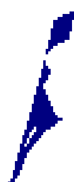
РАЗДЕЛ 1
НАУЧНЫЕ ИССЛЕДОВАНИЯ И КОНЦЕПЦИИ

SECTION 1
ACADEMIC INVESTIGATIONS & CONCEPTS



THE SOCIETAS EUROPAEA – A STEP TOWARDS CONVERGENCE OF CORPORATE GOVERNANCE SYSTEMS?

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Abstract

Since October 2004 the idea of a European Company, the Societas Europaea, has become reality and companies are allowed to incorporate in this legal form. Concerning corporate governance the Statute allows the companies to choose between a two-tier organisational structure typical for Civil Law countries and a one-tier organisational structure which is predominant in Anglo-Saxon Common Law countries. By analysing the regulations of Austria and the United Kingdom for the two board systems to elaborate the respective advantages and pitfalls, we find a strong evolution of the systems towards each other. As the board system is an integral component of a corporate governance system, the Societas Europaea highlights a major step towards convergence of these systems.

Keywords: corporate governance, Societas Europaea, United Kingdom, Austria, board systems, convergence

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1. Introductory comments on the two different board systems

From an economic point of view a company can be described as a nexus of (incomplete) contracts between shareholders, managers, creditors, employees and customers. Each company structure therefore creates *transaction costs*, as coordination processes between the different actors waste resources (in terms of money and time). These costs have their origin in the relationship between i) shareholders and management, ii) majority- and minority shareholders and iii) shareholders and other stakeholders (especially employees and creditors) (cf. Jensen and Meckling, 1976).

Therefore it is the duty of company law to deal with these relationships and minimise the transaction costs between the stakeholders. Boards of directors, respectively supervisory boards, are seen as a linking part between the different interest groups within a company to guarantee “good governance”. A board is seen as an economic institution that can help solving the agency problems inherent in managing an organization. But the boards itself poses many problems as their members are utility maximisers as well and therefore it cannot be assumed that they always represent the best interests of the shareholders. We have to differ between one-tier board systems in Anglo- Saxon Common Law countries, and the two-tier board structure characteristically for Conitental European Civil Law states. Both take an allegedly different route to solve the multiple agency problems.

The *one-tier board system* (with only an administrative organ) has the advantage that the common responsibility of its members for

management and control provides much more *flexibility* for board organisation, and therefore a *faster decision making*.

Moreover, the onetier board ensures that the necessary information will be available to all its members by *direct information access*. Information cannot be biased and it is impossible to exclude a director from information. Control can therefore be ensured by independent non-executive directors, which should make up the majority of the board members according to the common principle of all newly released corporate governance codes like the UK Combined Code (2003), which is part of the listing requirements at London Stock Exchange. The rationale behind this regulation is that if directors are not otherwise dependent on the CEO they are more likely to defend shareholders' interests. But it is not difficult to find flaws in this logic. For one thing, directors who are independent to the firm may lack the knowledge or information to be effective monitors. For another, even unrelated directors are still dependent on the CEO for reappointment.

Therefore this system lacks independence of control because of board members too often being dependent on the CEO. In a one-tier board system the CEO has incentives to "capture" the board to ensure that she/he can keep his job and increase managerial discretion. Outside (independent) directors have an incentive to maintain their independence, to monitor the CEO, and replace the latter if performance is poor. But this behaviour of the directors is only valid if we assume that they have incentives to build reputations as expert monitors (Fama, 1980). However, a reputation as a director who does not cause trouble for CEOs is potentially valuable to the director as well (Holmstrom, 1999). Consequently, their incentives are not clear yet. Another problem is due to the dispersed ownership structure within Anglo-Saxon companies. The free rider problem for the shareholders manifests here and the voting rights are therefore exercised by a proxy assigned to the management. Consequently the management finally safeguards its job.

Board *committees* are very common in one tier boards, as they represent independent counsellors for the boards of directors. An audit committee is part of the listing requirements at almost all stock exchanges. The task is to set the scope and review the results of the yearly audit (UK Combined Code 2003, Section D.3). It further reviews the financial relationship between the company and auditors. Contrary to the board of directors which meets five to six times a year, committees meet on average three times a year. By contrast, the *two-tier board system* (with supervisory- and management organ) - theoretically and historically - is based on the idea of a separate outside board. Since its introduction the supervisory board has been designed to *control* the management board not only on behalf of the shareholders, but also to protect the public interest. The supervisory board has the right to approve certain categories of management decisions with far reaching consequences (for example major acquisitions). Day to day management is strictly reserved for the management board. In practice, though, the supervisory board is also dependent on the management board. Former members of the management board often become ordinary members or even president of the supervisory board (Schmidt and Drukarczy, 1997). Another problem of supervisory board is the ownership structure in Continental Europe where the twotier board system is predominant. In those countries certain groups often hold large blocks of companies. In corporations with concentrated ownership where the blockholders position supervisory board members it is therefore quite impossible that the supervisory board protects the interest of the minority shareholders against both managing board and blockholders. Committees – although legally allowed – are less common in two tier board systems. Nevertheless, the majority of the larger listed German companies has already installed them (Hopt et.al., 1998). Apart from this strong position of blockholders in supervisory boards one might also view interlocking directorships as a problem of the two-tier board system. These directorships are established if a member of one supervisory board is also a member of one or more other supervisory or management boards of another company (Boehmer, 2001). The strong emphasis on separation of management and control can also lead to inefficiency in this system as the two bodies of the company should work together. As each control method has got a trade-off between a first-degree error (i.e. a good management is qualified as insufficient) and a second degree error (i.e. bad management is not disciplined) the question of an optimal level of control is hard to pin down. In this context consequences like occasional scandals (Enron, WorldCom, Parmalat etc were the reason for tightening control) are inevitable if one wants to avoid a second degree error where efficient management would be continuously hassled which would ultimately harm the company because of lower manager motivation.

The incentives for the supervisory board to act in the interest of the shareholders are as well at least questionable. The members of the supervisory board may as well be interested in avoiding conflicts and obtain cooperation. This aspect is documented in several studies and recently a proponent of such theses, *Daniel Kahneman*, was awarded with the Nobel Price (cf. Kahneman, 2003). Furthermore the supervisory board collects the necessary information from the management board - the body which it should control. This exertion of influence is reinforced as the management board has a proposal-right for the supervisory board members, where the

latter elects the management organ. This represents a closed loop where leadership and control coincide. The *per definitionem* assumed function of the supervisory board, to maximise shareholder value, can therefore be disbelieved as supervisory board members are no altruists and therefore interested in another appointment and a quite life. Only recently supervisory board members asked "where has all the fun gone" (Economist, 2004). Generally the importance of the boards (independently whether one- or two-tier) is strengthened by the implementation of Corporate Goverance Codes all over the world. The UK Cadbury Report (1992) was one of the first of these codes and already claimed for intensive monitoring of the executive management (Cadbury Report, 1.1). Principle V of the OECD Principles of Corporate Governance (1999) holds the same view by highlighting the board's accountability to the company and the shareholders. As the OECD Principles are the common basis of most Corporate Governance Codes, we find sections about the duties and responsibilities of boards within all Codes (cf. German Corporate Governance Code, 2002, section 4; French Bouton Report, 2002, part 1, Japanese Corporate Governance Code, 2001, chapter 1).

2. The Societas Europaea

After more than 40 years of endless discussions and legislative activity, the statute of the European Company, called *Societas Europaea* (hereafter: SE), was finally adopted by the Council of the European Union on October 8th, 2001 (see Blanquet, 2002; Lutter, 2002). Since October 2004 the idea has become reality and companies are allowed to incorporate in this legal form. All companies within the 25 EU Member States incorporating as a SE may choose between a one-tier and two-tier organisational structure. As the Member States are characterized by different forms of board structures and employee representation, we will analyse the legal regulations for the respectively unfamiliar board system for Austria (as a typical Civil Law country) and the United Kingdom (a Common Law country) in section 3. Aside from managerial differences we observe the same difficulties of control for both board systems as has been briefly sketched above.

The strong evolution of the systems towards each other highlights a step of convergence of corporate governance systems, which will be the topic of section 4. The legal foundation of the SE is on the one hand the Regulation 2157/2001 of the European Council (hereafter: SE-Reg) and the Council Directive 2001/86 (hereafter: SE-Dir) supplementing the Statute for a European company with regard to the involvement of employees. From Art 12 para 2 and 3 SE-Reg it can be deduced that both sources of law constitute an inseparable entity. Concerning involvement of employees the SE-Dir wants to make sure that the existing national regulations are not undermined.

Therefore national rules in this context have to be applied to both, one-tier and two-tier board systems of the SE. Having a look at the recitals (1) and (4) of the Regulation's preamble, the *ratio legis* of the European Company is to provide companies active in the entire Common Market with a supra-national company body able to do business Europe-wide on the basis of a simplified and unified legal structure, therefore avoiding the parent-subsidiaries structure typical of European firms doing business in several Member States now. According to calculations of the *Ciampi* group the current structure produces a complicated landscape bearing costs of 30 billion dollars a year. With the statute of the SE this waste of resources in administration and accounting could be stopped.

The Statute creates *a new legal form of a company* regulated by a mix of European and national law. The original aim to create an integrative legal form independent of the national legislations could not be achieved. Legal and social differences of the Member States are still too large to realise such an idea. Moreover a European Civil Law where a unitary European Corporation could be embedded is missing. Therefore the Regulation is limited to 70 Articles - from the initial 400 Articles of the first draft of 1970 (Lutter, 2002). As a general regulatory technique *renvoi* was used. This means that the SE-Reg directly regulates some issues of the European Company but simply refers several other aspects of the European Company to the legislation of the Member States. Their legislations have to fill the gaps left open by the SEReg. It is clear that the *renvoi* technique is the result of political compromises. In this context commentators doubt that there will be a unitary European company form but expect every Member State to develop an own version thereof (Hommelhoff, 2001).

Therefore we can anticipate a competition of the legislations regarding these European companies (Lutter, 2002). Consequently, where single national legislations fail to properly fill the gaps left by the implementation of the SE-Reg, national courts will do it by the way of case law. In the remainder we want to concentrate on a spot of the Stature which is highly relevant in context with corporate governance. The Statute allows companies that decide to use the SE legal form to choose between a two-tier organisational structure - well known from Austria and Germany - and a one-tier organisational structure, which is predominant in Anglo-Saxon countries. In addition to the general assembly of the shareholders the SE therefore disposes – according to Art 38 SE-Reg - either of a supervisory organ and management organ (dualistic system) or an administrative organ (one-tier system). The Regulation regulates the two-tier board system

within the Art 39-42 SE-Reg, the one-tier board system within Art 43-45 SEReg. Hereafter follow the Art 46-51 for joint provisions. The choice between the two systems takes place within the by-laws and exists independently of co determination of employees (Hommelhoff, 2001). The background for the opening of this choice are the national corporation laws which should not be repealed. Insofar this political compromise offers new possibilities for the companies. We can find a compulsory two tier board model outside the German and Austrian boarders in Denmark, Finland, Sweden, for larger corporations in the Netherlands and most of the New Member States. The legal systems of France, Portugal and Spain allow both systems (Berrar, 2001). According to Art 39 para 5 and Art 43 para 4 SE-Reg each Member State "has the right" to enact regulations for the respectively unfamiliar board system. The national legislator in this sense has a possibility to do this but no obligation. According to Art 9 para 1 lit b and c SEReg which regulates applicable law for the European Company, however, the provisions of the SE-Reg apply for Member States if they do not enact provisions for the board systems. That way the Members are finally forced to enact appropriate precepts for the completion of the SE-Reg (Bungert and Beier, 2001). As board systems are an essential factor in the competition of companies it is interesting to know the designs of the Societas Europaea within the different Member States.

Therefore we analyse the SE regulations in Austria, where a two-tier board system is compulsory for all larger limited liability companies and the legislator thus had to think about provisions for a European Company incorporating in Austria with a one-tier board system. The reversed situation seems to exist for the United Kingdom. Here the legislator would have to introduce regulations for the unfamiliar two-tier board system.

3. The European Company within different Member States

3.1. The Austrian way

Within the recently enacted change of the Company Law ("Gesellschaftsrechtsänderungsgesetz 2004", hereafter: GesRÄG) one can find regulations for the two management systems (fourth chapter) in addition to the general framework concerning the relocation of the domicile of a SE in Austria (second chapter) and the incorporation (third chapter). The *two-tier board system* of the European Company is in wide parts influenced by the German and Austrian Public Corporations Act ("Aktiengesetz", hereafter: AktG, cf. Hommelhoff, 2001). Therefore the regulations are similar to the provisions of the Austrian AktG (established 1965). In short, the general assembly that meets once a year or extraordinarily in the case of emergency relieves the management and supervisory board according to § 104 AktG (Buchheim, 2001) and has the right to elect the latter (§ 87 AktG). As the supervisory board in turn elects the management board (§ 75 AktG) and concludes the contracts with each of the members of the management board (§ 97 AktG), a direct election of the management board by the general assembly is not allowed in Austria contrary to the provisions of the SE (Jahn, 2001). The management organ should be controlled by the supervisory organ (§ 95 AktG). As the management board has the right to suggest part of the members for the supervisory board this system is often criticised and can lead to collusion of these two bodies.

Generally the members of one board cannot act as members of the other board (§ 90 AktG), which is also highlighted in Art 39 para 1 SE-Reg. Furthermore managerial functions cannot be delegated to the supervisory board. The composition of the supervisory board reflects the stakeholder perspective in Germany and Austria, namely the high influence of labour representatives, especially since 1976 (Co-determination Act). Since 1976, it is obligatory that for two members of the capital side, the labour side can delegate one board member (so called one-third regime). Large blockholders (in Austria 33% of the capital) can also delegate supervisory board members. The number of supervisory board members has - according to Art 40 para 3 SE-Reg - to be stated in the by-laws, for which the Member States can determine minimum and maximum numbers, in Austria the minimum are 3 members (due to labour representation) and the maximum can be up to 20, depending on the share capital (§ 35 para 1 GesRÄG).

The *one tier board* on the other hand realises management and control within one body, the administrative organ (in Anglo-Saxon countries often called board of directors) which is vested with universal powers, i.e. business management, control and representation coincide. The members of the administrative organ are - according to § 46 para 1 GesRÄG – appointed by the general assembly for a time period regulated within the by-laws - not execeeding five years. Although it is facultative for the Member States to determine a minimum and maximum number of administrative organ members, in Austria such an organ has to consist of at least three and at most ten members according to § 45 para 1 GesRÄG. The accurate number has to be stated in the by-law. The *minimum number* can easily be explained by the regulations of the SE-Reg, whereby according to the provisions of Art 7 part 3 lit a and b the precepts of co-determination of a Member State apply further on. In other words, the onethird regime of labour representation becomes effective as this regulation has to be applied to a one-tier board system as well. If we take a very recent empirical study about the German codetermination

system of Gorton and Schmidt (2004), which find that high representation of employees on the supervisory board leads to remarkable stock market discounts when compared to companies where the representative of employees is low, we can already observe the importance of which board system to choose. In their study the stock market discount was 31% for companies with equal representation of employees and shareholders on the supervisory board compared to companies where the representative of employees fill only one third of the seats in the supervisory board. To understand the control function of the administrative organ, a pivotal distinction has to be made between executive directors who are employed as managers parallel to their directorate and non-executive directors who are not involved in the running of the day-to-day business of the company. As all directors have the same power, non-executive directors can also take the initiative in management decisions and they are not restricted to post-decision approval like the German supervisory board. According to § 50 para 2 GesRÄG the president and his/her deputy of the administrative board must not be executive directors. This is according to the regulations of most corporate governance codes, which recommend a separation of the positions CEO and Chairman of the Board.

3.2. The United Kingdom way

In 2004 the Department of Trade and Industry, which is the relevant British governmental department, published the European Public Limited Liability Company Regulations 2004 on how to implement the SE rules in the UK. Compared to a standard British public limited company (plc), the European Company stands out in two points. First, the choice between a one-tier and two-tier board, second, British plcs have never been confronted with employee representation at board level. Concerning *employee representation* it is therefore not surprising at all that the British legislator sticks very closely to the terms of the SE-Dir itself. Nevertheless, points such as the method of choosing the employee representatives, which is probably most important for the UK, are left to the Member States. Since the last quarter of the 19th century the predominant form of collective representation of employees as against the employer has been collective bargaining via a trade union (Davies, 2004). Mandatory board representation for employee representatives has never been a feature of the British Law. The choice of British worker representatives therefore was the main policy question left by the SE-Dir to the UK government, which raised the question of how, if at all, the government wished to tie the system of employee involvement in the SE into the system of collective bargaining. The British government took up a system parallel, but with little formal connection to collective bargaining. In relation to the crucial question of the choice of the British representatives on the Special Negotiation Body, which is to negotiate the system of involvement with the management of the proposed SE, the rule is that those representatives shall be elected by ballot of the UK employees and the candidates will be confined to employees of the relevant company, unless the employer permits a trade union official who is not an employee to stand (reg. 23). Where a domestic consultative committee representing all of the employees already exists that committee will appoint the representatives (reg. 25). The regulations do not give priority in the selection process to the trade union normally recognised for the purpose of collective bargaining (Davies, 2004).

Regarding *board structures* it is important to keep in mind Art 9 of the SE-Reg which provided that in case of matters either not governed or only partly governed by the SE-Reg, the domestic law (in this case to plcs) will apply to the European Company. As Art 39 para 5 claims for provisions for the respectively unfamiliar board system, the interesting question for the UK seems to be the two-tier board system. But here the special characteristic of the British Law starts.

The Department of Trade and Industry thinks that additional embedding rules are not necessary to enable a European Company registered in the UK to have an effectively functioning two-tier board. This view has its origin in the British Companies Act, which, as it currently stands, does not require companies incorporated under it to adopt the one-tier board at all. They are free of choice. Davies (2004) brings it up to the point; that British companies do overwhelmingly have a one-tier board is a matter of practice, not of the Law. This means that it is possible without any problems to comply with the Companies Act and adopt a twotier board system. Therefore separate provisions for a two-tier board according to Art 39 para 5 do not seem necessary because the Companies Act as it is anyway fills in for an insufficient SE-Reg. A Company Law Review indeed found that some British companies already have adopted a two-tier board structure (DTI, 2000). Unlike an Austrian or German AktG the British Companies Act does not say much about the structure or the powers of the board. All the Act says is that a public company must have at least two directors. This is the rule we find in the European Public Limited-Liability Company Regulations 2004 as well for the management and supervisory board as for the administrative board (regulations 61, 62 and 64). Board powers and board structures are the creation of the shareholders through their control of corporate governance rather than legal policies. If a British company wants to have a two-tier board, it can make this choice by stating it in its articles of association. This seems once more to highlight the freedom of the Anglo-Saxon companies, but nevertheless one has to take care of possible pitfalls

which are present in the UK and Austria as well. This points out none of the corporate governance systems is perfect. The British Companies Act may not care about board structures and composition at all, whereas the Austrian legislator regulated it too heavily. Nevertheless, the UK Combined Code (2003), representing a global standard of good governance, strikes another pass and drives both national regulations *ad absurdum*. One requirement of this code is that the board contains a majority of independent non-executive directors but that it must also contain a significant number of executive directors. The code explicitly defines indicators when a director, in principle, should not be deemed independent; the existence of an employment contract with the company within the last five years, a material business relationship within the last three years, additional remuneration apart from the director's fee, close family ties, cross directorships, representation of a significant shareholder, or a directorship for more than nine years. This regulation does make sense in a one-tier board to protect the shareholders' interest. But it simply does not make sense in a two-tier world, as the supervisory board alone *per definitionem* should control the management board and therefore represent the independent directors. But UK's potential two-tier European Companies would not fulfil the listing requirements at LSE, i.e. in their "home market". This was, what we think, definitely not the intention of the SE-Reg. For Austrian one-tier board SEs on the other hand it is impossible to follow the Combined Code as well, as labour representation hinders a majority of independent directors (Braendle and Noll, 2004).

4. A step towards convergence

Although formally different, we can already observe the similarities of the two board systems. The supervisory board in a dualistic system controls the management, whereas in unitary boards independent directors and committees fulfil this duty. So we can clearly observe a sign of convergence of the two systems in certain aspects such as composition. In addition to the ownership structure (LaPorta et al. 1997, 1998; LaPorta and Shleifer 1999), financial regulation, and capital markets the board structure is a key component of a corporate governance system. Their progress towards the respectively other system are therefore a strong sign of convergence.

Many explanations have been given for the evolution of different corporate governance systems. The *legal institutions* of the different countries differ from one another with respect to the protections they provide to shareholders. Some countries' legal institutions on request provide access to the names and address of all other shareholders for the purpose of calling a special meeting of the shareholders, others do not. Some countries demand more mandatory disclosure, i.e. managers have to disclose their shareholdings and compensation packages, in others they are not obliged to do this (Braendle and Noll, 2005). Corporate Law in Civil Law countries exhibits a more elaborated set of mandatory rules regarding changes in the capital structure, minimum capital or pre-emptive rights (Easterbrook, 1997; Coffee, 1999). Nevertheless, there is evidence of convergence of corporate governance systems in a number of areas. Shleifer and Vishny (1997) and Hansmann and Kraakman (2001) both report that governance systems in Germany, Japan, and the US show signs of convergence towards each other. Large shareholders are on the increase in US firms, especially institutional investors such as CalPERS (Smith, 1996; Chung et al., 2004), whereas the ownership structure in German DAX listed companies is becoming less concentrated. Wojcik (2001) finds changes in ownership structure in German firms over the period from 1997 through 2001. The level of ownership concentration fell significantly over this period, cross-holdings started to dissolve, and financial sector institutions declined in importance as block holders. In many studies it is concluded that German firms are, on average, moving towards the Anglo-Saxon system, because corporate governance codes around the world are consistent with convergence towards an Anglo-Saxon governance structure. Therefore, a certain convergence of the systems is occurring which is only in part imposed by the legislator and stems in part from the needs and the chosen practice of large enterprises (Hopt 1997).

Japan is changing its corporate governance system as well. Yoshimori (1995) suggests that signs of partial convergence of models are already observable among Japanese and Western board models. The financial sector is deregulated and over the last years the members of the *keiretsus* reduces their holdings of one another's shares (Gugler et.al., 2004). In addition, more and more Japanese companies are listed on either NYSE or London Stock Exchange (Bradley et.al., 1999; Kanda, 1997). And the tradition of "stable" shareholders, which do not reduce their shareholdings in the company of which they are "friends", does not exist anymore, as institutional investors are pressured by their clientele and do not choose their investments according to friendship (Kanda, 1997). Even before the scandals of Enron and WorldCom, several changes took place opposite the Atlantic. The separation of CEO and Chairman of the Board as well as the introduction of committees (e.g. audit committee) are signs for a change from the one-tier board system towards the two-tier system present in Continental Europe. Cadbury (1995) suggests that American boards are moving towards a de facto two-tier structure by means on increasing proportion of non-executive directors in the board and an executive board committee made wholly of executive directors. The

same is true for the UK (Kaplan, 1997). The financial scandals intensified these changes. The Sarbanes-Oxley Act (2002) is a clear sign for a move towards the Continental European system, where the legislator sets lots of rules. The boundaries between signs and drivers of convergence are floating. Legislators and Corporate governance codes were and still are responsible for changes within the different corporate governance systems. The legal statute of the SE illustrates this. Nevertheless we highlight here three additional drivers for a further harmonisation within the next years. The first driver is the emerging convergence of financial *accounting standards* and practices as companies have become involved in cross-border activities in product and capital markets (Walton and Haller, 1998). Each country has a reporting framework that reflects its political, legal, cultural and business environment, which may differ from that of other countries and result in the production of financial information that lacks international comparability. The Anglo-American thinking in quarterly results is reflected in the American accounting standard *US GAAP*. Nowadays a lot of European companies draw up annual reports using the US' accounting standard (Charkman, 1994). Research about companies that list on foreign stock exchanges has found that a stock exchange's reporting requirements influence a company's choice of exchange (Cheung and Lee, 1995). Just think about Chinese Air China deciding to list at LSE instead of New York due to the severe requirements of the Sarbanes Oxley Act (Economist, 2005a). Harmonisation initiatives include the development of International Financial Reporting Standards *(IFRS)* by the International Accounting Standards Board (*IASB*). Which accounting standard should be used is by no way accidental but of central impact for the company and the economy.

Another focal point which supports the harmonisation is the *proceeding integration* of the financial markets and the continuing process of mergers and acquisitions (Becht et.al., 2002; Pagano et.al., 2002). Paradigmatic for the first point is the effort for a fusion of the stock markets in London and Frankfurt (the recent bid of Deutsche Börse made many headlines, see Economist, 2005b), respectively *Euronext*, the pan-European stock exchange originated from the stock exchanges Paris, Brussels and Amsterdam. The second point can be comprehended by looking at the flood of international cross-boarder mergers (Mueller, 2003). An example is the hostile takeover of Mannesmann by Vodafone.

Third point serving as an argument for a proceeding harmonisation is the growing importance of *institutional investors*. Institutional investors include banks, insurance companies, pension funds, and mutual funds. An increase of investment funds will push the harmonisation further (Bradley et.al., 1999). Their fraction of all shares of institutional investors increased in Germany from 4% in the year 1990 to nearly 13% in 1998 (Schmidt and Dukarczyk, 1997). In the U.S., starting in 1987, institutional investors, pension funds in particular, deviated from their prior role as passive investors by submitting proxy proposals focusing largely on corporate governance issues. Between 1950 and 1994 the fraction of shares held by institutional portfolio holders in the U.S. increased from 10% to over 50% (Friedman, 1996). In Japan institutional investors hold about 45% of the listed shares (Kanda, 1997), and in the UK the percentage has grown from 29% in 1963 to 60% in 1994 (Davies, 1997). CalPERS, with over $166 billion invested in equities, is frequently mentioned in the shareholder activism literature and has pressured poorly performing companies to reform their corporate governance practices (cf. Davies, 1997). Nevertheless, in the last few years more and more articles were published which expressed doubt concerning the universal validity of this convergence theory. They take the opposite view that the irresistible force of global competition will meet the immovable object of path dependence. Even if there could be agreement on what constitutes an optimal corporate governance system – which traditionally has not proven possible (Taylor, 1998) – there are too many complementarities in economic systems for unstinting evolution toward the optimal corporate governance system (Aoki, 1984). The most important article is an approach of Roe and Bebchuk (1999) concerning the path dependence of legal systems. The theory combines the socio-historical approach with the economic analysis. Initial point of their considerations is the fact that corporate structures differ among advanced economies of the world. They contribute to an understanding of these differences by developing a theory of the path dependence of corporate structure, i.e. the corporate structures that an economy has at any point in time t1 depend in part on those that it had at an earlier time t0. Schmidt and Spindler (2000) share this scepticism towards convergence, but add several aspects which strengthenthe point made by Bebchuk and Roe (1999). They argue that it is important for the topic under discussion to distinguish more clearly than Bebchuk and Roe between an argument for path dependence based on the role of adjustment costs on the one hand and an argument borrowed from evolutionary biology on the other. The two concepts of path dependence have different implications for the issue of rapid convergence to the best system. Therefore the formal concept of *complementarity* is introduced and should demonstrate that national corporate governance systems are usefully regarded as – possibly consistent – systems of complementary elements. The dynamic properties of this sort of systems are such that a rapid convergence towards a universally best corporate governance systems is not likely to happen. On the contrary, it is tried to show

that in the specific case of corporate governance systems there exists the possibility of a convergence towards a common system which is economically inferior.

Although we believe in tendencies of persistence which are existing within legal systems all over the world, we do not share the opinion that these differences will last for a long time. We do not assume a complete harmonisation but we believe that the main elements will harmonise, so that the results are in wide parts identical. Furthermore the historical and political origin of a system should not be used as an explanation (or excuse) for each (insufficient) corporate governance system because this would hinder possible positive development. The claim of path dependence can be seen as rent seeking of certain interest groups (Garoupa and Ogus, 2003). Regarding the ideas of Schmidt and Spindler it seems like if there are only the systems A and B. Why shouldn't a system with good elements of another system – the happy medium of systems – be consistent itself? Moreover it is not true that systems are that incompatible. It is absolutely possible to implement some legal conceptions into a national system without becoming inconsistent (Malik, 1999). Last but not least the objective of a "consistent system" itself is very questionable. The aim has to be an "agencycost minimising system". The search for a new system C encompassing the best of A and B seems to be promising and already started.

5. Conclusion

Due to many constraints regarding the foundation of a Societas Europaea and the complicated unknown legal territory it is questionable whether we can expect a run on this new legal form. Nevertheless the European Company illustrates a step towards convergence of corporate governance systems by giving the companies the choice to incorporate either with a one-tier board, well known in Common Law countries, or with a two-tier board typical for Civil Law countries in Continental Europe. We reviewed the two board systems to elaborate the respective advantages and pitfalls. Twotier boards ensure a clear separation of direction and control.

Therefore, in theory, it better represents the shareholders' interests. In practice, the incentives to do so are questionable as supervisory board members are no altruists. One-tier boards stand for faster decision making and flexibility as they are characterized by a clearly defined management body. On the downside, there is a greater risk of board capture, i.e. the members are heavily influenced by the CEO.

In this context we found that Anglo-Saxon countries rely on a majority of independent directors within the board of directors to guarantee an alignment of interests between the management and the shareholders, which is claimed by all the recently released corporate governance codes. Aside from marginal differences we observed the same difficulties of control for both board systems by analyzing the legal provisions of the SE for Austria and the United Kingdom, and therefore comparable measures against these problems. The strong evolution of the systems towards each other on the one hand illustrated an obstacle for the new legal form since the additional benefit of the new freedom of choice between different board structures is lowered. Only time can tell whether potential saving as conjectured by the *Ciampi* group really exist and provide for an incentive to choose the new legal form. On the other hand the SE definitely highlights a step to further convergence of the two main corporate governance systems.

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