

# Chapter 1

## An Overview of German Business or Enterprise Law and the One-Tier and Two-Tier Board Systems Contrasted

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### Contents

1.1	Introduction .....	1
1.2	General Characteristics .....	2
1.3	Various Types of Business Organisations .....	4
1.4	Contrasting the One-Tier and Two-Tier Board Systems .....	8
1.5	Delineation .....	14

### 1.1 Introduction

It is hardly possible to judge the merits of the German corporate governance system without also having a basic knowledge of German business or enterprise law<sup>1</sup> and without analysing it within its wider cultural context<sup>2</sup> and linguistic background.<sup>3</sup> Whereas business law or enterprise law refer to all legal aspects pertaining to businesses or enterprises, the focus of this book is on corporate governance in context of primarily large companies or corporations. A distinctive feature of German companies or corporations is the particular relationship amongst the various corporate organs and the unique synthesis between corporations law and labour law. Understanding this synthesis is fundamental when the merits of the

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<sup>1</sup> In Germany, phrases like company law, corporate law and corporations law have different meanings and are often associated with specific political or academic theories. See and compare, for example, Thomas Raiser, 'The Theory of Enterprise Law in the Federal Republic of Germany' [1988] AJCL 111, 122 et seq; Gunter Teubner, 'Enterprise Corporation: New Industrial Policy and the "Essence" of the Legal Person' [1988] AJCL 130 et seq. For the purposes of this book these terms will be used interchangeably.

<sup>2</sup> See Bernhard Großfeld, 'Comparative Law as a Comprehensive Approach' (2000) 1 Richmond J of Global L and Bus 1; Bernhard Großfeld, *Core Questions of Comparative Law* (Carolina Academic Press, Durham NC 2004).

<sup>3</sup> Bernhard Großfeld, 'Comparatists and Languages' in Legrand and Munday (eds) *Comparative Legal Studies: Traditions and Transitions* (OUP, Oxford 2003) 154.

English and American one-tier system and the German two-tier system (the management board and the supervisory board) with employee participation are analysed and compared.<sup>4</sup> These aspects have often been neglected in the academic literature attempting to analyse the German corporate governance system from a traditional Anglo-American perspective.

## 1.2 General Characteristics

When German corporate law is studied, it should always be kept in mind that unique historic events played a major role in shaping German business organisations generally,<sup>5</sup> but these historic events also led to a unique feature of German corporate law, namely the concept of codetermination (*Mitbestimmung*).<sup>6</sup> At one stage labour law was conceived to be a branch of the law '[a]lmost entirely outside the horizon of commercial and company law'.<sup>7</sup> This is, however, not the case any more. Corporations law and labour law are now linked by various statutory provisions dealing with the rights and duties of employee representatives on supervisory boards and by rules pertaining to collective bargaining.<sup>8</sup> It is, however, the concept of codetermination, more than any other concept, which forms the most fundamental link between corporations and labour law in Germany.<sup>9</sup> Shortly after World War II the application of this concept made employees a part of the corporate governance structure of many large corporations and companies in Germany. Notwithstanding

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<sup>4</sup>For a general overview see Bernhard Großfeld, 'Management and Control of Marketable Share Companies' in *International Encyclopaedia of Comparative Law* (Mohr and Siebeck Verlag, Tübingen 1973); AR Oquendo, 'Breaking on Through to the Other Side: Understanding Continental European Corporate Governance' (2001) 22 U Pennsylvania J of Intl Eco L 975.

<sup>5</sup>See in particular Rudolf Wiethölter, *Interessen und Organisation der Aktiengesellschaft im Amerikanischen und Deutschen Recht* (CF Müller Verlag, Karlsruhe 1961) 272 et seq; Bernhard Großfeld, *Aktiengesellschaft, Unternehmenskonzentration und Kleinaktionär* (Mohr and Siebeck Verlag, Tübingen 1968) 113 et seq; Friedrich Kübler and Heinz-Dieter Assmann, *Gesellschaftsrecht* (6th ed, CF Müller Verlag, Heidelberg 2006) 5 et seq; Bernhard Großfeld and Ulrich Irriger, 'Intertemporales Unternehmensrecht' (1988) 43 JZ 531.

<sup>6</sup>For purposes of this book, the term codetermination (*Mitbestimmung*) will be used in its legal context, indicating the codetermination of employees in terms of various statutory provisions – see Chap. 5 for a closer description of the different ways in which the term codetermination is used. The term *Mitbestimmung* is also sometimes used in more general terms – see Christene Windbichler, 'Grenzen der Mitbestimmung in einer marktwirtschaftlichen Ordnung' [1991] ZfA 35. See generally Detlev F Vagts, 'Reforming the "Modern" Corporation: Perspectives from the German' [1966] Harvard L Rev 23, 26 et seq.

<sup>7</sup>Thomas Raiser, 'The Theory of Enterprise Law in the Federal Republic of Germany' [1988] AJCL 111, 113.

<sup>8</sup>Ibid 114.

<sup>9</sup>See especially the comprehensive exposition by Dieter Reuter, 'Der Einfluß der Mitbestimmung auf das Gesellschafts – und Arbeitsrecht' [1979] AcP 509–566.

this long-lasting interrelationship between corporations law and labour law, not all theoretical and practical difficulties associated with it have been solved.<sup>10</sup>

Two further aspects of German corporations law should be appreciated. Firstly, it has not escaped the influence of international debates on major corporate law issues, for example, the debate on the social responsibilities of large public corporations<sup>11</sup>; the debate on the most effective ways of regulating these powerful institutions in society<sup>12</sup>; and the debate on how the rights and duties of all stakeholders in the modern corporation (i.e. the shareholders, employees, creditors, consumers, the community etc.) should be recognised and balanced.<sup>13</sup> Today, International (European) Financial Reporting Standards<sup>14</sup>; the rise of rating agencies<sup>15</sup>; and new evaluation techniques<sup>16</sup> bring new dimensions to the corporate governance discussion in Germany.

Secondly, although the German law of corporations is indeed classified as ‘private law’,<sup>17</sup> it should be kept in mind that, particularly in the case of large public corporations, this ‘private law’ is based on very specific and detailed statutory provisions,<sup>18</sup> which do not allow for much deviation from the prescribed

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<sup>10</sup> Ibid 409–517.

<sup>11</sup> Thomas Raiser, ‘The Theory of Enterprise Law in the Federal Republic of Germany’ [1988] AJCL 111, 118, 122 et seq.

<sup>12</sup> See especially Bernhard Großfeld and Werner Ebke, ‘Probleme der Unternehmensverfassung in rechtshistorischer und rechtsvergleichender Sicht (I)’ (1977) 22 AG 59, 62 et seq. See also Klaus-Peter Martens, ‘Das Bundesverfassungsgericht und das Gesellschaftsrecht’ (1979) 8 ZGR 493, 508–9.

<sup>13</sup> Eckard Reh binder, ‘Das Mitbestimmungsurteil des Bundesverfassungsgerichts aus unternehmensrechtlicher Sicht’ (1979) 8 ZGR 471, 478, 480–81; Friedrich Kübler and Heinz-Dieter Assmann, *Gesellschaftsrecht* (6th ed, CF Müller Verlag, Heidelberg 2006) 176 et seq.

<sup>14</sup> Bernhard Großfeld, ‘Global Accounting: Where Internet Meets Geography’ (2000) 48 Am J Comp L 261; Bernhard Großfeld, ‘Comparative Corporate Governance: Generally Accepted Accounting Principles v International Accounting Standards?’ (2003) 28 North Carolina J of Intl L and Com Reg 847; Bernhard Großfeld, ‘Lawyers and Accountants: A Semiotic Competition’ (2001) 36 Wake Forest L Rev 167.

<sup>15</sup> Bernhard Großfeld, ‘Changing Concepts of Rules: Global Corporate Assessment’ (2002) 8 L and Bus Rev of the Americas 341.

<sup>16</sup> Bernhard Großfeld, ‘Global Valuation: Geography and Semiotics’ (2002) 55 SMU L Rev 197; Bernhard Großfeld, ‘Global Financial Statements/Local Enterprise Valuation’ (2004) 29 J of Corp L 338.

<sup>17</sup> B Großfeld and U Lehmann, ‘Management Structures and Worker’s Codetermination in Germany with European Perspectives’ [1994] *Corporate Law Development Series* 41, 43. See also Ingo Saenger, *Gesellschaftsrecht*, (Verlag Franz Vahlen, München 2010) 1.

<sup>18</sup> This was in accordance with the general principle of the German law of corporations that large public corporations should be regulated in detail in a separate act – see B Großfeld and U Lehmann, ‘Management Structures and Worker’s Codetermination in Germany with European Perspectives’ [1994] *Corporate Law Development Series* 41, 42; Bernhard Großfeld and Werner Ebke, ‘Probleme der Unternehmensverfassung in rechtshistorischer und rechtsvergleichender Sicht (I)’ (1977) 22 AG 59 et seq; Friedrich Kübler and Heinz-Dieter Assmann, *Gesellschaftsrecht* (6th ed, CF Müller Verlag, Heidelberg 2006) 4.

model.<sup>19</sup> These statutory provisions are not only contained in the basic act regulating public companies in Germany, namely the German Act on Public Limited Companies of 1965 (*Aktiengesetz*, 1965 (*AktG*)),<sup>20</sup> but also in various other statutory instruments.<sup>21</sup>

A vital part of these other statutory instruments deals with codetermination.<sup>22</sup> They are of great importance, since they extend the operation of codetermination beyond public corporations to other types of business organisations like private or proprietary companies (*Gesellschaften mit beschränkter Haftung* (*GmbHs*)), companies with one or more general partners but limited by shares (*Kommanditgesellschaften auf Aktien* (*KGaAs*)) and cooperatives (*Genossenschaften*).<sup>23</sup> Furthermore, most of these provisions have, to a greater or lesser degree, been influenced by court cases, provisions in companies' articles of incorporation (*Satzung*) and conventions.<sup>24</sup>

All these considerations make German business or enterprise law a very interesting area for purposes of comparative research, especially since German business or enterprise law not only provides a unique blend of typically German features, but also shows the signs of several modern international influences.<sup>25</sup>

### 1.3 Various Types of Business Organisations

German business or enterprise law employs a unique system of classifying enterprises.<sup>26</sup> Basically, one finds the sole proprietor, partnerships (unlimited “*offene Handelsgesellschaft*” or limited “*Kommanditgesellschaft*”) and companies

<sup>19</sup> See S 23(5)1 *AktG* which provides that the articles of incorporation can only contain deviations from the prescribed provisions of the Act when it is specifically provided for.

<sup>20</sup> *Bundesgesetzblatt* (BGBl. 1965 I 1089) (Official Journal of the Federal Republic of Germany, 1965, Part I at 1089).

<sup>21</sup> Ulrich Eisenhardt, *Gesellschaftsrecht* (14th ed, CH Beck Verlag, München 2009) 3.

<sup>22</sup> See in particular Peter Hanau, ‘Einführung’ in *Mitbestimmungsgesetze in den Unternehmen mit allen Wahlordnungen* (4th ed, Deutscher Taschenbuch Verlag, München 1991) VII–XX.

<sup>23</sup> See further Chap. 5.

<sup>24</sup> Friedrich Kübler and Heinz-Dieter Assmann, *Gesellschaftsrecht* (6th ed, CF Müller Verlag, Heidelberg 2006) 13 et seq. With regard to the articles of incorporation (*Satzung*), see Hans-Joachim Mertens ‘Zuständigkeiten des mitbestimmten Aufsichtsrats’ (1977) 6 ZGR 271, 283–88 and Hans-Joachim Mertens ‘Satzungs – und Organisationsautonomie im Aktien- und Konzernrecht’ (1994) 23 ZGR 426, 438–40; Barbara Grunewald, ‘Die Auslegung von Gesellschaftsverträgen und Satzungen’ (1995) 24 ZGR 68, 84–5.

<sup>25</sup> See in particular Chaps. 2 and 4.

<sup>26</sup> Detlev F Vagts, ‘Reforming the “Modern” Corporation: Perspectives from the German’ [1966] Harvard L Rev 23, 33.

or corporations.<sup>27</sup> As far as companies or corporations are concerned, the *Aktiengesellschaft* (AG) is the most important type of company or corporation from a corporate governance point of view and also forms the primary focus of this book. As far as English terminology is concerned, the word *Aktiengesellschaft* (AG) is often translated as ‘joint stock corporation’.<sup>28</sup> The use of the term ‘joint stock company/corporation’ or ‘joint-stock company/corporation’ was common when the various Joint Stock Companies Acts were passed in the 1800s in England,<sup>29</sup> but the term was used long before that.<sup>30</sup> This is also reflected in the titles of some of the leading textbook of the 1800s.<sup>31</sup> However, nowadays in the US, the UK and other Anglo-American jurisdictions, the trend is to refer to companies or corporations comparable to the *Aktiengesellschaft* (AG) simply as ‘public companies or corporations’; ‘publicly-traded companies or corporations’; ‘public companies or corporations limited by shares’; or ‘public limited companies or corporations’. The identifiable abbreviations for these companies or corporations are ‘Ltd’ (Limited) or ‘plc’ (public limited company). We will use these terms interchangeably when we refer to AGs.

Public companies or corporations are distinguished from so-called private or proprietary companies. The identifiable abbreviation used for these companies in the UK and several other Anglo-American jurisdictions is ‘(Pty) Ltd’ ((Proprietary)

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<sup>27</sup> On the basic forms of German enterprises, see Theodor Baums, ‘Corporate Governance in Germany: The Role of the Banks’ [1992] AJCL 503.

<sup>28</sup> See Hannes Schneider and Martin Heidenhain, *The German Stock Corporations Act* (2nd ed, CH Beck Verlag, München 2000); Martin Peltzer and Anthony G Hickinbotham, *German Stock Corporation Act and the Co-Determination Act: German-English Text with an Introduction in English* (OVS Otto Schmidt Verlag, Köln 1999).

<sup>29</sup> In particular the Joint Stock Companies Act 1837 (1 Vict c 73); Joint Stock Companies Act 1844 (7 & 8 Vict c 110) (5 September 1844); Joint Stock Companies Act 1856 (19 & 20 Vict c 47) (14 Julie 1856) and several Amendments Acts like the Joint Stock Companies Act 1862 (25 & 26 Vict c 896); Joint Stock Companies Amendment Act 1867 (30 & 31 Vict c 131); Joint Stock Companies Amendment Act 1877 (40 & 41 Vict c 26); Joint Stock Companies Amendment Act 1879 (42 & 43 Vict c 76); Joint Stock Companies Amendment Act 1880 (43 Vict c 19); Joint Stock Companies Amendment Act 1883 (46 & 47 Vict c 28); and Joint Stock Companies Amendment Act 1886 (49 Vict c 23).

<sup>30</sup> See WR Scott, *The General Development of the Joint-stock System to 1720* (The University Press, Cambridge 1912).

<sup>31</sup> Charles Wordsworth, *The Law of Mining, Banking, Insurance and General Joint Stock Companies Not Requiring Express Authority of Parliament* (6th ed, WG Benning and Co, London 1854); Nathaniel Lindley, *A Treatise on the Law of Partnership, Including its Application to Joint-stock and other Companies* (William Maxwell, London 1860); Francis William Clark, *A Treatise on the Law of Partnership and Joint Stock Companies according to the Law of Scotland* (T & T Clark, Edinburgh 1866); Henry Thring, *The Law and Practice of Joint-stock Public Companies* (2nd ed, Stevens & Sons, London 1868); Charles Fiish Beach, *Company Law: Commentaries on the Law of Private Corporations whether with or without Capital Stock, also of Joint-stock Companies* (TH Flood & Co, Chicago 1891); CEH Chadwyck Healy, Percy F Wheeler and Charles Burney, *A Treatise on the Law and Practice relating to Joint Stock Companies under the Acts of 1862–1890* (3rd ed, Sweet and Maxwell, London 1894).

Limited). In Germany it is the *Gesellschaft mit beschränkter Haftung* (*GmbH*) that is comparable to the private or proprietary company.<sup>32</sup> However, there are also some similarities between the *GmbH* and what is called ‘close corporations’ in some other jurisdictions.<sup>33</sup>

There are not nearly as many *AGs* as *GmbHs* in Germany. The number of *AGs* steadily declined between 1973 and 1984, but from 1985 the number of listed *AGs* rose again to 16,002 in 2004. Then it dropped to 13,122 in 2010.<sup>34</sup> The number of *GmbHs* showed a steady growth in number from 122,063 in 1973 to 543,440 in 1993 and to almost 1 million from 1999 to 2006. It is interesting to note that in 2008 only 465,694 *GmbHs* were considered to be actively trading based on the fact that they lodged tax returns.<sup>35</sup>

In 2007, when the first edition of this book was published, we observed that it was difficult to predict in which direction this trend will go.<sup>36</sup> We said that due to the dramatic change from the ‘seat theory’ towards a more liberal ‘incorporation theory’ that started in 2002, foreign corporate forms will probably increase in Germany, reducing the relative positions of *AGs* and *GmbHs*.<sup>37</sup> Now it seems as if some definite trends can be identified. At least since 1999 there were two clear trends in particular that can be identified that influenced the German corporate law scene quite significantly. Both trends originate from the European Community but in different ways. The first trend was initiated by the jurisprudence of the European Court of Justice (ECJ) which, since 1999, handed down a series of highly important decisions,<sup>38</sup> causing the German Supreme Court in Civil Matters (BGH)<sup>39</sup> to deviate from its hitherto firmly advocated ‘seat theory’ and to adopt the more liberal ‘incorporation theory’. The BGH performed its dramatic change in 2005.<sup>40</sup> The German legislator also responded to the new jurisprudence of the ECJ. In 2008,

<sup>32</sup> See Oliver Niedostadek, *The Proprietary Company – das Recht der Australischen Private Company* (LIT Verlag, Muenster 2004).

<sup>33</sup> See, for instance as far as South Africa is concerned, Nico Olbrisch, *Die südafrikanische close corporation und ihre strukturellen Unterschiede zur deutschen GmbH*, Münsteraner Studien zur Rechtsvergleichung (Band 23) (LIT Verlag, Muenster 1997); Nico Olbrisch and Jean J. du Plessis, ‘Some Structural Differences Between the South African Close Corporation and the German GmbH’ [1997] TSAR 315 et seq.

<sup>34</sup> Deutsches Aktieninstitut [DAI], DAI-Factbook 2010, 1-1-a.

<sup>35</sup> Statistisches Bundesamt, Statistisches Jahrbuch 2010, Umsatzsteuer 2008, 617.

<sup>36</sup> See Jean J. du Plessis Bernard Großfeld, Claus Luttermann, Ingo Saenger and Otto Sandrock, *German Corporate Governance in International and European Context* (Springer Verlag, Heidelberg 2007) 6.

<sup>37</sup> Werner Ebke, ‘The European Conflict-of-Corporate-Laws Revolution: Überseering, Inspire Art and Beyond’ [2005] *The International Lawyer* 39; Christian Kersting and Clemens Philipp Schindler, ‘Inspire Art Decision of Sept 2003 and its Effects on Practice’ (2003) 4 *German L J* (Electronic Journal) No 12.

<sup>38</sup> See 6.2.2.

<sup>39</sup> *Bundesgerichtshof in Zivilsachen*.

<sup>40</sup> See 6.3.1.1.

the German Act on Public Limited Companies of 1965 (*Aktiengesetz*, 1965 (*AktG*))<sup>41</sup> and the German Act regarding the Companies with Limited Liability of 1892 (*Gesetz betreffend die Gesellschaften mit beschränkter Haftung (GmbHG* (1892))<sup>42</sup> were amended.<sup>43</sup> These amendments were designed to enable companies, which maintained their real or factual seats<sup>44</sup> in Germany, to transform themselves into foreign (EU-based) public or foreign companies while maintaining their real seats in Germany. A small number of such companies used that opportunity to transform themselves into English public companies.<sup>45</sup> But a multitude of German private limited companies (*GmbHs*) – about 60,000 (!) in total – incorporated themselves as English private limited companies (*Ltds*).<sup>46</sup>

The second trend to be observed in today's German corporate life is its Europeanisation. In 2001, the Council of the European Union passed its Council Regulation (EC) No. 2157/2001 on the Statute for a European Company (*Societas Europaea* (SE)). That Regulation became operative on 8 October 2004.<sup>47</sup> Further, in 2008, the European Commission published its 'Proposal for a Council Regulation for a *Societas Europaea Privata* (SPE)'.<sup>48</sup> One can expect that this Proposal also will be adopted by the European Council within the foreseeable future. The SE has become a European story of success. In 2007, when the first edition of this book was published, the SE was only rarely used as company form by German companies. It is now reported that in January 2011 there were 169 'normal SEs'<sup>49</sup> registered in Germany.<sup>50</sup> It is to be expected that the SPE will become another success story and that many will be registered in future.

The attractiveness of these two European company forms (SEs and SPEs) seems to be due to the fact that they are perceived as 'international companies', with all the advantages associated with that in a globalised world. German export-oriented companies – be they small or middle-sized only – seem to be attracted to an international image and be part of other players in the world market perceived to be 'international players'. Thus, marketing seems to be the driving force behind

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<sup>41</sup> *Bundesgesetzblatt* (BGBl. 1965 I 1089) (Official Journal of the Federal Republic of Germany, 1965, Part I at 1089).

<sup>42</sup> *Reichsgesetzblatt* (RGBl. 1892, 477) (Official Journal of the former Reich, 1992 at 477).

<sup>43</sup> See 6.3.2.

<sup>44</sup> That is the place where those companies maintain their main administrative headquarters.

<sup>45</sup> See 6.3.3.1.

<sup>46</sup> See 6.3.3.2.

<sup>47</sup> For details, see 6.4.1.

<sup>48</sup> For details, see 6.5.

<sup>49</sup> A "normal SE" is an SE with operations and more than 5 employees. In contrast to that, "empty SEs" are SEs with operations but without employees, "Shelf SEs" (a great number of which have been incorporated) are SEs with neither operations nor employees – see 6.4.5.

<sup>50</sup> For details, see 6.4.5.

these European trends<sup>51</sup> and it is not difficult to predict that the more German companies will use these European company forms (SEs and SPEs), the more severe the impact on national German corporations law will be, at least in as far as there will be pressure and perhaps even demands to make German corporate law just as flexible and accessible as comparable European and even international forms of business available to German entrepreneurs.

## 1.4 Contrasting the One-Tier and Two-Tier Board Systems

Since German corporate law is facing increasing competition within the European Union<sup>52</sup> and since the Statute of the European Company (*Societas Europaea* (SE))<sup>53</sup> grants the option to choose between a one-tier and a two-tier model,<sup>54</sup> it is necessary at an early stage to illustrate the advantages and disadvantages of both models.

It is a matter of common knowledge that problems stemming from the separation of ownership and control are described by the theory of agency. From this perspective, it is one of the main tasks of corporate law to master these agency problems and the inevitable costs caused by these problems (agency costs). To ensure that the management is submitted to an effective monitoring institution, in terms of formal corporate structures, two basic options are available to SEs, namely a one-tier board<sup>55</sup> or a two-tier board.<sup>56</sup>

<sup>51</sup> See also Werner Ebke, 'The European Conflict-of-Corporate-Laws Revolution: Überseering, Inspire Art and Beyond' [2005] *The International Lawyer* 39; Christian Kersting and Clemens Philipp Schindler, 'Inspire Art Decision of Sept 2003 and its Effects on Practice' (2003) 4 *German L J* (Electronic Journal) No 12.

<sup>52</sup> Ingo Saenger, 'Recent Developments in European Company and Business Law' (2005) 10 *Deakin L Rev* 297, 309.

<sup>53</sup> Council Regulation (EC) 2157/2001 of 8 Oct 2001 on the Statute for a European company (SE). The document is online at <[http://europa.eu/legislation\\_summaries/employment\\_and\\_social\\_policy/social\\_dialogue/l26016\\_en.htm](http://europa.eu/legislation_summaries/employment_and_social_policy/social_dialogue/l26016_en.htm)>.

<sup>54</sup> Cf Art 38(b) of the Regulation on the Statute for a European company; see Harald Kallmeyer, 'Das monistische System in der SE mit Sitz in Deutschland' (2003) 24 *ZIP* 1531. The French system provides this option between the one-tier board 'Conseil d'administration' and the two-tier board 'Directoire/Conseil de surveillance' in Art 225–58 and 225–68 *Code de Commerce*. Concerning the European company, two types of executive directors are possible – those from within the administrative board on the one hand and external executive directors on the other hand; cf Kallmeyer 1533.

<sup>55</sup> The one-tier system (also known as the 'unitary board structure') is the system used in the USA and England and in jurisdiction under the influence of these systems, for example Canada, Australia, New Zealand and South Africa.

<sup>56</sup> The two-tier system (also known as the 'dual board structure') is mandatory in continental states of Europe such as Germany, Austria, Denmark, Sweden, Finland and in large companies in the Netherlands.



In a one-tier system, the board of directors is chosen as a general body which consists of executive or inside directors, who are engaged in the daily management of the company, and of non-executive directors, who are expected to fulfill a supervisory role within the board. A two-tier system, on the other hand, is composed of a management board which undertakes the daily management while the separate supervisory board is responsible for monitoring and advising the management board and the appointment and removal of management board members.<sup>57</sup> Metaphorically speaking, the supervisory board serves as a ‘sparring partner’ of the management board, as it is – besides its advisory function – supposed to act as a counterbalance. The specifics of the German management board and the German supervisory boards are dealt with in Chaps. 3 and 4.

Both the one-tier and two-tier board systems have inherent strengths and weaknesses. While the one-tier system allows a flexible division of scopes of duties within the board and helps to put in place a common responsibility of executive and non-executive directors, the neutrality of supervisors can be questioned since the monitoring, appointment and removal processes have overtones of some kind of self-control and dubious self-organisation.<sup>58</sup> Thus, it can be asked if the representation of shareholders’ interests is really guaranteed. But the joint responsibility of executive and non-executive directors ensures that the necessary information will be available to all members of the one-tier board, and this is seen as another advantage.

In contrast to that, a high degree of neutrality and a clear division of the respective duties of the two organs can be ascribed to the two-tier board system, which is based on the idea of a separate management board and a supervisory board. But the two-tier system might suffer from rigidity and a rather remote form control. In addition to that, the supervisory board is also often dependent on the management board, especially as far as acquiring relevant and updated information is concerned. Nevertheless, the kind of information typically provided by the management board to the supervisory board is also present in the one-tier system since there is a natural tendency to build an inner and outer circle of board members, in which the outer circle members are rather passive. These outer circle members have

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<sup>57</sup> BGH, 03.03.1991, II ZR 188/89, BGHZ 114, 127, 129 et seq; affirmed by BGH, 15.11.1993, II ZR 197/93, BGHZ 126, 340, 340 et seq. Both judgements (with further bibliography) described the function of the supervisory board as follows: ‘According to S 111 AktG the supervisory board is primarily responsible for monitoring the management. This control does not only relate to completed issues, but also to points of principles of the future business policy; [the control] is not limited to a review of legality, but must include the management’s expediency and thrift. Monitoring functions understood in this regard can only be effectively exercised by regular discussions with the management board and its ongoing consultancy; therefore, counselling is the leading instrument of a future-oriented management supervision.’ See Marcus Lutter and Thomas Kremer, ‘Die Beratung der Gesellschaft durch Aufsichtsratsmitglieder’ (1992) 21 ZGR 87 et seq for further details of these judgements. For questions of the supervisory board’s liability in this regard see Jens Buchta and Jürgen van Kann, ‘Die Haftung des Aufsichtsrats einer Aktiengesellschaft – aktuelle Entwicklungen in Gesetzgebung und Rechtsprechung’ (2003) 39 DSr 1665 et seq.

<sup>58</sup> Cf Kerstin Hartmann, *Die Aufsichtsratsvergütung als Erfolgsfaktor im deutschen Corporate-Governance-System* (Peter Lang Verlag, Frankfurt 2003) 18, 31.

to face the same problems concerning their supervisory mandate as supervisory board members in a two-tier board system.<sup>59</sup>

The two systems are extremes regarding possible corporate structures. There are also hybrid forms like the SE which empowers the shareholders' meeting to choose between the one-tier and two-tier system. However, it is not only this option which contributes to the long-lasting discussion about the convergence of the one-tier and two-tier system,<sup>60</sup> but also the mixture of both which can be found in some countries trying to combine the strengths of both systems while excluding their respective weaknesses. Even the preamble of the German Corporate Governance Code (GCGC) acknowledges this development which is called 'theory of convergence'.<sup>61</sup> Nonetheless, the consultation document of the Services of the Internal Market Directorate General declares explicitly that both systems can achieve an effective and sufficiently independent oversight function and that neither of the two is preferable.<sup>62</sup>

As part of the debate in Germany regarding which board structure was actually the best, some commentators pointed out that the UK and US unitary board systems were not without their own structural flaws. Röllner pointed out that in the UK non-executive directors were often appointed for political reasons 'to open some doors' rather than for their real competence as board members.<sup>63</sup> Baums queried the efficiency of boards in cases where the board was no more than a rubber stamp for management.<sup>64</sup> Christopher Martin pointed out that if one takes the Enron and WorldCom collapses as examples then it is hardly possible to conclude that the American corporate governance system is better and that it will ensure transparent

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<sup>59</sup> Peter Böckli, 'Konvergenz: Annäherung des monistischen und des dualistischen Führungs- und Aufsichtssystem' in Peter Hommelhoff, Klaus J Hopt and Axel von Werder (eds), *Handbuch Corporate Governance: Leitung und Überwachung börsennotierter Unternehmen in der Rechts- und Wirtschaftspraxis* (2nd ed, Otto Schmidt Verlag, Köln 2009) 270-272.

<sup>60</sup> Ibid 258 et seq.

<sup>61</sup> The preamble states: 'In practice the dual board system, also established in other continental European countries, and the internationally widespread system of management by a single management body (Board of Directors) converge because of the intensive interaction of the Management Board and the Supervisory Board, both being likewise successful.' Apart from that, the GCGC pleads for convergence with its recommendations made in the third division. It is a point in fact that companies increasingly intensify the cooperation of the management; cf Hendrik-Michael Ringleb, Thomas Kremer, Marcus Lutter and Axel von Werder, *Kommentar zum Deutschen Corporate Governance Kodex* (4th ed, CH Beck Verlag, München 2010) para 111 with further bibliography in footnotes 80-83.

<sup>62</sup> Recommendation on the role of (independent) non-executive or supervisory directors, 5 May 2004, 7; <[http://europa.eu.int/comm/internal\\_market/company/docs/independence/2004-05-consultation\\_en.pdf](http://europa.eu.int/comm/internal_market/company/docs/independence/2004-05-consultation_en.pdf)>. Also Jean J. du Plessis, 'Reflections on Some Recent Corporate Governance Reforms in Germany: A Transformation of the German Aktienrecht?' (2003) 8 Deakin L Rev 389, 390-92.

<sup>63</sup> Wolfgang Röllner, 'Quo vadis Aufsichtsrat?' (1994) 39 AG 334.

<sup>64</sup> Theodor Baums, 'Der Aufsichtsrat – Aufgaben und Reformfragen' (1995) 16 ZIP 15.

corporate management.<sup>65</sup> In addition, it requires no in-depth analysis to conclude that the global financial crisis (GFC) that emerged in late 2007 in the USA illustrates that the Anglo-American corporate governance model, including a draconian piece of legislation (the Sarbanes-Oxley Act of 2002), is far from a perfect model. In particular, several corporate governance problems have been identified and accentuated in the banking sector in the USA. However, at the end of the day corporate governance, also in particular in the banking sector, attracted a fair bit of criticism in Germany and in Europe in recent times,<sup>66</sup> but it is perhaps not appropriate to simply compare the one-tier and the two-tier board structure and to try and find a quick-fix for some problems experienced with a particular board structure.<sup>67</sup> Paul Davies appropriately sums up the underlying problem of adopting quick-fix corporate governance solutions from other jurisdictions. After reflecting on three papers published in the Fall 2000 *Comparative Labor Law & Policy Journal* he observes:

[A]ll three papers are suggestive and one general point emerges, which is of importance to policy makers. This is the unwisdom of becoming interested in other countries' corporate governance systems simply because one's own economy is doing badly in the current phase of economic cycle ... As Professor O'Connor points out, U.S. commentators and institutions began to be interested in German and Japanese systems of corporate governance in the 1980s when the U.S. economy seemed to be out-performed by the other two. Over the past decade, by contrast, the shoe has been on the other foot, in the case of Japan, decidedly so, and the proposition currently debated in scholarly articles is, accordingly, that everyone's corporate law is converging on the U.S./U.K. model. In fact, however, whilst these three countries have moved up and down the relative performance leagues, none has made significant changes in their governance systems.<sup>68</sup>

Commentators also pointed out that the UK and US corporations law has over time moved much closer to a de facto two-tier system, not very different from the traditional German two-tier system.<sup>69</sup> This is so because of the more important role

<sup>65</sup> Christopher Martin, 'Das U.S. Corporate Governance System – Verlust der Vorbildfunktion' (2003) 6 NZG 952.

<sup>66</sup> Peter O. Mülbert, 'Corporate Governance in der Krise (Editorial)' (2010) ZHR 375 et seq; Florian Möslin, 'Contract Governance und Corporate Governance im Zusammenspiel' (2010) JZ 72 at 73 et seq; Ulrich Seibert, 'Das VorstAG – Regelungen zur Angemessenheit der Vorstandsvergütung und zum Aufsichtsrat' (2009) 32 Zeitschrift für Wirtschafts- und Bankrecht 1498; Martin Peltzer, 'Trial and Error – Anmerkungen zu den Bemühungen des Gesetzgebers, die Arbeit des Aufsichtsrates zu verbessern' (2009) 27 NZG 1041 at 1041.

<sup>67</sup> For a very good and realistic overview of the aims and objectives of comparative research in the area of corporate governance, see Petri Mäntysaari, *Comparative Corporate Governance* (Springer Verlag, Berlin 2005) 9 et seq.

<sup>68</sup> Paul Davies, 'Employee Representation and Corporate Law Reform: A Comment from the UK' (2000) 22 Comparative Labor L & Policy J 135 para 135.

<sup>69</sup> Klaus J Hopt, 'Gemeinsame Grundsätze der Corporate Governance in Europa?' (2000) 29 ZGR 784–85; Carsten P Claussen, 'Aktienrechtsreform 1997' (1996) 41 AG 484; Theodor Baums, 'Der Aufsichtsrat – Aufgaben und Reformfragen' (1995) 16 ZIP 15; Günter Langenbucher and Ulf Blaum, 'Audit Committees – Ein Weg zur Überwindung der Überwachungskrise?' (1994) 47 DB 2197–98;

played by non-executive, external/outside and independent directors in UK and US unitary boards. There is also a de facto distinction between the management tier and the supervisory tier in the UK and the US: the function of managing the business of corporations is primarily fulfilled by senior executives, managing directors and managers, while the functions of overseeing or supervising the business of the corporation are functions of the board of directors, normally consisting of a majority of non-executive, external/outside and independent directors. These arguments are used to defend the German two-tier board system and to argue strongly against the adoption of a unitary board system in Germany.<sup>70</sup>

It is, however, important to keep perspective when comparing different board structures. The so-called ‘fit-all board structure’ does not exist and will probably never exist because there are simply too many local conditions, perceptions and practical realities applying to boards, their functions and their effectiveness.<sup>71</sup> The views of Berrar are quite interesting. He observes that if one looks at unitary board systems with several committees such as audit committees, nomination committees and compensation committees consisting of non-executive directors, then the unitary board system does not seem as one-dimensional as some would believe. On the other hand, the German two-tier board system is not always in practice as two-dimensional as some would make it out to be. Berrar is, however, realistic in his final analysis: if the differences between the unitary and two-tier board systems are analysed carefully, it becomes apparent that they are not really that far removed from each other.<sup>72</sup> This view is supported by other writers<sup>73</sup> and there have been some serious efforts in recent years to focus on the strengths of both systems and to combine them to improve corporate governance models.<sup>74</sup>

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Stefan Grundmann and Peter Mülbert, ‘Corporate Governance – Europäische Perspektiven’ (2001) 30 ZGR 221–22. Also Paul Davies ‘Struktur der Unternehmensführung in Großbritannien und Deutschland: Konvergenz oder fortbestehende Divergenz?’ (2001) 30 ZGR 292.

<sup>70</sup> Wolfgang Röller, ‘Quo vadis Aufsichtsrat?’ (1994) 39 AG 334. See generally Gerhard Cromme, ‘Status and Development of Corporate Governance in Germany’ address delivered at 7th German Corporate Governance Code Conference, Berlin, 27 July 2008 < [http://www.corporate-governance-code.de/eng/download/080627\\_Cromme\\_Konferenz\\_en.pdf](http://www.corporate-governance-code.de/eng/download/080627_Cromme_Konferenz_en.pdf) > at 1.

<sup>71</sup> As Paul Davies, ‘Employee Representation and Corporate Law Reform: A Comment from the UK’ (2000) 22 Comparative Labor L & Policy J 135 para 137 points out ‘there is no “one best” system of corporate governance’.

<sup>72</sup> Carsten Berrar, ‘Die zustimmungspflichtigen Geschäfte nach §111 Abs.4 AktG im Lichte der Corporate Governance-Diskussion’ (2001) 54 DB 2185–86.

<sup>73</sup> Jean J. du Plessis, ‘Corporate Governance: Reflections on the German Two-tier System’ [1996] TSAR 20 at 44–46.

<sup>74</sup> Ingo Saenger, ‘Conflicts of Interest of Supervisory Board Members in a German Stock Corporation and the Demand for their Independence – An Investigation in the Context of the current Corporate Governance Discussion’ (2005) 1 Corporate Governance L Rev 147 at 153.

In at least two comprehensive analyses by American authors,<sup>75</sup> the merits of the German two-tier system were identified and acclaimed.<sup>76</sup> In both instances, however, these commentators concluded that the imitation of the German two-tier system should be done with circumspection.<sup>77</sup> Taking into consideration that not all aspects of corporate governance in Germany have been fully resolved, even German commentators warn that their system of corporate governance can hardly be seen as the ideal system for all countries.<sup>78</sup> One is, therefore, in good company if one concludes, which we are not, that the German two-tier system is not worth following.

From the heated debate on the effectiveness of German supervisory boards, one could easily gain the impression that the Germans are primarily dissatisfied with the two-tier system. It is, however, suggested that that is not the case. Concentrating on the deficiencies of a particular institution like the supervisory board is always more likely to provide for publishable material than simply explaining the merits of the two-tier system. In particular in Chaps. 3 and 4 we are aiming at analysing the actual characteristics, legal rules and guiding principles pertaining to the German management board and supervisory board in much greater detail.

In general, it seems that most German writers are reasonably satisfied with the two-tier system. Already for several years the hammers and chisels in Germany were employed, sometimes delicately, sometimes with more vigour, *for finesse*, not to create a complete new model. This point will be clearly illustrated if the question is blatantly posed to German commentators: Do you think that the two-tier system should be abolished in Germany? The answer to this question would be, even by those in support of more drastic reforms to the supervisory board as institution,<sup>79</sup> an overwhelming, ‘no’!<sup>80</sup> It is, therefore, reasonably certain that one is also in good

<sup>75</sup> Mark J Roe, ‘Some Differences in Corporate Structure in Germany, Japan, and the US’ [1993] Yale L J 1927, 1979–80.

<sup>76</sup> Also Alfred F Conrad, ‘The Supervision of Corporate Management: A Comparison of Developments in European Community and US Law’ [1984] Michigan L Rev 1459; Richard M Buxbaum, ‘Institutional Owners and Corporate Management: A Comparative Perspective’ [1991] Brooklyn L Rev 1. For an analysis of Conrad and Buxbaum’s insights, see Edward Rock, ‘America’s Fascination with German Corporate Governance’ (1995) 40 AG 291, 293, 296–98.

<sup>77</sup> Detlev F Vagts, ‘Reforming the “Modern” Corporation: Perspectives from the German’ (1966) 80 Harvard L Rev 76–78, 87–88.

<sup>78</sup> Theodor Baums, ‘Corporate Governance in Germany: The Role of the banks’ [1992] AJCL 516 and 523.

<sup>79</sup> Marcus Lutter, ‘Unternehmensplanung und Aufsichtsrat’ (1991) 38 AG 249, 250. Marcus Lutter, ‘Vergleichende Corporate Governance – Die deutsche Sicht’ (2001) 30 ZGR 226–27 points out two of the unique characteristics of the German corporate governance system, namely the two-tier board system and employee at supervisory board level. He is, however, adamant that none of these should be changed (at 227).

<sup>80</sup> See Arno Probst and Manuel R Theisen, ‘Herausforderungen und Grenzen “mitunternehmerischer” Entscheidungen im Aufsichtsrat’ (2010) 65 DB 1573 at 1578; Elmar Gerum, *Das deutsche Corporate Governance-System* (Schäffer-Poeschel Verlag, Stuttgart 2007) 418–419 and 436–438; Frank Wooldridge and Matthias Pannier, ‘The German Corporate Governance Code: Status and Development’ [2005] EBLR 225 at 240–241; B Großfeld and U Lehmann,

company when one suggests that the German two-tier system provides answers to many of the compelling problems associated with the unitary system: a two-tier board system provides the potential for a broader spectrum of stakeholder-interests to be *and* it ensures that exclusive shareholder control is not the norm anymore.<sup>81</sup> The clear preference for a two-tier board system and the intention not to move towards a unitary board system in Germany has been confirmed by the German Government's Corporate Governance Commission in November 2010.<sup>82</sup> We trust that Chaps. 2–6 in particular will provide the reader with adequate information to form an informed judgment about the merits of the German two-tier board system.

## 1.5 Delineation

In the next chapter we will give an overview of corporate governance in Germany. The following two chapters (Chaps. 3–5) deal with the interrelationship among the various company organs (general meeting, management board and the supervisory board), mainly in large public corporations and larger private companies, and the important concept of codetermination (Chap. 5). In Chap. 6 we discuss the impact of European developments on German codetermination. Chapter 7 is devoted to the pivotal role played by accounting in modern corporate governance, while Chap. 8 deals with the German financial sector, global capital markets and corporate finance and governance. A new Chap. 9 was added since the first edition. It deals with corporate governance compliance. We conclude our study in Chap. 10 by focusing on corporate governance in a few selected jurisdictions (the US, UK and Australia) and the OECD principles of corporate governance and developments regarding corporate governance in the EU).

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'Management Structures and Worker's Codetermination in Germany with European Perspectives' in (1994) 1 Corporate Law Development Series 45.

<sup>81</sup> See *Report of the Committee of Inquiry on Industrial Democracy* (Bullock Report – Minority Report) 174 para 17, 177 para 36 and 189–91 (Appendix B); Wedderburn of Charlton, 'Companies and Employees: Common Law or Social Dimension?' [1993] LQR 230–38; Tom Hadden, *Company Law and Capitalism* (2nd ed, Weidenfield and Nicolson, London 1977) 447–48; André C Côté, 'Legal Regulation and Workers' Participation in the Enterprise' (PhD thesis, London School of Economics and Political Science 1973) 276–77. Also see Preamble to the 1st Draft Fifth Dir (1972 Bulletin of the European Communities (Supplement 10/72) 6–7); 'Explanatory Memorandum' [1972] Bulletin of the European Communities (Supplement 10/72) 33.

<sup>82</sup> *Bericht der Regierungskommission Deutscher Corporate Governance Kodex an die Bundesregierung*, November 2010 <[http://www.corporate-governance-code.de/ger/download/16122010/Governance\\_Bericht\\_Nov\\_2010.pdf](http://www.corporate-governance-code.de/ger/download/16122010/Governance_Bericht_Nov_2010.pdf)> at 9–10, para 1.1.3.

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