

Contents

1	An Overview of German Business or Enterprise Law and the One-Tier and Two-Tier Board Systems Contrasted	1
	Jean J. du Plessis, Bernhard Großfeld, Ingo Saenger, and Otto Sandrock	
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	13
	References	14
2	An Overview of the Corporate Governance Debate in Germany	17
	Jean J. du Plessis and Ingo Saenger	
2.1	Introduction	17
2.2	History and Significance of the German ‘Corporate Governance’ Debate	18
2.3	Focus on the Supervisory Board	21
2.4	Important Role of Supervisory Boards and Recommendations for Improvement	23
2.5	Initial Reaction	25
2.6	The German Corporate Governance Code	30
2.6.1	Overview	30
2.6.2	Section 161 of the AktG	33
2.6.3	Basic Changes to the Code Since 2002	36
2.6.4	Parts and Layout	44
2.6.5	Some Noteworthy Provisions of the Code	45
2.6.6	The Legal Nature of the Code	49
2.7	Need for a European Corporate Governance Code	52

- 2.8 The Global Financial Crisis and Corporate Governance in Germany 54
- 2.9 Concluding Remarks 55
- References 57
- 3 The General Meeting and the Management Board as Company Organs 63**
 - Jean J. du Plessis and Ingo Saenger
 - 3.1 Introduction 63
 - 3.2 The General Meeting 64
 - 3.2.1 Function as a Corporate Organ 64
 - 3.2.2 Some Specific Functions 65
 - 3.2.3 Emergence of Shareholder Activism in Germany 68
 - 3.2.4 Shareholders’ Lawsuit 69
 - 3.3 The Management Board 72
 - 3.3.1 Function as a Corporate Organ 72
 - 3.3.2 Qualifications, Appointment, Removal and Compensation of Members 72
 - 3.3.3 Rights, Powers and Responsibilities 83
 - 3.3.4 Duties and Forms of Liability 91
 - 3.4 Concluding Remarks 99
 - References 100
- 4 The Supervisory Board as Company Organ 105**
 - Jean J. du Plessis and Ingo Saenger
 - 4.1 Introduction 106
 - 4.2 Appointment Prerequisites 107
 - 4.3 Conditions of Appointment and Qualifications to Serve as Supervisory Board Members 110
 - 4.3.1 General 110
 - 4.3.2 Some EU Recommendations 112
 - 4.3.3 Basic Knowledge of Economics, Law and Accounting 113
 - 4.3.4 Additional Requirement Pertaining to Knowledge and Qualification 114
 - 4.3.5 Women 115
 - 4.3.6 Conflicts of Interest 119
 - 4.3.7 Independence 120
 - 4.3.8 Former Members of Management Board Serving as Members of the Supervisory Board 123
 - 4.3.9 Number of Supervisory Boards an Individual Can Serve on 126
 - 4.4 Removal of Supervisory Board Members 128
 - 4.5 Compensation of Supervisory Board Members 129
 - 4.6 Rights and Responsibilities of Supervisory Board Members 133
 - 4.6.1 Appointment and Removal of Management Board Members 133

4.6.2	Determination of the Compensation of Management Board Members	135
4.6.3	Supervision	138
4.6.4	Reporting to the General Meeting	151
4.6.5	Instituting Action Against Members of the Management Board for a Breach of Their Duties	151
4.7	General Duties and Forms of Liability	153
4.8	The Supervisory Board as Integral Part of the German Two-Tier Board System	157
4.9	Concluding Remarks	159
	References	160
5	The German System of Supervisory Codetermination by Employees	167
	Otto Sandrock and Jean J. du Plessis	
5.1	Introduction	168
5.2	Statutory Rules on Codetermination (<i>Mitbestimmung</i>)	169
5.2.1	Terminology	169
5.2.2	Early History	169
5.2.3	Supervisory Codetermination in Particular	172
5.3	Advantages of the German System of Codetermination	188
5.3.1	Employee Representatives on Supervisory Boards: To Some Extent Co-Managers	189
5.3.2	Remuneration of Employee Representatives	190
5.3.3	Employee Representatives	191
5.3.4	One Special Feature: Middle-Sized and Small Companies (the <i>Mittelstand</i>)	194
5.3.5	Long-term Effects of German Codetermination on the German Economy in General and Conclusions	195
5.4	Disadvantages Inherent to German Codetermination	196
5.4.1	A List of Some Important Shortcomings	196
5.4.2	The Extension of Codetermination to Foreign Employees of German Companies	201
5.5	Some Further Mostly Negative Aspects of Codetermination	204
5.5.1	The Costs of the System	204
5.5.2	The Fixing of the Salaries and Bonuses of the Members of the Board of Directors	206
5.5.3	The Dependency of the Management Board on the Employee Representatives on the Supervisory Board	208
5.5.4	Some Recent Scandals Associated with Employee Representatives Serving on Supervisory Boards	211
5.5.5	The Mutual Take-Over Battle Between the VW AG and the Porsche SE: The VW AG Wins	215

5.5.6 The Proclivity to Corruption of the Employers
Representatives 228

5.5.7 Transformation of Codetermined Companies into
SEs 229

5.5.8 Opposition by Trade Unions to Essential Law
Reforms 229

5.6 Proposals to Modify the System of Codetermination 234

5.6.1 The Proposals of the So-Called Biedenkopf
Commission 234

5.6.2 The Deliberations of the German Lawyers Forum 235

5.6.3 The Proposals of a Group of German Expert Corporate
Lawyers 236

5.7 Concluding Remarks 237

References 238

**6 The Impact of European Developments on German
Codetermination and German Corporate Law 243**

Otto Sandrock

6.1 Introduction 244

6.2 Two Doctrines on the Proper Law of Companies in Effect
in the National Conflict of Law Rules of the EU Member
States 246

6.2.1 The Doctrine of Incorporation 246

6.2.2 The Theory of the Real, Administrative Seat (So-called
Seat Theory) 247

6.3 The Impact of Art. 49(1) and 54 TFEU: The Freedom
of Establishment Within the EU 249

6.3.1 The History of the Freedom of Establishment
for Companies Within the EU 249

6.3.2 Articles 49(1) and 54 of the TFEU as Cornerstones
of the Freedom of Establishment 250

6.4 Some Basic Judgments of the ECJ Dealing with the Freedom
of Establishment 251

6.4.1 The Transfer the Factual, Administrative Seat of a
Company 251

6.4.2 The Transfer of the Registered Seat (Connected
with a Change in the Substantive Law Governing the
Company) 262

6.4.3 Summary 266

6.5 The Impact of the ECJ Rulings on German Courts, German
Legislation and German Law Practice 269

6.5.1 Partial Conversion of German Courts to the Doctrine
of Incorporation 269

6.5.2 Purview of the Doctrine of Incorporation: Companies
from EU and EEA Member States 269

6.5.3	Continued Application of the Seat Theory to Companies from Non-EU States or from Non-EEA States	271
6.5.4	The Amendments of the German Statutes on Public and Private Limited Companies	274
6.5.5	German Companies Transform Themselves into English Limited Companies	276
6.5.6	The Proposal by a German Government Commission for New Statutory Regulations on International Company Law	278
6.6	The Creation, on the Level of the EU, of New Legal Organizations of Companies	280
6.6.1	The Creation of the <i>Societas Europaea</i> (SE) and the System of EU Codetermination	280
6.6.2	The Creation of a <i>Societas Europaea Privata</i> (SPE) . . .	295
6.6.3	The Creation of a <i>Societas Unius Personae</i> (SUP) and Codetermination	300
6.7	The Cross-Border Mergers of Limited Companies	301
6.7.1	The Sevic Decision by the European Court of Justice (2005)	301
6.7.2	The Directive on Cross-Border Mergers of Limited Companies and Germany's Implementation of that Directive	303
6.8	Recent Developments in a Nutshell	304
6.8.1	Some Fundamental Changes	305
6.8.2	Some Unwavering Institutions	318
6.9	Concluding Remarks	320
6.9.1	Codetermination Wins in Acceptance	320
6.9.2	Driving Factors	321
	References	324
7	Accounting as the Documentary Proof of Good Corporate Governance	329
	Claus Luttermann	
7.1	Back to the Future	330
7.2	Handling the 'Invisible'	332
7.3	Accounting Law	332
7.3.1	Accountability	332
7.3.2	A Complete Set of Financial Statements	334
7.3.3	European Law and IFRS	335
7.3.4	General Rule (<i>Bilanzwahrheit</i>) and Conflict of Laws . . .	337
7.3.5	IASB/IFRS: Lack of Legitimacy	338
7.3.6	German and European Law ('IFRS')	340
7.3.7	Regulatory Interactions	342
7.3.8	Corporate Governance Statement (Management Report)	342

7.4	Financial Statements: ‘A True and Fair View’	344
7.4.1	International Focus and Comparative Law	344
7.4.2	European Court of Justice (ECJ)	345
7.4.3	Guidance: Facts and Materiality	347
7.4.4	IFRS, Company Law and Tax Law	348
7.4.5	Rules of Accounting	349
7.4.6	Expectation Gaps and Procedural Law	350
7.4.7	Completeness: No ‘Off-Balance Sheet’	352
7.5	Valuation	354
7.5.1	Financing and the ‘Numbers Game’	354
7.5.2	The Fall of Lehman Brothers Inc.	355
7.5.3	The Legal Focus of Accounting Practice	356
7.5.4	The Procedural Law of Faithful Accounting	357
7.5.5	Conclusion for Corporate Directors and Auditors	359
7.6	Accounting and Company Groups (<i>Konzerne</i>)	359
7.6.1	Consolidated Financial Statements	359
7.6.2	Liability: Separate Legal Entity and International Taxation	361
7.6.3	Cash Pooling and Liability (Separate Legal Persons)	363
7.7	Accounting, International Allocation of Assets and Reform	364
7.7.1	Legal Order and Competition	364
7.7.2	Reform in Germany (‘BilMoG’ and ‘BilRUG’)	365
7.7.3	The ‘BilMoG’: Some of the Rule Changes	366
7.7.4	German and European Rule of Law (SMEs)	368
7.7.5	Fair Competition?	370
7.7.6	Comparative Law: Regional ‘IFRS’	371
7.7.7	Linguistic Diversity and European ‘IFRS’	374
7.7.8	European Accounting Law and Multijurisdictional Approach (Convergence with Foreign ‘GAAP’)	375
7.8	Auditing, Control and Sanctions	378
7.8.1	About Watchdogs and Materiality	378
7.8.2	Basics, Reforms and Lessons from the Crisis	379
7.8.3	Disclosure, Oversight and Enforcement	381
7.8.4	Liability in the European Context	383
7.8.5	Sanctions: Some Rules and Reasonableness	385
7.9	Legal Protection (Rechtsschutz)	387
7.9.1	European System	387
7.9.2	Procedural Concept of the Valuation of Companies (Assets)	388
7.9.3	International Court of Accounting	389
7.10	Perspectives of a World Monopoly: IFRS and XBRL	390
7.10.1	The Claim to Monopoly by the IASB	390
7.10.2	XBRL: The Financial Reporting Revolution	391
7.10.3	‘IFRS for SMEs’ as a Trojan Horse and Subsidiarity	392

7.11	Strategic Governance and Audit Committee	393
7.12	Concluding Remarks and Perspectives	395
	References	396
8	Legal Requirements for the Proper Appraisal of Companies: A Substantive Civil-Procedural Concept	401
	Claus Luttermann	
8.1	On Worlds of Make-Believe	402
8.2	The Valuation of Companies as a Legal Domain	403
8.2.1	The Order of Assets (<i>Vermögensordnung</i>)	403
8.2.2	Valuation Law: Legal Analysis of the Economy	404
8.2.3	European Law and International Law Perspectives	404
8.3	Corporate Governance and Valuation Law	406
8.3.1	Financing and Valuation of Corporations	406
8.3.2	Valuation: Occasions and Legal Foundations	407
8.3.3	Valuation Law for Entrepreneurs (<i>Unternehmer</i>)	408
8.3.4	Valuation of Companies (Source of Value)	409
8.3.5	Contractual Regulations and Legal Protection	410
8.4	Cash Compensation of Minority Partners (Shareholders)	411
8.4.1	Conditions of Valuation Law	411
8.4.2	Corporation and Jurisdiction	412
8.4.3	General Protection System	414
8.4.4	Entrepreneurial Freedom and Protection of Third Parties	415
8.4.5	Valuation Law Consequences	416
8.5	Legal Objectives for Proper Valuation	417
8.5.1	Imperative of Truth: Factual Basis	417
8.5.2	Valuation Concept by Civil Procedure Law	418
8.5.3	Accounts: Estimates and Analysis of the Past	418
8.5.4	Insolvency Law (Reorganisation) and the Principle of Prudence	420
8.5.5	Legal Protection and Valuation Methods	421
8.6	Judicial Practice (<i>Rechtsschutz</i>): Core Aspects and Consequences	422
8.6.1	Substance-Oriented Valuation (Fair Value)	422
8.6.2	Estimated Values: Basis and Limits of Discretion	424
8.6.3	Guideline for Implementation and Examination	425
8.6.4	Due Diligence (Liability) and Appraisal Report	426
8.6.5	Judicial Practice in the Law of Evidence	426
8.7	Concluding Comparative Remarks	427
	References	428

9	Banking on Trust as Individual Responsibility: Corporate Finance, Speculation and Global Capital Markets	431
	Claus Luttermann	
9.1	Managing the Corporation (Focus)	432
9.2	On Corporate Financial Oligarchy	433
9.2.1	Pax Americana	433
9.2.2	Casino Wall Street	434
9.2.3	Non-Transparency: Bankers, Technologies and Corporatism (Panama Papers)	435
9.3	Reflections on Corporations, Capital and Control	437
9.3.1	Corporation Finance	437
9.3.2	Concepts and Practice of Control	438
9.3.3	Personal Qualification and Independence	439
9.4	Germany: Personal Duty of Care and Responsibility	441
9.4.1	Legal Foundations (Overview)	441
9.4.2	On the Liability of the Management Board Members (Business Judgement Rule)	442
9.4.3	Speculative Transactions and Company Financing	443
9.5	International Developments and Influences	446
9.5.1	The Wind of Change	446
9.5.2	Controlling German Banks: Mismanagement	448
9.5.3	Tightening of Personal Liability (U.S. Yates Memorandum) and the International Order of Assets (<i>Vermögensordnung</i>)	451
9.6	Global Corporate Finance and Hyperspeculation	452
9.6.1	Governance: Financing of Infinite Brassiness	452
9.6.2	Exorbitance (Hyperspeculation) and Gold Standard	453
9.6.3	The Goldman Sachs Case	455
9.6.4	Financial Engineering: Collateralized Debt Obligations (CDO) and Credit Default Swaps (CDS)	456
9.6.5	Deutsche Bank AG (International)	458
9.7	Macroeconomics of Corporate Governance	461
9.7.1	Real Economy and Systemic Risk: ‘Too-Big-To-Fail’?	461
9.7.2	The Practice of a Paradigm Shift	462
9.7.3	Legal Analysis of the Economy Instead of Exorbitance	463
9.8	European, German and Global Perspectives	465
9.8.1	Financial Institutions and Beyond	465
9.8.2	Comparative Law: Corporate Directors and Boards	466
9.8.3	Restriction of Mandates of the Supervisory Board	469
9.9	Concluding Remarks and Perspectives	471
	References	473

10 Corporate Governance and Corporate Compliance 477
Matthias Casper

10.1 Corporate Compliance: Temporary Fashion and the Concept
in Law 478

10.2 Interrelation Between Corporate Governance and Corporate
Compliance: The Programme 480

10.3 Corporate Compliance as a Management Task 481

10.3.1 The Duty of Legality as a Starting Point 481

10.3.2 Organisational Duty as a Characteristic of the Duty
of Legality for all Stock Corporations 484

10.3.3 Possible Content of the Duty to Establish a Compliance
Department 488

10.3.4 Legal Consequences of a Violation of the Duty to
Establish a Compliance Department: Applicability
of the Business Judgment Rule 490

10.4 The Role of the Supervisory Board 492

10.4.1 The Underlying Principle 492

10.4.2 Scope of the Monitoring Function 493

10.4.3 Delegation to the Audit Committee 495

10.4.4 Transmission Duties of the Compliance Department
to the Supervisory Board in the Event of an Involvement
of the Management Board 496

10.5 Selected Specific Issues 497

10.5.1 Independence of the Compliance Department 497

10.5.2 Whistle-Blowing as a Necessary Part of a Compliance
Department 499

10.5.3 Particulars of Compliance Systems Within Company
Groups 501

10.5.4 Particularities for Investment Services Companies 506

10.6 Summary: Corporate Governance and Corporate Compliance—A
Conflicting Relationship? 511

References 512

**11 Corporate Governance in the EU, the OECD Principles of Corporate
Governance and Corporate Governance in Selected Other
Jurisdictions 517**
Jean J. du Plessis and Ingo Saenger

11.1 Introduction 518

11.2 European Union 519

11.2.1 Enhancing Corporate Governance 519

11.2.2 European Corporate Governance Forum (ECGF) 522

11.2.3 Corporate Governance and Financial Institutions 524

11.2.4 The EU Single Market 524

11.2.5 Internal Market and Convergence with Foreign
GAAP 525

11.2.6	Significance of Continued EU Corporate Governance Harmonisation Acknowledged	527
11.2.7	Recent Harmonisation Initiatives Legalised through EU Directives	527
11.2.8	Recent Developments in the EU Regarding Gender Quota Legislation	531
11.2.9	Reflection	534
11.3	G20/OECD Principles of Corporate Governance	534
11.3.1	Background to the G20/OECD Principles of Corporate Governance	534
11.3.2	Broad Aims and Application	535
11.3.3	Structure	536
11.3.4	Ensuring the Basis for an Effective Corporate Governance Framework	536
11.3.5	Disclosure and Transparency	537
11.3.6	Conclusions on G20/OECD Corporate Governance Principles	539
11.4	United States	539
11.4.1	Background to the Corporate Governance Debate in the USA	539
11.4.2	The American Law Institute's Involvement in the Corporate Governance Debate	541
11.4.3	The Securities and Exchange Commission	544
11.4.4	The Sarbanes–Oxley Act of 2002: The USA Response to Collapses Like Enron and WorldCom	545
11.4.5	Some Perspectives on SOX and Its Effect	547
11.4.6	NYSE: Section 303A: Corporate Governance Standards	549
11.4.7	Summary of the Most Important NYSE Corporate Governance Rules	550
11.4.8	The Dodd–Frank Wall Street Reform and Consumer Protection Act (The Dodd–Frank Act)	551
11.5	United Kingdom	553
11.5.1	Background to the Corporate Governance Debate in the United Kingdom	553
11.5.2	The Cadbury Report and the Unfolding of the Concept of 'Corporate Governance' in the United Kingdom	554
11.5.3	The Greenbury Report (1995), the Hampel Report (1998), the Smith Report (2003) the Higgs Report (2003) and the Walker Review (2010)	556
11.5.4	The UK Approach to Corporate Governance	559
11.5.5	The 2008 UK Combined Code and the 2012 UK Corporate Governance Code	560
11.5.6	The Stewardship Codes	565

11.6	Australia	566
11.6.1	Background to the Corporate Governance Debate in Australia	566
11.6.2	The Bosch Reports	569
11.6.3	The Hilmer Report	573
11.6.4	The Virtues of Good Corporate Governance in Australia Between 1991 and 1998	575
11.6.5	The Australian Securities and Investments Commission	576
11.6.6	The ASX Group	580
11.6.7	Changes	583
11.7	Concluding Remarks	587
	References	588
	Index	593