

# THE PUBLIC INTEREST AND THE COMPANY IN BRITAIN AND GERMANY

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## REPORT

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## SUMMARY

- This study is principally concerned with public interest agendas in relation to the company and how far these differ in Germany and Britain. It is not concerned with the detail of external corporate regulation, but with how the internal structures of the company are constituted by particular political understandings of the public interest, which become embodied in formal and informal rules.
- We examine factors which shape the *politics of the public interest* in relation to the company: firstly, the role of political ideas and interests in creating political coalitions which express a particular conception of the public interest; secondly, the extent to which rules and norms embodied in institutions and legal cases shape subsequent expectations of how the company is related to the public interest, and how it should behave; thirdly, how the constraints and opportunities of the global economy shape attitudes towards the boundaries of legitimate interference in company affairs; and fourthly, whether European integration substantially shapes company law in a way that can be distinguished from national legislation.
- Historically, we show how the politics of the public interest in Britain and Germany has defined the public interest in relation to the company differently, and set different limits of legitimate state interference in the structure and behaviour of the company. We

contrast the British model of the company as a private association with the German model of the company as a constitutional association, and review the evolution of public interest agendas in the two countries since the introduction of limited liability in Britain in the 1850s and the reform of German corporate law in the 1870s, and how they have shaped the development of company law and regulation in response to changing economic and political circumstances.

· Company law in Britain has tended historically to favour a 'private association' model of the company. In the UK the public interest in relation to the company has historically been identified with the maximisation of profits, the protection of small private investors, and the reluctance of the state to specify particular forms of company structure. Hence, company law has been primarily concerned with issues such as the fiduciary duties of company directors and the obligation imposed on all companies to disclose financial information and hold shareholders' meetings. Corporate law leaves a large scope for shareholders and managers to decide procedures for making decisions by contract. Where the state intervenes, the emphasis has been on protection of minority shareholder rights and on market-making rules such as accounting and disclosure. Other social and economic concerns, such as the treatment of employees and the impact of corporate activ-

ity on local communities and the physical environment, have been viewed as issues *external* to the company and company law. The interests of employees have traditionally been protected through collective bargaining, and legislation aimed at reducing adverse third-party effects assumed until recently an adversarial relationship between the company and affected groups. Most perceived deficits in the UK system have been addressed by a proliferation of voluntary Codes of Conduct in the 1980s and 1990s and efforts to diffuse best practices through shareholder activism.

By contrast, a 'constitutional' model of the company predominates in Germany. Constitutionalism is distinguished by the strong use of non-contractual rights and obligations of its members, rooted in public authority. Private actors are often obligated by law to consider 'public' interests in addition to the private interests they represent. For example, works councils and management have the legal obligation in the Works Constitution Act to work together in the interests of the company. The two-tiered board structure also 'constitutionalises' shareholder interests by specifying procedures for shareholder representation and monitoring in a more detailed manner than board systems in most

countries. The scope of public interest obligations for Germany companies is also wider than in Britain, incorporating a pluralist structure of interests within company governance. The most prominent example is codetermination (*Mitbestimmung*) of employees in works councils and the supervisory board (*Aufsichtsrat*) of companies.

This report analyses the changing context for public interest agendas toward the company particularly in the 1990s. This has three main aspects: the extent to which a more liberal global economy creates pressures for convergence of institutional arrangements within capitalist economies; new public interest concerns advanced by pressure groups and social movements, particularly concerning the environment and the rights of minorities; and pressure from the EU on member states to adopt uniform European rules and practices. The report analyses the scope of public interest concerns. It shows how Germany and Britain differ in the typical *instruments* of public policy for pursuing public interest claims against the company. Three main aspects of the company in relation to public interest agendas are analysed for both Britain and Germany: companies and shareholders; companies and employees; and companies and the community.

## INTRODUCTION

The company is a vital institution in all modern economies, but its character as a social and economic actor and the legal rules that shape it vary considerably between national systems. In the UK the company is viewed as a private association, while in Germany the company has a 'constitutional' structure stipulated by public authority. A well-established comparative literature argues that the differences between these two conceptions are so fundamental that they constitute different models of capitalism, reflecting distinctive sets of historical attitudes and institutional features (Shonfield, 1965; Albert, 1993). More recently, this comparative political economy literature has been concerned with the extent to which the different patterns of corporate organisation in Europe may be converging as a result of competitive pressures in international financial and product markets and the harmonisation of regulatory systems (Streeck, 1997; Crouch and Streeck, 1997). Extensive though this literature is, there has so far been little work systematically comparing the different *political* and *legal* assumptions on which the company is based in different countries and linking this to different understandings of the *public interest* with regard to company behaviour and regulation which are found in different countries. The present study, funded by the Anglo-German Foundation, seeks to fill this gap in respect of Germany and Britain.

The diverse architecture of the company across Europe has conventionally been explained by differing structures of ownership and control and governance mechanisms, particularly the roles of concentrated

shareholdings as against dispersed holdings and reliance on the take-over market (Franks and Mayer, 1990). Recent research has also focused on the role of company law in explaining the divergent patterns of corporate ownership (La Porta *et al.*, 1998; Schleifer and Vishny, 1996; Berglof, 1997). This work draws attention to the importance of the different legal foundations of the company in shaping the relationship between companies, their constituent stakeholders, and society at large. These different legal structures are themselves highly contingent upon political accommodations and settlements, which are specific to each country.

A particularly neglected issue in political and legal research on the company concerns the relationship of the company to the *public interest*. Despite the criticism it has at times received, the public interest has remained a central concept within modern politics (Barry, 1964; Flathman, 1966). Public interest concerns are ubiquitous, and the public interest is constantly invoked to justify particular interventions by governments in the economy and the regulatory regime. But the term has a range of meanings, and once particular cases are examined the complexity of its use becomes apparent. Understandings of the public interest are also transformed by economic and social change. All legal systems recognise the importance of public interest issues, but the different understandings of what these entail and the inherently political nature of these judgements have rarely been drawn out. If the company is a public institution constituted by legal rules and political decisions, how are public interest obligations defined, how do they adapt to eco-

conomic and social change, and what instruments of public policy are used to enforce them?

The main focus of this report is on these different understandings of the public interest in relation to the company in Britain and Germany. In Part I we compare the political and legal notions of the company in the two countries as they have evolved since the nineteenth century. In Part II we analyse three key areas of contemporary regulation of the company in the two countries.

A company is an association which has a legal personality separate from its members. It raises finance, it contracts for various kinds of services, and it organises production (Tivey, 1978). It is the central institution of the modern capitalist economy. Although the literature on law and economics has made possible a more precise discussion on the legal and financial aspects of the company, relatively little work analyses normative and empirical aspects of how the company is related to the public interest.<sup>1</sup> How do legislators and administrators see the company's objectives when they make regulatory decisions? What makes a company legitimate? Who has a right to participate in the company's operation? How is power distributed within the company?

There are at least three broad arguments in relation to the corporation which give rise to a public interest agenda. The first is the issue of the concentration of economic power, and the political power which it confers. The economic power of corporations is seen to have political consequences for states, communities and individuals. The

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<sup>1</sup> German-language literature on the public interest uses two overlapping concepts of *öffentliches Interesse* (public interest) and *Gemeinwohl* (common good), both of which are used in legal doctrine.

concentration of resources in the hands of managers provides them with economic and social power that may undermine the public interest. In post-1945 Germany, for example, law-makers justified checks on managerial autonomy through employee codetermination because in the 1930s autonomous managers had used their economic power to support the Nazi regime. Concentration of economic power has long been a significant political issue in the United States, because it is seen as threatening democracy<sup>2</sup> as well as the ideals of free competition (Roe, 1994). Concentration of market power remains a concern in the perennial debates over the 'power of banks' (*Macht der Banken*) in Germany.

A second argument focuses on the economic consequences of corporate behaviour. Companies impose externalities on other agents in the community through their activities. Negative externalities arise in connection with the monopoly power of large corporations (a traditional concern of liberals who have argued that there is a public interest in preserving fair competition and protecting consumers), environmental pollution, and bankruptcy (especially when caused by insufficient monitoring and the lack of effective governance structures). Positive externalities arise through employment, economic growth, and innovation. States have become increasingly concerned to use regulation to promote internationally competitive business environments and attract or retain corporate investment.

A third argument is that corporate behaviour also has broader social consequences which involve a public interest. Examples include labour unrest, income inequality, discrimination, or confidence in the financial system.

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<sup>2</sup> In the USA, concern is often focused on political campaign finance by corporations.



In Germany such concerns led to the demand for institutions centred on the corporation to reduce individual risks through social insurance or encourage social peace through well-defined participation rights within managerial hierarchies (codetermination). In Britain, such concerns include frameworks for industrial relations, and more recently concern over gender and racial discrimination.

Public interest agendas involving the company are examined in this report with regard to three principal relationships. The first is the relationship between *companies and investors*, which refers most frequently, but not exclusively, to shareholders. In Germany, the relationship between companies and investors has been viewed as problematic since the introduction of limited liability in 1870. The agency problems of the modern corporation, stemming from the incapacity of fragmented shareholders to effectively monitor management, led to the introduction of a two-tier board system that 'constitutionalised' relations between company bodies. This measure was rooted in Germany's experience of a speculative crisis in the 1870s, and went together with a more general political break from the doctrine of economic liberalism in favour of non-liberal approaches to 'embedding' the emerging market economy in order to preserve social stability (Streeck and Yamamura, 2000). This approach guided legal developments to the present day, and has survived recent shifts supporting more liquid capital markets and stronger protections for individual shareholders. In the UK, the country's political and legal leadership have traditionally viewed the relationship between the company as a private association (Parkinson 1993) and its investors as relatively unproblematic. Even as ownership became more dispersed this attitude persisted, along with a concern with the effect of increasing regulation on the competitiveness of British business. Minimal regulation was advocated because there was confidence

that change in personnel and policies in poorly managed companies could be brought about by the workings of the market for corporate control and the ability of investors to exit. But it came to be recognised that the market for corporate control was unlikely to work efficiently unless investors were able to make informed decisions, for which they needed high disclosure of information about the company's financial management. As a consequence, efforts to deal with the concerns of investors relating to corporate governance have revolved around transparency and the auditing of information, as well as voluntary measures. Compared with Germany, mandatory interference in the internal constitution of the firm has been relatively limited.

The second relationship is that between *companies and their employees*. In Germany, worker participation in corporate governance was promoted as an important objective, particularly during the Weimar Republic and in the Federal Republic since 1949. However, other public interest objectives existed and continue to exist alongside the quest for industrial democracy. The imperial government saw the nation's productive capacity as a public interest in its own right that justified institutionalising cooperative decision-making within the firm in 1905 and 1916. The Federal Republic viewed industrial democracy as a means not only to checking the power of companies in its early years, but also as a means for ensuring the political legitimacy of the capitalist system in the mid-1970s. In Britain, in contrast, it was private ownership itself that was challenged in the name of controlling the company and legitimising the structure of the economy, rather than the internal structure of privately owned companies. There was a widespread assumption that the company was a private association that should either be left alone in accordance with *laissez-faire* principles, or abolished altogether in the name of social

justice. Compared to Germany, what is largely missing in the British debate is the idea of the company as an association whose internal structures could be altered in order to pursue pragmatic compromises between capital and labour.

The third relationship is that between *companies and the broader community*. This became a stronger public interest agenda in the 1970s, when public opinion in both countries focused attention on post-materialist issues such as environmental protection and equal treatment for women and racial minorities. In this case, attitudes about the desire to promote these goals are not so very different in Britain and Germany, but the mechanisms by which they are pursued are heavily influenced by patterns of (non-)interference in company affairs established to manage relations with investors and with employees.

This report seeks to explain the differences as well as the similarities between Britain and Germany in respect of the way the public interest is conceived and implemented in relation to the company. The purpose of com-

parative studies of national systems is to understand the nature of each national system more clearly by throwing it into sharper relief, asking unaccustomed questions of each system, and exposing what is particular and what is common in the institutional pattern and policy responses of each country. The second objective is to provide a basis for evaluating the success of particular patterns of adaptation to external economic and political changes. Germany and Britain are particularly suitable for this kind of comparison, both because of their broadly equivalent size, wealth and importance within the European Union, and because there is a long-established literature which has drawn attention to the different ways in which the legal systems, political systems, and economic systems are organised in the two countries (Coates, 2000). Britain and Germany have sometimes been represented as two contrasting *ideal types* of economic and political organisation. Despite this, they also share a number of important attributes and there are persistent calls in both countries for policy borrowings in the design of economic and political institutions and in the formulation of public policy.

# PART I

## HISTORICAL PERSPECTIVES ON THE COMPANY AND THE PUBLIC INTEREST IN BRITAIN AND GERMANY

### Introduction

Between 1844 and 1870, both Britain and Germany changed their company and investment laws to encourage the development of joint stock corporations. The capacity of such companies to pool capital, enter into contracts as legal persons, and take advantage of limited liability as a safety net for entrepreneurial activity were seen as requisites for strong economic growth. It also facilitated management fraud, had the potential to exacerbate economic crisis, and opened up the prospect of corporate power being abused without proper accountability to shareholders or the community.

In Britain, the company from the start was conceived as a private association of shareholders. The company was initially a 'they' – a 'company of shareholders' – rather than an 'it'. This conceptualisation of the company changed during the course of the nineteenth century as the legal implications of separate corporate personality were worked out, but the equation of the company with its shareholders has continued. Groups connected with, or affected by, companies have traditionally been regarded as 'outside' the company. If their interests needed to be protected by statutory intervention this would be by forms of regulation external to company law, applying to all forms of business, whether companies or not, and consisting of finite constraints on the business's operations rather than requiring a reassessment of the company's goals.

For most of the Victorian period the predominant view was that the law should be primarily facilitative. The members of a company

were the best judges of their own interests and the role of the law was to enable them to give binding effect to the business arrangements they wanted to adopt. This view was buttressed by a property rights argument that resists intrusion into the internal workings of the company. A series of financial scandals made clear, however, that providing adequate safeguards for non-managerial shareholders could not be left to private ordering. The main response was to impose a regime of mandatory financial disclosure, the details of which have evolved over many Companies Acts and, latterly, in order to implement EC directives. Transparency is viewed as enabling shareholders to hold management to account through internal 'voice' mechanisms, and – at least as important – as securing the foundations of an efficient capital market and associated mechanisms of controlling management, particularly through the market for corporate control.

In Germany, corporate law was approached in a very different way. While shareholders remained the principles of the company, a more regulative approach was taken regarding shareholder rights. The widespread fraud and economic crisis in the 1870s shook the faith of political elites in liberalism and prompted the state to intervene in the internal structure of the firm. Rather than a voluntaristic approach to shareholder control, public authority was used to 'constitutionalise' the interactions between shareholders and management through a densely regulated two-tier board system. The two-tier system delegated many supervisory tasks from the shareholders' meeting to a newly created supervisory board (*Aufsichtsrat*), as well as separating management and supervisory functions. In contrast to Britain, the state

viewed measures as necessary to protect the internal functioning and stability of corporate organizations as a matter of public interest in protecting public confidence and the success of the market economy. Over the next decades, this 'constitutional' model of company decision-making was gradually expanded to include other stakeholders, particularly employees, through representation on the supervisory board and works councils. This pluralistic and procedural conception of the firm implies that all actors are obligated to consider 'public' interests in addition to the private interests they represent. This part of the report traces this evolution with regard to the development of public interest agendas in both Germany and England.

## GERMANY

### The Origins of Non-Liberal Company Law

The earliest corporations with limited liability within the German states were established by state concession to undertake specific activities in the public interest. Railways and trading ventures were among the sectors to establish corporations under the *Eisenbahngesetz* (Railway Law, 1838) and the Prussian *Aktiengesetz* (Joint Stock Corporation Law, 1843). By 1861, a General German Commercial Code was negotiated between the German states as part of the Customs Union. The Code established general guidelines for granting concessions for corporate charters following the Prussian example, although the Hanseatic states were allowed to continue their liberal approach to granting charters without state concessions.<sup>1</sup> The concession system was justified in order to protect creditors under conditions of

<sup>1</sup> Representatives from Hamburg argued that their experience without state concessions had not led to abuses and that state guarantees may in fact decrease private responsibility and care.

limited liability, as well as protecting the public interest so that, given the 'unusually large sums of capital brought together by stock, the financial power of such corporations is not used to the detriment of the general good or national industry' (Makower, 1868). The state retained powers to revoke corporate charters without compensation 'given compelling reasons of the general good' (Makower, 1868), while posing requirements for company statutes. Corporations were also required to establish a management board (*Vorstand*) to legally represent the corporation and provide a clearly identifiable management that could be held accountable to shareholders and the state.

The concession system ended in 1870 with an amendment to the Commercial Code. The departure reflected the view that the state could not exercise effective control over corporate investment (Horn, 1979). Rather, corporate law should seek to facilitate private actors in protecting their interests and to ensure the technical functioning of the company. The new law established a 'normative system', opening incorporation to all once certain organizational norms were met. These normative stipulations remained relatively mild, reflecting the economic liberalism of the Prussian bureaucracy. In place of state concession, a supervisory board was made mandatory. Its duty was to 'supervise the management of the corporation', specifically to examine the balance sheets and proposed distribution of profits in order to make recommendations to the shareholders' meeting.<sup>2</sup> The 1870 law thus introduced the ba-

<sup>2</sup> In contrast to the 1861 law, the supervisory board (rather than the management) had the power to call a shareholders' meeting. The supervisory board was given information rights, as well as held accountable for certain damages if wrong-doings occurred with their knowledge. However, the shareholders' meeting retained the direct power to appoint management, set corporate statutes and intervene directly in management decisions.

sic features of the two-tier board structure in Germany, with competences divided between the shareholders' meeting, the supervisory board, and the management board. The relations between the three organs remained loosely defined (see Appendix 3) and went little beyond codifying common practices where shareholders voluntarily elected a small group of representatives to monitor management.

#### Crisis and the Abandonment of Liberalism

Under the liberal 1870 law, the number of corporations quadrupled, while one in thirteen went bankrupt and one in three were liquidated. Shareholder losses totalled around half a billion Marks. This financial collapse, referred to as the *Gründerkrise*, involved widespread fraud.<sup>3</sup> Specific economic factors had fuelled speculation: a demand boom and economic expansion through German unification and from France, nationalistic optimism, and excess financial liquidity through high profits and French war reparation payments. The founding of new and poorly governed corporations led to excess capacity, price competition and quick bankruptcies. The financial crisis resulted in widespread public distrust of corporations generally, particularly regarding the short-term and speculative interests of shareholders (Hommelhoff, 1985).

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<sup>3</sup> As described in the preamble to the corporate law reform, 'directly after the end of the state concession system, a period of stock fraud began (...) these facts suggest that in founding [corporations] the objective need of the firms seldom played a role (...) In the place of associations of people interested in the activity and growth of the enterprise and who invested their capital and sought the participation of other capital for this purpose, there appeared so-called syndicates who, for the purpose of forming a corporation, sought out some preferably nondescript enterprise in order to create shares as a commodity on the stock exchange and then to sell them' (Reichstag, 1884: 412).

The *Gründerkrise* began a movement for corporate law reform that took over ten years to complete (see Jackson, 2000a). The first reform proposals by the Prussian Minister of Trade in 1873 were repeatedly delayed by liberal state bureaucrats and the legislature. The liberal position against reform typically cited several arguments: the financial collapse had many non-legal sources that could not be remedied, over-regulation would endanger entrepreneurship and individual responsibility, and corporate law reform should only be undertaken in conjunction with more comprehensive reforms of the Commercial Code and capital market regulation. Prussian representatives continued formulating proposals and pressuring the *Reichskanzleramt*, eventually outvoting the liberal Hanseatic coalition in the *Bundesrat* in 1874. The state ministries nonetheless continued to drag their feet. By 1878, however, Germany's political coalition had shifted fully to nationalist conservatism, and began purging liberals from the bureaucracy. Hermann von Schelling replaced the liberal Heinrich von Friedberg as State Secretary of the *Reichsjustizamt* in 1879. The Ministry was no longer able to maintain its liberal ideals in resistance to Bismarck's new economic policies.

The reform of liberal corporate law must therefore be seen in the context of a more general break with the doctrine of economic liberalism and the rise of a new political discourse coalition among the state bureaucracy in support of 'conservative social reform' (Lehmbruch, 2000). This new discourse coalition displaced the discourse of 'bureaucratic liberalism' guiding economic policy through the Customs Union and early 1870s (Langewiesche, 1988). The deflationary crisis and financial crash in 1873 shook the faith in economic liberalism among German elites, and went along with a political realignment. National-liberal party dominance was replaced by a coalition of conservative and Catholic interests with the support of a

protectionist alliance between heavy industry and large agriculture. Starting around 1878, a new policy direction stressed state action to protect general welfare (state ownership of railways and utilities, Bismarck's social insurance schemes, and protectionist trade policies).<sup>4</sup> Within this context, corporate governance reform was considered an important pillar of the 'social question'.

The resulting Second Corporate Law Reform in 1884 represents several rounds of deliberations between 1880 and 1884 by the *Reichsoberhandelsgericht*, the Ministry of Justice, an expert committee for corporate law reform,<sup>5</sup> the Ministry of the Interior, the *Bundesrat*, and the *Reichstag*. Rather than restore the concession system or continue the liberal system supported by Hanseatic representatives, reformers set about improving and expanding the normative system of 1870 in order to address the public interest consequences of 'agency problems' in the modern corporation.<sup>6</sup> The reformers developed a uniquely non-liberal approach towards corporate property rights.

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<sup>4</sup>The most influential intellectual pioneer was Lorenz Stein (1815–90). Stein was inspired by Hegel's view that the achievements of the market economy must be balanced by a mix of administrative regulation by the state and self-regulation by organized interests in containing its disruptive effects. As a 'general estate', the bureaucracy was to be central in mediating social conflict in the public interest.

<sup>5</sup>The committee included members of the Ministry of Justice and ten outside experts, including several lawyers, public sector bankers and university professors. Prominent were founding members of the Deutsche Bank, Adelbert Gottlieb Delbrück (1822–1890), and the *Verein für Socialpolitik*, Adolph Wagner (1835–1917). While Wagner defended strong normative requirements, the committee generally moved to relax new requirements.

<sup>6</sup>The *Gründerkrise* was also important in leading to the Stock Market Law (*Börsengesetz*) in 1896 to address many similar issues.

Reformers were sceptical about the effectiveness of shareholder democracy. Shifting majorities of the shareholders' meeting were not seen as enough to guarantee effective control over management, nor were elected auditors. The 1870 law was criticized as reinforcing the shareholders' 'natural' passivity, since the contractual freedoms it allowed had led to company statutes written by the founders in which nearly all effective shareholder influence on company decisions was delegated to directors. For reformers, the alternative of strengthening the individual rights of small shareholders was rejected for several reasons:

- Small shareholders are unlikely to monitor the corporation effectively due to their lack of expertise or long-term interests. The shareholders' meeting alone would not be enough to monitor management, due its shifting majorities and free rider problems. 'Next to a management board equipped with the most far reaching administrative powers, only a continuous organ can successfully realize the interests of the corporation and its creditors' (Reichstag, 1884: 457). The remedy was seen in strengthening the role of the supervisory board.
- Strong *individual* shareholder rights were viewed as potentially disruptive. Shareholders were viewed as having only short-term interests that would be the source of possible disturbances to company management if individual rights were too strong.<sup>7</sup> Direct and regular influence in company affairs was not desired. For example, the 1884 reform gave shareholders few rights to

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<sup>7</sup>The responsibility of management would be impaired, management could be blackmailed by shareholders' who might disrupt decisions, etc.

change the agenda of the shareholders' meeting. Information rights for individual shareholders were not discussed.<sup>8</sup>

German authorities viewed share ownership as the domain of the wealthy classes, due to its inherently risky and speculative nature and to the need to ensure sufficient incentives for shareholders to monitor management (Pross, 1965: 64). An important and contested reform measure thus involved raising the minimum nominal value of shares to DM1000 in order to 'protect small capital' – in Britain, by contrast, no minimum value was set.

Both *laissez-faire* and more 'enlightened' liberal approaches, such as promoting corporate disclosure and individual shareholder rights, were thereby defeated in favour of a non-liberal alternative. The most important features of the 1884 reform aimed at reshaping the internal organization of the corporation to strengthen the shareholders' meeting and separate the responsibilities of the supervisory board, management board, and shareholders' meeting.

The shareholders' meeting was viewed as the central organ of the corporation. However, its contractual freedoms became greatly restricted. Some restrictions aimed at preventing management from usurping decision-

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<sup>8</sup> The absence of individual rights was in stark contrast to the prevailing English view of the time (Reichstag, 1884). Individual rights later were categorically denied by a decision of the *Reichsoberhandelsgerichts* in 1892 (Grossfeld and Ebke, 1977). In England, derivative suits had developed as early as 1828, where individual shareholders succeeded in holding management liable. Such rights were restricted in a later court decision, but were largely unrestricted under US law since an 1855 Supreme Court decision.

making powers. For example, the power to elect the supervisory board could not be delegated<sup>9</sup> and voting rights were guaranteed to all shareholders to ensure that true majorities were represented at the shareholders' meeting. Other measures were concerned with compensating for the aforementioned failures of the shareholders meeting itself. Perhaps most startling, the election of the management board was not given to the shareholders' meeting. The central reason was that electing management is a 'technical' decision unsuitable for a large group with shifting composition (Makower, 1868: 463). The 1884 law left the method of election open to the company statutes – only the 1937 reform finally required election by the Supervisory Board.

With many important functions of the shareholders' meeting now delegated to the supervisory board, the monitoring responsibilities of the supervisory board were sharpened.<sup>10</sup> Individuals were forbidden from being members of both supervisory and management boards. Control could be exercised through a catalogue of decisions requiring supervisory board approval to be defined by company statutes, thus allowing for shareholder input. Its veto powers over management decisions could allow the supervisory board strong *ex ante* control over management while maintaining a clear separation of monitoring and management functions. The law nonetheless left open the possibility that the supervisory board could issue direct instructions to management. The law also increased the liability and obligations of individual supervisory board members.

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<sup>9</sup> To ensure its independence from the founders, the first supervisory board had to be dissolved after one year, and a completely new board elected.

<sup>10</sup> Procedures for founding corporations were also strongly regulated (see Appendix 3), but these cannot be discussed in detail here.

In sum, the reform took a surprisingly modern view of agency problems of the modern corporation and attempted to resolve them through public authority. *The non-liberal approach to protecting shareholders and ensure the functioning of business was by reducing the voluntarist and contractual nature of the corporation.* The internal procedures of corporate decision-making became 'constitutionalised' by law in order to promote effective *self-regulation* by private actors. Here the concept of 'constitution' serves as an effective metaphor to describe non-contractual conditions that circumscribe legitimate decision-making procedures – that is, the rules for rule-making. The 1884 reform had a lasting impact on German company regulation, establishing the basic institutional features of today's system, while defeating an early historical alternative along a more liberal, private association view of the corporation.

#### Reform of 1937

Corporate law was rewritten in 1937. Most of its substance was anticipated in the emergency decree of 1931,<sup>11</sup> but was also the culmination of debates during the Weimar period starting in 1925. Most scholars agree that the law does not strongly reflect Nazi ideology, and was left unchanged until 1965. The reform focused on reducing shareholder influence and introducing broad public interest provisions. A number of technical issues were improved, particularly concerning corporate disclosure, auditors, and minority shareholder protections. The supervisory board was now made exclusively responsible for electing the management board, and a maximum size for the supervisory board was set.<sup>12</sup> But the core of the reform was to increase managerial independence from shareholders. Paragraph 70 of the

<sup>11</sup> Decree of 1 September, 1931, *Reichsgesetzblatt*, 493.

*Aktiengesetz* (Joint Stock Corporation Law) obliged the *Vorstand* to manage the corporation for 'the good of the enterprise, the employees and the people and country'. The first deviations thus were made from the basic shareholder-sovereignty concept in corporate law, helping to open the way to a more pluralistic view of the corporation.

This public interest provision was influenced by the idea of a state- or council-run system of economic democracy. One stream of left political thought in Germany saw the 'organised' nature of business as a step towards state planning. Another strand posited that big business was not to be fragmented in order to promote market competition, but rather to be democratised from inside or controlled externally by the state. Under Nazi rule, the public interest provision was interpreted through a narrow nationalist notion of a *Führerprinzip* that opened management to direct Nazi party and state influence—politicising corporate governance.

#### Post-War Reforms

Post-war corporate law has incorporated several liberal elements while maintaining its 'constitutional' character (*Aktiengesetz*, 1965). The centrepiece of post-war reform was the *Aktiengesetz* (Joint Stock Corporation Law) of 1965.<sup>13</sup> Its preparation began in 1953 and led to a draft statute in 1958 under the Christian Democratic Union (CDU) (Jünger and Schmidt, 1965). A government draft was presented in 1960, but debated until its passage in 1965. The 1965 reform was not motivated by a crisis

<sup>12</sup> Supervisory boards had often grown to unwieldy sizes during the vigorous period of concentration and cartellization of German industry. Merged companies often retained all board members, and the introduction of works council delegates to the board fuelled the growth in size and reduced the effectiveness of monitoring.

<sup>13</sup> See *Bundesgesetzblatt*, 1089.



in the existing law. Its stated aim was to bring corporate law into line with basic post-war socio-political values, in particular that the right to private property is 'only to be restricted in so far as it is required to ensure the functionality and the realisation of the goals of association which the shareholder has voluntarily entered into, as well as the protection of superordinate economic and socio-political goals' (Aktiengesetz, 1965). While reaffirming the principle of shareholder control, the complexity of the economic environment requires that corporate decisions have a 'technically informed and empowered management (...) the consequence for the position of the individual shareholder is that he must accept restrictions and submit his will to that of the majority in the interests of the jointly pursued goals' (Aktiengesetz, 1965).<sup>14</sup> Thus, the reform reaffirmed the model of a strong *Vorstand* and explicitly rejected abandoning the two-tier board system in favour of an Anglo-Saxon board model. The 'collegiality' principle in the *Vorstand* was also ensured, promoting consensus decisions rather than strong chief executives.

However, reformers saw the existing law as too restrictive of shareholders' rights in a number of areas (disclosure, control over the distribution of profit, procedures for the shareholders' meeting, shareholder lawsuits).<sup>15</sup> Accounting rules were changed to make valuations more stringent and disclosure more detailed to improve shareholder influence in determining the amount of profit to be distributed. Shareholder rights in the AGM and proxy rules were strengthened. Despite their pro-shareholder

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<sup>14</sup> The law rejects giving management responsibilities to the shareholders' meeting in the name of shareholder democracy. 'A corporation is not a miniature state, the management board not a government, the shareholders' meeting not a parliament. A corporation should, as under existing law, be managed by a small number of technically expert persons' (Aktiengesetz, 1965: 96).

bent, the standards established were rather conservative by today's standards. Regulation did not address possible conflicts of interests by banks in voting shares. Nor did shareholders gain direct access to corporate books and records.

More controversial was the removal of the clause from 1937 binding the *Vorstand* to consider the public interest in managing the corporation. 'It is self-evident that the management board must consider the concerns of shareholders and employees in its actions, and therefore this need not be explicitly determined by the law. The same concerns the interests of the general community' (Aktiengesetz, 1965). The *Bundestag* claimed that the principle of social responsibility was subsumed under the German Basic Law,<sup>16</sup> as well as a variety of other regulations. Thus, the proposal that the enterprise be run with regard to the 'good of its employees, shareholders and the general public' was defeated. Constitutional courts rejuvenated the principle in the *Feldmühle* case, and the 'interest of the enterprise' became an important legitimation in debates over codetermination – although divergent interpretations exist that stress public, pluralistic and procedural ways of defining the company's interest.

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<sup>15</sup> While beyond the scope of this report, a major component of the reform dealt with so-called 'related companies' in order to protect minority shareholders and creditors in subsidiary companies, as well as increase transparency. Its aim is to regulate conflicts of interest between controlling companies and outside shareholders in a more predictable way than under American case law. The 'prevention against abuse of economic power' was an important rationale.

<sup>16</sup> The Basic Law sets out a catalogue of liberal rights, but differs from the US Constitution, for example, by explicitly linking private property rights to obligations to support the public interest. Article 14, Paragraph 2 of the Basic Law states: 'Property carries obligations. Its use should simultaneously serve the public good.' The importance of this clause related to the notion of 'socially limiting' or embedded classic rights, and giving the state the duty to limit freedoms.

### Co-Determination and the Origins of Industrial Citizenship within the Enterprise

Parallel to the state intervention into company decision-making to protect shareholder interests, codetermination reflects a long tradition of using public authority to intervene in company labour relations as a matter of public interest. Employee interests are distinctly internalised in the governance structure of companies through rights to information, consultation and codetermination in works councils, and through representation on the supervisory boards of corporations. Worker representatives are obligated to work for peaceful cooperation in the interests of the company as a whole. This reflects a strong public interest commitment to 'social peace' within the firm (Jackson, 2000a). While it cannot be discussed here in detail, codetermination must be understood in the context of associational governance in German industrial relations. A variety of governance issues, most notably wage bargaining and occupational training, are negotiated by industry-wide employers' associations and unions. By promoting quasi-public standards across companies, many conflictual issues are taken outside company-level institutions. 'Cooperative' firm-level institutions developed historically in tandem with powerful industrial unionism and corporatist institutions outside the firm – again, another difference with respect to British industrial relations.

This section addresses the impulses to state intervention in the employment relation. To an important degree, state intervention reflected political interest of the state in simultaneously repressing and coopting organized labour in Germany. Later, participation rights in companies also developed into a political programme of organised labour, thereby 'democratising' earlier state-led institutions. Employers often vehemently opposed ceding managerial prerogatives to employee representatives, while at other times employers became an ally of labour in political strug-

gles to avoid nationalisation. At the end of both world wars, employers sought to stabilise their own legitimacy by collaborating with employee representatives. Hence, for various reasons, maintaining 'social peace' with the company became a widespread political concern within German politics.

The idea of 'codetermination' (*Mitbestimmung*) pre-dated both corporations and labour unions. Its origins have complex roots and variants in Christian, socialist and romantic philosophies, as well as the notion of parity (*Parität*) and economic democracy (see Teuteberg, 1961; 1981). Under the rubric of *Organisation der Arbeit* and the concept of *Association*, many diverse ideas for a constitutional or democratic economic order were debated during the Frankfurt Assemblies in 1848–49. Codetermination in various forms became central to German discourse on the social question. The common thread was state-sanctioned parity representation of labour. Codetermination represented a socially integrative alternative to revolution or socialism, analogous to demands for constitutional rights in the political sphere, recognising that the freedom of entrepreneurs within a liberal economic order also requires obligations to prevent social ills.

### The Institutional Legacies from the Coal Industry

Organizational impulses for codetermination came only much later in the nineteenth century, particularly in the coalmining industry. Both due to its significance as an early industrialising sector and the national interest in natural resources, state intervention in the coal industry institutionalised standards and practices that later served as models for other economic sectors.

Through the mid-nineteenth century, both publicly and privately owned mines were governed by direct state control in the areas

of hiring and dismissals, working time, and social insurance. The Prussian Mining Reforms (1851–1865) finally yielded control over work organization to private entrepreneurs.<sup>17</sup> State intervention was restricted to cases of ‘compelling reasons of public interest’ (Fischer, 1974: 142).<sup>18</sup> Despite a new liberal tone, Prussian reformers retained considerably more scope than did English or French law in allowing state intervention, particularly concerning safety, workers’ health, and protection of machines. The state retained the right to unilaterally change the work plan without the consent or consultation of the mine’s owners. Intervention was linked to a prevention principle, unlike British mining inspectors until 1860 who could only warn workers and thereafter only issue fines for safety violations. The Prussian reform combined elements of ‘freedom of contract’ under a shadow of hierarchical state intervention.

These privileged state protections for miners also went together with severe restrictions on freedoms that subordinated miners to state discipline. Infractions of mine work rules were criminally punishable, unlike other contractual relations. And employees had little influence over work rules, lacking the right to organise which was collectively enforced brutally under the Socialism Law. En-

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<sup>17</sup> In Prussia, free use of private property was guaranteed in 1807, but the mining and iron industries remained exceptions. The Prussian mining reform consisted of 14 individual measures adopted between 1851 and 1863 that aimed to both liberalise existing regulation and unify rules across the German territories. These measures were consolidated into the *Allgemeines Berggesetz für die Preußischen Staaten* in 1865.

<sup>18</sup> Initial reform drafts specified obligations for state officials to intervene in the ‘economic interests of the state’. The residual of the old state tradition remained Paragraph 196, which spoke of ‘protections against effects to the detriment of the common good’.

trepreneurs effectively usurped state authority and developed an autocratic management style without the paternalistic protections formerly guaranteed to miners under the pre-reform laws. The partiality of state bureaucrats increased the aggressiveness of entrepreneurs in promoting their interests and led to an underlying political instability. Liberal contractual principles resulted in a perceived ‘proletarianisation’ of their social status, as well as living and working standards that resulted in strikes during 1872, 1889 and 1905.<sup>19</sup> Crisis renewed the non-liberal pattern of state intervention, as the state adopted a policy of cooptation. Despite Bismarck’s opposition, Kaiser Wilhelm II had taken a special interest in the social question and in the councils that had been demanded by strikers in 1889. In 1890, Wilhelm declared that factory rules should ‘no longer be decided unilaterally by employers, rather agreed upon with representatives of the employees’ (Teuteberg, 1961: 372). The councils were expected to take on board the growing working-class demands and diffuse their radicalism.

More generally, the political climate had shifted in Germany after the 1889 strike and with the rise of the Social Democrats in the 1890 *Reichstag* elections. The *Gewerbeordnungsnovelle* was passed in 1891, legally institutionalising workers’ councils (*Arbeiterausschüsse*) with limited consultation rights (Teuteberg, 1981). The regulations had little practical influence, but established a principle that employment relations were to be regulated in the public interest. In 1892, a further mining reform required firms to establish work rules for the mines that required

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<sup>19</sup> Issues of working time, treatment by supervisory personnel, and so-called ‘zero-cars’ (where supervisors refused to count mining cars not sufficiently filled with coal) were central issues in labour conflicts (Fischer, 1974).

state approval. After the 1905 strike, covering roughly 75% of mining workers and lasting nearly six weeks, employers were forced to retreat from a *Herr-im-Haus* standpoint and to accept state intervention (Weisbrod, 1989). While employers appealed to the government to crush the strike militarily, Reichskanzler von Bülow declared such a struggle against social democracy would not serve the 'public interest'. A mining law reform was announced to address the strike demands, hence ending the strike without employers ever directly negotiating with the labour unions. The 1905 regulation required work rules to have the consent of a workers' council (*Arbeiterausschuss*), and particular rules were directly banned by state authority. These mandatory factory councils both significantly *restricted employer prerogatives*, as well *circumventing existing labour unions*. The councils represent an important step in the development of codetermination and served as a model for councils during World War I. The institutional legacy of the coal-mining reform also includes the *principle of mandatory social insurance* with compulsory participation of the employer, which 20 years earlier had served as a model for Bismarckian social insurance legislation.

This situation differs in important respects when compared with industrial relations in British coal-mining. State intervention in labour relations remained relatively weak in Britain for a number of reasons (see Berg, 1984). First, the earlier start of industrialization and slower pace of economic growth led to less direct state engagement in industry,<sup>20</sup>

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<sup>20</sup> British firms developed with lower capital intensity and, given their lower fixed costs, could adjust to business cycles largely via employment fluctuations without the need for further integrative mechanisms. In smaller firms, personal relations between labour and owner entrepreneurs persisted longer than in German firms, where a technically trained white-collar workforce was more widespread.

as well as less indirect promotion of industrialization. Whereas regulating labour relations was a necessary component of German industrial policy, the lack of direct state involvement in British industry meant that labour regulation would involve direct intrusion in existing domains of private autonomy. British entrepreneurs viewed their firms as largely private affairs rooted in civil liberties, and remained sceptical of state intervention.<sup>21</sup> Second, Britain granted the right to organise roughly 50 years earlier than Germany. The state promoted the private mediation of interests within the context of collective bargaining. For example, the British strike in 1893 led to the introduction of the 'National Board of Conciliation' that could mediate between class interests. In Germany, by contrast, the union movement remained politicised within the non-democratic political situation, meaning that support of unions would have threatened governing political coalitions. Third, the British civil service generally lacked the institutional capacity for intervention possessed by the German state bureaucracy.<sup>22</sup> State intervention thus generally came later in Britain: for example, limits on the working day, restrictions on the banning of female and child labour, and minimum wage laws. But German state authorities were more likely than the British to take the side of the company in implement-

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<sup>21</sup> The ideology of entrepreneurs was different in Germany, where strong networks between state bureaucracy and entrepreneurs strengthened the consciousness of their activity as a national service that should be actively supported by the state.

<sup>22</sup> The German bureaucracy was very large and independent compared to the British civil service. In the course of late national unification, Prussia developed an extensive state bureaucracy with extensive technical training. The British civil service was very different for a variety of reasons: greater responsibility to a democratic parliament, less direct involvement in law-making, less bureaucratized rules and careers, less specialised technical training, and greater social openness in recruitment (Cohen, 1965).

ing safety regulations or mediating industrial conflict.

#### World War I (1914–1918)

A wartime 'industrial truce' integrated the social democrats and labour unions into mainstream political life (Feldman, 1966; Marks, 1989: 107–111). The end of unilateral employer authority occurred with the passage of the *Gesetz über den vaterländischen Hilfsdienst* in 1916. As the war effort intensified in anticipation of US intervention, the Hindenburg Programme obliged all non-military men between the ages of 17 and 60 to take up employment and forbade those working in war-related industries to leave their jobs without a special permit. Fearing a wave of strikes, the state sought ways of compensating for these restrictions of civil freedom so as to maintain order in industrial production. The law required workers' councils to be elected by secret ballot. Drawing upon the mining reform law of 1905, the controversial Paragraph 12 gave councils consultation rights regarding the 'demands, wishes and complaints of the work force with regard to the factory, wage and other employment conditions and the social welfare policy of the firm' (Teuteberg, 1961: 511). While councils had no rights to information or codetermination, their power was greater than anticipated. Paragraph 13 had provided for mediation by a council with parity composition and chaired by a representative of the War Ministry. As the committee subjected the employer to binding decisions, employers often preferred to negotiate solutions with their councils.

The councils thereby fell out of employer control, and became increasingly linked with an independent labour movement. Unions were extremely influential in the formation and practice of the councils. Radical labour unions began to see a revolutionary potential, while others saw councils as a corner-

stone in building 'economic democracy' through Soviet-style councils. Employers resisted implementing the law and emphasised the temporary character of the councils as a wartime institution, while organised labour oriented itself to the retention and development of councils (Teuteberg, 1981).

#### Weimar Republic (1918–1933)

The end of the war, the collapse of the Imperial state, the development of a revolutionary council movement,<sup>23</sup> and the role of social democratic politics and unions in the Weimar Republic cannot be discussed here in detail. These factors led to the anchoring of codetermination in the Weimar Constitution and the passage of the Works Councils Law in 1920. The new state sought to limit the impact of the revolutionary council movement by incorporating a less radical notion of works councils into company practice. The law mandated the formation of works councils in all commercial and public establishments with over 20 employees to be made up of equal numbers of elected blue-collar (*Arbeiter*) and white-collar employees (*Angestellte*). The supplementary law passed in 1922 allowed the works council to also send a maximum of two employees as *Aufsichtsrat* representatives. The laws institutionalised many features of the contemporary German model: the works council's obligation to work towards peaceful cooperation in the interests of the firm, the separation of collective bargaining from the activities of the works council, and codetermination rights in the social affairs of the firm. The works council had its basic institutional form: a 'dual' role in protecting

<sup>23</sup> 'Revolutionary' councils were often loyal to their firms, and had a generally cooperative orientation. Their demands often included: the end of authoritarian management styles, codetermination in wages and personnel issues, rights to company information, and profit-sharing.

and representing the independent interests of workers while supporting the business interests of the employer. Despite the rapid diffusion of works councils in large plants, employer acceptance of the law remained uneven in practice. For example, a pragmatic and cooperative stance towards works councils existed in the electronics and chemical industries, while the steel industry employers and associations continued to bitterly oppose them.

#### Nazi Germany (1933–1945)

The Nazi party destroyed all autonomous labour organizations through arrests, confiscation of property, and dissolutions. Workers were reorganized under the party-run Labour Front (Neumann, 1944). The labour market came under state control – changes of employment became illegal without permission of the labour exchanges, and wages were set by state trustees. Nazi ideology posited a harmony of interests between capital and labour – work was portrayed as honourable national service. The *Gesetz zur Ordnung der nationalen Arbeit* in 1934 institutionalised a plant community ideology: ‘In the plant, the entrepreneur as the plant leader and the salaried employees and workers as the followers work jointly to further the aims of the plant and for the common benefit of the people and the state.’ This principle restored managerial prerogatives and the personal authority of managers. Nazi management ideology contained paternalistic elements, and new company rules stressed the obligations of employees to follow the will of their superiors in good faith. Likewise, the mandate of management under corporate law was to manage ‘in the interest of the firm, its members, and the general benefit of the people and the *Reich*’. The 1933 *Gesetz über die Treuhänder der Arbeit* transferred codetermination rights to a single state representative (Teuteburg, 1981: 41). Works councils were abolished and replaced with new employee councils, now called

*Vertrauensräte* or ‘councils of trust’, conceived as plant-level cells of the Nazi party. The councils were to strengthen trust within the enterprise community. Nazi efforts largely broke down during the war, and the regime increasingly resorted to terror to control labour.

#### Post-War Democratisation and Reform

Codetermination re-emerged as part of post-war democratisation and was institutionalised by the law on *Montanmitbestimmung* in the coal and steel industry during 1951. Codetermination was closely related to the project of political democracy and addressed socio-political concerns about the political abuse of economic power under the Nazis. Codetermination thus enjoyed a wide spectrum of political support, becoming part of the constitution of many federal states, supported by platform papers from the conservative CDU, and also receiving the support of employers in the hope of gaining union support in stalling Allied plans for socialisation of heavy industries. The Allies also sought to incorporate unions into their restructuring plans in the absence of a functioning German state and given the mistrust of industrialists due to their wartime collaboration. Works councils were encouraged by the *Kontrollratgesetz*, but their rights were left to plant-level negotiated agreements. In the coal and steel industry, unions were able to gain representation in the *Aufsichtsrat*, develop strong works councils, and directly elect a labour director to the *Vorstand*. The specific motives of the British powers for introducing codetermination remain unclear (Müller, 1987). The Allies later thwarted the ambitions of unions and German political parties to socialise heavy industry, restoring ownership rights in heavy industry in 1948. By 1950, under the new German state, firms fell under German corporate law that provided no codetermination rights. The metalworkers’ union called for a strike in 1951, which led to the direct involvement of Chancellor Konrad Adenauer regarding

codetermination, resulting in the 1951 law that preserved the parity model of *Aufsichtsrat* representation in heavy industries.

A weaker model of codetermination developed outside the coal and steel industries due to opposition of the liberal party (FDP) and employers. Unions were unable to exert sufficient pressure to reproduce the *Montan* model, and the 1952 law only mandated one-third of *Aufsichtsrat* seats for labour, more limited rights for works councils, and had no provisions for a labour director in the *Vorstand*. The 1972 reforms under the social democrats (SPD) formalised new rights for works councils, and the 1976 revision widened *Aufsichtsrat* representation, although remaining weaker than the *Montan* model in several regards.

In conclusion, despite its diverse ideological and institutional origins, codetermination aimed to 'democratise' what had historically been recognised as a relationship of *authority* within enterprises rather than as a pure market exchange. The state viewed the regulation of this relationship as a matter of public interest due to its socio-political consequences. The impact has been to widen the scope of stakeholders to which companies are accountable, and promote a concept of 'company interests' that (even if vaguely defined) are not reducible to shareholder interests alone. Particularly *Aufsichtsrat* representation introduced management accountability to employees, and thereby altered the constitutive interests of the firm towards a 'dual' logic of balancing multiple groups in the interests of the firm as a whole. While related to political democracy, codetermination did not institute pure democratic principles into capitalist enterprises but 'constitutionalised' the relations between stakeholders in a regime of participation that implies a sharing of responsibility and mutual obligations.

## BRITAIN

### The Origins of the British Company Law Approach

Incorporation became freely available on registration in 1844, though under the earliest legislation shareholders had unlimited liability for the company's debts. Previously, incorporation (with or without limited liability) had been available only by specific Act of Parliament or royal charter and was viewed as a special privilege, granted, for example, where there was a need to raise an unusually large amount of capital, as with railways and other utilities, and an obvious public benefit. Pressure increased for wider access to incorporation with the growing need for capital in new branches of industry where the partnership form, or the unincorporated joint stock company (itself in law a partnership) created practical problems. Much political and legal opinion still resisted the idea that registered companies should be allowed to trade with limited liability.<sup>24</sup> The coalition which led to limited liability becoming available on demand (in 1855) relied on two main arguments. First, that limited liability was necessary to give security to small investors, whose capital otherwise would not be mobilised and who would be debarred from participating in the success of the new industries. Second, that if parties wanted to contract with one another under terms of limited liability, they should be free so to do and the state should not stand in the way (Hunt, 1936).

These two arguments pulled in opposite directions. The first principle conceived of the company as a little republic, a miniature

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<sup>24</sup> The ruling doctrine emphasised the importance of individual owners taking full responsibility for all their actions, which meant unlimited liability. Any encroachment on this principle was regarded as an erosion of the moral basis of capitalist enterprise.

political system in which all its members, the shareholders, had rights to representation, information, and ultimate decision-making through the annual general meeting. The directors had to be accountable to these shareholders. The second, *laissez-faire* principle, by contrast, was much less concerned with the rights of shareholders and much more with the possibilities which limited liability provided for large-scale enterprise and managerial autonomy.

The *laissez-faire* principle was dominant for much of the nineteenth century. While the 1855 legislation had provided for mandatory publication of accounts and auditing, these requirements were removed only a year later. There were doubts about their effectiveness, but at least as important was the view that if shareholders (or creditors) wanted these safeguards, they could contract for them. There was no case for state intervention in private commercial relationships. This highly unregulated environment prevailed for the rest of the century. Thereafter, a financial disclosure regime was imposed in stages over many separate pieces of legislation, often in the face of objections from those opposed to state 'interference'. The relevant measures usually followed a major corporate collapse or scandal, facilitated by the laxity of the regulatory framework. Similarly, disclosure was relied on to combat fraudulent promotions, which were a common hazard faced by potential investors in the Victorian era and after. Public policy in this period can be regarded as having two main objectives: to protect outside shareholders, mainly through publicity, from dishonest and incompetent promoters and managers; and to increase confidence in equity markets and thereby facilitate the flow of finance to industry.

The transformation from an economy made up largely of companies subject to personal or family control, to one in which companies had widely dispersed shareholders who

were uninvolved in management or in performing governance functions, was relatively slow in the UK. It was not unusual in the early years of the twentieth century, particularly in manufacturing, for family interests to predominate even in companies that had publicly floated. This was sometimes achieved by issuing to the public non-voting preference shares. Companies in which shares were widely held were, however, common in all sectors by the 1930s. By then it had been recognised that the idea of shareholder democracy in such companies, in particular shareholder control over the composition of the board, was largely a myth. One of the curiosities of the British story is the apparent absence of any significant political challenge to this dispensation. The reasons for this are complex and cannot be explored in detail here, but important factors include:

- the structure of the UK financial system, particularly the resulting relationships between the banks and industry in the UK which prevented the kind of concentrated share ownership of companies seen in some other countries, particularly Germany.<sup>25</sup> This ensured the lack of incentive for universal banks to organise a challenge to corporate boards.
- the dominance of *laissez-faire* principles rather than individualist, libertarian principles in British political economy in the last decades of the nineteenth century. *Laissez-faire* arguments were not based on individual rights for shareholders and were often

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<sup>25</sup> Recent research has shown that banks have exercised supervisory and monitoring functions over some British companies more than is sometimes thought (Bowden, 1999a; 1999b).



employed to sanction non-interference with existing economic interests, and in particular were used to justify and underpin the emerging corporate economy (Hunt, 1936). The traditional inherent property rights doctrine was employed to legitimate the new forms of corporate property, which came to be seen as in principle no different from individual owner-managed assets. This allowed corporate property to be treated as a private association, which should have the minimum of government regulation and interference, despite the legal privilege of incorporation having been granted.

the lack of political interest in the legal framework for companies. The Conservative Party, the dominant governing party in the UK for two-thirds of the twentieth century, accepted the assimilation of corporate property with private individual property, and became in practice a staunch defender of the corporate economy. It saw no need for a reform programme: the 'Gladstonian company' remained as relevant to the late twentieth century as it was to the mid-nineteenth century. The Liberal Party did become interested in many aspects of corporate organisation and produced many new ideas (Gamble, 1983), but the Liberals were a minority-third party force after the 1920s and for most of the time had no influence on government. Perhaps most importantly of all, the Labour Party, which might have been expected to push through corporate law reform, always gave it a very low priority (Clift *et al.*, 2000).

the emergence of an effective market for corporate control, which, in the absence of a strong shareholder democracy to hold managers to account, be-

came the principal mechanism to ensure that the divergence between the interests of managers and the interests of shareholders did not become too extreme. An effective market for corporate control allows hostile as well as voluntary takeovers to take place. If managers underperform, the assets under their charge become underpriced, and this opens the way for a corporate raider to make a bid for the firm by offering existing shareholders substantially more than the existing value of their shares. An active market for corporate control has been defended as a better guarantor of shareholder interests than assigning shareholders strong political rights over the board because it gives all shareholders the option of exit if the shares become underpriced, while the exercise of shareholder rights relies on the option of voice, which, however, can only be effective if the collective action problem in getting sufficient shareholders to mobilise and turn up to vote can be overcome (Sternberg, 1996).

the lack of political or economic crises strong enough to put the political and economic foundations of company autonomy in question. Unlike the German economy, where the 1873 crash called the country's productive capacity and manager competence into question, the British economy and political system was able to weather the pressure of the depression relatively well (Gourevitch, 1986).

The reaction of law reform bodies to the 'illusory nature' (Cohen, 1945) of shareholder control was largely that the remedy lay in the hands of the shareholders themselves, who had powers to control management, if they chose to use them. These were reinforced in the Companies Act of 1948, which

provided that the shareholders should be able to remove the directors by simple majority (previously directors were often entrenched in office). By this stage, with shareholdings widely dispersed, it was accepted that such matters could not simply be left to bargaining between the parties. Further interventions were proposed by the Jenkins Committee in 1962. The Committee accepted that the scope of management discretion was in general best left for determination in the company's articles, but noted also that it was possible for the directors, without committing any breach of the law, 'to make use of their powers for the purpose of diverting the company's assets without the knowledge of the shareholders' to uses to which the shareholders might object (Jenkins, 1962). Similarly, there were concerns about the breadth of the directors' discretion to issue new shares. Proposals to limit the powers of directors to make significant asset disposals were never implemented (though there are restrictions in the Stock Exchange Listing Rules), and those on share issues had to wait until the 1980s and the impact of EC directives.

A key area of governance, in contrast with Germany, left almost entirely to private ordering was (and remains) the structure and composition of the board. While legislation requires companies to have directors, it does not set out their functions, nor does it recognise a distinction between executive and non-executive directors or the office of chairman. In so far as the case law acknowledged a duty on directors to monitor each other, the content of this duty was minimal. A public policy interest in the composition of the board, particularly in relation to the presence of 'independent' directors who could perform strategic and monitoring roles, did not begin to take shape until the 1970s. Even then, the unique circumstances of individual companies, the need for flexibility, and the dangers of prescription were influential arguments

against statutory intervention (Parkinson, 1993).

#### Politics of Industrial Relations

Working-class demands on the political and economic systems were met in Britain from the 1880s onwards through a combination of political participation through extension of the franchise, early incorporation of working-class issues into the political system through the Liberal Party (Luebbert, 1991: 227), and until the 1906 Trade Disputes Act, through court-sanctioned repression. Companies had no legal incentive to admit organised labour into the governance process before the inter-war period of the twentieth century. Union formation was repressed under criminal law until the repeal of the Master and Servant Act in 1867, and union activity deterred under tort law until the 1906 Trade Disputes Act (Bowers, 1997: 3–4); and cooperation remained rare afterwards. The Master and Servant Act, in conjunction with the Combination Act of 1825, made it a crime to conspire to act collectively for the purpose of demanding wages or working conditions. The Taff Vale case of 1900 made organised workers liable for the financial consequences that a strike had on the employer. Still, in 1906, employers remained free to refuse union recognition and to fire unionised employees. Nor did unions want mandatory participation in cooperative governance (Ewing, 1997). Consequently, the existing liberal sense of the public interest in preserving the right of the individual to choose relationships freely (without reference to the context in which that decision is made) was preserved. The Trade Disputes Act was a significant change, but only in that it stopped official repression of worker associations.

When the opportunity came to introduce cooperative decision-making between firms and their employees, the concept of company autonomy from internal, mandatory

regulation was so strong that the government resorted to an indecisive and transitory introduction of corporatism, with no firm legal rules. During World War I, the government pursued a course of labour–employer consultation that was marked by its voluntarism, and reliance on executive authority on the part of the state rather than statute. The 1916 New Ministries and Secretaries Act gave the minister of labour the responsibility to promote the formation of conciliation councils and joint industrial councils, which would bring together unions and management at the firm and industry levels, respectively. However, the government refused to mandate them for all firms, preferring to threaten employers with the imposition of a council if the economic sector was considered important. While this achieved results between 1918 and 1922, creating 73 councils, it allowed the number of councils to shrink to 20 by 1939 (Ewing, 1997: 15–25). Parallel to the councils were industrial courts, which were provided for through the 1919 Industrial Courts Act. Again, use of the dispute settlement mechanism remained voluntary and underused (Bowers, 1997: 4).

The Labour Party favoured securing its conception of the public interest through public ownership, legislation on monopolies and mergers, and legal support for trade unionism rather than structural changes to the company. Consequently, the Labour Party let two opportunities pass during which it could have challenged Tory minimalism on company law reform. The 1945 Cohen Committee report on company law rejected calls for more extensive measures to introduce a republican mode of governance for the firm, and its mild adjustments were adopted relatively uncritically in 1948 as the Companies Act was overhauled. The 1962 Jenkins Committee on company law also took a minimalist approach. Most significantly, it remained committed to the voluntarist tradition in industrial relations, which meant maintaining the ability to trade unions to bar-

gain freely, treating them as private voluntary associations with some legal immunities from the provisions of the common law, counterbalancing the treatment of companies as, in effect, private voluntary associations (Wedderburn, 1993). The main departure from this (until recently) was the pressure which built up in the Labour movement in the 1960s and 1970s for greater industrial democracy and which led to the appointment of the Bullock Committee. The political strength of this committee was, however, undermined by the division of opinion within the British trade unions and the Labour Party as to the desirability of having worker directors on company boards. The employers' organisations were implacably opposed (Clift *et al.*, 2000).<sup>26</sup>

Labour policy conflict since 1945 has taken place on issues that reflect the polarised nature of company–employee relations, and its manifestation in confrontations that are distinct from those found in Germany at the time. Neither the Labour Party nor the Trade Union Congress (TUC) was able to fully accept anything less than full power parity with company managers for employees. Nor, until about 1974,

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<sup>26</sup> There is an interesting contrast in historical development between Britain and the United States, the two supposed citadels of shareholder value. In the USA the rise of the corporate economy was politically contested much more than it was in Britain, and regulatory measures were introduced to break up trusts and to prevent concentrated share ownership of companies by financial institutions. Share ownership became highly dispersed as a result, but some commentators have argued that this was a direct result of the imposition of regulation (Roe, 1994). Although this prevented concentration of ownership, it did not prevent concentration of production or the rise of the corporate economy. The invocation of shareholder value in this case, as with Britain, meant ceding a large degree of autonomy to managers, since if shareholdings are highly dispersed the collective action problems in making shareholder power a reality are formidable; the initiative tends to lie with the management, whatever the formal procedures may be.

was either side prepared to endorse the prospect of institutionalised codetermination. They expected that large sectors of the economy would fall into state receivership after a period of increasingly poor performance. As a consequence, the Labour government that assumed office in 1945 faced a union federation that was not only refusing to push codetermination in the company, but also positively hostile and pursuing other goals (Clift *et al.*, 2000). These included permanent employment guarantees and, most importantly, the establishment of an authoritative macro-level corporatist framework that would provide the TUC with an effective veto on national economic policy (Shonfield, 1965: 113–119, 153). The Labour Party was consequently unwilling to legislate beyond conditions which would improve the right of unions to form, represent workers and collect membership dues (Bowers, 1997: 1–11). Similarly, unions heavily and successfully opposed Labour initiatives in 1968–69 to achieve labour peace by instituting binding collective bargaining arrangements in which government would have a substantial role (Donovan, 1968; McIlroy, 1995). At the firm level, the TUC opposed joint decision-making as a vehicle to dilute union independence and influence (McIlroy, 1995).

While the Labour Party was reluctant to introduce partnership arrangements, the Conservative Party was intent on establishing the primacy of individual rights and voluntary contract negotiation in industrial relations, and restricting the right to strike. The 1971 Industrial Relations Act attempted to restrict the right to strike, but was shown to be ineffective by the industrial unrest of 1972 (McIlroy, 1995). The Thatcher and Major governments ended mandatory union recognition introduced during the second half of the 1970s, and successively promoted restrictions on industrial action on the grounds of individual rights to enter into contracts unimpeded by third parties (Donnelly, 1999).

The TUC reversed its hostility to codetermination gradually between 1968 and 1974, as a result of changing grassroots opinion in the party, and spurred on by the Fifth EC Company Directive in 1972 that mandated works councils (McIlroy, 1995). Still, the Labour government and the TUC were divided on the Bullock Committee report of 1977 that recommended a change to the fiduciary duties of boards of directors of public sector companies to reflect the importance of employee interests (Clift *et al.*, 2000).<sup>27</sup> The Confederation of British Industry (CBI) dismissed power sharing as an unacceptable form of interest group representation within the board, a means by which collective bargaining might become a reality, and a dilution of managerial professionalism. For its part, the TUC wanted a guarantee of half of the seats on the board, so as to realise the legitimacy of the enterprise for employees through industrial democracy (McIlroy, 1995).

The role of labour in the company in the UK underwent some major changes from the 1970s onwards as a result of the structural adjustments in the economy brought about by a combination of global economic trends and the policies of national government and the EU. British industrial relations were always characterised by a high level of voluntarism and a minimum of formal legislation. Both sides of industry preferred collective bargaining to be 'free' and voluntarist, and there was resistance to legal framework for industrial relations which was common elsewhere and which would have necessarily embraced the role of labour in the company. (Wedderburn, 1971). As far as the Brit-

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<sup>27</sup> It recommended that British companies keep the single-tier board system, with a '2x + y' representation system. This meant an equal number of directors elected by shareholders and unions, plus a smaller number of expert directors from outside.

ish trade union movement was concerned, it adhered to an adversarial model of industrial relations in which there was a sharp divide between the interests of capital and of labour, and good industrial relations depended on keeping that distinction clear. This enabled trade union negotiators acting for organised labour to get the best possible deal from the owners of capital. Many British trade unionists looked with suspicion on attempts to create works councils or employee representation within companies, fearing they would dilute the ability of trade unions to represent the interests of their members. Another feature of labour representation in the UK is that many unions have been general unions rather than industrial unions, so that not only have there been a very large number of trade unions, but in many sectors the employees have been split up among several different unions.

One of the consequences of the tradition of voluntarism in industrial relations was that there was always a potential conflict between the stipulations of common law and the actions of trade unions, since the latter often lacked any formal legal basis for their activities. This problem was resolved by the *Trade Disputes Act* of 1906 and subsequent legislation, which provided immunity to trade unions from the provisions of common law in respect of damage done to the interests of employers and third parties by activities such as strikes. Trade unions were treated as private associations with special legal privileges.

The *modus vivendi* worked out between the power of organised capital and the power of organised labour was sometimes praised for its flexibility and its acknowledgment of the fundamental and irreconcilable conflict between labour and capital which exists at the heart of every modern capitalist economy (Kahn-Freund, 1969). But it was also increasingly criticized by those who wanted organised labour

to be fully incorporated into economic institutions and more directly involved in the formulation and implementation of the public interest. The various attempts to create forms of corporatist intermediation in the UK in the 1960s and the 1970s,<sup>28</sup> and the campaign for industrial democracy which culminated in the Bullock Report of 1977, were inspired partly by the need to improve British economic performance, and partly by the evidence from industrial relations systems elsewhere.

## Conclusion

The historical development of public interest agendas in German and the UK shaped corporate governance in different ways. First, liberalism dominated British politics from the nineteenth century to the present day, but was rejected politically in Germany in the wake of the 1873 economic collapse. That anti-liberal tradition did not recover in the Weimar Republic, nor did it fully reassert itself in the Federal Republic.

Second, the most durable and extensive institutions in the UK were legal principles, often found in case law regulating the bounds of good behaviour on the part of managers and employees. In Germany, however, the

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<sup>28</sup> The key public interest dispute in British labour relations remained whether unions should be recognised to represent all employees in a bargaining unit, or whether the law should preserve the right of individuals and firms to engage freely in contracts. Mandatory recognition procedures were in place between 1975 and 1980, and two key institutions were established to manage recognition and voluntary arbitration, the Central Arbitration Committee (CAC) and Advisory, Conciliation and Arbitration Service (ACAS), respectively. ACAS was set up to ensure the good offices of a third party without interference from politicians, and to oversee industrial tribunals and the CAC. Both the CBI and the TUC valued its role because it ensured that wage negotiations remained unregulated by law.

early example and precedent of the Supervisory Board to aid in the governance of firm–investor relations was adapted and extended to other issues in the twentieth century not yet legitimated, such as employee representation.

Third, company failures and threats of failures had stronger policy consequences in Germany than in the UK historically. Germany had crises leading to change, or caused by monumental political changes in 1872, 1916, 1934–37 and 1953. Britain had a sense of limited crisis in 1878 (in the banking sector).

Fourth, the public interest agendas held by critics makes a significant difference in the development of corporate governance arrangements. The position of Britain's Labour Party and the TUC during this period ensured that corporate governance debates were suppressed in favour of a public ownership agenda, whereas the German Social Democrats could commit themselves to the social market economy and focus on the internal governance of the private firms whose existence they accepted after the Bad Godesberg declaration. Consequently, the Labour Party let several opportunities pass in the post-war period, when it could have challenged the Conservative, Gladstonian view of the company (Clift *et al.*, 2000).

## PART II

# THE PUBLIC INTEREST AND THE CONTEMPORARY FIRM

### Introduction

We now turn to the development of public interest agendas in relation to the company in Britain and Germany during the 1990s. Debates over corporate governance reform have proliferated in the last decade, centred on the notion of internationalisation, particularly of capital markets. However, domestic political concern over corporate accountability has also been renewed through the problems of executive compensation, corporate failures, and concerns of local communities over pollution and racial and gender equality. Among the forces for change in public interest agendas on the company have been:

- *Internationalisation.* International capital mobility has placed national financial systems under growing competitive pressure to provide comparable risks and returns. This increases the 'exit' options of domestic investors, and has particularly increased the engagement of Anglo-American institutional investors in less open markets such as Germany. Regulatory regimes also face pressures from market actors and from intergovernmental institutions to make corporate governance systems 'transparent' and 'open' to market actors.
- *European integration.* The political process of European integration has also played a major role in the evolution of public interest agendas. After 1968, the European Commission formulated a series of directives on companies. A new impetus developed af-

ter the negotiation of the Single European Act in 1985. The new approach led to the mutual recognition of national law under the principle of subsidiarity rather than harmonisation under a supranational structure. A number of directives have been passed, particularly seeking to ensure that shareholders across the EU have access to sufficient and reliable information on companies (see Appendix 1). The objective of this strategy is to ensure that all EU states impose the same regulatory or structural requirements on their companies, thereby levelling the competitive playing field. However, the adoption of common rules has progressed at a modest pace and the establishment of a Europe-wide corporate form has yet to emerge. This process of Europeanisation can be understood as 'negative integration' (removing barriers) and the expansion of markets through intergovernmental agreements and bureaucratic agencies rather than positive political integration with uniform sets of rules. 'The result is a multi-level political economy, where politics is decentralized in national institutions located in and constrained by integrated competitive markets extending far beyond their territorial reach, and where supranationally centralized institutions are primarily dedicated to implementing and maintaining those markets' (Streeck, 1998). While it has proven politically impossible for Germany to 'export' its employee-oriented model to Europe, due in no small part to Brit-

ish opposition, Germany has thus far been central to blocking any version of the *Societas Europaea* that would undermine the existing pluralistic approach to the company domestically. Thus, despite the economic arguments for a uniform European company form, agreement on the proposed Fifth Directive (see Appendix 2) remains elusive.<sup>1</sup> The issue of codetermination in the supervisory board as a major barrier to the Fifth Directive will be discussed below.

*Post-materialist concerns.* Concerns over the company's role in community affairs have been increasingly formalised. They include environmental concerns, as well as issues of equal treatment in employment for women and for racial and ethnic minorities. Country-specific patterns can be observed in how these issues become addressed within the context of existing corporate governance institutions, leading to the adoption of different instruments of public policy. For example, works councils in Germany proved themselves remarkably adaptable to incorporating new concerns of workplace safety and equal treatment that were not envisaged in the existing legislation, while the growing legal requirement for designated company officers responsible for specific issue areas such as environmental protection have been key to furthering specific public interest agendas. This development contrasts strongly with the rise of external regulation in the UK, where companies lack this mechanism.

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<sup>1</sup> Presently, companies operating in Europe must establish complex networks of holding companies and subsidiaries in the 15 member countries, each operating under different legal principles and creating direct administrative costs.

Together, these factors lead to several new challenges for the shaping by domestic political institutions of public interest agendas with regard to the corporation. Several important questions will be explored in the next section. To what extent has the public interest agenda changed in relation to the corporation? To what extent has Germany liberalised its 'constitutional' model in response to market pressures, changing political coalitions, and the process of negative integration in the EU? To what degree is the British model evolving to accommodate other stakeholder concerns?

## GERMANY

### (i) Companies and Investors

The public interest agenda regarding the corporation in Germany has shifted notably in the 1990s. This process is closely linked with the internationalisation of capital markets – the growing number of foreign investors in Germany, the growing use of foreign markets by German companies, and the associated political process of market-making and liberalisation. As is well known, German corporate governance is characterised by concentrated ownership, narrow equity markets and a strong governance role for banks (Schmidt *et al.*, 1997; Jackson, 2000a). Germany has relatively few listed companies, low market capitalization, and less reliance on the stock market to discipline management. Efforts to broaden and deepen these markets have culminated in a number of complex regulatory measures, including: three Financial Market Promotion Acts (in 1989, 1994 and 1997); the Law on Small Public Companies (1994); the Investment Facilitation Act (1998); and the Law on Control and Transparency (1998). The earliest measures were introduced in the context of the EC's decision in the Single European Act to promote economic integration by liberal-



ising capital markets and ensuring equal protection for small investors across member states. It is significant that most of the major changes in the 1990s have come in the area of capital market regulation rather than corporate law – whereas the distinction between the two legal areas has become increasingly fuzzy.

#### Capital Market Regulation

Three *Financial Market Promotion Acts* sought to liberalise German capital markets, as well as implement a number of EU directives.<sup>2</sup>

- The First Law introduced secondary capital markets for the first time, making it possible for investors in company debt to trade bonds. Secondary capital markets had been banned in the 1890s, and only permitted in a limited form since the 1970s.
- The Second Law, introduced in 1995, focused on increasing transparency, protecting small investors, and allowing more types of investment funds. These measures helped bring German practice in line with international standards as expressed in EU directives (Lütz, 1996).<sup>3</sup> The law established a Federal Securities Trading Commission (*Bundesaufsichtsamt für Wertpapierhandel*) to monitor securities trading – particularly to enforce

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<sup>2</sup> A Fourth Law was discussed under the Kohl administration to introduce more extensive private pension provision. No agreement was reached considering the social (and particularly income-distributive) implications of subsidising the establishment of private pension funds with tax expenditures and a smaller public system.

<sup>3</sup> These EU directives include those on insider trading (89/595/EC), transparency (88/627/EEC) and investment services (92/22/EEC).

new insider trading rules and disclosure requirements on large blocks of equity. Previously, this had been the responsibility of the *Länder* governments.

- The Third Law of 1998 sought to increase both the supply and demand for risk capital by reducing the costs of securities issues (for example, reducing prospectus liability)<sup>4</sup> and authorising a broader range of investment funds and transactions. Further important changes include capital gains becoming tax-free after one year (rather than six years), loosening rules on the minimum number of shareholders, and removing the obligation that investment companies go public within 10 years.

Parallel to these changes, the Deutsche Börse AG created the *Neuen Markt* or New Market in 1997 to promote the flotation of next-generation high-technology companies. The market has expanded rapidly to around 120 companies in June 1999, although with a relatively small share price capitalisation despite its fast growth. In order to promote investment in young companies, rules of disclosure are stricter (for example, quarterly reports in German and English) and more shareholder-friendly than those that apply to companies listed on the regular official exchange. While this measure does not influence the governance of existing corporate bodies, the standards used in the New Market are more typical of a market-oriented US-style approach to governance concerns.

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<sup>4</sup> For example, the 30-year period of liability for investment information was shortened to three years. While for the ostensible protection of shareholders, such restrictions made it unlikely that shareholding would spread beyond the modest core of listed companies and banks or firms with private informational advantages.

These changes in capital market regulation represent an important departure in the historical public interest agenda in Germany. Investor protection had been historically expressed in a 'constitutional' model of the company that favoured banks as monitors and remained sceptical toward small individual investors. The new measures sought to level the playing field for all investors and stress information disclosure in order to create more effective markets. Such measures serve the interests of small investors, as well as foreign institutional investors. Rather than seeking to limit the scope of markets and correct for their failures through other institutions, the new regulatory paradigm puts renewed stress on market mechanisms. This entails reducing the advantages of private information gathered by large shareholders such as banks. Market-promoting regulation has reinforced secular trends toward ownership fragmentation and towards a more Anglo-Saxon pattern. Liberalising markets, however, is far from wholesale deregulation. Rather, free markets often require more rules (Vogel, 1996). Within the multi-level European polity, capital market liberalisation entailed bringing investor protection 'up' to Anglo-American standards. That decision was important because it made it more difficult to continue the set of insider relationships among a hard core of investors that distinguishes the structure of German company ownership (Deutscher Bundestag, 1995). Similar shifts can be seen in several other areas of regulation, namely corporate law, takeover codes, and accounting.

#### Corporate Law

The most important change in the 1990s was the Law on Control and Transparency (KonTraG) passed in 1998. The law had its origins in the 1994 coalition negotiations between the CDU and FDP. The small coalition partner, the liberal FDP, controlled the Ministries of Justice and Economics and began to consider a moderate corporate law

reform to improve transparency and monitoring over the *Vorstand*. These concerns for transparency and disclosure were later expressed in terms of being necessary for the competitiveness of German firms in the global capital market. Both financial and remuneration instruments should be moved towards international standards. FDP policymakers also consulted with international investors outside the traditional German policy circles (Ziegler, 2000).

The reform process gained further momentum from the perennial debate within Germany about the 'power of banks', amidst public outcry over several high-profile corporate governance failures. Close relations with large private banks had been enjoyed by industrial concerns such as Metallgesellschaft and KHD, and had also come to light in high-profile affairs such as the Schneider real estate scandal. In the wake of these corporate failures, German legislators decided that the supervisory boards were providing 'too little supervision and too little counsel' to the executive board. Holding multiple seats, particularly by bankers, was viewed to lead to a ritualisation of meetings and ill-prepared discussions. The SPD expressed particular concern about the possible abuse of economic power and influence held by the universal banks.<sup>5</sup> Concern with the power of banks has a long history within German left thinking (Hilferding, 1911). The present public interest concerns of the SPD centred on two issues. The accumulation of bank influence is argued to create severe conflicts of interest. In the words of the SPD draft law, 'the rights of shareholders in the public company are factually restricted through the dominating position of large banks and company administrations'

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<sup>5</sup> Bank influence has several channels: direct share ownership, exercise of proxy votes, supervisory board representation, and role as a lender.

(Deutscher Bundestag, 1995). Bank influence is also argued to place the management of Germany's largest companies outside of effective control, while the absence of a market for corporate control and competition for management positions is said to dampen the innovativeness of German industry. In this sense, significant overlap existed between traditional left concerns regarding economic power and critiques by neo-liberals and US institutional investors of Germany's 'insider' system.

However, the final draft of the KonTraG places its emphasis on transparency and monitoring, rather than direct concern with banks. The law aims to heighten transparency through auditors appointed by the supervisory board rather than management, disclosure of multiple supervisory board memberships, disclosure of ownership stakes exceeding 5%, and improving the operation of the auditor. Shareholder influence was increased through several measures, also designed to curtail the dominance of banks in exercising shareholder rights: increased accountability to shareholders in the use of proxy votes, elimination of multiple voting rights and voting rights restrictions, limits to proxy votes exercised by banks where direct shareholding exceeds 5%, and increased obligations for financial oversight by the supervisory board. KonTraG also contained other important changes to the way companies can use their equity. First, the law removes restrictions on share buy-backs that had been designed to prevent fraud and share price manipulations. Second, stock options are now permitted for compensating management and employees. Both mechanisms are typical 'solutions' to principle-agent problems in the USA, but depart slightly from the conservative public interest agenda in Germany.

Politically, KonTraG represents a compromise between competing interests. The SPD draft

proposed to strongly curtail bank influence through a number of measures: to limit bank ownership to 5% stakes, prohibit the exercise of voting rights stemming from cross-shareholdings, cap the number of supervisory board mandates at five per person, and prohibit proxy voting by banks. While the SPD proposal was supported by the trade union federation, the Deutscher Gewerkschaftsbund (DGB), on this issue of bank power, the industry and banking associations opposed the draft as too severe (Ziegler, 2000). Thus, none of the severe restrictions on bank influence found their way into the final law passed by the CDU and FDP. The final draft only obliges banks to choose between voting their own shares and exercising proxy votes for their customers when their own block exceeds 5%. Furthermore, while the draft proposal sought to reduce the size of supervisory boards, German labour unions were particularly opposed to this change. While a smaller supervisory board would retain the parity between capital and labour, reducing the absolute number of members on the labour bench would upset the usual balance of representatives between inside employees and outside union members.

The law nonetheless represents a departure from the 'constitutional' approach to corporate law, in line with the 1965 reform in introducing liberal elements into the system. The stated principles of the law were to avoid increased regulation of the company and rely on increasing the incentives for self-organization by the existing company institutions and particularly by markets. Furthermore, law-makers sought actively to assist firms in meeting the expectations of international financial markets.

#### Accounting

Rules introduced in the Investment Facilitation Act (*Kapitalaufnahmeerleichterungs-gesetz*) in 1998 allow listed German companies the flex-

ibility to publish their accounts according to standards set either by the GAAP system (US generally-accepted accounting practices) or by the International Accounting Standards (IAS) system (widely accepted outside the United States). The law seeks to 'recognise the expectations of investors' to base their investment decisions on internationally recognized accounting principles. The measure was justified as a necessary step to protect the competitiveness of German firms in international capital markets. Thus, it is particularly salient for firms listed on foreign (particularly US) stock exchanges or having a high proportion of foreign ownership.

This step away from German accounting standards was sparked by the listing of Daimler-Benz on the New York Stock Exchange (NYSE), and the subsequent listing of Deutsche Telekom in 1996. Given the requirements of the Securities and Exchange Commission (SEC) for accounting, these firms were forced to maintain two sets of calculations for their NYSE listing and for tax purposes in Germany. The large discrepancies in the profit calculations of DM2.5 billion at Daimler-Benz led to bad publicity and encouraged scepticism of the German standards. In addition, firms had to consider the direct administrative costs of multiple book-keeping.

Both GAAP and IAS are significantly more shareholder-oriented than German accounting rules. Traditionally, German accounting has stressed very conservative prudence rules (*Vorsichtsprinzip*). These rules favour creditors by allowing firms to build substantial reserves through conservative valuation of assets and allowing up to 50% of profits to be used as internal reserves with shareholder approval. US rules, by contrast, stress market valuations and a more precise definition of profits. While many commentators stress the dangers of going too far towards market-valuation principles, the attractions of the US capital market and the uncompromising

stance of the SEC have prevented the emergence of a more conservative international standard. German firms were initially divided over the issue. Large companies had a growing interest in raising capital overseas but also enjoyed the advantages of the existing system. Slowly a shift in favour of market-oriented standards has occurred due to shareholder pressure and the linking of executive pay to stock prices.

The political solution was to allow German firms to tailor their accounting rules to their needs in accessing international capital markets, or continue a more creditor-oriented approach. However, at present the law is limited to six years' duration, in anticipation of a fundamental reform of German accountancy law in order to adapt to a uniform global standard.<sup>6</sup> However, given the conservative nature of German accounting, internationalisation again represents a substantial shift in the notion of public interest from creditor protection and stability of the company, towards a more shareholder-oriented model promoting competitive selection among companies.

#### Takeover Code

Germany has no law to specially regulate takeover bids, and proposed European directives on takeovers have not been passed (see Appendix 2 on the Takeover Directive). Agreement on the Takeover Directive has become more promising as EU member states, including Germany, see the value in mandatory rules. The obstacle in the medium term, however, remains disagreement among European governments over thresholds, and the requirement of a bidding company to offer to purchase 100% of the outstanding shares.

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<sup>6</sup> The International Accounting Standards Committee and the International Organization of Securities Commissions are currently negotiating to bring the IAS and GAAP together.

In the meantime, Germany introduced a voluntary Takeover Code in 1995 to protect shareholder interests in the event of a takeover bid. The Code was developed by a committee within the Ministry of Finance (*Börsensachverständigenkommission*), and was unusual in being developed by a small group of individuals without input from a large number of companies and associations such as the Bundesverband der Deutschen Industrie (see Vitols *et al.*, 1997). The Takeover Code was strongly influenced by the British code, and is monitored by an Office of the Takeover Commission (*Geschäftsstelle der Übernahme-kommission*). Compliance with the Code has been weak, with around 38% of listed companies participating and only 75% of the DAX 30 companies. Low compliance may relate to some problematic legal issues in the Code, as well as the lack of effective sanctions as in Britain. For example, companies cannot be delisted for failure of compliance. Thus, a renewed discussion emerged about the need for a statutory code. A statutory approach was slowed both by the preference of the business community for a more flexible voluntary approach, as well as anticipation of European-level regulation. In short, despite the bipartisan support for legal regulation, Germany had decided to wait until negotiations over the EU directive were completed. Germany still opposed a proposed EU rule requiring a buyer to make a bid for all outstanding shares rather than just a controlling stake, as this raises the cost for effective corporate control. However, since the takeover battle over Mannesmann in 1999, German legislators appear to be moving towards a new legal regulation.

#### Corporate Governance Code

A 'code of best practice' was published by a small panel on corporate governance in January 2000. The 10-member group consists of several prominent German academics, managers from VEBA and SGL Carbon, and rep-

resentatives from a small shareholders' association, the Deutsche Schutzvereinigung für Wertpapierbesitz (DSW). The stated goal of the Code is to assist in achieving 'a responsible, value-oriented management and control' in German companies. The Code makes reference to the published OECD corporate governance principles in stressing several items: protection of shareholder rights, equal treatment of shareholders, and disclosure and transparency. The Code spells out responsibilities for the *Vorstand* and *Aufsichtsrat*. The *Vorstand* should stress stock-market-oriented compensation, rapid disclosure, and regulations for conflicts of interests and insider trading. The section on the *Aufsichtsrat* discusses the selection of members, their role, the formation of committees (particularly strategic, accounting, management personnel, market and credit risks, and personnel issues), and again regulations for conflicts of interests and insider trading. Despite its cautious language (for example, 'value-oriented' rather than 'shareholder-value-oriented' or wanting to promote the confidence of both shareholders and employees), the thrust of the report is a change to more market-oriented mechanisms of control through disclosure and stronger share-related incentives for management. The consensus behind the Code remains unclear, although the DSW plans to promote its use through shareholder activism.

#### Politics and Change

No single force can be viewed as driving these changes in public interest agendas in Germany. EU directives have exerted a strong pressure to change national law, but these alone do not explain the pattern. Some measures may also be viewed as a response to the prospect of a single European currency. The Euro raised concerns about the competitiveness of Germany as a financial centre, given the increasing competition from London. In addition to Europeanisation, particular events such as corporate scandals and the

perceived success of venture capital markets in the USA have prompted political attention to corporate reform.

Societal actors such as corporations, banks and international investors also exert pressure to change corporate regulation in some areas, while opposing change in other areas. Corporate 'global players' have a growing interest in uniform rules, or easing access to international markets as seen in the Investment Facilitation Act. However, other businesses perceive continued advantage to the conventional German approach to accounting. Likewise, despite their changing strategies, German banks opposed forced change in bank–industry relations proposed by the SPD and were able to lobby against many measures. Another example of unsuccessful change is the Takeover Code, which lacked acceptance among a wide spectrum of corporate actors.

In addition to these pressures, political parties and institutions also played a major role in shaping change. The Ministries of Economics and Justice were both controlled by the liberal FDP party until late 1998, and were able to gradually liberalise capital markets. The party's position was more market-oriented than the more conservative CDU, which could only be persuaded to reform on a more piecemeal basis and in the context of EU pressure. However, stronger proposals to directly dismantle old institutions such as tight bank–industry relations or conservative accounting rules either failed or were not generated within the political system. In this sense, change has remained incremental rather than wholesale. And continuity may be observed alongside very important changes.

Outcomes were thus shaped by pressures of internationalisation and domestic political institutions. Rather than dismantling well-established institutions of company regula-

tion, a new public interest agenda emerged to promote capital-market-oriented rules and a greater shareholder-value orientation among large companies. This agenda differs substantially from the previous non-liberal approaches to shareholder protection and stakeholder integration described in Part I as 'constitutionalism' in company governance.

#### (ii) Companies and Employees

A high level of national consensus exists about the strengths of German codetermination both at the supervisory board and works council levels (see Kommission Mitbestimmung, 1998). Given its contested history, codetermination has an important symbolic value in post-war political culture. The public interest in social peace is widely seen as supporting the competitiveness of German industry by its affinity with a high-skill, high-quality production model in export industries. Large firms have been very successful in adapting codetermination to their competitive needs, and thereby reshaped institutions from having a defensive and status-protecting function towards supporting management in the implementation of competitive strategies. No crisis has developed around the legitimacy of codetermination that would open a discussion about wide-ranging deregulation, as there has been with the German system of collective bargaining. This is despite the fact that codetermination remains widely misunderstood by foreign investors, who view it as a serious infringement of investor rights.

In practice, the nature of codetermination has gradually evolved in response to economic trends and pressures. Codetermination practices have become increasingly contractualised in large German companies (Jackson, 2000b). Firms have developed quite heterogeneous practices fitted to sectoral and company-specific needs. Adaptation often leads to a gradual erosion of codetermination rights (through concession bargaining over

investments, the centralisation and decentralisation of decisions away from codetermined institutions, etc.) Employers are therefore content to let codetermination evolve on its own under competition pressures, rather than mount political efforts to deregulate. In addition, the diffusion of works councils has been slow in some new industrial sectors and in eastern Germany.

Despite the relative stability of national institutions, codetermination has proved impossible to generalise as an international model of governance. Codetermination is a central issue in the discussion of a European-wide corporate form. Most member states have, at least in principle, perceived advantages in European-level corporate regulation: giving firms greater certainty during European mergers, since the post-merger firms could adopt the European legal form rather than choosing one of the two national forms – not least in avoiding the associated psychological consequences for the new ‘corporate culture’. While tax questions plagued the early debates, progress of European regulation is perceived to be blocked by the question of German codetermination in the *Aufsichtsrat*. Early attempts to generalize this model for Europe through the *Fifth Company Law Directive* (see Appendix 2) failed due to opposition by Britain. Conversely, German unions oppose any measures that would allow German firms to migrate to other countries in avoidance of codetermination requirements. Indeed, the danger would be real if firms could maintain German headquarters while adopting a European legal form. However, other countries do not favour moving ‘up’ to German standards of codetermination.

A renewed debate over the *Societas Europaea* was initiated through the Davignon Commission, whose report (Davignon Commission, 1997) addressed several key questions. However, the recommendations were opposed by

several countries, particularly Germany. The most recent proposal would introduce a principle of ‘highest standards’: company stakeholders would either have to agree voluntarily to a new codetermination model, or the highest level of the two countries would remain in force. This *codetermination à la carte* might be a way of overcoming opposition to European regulation, but may lead to a long-term erosion process for codetermination to the degree that managers are likely to negotiate lower standards on a firm-by-firm basis.

In contrast to the blockage regarding European corporate law, the European Works Council Directive succeeded largely because it did not interfere with national systems of company interest representation, but rather supplements them with firm-specific institutions to represent non-domestic European workers at the headquarters of multinational companies. European regulation is procedural, and stresses both voluntarism and the principle of subsidiarity. In practice, European works councils are institutions worked out through company-level negotiations and thus strongly shaped by the home-country practices (Bonneton, 1996). Thus councils have different consequences for national regimes. In Britain, European regulation gives unions a foothold to strive for ‘higher’ standards, and helped renew debate in Britain. German works councils, by contrast, see the European institutions as a way to extend their influence transnationally. In both cases, outcomes are shaped by both EU and national institutions. The result is to set European-wide minimum standards of employee participation in large firms. The case shows both the difficulties in moving standards ‘up’ and the resistance to measures that lower standards – because EU regulation would either directly interfere with national institutions or increase the exit options of actors from those institutions.

**(iii) Companies and the Community**

Since the 1970s, community concerns have been a growing part of the public interest agenda. Social movements have been an important force in increasing corporate accountability to society. This section looks briefly at two issue areas: environmental protection and gender discrimination. Public interest concerns related to the environment include both the economic externalities of corporate pollution, as well as broader quality-of-life issues. Gender discrimination concerns the socio-political consequences of corporate hiring and promotion practices that affect the social equality of men and women generally.

German corporate law recognizes a general obligation of companies to consider the public interest, but generally leaves such obligations undefined and open to further specific legislation. When compared to Britain, the wider legal scope for accommodating public interest concerns in Germany has led to a greater *internalisation* of public interest issues into company governance. Comparable issues have been dealt with by external regulation in Britain, while the legal definition of directors' duties has remained more exclusively linked to accountability to shareholders. In the 1990s in Germany measures to mandate internal officers were taken in both the areas of environmental protection and gender equality. A company officer serves as a liaison between the firm and third parties. The outside advocate of the policy in question may be a government department, or a designated non-government actor with an interest in the issue who interacts with a specific company officer or body.

State governments are the traditional regulators of environmental issues, though much of the legislation is federal, dating back to the 1970s. Most commonly, the legislation requires German companies to submit reports to state authorities on the impact that

new industrial developments are likely to have on the surrounding area and broader environment, with periodic updates to cover changes to the business's operations. Early environmental law covering water pollution (*Wasserhaushaltsgesetz*) and emissions (*Bundesemissionsschutzgesetz*) required German companies to designate company officers responsible for monitoring compliance with emission standards and impact assessment requirements for new operations.

Such environmental regulation has become more prevalent and costly in the 1990s. For example, companies have been required since 1995 to reduce waste by taking back packaging that customers do not want, unless they participate in a national recycling system for which they must pay a fee. Since 1998, automobile manufacturers have also been required to take back cars that are taken off the road, with no direct cost to the consumer. Partly in fear of even more intrusive regulation, the German business community chose to offer government the prospect of participation in environmental protection schemes that focused on corporate governance itself, if, in return, participation were voluntary, and the scheme were organised by the Chamber of Commerce.

The result was the EMAS system, also known as the EU's Eco-Audit system. The EMAS system was introduced in 1993 and works on the basis of voluntary environmental auditing and dissemination in the form of an environmental statement. The audit rates companies on their business practices and makes recommendations for improvements. There are no set standards, and the business community successfully prevented the federal government from establishing a regulatory body, or allowing the Federal Environment Agency to carry out regulation. Instead, the process relies on positive publicity to encourage businesses to improve their profile by demonstrating their commitment to the environment.



Audit teams involve employees (3–15 in Germany) and at least two external auditors. Often responsibility for environmental protection is lodged with senior management, who take part in the audit procedure and place great importance on the assistance of the external auditors. Meanwhile, broad participation of the workforce varies widely, and specific environmental protection training is not prominent (Umweltbundesamt, 1998a: 75–84). Nor has EMAS been incorporated into the widespread quality management systems (ibid.: 86). In this sense, while participating firms are designating environmental protection officers, they often perform a supplementary function to company policy rather than an integrative one which injects environmental protection concerns into all company policies. Nevertheless, more and more companies are doing so, and many companies find it practical to aid implementation of environmental protection measures through information disseminated along with workplace health and safety issues (Umweltbundesamt, 1998b: 95–99). In the 1990s, however, federal and state governments also rely more heavily on a system that combines appointed environmental officers within the firm and environmental impact audits conducted by approved non-government agencies to monitor and target improvement of the company's pollution reduction policy. This arrangement suits both the authorities, which may then devote fewer resources to direct regulation, and businesses, which prefer the audit approach to direct regulation.

Equal treatment is entrenched in the Federal Republic's constitution, but equal treatment in hiring and workplace policy was not a high priority either for unions or employers until the 1990s. Their constitutionally guaranteed mutual responsibility for managing workplace affairs without interference (*Tarifautonomie*) led to little outside intervention and allowed female work to be poorly

evaluated into the 1990s. German unification rekindled debates over discrimination issues. Discrimination in pay and work practices is outlawed under the constitution, but defined in practical terms by unions and employer associations. Court cases at both the national and EU levels began challenging these standards in the years leading up to 1996, supporting changes in some collective bargaining agreements (Bundesministerium Frauen, Senioren, Familien und Jugend, 1998; DGB, 1996; 1998). The 1994 *Women's Promotion Act* required that companies appoint an officer responsible for women's issues in the workplace, and that all levels of government appoint a similar officer to supervise progress within their jurisdiction. These representatives should ensure that gender issues will be internalised within company governance, beginning with pay and discrimination issues, but now extending to harassment and soon to include measures that make work and parenthood more compatible (Deutscher Bundestag, 1998). Since these policy areas fall into the realm of the employer–employee relationship, they also require cooperation from management, unions and works councils.

Finally, in its last term the Kohl administration promoted making motherhood more compatible with the workplace. Many provisions are external to the firm, such as the right to day care. The principal in-firm measure is the right to extended leave of up to five years with a guarantee of re-employment under the 1995 *Mothers' Protection Act* (*Mutterschutzgesetz*). In addition, the government encourages businesses to allow for flexible working arrangements to accommodate expectant mothers, extending to the context of collective bargaining in the works council (BMFSFJ, 1998). In doing so, the government hoped to improve the quality and stability of relations between firms and their employees, and that firms would recognise

gains in productivity and corporate image as a result of their commitment.

Environmental and equity issues illustrate the growing scope of public interest agendas in the last decades. While the regulatory details are complex and cannot be covered here, this section stresses the internalisation of public interest concerns within German company governance. This differs from the British pattern. For example, equal treatment issues have been absorbed into structures that existed to handle employer–employee relationships, widening the scope of activities of the works councils to address new concerns and becoming incorporated in the regulatory concept due to their role in hiring, classification and pay issues.

Equal treatment and environmental protection issues have become more similar in that legislation sets up the possibility of an ongoing relationship with an established company officer responsible for a particular policy area, and a government department or a surrogate appointed in its place, such as an environmental audit group. While being less intrusive on corporate governance than a supervisory board or a works council, internal positions nevertheless increase the external accountability of companies for their activities and their exposure to public interest concerns. The strength of such an ‘internal’ approach is that particular public interest concerns are incorporated into everyday decisions and organisational norms and routines. Companies appear nonetheless to have failed to internalise commitments to environmental protection measures in corporate governance and environmental reporting as inherently positive and worthwhile activities. In the opinion of the Federal Environment Agency, management is more likely to view concern for these issues as restricted to a small core of academics and pressure groups than to the broader public.

## BRITAIN

### (i) Companies and Investors

It has been recognised since at least the 1920s that in many companies, because of collective action problems, shareholder democracy rarely works. Company legislation has nevertheless continued to operate on this basis, adding regularly to the matters on which shareholders are entitled to vote. Attention in recent years has focused on institutional investors, who now collectively own over 70% of the companies listed on the stock market, as a means of restoring integrity to the model of shareholder control. They are coming under political pressure (with the present government having raised the possibility of making voting mandatory) to vote their shares and involve themselves in a governance role.

Statutory regulation in relation to the governance function of directors is limited, apart from the various legal provisions targeting improper conduct and negligence. While the Companies Act requires companies to have directors, it does not set out their functions. This is left to the company’s articles of association, which invariably provide that management powers are vested in the board. There is, then, no distinction recognised in statute between executive and non-executive directors, nor is a monitoring duty explicitly set out. Companies listed on the stock exchange are, however, required to have at least one-third of non-executive directors (NEDs) on the board, a majority of whom must be independent of management. This is stipulated by the Combined Code (Committee on Corporate Governance, 1998), which is a distillation of the earlier Hampel (1998), Greenbury (1995) and Cadbury (1992) reports and codes (Parkinson and Kelly, 1999). In fact, it has always been common for companies with outside shareholders to have what we now term NEDs, but historically these were often titled or public

figures designed to add lustre to the board but not to perform a meaningful governance role.

The movement towards encouraging boards to appoint people who are reasonably competent and independent, and so able to perform a monitoring function, began in the 1970s with backing from the Bank of England. There was at the time a perception, which has continued, that executive management was insufficiently accountable. It was a series of major financial scandals that prompted the more formalised approach in Cadbury, but even before this it was widely accepted that proper board supervision was important to economic performance. In the 1970s and 1980s there had been initiatives by the institutions and by the CBI, as well as the Bank of England, to improve board structure and performance.

Following the financial scandals of the 1980s the corporate and investment communities proposed a code of best practice, in part to pre-empt pressure for more formal requirements. The Cadbury Committee on the Financial Aspects of Corporate Governance produced the first *Code of Best Practice* in 1992. The provisions of the Code were not mandatory (even in the context of a non-statutory system). Subsequently, however, they were made a condition of stock exchange listing. The listing rules imposed an obligation on companies to disclose in their annual accounts whether they were in compliance, and if not, the reasons for not conforming to the Code's requirements. The intention was to preserve flexibility: the assumption being that compliance with the Code would in most cases be appropriate, but that particular circumstances of a company might justify a departure. The disclosure requirement would make governance arrangements transparent, and shareholders would be able to put pressure on management, through the market or by other means,

where they considered that improvements were needed. The Code covers the structure and composition of the board, including the need for NEDs who are independent of management, procedures for setting directors' remuneration, the need to establish proper internal controls and the establishment of an audit committee to liaise with external auditors. Complying firms would ensure that the board of directors acquired clearly defined rights, responsibilities, and resources to monitor and check the power of the company's executive management, that NEDs<sup>7</sup> review and report on company finances with the aid of independent audit committees, and that shareholders gain the right to reliable information about finances, and regular opportunities to vote on directors.<sup>8</sup>

Cadbury was followed in 1995 by the setting up of the Study Group on Directors' Remuneration (the Greenbury Committee), and then by the Hampel Committee on Corporate Governance, which reported in 1998. The former was established in response to public disquiet about the scale of directors' remuneration in privatised utilities, where directors were being paid considerably more than they were before privatisation for argu-

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<sup>7</sup> PRO-NED published a voluntary code of practice in 1987, requiring NEDs for large companies, which the Cadbury Committee adopted by requiring NEDs on audit and remuneration committees. Unlike the proposed EC Fifth Company Law Directive, they do not have powers of appointment to the executive board. Parkinson, 1993: 193–196. At the time he was writing, the stock exchange had not adopted the Code into its Listing Rules.

<sup>8</sup> The Cadbury Committee advocated that audit committees' capacity for independence should be promoted informally through the Auditing Practices Board, which would propose standards for the business community. This was designed to set a standard which shareholders can demand the company adopt, or which companies can adopt in anticipation that the investor market will either demand it or demand a premium for non-compliance (Cadbury, 1992).

ably carrying out much the same role. A great deal of adverse publicity was also being attracted by the very generous terms and conditions awarded to directors in other areas. The establishment of the Greenbury Committee (by the private sector, but with government encouragement) was an attempt to deal with an issue that was bringing the privatisation policy into disrepute and a response to mounting criticism about 'fat cats' more generally. As with Cadbury, it was a more flexible, but also more ideologically palatable alternative to state intervention. The main recommendations of Greenbury were that pay and other conditions should be set by a remuneration committee comprised entirely of independent NEDs, and that more detailed information should be publicly disclosed about pay and its determinants.

The perception that this approach was not working (if anything, pay was rising at a faster rate, among other factors, because disclosure was stimulating a 'catching up' effect) was one reason for the appointment of the Hampel Committee. More generally, its function was to review the operation of the Cadbury Code and look at the role of shareholders in governance. Despite some criticism of an over-emphasis in the way in which Cadbury was being applied on the monitoring role of NEDs, at the expense of their contribution to strategy, the Hampel recommendations, now contained in the Combined Code, somewhat strengthen the Cadbury provisions relating to monitoring. In particular, the Combined Code provides for a lead independent NED to be identified in the annual report, and for a third of the board to comprise non-executives, a majority of whom are to be independent (as opposed to three non-executives, in Cadbury). Reflecting long-standing criticisms that the institutions were failing to take seriously their governance responsibilities, the Code stresses the importance of shareholders exercising their voting rights, of evaluating disclosures

about governance, and of participating in dialogue with management, though there are no means of enforcement for these recommendations.

In 1998 the newly elected Labour government launched a fundamental review of company law. It indicated that it believed that codes of practice were in general an appropriate way of dealing with governance issues, but did not rule out the possibility of statutory intervention where the present approach needed a legal underpinning or was seen not to be working (Department of Trade and Industry (DTI), 1998a). These matters are currently under consideration (DTI, 2000). Relevant issues concern whether the monitoring (as distinct from advisory or strategic) role of non-executives is effectively carried out and whether boards have enough, particularly independent, NEDs to be able to discipline an intransigent management. As regards remuneration, the government has come round to the view that the private sector initiatives have not succeeded and is planning some form of legislative intervention. The possibilities on which it has consulted include increasing shareholder control over pay by requiring a shareholder vote on remuneration policy, or requiring the chairman of the remuneration committee (to be put on a statutory footing) to be elected each year (DTI, 1999a).

The other main governance mechanism is the hostile takeover. This was not a deliberate invention of public policy, but evolved with changing attitudes in the 1950s (going over the head of the board with an offer to the shareholders having previously been regarded as 'ungentlemanly'), and in particular the availability of reliable financial information on the target company after the reforms in the 1948 Companies Act. The takeover mechanism was subsequently substantially bolstered by the self-regulatory City Code on Take-overs and Mergers, the main

concerns of which are to secure the equal treatment of shareholders in the target company and to prohibit defensive tactics on part of the target management that would have the effect of depriving the shareholders of the right to determine the outcome of a bid.<sup>9</sup> There has long been doubt about the effectiveness of takeovers as a means of disciplining management, about their broader economic effects, for example as possible contributors to short-termism, and their social consequences (redundancies and increased insecurity). Nevertheless the City has lobbied very effectively to prevent intervention in the takeover market. Proposals by Labour when in opposition to reverse the burden of proof in references to the Monopolies and Mergers Commission (now the Competition Commission) were dropped in office, for example, and the Takeover Panel has mounted effective opposition to the EC Takeovers Directive, notwithstanding its marginal impact in the UK. Perhaps the outstanding feature in relation to public policy and shareholding/governance has been the willingness to leave major issues to self-regulation. The positive interpretation of this is that the system is basically sound, but will benefit occasionally from technical adjustments which can be made 'flexibly'. A more critical interpretation is that the political will to remedy quite major defects in the system has been lacking.

Another important issue for the Company Law Review instigated in 1998 is whether to retain the exclusive shareholder orientation of company law in the UK, or to move in the direction of a 'stakeholder' model. In an-

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<sup>9</sup> A controlling interest is defined as 30% of the voting rights. The Panel reserves the right to approve partial bids that fall under the 30% threshold, or under the 50% threshold if the offeror states a distinct target, and 50% of the voting shareholders approve.

nouncing the Review, the government invited consideration of whether arguments that directors should have regard to a wider range of interests than those of the shareholders were just 'interesting philosophical ideas and ideals' or 'whether they lead to concrete proposals that should be pursued' (DTI, 1998a: para. 3.7). The background to this invitation was the interest expressed by the Labour Party before the 1997 general election in stakeholder approaches to the company and society more generally. In the light of the terms of reference of the Review, the issue has been approached by examining whether economic performance might be improved by broadening the range of groups whose interests directors must consider, and business responsibility/accountability questions. The intention has not been to use company law for redistributive purposes, nor has increasing employee participation in decision-making been recognised as desirable in its own right (DTI, 1999b: ch. 5).

The economic case for moving away from an exclusive shareholder focus has centred on the problems of fostering long-term cooperative relationships between companies and their employees, customers and suppliers. Concern has been expressed that many British companies fail to take advantage of the value-creating potential of such relationships and are overly reliant on short-term, arm's-length dealings. Studies by the Tomorrow's Company project (Royal Society of the Arts, 1995) and the Commission on Public Policy and British Business (1997) identified this as one among various reasons (such as low investment in research and development) for the large proportion of British companies that underperform compared to their overseas competitors. The responsibility/accountability debate centres on whether it is sufficient to rely on 'external' forms of social control over companies, such as environmental and consumer law, or whether these should be supplemented by imposing more compre-

hensive responsibilities on directors through company law to take account of the impact of the company's actions on others. As regards both the competitiveness and responsibility issues, it looks as though the recommendation will be to retain an overall responsibility to shareholders, but that this should be understood in an 'inclusive' way (DTI, 2000: ch. 5). In relation to directors' duties, this would not involve a major change in the law, but it is proposed that for the first time these should be made explicit by putting them into legislation, and in a form that draws specific attention to the importance to the success of the business of fostering relationships with participants, moderating adverse environmental and community impact, and protecting the company's reputation. The counterpart to these proposals is disclosure of information on performance in each of these areas where material. The intention is that the obligation to disclose will increase company sensitivity and strengthen the position of interested parties to put pressure on companies to improve performance. Whether the government will adopt these proposals will not become clear until after the final report of the Review in 2001.

EC directives designed to enhance investor confidence in European capital markets introduced the first statutory accounting and reporting standards in the 1980s. Requirements to report 'true and fair value' were first introduced in 1981 to comply with the EC's *Fourth Company Law Directive*. The 1985 *Companies Act* further encouraged accountants to establish a standards-setting body to provide some consistency to accounts, and directors' and auditors' reports, as required by the new law. In the absence of such a body, the 1989 *Companies Act* mandated an Accounting Standards Board to regulate accounting association standards, company auditor qualifications, and their practices in compliance with the EC's *Eighth Company Law Directive* (84/253). The profession still

effectively regulated itself in 1999, and the Blair government's intention to establish a standards and certification body independent of the profession was still being negotiated at the time of writing in order to instil more confidence in investor protection in the UK (DTI, 1998a). In general, pressure from the EU was important in bringing about change, and the need to bring the UK more into line with European developments was one of the reasons for the setting up of the Company Law Review in 1998. But British governments remained opposed to the idea of drawing up a model constitution for the European company.

#### (ii) Companies and Employees

The Conservative governments between 1979 and 1997 abandoned the attempts, whose high point was reached in the Bullock Report, to incorporate trade unions into the decision-making processes of the company, and instead brought in a raft of new laws designed to curb the powers of trade unions, and to reassert the authority of managers within companies. In this bid they were largely successful. Aided by high levels of unemployment, the collapse of traditional industries, privatisation, and victories in a number of high-profile strikes, the government effectively withdrew most of the immunities which trade unions had enjoyed since the beginning of the century, and trade unions were shut out from political influence at the national level<sup>10</sup> (Marsh, 1992). Under the Conservatives trade unions were seen as having nothing to contribute to the public interest, and it was hoped that they would wither away as the economy became reorganised on more individualist and entrepreneurial lines. The only public interest which the government acknowledged in respect of companies was shareholder value, and although it displayed some interest in employee share ownership, it showed little concern with providing channels of representation within the workplace or providing a le-

gal status for employee rights. At best it assumed that well-managed companies would pay proper attention to the needs of their employees. The only public interest it acknowledged was the preservation of the freedom of individuals and firms to act without interference from unions and the state.

These attitudes came under pressure both from the European Union, most of whose member states had very different attitudes towards industrial relations and trade unions, and from domestic political changes, in particular the growing political challenge from a revived Labour Party with new ideas about industrial relations. The pressure from the EU came through the European courts, which trade unions in Britain had learnt how to exploit, and through attempts to deepen the process of European integration by harmonising institutional arrangements in areas such as labour law. An example of the latter was the Social Chapter of the Maastricht Treaty, which proposed some (fairly general) social rights to be applied across all member states. This was too much for the Major government, which insisted on an opt-out from this clause.

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<sup>10</sup> Between 1980 and 1993, successive revisions of labour legislation removed mandatory recognition, restricted the right to strike and enhanced the capacity of individual employees to challenge unlawful industrial action and financial management by making them liable for economic losses incurred. The 1993 Trade Union and Labour Relations (Consolidation) Act restricted the right to strike. The *Trade Union Reform and Employment Rights Act* (1993) provided new deterrents to strikes by giving individuals the right to seek legal redress for the withdrawal of goods and services because of unlawful industrial action. Legal aid is also made available to them. In addition, the law instituted the office of a Commissioner for Protection against Unlawful Industrial Action. Until 1999, employers were not obligated to recognise unions, consult or negotiate with them or with employees. Restrictions on union activity were tightened throughout the 1980s and until 1993 (Bowers, 1997: 9–10).

The changes associated with New Labour can be traced back to the far-reaching policy review inaugurated under the leadership of Neil Kinnock in 1987, and which was further developed under his successors, John Smith and Tony Blair. The new approach emphasized individual rights as the basis of industrial relations and labour protection. There was no question of returning to the former adversarial voluntarist arrangements, nor any desire to experiment again with corporatist institutions. But there was a firm intention to introduce a durable and less one-sided legal framework for industrial relations, which would bring Britain closer into line with other EU member states. One of the first actions of the Blair government elected in 1997 was to sign the Social Chapter of the Maastricht Treaty. It also introduced a minimum wage and, after wide consultation, published its proposals on industrial relations in the *Fairness at Work* White Paper (DTI, 1998b) which gave significant new rights to both individual workers and trade unions, including setting out conditions under which firms must agree to trade union representation (Taylor, 1998; Gamble and Kelly, 2000). But the government also made it plain that it did not want to impose legal constraints on companies which might reduce flexibility and significantly increase costs. Like its predecessor, it therefore remained opposed to any more radical suggestions from the EU making it obligatory for companies to establish works councils or to provide major statutory improvements to working conditions, such as the length of the working day. New Labour adopted an enlightened shareholder-value model of the company and was prepared to legislate to ensure that minimum standards and rights were protected. But it did not favour a more proactive stance.

The 1999 *Employment Relations Act* introduced procedures for union recognition and collective bargaining that increase the likelihood of organised employer–employee re-

lations at the plant level for all firms with 20 or more employees, although it is too early to tell what impact the Act will have on British industrial relations. The Act provides for mandatory employer recognition of unions under the direction of the Central Arbitration Committee, CAC-imposed collective agreements if the parties are deadlocked after three months of negotiations, and a three-year moratorium on employer applications to withdraw recognition from the union in question. However, initial provisions for rapid recognition of a union without a formal ballot were removed to satisfy employer concerns about due process. Taken together, these measures demonstrate a strong concern on the part of the government that employers should take organised labour seriously as partners in the workplace, where the employees wish to be represented. The formula struck the middle road between business opposition to mandatory recognition, which went unheeded, and union desire to achieve recognition rights similar to those in other parts of the EU (TUC and CBI, 1998). The CBI opposed mandatory recognition on the grounds that collective bargaining was not practicable when only one partner was willing to engage in it (TUC and CBI, 1998), and they received political support from the Conservatives.

The legislative agenda does not extend to requiring all companies to inform and consult their employees over company policies and operating procedures, as many German companies do through works councils. Unions must be consulted on health and safety issues, discussed below, and other issues mandated by EU regulations, provided that the union is recognised. Otherwise, voluntary consultation is based on ACAS-issued codes of practice on disclosure, including a depiction of the company's production and financial profiles, pay, benefits, information on the situation of employees in the plant, as well as on health and safety issues and

pension provisions (Bowers, 1997: 432–4). The codes do not have legal force, but serve as a benchmark in disputes that are conciliated or brought before an industrial tribunal. Finally, the Employment Relations Act implements the EU Working Time Directive, which business opposed on account of its restrictions on the capacity of firms and employees to negotiate their terms of employment individually. Employers have also been dismayed by the need for a regulatory body that sets rules.

A stronger public interest agenda is evident in legislation on health and safety matters, and, with some reluctance, on information and consultation on redundancies. Health and safety protection regulations changed British corporate governance in the 1970s with the 1974 Health and Safety at Work Act in response to a report on workplace hazards. For the first time, employers had a responsibility to prevent accidents causing harm at work, rather than merely being liable to pay damages. The Act established the Health and Safety Executive to advise the government on detailed regulations and inform businesses on compliance (Barrett and Howells, 1995: 50–1). It also provided for employee participation in the form of safety representatives, but did not mandate them. Regulations passed in 1977 allowed recognised trade unions to appoint safety representatives to participate on company committees (Barrett and Howells, 1995: 52).

The 1992 Management of Health and Safety at Work Regulations<sup>11</sup> built on these principles, and were designed to implement EC

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<sup>11</sup> Workplace (Health, Safety and Welfare) Regulations 1992; Provision and Use of Work Equipment Regulations 1992; Personal Protective Equipment at Work Regulations 1992; Manual Handling Operations Regulations 1992; Display Screen Equipment Regulations 1992.



directives passed in 1989 to ensure company responsibility for safety in the workplace. They went further, however, in that they obligated employers to train employees and appoint competent safety officers for the first time. The Regulations are given further substance by the *Approved Code of Practice* for the management of health and safety at work, issued by the Health and Safety Commission. Failure to comply with the code is not an offence, but employers who violate it may be held accountable to its standards as a criminal violation under the 1992 regulations or the 1974 Act. This underlines the decentralised nature of enforcement, and the reluctance to set up regulatory bodies with enforcement powers. The employer is given the responsibility to assess risks and hazards to health and safety in the workplace, to prevent and minimise risks, to inform and train employees and to monitor their health during working hours while taking advantage of new technology. Employers are required to assign staff with sufficient resources and time to do the job (Health and Safety Commission, 1992).

The 1992 Trade Union and Labour Relations (Consolidation) Act required employers to inform employees about work conditions and employment policies, but only if the company recognised trade unions. In 1995, the European Court of Justice forced the Major government to implement EU measures requiring companies to consult with employees in the case of redundancies, whether or not it recognised unions (Bowers, 1997: 11).<sup>12</sup> The European Commission has tried to widen this requirement, by proposing that all European companies inform and consult their employees on a range of issues whether or not these employees belong to unions and the unions are recognised. But the Blair gov-

<sup>12</sup> Commission of European Communities v. UK [1994] IRLR 412.

ernment has resisted the initiative, citing the argument that subsidiarity allows countries to manage industrial relations at the national level (European Industrial Relations Observatory (EIRO), 1998a).

The Blair government has taken the same approach to European works councils. The government tabled a proposal to break the deadlock on developing a European Company Statute along the lines of the Davignon Report on company structure (1997) by proposing a new formula for negotiations between employees and employers of European companies, which would allow, but not mandate, the development of works councils and codetermination (EIRO, 1998b). Under this proposal national differences would persist. The TUC has concluded that the prospect of codetermination is a political non-starter in the UK. It decided that calling for some form of codetermination or works councils would clash so strongly with prevailing opinion in government circles that it would endanger less controversial objectives that the TUC wished to promote. The key to the future of employee–employer relations in British corporate governance depends on union recognition, since consultation and cooperative decision-making depend on whether or not unions are recognised. The Blair government has introduced measures that promote stable industrial relations and cooperative decision-making, and make it easier for unions to gain recognition. But this new approach only extends for the moment to those companies in which unions are recognised, and is vulnerable to reversal once more, should the Conservatives return to office, since they continue to oppose any measures that facilitate union recognition. As the German case shows, the acceptance by companies of new responsibilities depends significantly on the political resolve of government to pursue a public interest agenda, and to enlist support for it. The kind of industrial consensus that still exists in Germany on the responsibilities of companies is much weaker in Britain.

## (iii) Companies and the Community

In the traditional view of the Anglo-American company wider community interests, such as equal treatment of customers and employees or protection of the environment, are best served by companies pursuing the interests of shareholders within a competitive market. If there are adverse 'third-party' effects then these should be addressed through externally imposed regulation. There is little attention given either to the creation of governance mechanisms within the firm to resolve public interest issues, or to the role of government in providing incentives to firms to engage in particular modes of behaviour. On specific public interest issues, the government urges publicity and transparency on companies, but only imposes cooperative decision-making procedures, in the way that Germany does, when implementing EU directives.

## Corporate Responsibility

There is, however, a long tradition of corporate responsibility towards local communities, reflecting the view that enterprises should operate according to the same ethical and social norms as the rest of society. It used to be thought of in terms of charitable donations and 'good works', in line with the traditional American ideal of corporate philanthropy, but over the last decade in particular there has been an increase in the number of executives in large and medium firms who believe that corporate responsibility in relation to local communities implies behaviour different from corporate philanthropy and mere compliance with formal legal and regulatory obligations (Cadbury, 1992). There is, however, little consensus as to the form that these additional measures should take, the rationale for adopting them, or the extent of their coverage. Moreover, survey evidence suggests that only 31% of senior executives agree that they have a wider responsibility to 'society and community' as well as to shareholders (MORI, 1996).

Given the diversity of enterprises in terms of size, legal status and sector, it is inevitable that corporate responsibility towards communities covers a continuum of activities and approaches. Two broad perspectives can be identified. First, there are those firms for which corporate responsibility translates into a commitment not to undertake socially unacceptable practices (for example, using suppliers who employ child labour). Second, there are those firms which espouse the widely cited 'business case' for developing and monitoring sustainable relationships with key stakeholders such as employees, suppliers and local communities (RSA, 1995). These relationships can provide companies with a store of popular legitimacy and trust – a 'licence to operate' – which constitutes a source of competitive advantage. Consequently, there is no long-run trade-off between the interests of stakeholders and shareholders (Grayson, 1996). A more complex notion of this business case argues that companies are institutions which need to be governed by a set of rules and values which ensure legitimacy even if this occasionally entails sacrificing short-term profit-maximising behaviour (Kelly and Parkinson, 1998).

This second perspective is clearly of relevance to efforts to integrate new public interest considerations into the evolving agenda on corporate responsibility in the UK. Corporate responsibility is interpreted proactively; the company has a positive responsibility to adopt, rather than avoid, certain norms of behaviour in relation to communities. It makes corporate citizenship a central issue for business strategy, particularly as regards policy on human resource management and recruitment policy. It also assumes that this 'licence to operate' will not be static. As social trends and attitudes evolve so will the terms of the licence. This widening of the scope of corporate responsibility does not mean, however, that the traditional UK mode of dealing with public interest is-

sues has been superseded. The new approach is far from being accepted by all firms. There is a wide variation of opinion both within and between different sectors as to how companies should relate to the community. Nevertheless a change of view is discernible. This widening of the understanding of corporate responsibility in relation to the community reflects a number of factors: shifts in attitudes towards the involvement of the private sector in areas which have traditionally been the domain of the public sector; a change in the policy agenda coming from government; and a recognition by companies that the improvements in popular legitimacy which can flow from a strong community profile can be a source of commercial advantage.

The new thinking is reflected in the DTI's Company Law Review (1998–2001) which is considering the merits of extending directors' duties to stakeholder groups such as the local community, as well as in the White Paper on competitiveness (DTI, 1998c) which stresses the importance of highlighting best practice on corporate responsibility, and the 1998 Pre-Budget Statement which announced a review of fiscal incentives which might foster the involvement of companies with the community. Another important area of policy deliberation in this regard is the Inland Revenue's Review of Charity Tax which will help determine the tax treatment of giving and (perhaps more importantly) giving in-kind by companies.<sup>13</sup> In all these instances government is seen to have a major role to play in influencing the development of corporate responsibility. In relation to non-employment issues, the main trend has been towards the use of a variety of mechanisms to influence corporate behaviour which do not impose legal obligations: for instance, moral suasion involving the 'naming and shaming' or 'naming and praising' of individual firms; and the use of a spectrum of fiscal instruments such as subsidies, tax credits or and tax holidays. But in other ar-

reas the legal imposition of minimum standards remains critical. Two are given particular consideration here: equal treatment issues and environmental protection.

#### Equal Opportunity and Equal Treatment

The 1970 Equal Pay Act made it unlawful to offer men and women different pay or conditions for the same work; this was extended to work of equal value by the 1983 Equal Pay Regulations. The Equal Opportunities Commission (EOC) is responsible for overseeing compliance, investigating complaints, and for administering a *Code of Practice on Equal Pay*. The 1975 Sex Discrimination Act (SDA) broadened the prohibition on discrimination to cover employment and business transactions, both direct and indirect – the latter understood as unjustified rules which are formally applied to all persons, but which make it difficult or impossible for one sex to comply. However, business won exceptions where sex could be deemed a genuine occupational qualification for the job,<sup>14</sup> and where positive action is taken to help men or women compete on equal terms in the labour market. With respect to these issues,

<sup>13</sup> In addition to policy initiatives aimed at imposing or promoting modes of behavior across all firms in relation to the wider community, there are a number of policy debates and instruments which apply only to particular sectors. This is particularly the case in relation to the privatised providers of key utilities (water, electricity, telecommunications), but also to the providers of basic services such as banking and insurance. Here the 'community' in question consists of customers excluded from key services due to low income or some other form of disadvantage. A range of policy options are being considered to broaden access to these services, ranging from binding universal service obligations on firms, to the empowerment of consumer groups within the structure of the company, and to the threat of regulation if companies do not adopt voluntary codes. (See Kelly and McCormick, 1999).

<sup>14</sup> To be defined on a case-by-case basis in tribunals.

the Acts are negative in their prescription, since they require no standard operating procedures or structural features within the company, and are limited in their impact, since corrective action takes place on individual application to industrial tribunals. The SDA also outlaws sexual harassment and holds employers responsible for the actions of their employees in some cases. Companies must develop an internal policy on harassment, including grievance procedures and countermeasures to protect themselves from liability in the event of a complaint. In 1994, the Criminal Justice and Public Order Act opened up the possibility that sexual harassment could be treated as a criminal offence.

An important area of indirect discrimination pertains to rights associated with maternity leave. Employers are required to uphold the terms of an employment contract when an employee returns from maternity leave, and must show that redundancy decisions were not motivated by the employee's absence. However, the law allows loopholes such as whether it is 'practicable' to offer the employee similar employment, and requires plaintiffs to seek redress from employment tribunals on the basis of a breach of contract, which can be difficult to enforce. The 1999 Employment Rights Act introduced a longer maternity leave (unpaid) and implements the EU parental leave directive, which aims to help reconcile the responsibilities of work and parenthood for both sexes. Employees gained the right to time off for family emergencies, and easier access to the qualifying period for extended maternity leave – from two years to one (EIRO, 1998c). This in part reflects pressures from the European Union (e.g. directives on parental leave, and the proposals in the *Partnership for a New Organisation of Work Green Paper* (EC Commission, 1998, DG-V). The treatment of other equalities issues is also starting to shift the traditional mode of external regulation.

The 1976 Race Relations Act (RRA) deals with direct and indirect discrimination on the basis of racial, national or ethnic origins. Complaints are handled through industrial tribunals in the case of workplace disputes. As with the SDA, the RRA applies to all employers, with a few notable exceptions in which race is deemed a 'genuine occupational qualification'. At present, this means acting jobs, but also working in cafés and restaurants and delivering personal social services to a particular racial group. The RRA also forbids affirmative action programmes or measures aimed directly at hiring or promotion. The Commission for Racial Equality (CRE) investigates complaints provided that reasonable grounds for suspicion of discrimination are present. The CRE also sees itself as an active agent in promoting new attitudes toward discrimination. Residents are encouraged to know their rights, and to complain when they feel abused. The CRE is not satisfied with the RRA's effectiveness among British firms, and lobbied Parliament in 1998 to adopt EU directives to bring the treatment of racial discrimination in line with that for sexual discrimination. It also sought greater powers for itself to monitor discrimination and initiate prosecution, and to impose on public and private managers a duty to combat discrimination.

Discrimination against people with disabilities is managed along the same pattern as sex and race discrimination, in the 1995 Disability Discrimination Act. The Act established the National Disability Council (NDC) under the Secretary of State for Employment and Education to establish and develop a code of practice on discrimination that does not confer direct legal liability on discriminators for their actions, but may be used in hearings at industrial tribunals to provide a reference point for rulings. By 1 October 1999, companies were required to change policies and practices that deter disabled customers or potential employees in accord-

ance with the code (NDC, 1999). The NDC must consider the costs of its recommendations, and devotes much of its activity to developing partnerships with businesses and associations to develop role models for the rest of the corporate community. In its 1999 annual report, the NDC called on companies voluntarily to develop policies and practices to allow disabled people equal access and employment opportunities, but considered more intrusive regulation an option if firms failed to oblige. One side-effect of the partnership approach, however, is that a pattern of industry-specific codes is developing. The DDA covers trade associations as well as employers, and details a wide number of means by which discrimination may take place in the modern workplace, both in hiring practices and in membership rules. To date, however, research conducted on the NDC's behalf shows that 43% of UK businesses have not complied with the code, even when contraventions have been pointed out to them (NDC, 1999).

#### Environmental Protection

Protecting the environment became a matter for external regulation affecting companies in the Town and Country Planning Act 1948, which required local authority clearance for certain types of new developments and installations. Until 1990, new versions of the Act did not interfere with the internal operations of structure of companies, but simply extended the scope of application. Even the 1988 Town and Country Planning Regulations, which implemented EEC Directive 85/337 mandating environmental assessments of installations, only served to widen the scope of operations subject to mandatory requests for assessments. They obliged companies to assess the environmental effects of proposed new developments on natural resources, all forms of life, the landscape, climate and the area's cultural heritage, and to suggest means of mitigating the impact (Department of the Environment, Transport

and the Regions (DETR), 1998a). The public must be notified of the proposed development, have access to the environmental statement, and have the opportunity to comment (DETR, 1998b; Cullingworth and Nadine, 1997: 181).

A different approach, and one which better reflected the thrust of EU policy, was first evident in the Environmental Protection Act 1990, which introduced the first requirements for integrated pollution control – a change of corporate governance practices with the intent of reducing and preventing pollution – applicable to a limited range of businesses, in response to recommendations by the 1976 Royal Commission on Pollution. However, it applied the less stringent standard of Best Available Practice Not Entailing Excessive Cost (BATNEEC), rather than the standard preferred by the Royal Commission, the Best Practicable Environmental Option, which in itself remained less ambitious than the European Commission's preference for a Best Available Technology standard (McEldowney and McEldowney, 1996). It thereby underlined the importance of minimising the cost and intrusion on business activities (McGuinness and Richards, 1999: 27). Interaction between public authorities and companies was also kept to a minimum by relying on prosecutions and fines for polluters under the polluter-pays principle (Cullingworth and Nadine, 1997: 171).

The 1995 Environmental Protection Act created the Environment Agencies<sup>15</sup> after the Major government acquiesced to long-standing demands for more stringent controls on companies by the environment lobby. On this occasion, industry offered to cooperate with the regulators if they were given a one-stop

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<sup>15</sup> Two agencies were created: the Environment Agency for England and Wales; and the Scottish Environmental Protection Agency for Scotland.

shop at which they could sort out their environmental responsibilities (Cullingworth and Nadine, 1997: 173). The Environment Agencies gained the power to investigate the application of Integrated Pollution Control in 1996 (focusing on emissions), and to publicise the names of companies which had been fined for environmental damage (McGuinness and Richards, 1999: 22–28).<sup>16</sup> A significant upgrading of corporate responsibilities, with implications for internal governance, was first passed with the Pollution Prevention and Control Act of 1999. The Act implemented the European Union's Integrated Pollution and Prevention Control (IPPC) Directive (61/96), which regulated a significantly wider range of pollution sources, and consequently, a larger number of British businesses than previous legislation.

From 1999 the Environment Agencies have been responsible for monitoring and enforcing the IPPC Directive. It adds to the UK's existing Integrated Pollution Control system to cover noise, vibration and environmental accidents. It applies to entire production sites rather than specific processes within it, applies for the first time to heat, noise, light, vibration, energy consumption and accident prevention, and is extended beyond industrial operations to food-processing facilities and landfill sites (McGuinness and Richards, 1999: 33; Environment Agency, 1999). Companies are required to commit themselves to using *best available techniques* rather than the BAPNEEC standard to prevent pollution and waste, recycle where possible, conserve energy, prevent accidents and return the site to its original condition at the end of operations. This represents a significant departure from the cost orientation of previous legislation. The last three items are new under the

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<sup>16</sup> IPC existed since 1991, but regulation had been dispersed to a variety of agencies.

IPPC, and are made substantial for companies through a series of permits that specify emission limits, performance standards and annual reporting requirements (Environment Agency, 1999).

The Environmental Impact Assessment (EIA) Regulations 1999 implement another EU Council Directive (97/11/EC), and came into force on 14 March 1999. This formalises the relationship between companies and planners by requiring that local planning authorities give notice in writing, with a public justification, that a company is required to undergo the EIA. The directive allows each member state to set the thresholds at which an assessment is deemed necessary, and requires it to publish its standards, so that transparency of standards in Europe is achieved. The directive also makes assessments mandatory in 14 areas that focus on resource extraction, infrastructure projects, handling and processing of chemicals, and any process that impacts on water resources (DETR, 1998c).

Despite the environmental concern of the Blair government, and Conservative claims that the government paid little attention to the cost of the new measures,<sup>17</sup> cost still plays an important role in committing national businesses to environmental protection. Implementation of the EC Packaging Waste Directive leaves considerable room for interpretation at the national level, leading to less stringent application in Britain than Germany's packaging recycling laws (Environment Agency, 1997). The Blair government was also a central player, in conjunction with the Schröder government in Germany, in delaying and minimizing the cost of an EU directive requiring car manufacturers to recycle used cars.

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<sup>17</sup> Lord Jenkin, quoted in McGuinness and Richards (1999: 41).

The initiatives on environmental protection and on equal opportunity reflect an important shift in the understanding of the role of government in influencing how firms display corporate responsibility to the wider community. But these trends do not yet signify a shift towards a German-style constitutionalisation of public interest issues inside the firm. The increased role of government, however, in assuming responsibility for providing incentives or regulations which make companies more responsive to evolving public interest issues does mark a significant departure from the traditional UK model.

## CONCLUSION

This report has argued that there are important differences in the way in which the public interest is understood in relation to the company in Britain and in Germany. These differences are the result of different paths of historical development which resulted in different legal and political assumptions for the company in the two countries. These differences continue to shape current policy debates on the public interest in relation to the company. As Part II of this report demonstrates, many of the central features of both the British and the German company persisted through the 1990s. The idea of the company as a private association was still highly influential in Britain, while the idea of the company as a constitutional association, built around cooperative decision-making, still shaped attitudes in Germany.

Despite this continuity, however, this report has nevertheless demonstrated how public interest agendas in relation to the company have shifted in both countries, although so far perhaps more so in Germany than in Britain. In Germany, pressure has been increasing from many sources in the last decade for

more liberal capital markets. In the process, many fundamental questions of the rights of investors and shareholders have been revisited. The older constitutional model of decision-making has not been overthrown, but it has been placed in a new context. The core institutions of the supervisory board and codetermination have been left intact, but the context in which they operate has been changed through the adoption of measures promoting corporate disclosure, market-oriented accounting, performance-oriented executive remuneration, and more flexible use of corporate equity. These regulatory changes have reinforced the trends which already existed towards declining bank influence. In Britain, where liberal capital markets have been well established for much longer, the direction of change has been towards the recognition of the need for more explicit forms of external regulation of companies, as well as the beginnings of consideration of how internal practices should be reshaped to reflect public interest concerns.

These changes do not amount to convergence of the two systems (Vitols *et al.*, 1997). What seems to be emerging is an increasing split within each economy between two kinds of firms. In Germany there have been important structural changes which have meant an increasingly diverse pattern in the form of companies. The constitutional firm continues to dominate, but tends to be weaker in the new growth sectors, which are most exposed to international capital markets, as well as in the new states of the former GDR, and is so far showing few signs of taking root there. In Britain there is a sharp divide between companies which recognise unions and those which do not. The former are characterised both by the degree of consultation with employees which takes place as well as by their acknowledgement of their wider corporate responsibility. The advent of a Labour government in 1997, and the raft of new legislation on public interest issues,

including labour laws, which it introduced, suggested the possible growth in the number of 'stakeholder' companies, whose ethos, orientation, and internal structure are markedly different in important respects from the traditional model of the company as a private association. Nevertheless the traditional model is far from dead, although it is currently under more pressure than it has been for some time. Labour's Employment Relations Act of 1999, with its support for many of the structures, such as union recognition, which underpin the stakeholder company, has the potential to reinforce the divide between different kinds of British companies still further. Under the Blair government the idea of the company as a private association is weaker than it has ever been. If its policies succeed, it will bring employer-employee relationships closer in line with those in Germany and with other countries in the EU.

One of the strongest pressures and rationales for change in both countries has come from the EU. Where European directives exist, British governments are generally ready to act. The government is keen not to burden British firms with regulations and responsibilities that their EU counterparts do not have, but is also increasingly willing to tackle issues of broad concern to the public interest in concert with its European partners. The European Union has therefore emerged as a crucial arena for the definition and implementation of the public interest in relation to the company. This works in a number of ways. Both the European Commission and individual member state governments take initiatives. The Commission is responsible for formulating and promoting directives, while individual member states often seek to project their own national practice as the European norm. Britain and France, for example, supported EU directives on more open financial markets and on the importance of shareholder value which reflected

the assumptions of their own national legislation, while Germany sought to have works councils and codetermination introduced as part of the model constitution for the European Company.

The report also demonstrates how important is the role of government in negotiating, defining, formulating and implementing the public interest. Governments have many different tools at their disposal; they can use public speech and public persuasion; they can draft new laws, and seek compliance with them through legal and administrative authority; they also increasingly seek to achieve their aims indirectly by empowering other bodies to act on behalf of the public interest. Such bodies can be both public and private, and include regulatory agencies and professional bodies such as private auditing associations. The increasing range and complexity of the regulatory state is one of the key developments of modern government. Regulation itself now takes many forms. Examples include environmental auditing, which is incentive-based rather than obligation based. Companies gain goodwill from commitment, good performance and publicity. It replaces more traditional company obligations to adhere to environmental protection standards and equal treatment in the workplace and on the labour market. This is an alternative to direct regulation – often only a company officer responsible for a particular policy area interacts with the regulatory body. These forms of self-regulation, however, do not necessarily mean a relaxation of stringency in standards and application. They may under certain conditions enhance performance above and beyond what is required by law. This form is relatively new in Germany in the case of environmental regulation, and also in the case of equal treatment issues, which are handled principally, though not exclusively, through the works councils. Although it remains much less dominating than the super-



visory board and works councils, the willingness of the German state to impose its presence in this fashion is a departure from its traditional policy of allowing firms and employees to sort out many matters on their own.

Another important difference as to how the public interest is implemented in relation to the company in Britain and Germany derives from the extent of company independence from works councils and policy officers. The greater the independence, the more reliance has to be placed on external regulation by the state. This is often a sign of state weakness rather than state strength, because many of the public interest provisions that apply to the company through EU directives (and most recently this applies to various forms of employee protection in the workplace) require considerable interpretation to be fitted to the circumstances applying to companies in different regions and types of business. In Germany, legislators translate the principles into national law and then allow the works councils to implement the measures in a way appropriate to the firm, or even plant, in question. In companies without councils industrial tribunals take care of enforcement in a slow, pragmatic manner that resembles the British treatment. In Britain, legislation is equally incapable of spelling out all the standards, but, without works councils, it is forced to rely on secondary legislation and administrative regulations generated by central government departments such as the Department of Trade and Industry. This leaves it vulnerable to political charges that government is presiding over a monolithic and inflexible bureaucracy which is heaping regulatory burdens and their associated costs on to companies, and reducing the competitiveness of the economy.

The traditional model of the German firm as a constitutional association, and of the British firm as a private association, may be be-

coming less representative of their respective economies, but they are still important for understanding characteristic attitudes to the public interest in both countries (Parkinson *et al.*, 2000). Both are still recognisable as providing very different institutional patterns for the modern company. They underpin the dominant consensus in each country about how the public interest should be defined in relation to the company in respect of the three key relationships examined above: companies and investors; companies and employees; and companies and the community. In Germany the preference, although increasingly under threat, is still for public interest issues to be handled through institutionalised cooperative decision-making. The system has evolved as new sorts of public interest issues have emerged. On some issues, such as environmental protection, the interaction with management is less with unions than with the state itself or some regulatory agency or professional body empowered by the state. In Britain voluntarism and self-regulation, exemplified by the extensive use of codes of practice, dominates company relationships with investors, employees and the broader community. But this has been accompanied by increasingly systematic external regulation, and by the acknowledgement of many large companies of their wider responsibilities both to employees and to the community. In some areas, such as financial services, the old era of self-regulation is passing, and the same may be true of other areas, after the Employment Relations Act and the legislation that may follow the Company Law Review. Britain, however, remains a long way from Germany in the way the public interest is conceived. The degree of public involvement with the firm, and the expectation that the company exists to carry out public purposes, is still widely resisted in Britain. But there is a stronger impetus in Britain than at any previous time for the constitutionalisation of the firm, and the acceptance of its wider role as an instrument

of public policy, while in Germany there is now greater acceptance that companies need to become more flexible and autonomous, to succeed in global markets.

## APPENDIX 1

### EU DIRECTIVES ON COMPANY LAW: A BRIEF SUMMARY

The First Company Law Directive (68/151) required member states to establish some form of companies' register to collect information from companies revealing their location, articles of association, names of directors, amount of subscribed capital, and a balance sheet showing profits and losses for each financial year, and to make it available on request.

The Second Company Law Directive (77/91) required member states to introduce common standards for maintaining, managing and reporting on the company's capital, with mandatory shareholder ratification of changes by a two-thirds majority. This was intended to promote investment across borders through reassurance of minimum shareholder rights standards.

The Third Company Law Directive (78/855) regulates mergers within the same member state by requiring parties involved in mergers and acquisitions to publicise the terms and reasons, and to observe high quorums for ratifying such actions (two-thirds of those represented, or a simple majority if at least 50% of shareholders are represented). This directive, along with the Sixth and the proposed Tenth Directives, does not generally affect mergers undertaken through takeover bids, as are common in the UK.

The Fourth Company Law Directive (78/660) set minimum legal requirements for companies to publish financial information, based on a true and fair view of company assets. The valuation principles are influenced by British law, causing numerous changes for other member states where accounts reported

assets according to national tax purposes. The Directive also sets out common rules for certifying qualified auditors. The directive is justified by the protection that minimum information standards provide to investors dealing with a limited company. This directive was implemented by the Companies Act in the UK in 1981. The Fourth, Seventh and Eight Directives were implemented by Germany in the *Bilanzrichtliniengesetz* in 1985.

The Sixth Company Law Directive (82/891) duplicated these merger and acquisitions requirements of the Third Directive, but applied to company divisions.

The Seventh Company Law Directive (83/349) closed a reporting loophole in Fourth Directive. It requires that conglomerates present consolidated accounts when either the parent or subsidiary is a joint stock corporation, according to the same standards that apply in the Fourth Directive.

The Eighth Company Law Directive (84/253) required member states to harmonise qualifications for auditing accountants by ensuring a rigorous theoretical education in addition to professional training. Member states retain the right to approve individuals without the theoretical training, however. Special reference is made to the Fourth Directive, and to the requirement to corporate groups to submit consolidated reports under the Seventh Directive.

The Eleventh Company Law Directive (89/666) further extended the same information requirements developed for companies and subsidiaries to their branch locations abroad,

which had previously not been covered. The justification is that the economic and social importance of the branch plant or office may easily be as important as that of a subsidiary.

## APPENDIX 2

# PROPOSED EU DIRECTIVES ON COMPANY LAW

The Fifth Company Law Directive aims to set standards for the structure of public limited companies and establish equivalent protections regarding employee participation in management. The proposal includes measures to enhance the powers of shareholders and the influence of employees over key company decisions. First, measures are to be introduced to strengthen the capacity of shareholders to exercise their voting rights, and to introduce fair weighting (for example, the one share one vote principle, limiting preference shares). Second, companies will submit their activities to annual audits by independent accountants, who will publicise their results for shareholders before every annual meeting. Third, supervision of management is to be ensured through either a supervisory board or non-executive directors. The shareholders meeting shall appoint two-thirds of the board members, while employees (or employee representatives such as works councils or unions) elect the remaining one-third.<sup>1</sup> They will have responsibilities regarding plant closure, transfer, partial shutdown, reorganisation, and strategic partnerships with other firms. The European Commission will monitor compliance and report to the Council of Ministers and the European Parliament.

Before the first parliamentary reading in 1982, the draft directive only proposed a two-tier system and employee participation from a 500-employee threshold through the

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<sup>1</sup> This codetermination right applies to companies with over 1000 employees.

election of supervisory board members. The most recent Commission amendment stands since 1991. Unlike other company law directives, the provisions for employee participation mean that this directive requires unanimous consent before it can be passed. (Other directives require a simple majority.) Since the Davignon Commission Report (1997), attention has focused on the European Company Statute (below) as a means of making progress on this issue (likely because it also addresses shareholder issues in a logrolling approach).

The *Ninth Company Law Directive* was proposed in 1974 to ensure standards for corporate group law in the EU. Only Germany and Portugal have explicit corporate group law. Following German rules, the directive would protect minority shareholders and creditors of subsidiary companies by defining when control is apparent, and ensuring their compensation.

At present, conflicts arise when a parent company promises to use surpluses in profitable subsidiaries to subsidise others in financial difficulty, and particularly when the subsidiaries are in different countries. The European Court of Justice ruled in *Rabobank v. Mediasafe in liquidation* (C-104/96) that national law must apply, not the First Directive.

The *Tenth Company Law Directive* proposes to harmonise laws on cross-border mergers of public limited companies. In substance, it applies many provisions of the Third Directive to international mergers. First, shareholders of both the target and acquiring compa-

nies should approve the merger by a two-third majority, after the submission of an independent report on the offer by an expert appointed by a judicial or state administrative body. Second, protection for creditors should also be guaranteed. Third, both companies shall produce a report on the impact the merger on their employees. This directive was drafted in 1985, but not submitted to parliament. The potential impact on employee participation has remained a major sticking point for Germany.

The *Twelfth Company Law Directive* concerns permitting single-person private limited liability companies throughout member states. Germany, among other countries, allows such companies already.

The *Thirteenth Company Law Directive* (Takeover Directive) was first drafted in 1989 to regulate procedures for takeover bids, as well as defensive tactics of management.

## APPENDIX 3

# HISTORICAL OUTLINE OF CORPORATE LAW AND CODETERMINATION IN GERMANY

### Corporate law

**Early corporations:** Trading ventures and railways were among the sectors to establish corporations through the *Eisenbahngesetz* (Railway Law, 1838) and the *Aktiengesetz* (Joint Stock Corporation Law, 1843). The latter established the framework for a 'concession system' in Prussia, where the state could grant limited liability in establishing corporations under strict guidelines concerning the company's purpose and organization.

**General German Commercial Code (1861)** (*Aktienrecht des allgemeinen Deutschen Handelsgesetzbuches*) established as part of the customs union between German states:

- Established general pattern for the granting of state concessions for corporations with limited liability, while the state retained the power to revoke corporate charters without compensation at its discretion 'given compelling reasons of the general good' (Makower, 1868).
- Required the establishment of a management board (*Vorstand*) to legally represent the corporation.
- Required company statutes to specify: the purpose and duration of the corporation, the form of the shareholder's meeting, voting rights, methods for electing the management board, and the preparation and certification of the balance sheet.

**First Corporate Law Reform, 1870** (*1. Aktienrechtsnovelle, 1870*) created new framework for corporations after German unification.

- Ended the state concession system. Established a 'normative system' allowing corporations to be formed if certain organisational norms were met.
- Supervisory board was made mandatory to 'supervise the management of the corporation', specifically to examine the balance sheets and management-proposed distribution of profits in order to make recommendations to the shareholders' meeting.
- Required publication of balance sheet following four rules: value of stocks to be reported at maximum of their present market value; administrative costs to be listed under costs; paid-in capital and reserves to be listed as liabilities; and profits or losses from subtracting current assets from liabilities to be reported as an additional item.

**Second Corporate Law Reform of 1884** (*2. Aktienrechtsnovelle*) in response to the financial crash of 1873. Abandoned liberal approach, along with the rise of a new political discourse coalition (conservative and Catholic interests with the support of a protectionist alliance between heavy industry and large agriculture) among the state bureaucracy in support of 'conservative social reform'.

- The procedures for *founding corporations* were improved. Disclosure rules were extended, the independence of the company from its founders was heightened through supervisory functions, and the temporal aspects of founding procedures were improved.
- Individual and minority *shareholder rights* were improved as a 'last resort' for emergency intervention. Individual shareholders were given the right to recourse to the law if management acted illegally or contrary to the statutes of the company. Furthermore, 20% minorities were allowed to demand compensation in order to avoid collusion between management and shareholder majorities.
- The *internal organisation of the corporation* was changed to strengthen the shareholders' meeting and sharpen supervisory board responsibilities. General shareholders' meeting becomes the sole 'will' of the organisation, with extended mandatory rights and responsibilities. Supervisory role of the *Aufsichtsrat* strengthened by banning dual board membership and creating a catalogue of decisions requiring board approval.

**Corporate Law, 1937** (*Aktiengesetz 1937*). Corporate law was revamped in 1937 as the culmination of numerous debates during the Weimar period starting in 1925. Most scholars agree that the law does not strongly reflect Nazi ideology, and indeed the law was left unchanged after World War II until 1965.

- Improvements in corporate disclosure, the system of auditors, and some minority shareholder protections.
- The supervisory board was made responsible for electing the management

board on a mandatory basis, and a maximum size for the supervisory board was set.

- Paragraph 70 obliged the *Vorstand* to manage the corporation for 'the good of the enterprise, the employees and the people and country'.

**Corporate Law, 1965** (*Aktiengesetz 1965*). The 1965 corporate law reform strove to restore shareholder rights in several areas in response to EU directives:

- Accounting rules: more stringent valuation rules, more detailed disclosure, consolidated accounting statements, and increased shareholder control over the distribution of profits.
- Shareholders' rights: stress on proprietary nature of the corporation renewed, inspired by model of the SEC in the USA, notification required regarding the agenda of the shareholders' meeting, and proxy voters (banks) must solicit voting instructions.
- Groups of related companies: A major component of the 1965 law was the introduction of a whole set of regulations dealing with so-called 'related companies.' The major features included protection of minority shareholders and creditors in subsidiary companies, as well as increased transparency.
- Management board: Public interest clause of Paragraph 70 removed, collegiality principle of management board affirmed.

## Codetermination

**Early impulses:** Nineteenth-century origins in Christian, socialist and romantic philoso-



phies, as well as the notion of parity (*Parität*) and economic democracy as discussed in the 1848 Frankfurt National Assembly. Codetermination represented a socially integrative alternative to revolution or socialism, analogous to demands of constitutional rights in the political sphere.

**Early Institutional Influences:** The *Gewerbeordnungsnovelle* (1891) had little practical influence, but established the legal principle of intervening in enterprises in the public interest. Councils were later mandated in the coal industry in 1905 to solve problems of labour unrest. Other influences include the self-administration of social security funds by worker representatives.

**Gesetz über den vaterländischen Hilfsdienst, 1916** established during World War I.

- Mandated workers' councils (*Arbeiterausschüsse*) elected by secret ballot.
- Adopted Paragraph 12 of the mining reform law (1905) to give councils consultation rights regarding the 'demands, wishes and complaints of the workforce with regard to the factory, wage and other employment conditions and the social welfare policy of the firm'.
- Provided for mediation by a council with parity composition and chaired by a representative of the War Ministry.

**Works Councils Law, 1920** (*Betriebsrätegesetz*) represented compromise between competing visions of councils.

- Mandated the formation of works councils in all commercial and public establishments with over 20 employees to be made up of a parity between

elected blue-collar (*Arbeiter*) and white-collar employees (*Angestellte*).

- Established many modern features of the German model: obligation to peaceful cooperation, separation of councils from collective bargaining, and genuine codetermination rights.
- Supplementary Law in 1922 allowed two works council representatives on the Supervisory Board.

**Gesetz über die Treuhänder der Arbeit, 1934** abolished independent labour representation in the firm.

- Transferred co-determination rights to a single state representative.
- Works councils replaced with new employee councils, now called *Vertrauensräte* or 'councils of trust', conceived as plant-level cells of the Nazi party.

**Coal and Steel Codetermination Law, 1951** (*Montanmitbestimmung*) codified pre-war practices under Allied occupation for the coal and steel industries.

- Parity representation for employees on the supervisory board.
- Employee representatives hold veto over appointment of labour director (*Arbeitsdirektor*).

**Works Constitution Law, 1952** (*Betriebsverfassungsgesetz*) generalised a weaker form of codetermination to other industries.

- One-third representation for employees on the supervisory board in firms with over 500 employees.

- No provision for labour director.
- Weaker powers for works councils than under *Montanmitbestimmung*.

**Co-determination Law, 1976**  
(*Mitbestimmungsgesetz*)

- One-half representation for employees on the supervisory board in firms with over 2000 employees, with shareholder representatives holding a casting vote.
- Labour director must be appointed.

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## Interviews

Interviews were conducted in Germany and the UK between April and November 1999 with the following people:

### Germany

Dr. Alexander Barthel, Head of Economy, Finance and Taxes, Bundesvereinigung der Deutschen Arbeitgeberverbände (German equivalent to Confederation of British Industry).

Reinhard Dombre, Head of Secretariat, Deutscher Gewerkschaftsbund (German equivalent to Trades Union Congress).

Rainer Funke (FPD) Secretary of State, Ministry of Justice 1990–98, Member of Parliament.

Stefan Gebauer, Deutsches Aktieninstitut.

Markus Herdina, Deutsches Aktieninstitut.

Reinhard Pelgau, Senior Scientific Officer on Environmental Management, Federal Ministry of the Environment.

Thomas Schmidt (SPD), Economics Expert.

Dietmar Schreiber, Deutsches Aktieninstitut.

Wolfgang Steiger (CDU), Member of Parliament.

Thomas Weissgerber, Association of German Banks.

Alfred Wisskirchen, Head of Employment Law, Bundesvereinigung der Deutschen Arbeitgeberverbände.

Uwe Woetzel, Deutsche Angestellten-Gewerkschaft.

Peter Wiesner, Head of European Law, Bundesverband der Deutschen Industrie, Brussels.

### UK

Dominic Johnson, Confederation of British Industry.

Sarah Veale, Trades Union Congress.

Janet Williamson, Trades Union Congress.

Information also received from:

Jutta Reiter, Head of Women's Issues, Deutscher Gewerkschaftsbund.

Angela Browning (Conservative), MP, House of Commons.

David Perfect, Research and Resources Unit, Equal Opportunities Commission.

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