 trillion of total pension assets among the thirteen major pension markets); OECD, PENSIONS AT A GLANCE 2011, *supra* note 2, at 179 ($9.58 trillion out of $16.78 trillion in 2009, the latter number representing OECD countries).

129. Teresa Ghilarducci, *Organized Labor and Pensions*, *in* OXFORD HANDBOOK OF PENSIONS AND RETIREMENT INCOME 381, 385 (Gordon L. Clark et al. eds., 2006).

130. Stephen J. Choi & Jill E. Fisch, B*eyond CalPERS: Survey Evidence on the Developing Role of Public Pension Funds in Corporate Governance*, 61 VAND. L. REV. 315, 316 (2008).

131. THE CONFERENCE BOARD, THE 2010 INSTITUTIONAL INVESTMENT REPORT 25–26; Martin Gelter, *The Pension System and the Rise of Shareholder Primacy* 33, (Fordham Law Legal Studies Research Paper No. 2079607, 2012), *available at* http://ssrn.com/abstract=2079607.

pivotal role in shaping corporate governance in the United States and worldwide due to the sheer size of their investment portfolios: it was CalPERS which paved the way for activist corporate governance by shareholders.[132] As an association primarily representing the state pension funds, CII was instrumental in promoting the independent director paradigm and the corporate governance rules under the Dodd-Frank Act.[133]

3. Occupational Pensions in Germany

A union pension premium as seen in the United States[134] is not common in Germany. While occupational pensions in Germany are widespread in the financial and chemical industries, industrywide pension provisions—as in the electro and metal industries—are relatively new phenomenons, having been introduced in 2001.[135] Metallrente, a joint-venture of the employer association Gesamtmetall and the union IG Metall, now owns assets of 1.5 billion Euros. Unlike in Switzerland and the Netherlands, occupational pensions in Germany are not subject to collective bargaining by the unions.[136] In some cases, there is collective bargaining of works councils at the plant level.[137] In the case of Metallrente, providing occupational pensions is merely a choice for the employee, and not a duty.[138]

Direct pension promises is the default rule in Germany, and until 2001, pension promises were mandatorily linked to the earnings of the company for adjustments in retirement.[139] The German Occupational Pensions Act provides that pensions have to be adjusted for inflation if the financial situation of the company allows for it.[140] The German Federal Labor Court ruled that adjustments do not have to be paid for

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132. Michael P. Smith, *Shareholder Activism by Institutional Investors: Evidence from CalPERS*, 51 J. FIN. 221 230–32 (1996).

133. *See infra* Part III.A.1, IV.A.1.

134. Teresa Ghilarducci, *Organized Labor and Pensions*, *in* OXFORD HANDBOOK OF PENSIONS AND RETIREMENT INCOME 381, 385 (Gordon L. Clark et al. eds., 2006).

135. *See Stark für die Zukunft - Vorsorge mit MetallRente*, METALLRENTE, http://www.metallrente.de (last visited Jan. 29, 2013).

136. ROTH, PRIVATE ALTERSVORSORGE 2009, *supra* note 123, at 324.

137. *Id.* at 319–20.

138. *See* METALLRENTE, *supra* note 135.

139. Betriebsrentengesetz [BetrAVG] [Occupational Pensions Act], Dec. 19, 1974, BGBL. I at 3610, § 16 (Ger.).

140. ROTH, PRIVATE ALTERSVORSORGE 2009, *supra* note 123, at 638–50.

out of the substance (assets), but rather from the revenues of the company, and of the revenues, that a reasonable interest rate—the interest rate for secured bonds plus 2%—has to be left out to allow for further investments as well as an appropriate return on investment in order to secure the existence of the company first.[141]

Pensions of state employees in Germany are at best partly funded.[142] The biggest German public pension fund is the "Versorgungsanstalt des Bundes und der Länder" (VBL), which provides occupational pensions for public employees at the federal and state levels and has over €16 billion under management,[143] compared to CalPERS $257 billion.[144] In the United States, a large proportion of pension assets are held by public pension funds,[145] even if the underfunding of such funds is a subject of concern.

Neither Germany nor the United States is likely to exercise best practices in pension policy. According to data provided by the OECD, Germany and the United States provide under-average replacement ratios, especially for low incomes.[146] Moreover, only a minority of the working age population is enrolled in an occupational pension plan.[147] Therefore, in both the United States and Germany, automatic enrollment, as in the UK Pension Act 2008,[148] would enhance prospects for future retirees. Such reform has been suggested in Germany, *inter alia*, by the German Jurist Forum in 2004 and the Association for Occupational Pensions ("Arbeitsgemeinschaft für betriebliche Altersversorgung, AbA") in 2011, as well as in the United States by various authors on the basis of several empirical studies.[149]

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141. Bundesarbeitsgericht [BAG] [Federal Labour Supreme Court], 18.2.2003, 3 AZR 172/02, Entscheidungen des Bundesarbeitsgerichts [BAGE] 105, 72, 77.

142. This contrasts with other countries such as the US and Japan. Worldwide, the biggest pension funds are public pension funds. *See* WATSON WYATT INTERNATIONAL, INVESTMENT MATTERS 2008, at 32 (2008).

143. *See Die Vermögensanlage der VBL*, VBL, http://www.vbl.de/de/wir_ueber_uns/vermoegensanlage/ (last visited Feb. 2, 2013).

144. *CalPERS Investments*, CALPERS (May 28, 2013), http://www.calpers.ca.gov/index.jsp?bc=/investments/home.xml.

145. OECD PENSIONS OUTLOOK 2012, *supra* note 124, at 228.

146. *Id.* at 207.

147. *Id.* at 104 (about one-half of the workers).

148. 2008, c. 30, Pensions Act 2008 § 3 (U.K.). *See* DEP'T FOR WORK AND PENSIONS, PENSIONS BILL - IMPACT ASSESSMENT 45 (2008) (U.K.).

149. *See* George A. Akerlof, *Behavioral Macroeconomics and Macroeconomic Behavior*, 92 AM. ECON. REV. 411, 424 (2002); Brigitte C. Madrian & Dennis F. Shea, *The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior*, 116 Q.

4. Corporate Finance and the Trend from Defined Benefits to Defined Contributions

In the 1970s, Peter Drucker estimated that pension funds of the private sector held a quarter of all listed equity in the United States.[150] Since then, employee stock ownership programs (ESOPs) have been strongly promoted.[151] David Blake estimates that United Kingdom companies in the late twenteeth century owned a third of each other via their pension funds.[152] In post-World War II Germany, direct pension promises ("Direktzusagen") contributed about 20% to self-financing of German firms.[153] Due to the trend towards asset funding and international investments in equity (advisors conversely refer to a home bias in promoting international investments), direct and indirect self-financing is in decline.

Pursuant to ERISA,[154] asset funding has been legally required since 1974 in the United States.[155] Whether such asset funding is counteracting the alignment of employee and employer interests is now subject to discussion in the United States. The idea behind the promotion of occupational, and not state, pensions by General Motors in the 1950s was to invest in the American economy.[156] In the aftermath of the 2008 financial crisis, General Motors had to file for insolvency due to pension and health care obligations.[157] This is expected to result in

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J. ECON. 1149 (2001); J. Michael Orszag & Peter R. Orszag, *Individual Accounts: Lessons from International Experience*, 309 SCIENCE 250 (2005); James M. Poterba, *Individual Decision-Making and Risk in Defined Contribution Plans*, 13 ELDER L.J. 285, 291 (2005).

150. DRUCKER, *supra* note 5, at 1.

151. Henry Hansmann, *When Does Worker Ownership Work? ESOPs, Law Firms, Codetermination and Economic Democracy*, 99 YALE L.J. 1749, 1752 (1990).

152. BLAKE, *supra* note 7, at 575.

153. Günter Felix, *Die steuerliche Behandlung von betrieblichen Pensionsverpflichtungen*, 1958 RDA 89.

154. Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended in 29 U.S.C. §§ 1001-1461 & scattered sections of 26 U.S.C.) (2006).

155. For origins and structure of ERISA, see JOHN H. LANGBEIN ET AL., PENSION AND EMPLOYMENT BENEFIT LAW ch. 3, 78–145 (5th ed. 2010).

156. DRUCKER, *supra* note 5, at 5 ("Socialism came to America [through the efforts of] the most unlikely revolutionary of them all—the chief executive officer of America's largest manufacturing company, General Motors.").

157. For underfunding of the General Motors pension plan, see Leigh A. Wolfe, *Is Your Pension Safe? A Call for Reform of the Pension Guaranty Corporation and Protection of Pension Benefits,* 24 SW. U. L. REV. 145, 179 (1994).

further caution towards defined benefit promises, and is likely to propel the trend towards defined contributions even more.[158]

The trend from defined benefit to defined contribution must be seen against the backdrop of the lack of, or at least limited, financial risk for employers until the era of codification of occupational pension law in the 1970s.[159] In Germany, employers were allowed to revoke pension promises due to financial distress until the enactment of the Act on Better Occupational Pensions in 1974; even later on, there was still limited scope to do this.[160] In the United States, the insolvency of car manufacturer Studebaker gave rise to ERISA in response to employees and retirees losing all their pension claims.[161] Employers in the United States responded by switching pension promises from defined benefit to defined contribution, thereby shifting the asset management and longevity risks to the employees.[162] In Germany, employers reduced pension promises in general; the increase in pension promises since 2001 is due to the right of employees to convert up to 4% of their income into occupational pensions.[163]

C. THE RISE OF INSTITUTIONAL INVESTORS

1. The Rise of Institutional Investors in the United States and in the United Kingdom

The National Bureau of Statistics has closely documented the rise of institutional investors in the United Kingdom. In the 1970s and 80s, British institutional investors already held the majority of UK equity.[164] This was also due to Maynard Keynes, who advocated investments in

158. For automatic enrollment as a tool to counteract this trend resulting in short investment horizons, see *infra* Part IV.A.2.

159. On the effect of ERISA on occupational pension practice, see MCGILL ET AL., *supra* note 126, at 436.

160. ROTH, PRIVATE ALTERSVORSORGE 2009, *supra* note 123, at 569.

161. MCGILL ET AL., *supra* note 126, at 424–25.

162. For a view critical of the risk shift, see JACOB S. HACKER, THE GREAT RISK SHIFT: THE NEW ECONOMIC INSECURITY AND THE DECLINE OF THE AMERICAN DREAM (2006).

163. Occupational Pensions Act, Dec. 19, 1974, BGBL. I at 3610, § 1a (Ger.).

164. OFFICE FOR NAT'L STATISTICS, STATISTICAL BULLETIN, OWNERSHIP OF UK QUOTED SHARES, 2010 (2012) (U.K.).

equity while serving as an advisor to British insurers.[165] While British life insurance companies have invested heavily in equity, such investments are rare internationally and in most countries, restricted by supervisory agencies.[166] In the United States, reported percentages of equity held by institutional investors differ substantially. Gordon asserts that institutional investors already held the majority of US shares in the 1980s,[167] while Cheffins says that this occurred at least in the 1990s,[168] and Armour and Skeel date this to the 2000s.[169] The Conference Board provides related data, claiming that institutional shareholding has declined in the new millennium.[170] Data from the US Census Bureau for 2010 report households and foreigners holding about 50% of US equity, slightly more than the combined figures of pension funds, life insurance companies, mutual funds and ETFs.[171]

The rise of institutional shareholders was legally embedded in generously sponsored, funded occupational and individual pension regimes. As previously discussed, US occupational pension law literature hints at the irony that it was auto giant General Motors that pressed for generous occupational pensions to prevent the rise of 'socialism' by granting sufficient state pensions to the middle class. In the 1970s, the iconic Peter Drucker commented on this in his book, *The*

165. John Maynard Keynes, *Kapitalanlagepolitik der Lebensversicherungsgesellschaften nach englischer Auffassung,* 27 ZEITSCHRIFT FÜR DIE GESAMTE VERSICHERUNGSWISSENSCHAFT [ZVersWiss] 32, 39 (1927) (Ger.).

166. For Germany, see ROTH, PRIVATE ALTERSVORVORGE 2009, *supra* note 123, at 298–300.

167. Jeffrey N. Gordon, *The Rise of Independent Directors in the United States, 1950-2005: Of Shareholder Value and Stock Market Prices*, 59 STAN. L. REV. 1465, 1567 (2007).

168. Brian R. Cheffins, *The History of Corporate Governance* 11 (ECGI, Working Paper No. 184, 2012), *available at* http://ssrn.com/abstract=1975404.

169. John Armour & David A. Skeel, Jr., *Who Writes the Rules for Hostile Takeovers, and Why?—The Peculiar Divergence of U.S. and U.K. Takeover Regulation*, 95 GEO. L.J. 1727, 1768 fig.1 (2007).

170. *See* THE CONFERENCE BOARD, *supra* note 131, at 25–26; Gelter, *supra* note 131, at 33.

171. U.S. CENSUS BUREAU, THE 2012 STATISTICAL ABSTRACT 746 tbl. 1201 (2012) (providing the following statistics for equity holdings and net purchases, by investor type, in the year 2010 (all in billions of dollars): Total: 23,293, Household sector: 8,514; Rest of the world: 3,091; Life insurance companies: 1,423; Private pension funds: 1,983; State and local government retirement funds: 1,779; Mutual funds: 4,801; Exchange-traded funds: 854).

Unseen Revolution: How Pension Fund Socialism Came to America.[172] In the 1980s, Robert Clark promoted the idea of four stages of capitalism, beginning with the separation of ownership and management and continuing with institutional investors telling the people how much money they need to save.[173] In 2008, GM went bankrupt largely due to its underfunded pension plan. For airlines in the United States, filing Chapter 11 has been a business model for much of the twenty-first century.[174]

In the United States, the value of pension assets is about the same as GDP.[175] In the 1970s, US trust law was re-designed according to the portfolio theory,[176] and in the 1980s, states began to allow their pension funds to invest a higher ratio in equity.[177] The United Kingdom followed suit; supervisory authorities traditionally allow life insurance companies to invest substantial parts of their assets in equity.[178] In other countries, such as the United States and Germany, supervisory authorities limit investments in equities to contracts with guarantees.[179]

2. Institutional Investors and Foreign Shareholdings

Following the rise of institutional investors, foreign stock ownership rose considerably. According to data from the advisory firm Towers Watson, US occupational pension assets are worth $16 trillion in total,[180] with equity holdings of 44% and about $7 trillion invested in

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172. DRUCKER, s*upra* note 5.

173. Robert C. Clark, *The Four Stages of Capitalism: Reflections on Investment Management Treatises*, 94 HARV. L. REV. 561 (1981).

174. *See* Jonathan E. Collins, *Airlines Jettison their Pension Plans: Congress Must Act to Save the PBGC and Protect Plan Beneficiaries*, 70 J. AIR L. & COM. 289, 303–04 (2005).

175. TOWERS WATSON, *supra* note 2, at 7 (Pension assets equal 107% of GDP).

176. *See generally* Harvey E. Bines, *Modern Portfolio Theory and Investment Management Law: Refinement of Legal Doctrine* 76 COLUM. L. REV. 721 (1976); John H. Langbein & Richard A. Posner, *Market Funds and Trust-Investment Law* 1 AM. B. FOUND. RES. J. 1, 18 (1976); BEVIS LONGSTRETH, MODERN INVESTMENT MANAGEMENT AND THE PRUDENT MAN RULE (Statement of Advisers page) (1987); John H. Langbein, *The Uniform Prudent Investor Act and the Future of Trust Investing*, 81 IOWA L. REV. 641, 662 (1996).

177. Gelter, *supra note* 131, at 36–37.

178. Keynes, *supra* note 165.

179. ROTH, PRIVATE ALTERSVORSORGE 2009, *supra* note 123, at 464–65, 467.

180. TOWERS WATSON, *supra* note 2, at 7 ($16.851 trillion).

stock.[181] It is estimated that about one-fourth of all equity is invested abroad, accounting for about the same as, or perhaps even exceeding, the market capitalization of all German equities.[182] According to the US Department of Treasury, US portfolio holdings of foreign securities account for 13% of market capitalization of the German stock market, with comparable or even higher figures for other industrial countries: 18% in Canada, 12% in France, 11% in Japan, 17% in the Netherlands, 11% in South Korea, 26% in Switzerland, and 19% in the UK.[183] In the case of Germany, the total US equity investments nearly tripled from the end of 2001 to the end of 2009, increasing from about $70 billion[184] to about $200 billion.[185] During this time, the German market capitalization shrank by nearly 20%.[186]

3. Occupational Pensions and Foreign Shareholdings in Germany

In contrast to the United States, German pension assets account for only $498 billion,[187] significantly less than half of the total market capitalization of German equity. About €170 billion of occupational pension assets are invested in DAX 30-companies, which invest about 20% in equity.[188] Since other pension institutions are even more reluctant to invest in equity,[189] 10% of all occupational pension assets invested in equity is likely to be a good guess, totaling about $50 billion.

181. *Id.* at 8 (52% in equity).

182. *Id.* at 7, 31–32 (about 25% of total equity in foreign stock, 52% of pension assets in equity, amounting to one-eighth of $16.851 trillion); DEUTSCHE BÖRSE, CASH MARKET MONTHLY STATISTICS: DECEMBER 2011, at 41 (2012) (indicating a total market capitalization of German equity worth €912 billion).

183. PORTFOLIO HOLDINGS REPORT, *supra* note 30, at 12.

184. PORTFOLIO HOLDINGS REPORT, supra note 30, at 78 tbl.23 ($72.2 billion).

185. *Id.* at 39 tbl. A3 ($193 billion).

186. DEUTSCHE BÖRSE, *supra* note 182, at 41 (from €1,203,681 million to €1,065,713 million).

187. TOWERS WATSON, *supra* note 2, at 7.

188. ALFRED GOHDES & DR. THOMAS JASPER, TOWERS WATSON, DAX-PENSIONSWERTE 2011, at 13 (2012) (Ger.) (22% in equity).

189. For insurance companies, there are strict limits for equity investments. *See* ROTH, PRIVATE ALTERSVORSORGE 2009, *supra* note 123, at 298 –301, 464–75.

Even if all of this equity was German stock, this would not amount to more than 5% of the total market capitalization of German equity.[190]

Due to the internationalization of equity investment in Germany, it is likely that US pension funds invested in Germany doubles or triples the amount of domestic pension money.[191] Considering UK and other pension money as well, foreign pension funds invested in German equity might be five times higher than domestic pension funds in Germany, and perhaps even up to ten times higher.[192] It is also for this reason that domestic institutional investors play a minor role in Germany, and foreign institutional investors are assumed to hold the majority of shares in most German blue chips (DAX 30-companies).[193] According to data from Deutsche Bundesbank, considerably more than 40% of shares, in terms of market value, are in the hands of foreign investors.[194] Such ratios are also reported for other European countries such as the United Kingdom, France and Belgium,[195] while in the United States less than 20% of equity is in the hands of foreign investors.[196]

Investor relations websites of the top fifteen German blue chips show that according to market capitalization, most of them have no controlling shareholder.[197] Only VW, BMW and Henkel are de facto controlled by families or the state; these families and the state have a

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190. DEUTSCHE BUNDESBANK EUROSYSTEM, STATISTIK ÜBER WERTPAPIERINVESTMENTS 28 (2012) (Ger.) (market value of domestic equity equaling €1,105,140 million).

191. For U.S. holdings of German securities, see PORTFOLIO HOLDINGS REPORT, *supra* note 30, at 12. For pension asset allocation in domestic equity versus total equity exposure, see TOWERS WATSON, *supra* note 2, at 32.

192. TOWERS WATSON, *supra* note 2, at 13; DEUTSCHE BÖRSE, *supra* note 182, at 40.

193. ERNST & YOUNG, Wem gehört der DAX? Analyse der Aktionärsstruktur der DAX-Unternehmen (April 26, 2012) (54% of detectible equity owners) (on file with author).

194. DEUTSCHE BUNDESBANK EUROSYSTEM, *supra* note 190, at 28 (market value of domestic equity: €1,105,140 million; foreign investors: €521,006 million). A lower ratio of about 20%, in 2007, is provided by the Federation of European Stock Exchanges (FESE). *See* FED'N OF EUROPEAN SEC. EXCHS. (FESE), SHARE OWNERSHIP STRUCTURE IN EUROPE 13 fig.2 (2008) (21.3%). *See also* ORG. FOR ECON. CO-OPERATION AND DEV. (OECD), THE ROLE OF INSTITUTIONAL INVESTORS IN PROMOTING GOOD CORPORATE GOVERNANCE 120, 114–15 (2011) (finding nearly 30% foreign ownership in 2007).

195. FED'N OF EUROPEAN SEC. EXCHS., *supra* note 194, at 12.

196. U.S. CENSUS BUREAU, *supra* note 171, at 746 tbl. 1201 (about 15%).

197. *See DAX Marktkapitalisierung*, FINANZEN.NET, http://www.finanzen.net/index/DAX/Marktkapitalisierung.

significant role in VW, with the Porsche and Piech family controlling the Porsche holding of 51% of VW, the German state Lower Saxony holding another 20%, and Quatar holding 17% (these percentages refer to voting shares; VW is in the DAX with preference shares giving no voting rights).[198] The other companies have no German investor holding more than 10%. Of the twelve companies whose shares are in free float (out of fifteen with the biggest market capitalization), virtually all of them are in foreign hands, meaning a majority of foreign shareholdings. Only Deutsche Bank is regularly switching from domestic to foreign shareholder majority.[199] In the case of BASF, foreign majority is likely but not entirely clear.[200] These two exceptions among the companies in free float may also serve as examples of a long-term shareholder basis through generous employee participation in company stock.[201]

D. PENSION FUNDS AND CORPORATE GOVERNANCE

1. The Influence of Institutional Shareholders on US and UK Corporate Governance

The term corporate governance came into vogue, or at least was established, in the United States.[202] Corporate governance began to emerge with the inspections of companies reporting on bribes of foreign officials, resulting in the Foreign Corrupt Practices Act[203] and later the

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198. *See Shareholder Structure*, VOLKSWAGEN AKTIENGESELLSCHAFT (Dec. 31, 2013), http://www.volkswagenag.com/content/vwcorp/content/en/investor_relations/share/Shareholder_Structure.html.

199. *Shareholder Structure*, DEUTSCHE BANK (Dec. 31, 2012), https://www.deutsche-bank.de/ir/en/content/shareholder_structure.htm.

200. *Shareholder Structure*, BASF (Dec. 31, 2012), http://www.basf.com/group/corporate/en/investor-relations/share/shareholder-structure

201. For using ESOPs as a takeover defense in the US, see Hansmann, *supra* note 151, at 1797.

202. *See* Cheffins, *supra* note 168, at 2 (observing that the term "corporate governance" came into vogue in one single country: the United States).

203. Foreign Corrupt Practices Act, Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified as amended at 15 U.S.C. §§ 78dd-1—78dd-3). Reporting on this and on the Co-Determination Act of 1976, see Herbert Wiedemann, *Die Zukunft des Gesellschaftsrechts*, *in* FESTSCHRIFT FÜR ROBERT FISCHER 883 (Marcus Lutter, Walter Stimpel & Herbert Wiedemann eds., 1979) (Ger.).

OECD Convention on Combating Bribery.[204] In academia, the work of Eisenberg was influential in this area.[205] In practice, an association of state pension funds promoted corporate governance, with CalPERS the largest by assets, and CII. CII calls itself the 'voice of corporate governance' and stated that it championed the independent director paradigm which was later adopted.[206] The National Association of Pension Funds (NAPF) has been of similar, if not greater, importance in the United Kingdom. In preparing a collection of essays,[207] the Cadbury Report, they serve as a good starting point of the European corporate governance debate. When the Cadbury Report was issued, UK institutional investors, such as pension funds and insurance companies, held over half of the equity of UK listed companies.[208]

2. The European Code of Conduct Movement

In the United States, corporate governance standards are mandatory in the listing rules[209] and are not restricted to a comply-or-explain basis as in Europe. This more liberal regulatory approach was developed in the United Kingdom, where the European corporate governance debate

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204. *See generally* THE OECD CONVENTION ON BRIBERY: A COMMENTARY ON THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS OF 21 NOVEMBER 1997, (Marc Pieth et al. eds., 2007); *see also* Markus Roth, *Die OECD-Empfehlung im Gesamtzusammenhang der Verhinderung von Bestechung*, 56 RECHT DER INTERNATIONALEN WIRTSCHAFT [RIW] 737 (2010).

205. *See* MELVIN A. EISENBERG, THE STRUCTURE OF THE CORPORATION: A LEGAL ANALYSIS (1976).

206. COUNCIL OF INSTITUTIONAL INVESTORS (CII), http://www.cii.org/about_us (last visited Jan. 20, 2013). Former version (http://www.cii.org/about/who_we_serve.) accessible via the webarchive, stated under the headline 'Improving Corporate Governance':

> Many of the Council's corporate governance policies, once considered radical, are now in the mainstream. Principles that we championed over time—from director independence to clear links between executive pay and company performance—have been adopted by U.S. companies; enshrined in regulation, legislation and stock exchange listing standards; and emulated abroad.

207. NAT'L ASS'N OF PENSION FUNDS, CREATIVE TENSION? NATIONAL ASSOCIATION OF PENSION FUNDS (1990).

208. For the development of share ownership in the United Kingdom, see Armour & Skeel, *supra* note 169, at 1768–70.

209. *See, e.g.*, *Listed Company Manual* § 303A.00 Corporate Governance Standards NYSE (2013), http://nysemanual.nyse.com/LCMTools/PlatformViewer.asp?selectednode=chp_1_4_3&manual=%2Flcm%2Fsections%2Flcm-sections%2F (listing the Corporate Governance rules of NYSE-listed companies).

began.[210] Consistent with the regulatory philosophy of the City Code on Takeovers,[211] the Cadbury Report and the Combined Code, now the UK Corporate Governance Code, used the comply-or-explain principle. This tenet operated as the role model for the European Union, which introduced the comply-or-explain principle in the Fourth Council Directive in 2006.[212] Codes of conduct are better suited to more diverse companies according to shareholder structure, especially to companies with significant shareholders, and to co-determination and companies in countries with extensive regulation in stock corporation acts, such as Germany.[213] In Germany, the comply-or-explain principle has been part of the German Stock Corporation Act since 2002.[214] Initially only for listed companies, the Act now also applies to other capital market-oriented companies as well.[215]

E. THEORY OF THE FIRM

1. The Shareholder Value Puzzle

From a continental European perspective, one of the corporate governance puzzles that US academia and practice almost universally accept is that while the firm is a nexus of contracts,[216] shareholder primacy sets the standard for corporate action.[217] In terms of shareholder power vis-à-vis management, however, such shareholder primacy was in part implemented only after the financial crisis by the Dodd-Frank Act.[218] In Germany it is accepted that management may also take into account interests of other stakeholders, such as

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210. *See* Klaus J. Hopt, *Comparative Corporate Governance: The State of the Art and International Regulation*, 59 AM. J. COMP. L. 1, 11–14 (2011).

211. For the UK Takeover Code, see Armour & Skeel, *supra* note 169, at 1727–30.

212. European Parliament and Council Directive 2006/46, art. 1, no. 7, 2006 O.J. (L 224) 4 (EC) (amending Council Directive 78/660/EEC on the annual accounts of certain types of companies).

213. *See* Hopt, *supra* note 210, at 12.

214. Stock Corporation Act, Sept. 6, 1965, BUNDESGESETZBLATT [BGBL] I at 1089, § 161, as amended, Dec. 2012 (Ger.).

215. *Id.*

216. Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 311 (1976).

217. *See* ALFRED RAPPAPORT, CREATING SHAREHOLDER VALUE: A GUIDE FOR MANAGERS AND INVESTORS (1998).

218. *See infra* Part III.A.2.

employees;[219] in contrast to the US, some go so far as to say that the enterprise is more than the company as a legal form; it also consists of the interests of the employees and other stakeholders.[220]

2. Pensions Bridging the Rift Between Shareholder Value and the Stakeholder Approach

The rift between the shareholder and the stakeholder approach may be bridged by focusing on long-termism as an appropriate overarching corporate governance principle in times of pension capitalism.[221] Mirroring their own interests in a long-term increase in corporate value, private pension institutions place emphasis on sustainable corporate growth. Under the Corporate Governance Principles of Hermes, the primary goal is managing companies and establishing value in the long-term interest of shareholders.[222] The doctrines championed by CalPERS are based on the conviction that the structures set up by their principles will deliver the best long-term results for shareholders.[223] The Corporate Governance Principles of Hermes assume that independent directors are most likely to make decisions in the interests of all long-term shareholders.[224] This focus on the long-term interests of shareholders ensures that shareholder interests are taken into account, as a company can only be successful in the long run if it has sufficient regard for the interests of customers, suppliers, and employees.[225]

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219. For a long-term focus on plurality of interests, see Michael Kort, *in* AKTIENGESETZ: GROßKOMMENTAR § 76, no. 52 ff (Klaus J. Hopt & Herbert Wiedemann eds., 4th ed. 2002); leaning towards this view now, Peter O. Mülbert, *Soziale Verantwortung von Unternehmen im Gesellschaftsrecht*, 2009 AG 766, 774.

220. On this discussion, see Roth, *Employee Participation*, *supra* note 4, at 65.

221. *See infra* Part IV.

222. HERMES PENSIONS MGMT. LTD., THE HERMES PRINCIPLES (2002); HERMES INV. MGMT., INTERNATIONAL CORPORATE GOVERNANCE PRINCIPLES 1 (1999) [hereinafter HERMES CORPORATE GOVERNANCE PRINCIPLES]; HERMES INV. MGMT. LTD., THE HERMES RESPONSIBLE OWNERSHIP PRINCIPLES (2013) [hereinafter HERMES RESPONSIBLE OWNERSHIP PRINCIPLES].

223. THE CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM (CALPERS), GLOBAL PRINCIPLES OF ACCOUNTABLE CORPORATE GOVERNANCE 7, § III.A. (last updated Nov. 14, 2011) [hereinafter CALPERS, GLOBAL PRINCIPLES].

224. HERMES RESPONSIBLE OWNERSHIP PRINCIPLES, *supra* note 222, § XI (the ability for boards to "act objectively and independently in the long-term interest of the company and its shareholders").

225. Roth, *Private Altersvorsorge* 2011, *supra* note 1, at 540.

By focusing on long-term shareholder value, the enlightened shareholder value approach is appropriately implemented.[226] This idea largely levels the classical conflict between the shareholder and stakeholder approaches. In the long term, shareholder value should only be created if the company also promotes the interests of employees, clients, suppliers, and the public.[227] However, such a long term focus might be better implemented by also choosing a design which implements a more diverse view by giving human capital a "say" in corporate governance.[228] Referring to corporate governance principles established in the United States, the independent directors provided for in the Investment Act of 1940 had a significant impact some fifty years later on the governance of "normal" firms.[229] The representation of workers in United States pension funds, as required by some state laws—e.g., California's CalPERS—might play a similar role in the future.

In Germany, there is a long doctrinal tradition of including stakeholder interests in the company enterprise.[230] The German Corporate Governance Code endorses this approach by reference in its preamble to the interest of the enterprise. The Code "clarifies" the obligation of the management and supervisory boards to ensure the continued existence of the enterprise, as well as its sustainable creation of value in conformity with the principles of the social market economy.[231] According to the German Code, the management board is responsible for independently managing the enterprise in its own best interest,[232] thus taking into account the interests of shareholders, employees, and other stakeholders, with the objective of sustainable

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226. Without such long-term focus, *see, e.g.*, Companies Act, 2006, c. 46, § 172 (Eng.).

227. For a US perspective, see Hansmann, *supra* note 151, at 1816 (expressing the view that companies run *for* employees often perform better).

228. For German co-determination regimes, see *supra* Part I.A.2.

229. *See infra* Part II.A.1.

230. *See* WALTHER RATHENAU, VOM AKTIENWESEN: EINE GESCHÄFTLICHE BETRACHTUNG 62 (1917).

231. *See* GOV'T COMM'N, DEUTSCHER CORPORATE GOVERNANCE KODEX [DCGK] [GERMAN CORPORATE GOVERNANCE CODE] Foreword (2012), *translation available at* http://www.corporate-governance-code.de/eng/download/kodex_2012/D_CorGov_final_May_2012.pdf.

232. *See id*. § 4.1.1.

creation of value. Works councils, as company institutions within the company, are especially relevant in large companies.

The long-term shareholder value approach is aligned with the classical German approach of corporate interest (*Unternehmensinteresse*).[233] According to Gerhard Spindler, § 70 AktG of 1937 cannot be classified solely as a National Socialist provision.[234] Rather, the provision can also be based on the theory of the corporation (*Theorie des Unternehmens*); F.A. Mann has emphasized the influence of the teachings of the corporation (*des Unternehmens*) (§ 70 AktG) as such.[235] Even the Government Draft Bill of 1930 explicitly recognized the principle that the "corporate interest as such is equally worthy of protection as interests of individual shareholders" ("dass die Interessen des Unternehmens als solches ebenso schutzbedürftig sind wie das individuelle Interesse des Aktionärs"), and concluded that if the company is managed properly and individual shareholders have an appropriate attitude, the interests of the company and shareholders should converge.[236]

3. The European Company

About half of all operating European companies, and an even larger share of co-determined European companies, are of German origin;[237] a partial explanation for this increasing number of European companies in

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233. *See* ARNDT RIECHERS, DAS "UNTERNEHMEN AN SICH": DIE ENTWICKLUNG EINES BEGRIFFS IN DER AKTIENRECHTSDISKUSSION DES 20. JAHRHUNDERTS (1996).

234. GERALD SPINDLER, HANS-BÖCKLER STIFTUNG, UNTERNEHMENSINTERESSE ALS LEITLINIE DES VORSTANDSHANDELNS – BERÜCKSICHTIGUNG VON ARBEITNEHMERINTERESSEN UND SHAREHOLDER VALUE [COMPANIES INTERESTS AS A GUIDELINE OF BOARD ACTION - CONSIDERATION OF EMPLOYEE INTERESTS AND SHAREHOLDER VALUE] 4 (2008).

235. Frederick A. Mann, *The New German Company Law and Its Background*, 19 J. COMP. LEGIS. & INT'L L. 220, 227 (1937).

236. ENTWURF EINES GESETZES ÜBER AKTIENGESELLSCHAFTEN UND KOMMANDITGESELLSCHAFTEN AUF AKTIEN SOWIE ENTWURF EINES EINFÜHRUNGSGESETZES NEBST ERLÄUTERNDEN BEMERKUNGEN: ERLÄUTERNDE BEMERKUNGEN, EINLEITUNG 94 (1930).

237. According to the European Trade Union Institute (ETUI), 121 out of 244 European Companies with more than five employees are located in Germany as well as 40 out of 49 co-determined European Companies, ETUI, OVERVIEW OF CURRENT STATE OF SE FOUNDING IN EUROPE, Update: 1 April 2013, 3, 10

Germany is the German co-determination law.[238] While in German stock corporations only employees employed in Germany are represented in supervisory boards, in European companies (Societas Europaea, SE),[239] employees located in other European Union countries are also represented.[240] Considering, *inter alia*, the demands for greater diversity on the supervisory boards, it appears questionable how long international pension funds will put up with the outmoded German co-determination model.[241] The recommendation by the study group on co-determination ("*Arbeitskreis "Unternehmerische Mitbestimmung*") to introduce a regime similar to the SE[242] has rather unsurprisingly been rejected by the labor unions.[243] International institutional investors are also questioning the mandatory participation of labor unions.[244] Against this backdrop, Hermes is encouraging companies to consider a conversion to an SE.[245] A striking observation in practical terms is that

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238. *See* Horst Eidenmüller et al., *Incorporating under European Law: The Societas Europaea as a Vehicle for Legal Arbitrage*, 10 EUROPEAN BUSINESS ORGANIZATION LAW REVIEW [EBOR] 1, 32 (2009) (U.K.).

239. *See* ERNST & YOUNG, STUDY ON THE OPERATION AND THE IMPACTS OF THE STATUTE FOR A EUROPEAN COMPANY (SE): FINAL REPORT 246 (2009) [hereinafter 2009 ERNST & YOUNG STUDY] (explicitly labeling this as an advantage of the SE). On December 31, 2008, more than half of all SEs were incorporated/domiciled in Germany (45 of 73). *See* Berndt Keller & Frank Werner, *Arbeitnehmerbeteiligung in der Europäischen Aktiengesellschaft (SE) – Empirische Befunde und (un-)erwartete Konsequenzen,* 62 WSI MITTEILUNGEN 416, 419 tbl.2 (2009).

240. *See* Council Directive 2001/86 of 8 October 2001 Supplementing the Statute for a European Company with Regard to the Involvement of Employees, 2001 O.J. (L 294) 22 (EC).

241. *See* Rüdiger von Rosen, *Kapitalmarkt und Mitbestimmung*, *in* STEFAN GRUNDMANN ET AL., UNTERNEHMENSRECHT ZU BEGINN DES 21. JAHRHUNDERTS: FESTSCHRIFT FÜR EBERHARD SCHWARK ZUM 70. GEBURTSTAG 789, 799 (Christine Windbichler et al. eds., 2009) (maintaining the continued need for reform).

242. Arbeitskreis 'Unternehmerische Mitbestimmung,' Entwurf einer Regelung zur Mitbestimmungsvereinbarung sowie zur Größe des mitbestimmten Aufsichtsrats, 30 ZIP 885 (2009).

243. For an unambiguous account, see the contribution by Hexel in the roundtable discussion, 30 ZIP (Beilage zu Heft 48) 35, 36 (2009).

244. Thomas von Oehsen, *Die Rolle von ISS im Kapitalmarkt und Perspektiven guter Corporate Governance*, *in* 65. DEUTSCHER BETRIEBSWIRTSCHAFTER-TAG 2011, 45 (2012).

245. HERMES EQUITY OWNERSHIP SERVS., HERMES CORPORATE GOVERNANCE PRINCIPLES – GERMANY (2011). On the construction of the co-determination regime of the SE in Germany, Austria, Sweden and France, see Claudia Schubert, *The National Implementation of Employee Participation in the Administrative Board of the SE in the*

all German co-determined SEs have so far chosen a dualistic board.[246] This should change, however, if the proposal by Ernst & Young is adopted, under the terms of which the SE statute would explicitly limit equal co-determination to non-executive directors.[247]

II. INDEPENDENT DIRECTOR PARADIGM AND BOARD COMMITTEES

A. INDEPENDENT DIRECTORS IN THE US, EUROPE AND ASIA

1. The Rise of Independent Boards

Institutional investors, particularly pension funds, place great value on independent supervisory boards or board members.[248] On its website, the CII demands at least two-thirds of board members to be independent.[249] In the early 1990s, the Cadbury Report provided for more than half of the non-executive board to be independent.[250] The Combined Code has now extended this quota to the entire board; smaller companies should have at least two independent directors.[251] The Principles of Corporate Governance of the Hermes pension fund deal with the ideal proportion of independent directors at the country level: in

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One-tier Model – A Legal Comparison on the Basis of Germany, Austria, Sweden, and France, 5 EUR. CO. & FIN. L. REV. [ECFR] 422 (2008).

246. *See* Roth, *Employee Participation*, *supra* note 4, at 83. An exception to this is PUMA (a listed company with a foreign majority shareholder), which has converted to a monistic board system.

247. *See* 2009 ERNST & YOUNG STUDY, *supra* note 239, at 285 (discussing Art. 43 of SE Regulation).

248. *See* Joseph A. McCahery et al., *Behind the Scenes: The Corporate Governance Preferences of Institutional Investors* 51–52 tbl. IV, V (AFA 2011 Denver Meetings Paper, Tilburg Law School Research Paper No. 10, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1571046.

249. *See* COUNCIL OF INSTITUTIONAL INVESTORS, CORPORATE GOVERNANCE POLICIES § 2.3, *available at* http://www.cii.org/corp_gov_policies (last updated Oct. 5, 2012).

250. *See Report of the Committee on The Financial Aspects of Corporate Governance* (Cadbury Report), *reprinted in* COMPARATIVE CORPORATE GOVERNANCE, ESSAYS AND MATERIALS, Annex I/1 § 2.2 (Klaus J. Hopt & Eddy Wymeersch eds., 1997); *see also* John C. Shaw, *The Cadbury Report, Two Years Later*, *in* COMPARATIVE CORPORATE GOVERNANCE, ESSAYS AND MATERIALS, at 41.

251. *See* FIN. REPORTING COUNCIL, THE COMBINED CODE ON CORPORATE GOVERNANCE § A.3.2 (2010) (U.K.), *available at* http://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/The-Combined-Code-on-Corporate-Goverance.aspx.

the US, a simple majority; in Brazil, at least one-third must be independent.[252] In its Guide for Superannuation Trustees, the Australian Council of Superinvestors ("ACSI") requires a majority of the board to be independent.[253] Yet, there is no evidence on whether independent boards generate greater value.[254]

For the United States, CII corporate governance principles require that at least two-thirds of the board members be independent.[255] This exceeds considerably the listing rules of NYSE and NASDAQ, which require only a majority-independent board,[256] and has contributed to the fact that in the United States more than 80% of directors are independent.[257] In fact, the United States probably has the highest ratio of independent directors in the world.[258] Another explanation for this might be its relatively lenient standards for independence. In contrast to the European Union, the US's list of requirements for independence is relatively short and more lenient; for example, significant shareholders and their representatives are considered to be independent.[259] Even if the US is not famous for concentrated ownership, this might have an effect since founder-directors in tech firms can be treated as independent even with voting shares of 10% or higher.

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252. *See, e.g.*, HERMES EQUITY OWNERSHIP SERVS., HERMES CORPORATE GOVERNANCE PRINCIPLES – UNITED STATES (2012); HERMES EQUITY OWNERSHIP SERVS., HERMES CORPORATE GOVERNANCE PRINCIPLES – BRAZIL (2012).

253. *See* AUSTRALIAN COUNCIL OF SUPER INVESTORS (ACSI), A GUIDE FOR SUPERANNUATION TRUSTEES TO MONITOR LISTED AUSTRALIAN COMPANIES (ACSI GOVERNANCE GUIDELINES: MAY 2009) § 5(d) (2009).

254. Luca Enriques, Reinier Kraakman & Henry B. Hansmann, *The Basic Governance Structure: The Interests of Shareholders as a Class*, *in* ANATOMY OF CORPORATE LAW 56, 66 (Reinier Kraakman et al. eds., 2d ed. 2008); Sanjai Bhagat & Bernard Black, *The Non-Correlation Between Board Independence and Long-Term Firm Performance*, 27 J. CORP. L. 231, 263 (2002); *see also* the overview by Gordon, *supra* note 167, at 1500–09.

255. COUNCIL OF INSTITUTIONAL INVESTORS, *supra* note 249, § 2.3.

256. *See* NASDAQ OMX Group, Inc., NASDAQ STOCK MARKET RULES § 5605(b)(1); NYSE EURONEXT, NYSE LISTED COMPANY MANUAL § 303A.01.

257. SPENCER STUART US BOARD INDEX 2011, at 8 (2011) (84%).

258. For the United States, *see id.* For Europe, see HEIDRICK & STRUGGLES, EUROPEAN CORPORATE GOVERNANCE REPORT 2011: CHALLENGING BOARD PERFORMANCE 42 fig.35 (2011). With better data, see Enriques et al., *supra* note 254, at 56, 70.

259. NASDAQ, *supra* note 256, § 5605(a)(2) (defining "independence").

According to a European survey by Heidrick & Struggles, fewer independent directors are found in Europe.[260] In the Netherlands, 75% of all supervisory board members are independent, as well as 72% in Finland; 62% in Switzerland; 61% in the United Kingdom; 51% in Norway; and 48% in Italy.[261] Countries below the European average of 43% independent directors are, *inter alia*, France and Sweden (40%), Austria (36%), Spain (33%), Belgium (32%), Denmark (30%), and finally Germany (21%), which has lowest ratio of independent directors in the survey.[262] In most European countries, independence standards are stricter than in the United States.[263] For example, according to the European Recommendation on independence, a significant shareholder and his legal representatives are not independent.[264] In the United States and Switzerland, even majority shareholders traditionally pass as independent, although some companies refrain from declaring them as such. For a long time, Germany was reluctant to follow the European Union proposal,[265] but recently the Government Commission on Corporate Governance changed the German Corporate Governance Code to exclude majority shareholders from being independent.[266]

In Asia, independent directors are increasingly incorporated into national corporate governance regimes. By 2001, China had already incorporated independent directors into its unique corporate governance structure, with a board of directors that is overseen by a supervisory board.[267] Chinese listing regulations require that a third of the board of

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260. HEIDRICK & STRUGGLES, *supra* note 258.

261. *Id.* at 42.

262. *Id.*

263. For the United States, see NASDAQ OMX Group, Inc., NASDAQ STOCK MARKET RULES § 5605(a)(2); NYSE EURONEXT, NYSE LISTED COMPANY MANUAL § 303A.02. Calling for stricter independence standards in the US Hermes Equity Ownership Services, Hermes Corporate Governance Principles United States, Independence: companies should go beyond the definitions of independence according to the NASDAQ and NYSE. The new NYSE rules effective from July 1, 2013 does not reflect this.

264. Commission Recommendation 2005/162 of 15 Feb. 2005 on the Role of Non-executive or Supervisory Directors of Listed Companies and on the Committees of the (Supervisory) Board, Annex II, 2005 O.J. (L 52) 51, 63 (EC) [hereinafter Recommendation No. 2005/162].

265. See *infra* Part II.C.

266. GERMAN CORPORATE GOVERNANCE CODE § 5.4.2 (2012).

267. *See* Donald C. Clarke, *The Independent Director in Chinese Corporate Governance*, 31 DEL. J. CORP. L. 125, 173–74 (2006).

directors be independent.[268] For South Korea, there is evidence that the existence of independent directors correlates with firm performance;[269] South Korea first required outside directors after the Asian crisis.[270] Since the definition of an outside director in the Korean Securities and Exchange Act excludes, *inter alia*, significant shareholders,[271] at least half of the board has to be independent in large corporations.[272] In Japan, the Tokyo Stock Exchange requires the appointment of one independent director;[273] major shareholders are deemed not to be independent,[274] and the number of independent directors correlates with foreign investments. While companies with a shareholding ratio below 10% appointed 1.51 independent directors on average, companies with a foreign shareholder ratio of at least 30% have appointed an average of 2.93 independent directors.[275]

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268. Guidelines for Introducing Independent Directors to the Board of Directors of Listed Companies - 2001 (promulgated by China Securities Regulatory Comm'n., Aug. 16, 2001) Zhengjianfa [2001] No. 102, Art. I.3 (China), *available at* http://www.csrc.gov.cn/pub/csrc_en/newsfacts/release/200708/t20070810_69191.htm.

269. Jongmoo Jay Choi et al., *The Value of Outside Directors: Evidence from Corporate Governance Reform in Korea*, 42 J. FIN. & QUANTITATIVE ANALYSIS 941 (2007); Bernard S. Black et al., *How Corporate Governance Affects Firm Value: Evidence on Channels from Korea* 27 (University of Texas School of Law, Law and Economics Working Paper No. 51, 2008), *available at* http:// ssrn.com/abstract= 844744.

270. Bernard Black, *Corporate Governance in Korea at the Millennium: Enhancing International Competitiveness (Final Report and Legal Reform Recommendations to the Ministry of Justice of the Republic of Korea)*, 26 J. CORP. L. 537, 554 (2001).

271. Korean Securities and Exchange Act, Act No. 972, Jan. 15, 1962, art. 54-5(4), amended by Act No. 6695, Apr. 27, 2002, *available at* http://unpan1.un.org/ intradoc/groups/public/documents/apcity/unpan011491.pdf.

272. In terms of comparative Corporate Governance, this is a rather strict standard. For Switzerland, see ECONOMIESUISSE, SWISS CODE OF BEST PRACTICE FOR CORPORATE GOVERNANCE II.b.12, g.22 (2007). For the United States, see NASDAQ, *supra* note 256, § 5605(a)(2), (b)(1).

273. TOKYO STOCK EXCHANGE, INC., ENFORCEMENT RULES FOR SECURITIES LISTING REGULATIONS, Rule 436-2 (2012).

274. *Id.* at Rule 211(5)a.(d).

275. TOKYO STOCK EXCHANGE INC., WHITE PAPER ON CORPORATE GOVERNANCE 2011, 42 (2011).

2. Independent Chairpersons and Committees

Pension funds worldwide recommend an independent chairperson of the board,[276] as in the UK Corporate Governance Code[277] and the ACSI Governance Guidelines.[278] Similarly, the Dodd-Frank Act requires the SEC to pass appropriate rules.[279] Under the UK Corporate Governance Code, director independence is one of four criteria required for an appointment to the board,[280] maintaining the requirement that at least half of the board members be independent.[281] The Green Paper of the European Commission follows suit by including independence as a factor in selecting boards.[282] Internationally, independence of the majority of members is not required or practiced for all control organs, as is shown by the common global practice of employees sitting on co-determined boards, or at any rate on the (supervisory) boards of occupational pension institutions. A controversial point is the benchmark for determining independence.[283] According to the recommendation of the EU on the independence of supervisory boards and board members, even the representatives of major shareholders are

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276. *See*, *e.g.*, CALPERS, GLOBAL PRINCIPLES, *supra* note 223, at III.B., Recommended Rule 1.4; HERMES EQUITY OWNERSHIP SERVICES, LTD., HERMES CORPORATE GOVERNANCE PRINCIPLES – UNITED STATES 2 (2012) (identifying combined Chair/CEO Roles, expectation to split roles); MILLSTEIN CENTER FOR CORPORATE GOVERNANCE AND PERFORMANCE, YALE SCHOOL OF MANAGEMENT, POLICY BRIEFING NO. 4: CHAIRING THE BOARD: THE CASE FOR INDEPENDENT LEADERSHIP IN CORPORATE NORTH AMERICA 21 (2009) (recommending independent chairmanship as the default model).

277. Upon appointment, the chairperson should be independent. FIN. REPORTING COUNCIL, U.K. CORPORATE GOVERNANCE CODE § A.2.1 (2012) (U.K.), *available at* http://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-September-2012.aspx.

278. ACSI GOVERNANCE GUIDELINES, *supra* note 253, § 9.2.

279. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 972, 124 Stat. 1376, 1915 (2010).

280. UK CORPORATE GOVERNANCE CODE § B.1 ("The board and its committees should have the appropriate balance of skills, experience, independence and knowledge of the company to enable them to discharge their respective duties and responsibilities effectively.").

281. *Id.* § B.1.2.

282. The Green Paper's criteria for the selection of board members include: "merit, professional qualifications, experience, the personal qualities of the candidate, independence and diversity." *Green Paper, supra* note 24, at 5, § 1.1.

283. Enriques et al., *supra* note 254, at 64.

not considered to be independent.[284] Furthermore, and quite appropriately, employee representatives are not regarded as independent;[285] the rights to appoint board members are viewed critically.[286]

According to the listing requirement of the NYSE and NASDAQ, audit committees, nomination committees and remuneration committees in the United States have to be fully independent; due to this rule's mandatory nature, companies comply.[287] The UK Corporate Governance Code does not require full independence for all of these committees.[288] The EU's recommendation on independent directors requires only a majority of the audit committee, the remuneration committee and the nomination committee to be independent.[289] Quotas in many European countries are lower than this; according to a study by Heidrick & Struggles, Germany has the lowest quota among European blue chips.[290]

In Germany, the nomination committee is restricted to the nomination of supervisory directors.[291] This allows a co-determination-

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284. Recommendation No. 2005/162, *supra* note 264, at 63.

285. *See* Klaus J. Hopt & Markus Roth, *§ 100*, *in* AKTIENGESETZ: GROßKOMMENTAR, *supra* note 35, arguing this point originally, and more recently in Christine Windbichler, *Die Rolle von Amtsträgern der Betriebsverfassung im Aufsichtsrat*, *in* GRUNDMANN ET AL., UNTERNEHMENSRECHT ZU BEGINN DES 21. JAHRHUNDERTS, *supra* note 241, at 805. For a view raising doubts on this position, see Michael Kort, *Standardization of Company Law in Germany, Other EU Member States and Turkey by Corporate Governance Rules*, 5 ECFR 379, 404 (2008); Michael Kort, *Interessenkonflikte bei Organmitgliedern der AG*, 29 ZIP 717, 725 (2008).

286. For example, on the VW decision by the ECJ, see Gert-Jan Vossestein, *Volkswagen: The State of Affairs of Golden Shares, General Company Law and European Free Movement of Capital*, 5 ECFR 115, 125 (2008).

287. SPENCER STUART, *supra* note 257, at 9 (stating that only thirteen controlled companies do not have a fully independent nomination committee).

288. According to the UK Corporate Governance Code, the nomination committee has to be composed of a majority of independent directors. UK CORPORATE GOVERNANCE CODE § B.2.1 (2012).

289. Recommendation No. 2005/162, *supra* note 264, at 58 Annex I, §§ 2.1.2 (nomination committee), 3.1.2 (remuneration committee), 60 Annex I, § 4.1 (audit committee).

290. HEIDRICK & STRUGGLES, *supra* note 258, at 44.

291. GERMAN CORPORATE GOVERNANCE CODE § 5.3.3 (2012).

free composition.[292] A personal or presidential committee commonly organizes the nomination and remuneration of managing directors.[293] A remuneration committee is not specifically recommended, but is only mentioned by the German Corporate Governance Code.[294] According to the German Stock Corporation Act, the remuneration and appointment of managing directors are to be decided by the supervisory board as a whole.[295] Board committees in Germany are also subject to co-determination.[296] In September 2012, the German Jurists Forum recommended the introduction of quotas for the audit and remuneration committees.[297]

B. INDEPENDENCE AND EXPERTISE

The issue of appropriate expertise of supervisory directors has now come to the forefront of debate.[298] In Germany, the requirements have already been made stricter for credit institutions, insurance companies, and pension funds.[299] The draft of an act on the supervision of financial markets and the insurance industry also included the supervisory boards of retirement funds (*Pensionskassen*).[300] This could, however, lead to problems for the rather common worldwide practice of employee representatives and retirees sitting on co-determined boards in pension funds.[301] This is one reason why the legislature has refrained from

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292. According to German Stock Corporation Act § 124(3), resolutions for proposing shareholder representatives to be elected by the general meeting may be taken by shareholder representatives.

293. *See* Klaus J. Hopt & Markus Roth, *§ 107*, *in* AKTIENGESETZ: GROßKOMMENTAR, *supra* note 35, no. 340–47.

294. GERMAN CORPORATE GOVERNANCE CODE § 5.1, 2.

295. German Stock Corporation Act § 107(3).

296. See Klaus J. Hopt & Markus Roth, *§ 107*, *in* AKTIENGESETZ: GROßKOMMENTAR, *supra* note 35, no. 277–89.

297. GERMAN JURISTS FORUM, MUNICH 2012, *supra* note 89, Business Law Section, Resolution 12.d.aa-12.d.bb.

298. *See* Harald Hau & Marcel Thum, *Subprime Crisis and Board (In-)Competence: Private vs. Public Banks in Germany*, *in* 60 ECONOMIC POLICY 701 (2009) (finding the expertise of supervisory directors enhanced the performance of banks).

299. Gesetz zur Stärkung der Finanzmarkt- und Versicherungsaufsicht vom 29.7.2009, July 29, 2009, BGBL. I at 2305 (Ger.).

300. For the governmental draft, see DEUTSCHER BUNDESTAG: GESETZENTWURF DER BUNDESREGIERUNG [BT] 16/12783 (Ger.).

301. *See* ROTH, PRIVATE ALTERSVORSORGE 2009, *supra* note 123, at 211.

requiring a minimum level of expertise for supervisory board members of retirement funds.[302]

C. INDEPENDENT DIRECTORS IN GERMANY

The term independent director is not defined in the Stock Corporation Act.[303] For the independence criterion of the "financial expert," introduced by the German Stock Corporation Act to transpose the revised Auditor Directive,[304] academia draws on the February 15, 2005 European Commission Recommendation regarding the role of non-executive or supervisory directors of listed companies and committees of the (supervisory) board.[305] In contrast to the European Recommendation and the UK Corporate Governance Code, the German Corporate Governance Code provides a short list of criteria that indicate a lack of independence. This short list was recently proposed by the Governance Code Commission,[306] but dropped after public consultation.[307]

According to the German Corporate Governance Code of May 2012,[308] a supervisory board member is considered to be independent if he or she has no business or personal relations with the company, its management board, a controlling shareholder or an enterprise linked to

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302. Critical of this, see Andreas Hasse, *Auswirkungen des Gesetzes zur Stärkung der Finanzmarkt- und Versicherungsaufsicht auf die Corporate Governance von Versicherungsunternehmen*, 2010 ZEITSCHRIFT FÜR VERSICHERUNGSRECHT, HAFTUNGS- UND SCHADENSRECHT [VersR] 18, 19.

303. Mathias Habersack, "*Kirch/Deutsche Bank" und die Folgen – Überlegungen zu § 100 Abs. 5 AktG und Ziff. 5.4, 5.5 DCGK -*, *in* FESTSCHRIFT FÜR WULF GOETTE ZUM 65. GEBURTSTAG 121, 126 (Mathias Habersack & Peter Hommelhoff eds., 2011).

304. Aktiengesetz [AktG] [Stock Corporation Act], Sept. 6, 1965, BGBL. I at 1089, §§ 100(5), 107(4), last amended by Restrukturierungsgesetz [RStruktG] [Restructuring Act], Dec. 9, 2010, BGBL. I at 1900 (Ger.).

305. Uwe Hüffer, *Die Unabhängigkeit von Aufsichtsratsmitgliedern nach Ziffer 5.4.2 DCGK*, 27 ZIP 637 (2006).

306. *See* GERMAN CORPORATE GOVERNANCE CODE § 5.3.2 (2012), as amended on May 26, 2010 with proposals from the plenary session of 17 January 2012, *available at* http://www.corporate-governance-code.de/eng/download/aenderungen_2012/Kodexaenderungen_final_2012_02_01.pdf.

307. Most published statements of interested parties were critical of the list. See primarily Deutscher Anwaltverein, Handelsrechtsausschuss, *Stellungnahme zu den Änderungsvorschlägen der Regierungskommission Deutscher Corporate Governance Kodex vom 1.2.2012*, 2012 NZG 335, 337–38.

308. GERMAN CORPORATE GOVERNANCE CODE § 5.4.2 (2012).

the controlling shareholder, all of which may cause a conflict of interests. Academia is split on whether the EU Recommendation can be used to sharpen the independence requirements in the German Code.[309] Not more than two former members of the management board shall be members of the supervisory board; members of the supervisory board shall not hold directorships or similar positions, or perform advisory tasks for important competitors of the company.[310] In making proposals for the election of supervisory directors to the general meeting, holdings of 10% or more of the shares of the company must be disclosed.[311]

The supervisory board shall include what it considers to be an adequate number of independent directors.[312] The concrete objectives of the supervisory board and the status of their implementation shall be published in the Corporate Governance Report.[313] For Germany, it is appropriate to focus on shareholder representatives only; in major companies with a diversified shareholder structure, half of the board should be independent.[314] The proxy-advisor Institutional Shareholder Services ("ISS") calls for one-third of the entire board to be independent,[315] leading to the independence of two-thirds of shareholder representatives in quasi-parity co-determined boards.[316] On boards with a controlling shareholder located in countries that are in line with modern European corporate governance standards, *e.g.*, France,[317] the supervisory board may hold that it is "adequate" if one-third of the shareholder representatives are independent.[318] For smaller companies, such as UK companies outside the FTSE 350,[319] two independent

309. *See* Roth, *Unabhängige Aufsichtsratsmitglieder*, *supra* note 20, at 629–30 (assuming a clearly distinct German definition); *see also* Marcus Lutter, *Die Empfehlungen der Kommission vom 14. 12. 2004 und vom 15. 2. 2005 und ihre Umsetzung in Deutschland*, 20 Europäische Zeitschrift für Wirtschaftsrecht [EuZW] 799, 804 (2009).

310. GERMAN CORPORATE GOVERNANCE CODE § 5.4.2 (3).

311. *Id.* § 5.4.1 (4), (6).

312. *Id.* § 5.4.2 (1).

313. *Id.* § 5.4.1 (3)2.

314. *See* Roth, *Unabhängige Aufsichtsratsmitglieder*, *supra* note 20, at 636.

315. Institutional S'holder Servs. Inc. (ISS), 2012 EUROPEAN PROXY VOTING SUMMARY GUIDELINES 8 (2011) [hereinafter GUIDELINES].

316. *See* Markus Roth, *Information und Organisation des Aufsichtsrats*, 2012 ZGR 343, 380.

317. CORPORATE GOVERNANCE CODE OF LISTED CORPORATIONS § 8.2 (2008) (Fr.), *available at* http://www.ecgi.org/codes/documents/afep_medef_code_dec2008_en.pdf.

318. *See* Roth, *Unabhängige Aufsichtsratsmitglieder*, *supra* note 20, at 636.

319. UK CORPORATE GOVERNANCE CODE § B.1.2 (2012) (U.K.).

directors is generally sufficient. Less stringent standards are also generally applied in Austria and Sweden, which require only up to two independent directors. In Austria, when the free float is more than 50%, the two supervisory directors must also be independent from the controlling shareholder; when the free float is over 20%, only one has to be independent.[320] In Sweden, at least two members must be independent in relation to the company's major shareholders, regardless of the company size.[321]

It is contested whether employee representatives are independent. Unions claim that the employees sitting on the board as employee representatives, as well as union delegates representing the employees in the supervisory board, are independent.[322] Decisions by the courts do not make this issue clear, and most academics argue that employee representatives are not independent.[323] The EU Recommendation regarding independent directors[324] is somewhat ambiguous, suggesting that employee representatives need not be declared non-independent.[325] In a recent survey, advisor Heidrick & Struggles classifies employee representatives as a distinct category, leading to far less than half of all supervisory directors being considered independent in Germany.[326] The German Jurists Forum recommends taking co-determination into account by articulating requirements for independence.[327]

320. AUSTRIAN CODE OF CORPORATE GOVERNANCE § C (54) (Austria), *available at* http://www.wienerborse.at/corporate/pdf/CG%20Codex%202012_v5_englisch.pdf.

321. Swedish Corporate Governance Code § 4.5 (2010) (Swed.).

322. *See* Roland Köstler, *Die Mitbestimmung in der SE*, 2003 ZGR 800, 803.

323. *See* Klaus J. Hopt & Markus Roth, *§ 100*, *in* AKTIENGESETZ: GROßKOMMENTAR, *supra* note 35, no. 90.

324. Commission Recommendation of 15 February 2005 on the Role of Non-executive or Supervisory Directors of Listed Companies and on the Committees of the (Supervisory) Board, 2005/162, 2005 O.J. (L 52) 51.

325. *Id.* at 63, Annex II, 1(b).

326. HEIDRICK & STRUGGLES, *supra* note 258, at 42 (finding the actual number to be 21% of all supervisory directors).

327. GERMAN JURISTS FORUM, MUNICH 2012, *supra* note 89, Business Law Section, Resolution 12.a (approved 76:10:9).

D. Independence as a Substitute for Co-Determination and the Two-Tier Structure?

1. *Independent Directors in Co-Determined Boards*

The independent director paradigm was invented in countries in which boards were not subject to mandatory co-determination.[328] In the United States, the independence requirement has existed for a long time. Since 1940, the Investment Company Act has required 40% of investment fund directors to be independent.[329] By contrast, German boards today have a rather small ratio of independent directors.[330] This is due in part to quasi-parity co-determination for large companies with over 2,000 employees in Germany.[331] Although it is disputed whether employee representatives are independent, they are not treated as independent by international proxy advisors such as ISS.[332] German academia is split; the better view is that employee representatives are not independent.[333] ISS call for the board to be one-third independent in co-determined German companies.[334] For quasi-parity co-determined companies, this means that two-thirds of shareholder representatives have to be independent.

In order to highlight the problems arising from the implementation of independence in co-determined boards, it is helpful to note that the independence requirement in the US Investment Companies Act is contrasted by the absence of independent directors on the boards of pension funds.[335] Employee representation on boards of occupational pension institutions can be found at CalPERS in the US, as well as in the UK and Switzerland. For a long time, Switzerland required mandatory parity co-determination in the occupational pension sector.[336] In the UK, employees must appoint one-third of the trustees, with the State

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328. *See* Roth, *Unabhängige Aufsichtsratsmitglieder*, *supra* note 20, at 605.

329. *See* Investment Company Act of 1940, Pub. L. No. 112-90 § 10, 15 U.S.C. § 80a-10 (2006); *see also* ROTH, PRIVATE ALTERSVORSORGE 2009, *supra* note 123, at 214-18 ff (discussing the Investment Company Act of 1940 as well as the board composition of individual pension institutions with independent directors).

330. *See* HEIDRICK & STRUGGLES, *supra* note 258.

331. *See supra* Part I.A.2.

332. GUIDELINES, *supra* note 315, at 12.

333. *See* Roth, *Unabhängige Aufsichtsratsmitglieder*, *supra* note 20, at 630–631.

334. *See* GUIDELINES, *supra* note 315, at 8 (discussing board independence).

335. Only some pension funds like CalPERS give information about their boards.

336. Bundesgesetzes über die berufliche Alters-, Hinterlassenen- und Invalidenversorgung (BVG), AS 797 (1983), art. 51, para. 1 (Switz.).

Secretary authorized by the Pensions Act of 2004 to raise the employee proportion to one-half.[337] The California Government Code provides for co-determination for CalPERS; the chairperson and the vice-chairperson represent the interests of the beneficiaries.[338] In Germany, however, there is no mandatory board participation by beneficiaries or occupational pensioners in support funds, retirement funds, pension funds, or direct insurance offered by insurance companies.[339] Following the introduction of quasi-parity co-determination under the Co-Determination Act 1976 (*Mitbestimungsgesetz* (*MitbestG*) 1976), the book reserves intended to cover pension obligations often exceeded the equity capital.[340] With the increase of external funding of occupational pensions, mostly by Dax-30 companies, the employee representatives of the supervisory board can no longer be considered representatives of a "different form of capital."[341]

Other European countries implemented up to one-third parity co-determination at the board level.[342] Though it has co-determined boards in principle, the Netherlands has the highest ratio of independent board members in Europe.[343] The Dutch Corporate Governance Code provides that all but one member of the supervisory board shall be independent.[344] Company employees and union officials involved in collective bargaining are excluded from representing employees on the supervisory board, unlike in Germany.[345] However, international holding companies

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337. Pensions Act, 2004, c. 35, § 243(1) (Eng.).

338. CAL. GOV'T CODE § 20090 (West 2012). Currently, Rob Feckner serves as Board president, representative of the school members, and George Diehr serves as Board vice president, representative of the state members. Press Release, CalPERS, CalPERS Board Re-Elects Feckner as President; Diehr as Vice President (Jan. 14, 2003), *available at* http://www.calpers.ca.gov/index.jsp?bc=/about/press/pr-2013/jan/board-reelects.xml.

339. ROTH, PRIVATE ALTERSVORSORGE 2009, *supra* note 123, at 209–14, 327–30.

340. Ernst Steindorff, *Einzelfragen zur Reichweite des Mitbestimmungsgesetzes*, 1977 ZHR 457, 464 (Ger.).

341. *See* Kübler, *supra* note 8, at 108 (original source); *see also* ROTH, PRIVATE ALTERSVORSORGE 2009, *supra* note 123, at 209–10.

342. *See* Roth, *Employee Participation, supra* note 4, at 71–72 (2010).

343. *See* HEIDRICK & STRUGGLES, *supra* note 258, at 42, 45.

344. DUTCH CORPORATE GOVERNANCE CODE, art. III.2.1 (2008).

345. BURGERLIJK WETBOEK [BW] [DUTCH CIVIL CODE], art. 2:270 (Neth.).

are co-determination-free; companies may implement co-determination at the highest national level.[346]

The Australian approach[347] of not counting employee representatives is in line with national custom, and it appears to be more suitable than the ISS approach. There would be some pressure on Germany to call for more co-determination if the majority of shareholder representatives were independent, but none of the employee representatives fit the description. Becoming a European company may create some diversity on the employee side, but that is not a real option if all the employees are working in Germany. If representatives of the controlling shareholder are treated as independent, employee representatives must be treated as independent as well.

2. Establishing Two-Tier Boards or Co-Determination in the US?

Even if co-determination was supported by some US economists[348] and viewed more favorably after the way the financial crisis was handled in Germany, the spread of co-determination in the US hardly seems realistic. This is true even when taking into account co-determination in state pension funds and looking at independent directors as a substitute for labor representatives on the board of CalPERS, for example. The introduction of a two-tiered structure might be a better bet, even if it does not seem feasible today or in the near future. Such structures might arguably exist in the NYSE.[349] From a comparative perspective, the system in which all directors other than the CEO are independent resembles a two-tiered structure. Such a functional view is even more appealing if one takes into account the fact that management boards in German companies usually attend entire supervisory board meetings. Recomposing and transforming boards into

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346. *See* HEIDRICK & STRUGGLES, *supra* note 258, at 42, 45 (explaining the high ratio of independent directors).

347. AUSTRALIAN COUNCIL OF SUPER INVESTORS (ACSI), INTERNATIONAL VOTING ALERT GUIDELINES 15 (2010).

348. *See* Larry Fauver & Michael E. Fuerst, *Does Good Corporate Governance Include Employee Representation? Evidence from German Corporate Boards*, 82 J. FIN. ECON. 673 (2006) (discussing the criticalness of only quasi-parity co-determination); for a view critical towards quasi-parity co-determination, see Gary Gorton & Frank A. Schmid, *Capital, Labor, and the Firm: A Study of German Codetermination*, 2 J. EUR. ECON. ASS'N 863 (2004).

349. Andreas M. Fleckner*, Stock Exchanges at the Crossroads,* 74 FORDHAM L. REV. 2541, 2614 (2006) (on reporting to the independent directors).

a two-tier system might be a practical option if US Corporate Governance standards of independence are raised and significant shareholders and founders are considered dependent. If it still happens that more than two-thirds of the board consists of independent directors, it would be a practical choice to separate executives and non-executives onto different boards. In Europe, choosing between one-tier and two-tier boards is now becoming the norm;[350] following the Habersack Report,[351] the German Jurists Forum is now recommending that same choice for German stock corporations.[352]

III. BALANCING DIRECTOR PRIMACY AND SHAREHOLDER RIGHTS

A. STRENGTHENING THE ROLE OF SHAREHOLDERS

1. Shareholder Empowerment in the US

The Dodd-Frank Act introduced European standards of shareholder rights to the United States.[353] Since then, it has been possible for shareholders to nominate directors and to call for the separation of the Chairman of the Board and CEO roles; these have been two basic features of German company law since the 1861 enactment of the Commercial Code (which was codified in 1884).[354] According to its

350. Hopt, *supra* note 210, at 23.

351. HABERSACK, *supra* note 88, at 70–71, 103.

352. GERMAN JURISTS FORUM, MUNICH 2012, *supra* note 89, Business Law Section, Resolution 19 (adopted by vote of 53 in favor, 26 against, and 5 abstentions) (the legislator should allow all stock corporations, as is the case already for European Companies (SE), to choose between the two-tier and the one-tier board).

353. *See* Cools, *supra* note 16, at 742–43, 745–47; Bebchuk, *The Case for Increasing Shareholder Power*, *supra* note 15, at 847.

354. The Commercial Code of 1861 [Allgemeines Deutches Handelsgesetzbuch (ADHGB)] transformed the 'conseil de surveillance' of the French Act on partnerships, limiting it to shares of the stock corporation itself. INVESTORS' WORKING GRP., US FINANCIAL REGULATORY REFORM: THE INVESTORS' PERSPECTIVE 23 (2009), *available at*http://www.cii.org/files/issues_and_advocacy/dodd-frank_act/07_01_09_iwg_ report.pdf. *See* Roth, *Information und Organisation des Aufsichtsrats*, *supra* note 316, at 376–77. The reform in 1884 introduced a new Article 225a which foresaw personal incompatibility of management and supervisory board. *See also Entwurf eines Gesetzes, betreffend die Kommanditgesellschaften auf Aktien und die Aktiengesellschaften vom 7. März 1884 (Aktenstück Nr. 21). Teil 2*, *in* HUNDERT JAHRE MODERNES AKTIENRECHT 447, 461 (Werner Schubert & Peter Hommelhoff eds., 1985) (notes on the governmental draft).

policy statement, CII campaigned for the central corporate governance components of the Dodd-Frank Act, which were, *inter alia*, introduced by Senator Schumer and Maria Cantwell as the "Shareholder Bill of Rights."[355] In its policy statement, CII explicitly referred to European standards,[356] stating that "[i]n the United States, unlike most of Europe, the only way that shareholders can run their own candidates is by waging a full-blown election contest, printing and mailing their own proxy cards to shareholders. For most investors, this process would be onerous and prohibitively expensive."[357]

One noticeable omission within US company law is the absence of federal company law. It is disputed whether the competition between the states for corporate business produced a race to the top or a race to the bottom. Either way, Delaware, as the long-time champion of that competition, is not only responive to business in its state policies—for example, granting corporations the opportunity to exculpate directors for breaches of the duty of care after *Smith v. Van Gorkom*[358]—but also has well-equipped, professional, and specialized courts (*e.g.*, the Court of Chancery) for company proceedings.[359] The practice of excluding shareholders from management decisions was developed in the early 20th century and served as a blueprint for German legislation some 75 years ago, with German financial institutions providing the initiative.[360] In contrast, institutional investors in the United States campaigned in the opposite direction, namely to raise shareholder rights.

2. Stewardship Codes

The corporate governance responsibilities of institutional investors are currently being debated. As a result of the recent financial and

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355. Shareholder Bill of Rights Act of 2009, S. 1074, 111th Cong. (2009). *See also* Press Release, Senator Charles E. Schumer, Schumer, Cantwell Announce 'Shareholder Bill of Rights' to Impose Greater Accountability on Corporate America (May 19, 2009), *available at* http://www.schumer.senate.gov/new_website/record.cfm?id=313468.

356. INVESTORS' WORKING GRP., US FINANCIAL REGULATORY REFORM: THE INVESTORS' PERSPECTIVE 23 (2009), *available at* http://www.cii.org/files/issues_and_advocacy/dodd-frank_act/07_01_09_iwg_report.pdf.

357. For a German view, see Alexander Hellgardt & Andreas Hoger, *Transatlantische Konvergenz der Aktionärsrechte*, 2011 ZGR 38.

358. 488 A.2d 858 (Del. 1985).

359. For the German perspective, see JAN VON HEIN, DIE REZEPTION US-AMERIKANISCHEN GESELLSCHAFTSRECHTS IN DEUTSCHLAND 479–83 (2008).

360. *See infra* Part III.B.

economic crisis, institutional investors have been criticized for not exercising sufficient control over companies,[361] though many European companies already have a corporate governance or voting policy.[362] It was against this backdrop in November of 2009 that the British Institutional Shareholders Committee presented a Code on the responsibility of institutional investors.[363] Dealing with the same issue, the Stewardship Code was passed a few months earlier in July of 2009 by the British Financial Reporting Council;[364] the latter also revised the Combined Code and subsequently published it as the UK Corporate Governance Code.[365] The increasing emphasis on the importance of shareholders in corporate governance, as well as their glaring failure before and during the financial crisis, suggests that it may obtain significant importance.[366] The European Commission Green Paper also addresses the issue,[367] and similar initiatives can be found in France[368] and the Netherlands.[369]

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361. *See, e.g.*, DAVID WALKER, A REVIEW OF CORPORATE GOVERNANCE IN UK BANKS AND OTHER FINANCIAL INDUSTRY ENTITIES: FINAL RECOMMENDATIONS 5.10–5.12 (2009) [hereinafter WALKER REVIEW].

362. RISKMETRICS, STUDY ON MONITORING AND ENFORCEMENT PRACTICES IN CORPORATE GOVERNANCE IN THE MEMBER STATES 159 (2009). A majority of the companies that were questioned welcomed a duty to report on their Corporate Governance policy. *Id.* at 164

363. INSTITUTIONAL S'HOLDERS COMM. (ISC), CODE ON THE RESPONSIBILITIES OF INSTITUTIONAL INVESTORS (2009).

364. UK STEWARDSHIP CODE (2012), *available at* http://www.frc.org.uk/getattachment/e2db042e-120b-4e4e-bdc7-d540923533a6/UK-Stewardship-Code-September-2012.aspx.

365. *See infra* Part IV.

366. For a contrary view, see Holger Fleischer, *Zukunftsfragen der Corporate Governance in Deutschland und Europa*, 2011 ZGR 155, 164–65 (questioning the merits of having the Code function as a role model).

367. *Green Paper*, *supra* note 24, at 11 (stating that there is a lack of appropriate shareholder engagement), 13 (asset managers as active stewards of the investee companies).

368. LE CLUB DES JURISTES, COMMISSION RECOMMANDATIONS ET BONNES PRACTIQUES À L'ATTENTION DES ÉMETTEURS ET DES INVETISSEURS INSTITUTIONELS (2010).

369. EUMEDION CORPORATE GOVERNANCE FORUM, BEST PRACTICES FOR ENGAGED SHARE-OWNERSHIP INTENDED FOR EUMEDION PARTICIPANTS 1 (2011).

B. THE LEADERSHIP PRINCIPLE IN THE GERMAN STOCK CORPORATION ACT 1937

If one were to count reinsurance companies as private pension institutions, or examine the traditional close ties between Munich Re (previously Münchener Rück) and Allianz, then even in Germany, private pension institutions have played a significant role in promoting corporate governance.[370] The Stock Corporation Act (*Aktienrecht*) of 1937, which laid the foundation for the still applicable organizational structure (*Organisationsverfassung*) of the German Stock Corporation, is based largely on the ideas of various figures in the financial industry such as Wilhelm Kißkalt, CEO of Münchener Rück at that time.[371] In 1934, in a report by Kißkalt for the Commission on Stock Corporation Law published in the Journal of the Academy for German Law,[372] Kißkalt anticipated the stock corporation's organizational structure and forewarned of the board of directors' duty to take into account the interests of employees as well as that of the common good *(Allgemeinwohl)*.[373] He further suggested keeping the supervisory board as small as possible, with seven supervisory board members.[374] Johannes C.D. Zahn's *Wirtschaftsführertum und Vertragsethik im neuen Aktienrecht* (*Leadership and Ethics in the New Stock Corporation Law*),[375] which he wrote during his time as legal advisor for the association of private banks (*Centralverband des deutschen Bank- und Bankgewerbes*), also had an impact on the drafting of the Stock Corporations Act.[376] During the drafting of the new Stock Corporation

370. *See* Peter O. Mülbert, *Corporate Governance of Banks*, 10 EBOR 411, 424–25 (2009) (discussing corporate governance for banks).

371. MICHAEL STOLLEIS, GEMEINWOHLFORMELN IM NATIONALSOZIALISTISCHEN RECHT 152 (1974) (testifying to Kißkalt's strong influence in the Academy for German Law).

372. For the discussion, see 1 AKADEMIE FÜR DEUTSCHES RECHT, 1933–1945: PROTOKOLLE DER AUSSCHÜSSE/AUSSCHUß FÜR AKTIENRECHT, PROTOCOLS (Werner Schubert ed., 1986).

373. WILHELM KIßKALT, REFORM DES AKTIENRECHTS, *in* 1 ZEITSCHRIFT DER AKADMEIE FÜR DEUTSCHES RECHT [ZAkDR] 20 (1934).

374. Wilhelm Kißkalt, *Bericht über die 2. Erweiterte Sitzung vom 9.2.1934*, *in* 1933-1945: PROTOKOLLE DER AUSSCHÜSSE/AUSSCHUß FÜR AKTIENRECHT 68 (1986); FRANZ SCHLEGELBERGER, DIE ERNEUERUNG DES DEUTSCHEN AKTIENRECHTS 26 (1935) (pleading for 7-9 supervisory board members).

375. JOHANNES C. D. ZAHN, WIRTSCHAFTSFÜHRERTUM UND VERTRAGSETHIK IM NEUEN AKTIENRECHT (1934).

376. *See* KIßKALT, *supra* note 373, at 20.

Act, Zahn became general manager of the association of private banks; he later became CEO of the Bank Trinkhaus, now known as HSBC Trinkhaus.[377] Finally, the financial industry's influence on the current organizational structure of the German Stock Corporation was completed by the Minister of Trade and Industry at the time, Kurt Schmitt, whom Kißkalt had earlier appointed to the Allianz board.[378]

Keeping with the tradition of stock corporation law reform that took place during the Weimar Republic,[379] the organizational structure of the reform was developed comparatively:[380] In his monograph to US law, which was well-founded at the time, Zahn referred to the status of the general meeting of shareholders.[381] It also seems reasonable to presume Kißkalt's proximity to the United States, seeing that he joined the board after the 'Catastrophe of San Francisco' (*Katastrophe von San Fransisco*), a disastrous 1906 earthquake that caused a series of fires and destroyed much of the city.[382] This explanatory pattern with regard to the supervisory board—which is of particular interest here—does appear to be complex, particularly given that in the United States the construction of the supervisory board as a board of directors was sought to be halted in Germany.[383] The founding of the supervisory board through the Commercial Code (*Allgemeines Deutsches Handelsgesetzbuch* (*ADHGB*)) of 1861[384] marked a major legal

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377. *Johannes Zahn*, MUNZINGER ARCHIVE, http://www.munzinger.de/search/document?index=mol00&id=00000005034&type=text/html&query.key=aY7y5d6Y&template=/publikationen/personen/document.jsp&preview=.

378. *See* GERALD D. FELDMAN, DIE ALLIANZ ÜND DIE DEUTSCHE VERSICHERUNGSWIRTSCHAFT 1933-1945 (2001).

379. *See, e.g.*, WALTER HALLSTEIN, DIE AKTIENRECHTE DER GEGENWART: GESETZE ÜND ENTWÜRFE IN RECHTSVERGLEICHENDER DARSTELLUNG (1931).

380. Markus Roth, *Besondere Regeln für geschlossene und börsennotierte Gesellschaften: Überlegungen aus Anlass des 67. Deutschen Juristentages 2008*, *in* FESTSCHRIFT FÜR KLAUS J. HOPT ZUM 70: UNTERNEHMEN, MARKT UND VERANTWORTUNG 1261, 1268–69 (Stefan Grundmann et al. eds., 2010).

381. *See* ZAHN, *supra* note 375, at 95; *see also* Lamb v. Lehmann, 143 N.E. 276, 278 (Ohio 1924); Manson v. Curtis, 119 N.E. 559, 562 (N.Y. 1918).

382. *See Biography of Wilhelm Kißkalt*, *in* AKADEMIE FÜR DEUTSCHES RECHT, *supra* note 372, at LVI.

383. *See* Kißkalt, *Bericht über die 2. Erweiterte Sitzung vom 9.2.1934*, *supra* note 374, at 47; *see also* ZAHN, *supra* note 375, at 202 (though he does not mention the independence of the management board from the supervisory board).

384. *See* JAN LIEDER, DER AUFSICHTSRAT IM WANDEL DER ZEIT (2006) (providing a historical overview); MARCUS LUTTER, *Der Aufsichtsrat im Wandel der Zeit - von*

innovation, though at that point in time setting up the supervisory board was still optional.[385] Until then, control of German Stock Corporations was still largely, but by no means exclusively, held by the board of directors.[386] With the lapse of government supervision and the transition to the formation of stock corporations simply by fulfilling the legal requirements of the Commercial Code, the supervisory board became a compulsory company organ.[387] The board of directors was maintained in corporate practice, as expressly authorized by the Commercial Code of 1884.[388] Under Article 225 (3) of the Commercial Code of 1884, further tasks could be given to the supervisory board, since it was devised in practice as a de facto board of directors.[389] In 1933, a later editor of a monograph on the Stock Corporation Act of 1937, Friedrich Klausing, resisted a reversal of the de facto board of directors into a supervisory organ in the true sense; he later published the Stock Corporation Act of 1937, including an official explanatory report, in which he commented elaborately on the leadership principle,[390] though still with a fair degree of skepticism.[391]

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seinen Anfängen bis heute, *in* 2 AKTIENRECHT IM WANDEL 389–91 (Walter Bayer & Mathias Habersack eds., 2007).

385. Klaus J. Hopt, *Zur Funktion des Aufsichtsrats im Verhältnis von Industrie und Bankensystem*, *in* RECHT UND ENTWICKLUNG DER GROẞUNTERNEHMEN IM 19. UND FRÜHEN 20. JAHRHUNDERT 227, 231–32 (Norbert Horn & Jürgen Kocka eds., 1979).

386. Klaus J. Hopt, *Ideelle und wirtschaftliche Grundlagen der Aktien-, Bank- und Börsenrechtsentwicklung im 19. Jahrhundert*, *in* 5 WISSENSCHAFT UND KODIFIKATION DES PRIVATRECHTS IM 19. JAHRHUNDERT: GELD UND BANKEN 128, 152–54 (Helmut Coing & Walter Wilhelm eds., 1980).

387. *See* Gesetz, betreffend die Kommanditgesellschaften auf Aktien und die Aktiengesellschaften, June 11, 1870, Bundesgesetzblatt des Norddeutschen bundes [Federal Gazette of the North German Confederation], at 375, 378 (1870) (Ger.).

388. *See* Explanatory memorandum of the Commercial Code of 1884, *reprinted in Entwurf eines Gesetzes, betreffend die Kommanditgesellschaften auf Aktien und die Aktiengesellschaften vom 7. März 1884 (Aktenstück Nr. 21). Teil 2*, *supra* note 354, at 387, 447, 461.

389. *See* HERRMANN STAUB & ALBERT PINNER, 2 STAUB'S KOMMENTAR ZUM HANDELSGESETZBUCH § 246, Anm. 10 (14th ed. 1932) (discussing the relevant implications); RICHARD PASSOW, DIE AKTIENGESELLSCHAFT 397–98 (2d ed. 1922). *See also* Klaus J. Hopt & Markus Roth, *§ 95* and *§ 111*, *in* AKTIENGESETZ: GROẞKOMMENTAR, *supra* note 35, nos. 4–9, 563–68 (respectively).

390. *See* FRIEDRICH KLAUSING, GESETZ ÜBER AKTIENGESELLSCHAFTEN UND KOMMANDITGESELLSCHAFTEN AUF AKTIEN (AKTIENGESETZ) NEBST EINFÜHRUNGSGESETZ UND "AMTLICHER BEGRÜNDUNG" 59–61 (1937) (on the leadership principle).

391. *See* FRIEDRICH KLAUSING, REFORM DES AKTIENRECHTS 249 (1933).

An important new aspect of the organizational structure included in the Stock Corporation Act of 1937 was the exclusion of the general meeting of management.[392] This made it possible to portray the management as 'Führer,' thereby raising the level of approval of the stock corporation as a legal form in the Third Reich, which was necessary because of the danger of falling out of favor at the beginning of the that period.[393] Kißkalt justified his proposal with the missing practical significance of the general meeting's status, by saying that he did not know of any cases in which the general meeting encroached on the management of the company.[394] At the decisive second meeting, Kißkalt explicitly called on "gentlemen of the younger generation" to come up with new ideas and thoughts.[395] These included Cornelius Freiherr Heyl zu Herrnhausen, who demanded the abolition of the supervisory board;[396] Hans Würdinger, who proposed a distinction between management shareholders (*Verwaltungsaktionäre*) and bearer shareholders, with only the former having a voting right;[397] and Werner Bachmann, who wanted the management board to be appointed by the supervisory board only and then confirmed by a government agency.[398] The last speaker at the meeting was Zahn, whose proposals regarding the disempowerment of the general meeting and more subordinately, the limiting of the supervisory board's powers eventually found their way, to a large extent, into the Stock Corporation Act of 1937.[399] It can be assumed that Zahn's proposals represented the ideas of the banks, which in the 1920s and the 1930s held the majority of the supervisory board seats.[400]

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392. Stock Corporation Act, Jan. 30, 1937, RGBL. I at 107, § 95 (5) 1 (Ger.).

393. Roth, *Besondere Regeln für geschlossene und börsennotierte Gesellschaften, Überlegungen aus Anlass des 67. Deutschen Juristentags 2008*, *supra* note 374, at 1261, 1268, 1274 (explaining the reduction in the number of stock corporations as a result of of the introduction of the minimum capital regime).

394. *See* Kißkalt, *Bericht über die 2. Erweiterte Sitzung vom 9.2.1934*, *supra* note 374, at 47–48 (noting that none of the people present were aware of such cases).

395. *See id.* at 20.

396. *See id.* at 21–23.

397. *See id.* at 26–28.

398. *See id.* at 36–37.

399. *See id.* at 60–65; *see also* ZAHN, *supra* note 375.

400. *See* Karoline Krenn, *Von der "Macht der Banken" zur Leitidee des deutschen Produktionsregimes Bank-Industrie Verflechtung am Beginn des 20. Jahrhunderts*, 53 ZEITSCHRIFT FÜR UNTERNEHMENSGESCHICHTE [ZUG] 70 (2008) (for a more detailed account); *see also* Karoline Krenn, ALLE MACHT DEN BANKEN? ZUR STRUKTUR

C. PRINCIPLES SURROUNDING ENLIGHTENED DIRECTOR PRIMACY

1. Shareholders Directly Contacting Independent Directors

Stewardship Codes are associated with institutional shareholders seeking contact with independent directors.[401] The relevant pension associations in the United States and Australia, where no such Codes exist, stress that institutional investors should have access to the independent board members.[402] Though such contact is rarely discussed in Germany,[403] it is also possible under German law.

2. Director Accountability and Adequate Compensation

Some of the principles that were strengthened in order to balance the introduction of director primacy in the German Stock Corporation Act of 1937 were director liability,[404] adequate director compensation,[405] and annual discharge of liability[406] for all board members (management and supervisory boards). The latter does not lead to exemption from liability, but rather is a mandatory signal of trust at every annual general meeting. These principles are also relevant for long-termism, and

PERSONALER NETZWERKE DEUTSCHER UNTERNEHMEN AM BEGINN DES 20. JAHRHUNDERTS (2012).

401. *See* UK STEWARDSHIP CODE, Guidance to Principle 4 (suggesting that institutional investors consider contacting independent directors when they have concerns); *see also id.*, Guidance to Principle 3 (advising institutional investors to meet with the chairman and, where appropriate, with other board members, to ensure that independent directors provide adequate oversight).

402. *See* AUSTRALIAN COUNCIL OF SUPER INVESTORS (ACSI), A GUIDE FOR SUPERANNUATION TRUSTEES TO MONITOR LISTED AUSTRALIAN COMPANIES (ACSI GOVERNANCE GUIDELINES) § 18(c) (2011) ("The board should respond, where practicable, to communications from shareholders. In particular, shareholders should have access to non-executive directors.").

403. In the UK, such contacts (especially of the senior independent director) signal good corporate governance. *See* UK CORPORATE GOVERNANCE CODE § E.1.1 (2012), *available at* http://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-September-2012.aspx.

404. *See infra* Part IV.B.3.

405. *See infra* Part IV.B.1.

406. *See* Roth, *Information und Organisation des Aufsichtsrats*, *supra* note 316, at 368–69.

therefore will hopefully contribute to the international discussion in a more sustainable manner than capital requirements.[407]

IV. LONG-TERMISM

A. LONG-TERMISM IN THE INTERNATIONAL DISCUSSION

1. Long-Termism in the European Commission Green Paper on Corporate Governance

The Green Paper on corporate governance dicusses the inconsistency between the increasing importance of private pension institutions and the short-termism of capital markets generally.[408] Although private pension institutions have long-term obligations to their beneficiaries and their participation in capital markets has risen (according to the European Commission), the investment horizons in the last 20 years have decreased; due to a turnover of 150% of market capitalization, the average investment period is set to be eight months.[409] The Walker Review already identified this inconsistency.[410] The European Commission is remarkably frank in inquiring about rules that counteract the long-term interests of institutional investors,[411] and taking into account the relationship between private pension institutions and their asset managers.[412]

At present, there are no concrete measures in sight that would promote long-term investment by long-term-oriented investors.[413] In

407. *See* Fleischer, *supra* note 366, at 155, 169 (hoping for a transformation in German law); *see also* MARCUS LUTTER, KAPITAL, SICHERUNG DER KAPITALAUFBRINGUNG UND KAPITALERHALTUNG IN DEN AKTIEN- UND GMBH-RECHTEN DER EWG (1964); Marcus Lutter, *Legal Capital in Europe*, 1 ECFR, Special Volume (2006).

408. *See Green Paper*, *supra* note 24, at 3 (presenting this as the second and most detailed point of its "three subjects which are at the heart of good corporate governance"). The other two points deal with the board of directors and the duty to comply or explain. *See id.*

409. *See id.* at 12.

410. *See* WALKER REVIEW, *supra* note 361, at 26–27.

411. *See Green Paper*, *supra* note 24, at 12.

412. *See id.* at 12–13.

413. *See Green Paper Long-Term Financing of the European Economy*, at 15, COM (2013) 150 final (Mar. 25, 2013) ("Ideas have also been advanced to encourage greater

France, shareholders that have held their shares for longer than two years obtain a double vote.[414] The Reflection Group recommended that the articles of incorporation mandate that a higher dividend be given to shareholders committed to long-term investments.[415] This is to be understood as a reaction to the change in ownership structure and the dominance of portfolio investors. So far, long-term investors have only had an incentive to monitor the management of their shares if their holdings were large enough to intervene directly in the management of the company.[416] With dispersed ownership, by contrast, it is in the short-term interest of institutional investors and their 'principals' (the beneficiaries) to sell their holdings swiftly,[417] as the costs of control typically exceed the uncertain reward.

An additional dividend for shareholders committed to long-term investments appears to be possible in Germany under the prevailing law. It should be recognized that companies with dispersed ownership have an interest in long-term, stable structures, and in appropriate circumstances, a proportional encroachment on the rights of short-term shareholders may be acceptable.[418] Seen from the perspective of minority shareholder protection, it is questionable whether owner-managers, which are very important in Germany,[419] should be entitled to a special dividend, in addition to being given a control premium for share sales.[420] Alternative mechanisms to promote the control of management by institutional investors could be the establishment of

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long-term shareholder engagement . . . such as . . . granting increased voting rights or dividends to long-term shareholders.").

414. Code De Commerce [C. COM] art. L225-123 (Fr.) (stating that adouble voting right can be provided for in the articles of association or in an extraordinary general meeting).

415. *See* EUROPEAN COMMISSION, INTERNAL MKTS. AND SERVS., REPORT OF THE REFLECTION GROUP ON THE FUTURE OF EU COMPANY LAW 47 (2011).

416. *See* STEFAN PRIGGE, *A Survey of German Corporate Governance*, *in* COMPARATIVE CORPORATE GOVERNANCE: THE STATE OF THE ART AND EMERGING RESEARCH 945, 974 tbl. 9 (Klaus J. Hopt et al. eds., 1998) (on the ownership structure at the end of the 20th Century).

417. For a principles-based account, see ALBERT O. HIRSCHMAN, EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS AND STATES (1970).

418. On the requirements, see, for example, UWE HÜFFER, AKTIENGESETZ [AKTG]: KOMMENTAR § 53a, comment 10 (9th ed. 2010).

419. Some examples of family-owned companies in the DAX are Beiersdorf, BMW, and Metro.

420. *See* Fleischer, *supra* note 366, at 166–67.

special committees of long-term investors, for example,[421] or the establishment of such committees on the supervisory board. In Deutschland AG, the bank representatives on the supervisory boards fulfilled a similar role.[422]

European reforms will probably focus on investor and financial reporting rules for long-term investors and their relationships with asset managers. In Germany, the laws on investments and deposits for life insurance companies make it essentially impossible for them to invest in comapny shares.[423] In light of rising government debt, the risk of investments in shares, including occupational pensions, will have to be reconsidered.[424] Asset managers' remuneration of private pension institutions should be done on a long-term basis.[425]

The OECD installed a working group to focus on the issue of longer-term investments and published its first policy paper.[426] Globally, it is a challenge for the pension fund industry to bring its contracts with asset managers in line with its long-term obligations via its clients. Ensuring that hedge funds do not bet against the rest of the portfolio of the pension fund, thereby causing perhaps even more long-term harms by achieving short-term gains, seems difficult, if not impossible to achieve.

2. Changing Pension Design?

Enhancing long-termism in occupational pensions is not an easy task, especially since it is difficult to implement long-term investing. Matching pension obligations with long-term debt ignores the

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421. *See* WALKER REVIEW, *supra* note 361, at 26–27, 72–75 (considering the introduction of institutional shareholder committees).

422. *See* PAUL MYNERS, INSTITUTIONAL INVESTMENT IN THE UNITED KINGDOM: A REVIEW (MYNERS REPORT) 1–2 (2001) (likening a "strong funded pension system" to a "key national asset").

423. *See* ROTH, PRIVATE ALTERSVORSORGE 2009, *supra* note 123, at 298–300.

424. *See* Markus Roth, *Anmerkung zu EuGH, Urteil vom 15.07.2010 – C-271/08, Ausschreibung von Betriebsrentenzusagen*, 2011 EUROPÄISCHE ZEITSCHRIFT FÜR ARBEITSRECHT [EUZA] 213, 218.

425. *See Commission Recommendation on Remuneration Policies in the Financial Services Sector*, C(2009) 3159 (Apr. 30, 2009) (recommending alignment of a remuneration policy with a long-term business plan).

426. Raffaele Della Croce, Fiona Stewart & Juan Yermo, *Promoting Longer-Term Investment by Institutional Investors: Selected Issues and Policies*, 2011 OECD J. FIN. MKT. TRENDS 1.

insolvency risk of firms and states. It is necessary to develop and practice an overall investment strategy. Short investment horizons are not *per se* unsustainable, and an effort should be made to avoid imperfect portfolios with different asset managers in danger of betting against each other.

In an ideal occupational pension plan design, automatic enrollment should be strengthened.[427] In the United Kingdom, automatic enrollment was introduced by the Pension Act of 2008, leading to higher pension contributions of both employers and employees; with some state aid the total came to about 8% of employee earnings.[428] The concept of automatic enrollment was also endorsed by the German Jurists Forum in 2004[429] and in 2011 by the AbA, the German association on Occupation Pensions.[430] In the United States, many studies reflect favorably on automatic enrollment by showing improvements in participation rates and contributions.[431] A recent study also showed that large plans with automatic enrollment have significantly fewer costs than large plans without it, or small plans.[432]

With the general trend of the elderly working longer, occupational pensions seem to be acceptable even without guaranteeing a specific pension age. Pension age is rising in Germany, making lifetime working accounts that can be transferred into pension rights at will more attractive.[433] Such multi-channeling might also provide the opportunity for saving via occupational pensions with the option for earlier retirement. Occupational pensions should also be accessible before

427. *See* OECD PENSIONS OUTLOOK 2012, *supra* note 124, at 125; ROTH, PRIVATE ALTERSVORSORGE 2009, *supra* note 123, at 661–62.

428. Pensions Act, 2008, c. 30, § 20 (Eng.).

429. 65. DEUTSCHER JURISTENTAG, BONN 2004: BESCHLÜSSE [65TH GERMAN JURISTS FORUM, BONN 2004: DECISIONS], *Private* Pensions (2004) [hereinafter GERMAN JURISTS FORUM, BONN 2004].

430. ABA – ARBEITSGEMEINSCHAFT FÜR BETRIEBLICHE ALTERSVERSORUNG E.V., DIALOG PRO BETRIEBSRENTE: MEMORANDUM FÜR EINE NEUJUSTIERUNG DER ALTERSVERSORGUNG IN DEUTSCHLAND 15–16, 3.3 (2011) (opting out).

431. *See* Akerlof, *supra* note 149, at 424; *see also* Shlomo Benartzi & Richard H. Thaler, Save More Tomorrow: Using Behavioral Economics to Increase Employee Saving, 112 J. POL. ECON. 164 (2004), RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008).

432. DELOITTE, INSIDE THE STRUCTURE OF DEFINED CONTRIBUTION/401(K) PLAN FEES: A STUDY ASSESSING THE MECHANICS OF THE 'ALL-IN' FEE (2011).

433. *See* ANNEKATRIN VEIT, ARBEITSZEITKONTEN UND BETRIEBLICHE ALTERSVERSORGUNG (2008).

normal retirement age.[434] Generally, the confidence in guarantees[435] has deteriorated due to the financial crisis and the ongoing accumulation of state debts following it, leading to a state debt crisis.

B. German Long-Termism Company Law Principles

1. Adequate Management Compensation

Another politically relevant issue, management remuneration,[436] has now taken on a longer-term focus worldwide.[437] In the background of this issue is the multilevel principal/agent problem; the dualistic board structure in Germany makes this problem particularly pertinent. Asset managers are agents of the pensioners and supervisory directors are agents of the shareholders, and essentially the asset managers. Management board members are agents of the supervisory directors. The existing rules on management remuneration, and the liability they imposed, were already reformed in Germany before the end of the financial crisis.[438] Under the provisions of the VorstAG,[439] the remuneration of management board members of listed companies must be based on sustainable company development (§ 87 (1) German Stock Corporation Act).[440]

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434. *See* ROTH, PRIVATE ALTERSVORSORGE 2009, at 608 (the minimum age for occupational pensions in Germany is 60).

435. *See id.* at 193–242 (2009).

436. *See* Klaus J. Hopt, *Reformprobleme im Handels-, Gesellschafts- und Abschlussprüferrecht*, *in* KOMPATIBILITÄT DES TÜRKISCHEN UND EUROPÄISCHEN WIRTSCHAFTSRECHTS 21, 34 (Yesim M. Atamer & Klaus J. Hopt eds., 2009); *see also* Christoph Engel, *Das schwindende Vertrauen in die Marktwirtschaft und die Folgen für das Recht*, *in* FESTSCHRIFT FÜR KLAUS J. HOPT ZUM 70, *supra* note 380, at 2733, 2743–45.

437. *See* Guido Ferrarini, Niamh Moloney & Maria Cristina Ungureanu, *Executive Remuneration in Crisis: A Critical Assessment of Reforms in Europe*, 10 J. CORP. L. STUDIES [JCLS] 73 (2010) (explaining the executive remuneration in Europe).

438. Gesetz zur Angemessenheit der Vorstandsvergütung (VorStAG) [Adequate Management Remuneration Act], July 31, 2009, BGBL I at 2509; *see* Klaus-Stefan Hohenstatt, *Das Gesetz zur Angemessenheit der Vorstandsvergütung*, 30 ZIP 1349 (2009); Eberhard Vetter, *Begrenzung der Vorstandsbezüge durch Hauptversammlungsbeschluss?*, 30 ZIP 1307 (2009).

439. Adequate Management Remuneration Act, July 31, 2009, BGBL I at 2509.

440. *See Commission Recommendation on Remuneration Policies in the Financial Services Sector*, C(2009) 3159, at 59–60 (Apr. 30, 2009).

Internationally, there was a clear market failure with respect to the calculation of executive salaries.[441] As a solution to this, the United States endorsed the 'say on pay' model, based on the British one.[442] As a result of a referendum in Switzerland, 'say on pay' will be integrated in the Swiss Constitution in the form of a mandatory vote at annual meetings.[443] The US pension funds demanded a 'say on pay' for the United States at the time of enactment of recent financial market regulations.[444] The remuneration practice of directors has been questioned by some within the United States for a while;[445] however, the academic focus is currently on the remuneration practice of banks.[446] Financial service provider Hermes, as another example, now provides an opinion on executive salaries in Germany due to the increasing internationalization of share investments by Anglo-American pension funds.[447] However, there are two corporate law issues which are yet to be resolved: first, whether the directors should be remunerated as entrepreneurs or as company employees,[448] and secondly, the extent to which board members should be compensated by means of pension

441. *See* WALKER REVIEW, *supra* note 361, at 27.

442. Jeffrey N. Gordon, *"Say on Pay": Cautionary Notes on the U.K. Experience and the Case for Shareholder Opt-in*, 46 HARV. J. ON LEGIS. 323 (2009).

443. Bundesverfassung [BV] [CONSTITUTION] Mar. 3, 2013, art. 95, para. 3 (Switz.). The Swiss regulation is heavily discussed in Germany and may lead to further changes of the German Stock Corporation Act. The Adequate Management Remuneration Act in 2009, *supra* note 439, also introduced a say-on-pay regulation. Resolutions of the general meeting concerning the system on remuneration of managing directors are possible, but not binding. *See* Stock Corporation Act, Sept. 6, 1965, BGBL. I at 1089, § 120 (4), last amended by Restructuring Act, Dec. 9, 2010, BGBL. I at 1900 (Ger.).

444. *See* INVESTORS' WORKING GRP., *supra* note 349, at 6; *see also* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 951, 124 Stat. 1376, 1899 (2010).

445. LUCIAN A. BEBCHUK & JESSE M. FRIED, PAY WITHOUT PERFORMANCE - THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION 1 (2004).

446. Lucian A. Bebchuk & Holger Spamann, *Regulating Bankers' Pay*, 98 GEO. L.J. 247 (2010).

447. Sven Oliver Clausen, *Aktionäre erzwingen Votum über Vorstandsgehälter,* FIN. TIMES DEUTSCHLAND (Ger.), Sept. 9, 2009, *available at* http://www.ftd.de/finanzen/maerkte/:druck-von-hermes-aktionaere-erzwingen-votum-ueber-vorstandsgehaelter/50014388.html.

448. Peter O. Mülbert, *Shareholder Value aus rechtlicher Sicht*, 1997 ZGR 129, 147 (favoring a shareholder value approach); *see also* Peter O. Mülbert, *Marktwertmaximierung als Unternehmensziel der Aktiengesellschaft*, *in* FESTSCHRIFT FÜR VOLKER RÖHRICHT ZUM 65. GEBURTSTAG: GESELLSCHAFTSRECHT RECHNUNGSLEGUNG SPORTRECHT 421 (Georg Crezelius et al. eds., 2005).

claims (in which case the remuneration structure would be based on the sustainable growth of the company).[449]

In listed companies, remuneration of management board members must be aligned with the long-term success of the company.[450] The German Stock Corporation Act refers to 'sustainability,'[451] a phrase developed in 18th century German forest sciences and today widely used for environmental matters. In this context, 'sustainability' means long-termism as well as the careful handling of natural resources.[452] Whether the compensation of German executives has to be taken into account, and what the environmental consequences of the business may be, has not yet been discussed. The time needed for sustainable compensation might also be subject to judicial review. The German Corporate Governance Code refers only to multi-year compensation elements.[453] Although the German Stock Corporation Act contains a similar provision,[454] this specification might be too short. Real long-termism in management compensation might go beyond the five-year period discussed today and may also deal with pension payments.[455]

2. Annual Discharge of Managing and Supervisory Directors

Annual discharge has been part of German practice since the early 19th century, and has been mandatory since the incorporation of the leadership principle under the German Stock Corporation Act of 1937.[456] Since then, 'discharge' is no longer simply a discharge from liability, but a sign of confidence for managing and supervisory directors. The company may not waive liability claims in the first three

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449. *See* GERMAN CORPORATE GOVERNANCE CODE § 4.2.2, § 4.2.3, § 4.2.5, model tbl. 1 (2013). The 2013 amendment focused on management remuneration and on pensions: levels and disclosures. To base variable compensation components on a multi-year assessment (per the terms of § 4.2.3 of the German Corporate Governance Code) will be insufficient to achieve sustainability.

450. Stock Corporation Act, § 87.

451. *Id.* § 87(1).

452. Gregor Thüsing & Gerrit Forst, *Nachhaltigkeit als Zielvorgabe für die Vorstandsvergütung*, 2010 GESELLSCHAFTS-UND WIRTSCHAFTSRECHT [GWR] 515.

453. GERMAN CORPORATE GOVERNANCE CODE § 4.2.3 (2) 3.

454. Stock Corporation Act § 87 (1) 3.

455. Markus Roth, *Deutscher Corporate Governance Kodex 2012*, 66 WERTPAPIER-MITTEILUNGEN [WM] 1985 (2012).

456. Stock Corporation Act, § 70.

years after director wrongdoings.[457] In light of the financial crisis, the limitation period for director liability was extended to ten years for listed companies.[458] Loss of such confidence is cause for the supervisory board to remove management directors; international scholars therefore assume *ad nutum* that removal is possible for managing directors.[459]

Discharge and votes of confidence should be considered standard-setters in corporate governance. Annual re-elections of directors, as advocated by institutional investors internationally, might prove to be counterproductive when implementing long-termism in company law. At least at first glance, it seems counterintuitive to expect a director to seek re-election every year if corporate governance is directed to promote the long-term success of the company.[460] Nevertheless, such assumptions should not lead to the insulation of managers from shareholders.[461] Annual discharge of directors might even be accompanied by mandatory annual votes at the general meeting on the remuneration system and the maximum remuneration for managing directors.

3. Deductibles in D&O Insurance

The introduction of director primacy in the German Stock Corporation Act of 1937 was balanced by tightening liability standards.[462] If the premiums for D&O insurance are paid by the

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457. *Id.* § 93 (4) 3.

458. Theodor Baums, *Managerhaftung und Verjährung*, 174 ZHR 593 (2010) (Ger.).

459. Sofie Cools, *Europe's Ius Commune on Director Revocability*, 8 ECFR 199 (2011).

460. Justice Jacobs of the Delaware Supreme Court promotes longer-term board elections (such as for five years) instead of annual re-election. *See* Jack B. Jacobs, *"Patient Capital": Can Delaware Corporate Law Help Revive It?*, 68 WASH. & LEE L. REV. 1645, 1657 (2011).

461. *See* Lucian A. Bebchuk, *The Myth that Insulating Boards Serves Long-Term Value*, 113 COLUM. L. REV. (forthcoming 2013).

462. *See supra* Part III.C.2. For material standards of review, see Roth, *Outside Director Liability*, *supra* note 35, at 346–50, 354–69; for procedural requirements see Stock Corporation Act, Sept. 6, 1965, BGBL I at 1089, §§ 147–48, last amended by Restructuring Act, Dec. 9, 2010, BGBL I at 1900 (Ger.). See also Habersack's proposal in the Habersack Report that every shareholder should be allowed to sue managing and supervisory directors. HABERSACK, *supra* note 88, at 91–96 (2012). The proposal was

company, the German Stock Corporation Act now mandatorily provides a suitable deductible (though this idea was only a recommendation in the German Corporate Governance Code).[463] The Adequate Management Remuneration Act amended the German Stock Corporation Act in 2009.[464] Now if a company takes out a D&O insurance policy for the management board, a deductible of at least 10% of the loss, consisting of up to 1.5 times the fixed annual compensation of the management board member, must be agreed upon.[465] The German Corporate Governance Code recommends that a similar deductible be agreed upon in any D&O policy for the supervisory board.[466]

The financial crisis showed that some sectors' appetite for risk was too great.[467] Regardless, it would be questionable to delete liability exposure in practice.[468] If generous standards of judicial review are not met, personal liability leading to out-of-pocket payments must be an option.[469] Whether there should be a deductible, and what the scope of a suitable deductible would be, can be worked out by referencing the settlements in the Enron and the WorldCom cases.[470] It may be necessary to distinguish between violations of directors' duties based on the level of severity; directors' personal assets could be used in this calculation.[471] It is useful to look at what other countries have done in such a situation. In Japan, a cap for director liability is possible, but it has to amount to the earnings of six years for executives and two years

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rejected by the German Jurists Forum. GERMAN JURISTS FORUM, MUNICH 2012, *supra* note 89, Business Law Section, Resolution 22.

463. Stock Corporation Act § 93(2)3.

464. Adequate Management Remuneration Act, July 31, 2009, BGBL I at 2509 (Ger.).

465. GERMAN CORPORATE GOVERNANCE CODE § 3.8(2)(1).

466. *Id.* § 3.8(2)(2).

467. *See* WALKER REVIEW, *supra* note 361, at 52.

468. *See* TOM BAKER & SEAN J. GRIFFITH, ENSURING CORPORATE MISCONDUCT: HOW LIABILITY INSURANCE UNDERMINES SHAREHOLDER LITIGATION (2010).

469. *See* Bernard Black, Brian R. Cheffins & Michael Klausner, *Outside Director Liability*, 58 STAN. L. REV. 1055, 1070–71, 1089–95 (2006) (discussing the absence of outside director liability in US company law cases after Smith v. Van Gorkom, until at least 2004).

470. *See id.* at 1057 (explaining that to settle the WorldCom case, twelve outside directors personally paid $24.75 million, and in the Enron case, ten outside directors paid $13 million for securities litigation and $1.5 million for ERISA claims).

471. *See* Roth, *Outside Director Liability*, *supra* note 35, at 371.

for non-executives.[472] For minor errors in judgment, the range used by Germany, a quarter up to one year's earning, might be appropriate. For the transatlantic discussion concerning a suitable deductible, the amount of the Japanese cap should also be taken into account.

C. ENVIRONMENTAL, SOCIAL AND GOVERNANCE ISSUES (ESG), ESPECIALLY GREEN INVESTMENT

CalPERS has plans to integrate environmental, social and governance issues (ESG) into their investment process; it published its first report in the spring of 2012.[473] Generally, the long-term investment projections of private pension institutions suggest their support of sustainable investment policies. Against this backdrop, it makes sense that insurance companies and pension funds have a strong interest in sustainable investments[474] and that appropriate indices are being developed. It should be noted that the United Nations examined the duties of asset managers with respect to their investments in comparative perspective.[475] As part of a campaign by the insurance industry in the United Kingdom, 'Climate Wise' already represented 60% of property insurers and 50% of life insurers in 2008;[476] in 2009 more than half of these incorporated a climate change analysis in their investment strategies.[477] Climate Wise is supplemented by the Carbon Disclosure Project,[478] an initiative strongly supported by British Telecom (the majority owner of Hermes pension fund); by the terms of the project, companies should set a goal of how much they plan to reduce their CO_2 emissions.[479] Before the climate conference in Copenhagen, institutional investors (who in total manage $13 trillion worth of assets) signed a declaration stating which industrial nations

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472. Brian R. Cheffins & Bernard S. Black, *Outside Director Liability Across Countries*, 84 TEX. L. REV. 1385, 1460 (2006).

473. CALPERS, TOWARDS SUSTAINABLE INVESTMENT: TAKING RESPONSIBILITY (2012), *available at* http://www.calpers.ca.gov/eip-docs/about/press/news/invest-corp/esg-report-2012.pdf.

474. *See supra* Part IV.A.

475. U.N. ENV'T PROGRAMME (UNEP), ASSET MGMT. WORKING GRP., FIDUCIARY RESPONSIBILITY: LEGAL AND PRACTICAL ASPECTS OF INTEGRATING ENVIRONMENTAL, SOCIAL AND GOVERNANCE ISSUES INTO INSTITUTIONAL INVESTMENT (2009).

476. CLIMATEWISE, ONE YEAR REVIEW 5 (2008) (U.K.).

477. CLIMATEWISE, SECOND YEAR REVIEW 31 (2009) (U.K.).

478. *See also* Puri, *supra* note 70, at 435.

479. CARBON DISCLOSURE PROJECT, THE CARBON CHASM 20 app. (2009) (providing an overview of company-specific commitments).

should reduce CO_2 emissions by 80–95% by the year 2050.[480] CalPERS focuses on the disclosure of climate risks[481] and, as mentioned above, is in the midst of including climate change into its investment principles; its spring 2012 publication included its first portfolio-wide report on ESG.[482]

Even the SEC has begun to take the consequences of climate change seriously,[483] giving in to great pressure from large institutional investors and the US insurance supervisory authority. At the beginning of 2009, the National Association of Insurance Commissioners ("NAIC") decided to demand that insurance companies with a premium volume of more than $500 million report the environmental risks that could affect them.[484] The questions to be answered by the insurance companies relate mainly to the impact of climate change on their investment portfolios.[485] The NAIC has incorporated risk-focused examination questions into the Financial Condition Examiners Handbook, which addresses the impact of climate change.[486] In Europe, the European Commission launched a proposal to include a statement on

480. INSTITUTIONAL INVESTORS GRP. ON CLIMATE CHANGE ET AL., 2009 INVESTOR STATEMENT ON THE URGENT NEED FOR A GLOBAL AGREEMENT ON CLIMATE CHANGE (2009).

481. CALPERS, GLOBAL PRINCIPLES, *supra* note 223, at 63 app. G, 65 app. H.

482. CALPERS, FACTS AT A GLANCE: CORPORATE GOVERNANCE 8 (2012).

483. Evan Lehmann, *SEC Turnaround Sparks Sudden Look at Climate Disclosure*, N.Y. TIMES, July 13, 2009, *available at* http://www.nytimes.com/cwire/2009/07/13/13climatewire-sec-turnaround-sparks-sudden-look-at-climate-65102.html?pagewanted=all.

484. Press Release, Nat'l Ass'n of Ins. Comm'rs (NAIC), Insurance Regulators Adopt Climate Change Risk Disclosure, (Mar. 17, 2009), *available at* http://www.naic.org/Releases/2009_docs/climate_change_risk_disclosure_adopted.htm.

485. NAIC, INSURER CLIMATE RISK DISCLOSURE SURVEY (Mar. 28, 2010), http://www.naic.org/documents/committees_explen_climate_survey_032810.pdf ("Question 5: Has the company considered the impact of climate change on its investment portfolio? Has it altered its investment strategy in response to these considerations? If so, please summarize steps you have taken.").

486. *See Climate Change and Risk Disclosure*, NAT'L ASS'N OF INS. COMM'RS (Jan, 1, 13), http://www.naic.org/cipr_topics/topic_climate_risk_disclosure.htm.
For current activities and controversies, see ANNE OBERSTEADT, NAIC & CTR. FOR INS. POLICY AND RESEARCH, CLIMATE RISK DISCLOSURE ACTIVITIES (2012), *available at* http://www.naic.org/documents/cipr_1204_climate_risk_disclosure_activities.pdf.

environmental, social and employee matters in the annual report of larger firms.[487]

CONCLUSION AND OUTLOOK

Labor and pensions in the United States and Germany have significant differences. While German labor and pension law is based on bans of unfair dismissals in labor contracts, employee representation on supervisory boards, and public pensions, the United States provides no such employee rights, yet occupational pension assets equal the US GDP or the pension assets of the other OECD member states. Among the institutional investors who together own half of all equity of US-listed firms, pension funds, particularly state pension funds, are most active in setting corporate governance standards and imposing those standards directly and via proxy advisors. Some of the core principles already implemented involve independent directors, the balancing of director primacy with shareholder rights, long-termism (meaning the creation of long-term shareholder value), and consideration of ESG (especially green investments).

A transatlantic view is constructive for the evaluation of these core corporate governance principles, which are central for pension capitalism. The European Union and the United States apply different standards with respect to significant or majority shareholders. While the EU recommendation—as proposed by the Corporate Governance Commission, and perhaps in the near future by the German Corporate Governance Code as well—provides that significant shareholders are excluded from qualifying as independent directors, such relationships are not mentioned in the United States. This may be relevant since many US technology firms have founder-directors that are significant shareholders.

The inclusion of US corporate law principles in the German Stock Corporation Act of 1937 needs to be mentioned with respect to the balancing of shareholder rights with director primacy. Germany has maintained and tightened central shareholder rights, such as the right to nominate supervisory directors; it also introduced new ones, such as the annual discharge of supervisory and managing directors. Moreover,

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487. *Proposal for a Directive of the European Parliament and the Council amdending Council Directives 78/660/EEC and 83/349/EEC as regards of non-financial and diversity information by certain large companies and groups*, art. 1(1)(a), COM (2013) 207 final, (Apr. 16, 2013).

director compensation was mandatorily restricted to adequacy, and director liability was sharpened (it played no *de facto* role until the 1990s when US standards were discussed again). Such principles are also relevant for long-termism, and should be sharpened and raised to the top of the institutional investors' agenda. Pioneering pension funds, such as CalPERS and the UK Hermes Pension Fund, as well as pension fund associations, such as the US CII and the Australian ACSI, should focus on long-term shareholder value and other social issues.