“Exit Britain Enter the Stakeholders: Could Brexit end the cultural wars within the European Union Company Law and give birth to a truly “European Company”?”

MARIOS KOUTSIAS*

Abstract

The history of European Union company law is a very troubled one. It is a history of national conflicts and debates which resulted in the inability of the EU to create a common body of EU company law. The article will argue that national company laws are deeply rooted in national culture. Corporate governance in particular evolved into an arena where fierce corporate culture wars were fought for decades. This is why the European Company -the so-called Societas Europea- failed to evolve into a truly supranational corporate form. While all member states have their own distinctive systems of corporate governance, the failure in question has been mostly fuelled by the conflict between the two widely-opposed corporate governance systems of the UK and Germany. The UK endorses the so-called contractual model of corporate governance. Germany on the other hand employs the so-called stakeholder system of corporate governance. The rest of the member states of the EU lie between those two opposing poles. The conflict between the two European pillars of widely opposed corporate philosophies and consequently laws –the UK and Germany- has been so intense that it undermined any attempt to create a single European company. The article argues that Brexit can change that. The exit of one of the two main pillars of the conflict may pave the way for the dominance of the stakeholder model of corporate governance in the EU. A post-Brexit EU would lack the most vocal and influential supporter of contractualism. This should allow the remaining member states to converge into a standard that would be closer to the stakeholder model.

Keywords

Company Law, Corporate Governance, UK, Germany, European Company, Societas Europea, Culture, Brexit, Stakeholder model, contractual model, European Union

---

* Senior Lecturer in EU Commercial Law and Company Law, School of Law, University of Essex, UK.

Koutsias, Marios. ‘Exit Britain Enter the Stakeholders: Could Brexit end the cultural wars within the European Union Company Law and give birth to a truly “European Company”?’. *European Business Law Review* 30, no. 6 (2019): 881-908.

Introduction

The history of European Union company law is a very troubled one. It is a history of national conflicts and debates which resulted in the inability of the EU to create a common body of EU company law. While several aspects of company law have been harmonised to an extent, the failure of the EU to agree on a common form of corporate governance or a single European Company has been spectacular. A single "European Company" form is important for the smooth operation of the single market. It would greatly facilitate cross-border investment as investors would only have to look at one set of legislation instead of the current 28 different sets of national legislation. It would significantly enhance legal certainty as there would be clarity regarding the rules applicable to the establishment of a European Company in every member state of the EU. It would remove many regulatory as well as practical obstacles allowing every company or EU national to engage in cross-border business activities and expand to another member state of the EU without having to face a complex set of national rules. In simple words, the introduction of a truly European Company would complement the single market and it would enhance its operation.

While all member states have their own distinctive systems of corporate governance, the failure in question has been mostly fuelled by the conflict between the two widely-opposed corporate governance systems of the UK and Germany. These two jurisdictions have effectively evolved into the two pillars of the conflict. The UK endorses the so-called contractual model of corporate governance. This entails a public company with a mostly dispersed shareholding basis, where the shareholders are viewed as the exclusive members and the owners of the company. The UK regulatory framework leaves no place for stakeholders into the institutional architecture of its companies. Germany on the other hand employs the so-called stakeholder system of corporate governance. Its public companies have a more concentrated shareholding basis as a result of an increased role granted to banks as a source of capital for the company. In many instances the company is managed by a dual-board where shareholders and stakeholders assume executive and monitoring roles. The rest of the member states of the EU lie between those two opposing poles. They employ -with variations- the so-called stakeholder model, which endorses a corporate form which may not always entail a dual-board management, but it does involve a more inclusive corporate form which views the stakeholders as intrinsically linked with the company. The conflict between the two European pillars of widely opposed corporate philosophies and consequently laws –the UK and Germany- has been so intense that it undermined any attempt to create a single harmonised body of EU company law. It prevented the EU from creating a single European company.

The article argues that Brexit can change that. The exit of one of the two main pillars of the conflict may pave the way for the dominance of the stakeholder model of corporate governance in the EU. The remaining 27 members do not employ an identical system of corporate governance and differences would certainly continue to exist. But their national laws are based on relatively similar ideologies of stakeholder-friendly nature, which can justify optimism that convergence into a single European corporate form would be attainable within the next decade. A post-Brexit EU would lack the most vocal and influential supporter of contractualism. This should allow the remaining member states to converge into a standard that would be closer to the stakeholder model. The departure of the UK may allow the rest of the member states to negotiate and agree on a corporate form which would bridge the differences between their own respective corporate models. The negotiation in question would embark on a wholly different basis than previously. While it was impossible to converge the contractual and the stakeholder models of corporate governance into a single one, it is argued that it would be easier to find a middle way between the stakeholder-friendly models employed by the 27 EU members. The ideology behind the variations of this system is based on very similar philosophical and societal values which render convergence much more attainable.

The article will argue that national company laws are deeply rooted in national culture. Corporate governance in particular evolved into an arena where fierce corporate culture wars were fought for decades. The article will focus on the UK and Germany as the main pillars of the debate. It will examine the historical, philosophical and legal background of their regulatory choices and it will argue that the relevant cultural conflicts rendered any convergence into a single system of European Union corporate governance impossible. This is why the European Company -the so-called Societas Europea- failed to evolve into a truly supranational corporate form. The article will then look at Brexit and it will argue that the departure of one of the two pillars of the debate will significantly change the EU company law landscape. It will argue that Brexit will probably provide a great impetus for convergence at the EU level and that the prospect of a single European company will become very realistic. The article will conclude that Brexit will decisively tip the balance towards a stakeholder model of corporate governance. This may be the time that a truly EU company law may be born. The company that is now only nominally a "European Company" may indeed be truly European within the next decade.

The Restraints Posed by National Cultures on EU Company Law

Culture is a complex construct whose precise scope and definition may be hard to agree upon. It is viewed as "an integrated pattern of basic assumptions, values and artefacts that set the stage for action, belief and policy".[1] It is a social phenomenon which involves beliefs, art, morals, laws, customs as well as "symbolic and learnt aspects of human society".[2] Cultural anthropologists defined it as a "conscience creation of human rationality".[3] While it may be difficult for everyone to consent to a

[1] WC Frederick, *Values, Nature and Culture in the American Corporation*, 88 (Oxford University Press, Oxford, 1995).

[2] Angus Young, *Rethinking the Fundamentals of Corporate Governance: The Relevance of Culture in the Global Age* 29 Company Lawyer 172 (2008).

[3] John Scott, Gordon Marshall, *Oxford Dictionary of Sociology*, 133 (Oxford: OUP 2005).

common definition of "culture", there is consensus that the concept in question entails the existence of shared values, a system of common beliefs and set of common behavioural norms.[4] Values stand at the foundations of culture as they shape attitudes and pave the way for actions, policies and strategies on the part of the state that sees itself as the bearer of these values.[5] Friedman argued that "cultural factors are an essential ingredient in turning a static structure and a static collection of norms into a body of living law".[6] Therefore, institutions and laws reflect the prevailing cultural values.[7]

Corporate governance in particular is a by-product of the values prevailing in each country. The UK system of corporate governance is shareholder and market-centric.[8] It is based on the values of liberty, economic liberalism, property rights and individualism as defined within the British cultural context. The German system of corporate governance on the other hand is stakeholder-centric recognising both an institutional role for stakeholders but also their vested interest in the company.[9] It embodies the values of collectivism, inclusivity, stability and social cohesion as defined within the German cultural context. It does not come as a surprise that when this attempt was made to converge these set of values into a single system of corporate governance, the whole project ended in failure. Therefore, the failure to harmonise corporate governance is due to the "legal and cultural determinism proper to governance systems".[10] The failure to converge into a single system of corporate governance at the EU level has undermined the whole edifice of EU company law. This is not a new phenomenon. It has deep roots that have been explained since the 18th century by the great philosopher Montesquieu.[11] Institutional, cultural and social factors are determinants of the nature of governance as they define the context within which the later is taking its shape.[12]

Although the EU aims at forging common regulatory standards which are necessary for the smooth operation of its internal market, national culture emerged as such a strong determinant of corporate governance that preserved diversity of corporate

4 PJ Kotter, J.L Heskett, *Organisational Culture and Performance* (Free Press, New York, 1992).

5 JW Salacuse, *Corporate Governance, Culture and Convergence: Corporations American Style or with a European* Touch 9 Law and Business Review of the Americas 33-62 (2003).

6 Lawrence Friedman, *Law and Society*, 76 (Prentice Hall, 1977).

7 S Schwartz, H Shalom, *A Theory Of Cultural Value Difference: Some Implications for Work* 48 Applied Psychology 23 (1999).

8 Shabir Ahmad, Rosmini Omar, *Basic Corporate Governance Models: A Systematic Review* 58 International Journal of Law and Management 76 (2016).

9 See Gregory Francesco Maasen, *An International Comparison of Corporate Governance Models* (SpencerStuart, Third Edition, Amsterdam, 1999).

10 Veronique Magnier, *Comparative Corporate Governance, Legal Perspectives*, 6 (Edward Elgar, 2017).

11 Charles-Louis Montesquieu, *De l'esprit des lois*, (1748). See: <https://archive.org/details/spiritoflaws01montuoft>.

12 R Gill, *Law, Culture and Corporate Governance: Insights from Executive Compensation*, Canadian Law and Economics Association Annual conference, Toronto, September 2012. See: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2164532>.

governance rules, norms and principles.[13] The EU managed to harmonise various aspects of the wider commercial law field such as competition law to a great extent. The failure to harmonise corporate governance –and consequently of company law to a great extent- is due to history, philosophy, the existence of divergent national economic models and at the end it is due to the distinctive culture and identity of each member state. This is because national corporate governance "reflects public policy choices".[14] Each country's company law has developed according to the societies' own culture and consequently companies incorporated under different national laws often have less in common than one would be inclined to think,[15] because "the centre of gravity of legal development lies not in legislation nor in juristic science nor in judicial decision but in society itself".[16] The relevant legislation profoundly influences the priorities of firms, the nature of the employment relationship as well as the relations with the creditors and the suppliers. Therefore, corporate governance entails the regulation of matters which are of paramount importance for a society. The nature of these regulations can only reflect the prevailing cultural principles and societal values of the country in question.

The widely varying conceptions of "company" in different societies[17] explain why company law is not a purely technical form of regulation; it is intrinsically linked with the dominant social trends, notions and beliefs and it forms a part of law. The different national models of company law in the EU reflect differences in underlying economic conditions and in public policy considerations past and present.[18] It is interesting to note that it has been argued that culture functioned as "an antidote to convergence of corporate governance regulation".[19] Corporate governance found itself at the very centre of a debate that involves the very cultural identity and basic political choices made on the part of societies. The reason behind the debate that has generated academic articles and books,[20] a very lively exchange of ideas on the part

---

[13] Ajomboh Rachael Ntongho, *Culture and Corporate Governance Convergence* 58 International Journal of Law and Management 535 (2016).

[14] P Peter,A Gourevich and J Shinn, *Political Power and Control: The New Global Politics of Corporate Governance,* 3 (Princeton University Press, New Jersey 2005).

[15] Yavasi Mahmut, *Shareholding and Board Structures of German and UK Companies* 22 Company Lawyer 47 (2001).

[16] E Ehrlich, *Fundamental Principles of Sociology of Law*, 14 (Harvard University Press, Cambridge MA, 1936).

[17] Janice Dean, *Directors' Duties in Response to Hostile Takeover Bids* 14 International Company and Commercial Law Review 370 (2003).

[18] Ulf Bernitz, Wolf-George Ringe, *Company Law and Economic Protectionism, New Challenges to European Integration,* 191 (Oxford University Press, 2010), B Cheffins, *Company Law: Theory, Structure and Operation* (Clarendon, Oxford, 1997) arguing the opposite,

[19] Ajomboh Rachael Ntongho, *Culture and Corporate Governance Convergence* 58 International Journal of Law and Management 535 (2016).

[20] AC Riley, *Understanding and Regulating the Corporation* 58(4) Modern Law Review 595 (1995); JF Stiglitz, *Multinational Corporations: Balancing Rights and Responsibilities* 101 Proceedings of the Annual Meeting (American Society of International Law 2007), D Attenborough, *Giving Purpose to the Corporate Purpose Debate: An Equitable Maximisation and Viability Principle* 32(1) Legal Studies 4. JE Parkinson, *Corporate Power and Responsibility: Issues in the Theory of Company*

of politicians, industry and society and a rather overt confrontation between important parts of the society such as the employees, industry and the employers is the fact that corporate governance requires the effective engagement of actors that lie at the heart of the most important issues for a society. It is no coincidence that the EU has passed mostly directives to harmonise company law within its context; this is not the case with competition law where a regulation has provided us with legal clarity and a unified approach across the EU.[21] Directives by definition allow for a wide scope of discretion providing the member states with the liberty to leave their national models relatively immune to far-reaching harmonisation. The directive on the involvement of employees in the SE (European Company)[22] is an example of this approach. It allowed both the UK and Germany to maintain their widely different models of employee participation in the corporate management. This is explained in detail at the final part of the article.

Recently many scholars have said that a convergence of corporate governance is inevitable.[23] It has been argued that corporate governance systems are subject to an irreversible process of convergence to the degree that we should be talking about "the end of history for corporate law".[24] This could be true up to an extent, but like Mark Twain said "the report of my death was an exaggeration".[25] Although there is some convergence, national law of corporate governance is thriving. This is because, as this article argues, corporate governance resisted the forces of full harmonisation even at the EU level. When scholars assessed the development of company law in the EU a few decades ago, no one seemed to doubt its centrality in the making of an integrated European market both economically and politically.[26] What began with hopes for harmonised and unified company law rules across the EU, ended up with long legislative instruments like the regulation on the Societas Europea,[27] the success of which was prevented by "national resistance politics".[28] Even after the multi-year intense

Law, 237 (Clarendon Press, 1993). Andrew Keay, *The Corporate Objective* (Edward Elgar, 2011). B Cheffins, *Company Law : Theory, Structure and Operation,* 1999 (Clarendon Press, 1997), S Bottomley, *The Constitutional Corporation* (Ashgate, 2007).

[21] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

[22] Directive 2001/86/EC supplementing the Statute for a European Company with regard to the involvement of employees.

[23] Henry Hansmann and Reinier Kraakman, *The End of History for Corporate Law,* Harvard Law School John M Olin Center for Law, Economics and Business Discussion Paper Series. Paper 280 (2000).

[24] *Ibid.* but see a powerful contra argument by Andrew Keay, *The Corporate Objective,* above.

[25] Mark Twain, *The Complete Interviews,* 121 (Edited by Gary Scharnhorst, The University of Alabama Press, 2006).

[26] William Lazonick, *Varieties of Capitalism and Innovative Enterprise* 24 Comparative Social Research 21 (2007).

[27] Regulation on the Statute for a European Company (SE) EC 2157/2001.

[28] Peer Zumbansen, *Varieties of Capitalism and the Learning Firm: Corporate Governance and Labour in the Context of Contemporary Developments in European and German Company Law* 8 European Business Organisation Law Review 486 (2007).

efforts to harmonise company law in the EU, "little progress"[29] has been made in the direction of company law uniformity in the EU.

To consider corporate governance is also to consider competing models of capitalism and competing global economic models. It is therefore, important to shed light on the historical, socio-economic and legal developments which have contributed to national variation.[30] National corporate governance "reflects public policy choices".[31] Within the EU variation is attributed to the fight between a contractarian model of company law and corporate government championed by the UK and a stakeholder-inclusive model of company law and corporate governance pioneered mostly by Germany but in different forms by most countries of continental Europe. The conflict in question reveals deeply rooted philosophical differences which touch the core of a nation's identity and proved to be irreconcilable in designing an EU company law. In continental Europe where the state plays a more active role in economic policy both corporate governance but also labour law favour more collectivist value systems[32] than in the UK.

The company has been one of the most "prominent units of analysis for understanding modern economic growth".[33] Companies as a social institution are the outcomes of the social consensus reached in a given jurisdiction but at the same time they act as factors which influence it. The corporation is one of the most successful socioeconomic institutions of modern society.[34] Apart from culture itself, the diversity of the corporate governance systems can be also attributed to the different set of legal systems in place[35] such as common law and civil law.[36] The 'ownership' structure –as it will be thoroughly explained later- is a key feature that determines the nature of a corporate governance system. The dispersed nature of the shareholding of the UK companies creates a very different set of challenges compared to the rather concentrated nature of ownership of companies in Germany. Other important influences on a corporate governance system include the regulation of the financial and capital markets, labour law, bankruptcy laws and the banking system. That is partly the reason why introducing a reform of corporate governance is such a complicated and highly politicised issue of the utmost sensitivity for many parties. It involves the reform of company law, but it also entails changes in labour law, tax law and financial

---

29 Luca Enriques, in 66 International & Comparative Law Quarterly 763 (2017).

30 Zumbansen *supra* n28 at page 474.

31 P Peter,A Gourevich and J Shinn, *Political Power and Control: The New Global Politics of Corporate Governance,* 3 (Princeton University Press, New Jersey 2005).

32 Veronique Magnier, *Comparative Corporate Governance, Legal Perspectives*, 43 (Edward Elgar, 2017).

33 Franco Amatori, Andrea Colli, *Business History, Complexities and Comparisons*, 10 (2011).

34 Roger M Barker, *Corporate Governance, Competition and Political Parties, Explaining Corporate Governance Change in Europe*, 3 (Oxford University Press, 2010).

35 John C Coffee, Jr, *The Future of History: The Prospects for Global Convergence in Corporate Governance and its Implications* 93 NwU Law Review 641 (1999).

36 Mark J Roe, *A Political Theory of American Corporate Finance* 91 Columbia Law Review 10 (1991), Alan Dignam and Michael Galanis, *The Globalisation of Corporate Governance* (Ashgate, 2009).

regulation. Even though, capital markets are gradually globalising, company laws remain distinctively national.[37] Changing the law ordinarily requires political consensus[38] not only between shareholders and stakeholders, but it also entails a cultural change. This is a challenging task at national level; it proved to be an impossible task at the EU level.

The United Kingdom: The Kingdom of Shareholders

The UK is the most vocal proponent of the contractual model of corporate governance in the EU. That entails companies where shareholders enjoy -at least legally- absolute dominance; this is the principle of "shareholder supremacy".[39] There is a single board of directors, a usually dispersed shareholding basis and the shareholders are the exclusive members of the company. Other stakeholders are externalities with no saying in corporate affairs.[40] Stakeholders are viewed as the "groups without whose support the organisation would cease to exist"[41] such as shareholders and employees. Such an inclusive definition of the corporation comes into conflict with the perception of the corporate phenomenon in the UK, where the company comprises only the shareholders. This is a core principle of the nexus[42] of contracts theory[43] which defines the nature of the UK company.[44] In the UK so "much ideology is spent on commitment to shareholder interests".[45] It is "a fact that narrow contractarian models of the corporation have dominated academic thinking in the UK."[46] According to the nexus of contracts theory, the company is simply a network of contracts renegotiated by the individuals involved in it -the shareholders- with the principal aim of maximising their own profits and utility[47] as well as the market value of the company through

---

37 L Van de Berghe, *Corporate Governance in a Globalising World: Convergence or Divergence? A European Perspective* (Kluwer Academic Publishers, Amsterdam, 2002).

38 Jeffrey N Gordon, Mark J Roe, *Convergence and Persistence in Corporate Governance*, 3 (Cambridge University Press, 2004).

39 William W Bratton, *Berle and Means Reconsidered at the Century's Turn* 26 Journal of Corporate Law 761 (2001).

40 See Janet Dine, Marios Koutsias, *Company Law* (Palgrave McMillan, 2012).

41 R Freeman, *Strategic Management: A Stakeholder Approach*, 32 (Pitman Publishing, Boston, 1984).

42 M Jensen and W Meckling, *Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure* 3 Journal of Financial Economics 305 (1976); Fama (1980).

43 F Easterbrook, D Fischel, *The Corporate Contract* 89 Columbia Law Review 1428 (1989).

44 This does not mean that the application of the theory in the UK company law has not been criticised. See: Marios Koutsias, *Shareholder Supremacy in a Nexus of Contracts: A Nexus of Problems* 38 Business Law Review (2017).

45 V Dihn, *Codetermination and Corporate Governance in a Multinational Business Enterprise* 24 Journal of Corporation Law 983 (1999).

46 Roman Tomasic, Folarin Akin bami, *Towards a New Corporate Governance after the Global Financial Crisis* 22 International Company and Commercial Law Review 247 (2011).

47 A Alchian and H Demsetz, *Production, Information Costs and Economic Organisation* 62 American Economic Review 777 (1972) and see Cheffins (1997).

'allocative, productive and dynamic efficiency'.[48] Therefore, companies are 'simply legal fictions which serve as a nexus of contracting relationships among individuals'.[49] They are an exclusively private affair devoid of social considerations. Friedman argued that the only responsibility of managers was to make money for shareholders.[50] Adam Smith's *The Wealth of Nations* presents humans as driven by natural desire from self-improvement, which under conditions of free competition leads them "as if an invisible hand" to promote the public well-being.[51]

They consist of many 'different kinds of relations that are worked out by those voluntarily associating in a company'[52] and they form 'the substance of the corporate fiduciary duty'.[53] Each company in the UK has articles which form the constitution of the company.[54] The articles of association constitute a contract not merely between the shareholders and the company, but between each individual shareholder and every other .[55] The definition of the company as a collection of private contractual relationships[56] is quite consistent with the dominance of individualism within company law. Such ideology encourages laissez-faire principles as "corporate property was to be treated as private property demanding minimum government interference as this leads to inefficient allocation of capital".[57] It should be left intact from regulatory interference which would place limitations upon the right to use the free enterprise tool as shaped exclusively by its signatory parties and members; the shareholders.

In a stakeholder-friendly company, a wide variety of interests must ordinarily be taken into account when pursuing the interests of the company.[58] The new section 172 of the Companies Act 2006 –the fundamental duty of directors in the UK-[59] has a more stakeholder-friendly terminology in the sense that it requires directors when

---

[48] C Mayer, *Corporate Governance, Competition and Performance* 24 Journal of Law and Society 152, 155 (1997).

[49] M Jensen and W Meckling, *Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure* 3 Journal of Financial Economics 305 (1976); Fama (1980), p 310.

[50] Milton Friedman, *The Social Responsibility of Business is to Improve Its Profits*, New York Times, 13 September 1970.

[51] A Smith, *The Wealth of Nations* (Prometheus Books, New York 1991), originally published in 1776.

[52] Easterbrook and Fischel, *The Corporate Contract* above, p 1426.

[53] T Smith, *The Efficient Norm for Corporate Law: A Neotraditional Interpretation of Fiduciary Duty* 98 Michigan Law Review 214 (1999), p 217.

[54] Section 17, Companies Act 2006.

[55] *Wood* v. *Odessa Waterworks* (1889) 42 Ch D 636.

[56] E Fama., *Agency Problems and the Theory of the Firm* 88 Journal of Political Economy 288 (1980), p 290.

[57] S Kiarie, *At Crossroads: Shareholder Value, Stakeholder Value And Enlightened Shareholder Value: Which Road Should the United Kingdom Take*?, International Company and Commercial Law Review 330 (2006).

[58] Elaine Sternberg, *The Defects of the Stakeholder Doctrines* in *Corporate Governance: Accountability in the Market Place*, chapter 6: (Institute of Economic Affairs, London, 2004).

[59] See: *Shepherds Investments Ltd v. Walters* [2006] EWHC 836.

acting in good faith[60] and in the way that they[61] -reasonably-[62] consider to be in the best interests of the company[63] to have regard to stakeholders' interests. However, section 172 lacks an enforcement mechanism. The Confederation of British Industry rightly stated that directors in the UK are "responsible for relations with stakeholders; but they are accountable to the shareholders".[64] The UK's Company Law Review Steering Committee stated that the "ultimate objective of companies … – i.e. to generate maximum value for shareholders is in principle the best means also of securing overall prosperity and welfare".[65] In this sense it appears that despite the "new" section 172, the previous case law is still in force.[66]

Liberty and Property Rights in the English Context

As it is always the case, the nature and definition of these principles are a by-product of the distinctive historical developments which took place in the country over a long period of time. The common law became strongly associated with the idea of economic freedom and the subject's liberty from arbitrary action by the Crown[67] from a very early stage. Magna Carta placed 'individual liberties above all others except communal rights"[68] a concept adopted by English common law in the thirteenth century. In 1361 the English Justices of the Peace Act provided for the arrest of peeping toms and eavesdroppers. From the beginning the intent to protect an individual from the government was clear: "the poorest man may in his cottage bid defiance to all force of the Crown. It may be frail … the rain may enter; but the King of England cannot enter.[69] This position highlights vividly the prominent position that liberty assumed in the English legal order from a very early point of history. It is translated into the right of any individual to define a space which should be respected by anyone including the highest authority. The underlining concept of liberty was the right to personal property. Liberty is a sacrosanct right which allows an individual to exercise his activities without any intervention within a space where he can exercise his

60 *Re Smith & Fawcett Ltd* [1942] Ch. 304.

61 *Extrasure Travel Insurance Ltd v. Scattergood* [2003] 1 BCLC 598.

62 *Item Software (UK) Ltd v. Fassibi* [2004] EWCA Civ 1244; [2005] 2 BCLC 91.

63 *Regentcress plc v. Coben* [2002] 2 BCLC 80.

64 *Report of the Committee on Corporate Governance* (1998), para. 1.17. See it at: <http://www.ecgi.org/codes/documents/hampel.pdf>.

65 Company Law Review, *Modern Company Law for a Competitive Economy: Strategic Framework*, para. 5.1.12. (London, DTI, 1999).

66 See: *Re West Coast Capital (LIOS)* Ltd [2008] CSOH 72 and *Cobden Investments Ltd v. RWM Langport Ltd* [2008] EWHC 2810 (Ch).

67 PG Mahoney, *The Common Law and Economic Growth: Hayek Might Be Right* 30 Journal of Legal Studies 508 (2001).

68 BR Bale, *Informed Lending Decision v. Privacy Interests in Great Britain* 10 Transnational Lawyer 77 (1997).

69 BL Cardonsky, *Towards a Meaningful Right to Privacy in the United Kingdom* 20 Boston University International Law Journal 396 (2002).

authority. Therefore, the links between the right to property and liberty highlight the importance of the former within the English legal culture.[70]

In the corporate governance context, "ownership" entails the legal allocation of property rights to shareholders and "controls" the ways legal rules shape the balance of power among them.[71] The notion of ownership that is dominant in the English company law stems from partnership. By the early 18th century, small partnerships were the preferred tool to conduct business and trade in England. These companies were not incorporated, and a mere collection of individuals constituted and owned the entity.[72] The owners of the partnerships were also providing the funding for the enterprise. Rapid technological developments necessitated increased funding for the expansion of the existing enterprises if they were to embrace novel methods of production. These developments led to the unincorporated company, a form of partnership where some members would run the company and others, usually landowners or successful traders, would provide the capital. The partnerships were marked by absolute shareholder primacy; the shareholders were the "owners" of the entity. At that point, shareholder primacy was reflected at all levels of corporate activities and shareholders clearly enjoyed rights which were normally attributed to the owners of an object, in complete contrast to now. At that point every shareholder could block collective decisions. Partnerships reached decisions through the unanimity rule based on the one partner, one vote system.[73] While nowadays any property right of shareholders on the company is contested by many scholars,[74] the doctrine in question is still dominant within the English company law and theory. The philosophy of absolute shareholder dominance was clearly reflected by the Joint Stock Companies Bill of 1856[75] which was introduced in the House of Commons by Mr Robert Lowe, the Vice President of the English Board of Trade.[76] It was based on the principle that the company ought to pursue the best interest of its shareholders even if it has to act contrary to broader social interests.[77]

British companies operate in practice with a single board. Directors owe their duties to the legal person 'the company'.[78] The company is the only person with the

---

[70] See Marios Koutsias, *The Fallacy of Property Rights' Rhetoric in the Company Law Context: From Shareholder Exclusivity to the Erosion of Shareholders' Rights* 28 International Company and Commercial Law Review 217 (2017).

[71] S Wen, *Shareholder Primacy and Corporate Governance*, 13 (Abingdon: Routledge, 2013).

[72] FB Palmer, *Company Law,* 134 (London: Sweet and Maxwell, 1968).

[73] A Rahmani, *Shareholder Control and its Nemesis* I.C.C.L.R. 13 [2012].

[74] See Marios Koutsias, *The Fallacy of Property Rights' Rhetoric in the Company Law Context: From Shareholder Exclusivity to the Erosion of Shareholders' Rights* 28 International Company and Commercial Law Review 217 (2017).

[75] See: Hansard Vole 140, cols 124, 130,131. 1856.

[76] Joseph E.O Abugu, *Primacy of Shareholders' Interests and the Relevance of Stakeholder Economic Theories*, Company Lawyer 202 (2013).

[77] See: Rob McQueen, *A Social History of Modern Company Law: Great Britain and the Australian Colonies 1854-1920* (Ashgate, 2009).

[78] Section 172 Companies Act 2006.

capacity to raise an action against a director.[79] Only in exceptional circumstances can a shareholder act independently but still on behalf of the company with a derivative action. The shareholders enjoy the exclusive privilege of membership. They are the only insiders to the company as opposed to the other actors such as employees or creditors who are considered as externalities. Therefore, theoretically at least the shareholders are the ones who can convince or force the legal person (the company) to sue the management in case of abuse. The board would normally include non-executive or independent directors whose roles would be to monitor the executive ones.[80]

British companies usually have a dispersed shareholding basis as they take their capital mostly from the securities' markets. When they sell their shares to the public they attract potentially millions of new members; private individuals or institutional shareholders. This is a distinctive feature of the "outsider" model of corporate governance.[81] This is dominant in the UK and other commonwealth countries which resort to the stock market for the capitalisation of their companies. Scholars consider the outsider system of corporate governance an aspect of "liberal market economies".[82] Outsider systems –at least theoretically- emphasise "competitive market exchange where actors structure their interaction through arm's length bargaining and formal contracts funded by significant capital markets".[83] The "insider" corporate governance systems are those marked by a more concentrated shareholding basis with the most prominent examples being the German corporate governance system and to a certain degree other continental European countries; those economies are marked as "co-ordinated market economies".[84] The insider systems facilitate non market exchange, reliance on networks, the exchange of private information inside these networks and more reliance on collaborative as opposed to competitive relationships to build the competencies of the firm.[85] The Europeans emphasise cooperative relationships and reaching consensus,[86] while in the UK the emphasis is on competition and market processes.[87]

---

[79] Janet Dine, Marios Koutsias, *Company Law* (Palgrave McMillan, 2012).

[80] *Ibid.*

[81] Thomas Clarke, *International Corporate Governance, A Comparative Approach*, 186 (Routledge, New York, 2017).

[82] D Soskice and P Hall, *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford University Press, 2001).

[83] Alan Dignam and Michael Galanis, *Corporate Governance and the Importance of Macroeconomic Context* 28 Oxford Journal of Legal Studies 215 (2008).

[84] D Soskice and P Hall, *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford University Press, 2001).

[85] M Roe, *Political Preconditions to Separating Ownership from Corporate Control* 53 Stanford Law Review 539 (2000).

[86] Thomas Clarke, *International Corporate Governance, A Comparative Approach*, 251 (Routledge, New York, 2017).

[87] S Nestor S JKThomson, *Corporate Governance Patterns in OECD Economies: Is Convergence Under Way?* Discussion Paper, Paris (OECD, 2000). See: <https://www.oecd.org/corporate/ca/corporategovernanceprinciples/1931460.pdf>.

The German Company: Enter Stakeholders

Germany has a long and interesting history of company law. The German corporate governance system is the product of the country's long history, politics and economy as well as of its culture.[88] The article will focus mainly on the post-war era when modern German company law took its final shape within the context of the simultaneous development of the EU but, it will also shed light on the main actors which were critical in the evolution and shaping of the current German corporate governance model. The cartelisation and the cross-shareholdings and links between German companies, the traditional role of banks as capital providers and the landmark-feature of the German corporate architecture – the dual board- will be examined next.

A distinctive feature of the early phase of industrialisation in Germany was the wide-scale operation of cartels involving companies, banks and the state. German business thus, showed a tendency towards large scale and vertical integration as well as towards the extensive use of professional managers.[89] Germany was the home of industrial combination in Europe with closely knit business, government and banks.[90] Other countries were not immune to cartelisation, but Germany avoided tackling the issue. Cartelisation reflected the protectionist instincts of the German society which did not place the same amount of trust in the "invisible hand of the market" as England traditionally did. The German industrial landscape would acquire a sense of stability and continuity as cartelisation discouraged mergers as a means of concentrating production because the security afforded by cartels provided little incentive to acquire competitors.[91] In England mergers and takeovers would be viewed as necessary to create synergies and enhance corporate and managerial efficiency. In Germany, this was viewed as a matter that had to be deal with within the corporate context by the shareholders of the company rather than by external forces such as a takeover. To that end the effective supervision of management was deemed not only as necessary but also as consistent with the nature and protective character of the German economy. This explains why it was unlikely that the Germany system of corporate governance could ever be merged with the widely different structurally, philosophically and institutionally UK system of corporate governance into a single system of governance.[92] The idea of introducing a US type board system namely was discussed by the 34th conference of Germany jurists in 1926,[93] but it was rejected on the grounds that the dualistic system enabled shareholders to control the board quite effectively.

---

[88] Katharine Jackson, *Towards a Stakeholder/Shareholder Theory of Corporate Governance* 7 Hastings Business Law Journal 351 (2011).

[89] John E Wilson, *British Business History, 1720-1994*, 70 (Manchester University Press, 1995).

[90] GR Carter, *The Tendency Towards Industrial Combination*, 8 (Constable, 1913).

[91] John E Wilson, *British Business History, 1720-1994*, 72 (Manchester University Press, 1995).

[92] See: Lucian Bebchuck and Mark Roe, *A Theory of Path Dependence in Corporate Ownership and Governance* 52 Stanford Law Review 127 (2000).

[93] Petri Mäntysaari, *Comparative Corporate Governance, Shareholders as Rule-maker*, 252 (Springer, Berlin, Heidelberg, New York, 2005).

In Germany, an important source of finance for companies in the post war era was the access to internally generated funds which rendered most of them relatively independent of external sources of finance[94] such as the stock market. A corporate landscape which is characterised by a dense network of companies closely related to each other and to the banking system[95] provides fertile ground for the emergence of banks as a significant parameter of corporate governance. Germany has few listed companies compared with the UK.[96] This is because the banks play a pivotal role in corporate governance as they have historically been the provider of capital to German enterprises. This is why many German companies have a shareholding basis which is concentrated among a few powerful shareholders who hold enough shares to control the company and prevent a takeover of the company from another company; the so-called "blockholders". Even the listed German companies are more dominated by blockholders than the companies in the UK.[97] The most significant blockholders in German listed companies are families,[98] banks, insurance companies or the government itself with significant cross-shareholdings between industrial companies and bank groups.[99] Mark Roe argued that "shareholder primacy could be inefficient when an industry is concentrated because the shareholders of a monopolist would gain part of the consumer surplus while according to macroeconomic theory another part of it would be completely lost to society".[100] That is also due to the prevailing approach towards property rights in Germany which differs from the respective in the UK.

As the role of the banks in the corporate context was enhanced, they were anchored in a relationship closely linked to each other; they guaranteed a place on the supervisory board which granted them not only a monitoring role of the management but also an active role within the corporate institutional settings. They remained influential as they exercised depository voting rights on behalf of their clients; their role in "placing new securities and in lending with shares as collateral…ending up voting the shares of companies that used their underwriting services"[101] gave rise to their proxy voting powers. German business experienced the separation between ownership

---

[94] J Esser, *Bank Power in West Germany Revised* 13 West European Politics 17 (1990). J Edwards and K Fischer, *Banks, Finance and Investment in Germany*, 228 (Cambridge University Press, 1994).

[95] Stefan Beck, Frank Klobes, Christoph Scherrer, *Surviving Globalisation?: Perspectives for the German Economic Model* (Springer, 2005).

[96] Brian Cheffins, *The Metamorphosis of "Germany Inc": The Case of Executive Pay* 49 American Journal of Comparative Law 497 (2001).

[97] Parvez Raja Khurram, *Comparative Corporate Governance: Germany, Japan and Pakistan in Context: The Beginning or the End of Corporate Law History*? 28 International Company and Commercial Law Review 296 (2017).

[98] Brian Cheffins, *History and the Global Corporate Governance Revolution: The UK Perspective* 43 Business History Review 90 (2001).

[99] Mara Faccio, Larry HP Lang, *The Ultimate Ownership of Western European Corporations* 65 Journal of Financial Economics 365 (2002).

[100] Mark J Roe, *The Shareholder Wealth Maximisation Norm and Industrial Organisation* 149 University of Pennsylvania Law Review 2066 (2001).

[101] Randall Morck, *A History of Corporate Governance Around the World, Family Business Groups to Professional Managers*, 14 (The University of Chicago Press, 2007).

and control in a much more moderate way than the UK, if at all. In contrast to the UK where the dispersion of shares to a larger number of actors entailed the loss of control on the part of the owners, in Germany a crucial element shifted the power back to ownership; the voting rights. Multiple-vote shares – shares that carried multiple voting rights with them- were quite common place at that period. “In the interwar years this instrument was used extensively and was usually justified as means of fighting dilution of family control…allowing founding families to keep their grip on the company … as the votes per share ranged 20 and 250 times higher than the normal voting right … these privileged shares were given to members of the Supervisory board or to banks that committed themselves to vote according to the controlling group”.[102] The power of the future shareholders was therefore restricted waning the effects of the dispersion of shares and along with it the side effects of the separation of ownership and control. Today the issuing of such shares is not permitted. The emergence of banks as the primary source of capital within a tightly regulated environment forged their instrumental position within the German corporate edifice and fostered their links with companies.

The Employees Come On the (Dual) Board

The main conception of the company in Germany is a “thing in itself”.[103] This concept formed the intellectual basis for the German co-determination model.[104] It places the focus upon the company itself rather than a group within a company. Therefore, by definition the shareholders’ interests do not enjoy a monopoly in the corporate agenda.[105] There is room left for pursuing the interests of groups which are critical for the success of the company such as the creditors and the employees. In contrast to the UK law, the German company law embodies the stakeholder doctrine[106] with a two-tier board that distinguishes between management and supervisory boards and allows for employee participation in decision-making.[107] Since, the co-determination system requires labour participation at board level, “the norms of shareholder capitalism do

[102] *Ibid.*, p262.

[103] Ewan McGaughey, *The Codetermination Bargains: The History of German Corporate and Labour Law* 23 The Columbia Journal of European Law 138 (2016).

[104] Klaus J Hopt, *Labour Representation on Corporate Boards: Impacts and Problems for Corporate Governance and Economic Integration in Europe* 14 International Review of Law and Economics 203 (1994).

[105] Christine A Mallin, *Corporate Governance*, 252 (Fifth Edition, Oxford University Press, Oxford, 2016).

[106] Wolf George Ringe, *Changing Law and Ownership Patterns in Germany: Corporate Governance and the Erosion of Deutschland AG* in JG Hill and RS Thomas (eds), *Research Handbook on Shareholder Power*, 404-438 (Cheltenham: Edward Elgar Publishing, 2015).

[107] Neil Fligstein, Jennifer Choo, *Law and Corporate Governance* 1 Annual Review Law Social Sciences 61 (2005).

not automatically prevail over other stakeholders' claims".[108] The German Corporate Governance Code clarifies the obligation of the Management Board and the Supervisory Board to ensure the continued existence of the enterprise and its sustainable creation of value in conformity with the principles of the *social market economy* (interest of the enterprise).[109]

The enhanced institutional role for labour within many of Germany's companies was for the first time articulated and introduced in public discourse during the nineteenth century by a Catholic theologian named Franz von Baader. It was viewed sympathetically as a means to act against the dispossession of labour in the industrial revolution.[110] The need for capital was much bigger than at any point previously. The traditional elements of the financial system at the time comprised "agricultural credit institutions, government securities and short-term trading capital for international and interregional trade".[111] At that point "the majority of financial intermediaries were private banks. They executed a substantial share of the economy's payments, linked savers with investment opportunities, and helped found new businesses".[112] By contrast, the UK resorted to the stock market to fund its own industrialisation. As early as in 1861 The German Commerce Code provided the first codification of company law including the public limited company.[113] It established the two- tier system of corporate governance; of a management and a supervisory board. Both boards comprised of shareholders aiming at monitoring the management.[114] The supervisory board replaced a system of control of the company by the then government.[115] The government introduced the supervisory board aiming at serving the interests of stakeholders too with emphasis on the interests of the employees too.[116]

During the Second World War, the Nazis –as it well documented- created an utterly totalitarian state that concentrated all layers of powers in its authoritarian structures. In Nazi Germany, the -already highly concentrated- industrial sector provided a fertile ground for enhanced governmental control of its operations. The preparation for

---

[108] Parvez Raja Khurram, *Comparative Corporate Governance: Germany, Japan and Pakistan in Context: The Beginning or the End of Corporate Law History*? 28 International Company and Commercial Law Review 295, 296 (2017).

[109] German Corporate Governance Code, Foreword 1, see it at: <https://www.fsa.go.jp/en/refer/councils/corporategovernance/reference/german.pdf> .

[110] Ewan McGaughey, *The Codetermination Bargains: The History of German Corporate and Labour Law* 23 The Columbia Journal of European Law 138 (2016), page 146.

[111] Richard Tilly, *Germany 1815-1870* in Rondo Cameron, *Banking in the Early Stages of Industrialisation: A Study in Comparative Economic History,* 154 (Oxford University Press, New York, 1967).

[112] Caroline Fohlin, *Finance Capitalism and Germany's Rise to Industrial Power*, 17 (Cambridge University Press, 2007).

[113] Hartmut Schmidt, Drukarczyk Jocken, Dirk Honold, Stefan Prigge, Andreas Schüler, Gönke Tetens, *Corporate Governance in Germany*, 34 (Nomos Verlagsgesellschaft, Baden-Baden, 1997).

[114] Jean du Plessis, Otto Sandbrock, *The Rise and Fall of Supervisory Codetermination in Germany*, International Company and Commercial Law Review 71 (2005).

[115] Mark Loewenstein, *Stakeholder Protection in Germany and Japan: What Can We Learn from Foreign Systems?* 76 Tulane Law Review 1675 (2002).

[116] Klaus Hopt, *The German Two-Tiered Board in Comparative Corporate Governance*, 6 (Oxford University Press, 1997).

war led to the strengthening of linkages among companies through "the Nazi policy of enforced cartelisation".[117] In addition to that, the National Socialist government left its stamp on the current model of corporate governance. In order to consolidate their grip on the country's industrial sector, the regime introduced a fiduciary duty of directors towards stakeholders. While in today's terms this sounds particularly stakeholder-friendly and noble, the *Reich* included itself within the list of stakeholders.[118] While a more stakeholder-friendly approach is nowadays viewed as an element of corporate democracy, at this point it was exactly the opposite. It entailed an extension of the authoritarian hand of the Nazi state to the corporate sector establishing a directorial duty to somehow comply or take into account the agenda of the *Reich*. Corporate complicity to many of the crimes of the Nazi regime –which do not form part of the article- could be viewed from this perspective too. The regime banned voting by mail, and forced shareholders who could not vote in person to register their holdings with banks and entrust banks with proxy voting rights. "This bestowed the large banks with voting control over much of the German large corporate sector. The Reich then took control of the banks".[119] Despite the irony inherent in this and irrespective of the utterly different agenda of the *Reich*, the stakeholder-oriented structure of German companies could be traced in this period too.

In the 1950s[120] employees were granted the right of participation at the supervisory board level. The main impetus for supervisory codetermination by employees actually came when the British occupation authorities and German trade unionists were determined to ensure that the German nation should never fall into the dictatorial pattern of the Third Reich. The specific method invented was to "make it compulsory for labour and management to work together at the level of the supervisory board…to ensure that the very strict class distinction that existed in Germany would not emerge again".[121] The British believed that the incorporation of labour into the administrative structures of the German company would eliminate the possibility of a restive labour creating problems while it would ensure the administration of the German corporation on a more inclusive basis that would gradually wane the differences between the different components of the German society. It is interesting that at that point the UK viewed employee participation as a means to mitigate conflicts stemming from class and race distinction as well as a means to promote a more inclusive corporation that can evolve on a more consensual basis.

---

117 Ronald Dore, William Lazonick, Mary O'Sullivan, *Varieties of Capitalism in the Twentieth Century*, 15 Oxford Review of Economic Policy 107 (1999).

118 Randall K Morck, Lloyd Steier, *The Global History Of Corporate Governance, An Introduction*, 9 (National Bureau of Economic Research, 2005), <http://www.nber.org/papers/w11062.pdf>.

119 *Ibid.*

120 Employee participation on the supervisory board was introduced basically by the *Montan-Mitbest Act* of 1951 and the *Betriebsverfassungsgesetz* of 1952 followed by the 1976 *Mitbestimmungsgesetz* Act

121 Jean J Du Plessis, Bernhard Großfeld, Claus Luttermann, Ingo Saenger, Otto Sandrock, Matthias Casper, *German Corporate Governance in International and European Context*, 155 (Second Edition, Springer, 2012).

The turmoil and the previous period of conflict led Germany to seek a "“middle way” between unbridled capitalism and socialism. Labour leaders “sought to be represented on the boards partly to convince the Allies not to dismantle Germany’s coal and steel industry by asserting that labour would constrain the wartime industrialists via positions on the firm’s supervisory boards”.[122] Mark Roe suggests that the “ultimate reason for the prevalence of social democracy may have been a history of war and turmoil during the first half of the 20th century in the core civil law countries”.[123] The place reserved for labour within the administrative structure of the German company serves as the red line that utterly separates the UK corporate governance model with the German one.

The whole concept of “parity employee representation at supervisory level was observed with great scepticism when in 1951 it was forced upon the German population…there was hardly any other statute that had been met with so much rejection … by the legal profession in Germany as the *Montan-MitbestG* of 1951”.[124] The reaction of management was rather one of “horrified outrage. It predicted that labour representatives would come blundering into management affairs like a herd of bulls in a china shop”.[125] German academia and business viewed it as an intervention external to the nature of corporate governance; it was effectively a means to prevent “revolutionary employee techniques”.[126] The 1976 *Mitbestimmungsgesetz* Act was even brought before the Federal Constitutional Court[127] by German companies and shareholders. They alleged that the Act in question was contrary to certain articles of the Basic Law; more specifically the participation of employees on the supervisory board was arguably against Art. 14 paragraphs 1 and 2 of the Basic Law on property rights; this referred to the fact that employee participation was viewed as an infringement of the property rights held by shareholders. This was very close to the English perception of what a company is.

However, the Federal Constitutional Court adjudicated differently. The *Mitbestimmungsgesetz* Act of 1976 was “neither a danger to collective bargaining nor did it prevent the normal functioning of enterprises. Since the final decision within the supervisory board still rested within the shareholder representatives the guarantee of private property was not violated”.[128] Therefore, the Act was found constitutional and

[122] Mark Roe, *Political Determinants of Corporate Governance, Political Context, Corporate Impact*, 29 and 30 (Oxford University Press, 2006).

[123] Mark Roe, *Legal Origins, Politics, and Modern Stock Markets* 120 Harvard Law Review 462 (2006).

[124] Jean J Du Plessis, Bernhard Großfeld, Claus Luttermann, Ingo Saenger, Otto Sandrock, Matthias Casper, *German Corporate Governance in International and European Context*, 164 (Second Edition, Springer, 2012).

[125] Detlev F Vagts, *Reforming the Modern Corporation: Perspectives from the German* 80 Harvard Law Review 23, p68.

[126] Thomas Raiser, *The Theory of Enterprise Law in the Federal Republic of Germany*, American Journal of Comparative Law 120 (1988).

[127] German Federal Constitutional Court (BVerfGE) volume 50, 290 (1979).

[128] Manfred Weiss, Marlene Schmidt, *Labour Law and Industrial Relations in Germany*, 256 (Kluwer Law International, 2008).

along with it the whole model of employee codetermination at the level of supervisory board was found to be compatible with the constitutional rights and traditions of the country. Only three years after that ruling, the Supreme Court in Civil Matters[129] upheld the previous decision of the Federal Constitutional Court and went one step ahead by adjudicating that the 1976 *Mitbestimmungsgesetz* Act had been passed in the public interest. Therefore, when the By-Laws of Siemens AG were found to violate the Act, this "was found to be susceptible to constituting a ground to declare the provisions of the By Laws null and void".[130] The court recognised that the act in question "must be allotted special importance in context of the politics relating to corporations since it represents the result of fundamental decisions reached after years of confrontation…it stretches beyond the interests of the persons immediately affected by it…it does indeed serve the common weal of the community…it aims at the entire national economy".[131] This signals a shift in the approach on the part of the German legal world towards the Act. As Germany was reaping the benefits of stability and growth the initial reactions were fading and the Act was becoming an integral part of the German society and a landmark of its corporate governance model.

Property Rights in Germany

The wording of the constitution of Germany – the Basic Law- underlines the philosophical divergence between itself and the UK. Article 14(2) of the Basic Law on "property, inheritance and expropriation" states that: "property entails obligations. Its use shall also serve the public good".[132] While, the constitution clearly recognises a right to property as most constitutional texts in the West do, it sets certain limitations to it. Property does indeed entail obligations; namely that its use should also serve the public good. This renders a limitation on any property right of the shareholders on the company socially imperative and consistent with the constitutional definition of property rights. To that end the *Aktiengesetz* of 1937 contained the rule that "the two-tier system is not designed for the benefit of shareholders only. It is there also to protect the public interest and it is normal to say that members of the management board do not act in the interests of the shareholders only. By law, members of the management board are expected and entitled to carry out their duties for the benefit of shareholders, employees and the society as a whole".[133] Although, the current *Aktiengesetz* lacks a similar provision, it still "applies as a general uncodified

[129] German Federal Supreme Court in Civil Matters (BGHZ) volume 83, 106 (1982).

[130] Jean J Du Plessis, Bernhard Großfeld, Claus Luttermann, Ingo Saenger, Otto Sandrock, Matthias Casper, *German Corporate Governance in International and European Context*, 166 (Second Edition, Springer, 2012).

[131] *Ibid.*

[132] Basic Law for the Federal Republic of Germany, Grundgesetz, <http://www.iuscomp.org/gla/statutes/GG.htm#14>.

[133] Petri Mäntysaari, *Comparative Corporate Governance, Shareholders as Rule-maker*, 253 (Springer, Berlin, Heidelberg, New York, 2005).

principle"[134] supported by the spirit of the Basic Law and the aforementioned provision. This would be reflected by the basic duty of the members of the board is the duty to act in the interests and for the benefit of the company in good faith.[135] And although, this may sound similar to the respective British approach on directors' duties the difference lays in the definition of the content of the "interests of the company". In Germany, the definition would reflect the character of the company itself as a more inclusive legal entity, therefore the "interests of the company" would include "at a minimum the interests of the employees, the creditors and the shareholders".[136] In the UK, the "interests of the company" are the interests of the shareholders only[137] despite the wording of section 172 of the CA2006. Therefore, the duty of a director to promote the "interests of the company" is interpreted in two very different ways in Germany and in the UK.

The concept of social codetermination "basically revolves around the idea of works councils (*Betriebsräte*) a system where ordinary workers are actively involved in structuring their day to day environment in personal and social matters".[138] The system which has guaranteed an increased level of employee participation and the emergence of labour as one of the actual parameters of corporate governance has historically evolved on the basis of cross party support. The enhanced employee participation was upheld by Social Democrats and Christian Democrats alike guaranteeing the continuous support of the parties which formed the backbone of the governmental coalitions that ruled the country especially from the Second World War and onwards and until today. Already "before the First World War, codetermination was developed by both liberal and Christian theorists as a process necessitated by industrialisation and as an acceptable alternative to revolutionary employee practices".[139] Cross party support brought with it the universality of its acceptance not only by business but crucially enough by the society at large as a reflection of its "social economy model". The latter rooted in "Catholic philosophy of social ethics…as well as Protestant ethics…where distribution and the protection of the individual in a community were the focal point…the Church's answer to the problem of the alienation of the worker in the nineteenth century was the strong source for the intellectual basis of the Christian Democratic Party and the Christian Social Union in Bavaria. Together with the traditional orientation of the Social Democrats to workers as their prime voters …

[134] *Ibid.*

[135] See Section 242 BGB (German Civil Code).

[136] Andreas Cahn, Donald C David, *Comparative Company Law*, 335 (Cambridge University Press, 2010).

[137] *Brady v. Brady* [1988] BCLC 20, 40.

[138] B Grossfeld, U Lehmann, *Management Structures and Workers' Codetermination in Germany with European Perspectives* 1 Corporate Law Development Series 41 (1994).

[139] Thomas Raiser, *The Theory of Enterprise Law in the Federal Republic of Germany*, American Journal of Comparative Law 117 (1988).

produced an orientation in which social elements and collective approaches gained importance".[140]

Is the "European Company" truly European?

As it was explained at the first part of the article, the creation of a supranational corporate form which would be immune to national legislation and would be subject exclusively to the EU law was within the EU policy agenda from its early steps. After all, the EU operates the biggest single market in the world. It has harmonised to a significant extent several aspects of its single market facilitating and liberalising trade between its members to a very considerable extent. The single European company form would remove all regulatory as well as practical obstacles allowing every company or EU national to engage in cross-border business activities and expand to another member state of the EU without having to face a complex set of national rules. In simple words the introduction of a truly European Company would complement the single market.

However, due to the conflict between the UK and the German models of corporate governance, this was not the case. The EU negotiated the Fifth Directive[141] on structures of public companies and employee participation. The negotiations lasted for several decades and they were marked by a corporate cultural war ending up with the directive becoming defunct. The EU witnessed a collision between the UK corporate culture with the respective German one. The presence of employees at the board level[142] was pure anathema to the British side. The conflict between the one-tier board system of the UK and the two-tier system of Germany which guaranteed stakeholder participation in the management of the company was so fierce that at the end it sank the Fifth Directive.[143] The introduction of employee participation at board level with the establishment of a second supervisory board was too radical of a reform to be tolerated in the UK; therefore the proposed directive "faced strong opposition, notably by United Kingdom".[144] This is because such a reform entailed a vast cultural reform within the British company law. It would affect the role of stakeholders in the British company, it would challenge the absolute supremacy that shareholders enjoy within the British corporate context and it would undermine their property rights over the company. In simple words, the passing of the Fifth Directive did not just entail a

140 Horst Siebert, *The German Economy, Beyond the Social Market*, 24-25 (Princeton University Press, 2005).

141 OJ (C 240) 2.

142 Otto Sandrock, Jean J Du Plessis, *The German Corporate Governance Model in the Wake of Company Law Harmonisation in the European Union*, Company Lawyer 91 (2005).

143 Jean J Du Plessis, Janet Dine, *The Fate of the Draft Fifth Directive on Company Law: Accommodation instead of Harmonisation*, Journal of Business Law 23 (1997).

144 Karol Linmondin, *The European Company (Societas Europaea) – A Successful Harmonisation of Corporate Governance in the European Union?* 15 Bond Law Review: Special Issue: Comparative Corporate Governance 156 (2003).

reform of the British company law but a fundamental re-thinking of the entire edifice of the British corporate culture. While "the original SE and Fifth Directive drafts may have been viable proposals in the original 6-member EEC, the UK opposed them most fervently".[145] This is why the "UK resistance against employee representation on boards"[146] is cited in bibliography as one of the principal reasons for the failure of the Fifth Directive. There are genuine problems in radically reforming the dominant corporate culture; this is a principle referred to in bibliography as path dependency.[147] When such a wide-reaching reform which challenges deeply rooted beliefs is viewed as forced from regulators external to a country's institutions, it is usually doomed to fail. And it did. The Fifth Directive is a prominent monument in a virtual museum of defunct company law harmonisation initiatives. The Fifth Directive was consigned to history, but the EU continued to pursue its aim to create a single pan-European company. To that end, a new round of negotiations to introduce the "European Company Statute" or the "European Company" or the "Societas Europea" (SE) started. The aim was identical; to create a supranational corporate form subject exclusively to EU law.

The "European Company Statute"[148] was the follow-up effort to establish a European company on the basis of a common regulatory basis. It was supposed to be a new legal form for public companies governed by EU law and separate from any national system. However, once again after many years of negotiations the EU was nowhere close to that aim. The regulation on the SE was passed in 2001 after intense negotiations but it constituted a complex set of rules partially regulated by national legislation.[149] The first ideas for a European Company[150] and the first drafts of the SE Regulation aimed at a complete EU company law regime.[151] The regulation for an SE

---

[145] Martin Gelter, *EU Company Law Harmonization between Convergence and Varieties of Capitalism*, Law Working Paper N° 355/2017 June 2017, ECGI Working Paper Series in Law, <https://poseidon01.ssrn.com/delivery.php?ID=962008021127091123103028086031093005127032093088005092100094028070104069095120007078110024036005107000110020073072118070082126039072030002007096095103103068112116019032038040074092072082023122072117013122004094126080105123007028020109026090105026006099&EXT=pdf> accessed on July 25th 2018.

[146] *Ibid.* at page 19. See also Janet Dine, *Implications for the United Kingdom of the EC Fifth Directive*, 38 International & Comparative Law Quarterly 547-559 (1989). Daniel T Murphy, *The Amended Proposal for a Fifth Company Law Directive–Nihil Novum* 7 Houston Journal of International Law 215-235 (1984). J Temple Lang, *The Fifth Directive on the Harmonization of Company Law* 12 Common Market Law Review 345-368 (1975). Andrew Johnston, *EC Regulation of Corporate Governance* (Cambridge: Cambridge University Press 2009), Steven Schneebaum, *The Company Law Harmonization Program of the European Community* Law 14 and Policy in International Business 293-334 (1982).

[147] John Quinn, *German Codetermination and Ireland's Convergence* 37 Company Lawyer 331 (2016).

[148] Regulation on the Statute for a European Company (SE) EC 2157/2001.

[149] Carl Svernlov, Fanny Petersson, *The Future of European Company Forms* 26 International Company and Commercial Law Review 171 (2015).

[150] Mathias Siems., *The Impact of the European Company (SE) on Legal Culture* 30 European Law Review 437 (2005).

[151] Vanessa Edwards, *The European Company – Essential Tool or Eviscerated Dream* 40 Common Market Law Review 443 (2003).

was but a "shadow of its former self".[152] What was supposed to be a single European company –a Societas Europea- ended up being "as many different types of SEs as member states of the EU"[153] as several aspects of the SE (such as capital and minimum capital requirements and modifications related to shares and securities issued by an SE and employment and tax law issues)[154] were governed by the respective company laws of the member states. The Statute's board and governance provisions are enabling rather than mandatory and reflect the "panoply of corporate law principles and traditions"[155] which is dominant across Europe. The member states basically agreed that they disagree. Instead of a common European Company whose institutional structure and constitutional arrangements would be common across the EU, the regulation recognised that a common EU corporate governance model could not accommodate the significant divergence among its member states. The European company would be treated in every member state as if it were a public limited company formed in accordance with the law of the member state in which it has its registered office. The most important consequence of the existence of this plurality of sources of law which involve both EU and national law instruments is the fact that the SEs constituted throughout the EU may be treated differently in the various member states.[156] That defies the whole raison d'être of the regulation in question. To conceal insurmountable conflicts among member states, crucial aspects of the SE were left for national laws to regulate. The governance of the SE in particular, is shaped to a great extent by widely different national laws rendering the vision of a "truly autonomous, supranational form of organisation a sham".[157] Such is the variety of national laws applicable to the SE that it is probably correct to say that there are 28 regimes in 28 member states for the SE.[158] The failure of the European Company to take off was a by-effect of the "social objective"[159] it was assigned by the Commission to achieve. It was considered that the SE must be a "vector for social advance"[160] allowing employee participation on the board.

---

[152] Paul L Davies, *Workers on the Board of the European Company*?32 Industrial Law Journal 77 (2003).

[153] Carl Svernlov, Fanny Petersson, *The Future of European Company Forms* 26 International Company and Commercial Law Review 171 (2015).

[154] Eric Morgan De Rivery, Claire Stockford, *The European Company* 6 International Business Law Journal 717 (2001).

[155] Theo Raaijmakers, *The Statute for a European Company: Its Impact on Board Structures and Corporate Governance in the European Union* 5 European Business Organisation Law Review 160 (2004).

[156] Marios Bouloukos, *The Legal Status of the European Company (SE): Towards a European Company "A La Carte"?* 4 International Business Law Journal 506 (2004).

[157] Tobias H Troger, *Choice of Jurisdiction In European Corporate Law – Perspectives of European Corporate Governance* 6 European Business Organisation Law Review 57 (2005).

[158] Frank Wooldridge, *The European Company, The Successful Conclusion of Protracted Negotiations* 25 Company Lawyer 127 (2004).

[159] Nicole Stolowy, *Does the "Societas Europea" or "European Company" Make a Significant Contribution to Construction of a European Company Law*?, Journal of Business Law 363 (2012).

[160] *Ibid.*

The EU approved a directive on employee participation[161] which by definition grants to the member states the necessary discretion when introducing its provisions into their internal national legal orders. Taking into account that the otherwise "European" company now includes corporate forms based on either a single or a dual board model, the scope for discretion was indeed enormous. Therefore, the UK retained its support of absolute shareholder supremacy with the shareholders as the holders of a property right over the corporation. Germany maintained its distinctive co-determination system which recognises an effectively managerial role to stakeholders in an inclusive corporate form. National governments addressed the challenges of globalisation in their own distinctive ways. Cultural, institutional and other national differences constrained any push to convergence.[162] Decades of successful operation of the co-determination system in Germany's "participatory model of corporate governance",[163] which effectively granted a semi-managerial role to employees has become a part of the "German psyche and become a virtual habit"[164] to the degree that the country cannot give it away. The resilience of national company law is a by-product of divergent national models of capitalism each of which corresponds to local conditions where "interacting institutions complement each other".[165] The problem lies exactly at this point; that the countries which comprise the EU could not agree on what is a company, who is the company and for which purpose a company shall be run.[166] The debates in question evidently involve the most fundamental aspects of company law, and therefore undermined the creation of a common body of European company law from the very beginning.

Harmonisation and convergence of laws and standards are inherent in the functional identity of the single market as well as the nature of the EU as a whole. It is built on a notion of consensus and mutual concessions. Therefore, it is interesting that even within an institutional framework whose very raison d'être is legislative convergence, corporate governance emerged as perhaps one of the very few areas that resisted the forces of harmonisation.[167] Therefore, the development of European company law has proved that "uniformity is impossible and that national differences

[161] Directive 2001/86/EC supplementing the Statute for a European Company with regard to the involvement of employees.

[162] Manfred Weiss, *Convergence and.or Divergence in Labour Law Systems?: A European Perspective* 28 Comparative Labour Law and Policy Journal 486 (2007).

[163] Peter Koslowski, *The Ethics of Corporate Governance: A Continental European Perspective* 51 International Journal of Law and Management 29 (2009).

[164] Angela Richard, *Mitbestimmung: The Future of Co-determination in a Hostile World* 15 Debatte, 346 (2007).

[165] Daniel Komo, Charlotte Villiers, *Are Trends in European Company Law Threatening Industrial Democracy?,* European Law Review 179 (2009).

[166] Janet Dine and Marios Koutsias, *The Nature of Corporate Governance: The Significance of National Cultural Identity* (Edward Elgar, 2013).

[167] Janet Dine, Marios Koutsias, and Michael Blecher, *Company Law in the New Europe: The EU Aquis, Comparative Methodology and Model Law* (Edward Elgar, 2007).

remain prominent".[168] The end result of the harmonisation efforts of the EU in this field is indeed a variety of company law and corporate governance systems among the member states.[169] European company law still lacks the legislative act that puts in place a truly "supranational form of company".[170]

Brexit means No Right to Vote for Future EU Company Laws

As it is well known and documented by now, the British electorate voted to leave the EU on 23 June 2016. Despite the fact that the referendum was not legally binding, leaving the EU was politically imperative. The UK Prime Minister, Theresa May, has rather famously stated that "Brexit means Brexit".[171] This phrase was marked by a great level of obscurity since its very inception but the possible avenues that Brexit may take are indeed more concrete than the PM herself perhaps realised at that point. It is not the purpose of this article to analyse the multiple dimensions of Brexit which is by definition an issue of colossal importance for the UK and its legal order. The article would focus on the ability of the post-exit UK to influence the legislative mechanism of the EU. In all possible scenarios –except of course the rather unlikely case that the UK decides to indeed remain in the EU- the UK would lose its vote in the Council and its MEPs in the European Parliament and therefore, it would not be in the position to vote for EU law. The UK as one of the three biggest member states of the EU had considerable voting power in both institutions and the ability to forge alliances to promote its distinctive national interests. It left its imprint on the EU law. There is no better example of that than EU company law. As it was explained thoroughly in this article, the Union's fifty year old efforts to introduce a single-entity European Company ended up in failure due to stiff –but effective- resistance on the part of the UK.

The British Prime Minister has argued for "the freest and most frictionless trade possible in goods and services between the UK and the EU".[172] The potential avenues which can be followed after Brexit are fivefold; namely the UK remaining in the European Economic Area,[173] which involves membership of the most important

[168] Daniel Komo, Charlotte Villiers, *Are Trends in European Company Law Threatening Industrial Democracy?,* European Law Review 179, 182 (2009).

[169] *Ibid.*

[170] Wolfgang Schon, *The Concept of the Shareholder in European Company Law*, in European Business Organisation Law Review 10 (2000).

[171] Gerard McCormack, Hamish Anderson, Brexit and its Implication for Restructuring and Corporate Insolvency in the UK, Journal of Business Law 533 (2017).

[172] The United Kingdom's exit from and new Partnership with the European Union, White Paper, 2 February 2017.

[173] The EEA is an agreement applying to the EU member states and the EFTA states (Norway, Iceland, and Liechtenstein) except Switzerland. Switzerland is a member of EFTA, but it is not a member of the EEA. The EEA members get access to the Union's single market and they apply the Single Market rules. The EEA agreement does not covers matters such as agriculture, fisheries, taxation, common trade and foreign policy and a customs union.

aspects of the internal market, or the UK remaining only in the customs union like Turkey, or creating a complicated web of bilateral agreements like Switzerland does, or to sign a free trade agreement (FTA) like Canada which covers mostly the trade in goods or to fully extricate itself from the EU and to trade with it on the basis of the WTO rules. None, of these possible options involves the ability of the UK to remain a part of the legislative procedure of the Union and to remain a rule-maker instead of an EU-standard bearer. The EEA entails the free movement of persons -albeit with restrictions linked to "serious economic, societal or environmental difficulties"-[174] which was anathema to the Brexit side and arguably the most "reviled aspects of EU membership for UK referendum voters in the Leave camp".[175] It is also subject to the jurisdiction of the EFTA Court which follows the CJEU's precedent.[176]

The British government has at the moment decided to leave not only the EU but also its Single Market and the Customs Union,[177] therefore pursuing a so-called "hard Brexit". That rules out remaining a member of the EEA and it paves the way for either an FTA or a WTO-based agreement. Even as a member of the EEA, the UK would have "no vote on future changes to the applicable rules"[178] including EU Company Law. The UK would have no say in the post-Brexit efforts to re-introduce the European Company. Even if the UK remains within the EEA, which is the closest possible relationship with the EU while not forming part of its membership,[179] the UK would be subject to the entire fundamental "rules and regulations of the market, as is Norway and Iceland, although without any say in their future content".[180] That is of particular importance for EU company law. The departure of the UK from the EU would remove the one pillar of the debate. Irrespective, of the post-Brexit relationship of the UK with the Union, the right to vote in the Council and in the EP would be lost. The departure of the champion of contractualism and shareholder dominance from the EU, would probably lead to the emergence of the stakeholder model as the dominant force within the EU corporate landscape. That should be embodied by a new EU-wide European Company.

---

174 EEA Agreement, Art. 112. Agreement on the European Economic Area [1994] OJ L1.

175 Anne McGregor and Adam Kidane, *Post-Brexit Scenarios for UK Competition Policy and Public Enforcement: The EEA Model v. Complete Independence* 22(4) International Trade Law & Regulation 82 (2016).

176 Maziar Peihani, *Brexit and Financial Services: A Tentative Analysis of Possible Exit Scenarios*, Journal of Business Law 366 (2017).

177 Richard Tauwhare, *Brexit: Achieving Near-Frictionless Trade* 23(3) International Trade Law & Regulation 89 (2017).

178 Sue Arrowsmith, *The Implications of Brexit for Public Procurement Law And Policy in the United Kingdom*, Public Procurement Law Review 6 (2017).

179 Aoife Coll, *The EFTA Court's Role in Strengthening the Homogeneity Objective of the EEA Agreement: An Examination in light of Brexit*, International Trade Law & Regulation 119 (2016).

180 Christopher Clement-Davies, "*Brexit Means Brexit"? But What Does That Mean* …?, International Energy Law Review 159 (2016).

Conclusion

The article explained the role of culture within the context of company law. Company law is not immune in its making; it is a by-product of the society within which it is developed. The article argued that in the last fifty years the EU has been effectively marred by a cultural war between a contractual view of the company and the stakeholder approach. The two main pillars of this battle were the UK and Germany. The former defended fervently its contractual model of corporate governance which is marked by shareholder supremacy and by a definition of the company as a private affair between its shareholders. Germany on the other hand rallied around its own stakeholder-oriented model whereby the company is not devoid of social considerations and has incorporated stakeholders at the highest level of its corporate governance. The cultural and philosophical as well as economic and societal differences which constituted the roots of such a divergence could not be compromised. They undermined the efforts of the EU to create a European Company which would be subject to a single body of law. In this sense the single market has been left incomplete. A common corporate form – a European Company- is essential to establish legal clarity in cross-border investment and facilitate corporate expansion across the European Union. Investors would need to look only at a single piece of EU law in order to set up a company in another member state of the EU instead of a patchwork of complex national pieces of legislation as it is the case now. This is truly significant if not pivotal for the smooth operation of the single market as well as for its completion. However, after decades of conflict the EU ended up with a compromise which did not fulfil its initial aim; the European Company did not harmonise standards across the Union. It is "European" only by name. The article argues that Brexit is a game-changer. The departure of the most important pillar of contractualism in the EU would leave the Union with member states which mostly adhere to the stakeholder model in one or another way. The ideologically driven conflicts of the past would not be repeated. Brexit may finally deliver something that was thought as inconceivable only a few years ago; a truly inclusive and a truly "European Company". A company based on regulation common for all members of the European Union.