VOTE AND VALUE

An economic, historical and legal-comparative study on dual class equity structures

Wolters Kluwer
Deventer – 2020

Verkorte citeerwijze: Keijzer, *Vote and Value* (IVO nr. 121) 2020/[paragraafnummer].
Volledige citeerwijze: T.A. Keijzer, *Vote and Value. An economic, historical and legal-comparative study on dual class equity structures* (Uitgaven vanwege het Instituut voor Ondernemingsrecht nr. 121), Deventer: Wolters Kluwer 2020.

Ontwerp omslag: Hans Roenhorst, www.h2rplus.nl

ISBN 978 90 13 16058 1
NUR 827-715

De klantenservice van Wolters Kluwer Nederland BV kunt u bereiken via: www.wolterskluwer.nl/klantenservice.

De auteur houdt zich aanbevolen voor inhoudelijke opmerkingen en suggesties. Deze kunt u sturen naar: boeken-NL@wolterskluwer.com.

Vote and Value

An economic, historical and legal-comparative study on dual class equity structures

Stem en waarde

Een economische, historische en rechtsvergelijkende studie naar *dual class* aandelenstructuren

Proefschrift

ter verkrijging van de graad van doctor
aan de Erasmus Universiteit Rotterdam
op gezag van de rector magnificus

Prof.dr. R.C.M.E. Engels

en volgens besluit van het College voor Promoties.

De openbare verdediging zal plaatsvinden op
woensdag 9 december 2020 om 15:30 uur

door

Titiaan Adam Keijzer
geboren te Hengelo (Ov.)

Erasmus University Rotterdam

Promotiecommissie

Promotoren:	Prof.dr. M.J. Kroeze
	Prof.dr. H.M. Vletter-van Dort
Overige leden:	Prof.dr. J.M. de Jongh
	Prof.dr. A.M. Pacces
	Prof.dr. G. van Solinge

Preface

On 9 December 2020, Titiaan Keijzer obtained a doctorate at Erasmus University Rotterdam, the Netherlands, with a PhD-thesis on the merits of dual class equity structures at listed corporations. His supervisors were Professor Maarten Kroeze and Professor Hélène Vletter-van Dort. We are most pleased to include the resulting book in the Series of the Institute for Corporate Law of the University of Groningen and Erasmus University Rotterdam (*Serie vanwege het Instituut voor Ondernemingsrecht van de Rijksuniversiteit Groningen en de Erasmus Universiteit Rotterdam*).

The study of Keijzer comes at a timely moment. In the past few years, dual class equity structures have been strongly debated. In numerous corporate governance systems, the dominant position of outside minority shareholders, which appeared self-evident until recently, is under enormous pressure. Several household names, including Google and Facebook, have delivered outstanding investor returns whilst seemingly violating one of the most basic rules of corporate governance, being that of equal treatment of shareholders. At the same time, there is a long list of firms that have failed from a business perspective whilst deviating from the equal treatment rule, giving rise to claims that the chosen governance structure contributed to or even caused the lack of success.

To shed more light on paradoxes such as these, Keijzer analyses the effects of dual class equity structures in an unprecedentedly rigorous manner. His study consists of 4 parts. The first part considers the financial-economic aspects of dual class equity structures. The second, third and fourth part contain historical and comparative corporate governance analyses, focusing on the systems of the United States (in particular, Delaware), Germany and the Netherlands, respectively.

In the financial-economic part of this study, Keijzer discusses the arguments for corporations to go public or to stay private and the various factors that shape the firm's capital structure. He presents a highly innovative theory on capital structure, unifying various existing approaches, and in doing so, shows that every firm has a dynamic life-cycle. Accordingly, dual class equity structures may be a useful instrument for issuers, particularly in the earlier phases of their life-cycle. In addition, dual class equity structures can stimulate founder-led firms to go public, thus countering the continuing decrease of listed companies and ensuring a wide range of investing opportunities to the public.

In the legal parts of this book, Keijzer analyses the use of dual class equity structures in the United States (Delaware), Germany and the Netherlands. He does so in a well-organized manner, following a largely identical approach in every part. First, this involves describing the institutional and cultural factors that affect a particular legal system. Second, the legal-historical use of dual class equity structures and similar control enhancing mechanisms are discussed. Third, the powers of investors vis-à-vis those of the (executive or supervisory) board are studied, each on an independent basis. Fourth and finally, Keijzer considers the legal requirements for introducing or abolishing a dual class equity structure in a given jurisdiction and how investor and management powers interact.

Keijzer illustrates that historically, dual class equity structures have been used for a variety of purposes, adding to the potency of the mechanism. Moreover, the shift towards outsized insider control is likely to continue, given that this has been the norm for the last 200 years. Keijzer also shows that US (Delaware) corporate law is distinctly more enabling than its German counterpart with regards to the permitted deviations from the principle of equal investor treatment.

In his nuanced conclusions, Keijzer acknowledges that whereas dual class equity structures will not be useful for all firms, they may prove a suitable mechanism for individual corporations. Therefore, the law should principally be facilitative in nature, allowing issuances of non-voting shares and multiple voting shares, as well as non-profit participating and super-profit participating stock. Keijzer also presents a detailed proposal to introduce or abolish dual class equity structures. Most notably, he rejects majority-of-the-minority voting and elevated majority thresholds – as these may hamper the firm of setting the next step in its life-cycle – advocating an exit-mechanism instead. Keijzer also analyses certain related topics, for instance whether individual shareholders should be entitled to a higher price per share than others when a dual class equity structure corporation is acquired by a third party. In doing so, this book covers the corporation's entire existence from cradle to grave.

To summarize, Keijzer's study provides a most valuable interdisciplinary analysis of dual class equity structures. We have no doubt this book will be welcomed by legal and economic professionals, academics and government representatives as a detailed and inspiring source of knowledge.

C.A. Schwarz
J.B. Wezeman

Institute for Corporate Law
University of Groningen and Erasmus University Rotterdam, the Netherlands

Table of Contents – Abbreviated

Table of Contents

Abbreviations

ADHGB	*Allgemeines Deutsches Handelsgesetzbuch*
AG	*Aktiengesellschaft*
AGM	Annual General Meeting
AktG	*Aktiengesetz*
AktG 1937	*Aktiengesetz* of 1937
ARUG II	*Gesetz zur Umsetzung der zweiten Aktionärsrechterichtlinie*
AV	*Algemene Vergadering*
BGB	*Bürgerliches Gesetzbuch*
BJR	Business Judgment Rule
BV	*Besloten Vennootschap*
BW	*Burgerlijk Wetboek*
CdC	*Code de Commerce*
CEO	Central Executive Officer
CFO	Chief Financial Officer
DCGK	*Deutscher Corporate Governance Kodex*
DGCL	Delaware General Corporation Law
DrittelbG	*Drittelbeteiligungsgesetz*
ECMH	Efficient Capital Market Hypothesis
EFS	Entire Fairness Standard
EGAktG	*Einführungsgesetz zum Aktiengesetz*
EST	Enhanced Scrutiny Test
ETF	Exchange Traded Fund
GBJR	The German variant of the BJR
GmbH	*Gesellschaft mit beschränkter Haftung*
HGB	*Handelsgesetzbuch*
IPO	Initial Public Offering
MFW	Kahn v. M&F Worldwide
KG	*Kommanditgesellschaft*
KGaA	*Kommanditgesellschaft auf Aktien*
KonTraG	*Gesetz zur Kontrolle und Transparenz im Unternehmensbereich*
LBO	Leveraged Buy Out
LLC	Limited Liability Company

LLP	Limited Liability Partnership
MitbestG	*Mitbestimmungsgesetz*
NHM	*Nederlandsche Handel-Maatschappij*
NLCM	NYSE Listed Company Manual
NV	*Naamloze Vennootschap*
NYSE	New York Stock Exchange
PartG mbB	*Partnerschaftsgesellschaft mit beschränkter Berufshaftung*
PBC	Public Benefit Corporation
PE	Private Equity
PrAktienG	*Gesetz über die Aktiengesellschaften*
((R)MBCA	(Revised) Model Business Corporation Act
SE	*Societas Europaea*
SEC	Securities and Exchange Commission
SA 1933	Securities Act of 1933
SEA 1934	Securities and Exchange Act of 1934
SEO	Seasoned Equity Offering
SRD II	Shareholder Rights Directive II
VC	Venture Capital
VEUO	*Vereniging van Effectenuitgevende Ondernemingen*
VOC	*Vereenigde Oostindische Compagnie*
VvdE	Amsterdam Stock Exchange
WpÜG	German Securities Acquisition and Takeover Act
WvK	*Wetboek van Koophandel*
WvK 1928	*Wetboek van Koophandel* 1928
WvKD	*Wetboek van Koophandel* draft-Donner
WvKN	*Wetboek van Koophandel* draft-Nelissen
WvKHV	*Wetboek van Koophandel* draft-Heemskerk Visser
WvKJ	*Wetboek van Koophandel* draft-Jolles
WvKK	*Wetboek van Koophandel* draft Kist-committee
WvKKH	*Wetboek van Koophandel* voor het Koningrijk Holland
WvKNA	*Wetboek van Koophandel* van de Nederlandse Antillen
WVV	*Wetboek van Vennootschappen* en Verenigingen

Part I
– Introduction –

Chapter 1. Opening*

1.1 Setting the scene

1.1.1 Are stock markets becoming delusional?

Dual class equity structures have been the Alpha and the Omega of the past few years of my professional life.

This statement is more than just drama, but may require some clarification. Shortly before I started my PhD-research, Altice, a telecommunications business headquartered in Luxembourg, announced that it would be executing a cross-border merger to the Netherlands. The transaction, which was completed in 2015, involved the abolishment of the one share, one vote structure then in force. In exchange, all investors received shares of two distinct categories. The newly-created Class A shares granted one vote each, whereas the B class shares carried 25 votes.[1] Analysts estimated that as a result, the voting power of Mr Patrick Drahi, Altice's founder and then-CEO, who owned an equity stake of 58.5 %, could grow to 92 % over time. On the other side of the Atlantic Ocean, similar developments have been taking place. In 2014, Alphabet, the parent corporation to Google, issued non-voting shares to outside investors, a move which caused widespread controversy. The creation of these securities can actually be considered an extension of Alphabet's pre-existing dual class equity structure. Indeed, Google's 2004 IPO witnessed the use of high-voting stock, held by Larry Page and Sergey Brin, enabling them to retain control over

*. I am indebted to Bill Allen (†), Koen Bakker, Jaap Barneveld, Bart Bootsma, John Coates, John Coffee, Sophie Cools, Paul Davies, Jeroen Delvoie, Sven Dumoulin, Ronald Gilson, Marnix van Ginneken, Jeffrey Gordon, Zohar Goshen, Klaus Hopt, Kobi Kastiel, Reinier Kleipool, Reinier Kraakman, Patrick Leyens, Manuel Lokin, Martin Lipton, Sebastian Mock, Martin van Olffen, Frans Overkleeft, Paul Sleurink, Leo Strine, Guhan Subramanian and Tom Vos for inspiring discussions and useful suggestions. All remaining errors are solely my own.

1. For a critical analysis of the Altice case, *see* T. Hua, 'Growing Pains at Altice Prompt New Share Structure' (June 26, 2015), available at http://blogs.wsj.com/. For a more elaborate discussion, *see* § 28.4.4 *infra*. Some scholars attribute different meanings to the terms "stockholder" and "shareholder". *See* S. Davis, 'So Long, Stockholder' (2018), available at http://corpgov.law.harvard.edu/ This PhD-thesis uses both concepts interchangeably for syntaxic purposes.

the business they had founded. In many ways, the 2004 Google IPO can be considered as having sparked the current debate on dual class stock.[2]

As the finalization of this PhD-thesis approached, dual class equity structures again found themselves in the spotlights. A prominent example, arguably one of the strongest to date, was presented by Naspers, the South-African media conglomerate, which spun off its international digital activities. Notably, these included a 31 % interest in Chinese technology firm Tencent. The newly created holding corporation, Prosus, began trading on the Amstedam Stock Exchange in 2019, with 27 % of its stock listed. Interestingly, the common shares held by Prosus will convert into high-voting stocks carrying 1,000 votes each, upon Naspers' equity stake decreasing below the 50 % threshold.[3] Has the market lost its mind?

1.1.2 Two main issues

The cases of Altice, Alphabet (Google) and Prosus are far from unique. Rather, they should be viewed as anecdotal evidence that high-profile corporations are increasingly exploring novel governance arrangements. This observation can give rise to the question whether the use of high-voting and/or non-voting shares by listed corporations should actually be permitted. (Indeed, both instruments serve the same purpose, i.e. enabling insider to retain control.) Another, related question may spring to mind as well. Traditionally, corporate law has stipulated that all investors participate in corporate profits on an equal basis, in proportion to the amount of capital invested. However, following the increased attention for the use of high-voting and non-voting stock, one could also wonder whether listed corporations should be permitted to issue high-profit and/or non-profit participating shares. To obtain a better understanding of the implications of these questions, I will first analyze the core aspects of the membership relation between the corporation and its shareholders in more detail.

---

2. *See* N. Summers, 'Why Google Is Issuing a New Kind of Toothless Stock' (April 3, 2014), available at http://www.bloomberg.com/ ("Here's a philosophical question Google investors can ponder this morning: If you own stock in the tech giant, would you rather have voting rights that are essentially worthless or ones that are literally worthless?"). On the 2014 recapitalization, *see* § 17.3 *infra*. For the 2004 IPO, *see* § 15.5.1 *infra*.
3. *See* J. Cotterill, 'Naspers: 'Africa's SoftBank' looks beyond its Tencent stake' (July 22, 2019), available at http://www.ft.com/ (quoting an investor who feared "that this anti-activist control structure ultimately prevents shareholders applying the brakes if Naspers makes poor investment choices with its cash-pile.")

1.2 Defining voting rights and profit entitlements[4]

1.2.1 Introduction

In relation to shareholder rights, a distinction is typically made between control rights and financial rights. The critical element of control is that of the right to vote. Additionally, a wide variety of related competences may exist. These can include the right to attend the Annual General Meeting (AGM) or the right to receive information. Arguably, the relevance of such additional control powers lies primarily in the fact that they facilitate the exercise of the right to vote proper. Regarding shareholder's financial rights as well, there exist certain competences which largely lack a purpose in and by themselves, but mostly serve to facilitate the distribution of profits. These include, for instance, the right to inspect the corporate accounts. Thus, both control and financial rights each consist of two layers, being a core and a periphery.

The number of votes an investor may cast typically depends on the amount of shares held – usually, common stocks each carry 1 vote each. This is the "one share, one vote" default rule, as was applied by Altice prior to its recapitalization (*see* § 1.1.1 *supra*). Alternatively, the number of votes per share may be a multiple proportional to the share with the lowest par value. This may involve, for instance, an investor owning a share with a nominal value of € 10 being able to cast 1 vote and and investor owning a share with a nominal value of € 50 being able to cast 5 votes. The outcome between those approaches is not necessarily different. The bottom line is that in both systems, shareholders are treated equally in proportion to their capital contribution. The amount of financial distributions can similarly be calculated based on either the number of shares held or on their par value. Indeed, the principle of equality is fundamental to society as a whole, not just to corporate law.[5] However, the meaning of and decisions covered by the concept of equality may differ.[6] The same can be said of its mode of application. Indeed, parties opting to govern their relationship based on equality exercise their autonomy. Freedom of contract has been justified by the consequentialist argument that it has (presumably) positive effects on social welfare.[7] Conversely, if mandated, equality can be considered a form of

4. The categorizations presented here are not intended to be exhaustive. As Leff has eloquently observed, "tunnel vision […] is the price we pay for avoiding total blindness." *See* A.A. Leff, 'Economic Analysis of Law: Some Realism About Nominalism', 60 *Virginia Law Review* 451, 477 (1974).
5. *See* art. 14 of the European Convention on Human Rights and art. 26 of the International Covenant on Civil and Political Rights, banning all forms of discrimination.
6. *See* L. Enriques et al., 'The Basic Governance Structure: Minority Shareholders and Non-Shareholder Constituencies', in *The Anatomy of Corporate Law. A Comparative and Functional Approach* 79, 86 (R. Kraakman et al., 2017), observing that "some level of unequal treatment seems endemic to the corporate form."
7. *See* G. Pencinone, 'Welfare, Autonomy and Contractual Freedom', in: *Theoretical Foundations of Law and Economics* 214 (M.D. White ed., 2009).

paternalism, which can be defined as "the interference of a state or an individual with another person, against their will, defended or motivated by a claim that the person interfered with will be better off or protected from harm."[8]

1.2.2 Voting rights

Voting serves to determine the preferences of shareholders on an aggregate level, when the course of action has not been pre-determined lawfully otherwise.[9] Under the Jury Theorem, developed by De Concordet (1743-1794), the probability that a group will select the correct alternative approaches 1 as the number of voters gets larger, provided that the probability of any given voter choosing the correct alternative is greater than 0.5 (i.e. the voter is more likely to be right than to be wrong).[10] The right to vote can be exercised periodically at the AGM, and occasionally at an extraordinary AGM.

Importantly, the number of votes an investor may cast is, in and by itself, a meaningless figure whenever a corporation has more than 2 shareholders. Instead, the right to vote only becomes relevant when considered in combination with applicable decision-making thresholds. These include majority requirements and quorums, as well as initiation and veto rights. Therefore, the right to vote has a relative rather than an absolute character. Meanwhile, the presence or absence of voting rights can be either absolute or relative. An investor may be able to vote on all resolutions, or (by contrast) not on any resolution at all. Alternatively, the right to vote can exist specifically concerning individual agenda items whilst being absent in relation to other topics.

1.2.3 Profit entitlements

Stocks typically come with profit entitlements, granting investors a return on their investment and compensating them for the risks taken.[11] Shareholders have various forms of profit entitlements, the differences become apparent during the respective phases of the corporation. First, a stock usually entitles its holder to participate in distributions of corporate profits. Dividends can be paid annually, semi-annually or quarterly, or based on other, irregular

8. *See* G. Dworkin, 'Paternalism: Some Second Thoughts', in *Paternalism* (R. Sartorius ed., 1983).
9. *See* F.H. Easterbrook & D.R. Fischel, 'Voting in Corporate Law', 26 *The Journal of Law & Economics* 395, 402 (1983), arguing that "[t]he right to vote is the right to make all decisions not otherwise provided by contract".
10. *See* P. Edelman, 'On Legal Interpretations of the Condorcet Jury Theorem', 31 *Journal of Legal Studies* 327, 328 (2002). The Jury Theorem does not explain why shareholders (and not another constituency) should hold decision-making powers and carry the right to vote.
11. *See* L. Timmerman, 'Principles of Prevailing Dutch Company Law', 11 *European Business Organization Law Review* 609 (2010); *see also* F.H. Easterbrook & D.R. Fischel, *The Economic Structure of Corporate Law* (Harvard University Press, 1991).

time-intervals. Second, it is not uncommon for realized profits to be reserved by the board, at least partially. However, any undistributed amounts are not necessarily lost to the investor, as stocks may also create a proportional entitlement in relation to retained earnings. Until the moment of distribution – which can also take place in the form of a share buyback – the earnings retained can be reinvested. Doing so may or may not increase the stock's (book) value. Finally, in case of a liquidation of the corporation, shares entitle their holder to the surplus – the amount remaining after all debts have been repaid – provided such a surplus exists.

Owners of a certain class of stock (for instance, preferred or tracking stock) may take priority over their fellow investors in relation to all categories of profit entitlements, or with regard to some but not to others. Generally, holders of common shares are entitled to all three types of profit rights, although they may not be the first in line. Again, the economic rights of holders of non-profit participating stock may be present (or absent) in an absolute or relative sense.[12] In contrast to the right to vote, the right to profit has a more absolute character, as its materialization is primarily defined by the performance of the corporation, and results from the interaction between shareholders to a smaller degree.

1.2.4 Implications

Based on the foregoing, it may be observed that not all classes of stock are necessarily created equal. This is self-evident when comparing high-voting, non-voting, high-profit participating and non-profit participating securities. However, shares of those categories can also differ day and night from each other. For instance, non-profit participating stocks that entitle their holder to both dividends and retained earnings may be considered as having full financial rights in all but name, whereas the mere presence of a liquidation surplus entitlement will not create much investor appetite. The picture may be complicated further when it is acknowledged that in practice, absolute and relative control and financial rights are amalgamated into a single security, similar to building blocks.[13] Accordingly, concepts such as dual class equity structures, high-voting, non-voting, high-profit participating and non-profit participating stock may carry little information as to the exact distribution of powers in a certain situation. Instead, these concepts resemble more of a "Weberian

12. An absolute non-profit participating stock could be considered the polar opposite of a mandatory dividend share, common in some jurisdictions, including Brazil and Greece. *See* T.C. Martins & W. Novaes, 'Mandatory Dividend Rules: Do They Make it Harder for Firms to Invest?', 18 *Journal of Corporate Finance* 953 (2012).
13. *See* Z. Goshen & A. Hamdani, 'Corporate Control and the Regulation of Controlling Shareholders', in L. Enriques & T.H. Tröger (eds.), *The Law and Finance of Related Party Transactions* 33-34 (Cambrige University Press, 2019).

Idealtype".[14] For analytical purposes, I will make use of them myself as well. However, on a more abstract level, it may be concluded that any dual class equity structure simply consists of two types of securities, the one featuring more (control and/or financial) rights than the other. Using another Weberian Idealtype, it may therefore be more appropriate to refer to the shares involved as superior and inferior stock, especially when comparing various types of shares with each other and discussing the relative position of the investors owning these securities.

1.3 Functions of dual class equity structures

1.3.1 Voting structures

Dual class voting structures may serve a variety of purposes. This includes obtaining growth funding and assuring long-term value creation (perhaps by a founder or his family), preventing unsolicited takeovers, as well as countering shareholder absenteeism and shareholder uninformedness. Although one could theoretically distinguish between these goals, they are interrelated. In each case, the objective is to stimulate the corporation to operate on a going concern basis, either from an operational or from a financial market perspective. When viewed benevolently, dual class voting mechanisms can also facilitate employee stock ownership plans or the pursuit of a public or social goal, for instance the environment. More cynically, it could be argued that these instruments may prevent foreign investors to exercise control or to entrench insiders, enabling them to obtain advantages at the expense of outsiders.[15]

Interestingly, dual class voting structures can both be deployed to provide growth funding or to finance acquisitions – using inferior voting stock – *and* to frustrate unsolicited takeovers – by creating superior voting stock. Thus, a dual class voting structure may either result in a power shift amongst shareholders, or prevent it. The former is the case wherever superior voting stock is issued to some (inside) investors whilst excluding others. The latter occurs when certain (outside) investors only have the option of subscribing to inferior voting shares.

14. *See* M.C.E. Weber, *Gesammelte Aufsätze Zur Wissenschaftslehre*, 190-198 (Mohr Siebeck, 1922), as translated by Coser (L.A. Coser, *Masters of Sociological Thought: Ideas in Historical and Social Context*, 223-224 (Harcourt Brace Jovanovich, 1977): "An ideal type is formed by the one-sided accentuation of one or more points of view and by the synthesis of a great many diffuse, discrete, more or less present and occasionally absent concrete individual phenomena, which are arranged according to those one-sidedly emphasized viewpoints into a unified analytical construct." In fact, the observant reader will note that this PhD-thesis is full of Weberian Idealtypes.
15. For an extensive overview of the functions of dual class equity structures, *see* S. Daske, *Vorzugsaktien in Deutschland. Historische und rechtliche Grundlagen, ökonomische Analyse, empirische Befunde* 201-226 (Springer, 2019).

Whereas the issuance of superior or inferior voting stock causes or prevents a power shift, this is not a goal in and by itself. Indeed, a corporation can grant a long-term investor high-voting shares, to counter the effects of shareholder absenteeism, whilst simultaneously issuing non-voting stock to employees.

1.3.2 Profit entitlement structures

Admittedly, the rationale for creating different profit rights is less obvious. Superior profit participating stock could serve to placate retail investors in search of a dividend, as is the case with preference shares. The demand for inferior profit participating shares will presumably be rather low, even more so in listed than in closed corporations, where such an instrument may be useful with a view to succession planning. (Consider, for instance, a founder who wishes to pass on the proceeds generated by the firm to the children but intends to retain control over matters of corporate strategy.) If inferior profit participating stock carries the right to vote, it is plausible that the attention of investors subscribing to the instrument shifts to the aspect of control. In other words, the goal of inferior profit participating stock may be similar to that of a dual class voting structure. Accordingly, the functions of superior and inferior profit participating shares are quite different, as opposed to the functions of superior and inferior voting stock, which are rather similar.

Chapter 2. Juxtaposing the investor and the corporation

2.1 Introduction

In Chapter I, I discussed the control and financial rights vested in shares. Since stocks effectively act as a link between investors and corporations, Chapter II analyzes the archetypical characteristics of both actors in more detail, in § 2.2 and § 2.3, respectively. Particularly, I discuss how certain investor traits affect the corporation and *vice versa*. As may be observed, there exist considerable differences amongst investors, whereas most corporations share a single set of features, at least from a corporate law point of view.

2.2 The investor

2.2.1 Commitment to the investing process

The first characteristic of the investor is his commitment to the process of allocating assets. Naturally, the intensity of the commitment may differ. Certain parties choose to follow market developments, by investing through index trackers or Exchange Traded Funds (ETFs). Such passive investing is becoming increasingly popular because of its low administration costs.[1] By contrast, active investors acquire securities of individual corporations, thus attempting to realize returns superior to those of the market or the benchmark.[2] In practice, the distinction between active and passive investing may be a gradual

1. *See* I.R. Appel, T.A. Gormley & D.B. Keim, 'Passive Investors, Not Passive Owners', 121 *Journal of Financial Economics* 111 (2016), showing the market value of US passively managed funds quadrupled to more than 8% in the 1998-2014 period; *see also* C. Schmidt & R. Fahlenbrach, 'Do Exogenous Changes in Passive Institutional Ownership Affect Corporate Governance and Firm Value', 124 *Journal of Financial Economics* 285 (2017), mentioning that for the US, ETFs registered net inflows of $ 795 billion between 2007 and 2013, whereas actively managed mutual funds recorded net outflows of $ 575 billion.
2. Whether active investors actually achieve this goal remains debated. *See* K.R. French, 'Presidential Address: The Cost of Active Investing', 63 *Journal of Finance* 1537 (2008), arguing that the average investor would increase his annual returns by 0.67% by switching to a passive portfolio.

one.[3] Nevertheless, it has important implications. As far as risk appetite is concerned, passive investors are willing to accept market risk but not idiosyncratic risk.[4] Furthermore, the strategy underlying the allocative decision-making process will be more complex for active than for passive investors. For instance, asset allocation by active investors may be based on "technical" indicators. These indicators refer to market action itself, rather than the goods in which the markets deal.[5] Another option is to invest using "fundamental" metrics, in other words based on the financial statements released by the corporation. Such metrics notably include price-earnings (P/E) ratios, (tangible) book value ratios and/or the dividend yield. According to this ("value") philosophy, of which Warren Buffet is arguably the most prominent representative, an investment opportunity exists when a corporation appears undervalued in relation to its own historical multiples or those of peers.[6]

2.2.2 Investment horizon & holding period

In addition to making a commitment to the investing process, investors also set a certain investment horizon. This horizon mainly depends on future obligations becoming due – such as retirement allowances or college fees – but can also be indefinite. The investment horizon may conceptually be distinguished from the duration of an equity participation in relation to a specific corporation ("holding period"). Indeed, proceeds of liquidated holdings may be used to initiate new positions. Substantial efforts have been made to characterize long-term and short-term investors.[7] However, finding common ground on the timeframes involved – for instance 1, 5 or 10 years – has proven difficult. Interestingly, the average holding period has been decreasing steadily over the past years.[8] Technical developments – particularly the advent of "High

3. *See* M. Cremers et al., 'Indexing and Active Fund Management: International Evidence', 120 *Journal of Financial Economics* 539 (2016), distinguishing between explicit and closet indexers.
4. On Modern Portfolio Theory, *see* H. Markowitz, 'Portfolio Selection', 7 *Journal of Finance* 77 (1952).
5. *See* R.D. Edwards, J. Magee, W.H.C. Bassetti, *Technical Analysis of Stock Trends* 4 (CRC Press 2007).
6. Generally, *see* B. Graham, *The Intelligent Investor* (Harper, 1949); *see also* B. Graham & D. Dodd, *Security analysis* (McGraw-Hill, 1934). For a well-known case involving value investing, *see* Halliburton v. Erica P. John Fund, 573 U.S. 258 (2014). Value investing is at odds with the ECMH (*see* § 2.2.5 *infra*). On this tension, see J. Lakonishok, A. Shleifer & R.W. Vishny, 'Contrarian Investment, Extrapolation and Risk, in: R.H. Thaler, *Advances in Behavioral Finance* 273 (Princeton University Press, 2005).
7. Note that this distinction assumes the failure of the ECMH. *See* § 2.2.5 *infra*.
8. The annual turnover for shares of NYSE-listed corporations has increased from 10-30% during the 1940-1980 period, to more than 100% in 2005. *See* P. Bolton & F. Samama, 'Loyalty-Shares: Rewarding Long-term Investors', 25 *Journal of Applied Corporate Finance* 38 (2013); *see also* F. de Roon and A. Slager, *The Duration and Turnover of Dutch Equity Ownership, A Case Study of Dutch Institutional Investors* (2012) for similar findings in

Frequency Trading", which entails automated, split second buying and selling – have drastically contributed to this development.[9] Moreover, hedge funds have become increasingly vocal when (publicly) engaging with corporations (*see* § 2.2.3 *infra*). Indeed, it has been widely claimed that financial markets exert too much pressure to deliver short-term results. One of the arguments is that investors do not necessarily allocate capital directly to listed firms, putting them in the hands of fund managers instead. This "intermediation of the investment process" or "separation of ownership from ownership"[10] may burden in the financial chain, as with each additional element, the tension to deliver results increases.[11] Accordingly, operations which only generate returns over time (particularly, research & development) could become underfunded ("myopia"[12]). Others have attempted to rebuke this argument.[13] A more nuanced position is that the debate should actually be reframed as a conflict of views about the optimal time frame for the corporation to maximize its value creating potential, the outcome of which will likely be unique for each individual firm.[14]

relation to Dutch stock markets. *But see* A.M. Tucker, 'The Long and The Short: Portfolio Turnover Ratios & Mutual Fund Investment Time Horizons', 43 *Journal of Corporation Law* 581 (2018), observing that turnover ratios of mutual funds have remained broadly flat in the 2005-2015 period, with some evidence of a decline after 2008.

9. *See* J. Brogaard, T. Hendershott & R. Riordan, 'High-Frequency Trading and Price Discovery', 27 *Review of Financial Studies* 2267 (2014), finding that such activity causes 42% of the volume in large stocks (small stocks: 18%).
10. *See* U. Rodrigues, 'Corporate Governance in an Age of Separation of Ownership from Ownership', 95 *Minnesota Law Review* 1822 (2011); *see also* L.E. Strine, 'One Fundamental Corporate Governance Question We Face: Can Corporations Be Managed for the Long Term Unless Their Powerful Electorates Also Act and Think Long Term?', 66 *The Business Lawyer* 1 (2010); B.S. Black, 'Agents Watching Agents: The Promise of Institutional Investor Voice', 39 *UCLA Law Review* 811 (1991).
11. *See* I.H.-Y. Chiu & D. Katelouzou, 'Making a Case for Regulating Institutional Shareholders' Corporate Governance Roles', 62 *Journal of Business Law* 67 (2018). *But see* J. Morley, 'The Separation of Funds and Managers: A Theory of Investment Fund Structure and Regulation', 123 *Yale Law Journal* 1228 (2014), arguing that investing through (mutual) funds creates certain efficiencies, such as economies of scale.
12. On this concept, *see* B.J. Bushee, 'The Influence of Institutional Investors on Myopic Investment Behavior', 73 *The Accounting Review* 305 (1998).
13. *See* M.J. Roe, 'Stock Market Short-Termism's Impact', 167 *University of Pennsylvania Law Review* 871 (2018) (claiming that stock buybacks, although mounting, are not constraining research & development investments, whereas financial markets are happily supporting innovative, long-term, technological firms); *see also* J.M. Fried, 'The Uneasy Case for Favoring Long-Term Shareholders', 124 *Yale Law Journal* 1554 (2015) (arguing that opportunistic stock issuances and buybacks by management may exploit short-term investors); M.J. Roe, 'Corporate Short-Termism – In the Boardroom and in the Courtroom', 68 *The Business Lawyer* 977 (2013) (observing that alternatives exist to the stock market, including VC and PE, and that long-termism may be even more harmful than short-termism, as illustrated by the late 1990s DotCom bubble).
14. Then, the focus shifts towards aligning the respective investor horizons. *See* A.M. Pacces, 'Exit, Voice and Loyalty from the Perspective of Hedge Funds Activism in Corporate Governance', 9 *Erasmus Law Review* 199, 209 (2016).

2.2.3 *Amount of assets & ownership structure*

A third investor characteristic is the amount of assets held, both on an aggregate basis as well as in relation to the corporation involved. Investors with smaller holdings, mostly retail investors, face different challenges than those whose assets have a greater value. An important category of large-scale investors concerns institutional parties, which includes mutual funds, hedge funds, pension funds, (academic) endowment funds, insurance companies and commercial banks. One of the differences between retail and institutional parties relates to transaction costs. Obviously, such costs place a heavier burden on smaller parties than on larger ones. Bigger investors may also have a greater incentive to obtain information, and find themselves in an advantageous position to collect it. Indeed, they can afford research of higher quality and, pursuant to disclosure requirements, are more likely to be invited to bilateral meetings.[15] Meanwhile, the implications of asset size for the extent to which investors diversify are unclear. Smaller parties, notably active retail investors, may find it challenging to acquire securities of a sufficient number of corporations of which the stocks are not perfectly correlated.[16] By contrast, controllers aiming to (partially) liquidate a certain position may, by selling on the open market, risk incurring a steep discount.[17]

Furthermore, the stake of an individual shareholder should be considered relative to that of others (*see* § 1.2.2 *supra*). Traditionally, scholars have distinguished between firms with dispersed and those with concentrated share-ownership.[18] The latter has been more prevalent in continental Europe and Asia,[19]

15. *See* M.C. Schouten, 'The Mechanisms of Voting Efficiency', 2010 *Columbia Business Law Review* 763, 780-781 (2010); *see also* H.M. Vletter, *Gelijke behandeling van beleggers bij informatieverstrekking* (Kluwer, 2001); A. Shleifer & R.W. Vishny, 'Large Shareholders and Corporate Control', 94 *Journal of Political Economy* 461 (1986).
16. On (im)perfect correlation, *see* Markowitz 1952, *supra* note 4. Some scholars have argued that diversification can be more or less achieved by holding stocks of 10 corporations. *See* J.L. Evans & S.H. Archer, 'Diversification and the Reduction of Dispersion: an Empirical Analysis', 23 *Journal of Finance* 761 (1968). Another strand of the literature maintains this requires many more. *See* D.L. Domian & D.A. Louton, 'Diversification in Portfolios of Individual Stocks: 100 Stocks Are Not Enough', 42 *Financial Review* 557 (2007) for a recent version of this view.
17. *See* A. Edmans, 'Blockholders and Corporate Governance', 6 *Annual Review of Financial Economics* 23 (2014); *see also* Shleifer & Vishny 1986, *supra* note 15; W. Mikkelson & M. Partch, 'Stock Price Effects and Costs of Secondary Distributions', 14 *Journal of Financial Economics* 165 (1985). Note that blocks traded as a whole may deliver a significant premium. This reflects the private benefits of their holder. *See* § 10.2.2 *infra*.
18. Whereas dispersed and concentrated ownership patterns are often contrasted, these remain Weberian Idealtypes (*see* § 1.2.4 *supra*). *See* K. Geens & C. Clottens, 'One Share-One Vote: Fairness, Efficiency and (the Case for) EU Harmonisation Revisited' (2010), available at http://www.ssrn.com/; *see also* R.J. Gilson, 'Controlling Shareholders and Corporate Governance: Complicating the Comparative Taxonomy', 119 *Harvard Law Review* 1641 (2006).
19. *See* R.K. Morck, 'The Global History of Corporate Governance: an Introduction', in *A History of Corporate Governance Around the World* (R.K. Morck ed., 2005); *see also* M. Faccio

whereas the former has been comparatively more likely in the US and the UK. However, this observation is increasingly at odds with reality, because of heightened levels of institutional-passive ownership in the US and the UK (*see* § 10.2.3 *infra*). Nevertheless, contrasting dispersed and concentrated models may still serve analytical purposes. In firms with dispersed share ownership, monitoring the board is effectively discouraged, as the resulting costs are borne individually whilst the benefits are to be shared pro rata with other investors ("free-riding"). This, in turn, exacerbates shareholder absenteeism. Indeed, for many shareholders, particularly retail parties, the costs of monitoring simply outweigh the potential benefits, also because the board commonly possesses an informational advantage, which the investor has to catch up with. Then, passive behavior is the sensible option ("rational apathy").[20] Both free-riding and rational apathy entail that joint shareholder initiatives become complicated, even more so because mustering fellow investors gives rise to certain coordination challenges, particularly in case the preferences amongst shareholders differ. This is the "collective action problem".[21] Thus, residual risk bearing (ownership) can become separated from decision making rights (control).[22] Consequently, the board could be tempted to engage in projects or transactions which reward themselves but not the investors, and such actions may remain unnoticed (*see* § 10.2.2 *infra*). Alternatively, shareholders may incur costs to keep the board incentivized to act in their best interests, and even such initiatives may not eliminate inefficiencies entirely. When it is theoreticized that the board acts as an agent for the shareholders, who are then viewed as the principal, it can be concluded that the existence of the director-investor relationship gives rise to managerial agency costs.

& L.H.P. Lang, 'The Ultimate Ownership of Western European Corporations', 65 *Journal of Financial Economics* 365 (2002); S. Claessens, S. Djankov & L.H.P. Lang, 'The Separation of Ownership and Control in East Asian Corporations', 58 *Journal of Financial Economics* 81 (2000).

20. For this concept, *see* J. Buchanan & G. Tullock, *The Calculus of Consent: Logical Foundations of Constitutional* Democracy (Ann Arbor, 1962). For a recent application, *see* Y. Nili & K. Kastiel, 'In Search of "Absent" Shareholders: A New Solution To Retail Investors' Apathy', 41 *Delaware Journal of Corporate Law* 55 (2016) (advocating highly-visible default options that effectively force retail investors to vote); *see also* B.S. Black, 'Shareholder Passivity Reexamined', 89 *Michigan Law Review* 520, 521 (1990).

21. For an instructive overview on free-riding, rational apathy and collective action, *see* J.N. Gordon, 'Ties That Bond: Dual Class Common Stock and the Problem of Shareholder Choice', 76 *California Law Review* 1 (1988).

22. *See* E.F. Fama & M.C. Jensen, 'Separation of Ownership and Control', 26 *Journal of Law & Economics* 301, 304 (1983); *see also* M.C. Jensen & W.H. Meckling, 'Theory of the Firm. Managerial Behaviour, Agency Costs and Ownership Structure', 3 *Journal of Financial Economics* 305, 308 (1976); A.A. Berle & G.C. Means, *The Modern Corporation and Private Property* (Macmillan, 1932).

One check on these costs is offered by the fact that some investors with more considerable – yet in a sense still modest[23] – holdings are actually able to overcome the challenge to coordinate. These are mainly the activist hedge funds.[24] Such funds initiate both long and short positions (which are thus, on aggregate, "hedged") to eliminate market risks. As a result, any realized gains are solely due to the stock performance of the targeted corporation. Often, hedge funds engage in an active media strategy to exert pressure with a view to arranging a fundamental shift in strategy and/or replacing the board.[25] By some accounts, hedge funds, acting individually or jointly (in "wolf packs"[26]) are becoming increasingly active.[27] A distinction has been made between defensive and offensive activism. Defensive activism is aimed at ensuring the value of the initial investment and usually reactive in nature. Offensive activism is more directed towards the realization of a one-time gain, for instance through a super dividend or asset divestures.[28] Although activism (particularly in its offensive variant) might prevent or resolve inefficiencies,[29] it has also been associated

23. The approximately € 70 billion takeover of ABN AMRO by a consortium consisting of Fortis, Royal Bank of Scotland and Santander resulted from hedge fund TCI acquiring only 1-2% of the ABN AMRO stock. *See* C. de Groot, A. van Nood & F. Lambert, 'The ABN AMRO Ruling: Some Commentaries' 4 *European Company Law* 168 (2007). *See also* N. Gantchev, 'The Costs of Shareholder Activism: Evidence from a Sequential Decision Model', 107 *Journal of Financial Economics* 610, 621 (2013), finding that activists hold an average equity stake of 8 %.
24. Note that not all hedge funds are activists. For an extensive analysis of the methods of activist hedge funds, *see* Pacces 2016, *supra* note 14, at 203-207; *see also* R.J. GIlson & J.N. Gordon, 'The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights', 113 *Columbia Law Review* 863, 874 (2013) (concluding that the reconcentration of share ownership in the US and the UK has an empowering effect); M. Kahan & E.B. Rock, 'Hedge Funds In Corporate Governance and Corporate Control', 155 *University of Pennsylvania Law Review* 1021 (2007).
25. This similarly induces free-riding, as investors rush to buy shares once the hedge fund has disclosed its position. *See* M. Burkart & S. Lee, 'Activism and Takeovers' (2019), available at http://www.ssrn.com/.
26. For this terminology, *see* L.E. Strine, 'Who Bleeds When the Wolves Bite? A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Strange Corporate Governance System', 126 *Yale Law Journal* 1870 (2017).
27. *See* J. Rossman, 'Lazard's 1Q 2019 Activism Review' (2019), available at http://corpgov.law.harvard.edu/ (noting record activism levels for 2018 in the US, as well as in other developed economies around the world).
28. For the distinction between offensive and defensive, *see* I.H.-Y. Chiu, *The Foundations and Anatomy of Shareholder Activism* 8 (Hart, 2010); *see also* B.R. Cheffins & J. Armour, 'The Past, Present, and Future of Shareholder Activism by Hedge Funds', 37 *Journal of Corporation Law* 51 (2011). Similar terminology was already used by R.C. Pozen, 'Institutional Investors: The Reluctant Activists', 72 *Harvard Business Review* 140 (1994).
29. *See* Gantchev 2013, *supra* note 23 (reporting average returns of 39% over the campaign period); *see also* A. Klein & E. Zur, 'Entrepreneurial Shareholder Activism: Hedge Funds and Other Private Investors', 64 *Journal of Finance* 187, 188, 226 (2009) (finding an average 20 % return); A. Brav et al., 'Hedge Fund Activism, Corporate Governance, and

with exploiting long-term shareholders at the expense of short-term investors, or other corporate constituencies, including employees and customers.[30]

If the investor's equity stake, even if not a strict majority, is sufficiently large to control decision-making, effective shareholder monitoring of the board may actually be a realistic scenario.[31] Potentially, minority shareholders could even benefit from the controller's presence. However, in those circumstances, complications may arise in the relationship between the controller vis à vis other (minority) shareholders. Indeed, in this constellation, it will be the controller instead of the board which strives to obtain private interests, giving rise to shareholder agency costs (*see* § 10.2.2 *infra*). Empowering minority shareholders to combat potential abuse, for instance by reinforcing agenda setting rights, is complicated, as such mechanisms may simultaneously strengthen the controller.[32] Thus, controlled and non-controlled firms and their constituencies face different challenges, and there exists a trade-off between managerial and controlling shareholder agency costs.[33]

2.2.4 Investor engagement

The commitment to the investing process (*see* § 2.2.1 *supra*) as well as the investment horizon and holding period (*see* § 2.2.2 *supra*) should conceptually be distinguished from the intensity of the investor's engagement with an individual corporation, which is the fourth investor characteristic. Engagement can be demonstrated including or excluding the possibility of liquidating a position. Hirschman recognized three options for shareholders to respond to corporate performance: Exit, Voice and Loyalty.[34] Exiting the corporation means

---

Firm Performance', 63 *Journal of Finance* 1729, 1750 (2008) (obtaining similar figures as Gantchev 2013).

30. *See* E. deHaan, D.F. Larcker & C. McClure, 'Long-Term Economic Consequences of Hedge Fund Activist Interventions', 24 *Review of Accounting Studies* 536 (2019) (finding no returns of activism on a value-weighted basis).

31. *See* Edmans 2014, *supra* note 17; *see also* R.J. Gilson & J.N. Gordon, 'Controlling Controlling Shareholders', 152 *University Of Pennsylvania Law Review* 785 (2003); A.R. Admati, P. Pfleiderer and J. Zechner, 'Large Shareholder Activism, Risk Sharing and Financial Market Equilibrium', 102 *Journal of Political Economy* 1097 (1994); Shleifer & Vishny 1986, *supra* note 15.

32. *See* L. Enriques et al., 'The Basic Governance Structure: Minority Shareholders and Non-Shareholder Constituencies', in *The Anatomy of Corporate Law. A Comparative and Functional Approach* 79 (R. Kraakman et al., 2017).

33. Agency costs are traditionally considered the sum of i) monitoring expenditures by the principal, ii) bonding expenditures by the agent and iii) the residual loss. *See* Jensen & Meckling 1976, *supra* note 22, at 308. (The third agency problem is that between shareholders and the firm's contracting parties, such as employees and creditors.)

34. *See* A.O. Hirschman, *Exit, Voice, and Loyalty, Responses to Decline in Firms, Organizations, and States* 33 (Harvard University Press, 1970). For a contemporary analysis, *see* Pacces 2016, *supra* note 14, at 207-211 (stressing that the optimal level of exit and voice differs over time for each corporation); *see also* A.A. Bootsma, 'An Eclectic Approach to Loyalty-Promoting Instruments in Corporate Law: Revisiting Hirschman's Model of Ext,

an investor sells his stock, whereas voice refers to the shareholder and the corporation exchanging views, either formally through voting or informally by negotiations.[35] Exit is generally (although not necessarily for blockholders, *see* § 2.2.3 *supra*) easier, faster, cheaper, and somewhat blunt.[36] Voice is more difficult, time consuming and expensive, but nuanced. Hirschman's concepts are interrelated in a complicated manner. To a certain extent, making an exit can be considered raising one's voice on a non-recurring basis.[37] Massive exits may result in higher costs of capital and lower stock prices, initiating mechanisms relating to the market for corporate control.[38] The effect of exit diminishes in case an investor is merely replaced by another: *faux* exit. Conversely, the use of voice partly depends on the costs of successfully making an exit. Voice is more obvious in case of illiquid markets and if coordination with fellow shareholders can be arranged more easily.[39] The presence of an exit option means voice becomes more powerful.[40] As is the case with exit, a distinction can be made between self-interested, *faux* voice and honest voice. Loyalty acts as a "hydraulic relation" between the two concepts.[41] Loyal shareholders neither sell stock nor engage with the corporation, but simply hold on to their investments. Thus, loyalty is principally passive and long-term oriented. Some investors are more likely to remain (the *Bleiber*), regardless

---

Voice and Loyalty', 7 *Erasmus Law Review* 111 (2013) (applying Hirschman's ideas to time phased (or loyalty) voting).

35. "[Exit] is the sort of mechanism economics thrives on. It is neat – one either exits or one does not; it is impersonal; any face-to-face confrontation […] is avoided and success and failure of the organization are communicated by a set of statistics; and it is indirect – any recovery on the part of the declining firm comes by courtesy of the Invisible Hand" […] "[Voice is] any attempt at all to change, rather than to escape from, an objectionable state of affairs, whether through individual or collective petition to the management directly in charge, through appeal to a higher authority with the intention of forcing a change in management, or through various types of actions and protests, including those that are meant to mobilize public opinion." *See* Hirschman 1970, *supra* note 34, at 15-16, 30.
36. Thus, Hirschman's variant of the argument that financial markets are exerting too much short-term pressure (*see* § 2.2.3 *supra*) could be that the voice of activist hedge funds, as supported by other investors, has become too powerful. *See* Pacces 2016, *supra* note 14, at 207-211.
37. *See* A.R. Admati & R. Pfleiderer, 'The "Wall Street Walk" and Shareholder Activism: Exit as a Form of Voice', 22 *Review of Financial Studies* 7 (2009).
38. The term "market for corporate control" was coined by Manne. *See* H. G. Manne, 'Mergers and the Market for Corporate Control', 73 *Journal of Political Economy* 110 (1965) (arguing that mergers and acquisitions could also be pursued for reasons other than scale or market share).
39. *See* Admati, Pfleiderer & Zechner 1994, *supra* note 31. On changing ownership structures, *see* § 2.2.3 *supra*.
40. *See* J. McCahery, Z. Sautner, & L.T. Starks, 'Behind the Scenes: The Corporate Governance Preference of Institutional Investors, 71 *Journal of Finance* 2905 (2016); *see also* M.J. Mallow & J. Sethi, 'Engagement: The Missing Middle Approach in the Bebchuk-Strine Debates', 12 *New York University Journal of Law & Business* 386 (2016).
41. *See* Hirschman 1970, *supra* note 34, at 34. For an extensive analysis of the aspect of loyalty, *see* Bootsma 2013, *supra* note 34, at 118-120.

of the circumstances, whilst for others (the *Ausreiser*), exiting may feel as the more natural option.[42] Loyalty may either cause the neglect of the exit option (blind loyalty) or, over time, induce the use of voice.

Winter, excluding the option of liquidation, distinguished between Compliant, Interventionist and Stewardship investors.[43] Compliance entails rather limited engagement. It refers to shareholder behavior strictly imposed by the law, not resulting from intrinsic beliefs. Compliance is considered thoughtless and not arising from the understanding that engagement adds value to the investment. Intervention goes one step further. If the situation so demands, discussions are initiated to alter corporate strategy or policy. Although intervention requires considerable understanding of the corporation, it is mostly incidental. Stewardship is the most far reaching variant of engagement, as it is structural, instead of limited in time, and its goal is to create long-term value. Consequently, stewardship necessitates a genuine involvement on the side of the investor.

2.2.5 Shareholder homogeneity & heterogeneity

Eminent scholars have analyzed the position of shareholders on a class basis.[44] Investors undoubtedly have certain interests in common and, in certain aspects, indeed show considerable homogeneity. Arguably, each shareholder pursues the highest returns possible given his pre-determined risk- and investment preferences, instead of passing suitable opportunities which may contribute to this goal. As information on corporate performance or macro-economic developments can be valuable, investors are stimulated to respond to such data by buying or selling securities. (The extent to which investors are receptive for information may differ, but even passive investors can be expected to respond to a hefty change in administrative fees.) Then, stock market prices, at any given moment, completely reflect all available information. This is the efficient capital market hypothesis (ECMH), developed by Fama.[45] As the price of a stock consistently approximates its intrinsic value, the ECMH

42. *See* A.O. Hirschman, 'Exit, Voice and the Fate of the German Democratic Republic: An Essay in Conceptual History', 45 *World Politics* 2 (1993).
43. S*ee* J.W. Winter, 'Shareholder engagement and stewardship: the realities and illusions of institutional share ownership', (2011) available at http://www.ssrn.com/; *see also* J.W. Winter, *Aandeelhouder engagement en stewardship*, in *Samenwerken in het Ondernemingsrecht* 39 (L. Timmerman et al. eds., 2011).
44. *See* J. Armour et al., 'The Basic Governance Structure: The Interests of Shareholders as a Class', in *The Anatomy of Corporate Law. A Comparative and Functional Approach* 49-77 (R. Kraakman et al., 2017).
45. *See* E.F. Fama, 'Efficient Capital Markets: A Review of Theory and Empirical Work', 25 *Journal of Finance* 383 (1970). For subsequent developments, *see* R.J. Gilson & R.H. Kraakman, 'The Mechanisms of Market Efficiency', 70 *Virginia Law Review* 549 (1984) (noting that institutions and information costs should not be disregarded); *see also* R.J. Gilson & R.H. Kraakman, 'Market Efficiency after the Financial Crisis: It's Still a Matter of Information Costs', 100 *Virginia Law Review* 313 (2012) (warning against wholly abandoning the ECMH).

implies that even sophisticated investors will not be able to systematically take advantage of freshly disseminated information.[46] Meanwhile, some have argued that, because of the resulting absence of knowledgeable market participants, a countermovement starts, and eventually, an equilibrium degree of disequilibrium will develop.[47] ECMH-proponents deal with this issue by distinguishing between various forms of the concept of "information". In its weak form, the ECMH considers that the stock market reflects all prior pricing data. According to this view, technical analyses cannot benefit investors, whereas fundamental analyses can (*see* § 2.2.1 *supra*). In its semi-strong variant, only private information may deliver abnormal returns. Under the strong form of the ECMH, not even private information can achieve this goal.[48]

Although the ECMH was widely accepted in the 1970s and 1980s, the idea has increasingly been called into question. According to certain studies, swings in stock prices have been far greater than one could attribute to the availability of new information.[49] Moreover, "noise traders" are believed not to be trading on fresh information, which would be irrational.[50] From a behavioral finance perspective as well, evidence is growing that investors do not always act (or vote) rational. Prospect theory, as developed by Kahneman, posits that most investors are risk averse and thus fear the possibility of losses far more than they value potential gains.[51] Finally, the ECMH may fail to accurately predict the consequences of fundamental long-term developments, as it cannot

---

46. Indeed, the EMCH generously assumes perfect market conditions, including immediate, free of cost information access and homogeneous expectations on the effects of that information. *See* Fama 1970, *supra* note 45. On the lack of homogeneous expectations, *see* L.A. Stout, 'The Mechanisms of Market Inefficiency: An Introduction to the New Finance', 28 *Journal of Corporation Law* 635 (2003).
47. *See* S.J. Grossman & J.E. Stiglitz, 'On the Impossibility of Informationally Efficient Markets', 70 *The American Economic Review* 393 (1980). Another option would be for investors to willingly acquire securities above fair value, with a view to reselling to other market participants at even higher prices ("rational irrationality"). For a response, *see* Gilson & Kraakman 1984, *supra* note 45 (arguing that stock markets may resemble the semi-strong form of the EMCH, with new information being absorbed rapidly, although not immediately as to allow arbitrage profits).
48. *See* Fama 1970, *supra* note 45, for these categorizations.
49. *See* R.J. Shiller, 'Do Stock Prices Move Too Much to be Justified by Subsequent Changes in Dividends?', 71 *The American Economic Review* 421 (1981). For the more recent version of this argument, *see* R.J. Shiller, *Irrational Exuberance* (Princeton University Press, 2016).
50. *See* F. Black, 'Noise', 41 *Journal of Finance* 529 (1985) (theoretically defining noise as the pure opposite of information, and arguing that whereas noise makes financial markets possible, it also makes them imperfect. Indeed, how does one distinguish between noise and information?). *But see* Gilson & Kraakman 1984, *supra* note 45, maintaining that noise traders from different sides will cancel each other out.
51. *See* D. Kahneman, *Thinking, Fast And Slow* 278, 317 (Farrar, Straus & Giroux 2015); *see also* D. Kahneman & A. Tversky, 'Prospect Theory: An Analysis of Decision Under Risk', 47 *Econometrica* 263 (1979). Other behavioral corrections to the assumption of rationality include the availability heuristic (judgements gravitate towards the most recent data, instead of older information). For an extensive analysis, *see* Schouten 2010, *supra* note 15, at 781-790.

incorporate the – initially unknown – effects of human creativity and socio-political change.[52] The Adaptive Market Hypothesis can be considered a response to these deficiencies. Whereas it acknowledges that investors suffer from behavioral setbacks, it also argues that they will learn from their past mistakes.[53] Arguably, this learning curve will differ amongst investors. The aspects discussed in § 2.2.1-§ 2.2.5 illustrate that investors are a rather heterogeneous group.[54] Accordingly, governance considerations are not necessarily a factor, let alone a constraining one, for all investors.[55]

2.3 The corporation

2.3.1 Legal personality

A similar exercise as has been undertaken in relation to investors can be concluded concerning corporations. Although corporations differ substantially over time and across jurisdictions, most share a set of five functional, complementary and interdependent characteristics.[56] Indeed, these aspects encapsulate the corporate nature.[57]

---

52. *See* R. Frydman & M.D. Goldberg, *Beyond Mechanical Markets: Asset Price, Swings, Risk, and the Role of the State* (Princeton University Press, 2011).
53. *See* A.W. Lo, 'The Adaptive Markets Hypothesis: Market Efficiency from an Evolutionary Perspective', 30 *The Journal of Portfolio Management* 15 (2004).
54. Obviously, further characteristics could be added, for instance by recognizing that investors may have different political preferences, including with a view to environmental and social matters. *See* P. Bolton, 'Investor Ideology' (2018), available at http://www.ssrn.com/. Moreover, note that this analysis only considers shareholders of public corporations, not VC and PE investors (which mainly target pre-IPO and post-public firms).
55. Bushee and Porter presented a model which, based on trading patterns, distinguishes between transient, dedicated and quasi-indexing investors. *See* Bushee 1998, *supra* note 12; *see also* M.E. Porter, *Capital Choices: Changing the Way America Invests in Industry* (Harvard Business School Press, 1994). Transient investors hold small stakes in numerous corporations and trade frequently. Dedicated investors have concentrated long-term holdings. Quasi-indexers are characterized by high diversification and low turnover. Whereas the terminology of Bushee and Porter differs, the criteria are rather similar. Note that they only consider institutional investors.
56. The discussion in § 2.3 is based, to a considerable extent, on J. Armour et al., 'What is Corporate Law', in *The Anatomy of Corporate Law. A Comparative and Functional Approach* 5-15 (R. Kraakman et al., 2017); *see also* J.M. de Jongh, *Tussen societas en universitas. De beursvennootschap en haar aandeelhouders in historisch perspectief* XXIII-XXVIII (Kluwer, 2014). One important limitation of this description is that it presupposes that corporations themselves lack the muscle to determine (or tweak) the rules of the game. However, some firms, especially multinationals, actually do have such powers, and their influence is growing. For a particularly harsh analysis, *see* L. Zingales, 'Towards a Political Theory of the Firm', 31 *The Journal of Economic Perspectives* 113 (2017).
57. Some scholars have listed fewer attributes or additional ones (notably, the potentially indefinite life-span of the corporation). For an overview of the various lines of reasoning,

First, being a corporation ordinarily entails legal personality. The specific nature of this aspect remains somewhat elusive. From a functional perspective, the corporation has been characterized as a "nexus for contracts".[58] In this view, legal personality permits the corporation to act as the sole contracting party, distinct from its members or managers. This requires rules concerning representation, thus establishing the authority to trade corporate assets, and rules of procedure, which specify how lawsuits can be brought by the corporation and its counterparty. Additionally, legal personality creates a "separate patrimony", a pool of assets apart from other funds owned by the shareholders. Since these assets are instead owned by the corporation, they cannot be seized by their personal creditors ("entity shielding"[59]). Accordingly, corporate creditors are granted priority over personal creditors of shareholders of the corporation, in relation to firm assets. By contrast, shareholders cannot withdraw their part of the corporate assets at will ("capital lock in").[60] Under a functionalist view, the term legal personality encapsulates the rules concerning entity shielding, transactional authority and litigation, which would be difficult to replicate contractually. Their joint presence harmonizes the expectations of investors, employees and other creditors, thus stimulating firm specific investments.

Importantly, the functional (nexus-for-contracts) notion of legal personality does not necessarily coincide with the doctrinal concept that bears the same name.[61] It may be argued this relates to the distinction between legal personality and legal subjectivity. In many jurisdictions, only the legislator can attribute legal personality. Although this does not prevent us from considering a wider range of constructs as legal subjects, legal personality cannot be acquired solely based on functional characteristics.[62] The functional perspective's internal consistency can be debated as well. Indeed, the nexus-for-contracts perspective simultaneously considers shareholders creditors and owners of the

see C.M. Bruner, 'What is the Domain of Corporate Law?' 13-21 (2019), available at http://www.ssrn.com/.

58. Arguably, this perspective potentially attributes slightly more substance than the "nexus of contracts" view does. For the purely contractarian view, *see* F.H. Easterbrook & D.R. Fischel, *The Economic Structure of Corporate Law* 12 (Harvard University Press, 1991); *see also* Jensen & Meckling 1976, *supra* note 22.

59. On the concept of entity shielding, *see* H. Hansmann, R. Kraakman & R. Squire, 'Law and the Rise of the Firm', 119 *Harvard Law Review* 1333 (2006). Meanwhile, the term asset shielding has been used to describe methods to circumvent seizure by creditors, thus reducing the power of enforcement. *See* Y.A. Arbel, 'Shielding of Assets and Lending Contracts', 48 *International Review of Law and Economics* 26 (2016).

60. *See* M.M. Blair, 'Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century,' 51 *UCLA Law Review* 387, 441 (2003).

61. *See* J. Armour & M.J. Whincop, 'The Proprietary Foundations of Corporate Law', 27 *Oxford Journal of Legal Studies* 429, 460 (2007); *see also* L. Timmerman, 'Samenwerking, rechtspersoon en het staart schudt hond-verschijnsel', in *Samenwerken in het Ondernemingsrecht* 1 (L. Timmerman et al. eds., 2011).

62. *See* M.J. Kroeze, 'Rechtspersoon en vennootschap', in *Met recht* 283 (P. Essers et al. eds., 2009).

corporation.[63] Moreover, the focus on individual contracts can conceal the fact that pooling assets may unlock value, if their combined value is higher than a sum of the parts.[64] Finally, the nexus-for-contracts approach makes it harder to distinguish between firms, especially when long term commitments between two of them are in place.

2.3.2 Limited shareholder liability

A second characteristic of the corporation is the fact that the liability of shareholders is limited. Absent other arrangements, creditors of the corporation lack a claim against personal assets of the shareholder. Indeed, the contractual liability of investors is internally limited to the amount of paid-in capital.[65] Externally, holders of paid-up stock are, in principle, not liable at all. Effectively, this arrangement ("owner shielding") mirrors the entity shielding-mechanism.[66] Limited shareholder liability distinguishes corporations from partnerships, as with the latter, there has traditionally been (at least) one investor who bears unlimited liability. Furthermore, limited liability permits shareholders to be less involved in operating the business, therefore contributing to the transferability of stocks (*see* § 2.3.3 *infra*) and implying delegated management under a board structure (*see* § 2.3.4 *infra*). Together, entity and owner shielding allow for "asset partitioning", which potentially creates comparative advantages in monitoring personal and corporate assets.[67] Consequently, the options for obtaining collateral increase, stimulating entrepreneurial behavior.

However, limited shareholder liability may have some disadvantages as well. Limited shareholder liability induces diversification and thus reduces monitoring. Moreover, it can give rise to externalities.[68] An externality is the "welfare effect felt by one party as a result of another actor's production or consumption decisions that is not mediated via the price system".[69] Projects with scenarios

63. *See* L. Stout, *The Shareholder Value Myth. How Putting Shareholders First Harms Investors, Corporations, and the Public* (Berret-Koehler, 2012).
64. *But see* M.M. Blair & L.A. Stout, 'A Team Production Theory of Corporate Law', 85 *Virginia Law Review* 248 (1999), where the team production approach is discussed within a contractual framework. For a subsequent discussion, *see* R. Harris, 'The History of Team Production Theory', 38 *Seattle University Law Review* 537 (2015).
65. For an extensive analysis, *see* S.M. Bainbridge & M.T. Henderson, *Limited Liability: A Legal and Economic Analysis* (Edward Elgar, 2017); *see also* F.H. Easterbrook & D.R. Fischel, 'Limited Liability and the Corporation', 52 *University of Chicago Law Review* 89 (1985).
66. *See* Hansmann, Kraakman & Squire 2006, *supra* note 59. On entity shielding, *see* § 2.3.1 *supra*.
67. *See* R.A. Posner, 'The Rights of Creditors of Affiliated Corporations', 43 *University of Chicago Law Review* 499, 522-523 (1976).
68. *See* Zingales 2017, *supra* note 56; *see also* A.R. Admati, 'A Skeptical View of Financialized Corporate Governance', 31 *Journal of Economic Perspectives* 131 (2017).
69. *See* J. Armour, 'Share Capital and Creditor Protection: Efficient Rules for a Modern Company Law', 63 *The Modern Law Review* 355, 363 (2000).

involving a negative value, would all costs be properly internalized and liability not have been limited, become more rewarding for shareholders at the expense of other parties.[70] (Indeed, these scenarios no longer have to be taken into account.) Importantly, those parties are not involved in the relevant decision-making process. Thus, externalities prevent economically rational actors from making efficient decisions.[71] As such, they often offer short-term gain in exchange for long-term pain.[72] One typical example would be polluting the environment, contributing to the melting of glaciers, instead of engaging in the costly operation of processing the substances into less harmful forms of waste. Stricter regulation, with a view to ensuring a level playing field,[73] may combat externalities to a certain degree. Nevertheless, such an approach is unlikely to address the entire issue. Therefore, in recent years, some scholars have advocated a model in which limited liability basically becomes an optional corporate trait, which can be acquired.[74] This approach bears some resemblance to legal schemes of yesteryear – *Mais où sont les neiges d'antan?* – in which founding a corporation was only permitted when royal or state assent had been obtained (*see* § 15.2, § 22.2 and 27.2 *infra*). Although this proposal has not yet gained considerable ground with policy makers, it may illustrate that the attention for the potential downsides of limited shareholder liability is experiencing somewhat of a revival.

2.3.3 Stock transferability

The third characteristic of the corporation is stock transferability. At least one class of stock in the corporation is required to be fully transferable. Again, this distinguishes corporations from traditional partnerships. However, full transferability does not necessarily equate to free transferability. Transfer restrictions, in order to prevent dispersed or disapproved stock-ownership, may be negotiated upon. Corporations can be considered "open" in the absence of transfer restrictions and "closed" when these are present.[75] Additionally, corporations may (listed) or may not (unlisted) have (parts of) their equity

70. *See* C. Mayer, *Firm Commitment. Why the Corporation is Failing to us and how to Restore Trust in it* 36 (Oxford University Press, 2013) for arithmetic examples.
71. *See* J.E. Stiglitz, *Freefall: America, Free Markets, and the Sinking of the World Economy* 17 (Norton, 2010).
72. *See* Mayer 2013, *supra* note 70, at 55.
73. *See* M.C. Jensen, 'Value Maximization, Stakeholder Theory, and the Corporate Objective Function', 22 *Journal of Applied Corporate Finance* 16 (2001) (arguing that firms which do not impose externalities will lose to competitors).
74. *See* M. Simkovic, 'Limited Liability and the Known Unknown', 68 *Duke Law Journal* 275 (2018).
75. On the fundaments of closed corporations, *see* H.G. Manne, 'Our Two Corporation Systems: Law and Economics', 53 *Virginia Law Review* 259, 276 (1967). For further analysis, *see* F.H. Easterbrook & D.R. Fischel, 'Close Corporations and Agency Costs', 38 *Stanford Law Review* 271 (1986). For a more contemporary discussion, *see* J.A. McCahery & E.P.M.

instruments traded at a regulated market or Multilateral Trading Facility.[76] These stocks may (widely held) or may not (closely held) be held by a large number of investors, (un)familiar to management (*see* § 2.2.3 *supra*). Although the concepts of transfer restrictions, stock exchange listedness and shareholder quantity overlap, they do not necessarily coincide. The use of alternative trading systems such as SharesPost and SecondMarket is increasingly common. As a result, the distinction between the three aspects has become more subtle.

Stock transferability may be linked to legal personality (*see* § 2.3.1 *supra*), especially the aspect of capital lock-in, of which it is virtually the opposite. Indeed, if the transferability of stock would not be provided for, the creditworthiness of the firm could deteriorate substantially following changes in the identity of the shareholder base (i.e. well-funded members exiting). Stock transferability is also related to limited liability (*see* § 2.3.2 *supra*), for if absent, withdrawing investors could impose external costs on fellow shareholders, depending on the wealth of the acquirer. Finally, stock transferability encourages investor ownership (*see* § 2.3.5 *infra*), as it facilitates the market for corporate control.

2.3.4 Board structure

The fourth aspect of the corporation is that shareholders typically attribute control over corporate affairs to a board or a similar organ, which they periodically elect at the General Meeting (*see* § 2.3.5 *infra*). Whereas this step is a necessity to counter the effects of shareholder coordination and information challenges, it also gives rise to managerial agency costs (*see* § 2.2.3 and § 10.2.2 *supra*). Strongly competing views exist regarding the appropriate division of powers between the shareholders and the board, for instance in relation to matters of director compensation, mergers and acquisitions and dividend distributions.[77] Arguably, this allocation of competences is the defining issue of corporate law. The board can be characterized in a number of ways. Importantly, it enjoys an autonomous position and is (formally) independent from the shareholders. (Meanwhile, it should be responsive to their interests.) This facilitates swift decision-making, reduces control and challenges costs and permits the protection of minority shareholders. Similarly, the board is (formally) separate from operational management, although the degree of separation may differ. This depends on a number of factors, including whether the board consists of one or

---

Vermeulen, *Corporate Governance of Non-Listed Companies* 7-8 (Oxford University Press 2008).

76. Regarding these concepts, *see* S. 4 (1) (19) and (44) of Directive Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU.

77. *See* S. Cools, 'The Dividing Line Between Shareholder Democracy and Board Autonomy: Inherent Conflicts of Interest as Normative Criterion', 11 *European Company and Financial Law Review* 258 (2014).

two tiers and the presence of an executive committee.[78] Furthermore, the board typically contains multiple members, which serves to maximize the quality of decision-making.[79] The existence of a board structure can also be related to the aspect of capital lock-in. Indeed, safeguarding the position of minority shareholders and creditors stimulates firm-specific investments.

A somewhat forgiving liability regime, similar to the business judgement rule, also forms an indispensable characteristic of the board structure. This may sound counter-intuitive, given the fiduciary nature of (supervisory and/or executive) board member duties. However, a hypothetical comparison may illustrate this point. When allocating their funds, investors may demand a "margin of safety" – allowing for setbacks – which is factored into the price of the securities acquired (*see* § 2.2.1 *supra*). Directors make an investment as well, although they allocate time instead of assets.[80] Similarly, they require a margin of safety, which is taken into account for their liability regime. If directors would not be negotiating a margin of safety, the investor-director relationship becomes asymmetrical. This creates an incentive for directors to invest funds instead of time, heralding the end of the modern corporation.[81]

2.3.5 Residual shareholder ownership (?)

As a fifth aspect of the corporation, being a stockholder entails control and earnings rights (*see* § 1.2 *supra*). Economically – although, importantly, not legally – shareholders are the sole residual claimants and even owners of the corporation.[82] From this perspective, it is argued that maximizing the residual interest would benefit society as a whole, given that shareholders only receive compensation once the claims of other constituents, including employees and creditors, have been satisfied.[83] Usually, it is observed that the claims of such

78. On the differences between one and two tier boards, *see* W.J.L. Calkoen, *The One-Tier Board in the Changing and Converging World of Corporate Governance: A comparative study of boards in the UK, the US and the Netherlands* (Kluwer, 2012).
79. *See* S.M. Bainbridge, 'Why a Board? Group Decisionmaking in Corporate Governance', 55 *Vanderbilt Law Review* 1 (2002), arguing (somewhat optimistically) that the collective can trump the individual in gathering and storing information and may face less decision-making biases, including herding and overconfidence.
80. For an instructive analysis of the position of Board Members of listed corporations and the (psychological) challenges they face in relation to liability, *see* M.J. Kroeze, *Bange bestuurders* (Kluwer, 2005).
81. *See* T.A. Keijzer, 'Waarvan worden bestuurders bang?', in *De vele gezichten van Maarten Kroeze's 'bange bestuurders'* 137 (L. Timmerman & B.F. Assink eds., 2017).
82. *See* E.F. Fama & M.C. Jensen, 'Agency Problems and Residual Claims', 26 *Journal of Law & Economics* 327 (1983); *see also* Jensen & Meckling 1976, *supra* note 22, building notably on the works of Coase (*see* R.H. Coase, 'The Nature of the Firm', 4 *Economica* 386 (1937)). For an instructive historical analysis, *see* De Jongh 2014, *supra* note 56, at 268, observing that already in 1908, Steinitzer considered the corporation as a *Zyklus* or *Kette von Verträge*. *See* E. Steinitzer, *Ökonomische Theorie der Aktiengesellschaft* (Duncker & Humblot, 1908).
83. *See* Easterbrook & Fischel 1991, *supra* note 58, at 10-11.

parties are fixed and/or secured, for instance through labor and/or insolvency laws. In this view, the fact that the size of the shareholder claim is not or less fixed also justifies granting voting rights exclusively to shareholders, and not to other interest groups as well. Indeed, such a distribution of competences allows for contractual gaps, which necessarily arise over time, to be filled. Proportionality in the allocation of control (and, by extension, financial) rights would stem from economically equal risk-taking.[84] Furthermore, permitting management to focus solely on shareholder interests creates a clear performance-yardstick.[85] Finally, allowing shareholders to focus on serving their own interests incentivizes the monitoring of management.

However, it can be doubted whether the characteristic of residual shareholder ownership is as fundamental to the corporation as it might *prima facie* appear. In case of securities lending ("empty voting"), an economic interest is absent. Then, it is not abundantly clear why such an investor should qualify as residual claimant.[86] The emergence of public benefit corporations (PBCs, *see* § 16.1.1 *infra*) and the existence of large corporations, including ThyssenKrupp, of which the shares are largely held by pro-bono foundations similarly undercuts the dogma of residual investor ownership. So does the failure of the ECMH (*see* § 2.2.5 *supra*), as this implies that shareholders will not necessarily use the right to vote (or allocate their dividends) in the most efficient way theoretically possible. Furthermore, the position of other constituents also substantially depends on the good fortunes of the corporation. Debt-investors generally have to write-off part of the principal in case of a default.[87] Upon bankruptcy, firm-specific investments made by employees (including

84. *See* F.H. Easterbrook & D.R. Fischel, 'Voting in Corporate Law', 26 *The Journal of Law & Economics* 395, 410 (1983). For a recent example, *see* R.B. Thompson & P.H. Edelman, 'Corporate Voting', 62 *Vanderbilt Law Review* 129 (2009).

85. *See* Easterbrook & Fischel 1991, *supra* note 58, at 38: "A manager told to serve two masters […] has been freed of both and is answerable to neither." *See also* M. Friedman, *Capitalism and Freedom* 133 (Chicago University Press 1962), who famously argued that "there is one and only one social responsibility of business – to use it resources and engage in activities designed to increase its profits so long as it […] engages in open and free competition without deception or fraud".

86. For thorough analyses on securities lending, *see* M.C. Schouten, *The Decoupling of Voting and Economic Ownership* XVII (Kluwer, 2012); *see also* W-G. Ringe, *The Deconstruction of Equity: Activist Shareholders, Decoupled Risk, and Corporate Governance* 28-70 (Oxford University Press 2016); H.T.C. Hu & B.S. Black, 'Hedge Funds, Insiders, And The Decoupling Of Economic And Voting Ownership: Empty Voting And Hidden (Morphable) Ownership', 13 *Journal of Corporate Finance* 343 (2007); H.T.C. Hu & B.S. Black, 'The New Vote Buying: Empty Voting and Hidden (Morphable) Ownership', 79 *Southern California Law Review* 811 (2006).

87. *See* E. Martino, 'Bail-inable Securities and Financial Contracting: can Contracts Discipline Bankers?', 10 *European Journal of Risk Regulation* 164 (2019); *see also* Klein & Zur 2001, *supra* note 29 (observing decreases in bond prices following shareholder activism). Indeed, Jensen has advocated the concept of enlightened value maximization, which includes the value of equity as well as the value of debt. *See* Jensen 2001, *supra* note 73.

self-funded courses or unused leave days) will largely be lost as well.[88] In that sense, shareholders may impose external costs to others and cannot be considered the sole residual claimant.[89]

In conclusion, the conception of shareholders as the economic sole residual claimants of the corporation, let alone its legal owners, deserves nuance, perhaps more so than is the case with the other characteristics of the corporation (*see* § 2.3.1-§ 2.3.2 *supra*).[90] This is not to say that there should not be some constituency to make decisions on the future of the firm or to receive the profits resulting from its activities. Rather, the view in which shareholders, without any further consideration, are necessarily granted unilateral control over the corporation is increasingly considered simplistic and narrow-minded, and rapidly becoming obsolete.[91]

88. Note that employees find themselves in a difficult position to diversify their investments away from their employer. For a recent example on the interaction between the interests of employees, creditors and shareholders, *see* Y. Qiu, 'Debt Structure as a Strategic Bargaining Tool' (2017), available at http://www.ssrn.com/, observing that management typically counters an increase in union negotiation power by adjusting the debt structure to become more solid, thus providing an additional argument for leaving the rights of shareholders unaffected.
89. *See* Mayer 2013, *supra* note 70; *see also* Stout 2012, *supra* note 63 (observing that the residual claim is only paid out in full upon liquidation of the corporation); Blair & Stout 1999, *supra* note 64; A.A. Alchian & H. Demsetz, 'Production, Information Costs, and Economic Organization', 62 *The American Economic Review* 777 (1972).
90. *See* H.M. Vletter-van Dort, 'De aandeelhouder als hoeksteen van de beursvennootschap?', 20 *Ondernemingsrecht* 280, 286 (2018), for a by and large comparable conclusion.
91. For a similar view, *see* N. Lemann, *Transaction Man: The Rise of the Deal and the Decline of the American Dream* (Farrar, Straus and Giroux, 2019), analyzing various grand socio-economic conceptions. Lemann distinghuishes between the welfare state institutional era, the recent shareholder value transactional era and the coming digital network era, eloquently illustrating the pains of focusing on narrow financial considerations.

Chapter 3. Methodology

3.1 Introduction

In this PhD-thesis, I combine insights from various disciplines to assess the merits of dual class equity structures. This warrants an examination of the analytical methods adopted. To start with, I discuss the relevance of the economic perspective, in § 3.2. Subsequently, I elaborate on the importance of the legal (doctrinal and comparative) and historical perspectives, in § 3.3 and § 3.4, respectively. Although each method is discussed in isolation, the disciplines in certain cases overlap, and the differences between them can be rather gradual in nature.

3.2 Economic analysis

3.2.1 Focusing on efficiency

Economic arguments are of particular importance for assessing the quality of corporate law.[1] In fact, some scholars have argued that increasing welfare should be the sole aim of legislation.[2] Welfare can be enhanced through regulation which maximizes efficiency.[3] Accordingly, the purpose of corporate law is to reduce transaction costs, including agency, bankruptcy and information costs, and externalities. Traditionally, two views on efficiency have been put forward. A reallocation of rights and resources is Pareto-superior to the pre-existing alternative if the position of at least one person improves, whereas none is made worse-off. Thus, a Pareto-optimal state of affairs has no redistributions

---

1. *See* R.A. Posner, *Economics Analysis of Law* (Wolters Kluwer Law & Business, 2014); *see also* F.H. Easterbrook & D.R. Fischel, *The Economic Structure of Corporate Law* 15 (Harvard University Press, 1991) (famously contending that "corporate law should contain the terms people would have negotiated were the costs of negotiating at arms' length for every contingency sufficiently low").
2. *See* L. Kaplow & S. Shavell, *Fairness versus Welfare* 5 (Harvard University Press, 2002), arguing "a welfare-based normative approach should be exclusively employed in evaluating legal rules."
3. *See* R.A. Posner, 'Utilitarianism, Economics, and Legal Theory', 8 *Journal of Legal Studies* 103 (1979).

Pareto-superior to it.[4] Conversely, a reallocation is deemed Kaldor-Hicks efficient when those of whom the position improves could fully compensate those of whom the situation deteriorates. Importantly, this compensation does not necessarily have to take place; the theoretical possibility suffices.[5] However, if such compensation is actually granted, the modified state of affairs can also said to be Pareto-superior.[6] Other scholars have warned against overly focusing on efficiency, because of the steepness of the trade-off involved[7] or its utilitarian character.[8] Meanwhile, it has also been observed that welfare also be construed in such broad terms as to encompass non-monetary factors, including human and environmental well-being.[9] Then, it would be rather difficult to oppose a paradigm of welfare maximization, but the criterion also becomes so broad that one could question its usefulness. Indeed, focusing on welfare maximization does not relieve us from some of the practicalities involved, for instance measuring whether a certain measure contributes to this goal. Quantifying inherently qualitative factors, such as justice, is not exactly an easy task, but the same may be true for more quantative data. Shareholder value maximization is not necessarily equal to welfare maximization (*see* § 2.3.5 *supra*). Even when assuming that shareholder value is the appropriate criterion to maximize welfare, the question arises how shareholder value should be measured.[10] Stock market prices may deviate widely from their fundamental value, for instance because of behavioral factors (*see* § 2.2.5 *supra*).

4. Under the Coase-theorem, which assumes negligible transaction costs, a bargaining process on the allocation of externalities will result in a Pareto-efficient outcome, regardless of the initial allocation of property. See R.H. Coase, 'The Problem of Social Cost', 3 *Journal of Law & Economics* 1 (1960).
5. *See* N. Kaldor, 'Welfare Propositions of Economics and Interpersonal Comparisons of Utility', 49 *The Economic Journal* 549 (1939); *see also* J.R. Hicks, 'The Foundations of Welfare Economics', 49 *The Economic Journal* 696 (1939).
6. *See* J. Leitzel, *Concepts in Law and Economics. A Guide for the Curious* 3 (Oxford University Press, 2015); *see also* J.L. Coleman, 'Efficiency, Utility, And Wealth Maximization', 8 *Hofstra Law Review* 509 (1980).
7. "It is not crazy to feel that a leisurely daily walk to a dependable workplace in the well-preserved medieval city of one's birth is preferable to lower prices on MP3 players." *See* H. Hansmann, 'How Close is The End of History?', 32 *The Journal of Corporation Law* 745, 747 (2006).
8. *See* Coleman 1980, *supra* note 6, criticizing an efficiency-oriented approach as consequentialist (the moral desirability of a certain measure is conditioned on the outcome it produces). For a thorough analysis of the advantages and disadvantages of applying an economic perspective in a legal setting, *see* J.B.S. Hijink, *Publicatieverplichtingen voor beursvennootschappen* 144 (Kluwer, 2010).
9. *See* Kaplow & Shavell 2002, *supra* note 2, observing that "notions of fairness, such as corrective and retributive justice, should receive no independent weight in policy assessment".
10. *See* M.C. Schouten, 'The Mechanisms of Voting Efficiency', 2010 *Columbia Business Law Review* 763, 775-776 (2010); *see also* J.E. Fish, 'Measuring Efficiency In Corporate Law: The Role Of Shareholder Primacy', 31 *The Journal Of Corporation Law* 637 (2006).

3.2.2 Agency theory and control costs

Agency theory has, explicitly or implicitly, been at the basis of large parts of the current literature, as reviewed in Chapter 2. It emphasizes that the existence of a shareholder-director relationship gives rise to certain monitoring, bonding and residual costs[11] and aims to develop mechanisms for curbing the costs imposed on the principal by the agent. Traditionally, it has been theoreticized that dual class equity structures reduce corporate performance, as measured by stock price. Due to the fact that these mechanisms aggravate the "wedge" between equity interest and control, they further induce managerial and shareholder agency costs. These may come, for instance, in the form of projects which reward insiders at the expense of outsiders (*see* § 10.2.2 *infra*). When unconditionally accepting this argument, one would expect dual class equity structures to become extinct. However, this has not been the case. Therefore, traditional agency theory has a hard time explaining the existence of dual class equity structures.

The fact that agency theory is at the very heart of contemporary scholarship is not entirely unjustified. It has delivered important insights on potential conflicts of interest of those involved in the corporation. However, certain drawbacks exist as well, some of which have already been discussed.[12] Meanwhile, my most fundamental objection is that agency theory is primarily preoccupied with avoiding the waste of resources and preventing failure. Agency theory views human behavior negatively. To exaggerate slightly, agents are considered lazy, risk-averse, self-serving, and only extrinsically motivated. Thus, stimulating private initiative is principally downgraded. From a normative point of view, it can be questioned whether such a pessimistic view should be governing entrepreneurial organizations. In fact, agency theory could, by largely disregarding growth and innovation opportunities, come at odds with its own overarching objective of promoting the interests of the residual claimants (i.e. shareholders).[13] Therefore, a complement to agency theory is required.

Stewardship theory could be considered a candidate, taking a radically different approach.[14] Stewardship can be defined as "the process through which

---

11. *See* E.F. Fama & M.C. Jensen, 'Agency Problems and Residual Claims', 26 *Journal of Law & Economics* 327 (1983); *see also* E.F. Fama & M.C. Jensen, 'Separation of Ownership and Control', 26 *Journal of Law and Economics* 301, 304 (1983); M.C. Jensen & W.H. Meckling, 'Theory of the Firm. Managerial Behaviour, Agency Costs and Ownership Structure', 3 *Journal of Financial Economics* 305, 308 (1976).
12. *See* § 2.3.5 *supra*, concerning the validity of exclusive residual shareholder ownership when considering securities lending, PBCs, the ECMH, and stakeholder contributions.
13. *See* S.M. Bainbridge, 'Director Primacy: The Means and Ends of Corporate Governance', 97 *Northwestern University Law Review* 547 (2003); *see also* L.E. Strine, 'Toward a True Corporate Republic: A Traditionalist Response to Bebchuk's Solution for Improving Corporate America', 119 *Harvard Law Review* 1759 (2006).
14. For the (sociological or even theological) origins of stewardship theory, *see* L.H. Donaldson & J.H. Davis, 'Stewardship Theory or Agency Theory: CEO Governance and Shareholder

shareholders, directors and others seek to influence corporations in the direction of long-term, sustainable performance that derives from contributing to human progress and the wellbeing of the environment and society." It postulates that agent and principal interests are congruent, at least long-term.[15] Conceptually, stewardship theory views human behavior more positively, building on trust[16] and intrinsic motivation.[17] However, in practice, it mainly serves to empower a subset of investors – primarily institutional parties – on matters of their choice, whilst enabling them to reject further-reaching responsibilities on other topics.[18] As such, stewardship theory falls short, and does not make the fundamental contribution required.

In fact, a quite subtle addition to agency theory may already be sufficient for creating a considerably more holistic economic framework. This involves the introduction of the concept of principal costs. Such costs occur when investors exercise control, and may stem from a lack of expertise, information, or skewed incentives – for instance, cash-strapped investors demanding dividends. Agent and principal costs are substitutes, as a reallocation of control rights decreases one type of cost but increases the other. Jointly, agent and principal costs are referred to as control costs.[19] The insight that agency costs, although undeniably important, only constitute a part of the equation, is fundamental, and underlies the entirety of my economic analysis.

Returns', 16 *Australian Journal of Management* 49 (1991); *see also* T. Thompson, *Stewardship In Contemporary Theology* (Association Press 1960).

15. *See* R.M. Barker & I.H.-Y. Chiu, 'From Value Protection to Value Creation: Rethinking Corporate Governance Standards for Firm Innovation', 23 *Fordham Journal of Corporate & Financial Law* 437, 500 (2018); *see also* I.H.-Y. Chiu, 'Turning Institutional Investors into 'Stewards': Exploring the Meaning and Objectives of 'Stewardship'', 66 *Current Legal Problems* 443 (2013).
16. *See* K.E. Goodpaster, 'Business Ethics And Stakeholder Analysis', 1 *Business Ethics Quarterly* 53 (1991) (arguing that morally, principals cannot hire agents to act on their behalf as they could not do themselves).
17. *See* J.H. Davis, F.D. Schoorman & L. Donaldson, 'Toward a Stewardship Theory of Management', 22 *Academy of Management Review* 20 (1997).
18. *See* I.H.-Y. Chiu & D. Katelouzou, 'From Shareholder Stewardship to Shareholder Duties: Is the Time Ripe?', in H. Birkmose (ed.), *Shareholder's Duties* 131 (Kluwer Law Interntional, 2016); *see also* D.A.M. Melis, *The Institutional Investor Stewardship Myth: A Theoretical, Legal And Empirical Analysis Of Prescribed Institutional Investor Stewardship In A Dutch Context* (Nyenrode, 2014). For a critical Dutch analysis, *see* H.M. Vletter-van Dort & T.A. Keijzer, 'Herziening Britse Corporate Governance Code: stof tot nadenken', 20 *Ondernemingsrecht* 321 (2018).
19. *See* Z. Goshen & R. Squire, 'Principal Costs: A New Theory for Corporate Law and Governance', 117 *Columbia Law Review* 767 (2017); *see also* Z. Goshen & A. Hamdani, 'Corporate Control and Idiosyncratic Vision', 125 *Yale Law Journal* 560 (2016). For earlier, similar observations, *see* A.M. Pacces, *Rethinking Corporate Governance: The Law and Economics of Control Powers* 93-94 (Routledge, 2012); *see also* S. Cools, 'The Dividing Line Between Shareholder Democracy and Board Autonomy: Inherent Conflicts of Interest as Normative Criterion', 11 *European Company & Financial Law Review* 258, 272 (2014).

3.3 Legal Analysis

3.3.1 Aiming for justice

This PhD-thesis also adopts a doctrinal approach. This choice can be considered in keeping with tradition. One advantage is that there exists a rather standardized definition of doctrinal research.[20] This involves analyzing statutes and treaties, principles, precedents and scholarly works, for the purpose of "drawing conclusions that cannot be deduced simply by reading a legal text itself".[21] As opposed to the economic method, which broadly focuses on increasing welfare – in one form or another – the aim of the legal discipline is principally to ensure that justice is served. Whereas efficiency is the central paradigm of the economist, justice and fairness are those of the legal scholar.[22] In this view, justice and welfare cannot always be morphed into a single, overarching concept. The emphasis on justice also has strong programmatic implications. Indeed, the researcher who considers positive law unsatisfactory should ultimately propose a new framework, perhaps building on the old one, which is more acceptable from a normative point of view.[23]

3.3.2 Doctrinism: methodological rigor?

In essence, the doctrinal approach is quite straightforward. As a result, a fundamental debate is taking place concerning the academic merits of the resulting scholarship.[24] Specifically, the attention has been drawn to the alleged absence of a prevailing methodology for processing the respective legal sources. Indeed, the simplicity of the doctrinal approach also gives it a certain hollowness. Some scholars have addressed this issue by comparing doctrinal

---

20. *See* W. Twining, *Law In Context: Enlarging A Discipline* 33 (Oxford University Press, 1997): "The study of law is equated with the study of legal rules […] a high premium is placed on conceptual precision, on logical consistency within the system, and on technical excellence".
21. *See* G.E. Langemeijer, *Juridische Dogmatiek* 23 (Noord-Hollandsche Uitgevers Maatschappij, 1962) ("*[E]en stelselmatige bewerking van het positieve recht met het doel daaruit nog andere lering te putten dan haar voorschriften onmiddellijk uitdrukken*.")
22. *See* J. Rawls, *Justice as Fairness: A Restatement* (Harvard University Press, 2001), arguing that i) each person is fully and equally entitled to an adequate scheme of basic liberties and that ii) social and economic inequalities may only stem from offices and positions fairly and equally open to all, which offices and positions should bring the greatest benefit to the least-advantaged members of society.
23. On the positive and normative angle of the law, *see* J-L. Bergel, *Théorie générale du droit* 3 (Dalloz, 2003) ("*Une étude savante, raisonnée et construite du droit positif sous l'angle du devoir-être, c'est-à-dire de la solution souhaitable et applicable*.")
24. *See* S. Bartie, 'The Lingering Core of Legal Scholarship', 30 *Journal of Legal Studies* 345 (2010). For the Netherlands, much of the debate can be traced back to a lecture delivered by Stolker. *See* C.J.J.M. Stolker: ''Ja, geléérd zijn jullie wel!' Over de status van de rechtswetenschap', 77 *Nederlands Juristenblad* 766 (2003).

methods to those of judges.[25] However, the debate on the value of legal scholarship is actually not that new. For instance, the 19th century witnessed extensive discussions on the usefulness of *Begriffsjurisprudenz*.[26] Furthermore, it should be noted that many academic disciplines – if not all of them – are constantly engaged in methodological affairs. A typical example concerns the contrasting views of Keynes and Friedman on whether to favor qualitative or rather quantitative economic research. As such, the legal discipline is not unique – if anything, the debate on the merits of doctrinal scholarship confirms its academic status. In the past, such research has been ridiculed as "black letter law", supposedly being trivial, nationalistic, unoriginal and thus irrelevant. However, even if one were to subscribe to this view – which I do not – it is beoming increasingly obvious to critics that a sound analysis of legal doctrine remains indispensable for multidisciplinary research.[27] At the same time, corporate law scholars have accepted that legal questions can prove difficult to answer when merely adopting a doctrinal perspective.[28] Accordingly, a pluralistic approach is required[29] to counter fragmentation.[30] Although research "along the borders of orthodoxy" is not as unconventional as it once was[31] and the law may, on certain matters, require empirical and theoretical input from

25. *See* J.B.M. Vranken, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. Algemeen deel****. Een synthese* (Kluwer, 2014) (arguing for instance that, whereas scholars are able to draw upon many sources, judges are bound by the case presented to them, and that judges are less required to explicitly state their sources of law); *see also* R.A. Posner, *How Judges Think* (Harvard University Press, 2008) (distinguishing between conventional and non-routine cases, and advocating pragmatism in case of the latter).
26. For an overview of the waves in the debate on law as a science, *see* R. van Gestel, H-W. Micklitz & H. Poiares Maduro, 'Methodology in the New Legal World' (2012), 10, available at http://www.ssrn.com/ (arguing that, regarding the academic character of legal research, the definition of science used will be ultimately decisive).
27. *See* R.A. Posner, 'The Decline of Law as an Autonomous Discipline: 1962-1987', 100 *Harvard Law Review* 761 (1987).
28. *See* R.J. Gilson, 'From Corporate Law to Corporate Governance' (2017), available at http://www.ssrn.com/; *see also* D.J. Smythe,'Shareholder Democracy and the Economic Purpose of the Corporation', 63 *Washington & Lee Law Review* 1407 (2006) ("We will never have a complete understanding of the corporation as a social, political, and economic entity unless we understand it coherently in all its dimensions, and we will never understand it coherently in all its dimensions unless we examine it rigorously from all perspectives.")
29. *See* B.M.J. van Klink & H.S. Taekema, 'On the Border. Limits and Possibilities of Interdisciplinary Research', in: *Law and Method. Interdisciplinary Research Into Law* 7 (B.M.J. van Klink & H.S. Taekema eds., 2011), elaborately discussing forms of interdisciplinary research and the issues arising when designing and conducting such studies.
30. On academic fragmentation, *see* E. Husserl, *Die Krisis der europäischen Wissenschaften und die transzendentale Phänomenologie: eine Einleitung in die phänomenologische Philosophie* 194 (Martinus Nijhoff, 1954).
31. *See* J.M. Buchanan & G. Tullock, *The Calculus of Consent: Logical Foundations of Constitutional* Democracy V-VI (Ann Arbor, 1962). Additionally, the borders of orthodoxy are themselves often blurred.

the social sciences,[32] this also means that doctrinalism remains at the very heart of legal research.

3.3.3 Comparative analysis

Underpinning the comparative legal analysis lies the presumption that, in a rapidly globalizing economy, most if not all jurisdictions cannot act as an island in "splendid isolation".[33] As such, a properly functioning and internationally understandable system of corporate law is of considerable importance for maintaining welfare and enhancing justice. The roots of the comparative movement can be traced back to the International Congress for Comparative Law, which was organized as part of the 1900 Paris World Exhibition. Then, the goal of comparatists was rather idealistic (and somewhat naive): the propagation of one global legal system, or even of world peace.[34] Those days have passed. Contemporary comparative scholarship recognizes multiple levels of mutual understanding. These range from merely increasing the general knowledge on foreign systems of law to conceiving innovative (interpretations of existing) provisions based of overseas statutes and harmonizing, to the extent possible, entire legal systems.[35] Meanwhile, the potential for outright implementing a certain concept from one legal system to another (a "legal transplant"[36]) has been doubted.[37]

Traditionally, several legal families are identified. Based on the composite criterion of "style", Zweigert & Kötz distinguish between Romanistic,

32. *See* M. Bodig, 'Legal Doctrinal Scholarship and Interdisciplinary Engagement', 8 *Erasmus Law Review* 43 (2015); *see also* H.S. Taekema, 'Relative Autonomy: A Characterization of the Discipline of Law', in: *Law and Method. Interdisciplinary Research into Law* 33 (B.M.J. van Klink & H.S. Taekema eds., 2011).
33. The term was coined in 1896 by Sir George Eulas Foster (1847-1931), Canadian Member of Parliament, to describe British diplomacy in the 19th century, particularly the practice of refusing long-term alliances with continental Great Powers. In recent years, Foster's views have apparently been regaining ground.
34. *See* K. Zweigert & H. Kötz, *An Introduction to Comparative Law* 49-62 (Oxford University Press, 1998).
35. Although many had high expectations of EU corporate law at the dawn of the 21st century, it has become clear that a certain amount of realism is warranted as to the degree of potential unification. *See* L. Enriques, 'A Harmonized European Company Law: Are We There Already?', 66 *International & Comparative Law Quarterly* 763 (2017).
36. For the term, *see* A. Watson, *Legal Transplants: An Approach to Comparative Law* (Scottish Academic Press, 1974),.
37. *See* P. Legrand, 'The Impossibility of 'Legal Transplants'', 4 *Maastricht Journal of European and Comparative Law* 111 (1997). For similar corporate law observations, *see* Enriques 2017, *supra* note 35 (noting that identical provisions may have different effects, because of variations in the structural framework); *see also* H. Fleischer, 'Legal Transplants in European Company Law – The Case of Fiduciary Duties', 2 *European Company & Financial Law Review* 378, 379-380 (2005) (pointing to the relevance of cultural factors for the acceptance of legal rules).

Germanic, Anglo-American, Nordic, Far East and Religious systems.[38] Such distinctions are not cast in stone, as legal systems, to give a few examples, have also been categorized based on cultural[39] and philosophical[40] factors, or even chronologically.[41] Additionally, legal systems may develop and cease to exist over time, as socialist law largely illustrates.

Despite all the criticisms it has received,[42] I primarily apply the mainstream functional approach, as it remains the cornerstone of comparative research.[43] Functionalism focuses on a specific issue simultaneously present across jurisdictions – here, the minimization of corporate control costs, *see* § 3.2.2 *supra* – instead of letting the presence or absence of identical legal rules restrict oneself. Indeed, the functional method stipulates that provisions addressing a certain situation are to be analyzed regardless of their *nomen juris*. Meanwhile, I switch regularly between the micro- and the macro-points of view, the latter of which bears more similarities with the structural and contextual comparatist methods rather than with functionalism.[44] Combining these different mindsets allows me to not only consider the purpose of a rule, but also to see its proper legal perspective. Finally, it has become a core tenet that, in order to conduct true comparative research, not only (the function of) legal rules as such, but also their socio-cultural and institutional context should be studied.[45] Thus,

38. *See* Zweigert & Kötz 1998, *supra* note 34, at 68. The components of the "style" criterion are history, background, mode of thought, institutional factors and ideology. Note that these categorizations create a rather Westernized world view. *See* H. Patrick Glenn, *Comparative Legal Families and Comparative Legal Traditions*, in *The Oxford Handbook of Comparative Law* 422 (M. Reimann & R. Zimmermann eds.).
39. *See* M. van Hoecke & M. Warrington, 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law', 47 *International and Comparative Law Quarterly* 495 (1998).
40. *See* H. Patrick Glenn, *Legal Traditions of The World* (Oxford University Press, 2014), discussing for instance talmudic, civil and confucian law.
41. *See* J-F. Gerkens, *Droit privé comparé* (Larcier, 2007). Often, using different criteria does not drastically affect the types of families eventually identified.
42. *See* R. Michaels, *The Functional Method of Comparative Law*, in *The Oxford Handbook of Comparative Law* 339 (M. Reimann & R. Zimmermann eds.), describing the many variants of the functional method and characterizing it as "both a mantra and a *bête noire*"; *see also* M. Adams & J. Bomhoff, *Comparing law: practice and theory*, in *Practice and Theory in Comparative Law* 12 (M. Adams & J. Bomhoff eds.).
43. For potential alternatives, including analytical, structural, historical and law-in-context methods, *see* M. van Hoecke, 'Methodology of Comparative Legal Research', 5 *Law & Method* 1 (2015). *But see* M. Oderkerk, 'The Need for a Methodological Framework for Comparative Legal Research - Sense and Nonsense of "Methodological Pluralism" in Comparative Law', 79 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 589 (2015), concluding there exist clear, uniform guidelines for any type of comparative legal research.
44. *See* Van Hoecke 2015, *supra* note 43; *see also* Zweigert & Kötz 1998, *supra* note 34, at 5.
45. *See* R. Cotterrell, *Comparative Law and Legal Culture*, in *The Oxford Handbook of Comparative Law* 709 (M. Reimann & R. Zimmermann eds.); *see also* Van Hoecke & Warrington 1998, *supra* note 39. For a chronological account of this shift towards culture as a

comparatists stress the relevance of the law's *mentalité*. Corporate law scholars have arrived at the same conclusion, referring to this approach as "comparative corporate governance".[46]

3.4 Historical analysis

Studying the legal-historical discourse helps us to identify thoughts from and, as a general aspiration, to rethink the past.[47] In turn, the knowledge obtained may enable us to make more informed choices for enhancing future welfare and justice.[48] To that end, I combine internal (doctrinal) and external insights. Indeed, omitting external (non-legal) aspects – for instance, social, economic, political, and cultural circumstances – could cause the law being viewed in isolation from the forces causing its evolution.[49] Then, the legal-historical analysis would contribute merely towards a justification of the current state of affairs. By adopting an evolutionary approach, combining internal and external observations, we might get a grasp of why some rules and doctrines concerning dual class equity structures were adopted, whilst others faced less recognition or were abolished.[50] Specifically, such an approach may facilitate a better

relevant factor for comparatists, *see* J. Hendry, *Legal comparison and the (im)possibility of legal translation*, in *Comparative Law - Engaging Translation* 87, 96 (S. Glanert ed.).

46. *See* Gilson 2017, *supra* note 28; *see also* L.E. Strine, 'The Soviet Constitution Problem in Comparative Corporate Law: Testing the Proposition that European Corporate Law is More Stockholder Focused than U.S. Corporate Law', 89 *Southern California Law Review* 1239 (2016); K. Hopt, *Comparative Company Law*, in *The Oxford Handbook of Comparative Law* 1161 (M. Reimann & R. Zimmermann eds.); Fleischer 2005, *supra* note 37.
47. *See* W. Prest, 'Lay legal history', in *Making Legal History: Approaches and Methodologies* 196, 209-210 (A. Musson & C. Stebbings eds.), noting there are limits to "putting oneself in the shoes of the subjects one is attempting to understand – how could we know when we have succeeded in rethinking the thoughts of William Blackstone?".
48. In a sense, the legal-historical perspective can also be viewed as an integral part of the comparative method. *See* Van Hoecke 2015, *supra* note 43. Although the two methods are indeed intertwined (*see* § 3.3.3 *infra*) I nevertheless discuss them seperately for analytical purposes.
49. *See* B.Z. Tamanaha, 'How History Bears On Jurisprudence', in *Law in Theory and History: New Essays on a Neglected Dialogue* 329 (M. del Mar & M. Lobban eds.); *see also* D.M. Rabban, 'Methodology in legal history', in *Making Legal History: Approaches and Methodologies* 88 (A. Musson & C. Stebbings eds.); D. Ibbetson, 'Comparative legal history', in *Making Legal History: Approaches and Methodologies* 131 (A. Musson & C. Stebbings eds.).
50. *See* Tamanaha 2016, *supra* note 49, arguing that the legal-historical method, by incorporating external factors, in certain aspects borders on sociology, and referring to the works of Roscoe Pound. *See* R. Pound, 'The Scope and Purpose of Sociological Jurisprudence I', 24 *Harvard Law Review* 591 (1911); *see also* R. Pound, 'The Scope and Purpose of Sociological Jurisprudence II', 25 *Harvard Law Review* 140 (1912); R. Pound, 'The Scope and Purpose of Sociological Jurisprudence III', 25 *Harvard Law Review* 489 (1912).

understanding of the circumstances altering the law,[51] as well as why these circumstances were decisive at that particular moment[52] and whether these arguments have remained valid. Given that the law is "stable yet dynamic, […] comprised of a multitude of doctrinal threads that extend backward and project forward",[53] the choice for the legal-historical method also indicates an examination of contemporary legal practices (*see* § 3.3 *supra*). As the analysis progresses chronologically, the discussion gradually evolves from descriptive to participatory.[54]

51. *See* D. Looschelders, 'Zum Nutzen der Rechtsgeschichte für die Dogmatik', 30 *Zeitschrift für Neuere Rechtsgeschichte* 282 (2008).
52. *See* Ibbetson 2012, *supra* note 49, at 140 ("Law is largely backward-looking and heavily inertial […] As well as analyzing why some alteration in the rules occurred, we need to look at why it occurred at that particular time.")
53. *See* Tamanaha 2016, *supra* note 49.
54. For a similar approach, *see* J.M. de Jongh, *Tussen societas en universitas. De beursvennootschap en haar aandeelhouders in historisch perspectief* XL (Kluwer, 2014). I abstain from discussing whether it would be theoretically possible to distinguish between the descriptive and the participatory perspective.

Chapter 4. Scope

4.1 Introduction

In Chapter 4, I discuss the various research methods which are applied and what their scope is. Again, I first consider the economic aspect of the analysis, of which the scope is determined in § 4.2, followed by a discussion of the scope of the legal and historical perspectives, in § 4.3 and § 4.4, respectively.

4.2 Economic analysis

4.2.1 The function of financial markets

A dual class corporation, like any other firm, participates in financial markets. Broadly defined, these can be considered the sum of all buyers and issuers of securities, as discussed in Chapter 2. To understand the effects of superior and inferior voting and profit participating stock, it is imperative to first assess how the financial markets work. Therefore, I will analyze the basic function of these markets. For this analysis, I focus on the two institutions that are economically most important and have received the greatest scholarly attention: stock exchanges and banks. Comprehending the way in which the financial markets operate not only requires discussing these two institutions in isolation, but also necessitates comparing their respective costs, benefits and effectiveness.

Subsequently, I discuss the role of the stock markets in more detail. Traditionally, the stock market has been construed as a vehicle to obtain funding. However, extensive empirical data indicates that stock exchanges actually play a rather different role. This raises the question of whether they have been successfully in doing so. I analyze this issue by considering developments in the number of listed corporations over time. The observations have considerable implications for the use of dual class equity structures.

Finally, I consider whether there exists a connection between the presence of financial resources and economic growth. Although such a link might seem like entirely obvious, the relationship is in fact more complicated than one might assume. In turn, this knowledge is used to determine an efficient role of the law in enabling the development of financial markets. Again, the findings have considerable implications for the use of dual class equity structures.

4.2.2 Capital structure and dividends

Superior and inferior voting and profit participating stock can not only be considered as securities traded on the financial markets. Alternatively, dual class equity structures may be conceived as part of the corporate equity and, by extension, corporate capital structure. The Modigliani & Miller-theorems are the starting point for any type of economic research in this regard, and they are for this PhD-thesis as well. Modigliani & Miller famously argued that the choice between debt and equity finance is irrelevant[1] and that the choice between distributing profits and retaining them would not affect total returns.[2] However, the theorems are based on a series of rather stringent assumptions. In practice, these will not hold. (This has not been a secret; the authors acknowledged themselves as much.) Thus, I analyze the models that have, over the years, been developed to invert the Modigliani & Miller-theorems, focusing on the most well-researched derivatives.[3] With a view to the corporate capital structure, the derivatives include trade-off and pecking order theory. For dividends, these are the clientele, uncertainty, signaling and agency theories. The literature reviewed is mainly empirical, but to a degree also theoretical by nature. Studying the various inversions of the Modigliani & Miller-theorems enables us to identify the factors that actually are relevant with a view to minimizing control costs (*see* § 3.2.2 *supra*). For instance, this part of the research facilitates the comparison of non-profit participating stock and profit-participating shares of which the dividends are not paid out but instead reserved. Thus, this part of the PhD-thesis is more oriented towards the financial aspect of the position of the shareholder, and less towards the element of control.

4.2.3 Capital structure and voting rights

Subsequently, this PhD-thesis examines the economic effects of superior and inferior voting rights. Accordingly, this part of the research is more oriented towards the control rights of shareholders and less towards their financial

1. *See* F. Modigliani & M.H. Miller, 'The Cost of Capital, Corporation Finance and the Theory of Investment', 48 *American Economic Review* 261 (1958). Meanwhile, in certain cases, differences between equity and debt may be rather subtle. In recent years, the use of contingent convertible securities has become widespread, especially by financial institutions. These securities are partly written off or converted into equity in times of financial distress. *See* E. Martino, 'Bail-inable Securities and Financial Contracting: can Contracts Discipline Bankers?', 10 *European Journal of Risk Regulation* 164, 174 (2019).
2. *See* M.H. Miller & F. Modigliani, ´Dividend Policy, Growth, and the Valuation of Shares´, 34 *The Journal of Business* 411 (1961).
3. Indeed, dividends are vital for assessing the position of the corporation. *See* B.R. Cheffins, 'Dividends as a Substitute for Corporate Law: The Separation of Ownership and Control in the United Kingdom', 63 *Washington & Lee Law Review* 1273 (2006).

interests, and mainly targets equity finance, thus disregarding debt.[4] Both theoretically and empirically, this study primarily reviews the literature examining the effects of dual class equity structures on shareholder value, as measured by stock price, despite the drawbacks of such a more narrow approach identified in § 2.3.5 and § 3.2.1. (The same drawback applies in respect of the literature on corporate capital structure and dividends.) Doing so allows us to build on a rich body of existing ideas[5] – putting it more bluntly, coming up with a viable alternative poses a challenge. Simultaneously, this disregard for external costs is one of the main limitations of the present analysis.[6] The study covers two types of agency conflicts (*see* § 3.2.2 *supra*). Indeed, the use of inferior voting stock mainly relates to the board-shareholder conflict of interest, but potentially also to the majority-minority shareholder conflict, whereas the issuance of superior voting stock pertains mostly to the majority-minority shareholder conflict.

Of the possible functions of dual class equity structures identified (*see* § 1.3.1 and § 1.3.2 *supra*, respectively), the discussion is geared chiefly towards mechanisms which intend to stimulate the corporation to operate on a going concern basis. Thus, I largely disregard the use of superior or inferior voting stock for the purpose of enhancing employee ownership, the achievement of

4. However, it can be argued that certain forms of non-profit participating stock approximate interest-free debt. Then, it could be observed that to aspire a truly fundamental understanding of the forces in play, the issue of granting control rights to debt-investors should also be taken into consideration. On the theoretical implications of the presence of a controlling shareholder for debt-investors, *see* L.A. Bebchuk, R. Kraakman & G. Triantis, 'Stock Pyramids, *Cross-Ownership and Dual Class Equity: The Mechanisms and Agency Costs of Separating Control From Cash-Flow Rights* 445 (R. Morck ed., 2000). However, the available empirical data actually suggests that debt-investors, in their search for yield, have actively been trading governance rights in exchange for higher returns. *See* S. Çelik, G. Demirtaş & M. Isaksson, 'Corporate Bonds, Bondholders and Corporate Governance', *OECD Corporate Governance Working Papers* No. 16 (2015), available at http://www.ssrn.com/ (pointing to the use of less-strict covenants). Thus, it would seem more appropriate to focus on equity investors.
5. Meanwhile, most of the empirical studies primarily rely on (industry-adjusted) Tobin's Q-metrics. The Tobin's Q is the ratio between the market and the asset value of a corporation or, when assuming that the market and book value of liabilities are equivalent, the ratio between the equity market value and the equity book value. On its origins, *see* J. Tobin & W. Brainard, 'Pitfalls in Financial Model Building', 58 *American Economic Review* 99 (1968). Then, a corporation is undervalued when the Tobin's Q is less than 1 and overvalued in case the Tobin's Q exceeds 1. The choice of a metric is highly relevant, as it can contribute to differences in the overall findings. The Tobin's Q remains the "workhorse of […] studies". *See* P.A. Gompers, J. Ishii & A. Metrick, 'Corporate Governance and Equity Prices', 118 *Quarterly Journal of Economics* 107 (2003). However, it "produces a very noisy signal". *See* R. Morck, A. Shleifer & R.W. Vishny, 'Management Ownership and Market Valuation. An Empirical Analysis', 20 *Journal of Financial Economics* 293 (1988).
6. Accordingly, there exist fruitful avenues for future research here – for instance, how do shareholder returns of dual class technology corporations weigh against recent inundations of fake news?

public or social goals and the assurance of state influence.[7] It could be argued that such dual class equity structures are created or maintained because of reasons which are, to a certain degree, beyond the scope of traditional corporate law, and should be considered first and foremost in their own legal context.[8] Moreover, alternatives for such dual class equity structures are readily available. This is especially apparent in case of state control, where protectionist statutes would likely be the driving force, and trade tariffs could be implemented. Similarly, stock options or wages may mimic employee stock ownership plans, and foundation or PBC-like entities can be deployed to serve the greater good. Because of the focus on the corporation on a going concern basis, temporary mechanisms, including securities lending, are similarly excluded. (Also note, as applies to shareholder agreements, that such instruments do not necessarily involve a corporate membership relation.) Furthermore, the function of archetypical dual class equity structures and time-phased (or tenure, or loyalty) mechanisms is rather different. Therefore, such mechanisms are, with some exceptions (notably, *see* § 10.6.4 *infra* for a comparison between the two concepts), disregarded as well. Naturally, this is not to say that the findings of this PhD-thesis may not be relevant for analyzing non-going concern dual class equity structures or temporary mechanisms.

For the purpose of determining the effects of dual class equity structures on aggregate shareholder value, I first consider the costs of these mechanisms from a theoretical point of view, adopting an agency perspective (*see* § 3.2.2 *supra*). This discussion revolves primarily around the concepts of the wedge and private benefits of control. However, the value effects of dual class equity structures may not be distributed uniformly across individual investors. Therefore, I subsequently analyze price differences between superior and inferior voting stock empirically, as well as discussing the factors mitigating or aggravating these differences. The empirical literature in this regard mainly consists

---

7. This protectionist function of corporate law is currently experiencing somewhat of a revival, as is highlighted by various legislative initiative. *See* Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union.

8. For instance, a complication in relation to Employee Stock Ownership Plans (ESOPs) is that they may be heavily reliant on jurisdiction-specific tax and labor laws. Additionally, many empirical studies do not distinguish consistently between the absence or presence of the right to vote. ESOPs may align employee and employer interests, but can also separate them. This is the case, for instance, when the stocks awarded do not complement but replace wages, thus reducing worker investment diversification. ESOPs can contribute to employee entrenchment, strengthening their bargaining power vis-a-vis the corporation, or serve to thwart the threat of unsolicited takeovers. *See* S. Chaplinsky & G. Niehaus, 'The Role of ESOPs in Takeover Contests', 49 *Journal of Finance* 1451 (1994). The use of non-voting stock for ESOPs negates this risk. *See* E.H. Kim & P. Ouimet, 'Broad-Based Employee Stock Ownership: Motives and Outcomes', 69 *Journal of Finance* 1273 (2014), finding that smaller ESOPs (less than 5 % of the share capital) are effective in increasing productivity, but that this effect diminishes as the size of the ESOP in relation to the share capital increases.

of studies examining the simultaneous co-existence of two (or more) classes of superior and inferior voting stock, or a block versus dispersed share-ownership. Then, I take the empirical analysis to a more granular level, examining the effects of dual class equity structures on IPO underpricing, going concern firm value, in general as well as in relation to family businesses, innovation and takeover situations. Indeed, these topics each represent vital aspects of the existence of the corporation. Empirical studies the effects of dual class equity structures on firm value again come mainly in two forms. The first considers the co-existence of two (or more) classes of superior and inferior voting stock, whereas the second analyzes stock splits and reverse stock splits, creating or cancelling such classes.[9] These splits and reverse splits may be either voluntary, forced by activist hedge funds,[10] or mandatory, because of regulatory changes. Post-IPO ("midstream") governance changes are viewed as more troublesome than modifications prior to the IPO, given that these can constitute a change in priority which i) may have been unforeseeable at the time the investment was made and ii) may not be possible to block, given the size of the investor's equity stake. Moreover, iii) outside equity investors may not be able to withdraw equity before the recapitalization's announcement, iv) whilst the voting process will likely suffer from collective action problems and related issues.[11] Takeover situations are relevant as well, as, firms facing a potential loss of independence arguably enter a rather turbulent period. Activity on the market for corporate control, similar to activity on the market for corporate influence, can effectively entail the cancellation of a dual class equity structure. Particularly, I am interested in the treatment of minority and controlling shareholders and whether equal compensation for superior and inferior voting shares should be mandatory or not. Having contrasted the empirical effects of dual class equity structures with the costs of such mechanisms as implied by agency theory,

9. Without attempting to overly antagonize a too great number of economists, it is somewhat remarkable to see that many empirical studies only distinguish marginally between various deviations of proportional treatment of investors, for instance lumping stock pyramids and non-voting preference shares together. Assuming that such mechanisms are fully equivalent may be all too easy. Wherever possible and to the extent relevant, I have attempted to screen out such cases.

10. *See* § 2.2.3 *supra*. Following a successful intervention, a previously controlled corporation may become non-controlled. As such, these campaigns are a prime example of the market for corporate influence, as opposed to the market for corporate control. *See* B.R. Cheffins & J. Armour, 'The Past, Present, and Future of Shareholder Activism by Hedge Funds', 37 *Journal of Corporation Law* 51 (2011).

11. *See* A.M. Pacces, 'Exit, Voice and Loyalty from the Perspective of Hedge Funds Activism in Corporate Governance', 10 *Erasmus Law Review* 199 (2016); *see also* J.N. Gordon, 'Ties that Bond: Duel Class Common Stock and the Problem of Shareholder Choice', 76 *California Law Review* 3 (1988); R.J. Gilson, 'Evaluating Dual Class Common Stock: The Relevance of Substitutes', 73 *Virginia Law Review* 807 (1987). For an analysis from a Dutch perspective, *see* A.A. Bootsma, 'Loyaliteitsdividend, bijzondere stemrechtaandelen en de positie van minderheidsaandeelhouders. Midstream or IPO introduction, that's the question', 2 *Maandblad voor Ondernemingsrecht* 151 (2016).

I examine their potential advantages, building on the concept of principal costs (*see* § 3.2.2 *supra*). All of the previous then culminates into a unified analytical framework on dual class equity structures, in relation to both voting rights as well as profit entitlements.

Finally, I consider the implications of this framework for certain distinct topics. First, this concerns midstream recapitalizations, in general as well as in the cross-border variant. Second, I compare various possible responses to midstream recapitalizations for the purpose of safeguarding the interests of outside minority shareholders. These policy options are the majority-of-the-minority vote, the exit right and sunset clauses. Sunset provisions are particularly relevant, as this approach has recently gained considerable attention from scholars and the general public. They stipulate that a dual class equity structure will be replaced by a one share, one vote structure after a pre-determined period of time – for instance, 5, 10 or 20 years – except if the AGM decides to prolong its existence. Third, I examine the inclusion of corporations with a dual class equity structure in stock indices. In 2017, prominent index composers, including S&P Dow Jones, MSCI and FTSE Russel, sent out questionnaires in this regard, and excluded dual class corporations to varying degrees from their indices. The matter has attracted considerable interest, also because of the increase in passive investing (*see* § 2.2.1 *supra*). Indeed, the use of sunset mechanisms and the index inclusion of dual class equity corporations is likely to set the tone of the debate for the coming years.

4.3 Legal analysis

4.3.1 Jurisdictions

As has been outlined previously (*see* § 3.3.3 *supra*), this PhD-thesis contains a comparative corporate governance element. The analysis targets the treatment of dual class equity structures under the national legal systems of the United States (US) and Germany[12] and, in a derivative sense, the Netherlands.[13] There

12. One of the challenges of this PhD-thesis is that combining the economic and US comparative analysis may tip the scale too much in favor of utilitarian thinking. Meanwhile, US-economic scholarship has produced some groundbreaking ideas. Unfortunately, a single optimal solution, taking all academic interests fully into consideration, does not seem to exist. I have attempted to maintain the balance as much as possible by using primarily original sources for the German and Dutch comparative chapters and by considering economic studies in a non-US setting.
13. As the function of archetypical dual class equity structures and loyalty mechanisms is rather different (*see* § 10.6.4 *infra*), I abstain from including Italian and French corporate law in my analysis. Supranational EU-law is disregarded as well. EU-law principally offers the Member States great latitude in setting the substantive requirements with regard to the rights that should be vested in stocks, and as such permits a wide variety of instruments. Although stimulating the use of loyalty mechanisms has been considered as part of the revision of the

are a number of reasons for this selection. From a general comparatist perspective, it may be argued that the US and Germany represent important legal families (Anglo-American and Germanic law, *see* § 3.3.3 *supra*). Including multiple legal families is warranted by the fact these may be valued differently by the financial markets.[14] Then, considering various systems enables the selection of the most appropriate framework. Within the respective legal families, the US and Germany play a leading role.[15] Their legislative initiatives create a global impact.[16] Furthermore, it can be observed that the two systems complement each other in a number of ways. German scholarship is well-known for its thoroughness and sophistication from a doctrinal point of view.[17] Meanwhile, US (case) law has adopted a more pragmatic, economic approach.[18] Specifically with a view to dual class equity structures, German corporate law is rather strict when it comes to ensuring the equal treatment of shareholders, whereas the US is quite flexible.[19] Indeed, US and German corporate law differ in terms of the permitted dual class equity structures and the required compensation for the absence of voting rights. Again, analyzing such distinctions permits the design of the most suitable framework with a view to increasing welfare and promoting justice.

Additionally, the comparative corporate governance analysis encompasses Dutch corporate law. This stems from the fact that one of the goals of this PhD-thesis is to analyze whether the current Dutch statutory framework concerning dual class equity structures should be exapnded. In this regard, it is

---

Shareholder Rights Directive (Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement), this idea ultimately failed to gain sufficient support.

14. The studies of La Porta, Lopez-de-Silanes, Shleifer and Vishny can be considered as classics in this regard. For a critical appraisal of this literature, *see* § 7.4.2 *infra*.
15. For an instructive example of this comparative "flagship" approach, s*ee* K. Pistor et al., 'The Evolution of Corporate Law: a Crosscountry Comparison', 23 *University of Pennsylvania Journal of International Law* 791 (2014).
16. This observation may serve to explain the absence of the Nordic countries, where dual class equity structures are also widespread, from my comparative legal analysis. *See* R.J. Gilson, 'The Nordic Model of Corporate Governance: the Role of Ownership', in *The Nordic Corporate Governance Model* 94 (P. Lekvall ed., 2014). Note that Nordic, French and Italian corporations are occasionally represented in the economic analysis.
17. *See* H. Koziol, 'Glanz und Elend der deutschen Zivilrechtsdogmatik Das deutsche Zivilrecht als Vorbild für Europa?‘, 212 *Archiv für die civilistische Praxis* 1 (2012).
18. *See* R.A. Posner, *Economics Analysis of Law* (Wolters Kluwer Law & Business, 2014); *see also* F.H. Easterbrook & D.R. Fischel, *The Economic Structure of Corporate Law* (Harvard University Press, 1991).
19. *See* L. Enriques et al., 'The Basic Governance Structure: Minority Shareholders and Non-Shareholder Constituencies', in *The Anatomy of Corporate Law. A Comparative and Functional Approach* 79, 86 (R. Kraakman et al., 2017). Framed in different terms, German corporate law is more preoccupied with justice, whereas US corporate law is rather fixated on efficiency. *See* § 3.2 and § 3.3 *supra*, respectively.

noted that both the US and Germany are important economic partners of the Netherlands.[20]

4.3.2 Legal entities

This PhD-thesis focuses on the Idealtype of the (i) open corporation (ii) of which the equity instruments are traded on a regulated market or a Multilateral Trading Facility. Thus, closed corporations, which are unique in their dynamics of corporate governance, are disregarded. The same applies to various legal "amalgams", such as the Limited Liability Partnership (LLP) and the Limited Liability Company (LLC). Their rise to prominence[21] has further blurred the distinction between the corporate and partnership law. Most corporations meet (at least) four of the five criteria (*see* § 2.3.1-§ 2.3.5 *supra*). Differences between corporations and amalgams might exist particularly in respect of entity shielding and capital lock in (notably, the liability of the general partner) and in relation to management structure (unanimous decision-making). One could argue as well that such entities are tailored for small and medium size enterprises which, expectedly, would give rise to issues regarding stock transferability. The inclusion of partnership amalgams would render the comparison unworkable, although perhaps to a smaller extent than in the past.[22]

Despite the exclusion of close corporations and amalgams, two reservations should be made. First, it may, in practice be rather complicated to distinguish clearly between closely and widely held corporations. For the US, for instance, Section 501 of the US Jumpstart Our Business Startups (JOBS) Act increases the number of shareholders a corporation is allowed to have before being required to register with the Securities and Exchange Commission (SEC) up to 2,000.[23] Second, the underlying differences between open corporations

20. Based on 2017 figures concerning the export of goods, as collected by Statistics Netherlands (*Centraal Bureau voor de Statistiek*), Germany and the US ranked 1st and 5th, respectively.
21. Specifically for the US, *see* R.D. Chrisman, 'LLCs are the New King of the Hill: An Empirical Study of the Number of New LLCs, Corporations, and LPS Formed in the United States between 2004-2007 and How LLCs Were Taxed for Tax Years 2002-2006' 15 *Fordham Journal of Corporate & Financial Law* 459 (2010), showing that "the number of new LLCs formed […] in 2007 outpaced the number of new corporations by a margin of nearly two to one".
22. *See* L.E. Ribstein, *The Rise of the Uncorporation* 3 (Oxford University Press, 2009), arguing that "uncorporations predominated up until the latter nineteenth century, at which point the corporation took off and achieved a century of dominance. Although the corporation remains the primary form of business organization, the uncorporation is catching up". This development is attributable in part to increased possibilities of limiting the liability of partners.
23. *See* B. Hamel, 'An Examination of the Jumpstart Our Business Startups Act: How JOBS Act Exemptions May Help Startups and Hurt Investors', 17 *Houston Business and Tax Law Journal* 79 (2016); *see also* C. Berdejo, 'Going Public after the JOBS Act', 76 *Ohio*

may still be considerable, for instance given variations in industry, corporate culture, location of the trading facility location and shareholder base. Thus, the homogeneity of open corporations should not be overestimated.

4.3.3 Topics & legal sources

The matters addressed in the comparative part of the research are the following. First, I consider the distinctions between federal versus state, and corporate versus securities law. These issues are of particular importance for the US legal system but are also relevant, to a lesser extent, for Germany. With regard to the US legal system, corporate law is largely state law, and I argue that the comparative analysis should be focused on the laws of the state of Delaware (*see* Chapter 14). Specifically for the German legal system, the continuum of open, listed corporations is more extensive (*see* § 20.3 *infra*), and the selection of the appropriate legal form to be compared is thus discussed in greater detail. The inclusion of these topics can be considered as reflective of the comparative macro-point of view (*see* § 3.3.3 *supra*). Second, I analyze the goal of the corporation under the US and German legal system, their approach to legal personhood and the balance between mandatory and enabling law. Moreover, I explore the relevance of co-determination under German law. Discussing these issues serves to encapsulate the *mentalité* of the respective legal systems (*see* § 3.3.3 *supra*). Third, I examine the position of the board, the shareholder's right to vote as well as the competences of the AGM, and the shareholders' entitlement to dividends. For Germany, which has a two tier-system, both the executive and the supervisory board are incorporated. As far as the capabilities of the AGM are concerned, I primarily consider agenda setting, convocation and director appointment rights, since in practice, these are amongst the most relevant shareholder powers. The entitlement of shareholders to dividends mirrors the possibility of the corporation to retain earnings, which is therefore included in the study as well. The third part not only discusses the shareholders' right to vote and profit entitlements, but also expressly relates to the extent to which varying with these rights is legally permitted. Thus, it connects the comparative and economic aspects of the research and serves as a preamble to the fourth and final comparative element. This involves the applicable legal framework concerning the introduction and abolition of dual class equity structures, an issue which cannot be fully grasped without having first discussed the position of the respective corporate actors. For this part of the comparative research, I again focus on midstream introductions and abolitions of dual class equity structures, and specifically on the applicable (majority) requirements for concluding such recapitalizations.

State Law Journal 1 (2015); T.B. Skelton, '2013 Jobs Act Review & Analysis of Emerging Growth Company IPOs', 15 *Transactions: The Tennessee Journal of Business Law* 455 (2014).

The fact that the problem of midstream restructurings is fundamental to the comparative research as a whole is testament to the primacy of the functional method (*see* § 3.3.3 *supra*). The period in which the corporation faces a potential loss of independence has been identified as meriting special scrutiny (*see* § 4.2.3 *supra*). Accordingly, I examine how US and German corporate law treats holders of superior and inferior voting and profit participating stock in case of a takeover, as such a transaction effectively abolishes a dual class equity structure.

Application of the functional approach warrants the analysis of statutes, but also of listing rules issued by stock exchanges, notably the NYSE and Deutsche Börse. I focus on the listing rules governing medium and large ("blue chip") corporations, rather than those applicable to the smallest ones. Although this approach excludes an important source of economic growth, this step is necessary to keep the research feasible. Moreover, corporations are increasingly waiting longer, and are thus becoming larger, before going public (*see* § 7.3.1 *infra*). Similarly, the functional approach necessitates an analysis of corporate governance codes. Although these do not necessarily constitute "hard law", they may still influence the behavior of market actors to a substantial degree. Specifically, I study national Codes tailored to a concrete governance environment, not supra-national Codes as those of the OECD.

4.4 Historical analysis

One could claim that ideally, the legal-historical analysis should trace the roots of dual class equity structures back to antiquity and beyond.[24] However, compelling objections can be made against such an approach. First, the focus of the research would shift, even if in recent times, some rather comprehensive historical studies have been conducted on the relationship between the corporation and its shareholder.[25] Second, such a conceptualization would contain several anachronisms. Important ideas, including legal personality and limited

24. Indeed, Roman tax farmers (*publicani*) were already familiar with the concept of superior and inferior voting rights. *See* E. Chancellor, *Devil Take the Hindmost, A History of Financial Speculation* 4-5 (Farrar, Straus, Giroux, 1999).

25. The literature is too extensive to be cited here in full. In fact, the historical approach to corporate law appears to be experiencing a revival. Just for the Netherlands, *see* F.G.K. Overkleeft, *De positie van aandeelhouders in beursvennootschappen. Een analyse van recht, gebeurtenissen en ideeën* (Kluwer, 2017) (focusing on the latter half of the 20th century); *see also* J.M. de Jongh, Tussen *societas en universitas. De beursvennootschap en haar aandeelhouders in historisch perspectief* (Kluwer, 2014); J. Barneveld, *Financiering en vermogensonttrekking door aandeelhouders: een studie naar de grenzen aan de financieringsvrijheid van aandeelhouders in besloten verhoudingen naar Amerikaans, Duits en Nederlands recht* (Kluwer, 2014) (both spanning almost four centuries); H.M. Punt, *Het vennootschapsrecht van Holland* (Kluwer, 2010) (mainly addressing older times); P. Frentrop, *Corporate Governance* (1602 – 2002) (Prometheus, 2002).

liability, have all undergone fundamental reinterpretations over the centuries.[26] Therefore, the retrospective discussion is limited to relatively modern times. Although each starting point runs the risk of being arbitrary, I have generally opted to analyze developments from the 1800s onwards. This era witnesses the broad societal emergence of modern joint stock companies, notably railroads and chemic industries. Prior to this point, founding a corporation – if not a business – was primarily restricted to government-sponsored, long-distance trade initiatives. Particularly the Dutch East India Company (*Vereenigde Oostindische Compagnie* or VOC), of which the charter was drafted in 1602, would have offered a tempting alternative starting point. The VOC still signifies a pivotal point in the history of Dutch corporate law[27] and has been globally considered the most well-known precursor of the listed corporation. Although this comparison is not entirely without merit, it is neither without complications. Whereas the VOC's share capital was traded, it lacked an AGM and featured an unclear director liability regime for corporate debts (*see* § 27.1.1 *supra*). Moreover, the VOC had the power to make arrests, construct fortifications and wage wars in name of the Dutch Republic. Thus, the VOC was a semi-governmental body serving geopolitical purposes with distinct capitalistic elements.[28]

To maintain the structural integrity of the analysis, I focus on historical developments taking place in the jurisdictions which are also the subjects of the comparative study – the US and Germany. In fact, the historical analysis is presented as an integral part of the comparative discussion. Because dual class equity structures, as currently used, have become more refined over time, and taking the availability of sources into consideration, research covering earlier times is more oriented towards controlling and financial rights in general. Gradually, the focus shifts towards differentiated voting and profit rights specifically. For more recent times, the discussion is structured around distinct periods ("waves") in which the use of dual class equity structures developed rapidly, for instance because of abrupt economic developments.

26. *See* W. Rathenau, *Vom Aktienwesen – Eine Geschäftliche Betrachtung* 124 (Berlin, 1917), referring to this phenomenon as the "*Substitution des Grundes*".
27. *See* E. Gepken-Jager, G. van Solinge & L. Timmerman, *VOC 1602-2002. 400 Years of Company Law* (Kluwer Law International, 2005).
28. For an instructive analysis, *see* De Jongh 2014, *supra* note 25, 60-127. In De Jongh's view, the VOC should be considered in its own legal, political and economical context, instead of a direct precursor to modern corporations.

Chapter 5. Research questions, goals & relevance

5.1 Central research question & sub-questions

Building on the matters discussed in Chapters 3 and 4, the central research question of this PhD-thesis can be explicitated as follows:

Should open, listed corporations be permitted to create a dual class equity structure, involving inferior and/or superior voting and/or profit-participating stock?

As may be deduced from the analysis in Chapters 3 and 4, this research question is to be divided in three specific parts. Consequently, the sub-questions are the following:

The Economic Perspective

- How do permanent, going concern dual class equity structures relate to the function of financial markets, in which ways do they affect shareholder value, in general as well as on a per class basis, and what are the effects of midstream introductions and cancellations?

The Historical Perspective

- What types of permanent, going concern dual class equity structures have US, German and Dutch open, listed corporations been able to create, starting from the 1800s, and which internal and external factors have contributed to changes in legal doctrine and legal practice?

The Legal Perspective

- What types of permanent, going concern dual class equity structures can open, listed US, German and Dutch corporations currently create, how does this relate to the broader system of corporate governance in the respective jurisdiction, and under which circumstances are midstream introductions and cancellations permitted?

5.2 Research goals & relevance

As will emerge in this PhD-thesis, the debate on dual class equity structures is, in itself, far from new. Nevertheless, it has significant societal and academic relevance, and I intend to make a few contributions.

From an economic perspective, the goal of this PhD-thesis is stimulate the enhancement of welfare, broadly defined.[1] This general aspiration contains several elements, including the facilitation of economic growth, the prevention of externalities, the stimulation of innovation, and the safeguarding of a sufficient number of investment opportunities and minority shareholder interests. Presumably, realizing all those specific goals simultaneously may pose a challenge. Consequently, it will be necessary for me to determine which arguments bear the most weight in contributing to welfare and justice. As such, the research carries great societal importance, given that its outcome may indirectly affect matters as diverse as the fulfillment of retirement schemes and control over the public opinion.

From a doctrinal perspective, this PhD-thesis aims to strengthen our understanding of the nature of shareholder membership rights. In doing so, the research contributes to furthering justice and enhancing the quality of Dutch corporate law. With some exceptions, a systematic analysis of dual class equity structures, as understood here, has been absent in the Dutch legal order.[2] That issue is somewhat pressing, given the lack of statutory coherence in this regard[3] and the fact that the use of dual class equity structures has been steadily increasing in recent years (*see* § 10.2.3 *infra*). Thus, one may want to discuss whether a legislative framework responding to these developments is necessary and, if so, in what specific form. Indeed, Dutch corporate law has previously been referred to as "the Delaware of Europe". The qualification is traditionally not understood as a compliment.[4] Meanwhile, legitimate concerns of exploitation should be weighed against the reasonable interest of jurisdictions of maintaining a modern and competitive system of corporate law. This is especially the

---

1. *See* L. Kaplow & S. Shavell, *Fairness versus Welfare* (Harvard University Press, 2002), on which *see* § 3.2.1 *supra*.
2. The use of non-voting shares has been studied extensively, but primarily in relation to closed corporations. *See* R.A. Wolf, *De kapitaalverschaffer zonder stemrecht in de BV* (Wolters Kluwer, 2013). Moreover, Bootsma and De Jongh have thoroughly analyzed loyalty voting schemes. *See* § 28.3.3 *infra*. However, as mentioned, their function differs from those of archetypical dual class equity structures. *See* § 10.6.4 *infra*.
3. Whereas listed corporations cannot issue non-voting shares, a substitute (depository receipts) is available, and using high-voting shares is permitted. By contrast, issuing shares without dividend entitlements is prohibited. (For private corporations, the possibilities to differentiate in shareholder rights are rather wide-ranging.)
4. *See* J. Wouters, 'European Company Law: Quo Vadis?', 37 *Common Market Law Review* 257 (2000). For similar statements by Dutch authors, *see* A.A. Bootsma, 'Nederland, het Delaware van Europa?', 18 *Ondernemingsrecht* 419 (2016); *see also* M.J. Kroeze, 'Het Delaware van Europa?', 6 *Ondernemingsrecht* 565 (2004).

case since competition amongst EU Member States could intensify in respect of the statute of open, listed corporations following the rulings of the European Court of Justice in *Cartesio*,[5] *Vale*[6] and *Polbud*.[7] These rulings have facilitated cross-border conversions to some extent and, presumably, made a major contribution to the European Directive in this regard, which entered into force in 2020.[8] Although this PhD-thesis is not strictly aiming for harmonizing the treatment of dual class equity structures amongst legal systems, the discussion laid down herein could theoretically benefit the debate in other jurisdictions as well, provided that the structural differences with the legal systems discussed in this PhD-thesis are sufficiently acknowledged.

5.3 Outline

To answer the questions mentioned in § 5.1, the remainder of this thesis is structured as follows. Part 2, consisting of Chapters 6, 7, 8, 9, 10, 11 and 12, encompasses the economic analysis. Part 3 contains the comparative discussion, focusing on US (Chapters 13, 14, 15, 16, 17 and 18) and German (Chapters 19, 20, 21, 22, 23 and 24) law. Part 4 adopts a Dutch perspective, in Chapters 26, 26, 27, 28, 29 and 30. Part 5, also known as Chapter 31, contains the conclusion and answers the general research question and sub-questions.

5. *See* European Court of Justice 16 December 2008, ECLI:EU:C:2008:723 (*Cartesio*).
6. *See* European Court of Justice 12 July 2012, ECLI:EU:C:2012:440 (*Vale*).
7. *See* European Court of Justice 25 October 2017, ECLI:EU:C:2017:804 (*Polbud*).
8. *See* Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions.

Part II
– Economic Analysis –

Chapter 6. Introduction to Part II

In Part II, I discuss dual class equity structures from a financial-economic perspective. The rationale for this approach has been outlined in Chapters 3 and 4 (specifically, *see* § 3.2 and § 4.2 *supra*). The structure of Part II is as follows. In Chapter 7, I analyze how financial markets operate in general. In § 7.2, I examine in which ways banks and stock markets allocate risk and resources. I build on these findings to analyze the function of the stock market in greater detail, in § 7.3, and its role as a source of funding and exit platform. In § 7.4, I study the relationship between finance and economic growth and the contribution of the law in this respect.

Subsequently, in Chapter 8, I discuss the effects of dual class equity structures in light of Modigliani and Miller's capital irrelevance theorems. To that end, I first analyze these Theorems themselves and the assumptions upon which they are founded, in § 8.2. Then, I examine two of the principal inversions of the capital irrelevance theorems, being trade-off theory and pecking order theory, in § 8.3 and § 8.4, respectively. Based on this discussion and some of the most recent parts of the literature, I present a more holistic approach to the corporation's capital structure, which is focused on its life-cycle and incorporates the theories previously analyzed, in § 8.5.

Building on this knowledge, I study the implications of corporate dividend policy for dual class equity structures, in Chapter 9. Here as well, Modigliani and Miller's dividend irrelevance theorem is the starting point of my analysis, in § 9.2. Subsequently, I examine the principal inversions of this Theorem. These are the clientele (§ 9.3), uncertainty (§ 9.4), signaling (§ 9.5) and agency (§ 9.6) models. I conclude Chapter 9 by arguing that these models should actually be reconsidered as a manifestation of the life-cycle perspective (§ 9.7).

In Chapter 10, I turn towards the consequences of the distribution of voting rights. Accordingly, I first analyze the agency theoretical complications of dual class equity structures for aggregate shareholder value, focusing on the wedge and private benefits of control (§ 10.2). Subsequently, the empirical effects of dual class equity structures on the value of individual securities are discussed (§ 10.3). I then continue by examining the empirical effects of dual class equity structures on IPO underpricing, aggregate shareholder value, corporate innovation and takeover situations (§ 10.4). Having contrasted the empirical effects of dual class equity structures with the costs of such mechanisms as implied by agency theory, I examine their potential advantages (§ 10.5). I finish Chapter 10 by observing that the life-cycle perspective not only governs capital structure and dividend policy, but also the distribution of voting rights, thus replacing agency theory, and elaborate on the nature of the life-cycle (§ 10.6).

Finally, in Chapter 11, I consider the implications of the life-cycle framework for a set of distinct topics. First, this concerns midstream recapitalizations (§ 11.2), both with regard to voting rights and profit entitlements and in the national and international variant. Second, I compare various policy options to cope with midstream recapitalizations, including the majority-of-the-minority vote, the shareholder exit right and sunset clauses (§ 11.3). Third, I share my views on the exclusion of dual class equity structure corporations from stock indices (§ 11.4). The findings of Part II are then summarized in Chapter 12.

Chapter 7. The functions of financial systems and the stock market

7.1 Introduction

Corporations operate in complex financial markets. The introduction or cancellation of a dual class equity structure may trigger a response by these markets. The presence of a dual class equity structure, meanwhile, can also affect market structure, albeit perhaps to a small degree.

To gain a better understanding of the issues involved, Chapter 7 focuses on the functions of financial markets. In § 7.2, I first examine in which ways banks and stock markets allocate risk and resources in general. To that extent, I consider various types of risk and the processes of asset allocation. I continue on these findings by analyzing the function of the stock market in greater detail, in § 7.3. In particular, I stress the roles of the stock market as a source of funding and as an exit platform. In § 7.4, I study the relationship between finance and economic growth, and the contribution the law can make to stimulate growth. Both the findings in relation to the roles of the stock market in § 7.3 as well as the findings regarding the relationship between finance, growth and law in § 7.4 offer significant insights in the use of dual class equity structures, albeit few definitive answers.

7.2 Financial systems: risk sharing & resource allocation

Financial systems primarily serve one goal: to facilitate the allocation of resources, across time and space, in an uncertain environment.[1] Related functions involve the monitoring of managers, the mobilizing savings and the stimulating specialization and innovation.[2] By balancing the resources and risks,

---

1. *See* R.C. Merton & Z. Bodie, 'A Conceptual Framework for Analyzing the Financial Environment', in: *The Global Financial System: A Functional Perspective* 12 (D.B. Crane et al. eds., 1995).
2. *See* R. Levine, 'Financial Development and Economic Growth: Views and Agenda', 35 *Journal of Economic Literature* 688 (1997). Other functions of the financial markets have been identified as well. For a striking example, *see* S.S. Huebner, 'Scope and Functions of the Stock Market', 35 *The Annals of the American Academy of Political Science* 1, 17 (1910), contending that "the ownership […] of a large mass of securities […] is a strong safeguard against financial panic", an argument which many nowadays would view as requiring further refinement.

financial systems alleviate problems created by information and transaction costs. If such systems are ill-developed, information and transaction costs may prohibit productive investments from materializing or, if investments eventually were to be made, unduly burden the exit. Basically, two types of financial institutions exist: stock exchanges and banks. The stock market has been viewed as the archetypical Anglo-Saxon model, whilst banks constitute the classic German-Japanese approach. Whereas banks are few and act as long-term but perhaps infrequent monitors, stock market participants are many. They guarantee virtually permanent monitoring, although typically for a much shorter period of time.[3]

Let us now take a closer look on risk sharing and resource allocation, the primary functions of financial systems. First, the facilitation of risk sharing relates to both liquidity risk and idiosyncratic risk. Liquidity is the ease and speed with which assets can be converted into purchasing power at agreed prices.[4] In liquid capital markets, it is relatively inexpensive to trade financial instruments, with little uncertainty about the timing and the settlement of those trades. Thus, investors can readily sell their stock, whilst corporations benefit from permanent access to capital (*see* § 2.3.3 *supra*). Greater liquidity will induce a shift towards longer-during, higher-returning projects.[5] By contrast, idiosyncratic risk is associated with investing in specific industries (such as nuclear power generation versus biological crop growing) and regions (say, Syria or Iraq as compared to Switzerland).

Second, the facilitation of resource allocation allows capital to flow to its highest value use. Publishing stock market prices can also be considered as aggregating and disseminating information. This information highlights potentially attractive business opportunities, decreasing costs of acquiring information and transacting, thus increasing investments.[6] The existence of information acquisition costs creates incentives for intermediaries to emerge. Instead of each individual gathering information on his own, an intermediary can do this for all its members. However, the quicker information is spread, the fewer incentives exist for spending resources on the investigative process (*see* § 2.2.5 *supra*). The facilitation of resource allocation involves both cap-

3. For a thorough comparison of the characteristics of stock markets and banks, *see* F. Allen, 'Stock markets and resource allocation', in: *Capital Markets and Financial Intermediation* 84-88 (C. Mayer & X. Vives eds., 1993). On investor traits and decreasing stock holding periods, *see* § 2.2.2 *supra*.
4. The relative importance of liquidity and idiosyncratic risk may change over time. *See* W.W. Bratton, 'The Separation of Corporate Law and Social Welfare', 74 *Washington & Lee Law Review* 767, 772 (2017), arguing that liquidity was especially important in the 1950s and 60s.
5. *See* Levine 1997, *supra* note 2. Indeed, with liquidity assured by the financial markets, the chances that a corporation will not be able to obtain additional finance, should the need suddenly arise, are considerably smaller, meaning that corporate appetite for more illiquid assets will increase.
6. *See* Levine 1997, *supra* note 2.

ital formation and its subsequent redeployment. In the purest sense, capital formation entails that productive activities are commenced only after funding has been obtained. However, conducting an Initial Public Offering (IPO) for this purpose is quite rare nowadays. (A somewhat comparable figure would be that of the Special Purpose Acquisition Company, which uses IPO-proceeds to acquire an existing private corporation.[7]) Arguably, one would expect some leapfrogging between obtaining funding and initiating production. This brings us to the finance-growth debate, which will be discussed in § 7.4.

7.3 Functions of the stock market specifically

7.3.1 Obtaining funding?

"Conventional wisdom has it that the primary function of the stock market is to raise cash for companies for the purpose of investing in productive capabilities. The conventional wisdom is wrong."[8] Indeed, it is rather complicated to establish a causal link between capital invested in the equity markets and actual productive capabilities. Outside the financial sector, most investments have traditionally been funded by either retained earnings or debt,[9] with the latter gradually becoming more important. Starting in the 1970s-1980s, inflows in the stock market have become negative. Put more directly, the amount of dividends declared and stocks repurchased exceeds the amount of funds raised through IPOs and seasoned equity offerings (SEOs). This applies especially to the US. For the 2006-2015 period alone, net outflows (i.e. after taking IPOs and SEOs into consideration) amounted to $ 4,466 billion,[10] almost the entirety of corporate income.[11] Although the picture is somewhat more

7. SPACs are associated with severe underperformance, both compared to the stock market in general as to IPOs. *See* J. Kolb & T. Tykvova, 'Going Public via Special Purpose Acquisition Companies: Frogs do not Turn into Princes', 40 *Journal of Corporate Finance* 80 (2016).
8. *See* W. Lazonick, 'The Functions of the Stock Market and the Fallacies of Shareholder Value' (2017), available at http://www.ineteconomics.org/.
9. *See* Z. Goshen, 'Shareholder Dividend Options', 104 *Yale Law Journal* 881 (1995) (giving a 75 % figure for the US); *see also* B.R. Cheffins, 'Dividends as a Substitute for Corporate Law: The Separation of Ownership and Control in the United Kingdom', 63 *Washington & Lee Law Review* 1273 (2006); C. Mayer, 'New Issues in Corporate Finance', 32 *European Economic Review* 1167 (1988) (on the situation in the UK, US, France, Germany and Japan).
10. *See* Lazonick 2017, *supra* note 8, referring to Federal Reserve data. Repurchases are partially substitutes for dividends, but to a certain degree also reflect an increase in distributions. On their interaction, *see* § 9.4.1 *infra*. On this era of excessive focus on shareholder value, *see* N. Lemann, *Transaction Man: The Rise of the Deal and the Decline of the American Dream* (Farrar, Straus and Giroux, 2019).
11. For similar findings, *see* K.M. Kahle & R.M. Schulz, 'Are Corporate Payouts Abnormally High in the 2000s?' (2020), available at http://www.ssrn.com/ (answering the question with a resounding yes). *But see* J.M. Fried & C.C.Y. Wang, 'Are Buybacks Really Shortchanging Investment?', 96 *Harvard Business Review* 88 (2018), painting a different picture and noting

nuanced for European firms, their stock repurchases have been increasing rapidly as well.[12] If there were a general allocative function to the stock market, it appears to be channeling funds away from productive capabilities, perhaps even into consumption, the fact that individual corporations may raise funds notwithstanding. In part, this may be due to the rise to prominence of the agency-paradigm, which posits that corporations should gorge out as much cash as possible to the benefit of their investors (*see* § 2.3.5 *supra*). Relatedly, and arguably more important, the character of listed corporations has changed. This brings us to § 7.3.2.

7.3.2 The stock market as exit platform

Stock markets no longer serve purely to obtain funding. Especially in modern times, many corporations obtain their funding from venture capital (VC) investors. Such firms can act both as a long term and a frequent monitor.[13] They are present in specific regions and focus on distinct businesses. Typically, VC firms invest in high tech, high risk, high reward enterprises, either in the form of convertible debt or preferred stock. Whilst funds obtained from VC firms can seem limited compared to other sources – estimates for the US range from \$ 60 to \$ 70 billion annually,[14] or a few percent of total investments[15] – VC-backed corporations punch above their weight, creating considerable employment.[16] The presence of VC investors is also indicative of a higher chance of success post-IPO.[17] Such observations confirm that the building of

---

that distributing the net income leaves research & development investments unaffected, as net income is calculated after accounting for such expenses.

12. *See* H. von Eije & W.L. Megginson, 'Dividends and Share Repurchases in the European Union', 89 *Journal of Financial Economics* 347 (2008). For similar conclusions from a Dutch perspective, *see* J.M. de Jongh, *Tussen societas en universitas. De beursvennootschap en haar aandeelhouders in historisch perspectief* (Kluwer, 2014).
13. *See* R. Bronzini, G. Caramellino & S. Magri, 'Venture Capitalists at Work: What are the Effects on the Firms They Finance?' (2017), available at http://www.ssrn.com/; *see also* A. Berger & K. Schaeck, 'Small and Medium-Sized Enterprises, Bank Relationship Strength, and the Use of Venture Capital', 43 *Journal of Money, Credit & Banking* 461 (2011), both noting that the presence of VC firms increases reputation and professionalization and decreases the "time to market" of new products.
14. *See* PwC/CB Insights, '*MoneyTree Report*' (2016), available at http://www.pwc.com, showing that in 2016, VC firms investments totaled USD \$ 59 billion (2015: \$ 73 billion).
15. *See* A. Berger & G. Udell, 'The Economics of Small Business Finance: the Roles of Private Equity and Debt Markets in the Financial Growth Cycle', 22 *Journal of Banking & Finance* 613 (1998), giving a figure of 2 % of equity finance.
16. *See* M. Puri & R. Zatuskie, 'On the Life Cycle Dynamics of Venture-Capital- and Non-Venture-Capital-Financed Firms', 67 *Journal of Finance* 2247 (2012), showing that VC-backed corporations account for 5-7% of jobs. Admittedly, the amount of funds withdrawn from VC-businesses is unclear, although one would assume this figure to be small, given the abundance of growth opportunities.
17. *See* A. Brav & P.A. Gompers, 'Myth or Reality? The Long-Run Underperformance of Initial Public Offerings: Evidence from Venture and Nonventure Capital –Backed Companies', 52

a business may actually occur in important part prior to going public. In this view, stock markets act as a necessary stimulus and provide entrepreneurs and initial investors with an exit opportunity.[18] Accordingly, early adopters rely on the latent liquidity of the exit option when providing funds in the first place. Simultaneously, the stock market can be considered a diversification opportunity, allowing for the investment circle to start anew.[19] Achieving a successful exit was arguably one of the motives behind the controversial Snap IPO, in which public investors could only subscribe to non-voting shares.[20] However, the importance of the stock market as an exit platform is not new. Already at the end of the 19th century, prominent investment banks, including J.P. Morgan, and independent "promoters" were highly accustomed to merging various smaller firms into a more powerful business with a considerable market share, creating a highly suitable candidate to list on the stock exchange.[21]

7.3.3 Effectiveness and implications for dual class equity structures

If stock markets should act as an exit platform, they are not doing a particularly great job.[22] Already at the end of the 1980s, Jensen predicted the eclipse of the public corporation.[23] Apparently, this prediction has materialized to a large degree. The number of US listings has halved from 7,500 in 1997 to

---

Journal of Finance 1791 (1997).

18. *See* Lazonick 2017, *supra* note 8; *see also* B.S. Black, 'The Legal and Institutional Preconditions for Strong Securities Markets', 48 *UCLA Law Review* 781 (2001); E.B. Rock, 'Greenhorns, Yankees, and Cosmopolitans: Venture Capital, IPOs, Foreign Firms, and U.S. Markets', 2 *Theoretical Inquiries in Law* 711 (2001); R.J. Gilson & B.S. Black, 'Venture Capital and the Structure of Capital Markets: Banks versus Stock Markets', 47 *Journal of Financial Economics* 243 (1998).
19. The diversification option mainly concerns VC firms and not so much founders. *See* Gilson & Black 1998, *supra* note 18, arguing that an implicit contract might exist between entrepreneurs and VC firms, giving the former the option of regaining control by using an IPO to lose the latter.
20. On the Snap IPO, *see* § 11.2.3 and § 11.3.4 *infra*. At the time of execution, it was widely predicted that Facebook – by Instagram Stories – would be dominating Snap's market, forcing many early-stage investors out.
21. For a vivid description of the era, *see* T.R. Navin & M.V. Sears, 'The Rise of a Market for Industrial Securities, 1887-1902', 29 *The Business History Review* 105 (1955). On the role of promoters, *see* P.G. Mahoney, 'Mandatory Disclosure as a Solution to Agency Problems', 62 *University of Chicago Law Review* 1047 (1995).
22. The discussion in § 7.3.3 is based in part on my Report for the ECGI Conference 'Why Are Fewer Companies Going Public?', hosted by the Stockholm School of Economics on June 10, 2019.
23. *See* M. Jensen, 'Eclipse of the Public Corporation', 67 *Harvard Business Review* 61 (1989). Then, Jensen was referring mainly to the trend of corporations being taken private through an LBO. The current developments are more fundamental in nature.

3,750 today.[24] For Europe, the picture is similar, although somewhat mixed across jurisdictions.[25] The total listing gap – i.e. the number of corporations one would expect to be listed versus the number of corporations actually listed – is estimated at more than 5,000 firms.[26] This gap stems from a combination of a drop in IPOs – which is in itself already remarkable, given stock market performance in recent years – and a continuous, elevated rate in mergers and going private transactions. Consequently, smaller firms (i.e. those with a capitalization below $ 100 million) have become much less common. Instead, such businesses prefer to sell themselves to a well-funded, industry-leading competitor.[27]

There exist multiple causes to potentially explain the decrease in stock listings. First, this relates to the costs of going public.[28] These include, for instance, the costs of underpricing and those of the underwriting process, which is facilitated by investment bankers.[29] In 2018, Spotify therefore executed a "direct listing" specifically with a view to trimming underpricing and underwriting costs.[30] As far as the costs of going public are concerned, one could also point to regulatory costs. In recent years, the number of listed corporations has been relatively stable, which has been attributed to regulatory relaxations such as the JOBS Act[31] and the introduction of listing venues featuring reduced administrative requirements, for instance the German *Neuer Markt*

---

24. *See* C. Doidge et al., 'Eclipse of the Public Corporation or Eclipse of the Public Markets?', 30 *Journal of Applied Corporate Finance* 8 (2018); *see also* C. Doidge, A. Karolyi & R.M. Stulz, 'The U.S. Listing Gap', 123 *Journal of Financial Economics* 464 (2017). For a different and, in my view, plainly wrong conclusion, *see* B.R. Cheffins, 'Rumours of the Death of the American Public Company are Greatly Exaggerated' (2018), available at http://www.ssrn.com/.
25. Specifically for the Netherlands, *see* A.A. Bootsma & J.B.S. Hijink, 'De beurs-NV in den vreemde', 16 *Ondernemingsrecht* 85 (2014).
26. *See* Doidge et al. 2018, *supra* note 24; *see also* Doidge, Karolyi & Stulz 2017, *supra* note 24.
27. On the trade-offs faced by startups in this regard, *see* A. Arora, F. Fosfuri & T. Roende, 'Waiting for the Payday? The Market for Startups and the Timing of Entrepreneurial Exit' (2018), available at http://www.nber.org/.
28. *See* J. Kesten, 'The Law and Economics of the Going-Public Decision' (2018), available at http://www.ssrn.com/; *see also See* R.J. Gilson & C.K. Whitehead, 'Deconstructing Equity: Public Ownership, Agency Costs, And Complete Capital Markets', 108 *Columbia Law Review* (2008), observing that going public, while remaining meaningful, is becoming less attractive as the equilibrium between agency costs and the costs of public ownership shifts.
29. *See* G. Lee & R.W. Masulis, 'Seasoned Equity Offerings: Quality of Accounting Information and Expected Flotation Costs', 92 *Journal of Financial Economics* 443 (2009), noting that underwriting fees typically range between 3% and 8% of gross proceeds; *see also* J.R. Ritter, 'The Costs of Going Public', 19 *Journal of Financial Economics* 269 (1987), estimating that, underpricing and underwriting costs may jointly amount to 20-30% of firm value.
30. For an extensive discussion, *see* M.D. Jaffe, G. Rodgers & H. Gutierrez, 'Spotify Case Study: Structuring and Executing a Direct Listing' (2018), available at http://www.corpgov.law.harvard.edu/.
31. Under the JOBS Act, the number of shareholders a corporation may have before it should register its securities was increased (note that this may also delay IPOs). It also allowed for

(*see* § 21.4.3 *infra*). However, the drop in IPOs commenced before regulatory burdens increased, meaning that the argument that regulation killed small businesses may not be compelling.[32] Second, VC and Private Equity (PE) have become even more institutionalized. Specifically, the financial crisis of 2008 caused PE firms[33] and mutual funds to engage in venture activities.[34] Because of this institutionalization, the traditional liquidity advantage of the stock markets and the need to go public have decreased.[35] Startups which stay private can thus eventually reach the size (in terms of sales and number of employees) only public corporations used to have. Third, modern businesses are increasingly reliant on intangible assets, such as software applications, as opposed to traditional enterprises being built around tangible assets, including brick and mortar factories. Intangible assets may be more difficult to finance on public markets, given that doing so increases the risk of losing one's (technological) advantages to competitors, because of disclosure obligations.[36] However, intangible assets may also require considerable upfront investments such as marketing, creating barriers for competitors to enter the market. Thus, it may also be possible that smaller firms are disappearing altogether, not just from the stock market. Greater size permits firms to display more monopolisitic behavior, obtaining higher earnings without improving efficiency.[37]

Whatever the exact cause of the decline in stock market listings, the phenomenon is there. A reduction in the number of listed corporations has considerable policy implications. Indeed, it entails a smaller universe of publicly accessible investment opportunities, notably for retail investors with a view to funding their retirement.[38] As such, the developments outlined in § 7.3 carry clear implications for the topic of this PhD-thesis. Whereas the decision to execute an IPO

---

draft registrations to be filed with the SEC confidentially and reduced disclosure requirements. For a more extensive discussion, *see* § 14.5.1 *infra*.

32. *See* Doidge et al. 2018, *supra* note 24; *see also* Doidge, Karolyi & Stulz 2017, *supra* note 24; X. Gao, J.R. Ritter & Z. Zhu, 'Where Have All the IPOs Gone?', 48 *Journal of Financial and Quantitative Analysis* 1663 (2013).
33. *See* A.F. Tuch, 'The Remaking of Wall Street', 7 *Harvard Business Law Review* 315 (2017).
34. *See* J. Schwartz, 'Should Mutual Funds Invest in Startups? A Case Study of Fidelity Magellan Fund's Investments in Unicorns (and other Startups) and the Regulatory Implications', 95 *North Carolina Law Review* 1341 (2017).
35. Also note that smaller corporations, going public at an early stage at a venue where less (disclosure) obligations apply for the purpose of subsequently relocating to a mainstream stock exchange, may find it difficult to complete this process. *See* U. Brüggeman et al., 'The Twilight Zone: OTC Regulatory Regimes and Market Quality', 31 *Review of Financial Studies* 898 (2018), showing that over time, only 7 % of corporations "trade up".
36. *See* Doidge et al. 2018, *supra* note 24; *see also* Doidge, Karolyi & Stulz 2017, *supra* note 24.
37. *See* G. Grullon, Y. Larkin & R. Michaely, 'Are U.S. Industries Becoming More Concentrated?' (2018), available at http://www.ssrn.com/.
38. *See* Doidge et al. 2018, *supra* note 24; *see also* Doidge, Karolyi & Stulz 2017, *supra* note 24; J. Kay, 'The Kay Review of UK Equity Markets and Long-term Decision Making – Interim Report' (2012), available at http://www.gov.uk/.

hinges on a lot of factors, notably pricing,[39] dual class equity structures play a role as well. Although it only concerns a single factor in the IPO cost-benefit tradeoff, such mechanisms may, in certain cases, actually tip the balance to induce a founder or VC firm to take a corporation public. Dual class equity structures allow a shareholder to retain control, even if it is no longer privately held. Accordingly, the analysis of § 7.3 posits that differentiated voting rights should be permitted, and perhaps even ought to be stimulated.

7.4 Finance versus growth

7.4.1 A logical connection?

A strong relationship between the development of financial markets and economic (GDP) growth may simply appear as the natural order of things. The matter has been discussed extensively by economists, and there exists a substantial body of (empirical) literature in this regard. In general, stock market liquidity and banking development are indeed significantly correlated with current and future economic growth.[40] However, there are some points of discussion as well. First, it should be noted that correlation does not equate to causation, and it remains debated whether production follows from finance or vice versa.[41] Second, the relative usefulness of stock markets and banks in contributing to economic growth continues to be a complicated matter.[42] Different types and combinations of information and transaction costs warrant dynamic landscapes, in which the relative importance of either institution will vary. For instance, in recent years, banks have started to collect vast amounts of relevant data on economic behavior, meaning that added value of stock markets may decrease. Third, generalizations across countries should be han-

39. *See* M. Baker & J. Wurgler, 'Market Timing and Capital Structure', 57 *Journal of Finance* 1 (2002), on the timing of stock issuances (finding evidence that IPOs are executed when valuations are elevated).
40. *See* R.G. King & R. Levine, 'Finance and Growth: Schumpeter Might be Right', 108 *The Quarterly Journal of Economics* 717 (1993); *see also* R. Levine & S. Zervos, 'Stock Markets, Banks, and Economic Growth', 88 *The American Economic Review* 537 (1998); R. Levine, 'Finance and Growth: Theory and Evidence', in: *Handbook of Economic Growth* 865 (P. Aghion & S.N. Durlauf, 2005); A. Demirgüç-Kunt, E. Feyen & R. Levine, 'The Evolving Importance of Banks and Securities Markets', 27 *The World Bank Economic Review* 476 (2013).
41. For early iterations of this debate, *see* J.A. Schumpeter, *Theorie der Wirtschaftlichen Entwicklung* 58-74 (Dunker & Humblot, 1912), already contending that entrepreneurs require credit in order to finance new production techniques and viewing banks as key facilitators. *But see* J. Robinson, *The Generalization of the General Theory* 86 (Macmillan, 1952), declaring that where enterprise leads, finance follows.
42. *See* Gilson & Black 1998, *supra* note 18; *see also* P. Arestis & P. Demetriades, 'Financial Development and Economic Growth: Assessing the Evidence', 107 *The Economic Journal* 783 (1997); Robinson 1952, *supra* note 41; Schumpeter 1912, *supra* note 41.

dled with care as well.[43] Fourth, the development of financial markets may be more significant for certain industries than for others,[44] or can be especially important during specific periods of time.[45] As such, the picture is perhaps more complicated than one might expect.[46]

7.4.2 Law matters?

A (subtle) flavor of law can be added to the (economic) finance-growth debate by introducing the works of La Porta, Lopez-de-Silanes, Shleifer and Vishny.[47] For their research, La Porta, Lopez-de-Silanes, Shleifer and Vishny constructed a database on the degree to which countries granted certain shareholder rights, either through statute, case law or other binding instrument. The shareholder rights taken into consideration were (i) allowing proxy votes to be sent by mail; (ii) not being required to deposit stock prior to the General Meeting; (iii) allowing cumulative voting or proportional representation of minorities on the board; (iv) instituting a mechanism for oppressed minorities; (v) providing for a call of an Extraordinary Meeting by 10% or less of the share capital; (vi) providing that preemptive rights can only be waived by the General Meeting. (Initially, the one share, one vote standard was considered as well, but eventually, it was excluded.) These variables have collectively been referred to as the "anti-director rights index". La Porta, Lopez-de-Silanes, Shleifer and Vishny argued that putting sufficient safeguards in place, promoting the interests of minority investors, is a necessary precondition for the existence of active financial markets. Thus, the development of financial

---

43. *See* Arestis & Demetriades 1997, *supra* note 42; *see also* R.D.F. Harris, 'Stock Markets and Development: a Re-assessment', 41 *European Economic Review* 139 (1997), finding different effects of finance on growth for developing and developed countries.
44. *See* R.G. Rajan & L. Zingales, 'Financial Dependence and Growth', 88 *The American Economic Review* 559 (1998), showing that industries relying more on external finance do better if financial markets are more developed.
45. *See* P.L. Rousseau & P. Wachtel, 'What is Happening to the Impact of Financial Deepening on Economic Growth?', 49 *Economic Inquiry* 276 (2011), arguing that the finance-growth relationship seems to be partly disappearing.
46. For a thorough overview, also pointing to the importance of institutional and policy factors, *see* J.B. Ang, 'A Survey of Recent Developments in the Literature of Finance and Growth', 22 *Journal of Economic Surveys* 536 (2008).
47. *See* R. La Porta et al., 'Legal Determinants of External Finance', 52 *Journal of Finance* 1131 (1997); *see also* R. La Porta et al., 'Law and Finance', 106 *Journal of Political Economy* 1113 (1998); R. La Porta, F. Lopez-de-Silanes & A. Shleifer, 'Corporate Ownership Around the World', 54 *Journal of Finance* 471 (1999); R. La Porta et al., 'Investor Protection and Corporate Governance', 58 *Journal of Financial Economics* 3 (2000); R. La Porta, F. Lopez-de-Silanes & A. Shleifer, 'What Works In Securities Laws', 61 *Journal of Finance* 1 (2006); R. La Porta, F. Lopez-de-Silanes & A. Shleifer, 'The Economic Consequences of Legal Origins', 46 *Journal of Economic Literature* 285 (2008). For a Dutch analysis of this scholarship, *see* M.J. Kroeze, *Afgeleide schade en afgeleide actie* 146-149 (Kluwer, 2004).

markets and the development of the law correlate: "law matters".[48] Attracting additional investors will increase liquidity and decrease volatility (jointly referred to as "depth") of the stock market and, consequently, lower the cost of capital. According to La Porta, Lopez-de-Silanes, Shleifer and Vishny, the empirical analysis indicates that civil-law countries did worse in protecting minority investors compared to common law countries.[49] In turn, the value of insider positions increased, and concentrated ownership structures arose. Historically, this outcome may be attributed to the role of the government in corporate law and its approach to protecting private property versus regulating the economy.

7.4.3 Critiques and implications for dual class equity structures

There have been quite some critiques on the studies of La Porta, Lopez-de-Silanes, Shleifer and Vishny, notably on methodological matters, including the scoring of jurisdictions[50] and the usefulness and representativeness of the indices used.[51] Others have proposed differently composed shareholder rights indices[52] or alternatives to the "law matters" hypothesis. Coffee advocated a reversed cause and effect sequence, reminiscent of the question whether finance precedes growth or the other way around (*see* § 7.2 *supra*). He argued that statutory investor protection cannot have been a necessary precondition for the development of stock markets, as the law cannot anticipate problems

---

48. A term coined by Coffee; *see* J.C. Coffee, 'The Future as History: The Prospects for Global Convergence in Corporate Governance and its Implications', 93 *Northwestern University Law Review* 641 (1999).
49. On the concept of legal families and the issues involved, *see* § 3.3.3 *supra*; *see also* § 2.2.3 *supra* on ownership patterns.
50. For such methodological critiques, *see* H. Spamann, 'The "Antidirector Rights Index" Revisited', 23 *Review of Financial Studies* 467 (2010) (arguing that the scoring of 33 of 46 countries should be corrected); *see also* S. Cools, 'The Real Difference in Corporate Law Between the United States and Continental Europe: Distribution of Powers', 30 *Delaware Journal of Corporate Law* 697 (2005) (specifically addressing the scoring of Belgian corporate law).
51. *See* B.S. Black et al., 'Corporate Governance Indices and Construct Validity', 25 *Corporate Governance: an International Review* 397 (2017); *see also* M. Klausner, 'Empirical Studies of Corporate Law and Governance: Some Steps Forward and Some Steps Not', in *The Oxford Handbook of Corporate Law and Governance* (J.N. Gordon & W-G. Ringe eds), noting the indices "reflect a regrettable (and avoidable) failure on the part of economists to learn the institutional and legal facts"; R.K. Morck & L. Steier, 'The Global History of Corporate Governance – An Introduction' (2005), available at http://www.nber.org/.
52. *See* L.A. Bebchuk, A. Cohen & A. Ferrell, 'What Matters in Corporate Governance?', 22 *Review of Financial Studies* 783 (2009) (using a narrower governance index of 6 instead of 24 provisions but obtaining similar results); *see also* P.A. Gompers, J. Ishii & A. Metrick, 'Corporate Governance and Equity Prices', 118 *Quarterly Journal of Economics* 107 (2003). For a meta-analysis, *see* M. Cremers & A. Ferrell, 'Thirty Years of Shareholder Rights and Firm Value', 69 *Journal of Finance* 1167 (2014).

that have not yet arisen.[53] Furthermore, the "law matters" hypothesis can be contrasted with the view put forward by Hansmann and Kraakman (and subsequently nuanced by one of them[54]), according to which systems of corporate governance will eventually converge to the "standard shareholder oriented model" as being the most efficient. On the other side of the "law matters" hypothesis, Roe's "path dependency" theory can be found. In Roe's approach, it are primarily political and cultural factors which are responsible for shaping developments in and differences between systems of corporate governance.[55]

Despite the methodological and substantive critiques, the analysis of La Porta, Lopez-de-Silanes, Shleifer and Vishny has received widespread recognition.[56] This scholarship has clear implications for the topic of this PhD-thesis as well. Fundamentally, La Porta, Lopez-de-Silanes, Shleifer and Vishny relate economic growth to the protection of minority investors. As dual class equity structures are principally in conflict with the position of minority shareholders, the analysis of the finance-growth debate suggests that such structures should not be stimulated, and perhaps even ought to be prohibited. These findings are at odds with the suggestions following from the analysis of the functioning of the stock markets (*see* § 7.3.3 *supra*). Because of the conflicting observations, the discussion of the structure of financial systems, as laid down in Chapter 7, offers little robust policy implications on the usefulness of dual class equity structures and whether these ought to be prohibited, permitted, discouraged or stimulated.

---

53. *See* J.C. Coffee, 'The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control', 111 *Yale Law Journal* 1 (2001). However, Coffee recognizes the importance of pre-existing self-regulation to credibly signal minority investors that they would not be exploited. For a similar approaches, *see* S. Deakin, P. Sarkar & M. Siems, 'Is there a relationship between shareholder protection and stock market development?', (2017), available at http://www.ssrn.com/; *see also* B.R. Cheffins, 'Law as Bedrock: The Foundations of an Economy Dominated by Widely Held Public Companies, 23 *Oxford Journal of Legal Studies* 1 (2003).
54. *See* H. Hansmann & R. Kraakman, 'The End of History for Corporate Law' (2001) 89 *Georgetown Law Journal* 439; *see also* H. Hansmann, 'How Close is The End of History?', 32 *The Journal of Corporation Law* 745 (2006).
55. *See* M.J. Roe, 'Chaos and Evolution in Law and Economics', 109 *Harvard Law Review* 641 (1996); *see also* L.A. Bebchuk & M.J. Roe, 'A Theory of Path Dependence in Corporate Ownership and Governance', 52 *Stanford Law Review* 127 (2000). On the relevance of culture for comparative corporate governance in general, *see* § 3.3.3 *supra*.
56. *See* A.M. Pacces, *Featuring Control Power* 217-224; 238-255 (RILE, 2008); *see also* Coffee 2001, *supra* note 53; Black 2001, *supra* note 18; K. Pistor et al., 'The Evolution of Corporate Law: A Cross-Country Comparison', 23 *Journal of International Economic Law* 791 (2003).

Chapter 8. Capital structure and dual class equity structures

8.1 Introduction

Superior and inferior voting and profit participating stock can not only be considered as securities traded on the financial markets, of which the functioning was analyzed in Chapter 7. Moreover, dual class equity structures may be conceived as part of the corporate capital structure. The debate on capital structure relates to the corporation's optimal mixture of funds with a view to financing productive capabilities. In this discussion, the corporation is typically understood as an industrial firm, meaning that financial and utility businesses are disregarded given their specific, regulated nature. The Modigliani and Miller-theorems are the starting point for any economic research with regard to the corporation's capital structure.

I first analyze the Modigliani and Miller-theorems themselves and the assumptions upon which they are founded, in § 8.2. Then, I examine two of the principal alternatives to the capital irrelevance theorems, being trade-off theory and pecking order theory, in § 8.3 and § 8.4, respectively. Based on these discussions and some of the most recent parts of the literature, I present a more holistic approach to the corporation's capital structure, which is focused on its life-cycle and incorporates the theories previously analyzed, in § 8.5.

8.2 The modigliani-miller irrelevance theorems

8.2.1 General concept

The reasoning under Modigliani and Miller's irrelevance principle is the following. When a corporation generates income indefinitely and its securities can be categorized into groups of equivalent returns, the price paid for every Euro or Dollar of expected return would be identical (for stocks of the same group). If the same would apply for debt instruments (bonds), then a corporation's market value would be independent of its capital structure.[1] This

1. *See* F. Modigliani & M.H. Miller, 'The Cost of Capital, Corporation Finance and the Theory of Investment', 48 *American Economic Review* 261, 265 (1958). For a contemporary analysis, *see* S.C. Myers, *Financing of Corporations*, in *Handbook of the Economics of Finance*

is Proposition I. Proposition II, which essentially follows from Proposition I, is that an increase in debt causes a proportionally higher required return on equity, given the increased risk. Consequently, the average cost of capital will remain constant.[2] In short, the value of a corporation depends on its investments in production capabilities, not on their source of funding. Modigliani and Miller illustrate their argument with the behavior of a farmer. Under perfect market conditions, the farmer will not be able to increase his earnings from milk by skimming the butter fat and selling it separately. Whereas the butter fat, per unit weight, sells for higher prices than whole milk, these gains would be offset by the proportionate decrease in revenues incurred for thinned milk.[3] Had the farmer acquired a second cow, things could have been different. With the choice between debt or equity (financing strategy) irrelevant for the corporation's market value, it would be difficult to see how the use of dual class equity structures (financing tactics) might affect it.[4]

8.2.2 Assumptions underlying the modigliani-miller irrelevance theorems

It is not an understatement to say that the works of Modigliani and Miller have proven highly influential,[5] and continue to shape the field of financial economics.[6] However, the drastic nature of their assumptions has been

216 (G.M. Constantinides, M. Harris & R. M. Stulz eds.); *see also* R.A. Brealey, S.C. Myers & F. Allen, *Principles of Corporate Finance* 428 (McGraw-Hill, 2014).

2. *See* Modigliani & Miller 1958, *supra* note 1, at 273-274.
3. *See* Modigliani & Miller 1958, *supra* note 1, at 279-280. Another anecdote (of Miller's) is the question for Yogi Berra (one of the great players in the history of the New York Yankees baseball team) whether his pizza should be sliced in quarters or eights, to which Berra's reply would be "No, cut it into eight pieces, I am feeling hungry tonight".
4. Consider that for each corporation, Modigliani & Miller 1958, *supra* note 1 assumed one class of common stock.
5. An interesting yet largely forgotten precursor to Modigliani and Miller is Williams. *See* J.B. Williams, *The Theory of Investment Value* 72-73 (Harvard University Press, 1938), who argued that "no change in the investment value of the enterprise as a whole would result from a change in the capitalization…It leads us to speak of the Law of the Conservation of Investment Value, just as physicists speak of the Law of Conservation of Matter, or the Law of the Conservation of Energy."
6. Various special issues have periodically been published in honor of the Miller & Modigliani theorems. *See* M.H. Miller, 'The Modigliani-Miller Propositions After Thirty Years', 2 *Journal of Economic Perspectives* 99 (1988); J.E. Stiglitz, 'Why Financial Structure Matters', 2 *Journal of Economic Perspectives* 121 (1988) (describing the 1958 paper as a "landmark in modern theory of finance"); S.A. Ross, 'Comment on the Modigliani-Miller Propositions', 2 *Journal of Economic Perspectives* 127 (1988); S. Bhattacharya, 'Corporate Finance and the Legacy of Miller and Modigliani', 2 *Journal of Economic Perspectives* 135 (1988) (arguing that the influence of Modigliani & Miller "permeates almost all aspects of financial economics"); F. Modigliani, 'MM--Past, Present, Future', 2 *Journal of Economic Perspectives* 149 (1988); M.J. Gordon, 'Corporate Finance under the MM Theorems', 18 *Financial Management* 19 (1989) ("MM soon became and has remained the dominant theory of corporate finance").

noted, as Modigliani and Miller require no less than the existence of perfects markets. This comprises the absence of i) stock price setters, ii) information, transaction, bankruptcy or agency costs, and iii) differences in fiscal treatment regarding dividends and capital gains. It also assumes natural persons and corporations having equal access to capital markets. Subsequently, Modigliani and Miller presuppose rational behavior and perfect certainty as to both the future investments and the profits of a corporation. Finally, their argument is based on the notion that investment policy can be considered separable from dividend policy.[7]

8.2.3 The assumptions do not hold – but does it matter?

It is clear from the outset that in the real world, the Modigliani and Miller assumptions will not hold. Managers are insiders and likely have better knowledge on the future prospects of the corporation. Additionally, they will probably be able to better assess the implications of newly available information. Even if transaction costs have decreased substantially in modern times for retail investors, floatation costs for firms aiming to raise capital remain significant (*see* § 7.3.1 *supra*). Bankruptcy threatens valuation of the corporation on a going concern basis (*see* § 8.3.1 *infra*). Furthermore, taxes are supposedly one of the few certainties in life,[8] but may differ drastically over time and across jurisdictions. Whereas equal access to capital markets is assumed for natural persons and corporations, the former may struggle to mimic the characteristics of securities issued by corporations.[9] Moreover, the rationality of human behavior has increasingly been called into question as well (*see* § 2.2.5 *supra*). Finally, the fact that many integrated oil and gas companies fiercely resisted a dividend cut, despite suffering from a collapse in oil prices (from approximately $ 120 to $ 30) in 2014 and 2015,[10] may serve as anecdotal evidence that

7. *See* F. Allen & R. Michaely, *Payout Policy*, in *Handbook of the Economics of Finance* 339, 353 (G.M. Constantinides, M. Harris & R. M. Stulz eds.); *see also* E.F. Fama, 'The Effects of a Firm's Investment and Financing Decisions on the Welfare of its Security Holders', 68 *The American Economic Review* 272 (1978). *But see* J.E. Stiglitz, 'A Re-Examination of the Modigliani-Miller Theorem', 59 *The American Economic Review* 784 (1969), arguing that the Modigliani-Miller theorems also apply under more general conditions, claiming instead that the critical assumption is that bonds are free of default risk.
8. The quote has been commonly attributed to Benjamin Franklin (*see* A.H. Smyth, *The Writings of Benjamin Franklin, Vol. X (1789-1790)* 69 (MacMillian, 1907), but earlier roots may not be ruled out.
9. *See* D. Durand, 'The Cost of Capital, Corporation Finance, and the Theory of Investment: Comment', 49 *The American Economic Review* 639 (1959), on arbitrage mechanisms involving personal and corporate leverage and their (non-)interexchangeability; *see also* F. Modigliani & M.H. Miller, 'The Cost of Capital, Corporation Finance, and the Theory of Investment: Reply', 49 *The American Economic Review* 655 (1959).
10. A relevant example would be Royal Dutch Shell, which until the Covid-crisis hit in early 2020 could pride itself in the fact that it had not reduced its dividends since 1943.

dividend and investment policies are rather intimately intertwined, or at least more so than the Modigliani-Miller theorems suggest. Thus, in practice, capital structure does matter. After all, if the creation of novel security instruments never added value, there would be no incentive for financial innovation.[11]

8.2.4 Inverting the modigliani-miller capital irrelevance theorems

In § 8.3-§8.5, I discuss two of the principal theories that relax one or more of the assumptions underlying the Modigliani and Miller models, as well as the implications of these theories.[12] Indeed, inverting the Modigliani and Miller theorems is arguably their main virtue, as this allows us to understand which aspects of financing actually do affect the value of the corporation.[13] An example of such an inversion has been provided by Modigliani and Miller themselves. As was already mentioned, the presumption of perfect markets includes the absence of taxes. However, if the compensation paid in respect of debt, contrary to that of equity, is tax deductible – as is frequently, though not necessarily, the case – the cost of debt decreases, thus increasing the value of the corporation (the "tax debt shield").[14] Theoretically, with a marginal corporate tax rate of 35 %, the present value of a tax debt shield involving € 1 million in perpetual debt would be € 350,000. Then, tax debt shields stimulate borrowing, up to the point that debt becomes the sole source of corporate funding. Additionally, whenever capital gains are taxed at a lower rate than dividends – as they were in the past in the US and still frequently are elsewhere[15] – one would expect for investors to prefer corporations not to make any distributions, as this would merely lower the return on investment.

---

11. *See* Myers 2003, *supra* note 1, at 220, admitting however that successful innovations, after some time, become commodities, so that the Modigliani and Miller-equilibrium is more or less restored.
12. Analyzing all theories that have been put forward over time is beyond the scope of this discussion. For a somewhat outdated yet highly detailed categorization, *see* M. Harris & A. Raviv, 'The Theory of Capital Structure', 46 *Journal of Finance* 297 (1991). Note that the question why corporations issue debt or equity is related to, but can theoretically be distinguished from the issue of when such issuances are made.
13. *See* Miller 1988, *supra* note 6 ("showing what doesn't matter can also show, by implication, what does").
14. *See* F. Modigliani & M.H. Miller, 'Corporate Income Taxes and the Cost of Capital: A Correction', 53 *The American Economic Review* 433 (1963); *see also* Modigliani & Miller 1958, *supra* note 1.
15. For an overview of the implications of differences in taxation in the US and other countries, *see* J.R. Graham, *Taxes and Corporate Finance* in *Handbook of Corporate Finance. Empirical Corporate Finance* 62 (B. Espen Eckbo ed.).

8.3 Trade-off theory

8.3.1 General concept and implications for dual class equity structures

In § 8.2.4, it was observed that because of the tax debt shield, debt may effectively be cheaper than equity. However, it may well be argued that not only the advantages of debt should be taken into account, but that its disadvantages should be considered as well.[16] This is the general idea behind trade-off theory. The disadvantages of debt are bankruptcy costs, both in the direct and in the indirect variant.[17] Direct bankruptcy costs include legal fees, administrative expenses and impairments incurred when disposing of assets at fire-sale prices, to the extent that these costs would not be incurred absent financial distress.[18] Indirect costs of bankruptcy may concern opportunity costs from suboptimal investments ("debt overhang"), or suppliers demanding more insulating contracting terms upon becoming aware of the delicate situation of a corporation ("risk shifting"). Other forms of bankruptcy costs could include talented employees seeking employment elsewhere.[19] Even the mere threat of default may therefore give rise to bankruptcy costs. Under trade-off theory, using prudent leverage can increase the value of the corporation (implying an unobservable target debt-equity ratio), but only up to the point that the marginal costs of bankruptcy offset the marginal benefits of the tax debt shield.[20] This trade-off can be considered both at a single moment in history (static), and across multiple consecutive periods of time (dynamic).[21] Dynamic trade-off models reflect that not only the weight of the factors involved in the trade-off might change, but also the trade-off itself, given firm-specific characteristics. By considering the costs of adjusting to future expectations, dynamic trade-off models incorporate notions of uncertainty. This may cause

16. *See* A. Kraus & R.H. Litzenberger, 'A State Preference Model of Optimal Financial Leverage', 28 *Journal of Finance* 911 (1973), presenting an early analysis on the costs and benefits of debt.
17. For an in-depth analysis of the factors involved, *see* M.Z. Frank & V.K. Goyal, *Trade-off and Pecking Order Theories of Debt* in *Handbook of Corporate Finance. Empirical Corporate Finance* 136 (B. Espen Eckbo ed.); *see also* J.R. Graham, M.T. Leary & M.R. Roberts, 'A Century of Capital Structure: The Leveraging of Corporate America', 118 *Journal of Financial Economics* 658 (2015), observing a leverage increase from 11 % in 1945 to 47 % in the 1990s.
18. On losses because of short-term divestments, *see* T.C. Pulvino, 'Do Asset Fire Sales Exist? An Empirical Investigation of Commercial Aircraft Transactions', 53 *Journal of Finance* 939 (1998); *see also* A. Shleifer & R.W. Vishny, 'Liquidation Values and Debt Capacity: A Market Equilibrium Approach', 47 *Journal of Finance* 1343 (1992).
19. *See* E.S. Hotchkiss et al., *Bankruptcy and the Resolution of Financial Distress*, in *Handbook of Corporate Finance. Empirical Corporate Finance* 260-265 (B. Espen Eckbo ed.).
20. *See* Frank & Goyal 2009, *supra* note 17, at 141; *see also* Myers 2003, *supra* note 1, at 221.
21. *See* E.O. Fischer, R. Heinkel & J. Zechner, 'Dynamic Capital Structure Choice: Theory and Tests', 44 *Journal of Finance* 19 (1989).

a firm to retain superfluous earnings for some time, to prevent shareholders being presented a tax bill if it is aware that additional funding in the near future will be required,[22] or to enable management to obtain benefits at the expense of outsiders.[23]

Trade-off theory has several implications for dual class equity structures. Superior profit participating stock will not be used often, as issuing such securities will only make bankruptcy more likely. By contrast, issuing inferior voting and inferior profit participating stock could diminish the probability of such a scenario playing out, and therefore reduce bankruptcy costs. However, it would appear questionable whether investors would be willing to acquire such securities in times of (looming) financial distress. Subscribing to inferior voting and inferior profit participating stock means control rights and a risk premium will be absent. Consequently, trade-off theory predicts that the use of dual class equity structures will not be widespread.

8.3.2 Critiques on trade-off theory

Trade-off theory relies on the existence of a tax debt shield and bankruptcy costs. However, both the magnitude of the tax debt shield and the size of bankruptcy costs have been debated. Consequently, it is unclear to which degree trade-off theory is actually relevant. Miller argued that his initial calculations on the value of the tax debt shield, made together with Modigliani, ignored taxes due at the investor level. Indeed, Modigliani and Miller only took into account the tax debt shield at the level of the corporation. When a corporation reduces its own tax liabilities by issuing debt (at a progressively higher interest rate), it increases the tax liabilities of its investors in respect of interest income (the "Miller equilibrium").[24] Modigliani and Miller's earlier calculations also assumed fixed interest obligations and stable marginal corporate tax rates. Both assumptions may prove questionable, not only because of regulatory changes but also because of corporate tax evasion.[25] Additionally, a

22. *See* H. DeAngelo, L. DeAngelo & T.M. Whited, 'Capital Structure Dynamics and Transitory Debt', 99 *Journal of Financial Economics* 235 (2011).
23. *See* E. Morellec, B. Nikolov & N. Schürhoff, 'Corporate Governance and Capital Structure Dynamics', 67 *Journal of Finance* 803 (2012). The aim of § 8.3 is to outline the foundations of trade-off theory. In my view, a more compelling perspective exists (*see* § 8.5 *infra*). Therefore, I abstain from analyzing differences between static and dynamic trade-off models in more detail.
24. *See* M.H. Miller, 'Debt and Taxes', 32 *Journal of Finance* 261 (1977). For further analysis on this topic, *see* H. DeAngelo & R.W. Masulis, 'Optimal Capital Structure Under Corporate and Personal Taxation', 8 *Journal of Financial Economics* 3 (1980).
25. *See* J.E. Blouin, J.E. Core & W. Guay, 'Have the Tax Benefits of Debt Been Overestimated?', 98 *Journal of Financial Economics* 195 (2010), using more sophisticated marginal tax-rates estimates and observing that the tax debt shield may carry less value than previously assumed.

firm must remain profitable for the tax debt shield to have any value.[26] Some studies fail to find evidence of a relationship between taxes, financing and market value,[27] whereas others do.[28] It has also been argued that taxes affect financing, but that debt usage should be more widespread than is the case in practice.[29] Conversely, it has been maintained that corporations actually have been assuming more debt,[30] or that it are specifically the industry's most profitable corporations which tend to borrow less.[31] As one may observe, there exist many (conflicting) positions in this regard.[32]

Similar observations as to the alleged unimportance of the tax debt shield have been made concerning the size of bankruptcy costs. In this regard, a distinction has been made between liquidation (dismantling the firm) and bankruptcy (transferring ownership to creditors).[33] One the one hand, direct bankruptcy costs appear indeed relatively low, amounting to 2-6 % of pre-bankruptcy firm value on average, although they are likely to increase as the process becomes more time-consuming.[34] Indirect costs of bankruptcy, on the other hand, appear substantially larger.[35] A complication of these costs is that they should be

26. *See* Myers 2003, *supra* note 1, at 222-223.
27. *See* E.F. Fama & K.R. French, 'Taxes, Financing Decisions, and Firm Value', 53 *Journal of Finance* 819 (1998) who, despite being skeptical on the tax benefits of debt, acknowledge that assuming debt can have informational effects on profitability, which may blur the picture.
28. *See* D. Kemsley & D. Nissim, 'Valuation of the Debt Tax Shield', 57 *Journal of Finance* 2045 (2002), whose estimates of the tax debt shield amount to 10 % of firm value; *see also* J.R. Graham, 'How Big are the Tax Benefits of Debt?', 55 *Journal of Finance* 1901 (2000), obtaining similar results.
29. *See* Graham 2000, *supra* note 28, arguing that US corporations could increase their value by 7.5 % by "gearing up" to still-conservative debt ratios; *see also* R.G. Rajan & L. Zingales, 'What do we Know About Capital Structure? Some Evidence from International Data', 50 *Journal of Finance* 1421 (1995).
30. *See* Graham, Leary & Roberts 2015, *supra* note 17, seeing leverage grow from 11 % in 1945 to 47 % in the 1990s.
31. *See* E.F. Fama & K.R. French, 'Testing Trade-Off and Pecking-Order Predictions About Dividends and Debt', 15 *Review of Financial Studies* 1 (2002); *see also* Rajan & Zingales 1995, *supra* note 29.
32. For a recent overview, *see* J.R. Graham, 'Taxes and Corporate Finance: A Review', 16 *Review of Financial Studies* 1075 (2003); *see also* Kemsley & Nissim 2000, *supra* note 28.
33. *See* R.A. Haugen & L.W. Senbet, 'The Insignificance of Bankruptcy Costs to the Theory of Optimal Capital Structure', 33 *Journal of Finance* 383 (1978), arguing that the existence of two options has a mitigating effect on costs, for if bankruptcy is the more attractive option, it will effectively also trigger liquidation and vice versa.
34. For a thorough analysis, *see* Hotchkiss 2009, *supra* note 19, at 260-263, containing numerous references, including to S.J. Lubben, 'The Direct Costs of Corporate Reorganization: An Empirical Examination of Professional Fees in Large Chapter 11 Cases,' 74 *American Bankruptcy Law Journal* 508 (2000). Miller also deemed bankruptcy costs to be rather modest. *See* Miller 1977, *supra* note 24.
35. *See* E.I. Altman, 'A Further Empirical Investigation of the Bankruptcy Cost Question', 39 *Journal of Finance* 1067 (1984), estimating indirect costs at 10 % of pre-bankruptcy firm value.

distinguished from the operational setbacks that put the firm in distress in the first place. Moreover, they remain largely unobservable. Although exceptions exist,[36] most research indicates that the total costs of financial distress should not be overestimated.[37] Additionally, economies of scale have been observed.[38]

8.4 Pecking-order theory

8.4.1 General concept and implications for dual class equity structures

A competitor to trade-off theory is pecking-order theory. The term has been coined by Myers and Majluf (another M&M-pair). However, they were happy to acknowledge that their idea should not be considered a panacea[39] and could be recognized in earlier works as well.[40] Pecking-order models, in the traditional sense,[41] make just one exception to the assumption of perfect markets.[42] This exception is the acknowledgement of the existence of information asymmetries between managers and investors.[43]

---

36. *See* B. Glover, 'The Expected Cost of Default', 119 *Journal of Financial Economics* 284 (2016), finding an average loss in firm value of 45 % and arguing that firms with higher costs of distress apply a lower level of leverage, so that earlier studies suffer from selection biases.
37. *See* A. Korteweg, 'The Net Benefits to Leverage', 65 *Journal of Finance* 2137 (2010), whose estimates range from 15 % to 30 % of firm value; *see also* G. Andrade & S.N. Kaplan, 'How Costly is Financial (Not Economic) Distress? Evidence from Highly Levered Transactions That Became Distressed', 53 *Journal of Finance* 1443 (1998), estimating these costs at 20 % of firm value and arguing that they are, for the larger part, incurred before bankruptcy is declared; L.A. Weiss, 'Bankruptcy Resolution: Direct Costs and Violation of Priority of Claims', 27 *Journal of Financial Economics* 285 (1990), finding the costs of financial distress averaging 10-20 % of equity pre-bankruptcy.
38. *See* J.B. Warner, 'Bankruptcy Costs: Some Evidence', 32 *Journal of Finance* 337 (1977).
39. *See* S.C. Myers, 'The Capital Structure Puzzle', 39 *Journal of Finance* 575 (1984); *see also* S.C. Myers & N.S. Majluf, 'Corporate Financing and Investment Decisions When Firms Have Information That Investors do not Have', 13 *Journal of Financial Economics* 187 (1984).
40. *See* G. Donaldson, *Corporate Debt Capacity: A Study of Corporate Debt Policy and the Determination of Corporate Debt Capacity,* 57-70 (Harvard University, 1961), for a prior iteration of the concept.
41. Here as well, subtle distinctions between different variants have been made. *See* M.L. Lemmon & J.F. Zender, 'Debt Capacity and Tests of Capital Structure Theories', 45 *Journal of Financial and Quantitative Analysis* 1161 (2010), advocating a modified model which incorporates costs of financial distress.
42. For an overview of recent scholarship, *see* M.T. Leary & M.R. Roberts, 'The Pecking Order, Debt Capacity, and Information Asymmetry', 95 *Journal of Financial Economics* 332 (2010) (arguing that the more exceptions to the Modigliani & Miller theorems are incorporated into the pecking order model, the higher its predictive accuracy rises).
43. *But see* B.E. Eckbo, R. Giammarino & R. Heinkel, 'Asymmetric Information and the Medium of Exchange in Takeovers: Theory and Tests', 3 *Review of Financial Studies* 651 (1990), arguing that information asymmetries can be two-sided, so that more than one equilibrium of financing may exist.

According to pecking-order theory, rational managers will always prefer deploying retained earnings (internal finance) over debt until that option has been depleted, as it is less risky and therefore cheaper. First, this implies that targeted dividend payout ratios are adapted to investment opportunities. Whereas trade-off theory centers around an unobservable debt-equity target ratio, the pecking-order model bases the debt-equity ratio solely on the corporation's project-related deficits and corresponding requirements for external financing.[44] Second, it entails that most corporations will be purely debt financed. Similarly, until depleted, debt is preferred over equity (which, together with debt, is jointly referred to as external finance).[45] When management – assumed to be preoccupied with maximizing the value of existing stock – possesses favorable private information on the state of the corporation, it may refrain from issuing what it perceives as undervalued shares. Then, asymmetric information may also give rise to the costs of not issuing securities and therefore not being able to participate in investments with a positive value. Such costs are avoided only if sufficient internally-generated funds have been retained or if debt can be issued. (Thus, "financial slack" is not without value.) Conversely, if management's private information were unfavorable, any decision to issue additional stock signals unwelcome news, both to existing and prospective shareholders. Again, issuing debt may prove a viable alternative.[46] However, debt cannot be issued infinitely. Therefore, corporations must resort to equity when their debt capacity has been exhausted – in the sense that issuing more debt would give rise to prohibitive costs.[47] Naturally, shareholders are aware of this.[48] In this view, the preference of managers for internal financing is due purely to notions of wealth maximization instead of other motives, including agency considerations. Indeed, equity issuances can only signal negative news, or will not occur at all. Under pecking-order theory, the most profitable firms borrow less, not because their target debt ratio is low but instead because they have more sources of internal financing.[49]

44. For thorough comparisons, *see* L. Shyam-Sunder & S.C. Myers, 'Testing Static Tradeoff Against Pecking Order Models of Capital Structure', 51 *Journal of Financial Economics* 219 (1999), concluding, perhaps unsurprisingly, that at least for mature firms, the pecking-order model does an excellent job of predicting corporate finance behavior.
45. *See* Myers 2003, *supra* note 1, at 233-234.
46. *See* Frank & Goyal 2009, *supra* note 17.
47. *See* Myers 2003, *supra* note 1, at 233-235.
48. *See* P. Asquith & D.W. Mullins, 'Equity Issues and Offering Dilution', 15 *Journal of Financial Economics* 61 (1986), finding that the announcement of a stock issue drives down stock prices 3 % on average, suggesting there exists a downward sloping demand curve for stock; *see also* A. Shleifer, 'Do Demand Curves for Stocks Slope Down?', 41 *Journal of Finance* 579 (1986). Note that Modigliani and Miller 1958, *supra* note 1, hypothesized that corporations requiring additional funding could simply issue additional stock as returns remained constant.
49. *See* Myers 2003, *supra* note 1, at 235.

Pecking order theory can also be applied in relation to dual class equity structures. Specifically, it implies that inferior voting shares should not at all be considered as a cheap "equity currency" to fund takeovers or other entrepreneurial ventures. Instead, such instruments are rather costly, at least more expensive than retained earnings and debt. However, non-voting shares can be efficient up to the point that their costs offset the gains from being able to participate in projects which otherwise could not have been funded.[50] Theoretically, the same could apply in relation to superior voting shares and superior profit participating stock, although calculations may be more complex because of the additional rights involved.

8.4.2 Critiques on pecking-order theory

Pecking-order theory, similar to trade-off theory, is not free from complications. The implicit assumption underlying pecking-order theory is that issuing equity is not possible without triggering obstacles concerning information asymmetries. However, when taking more sophisticated financial instruments into consideration, such as employee stock grants and convertible bonds, informational signals may be substantially smaller.[51] Additionally, dividends and taxes are disregarded, and simply considered outside the scope of the model.[52] Finally, and notwithstanding the fact that stock markets, on an aggregate basis, return funds to investors instead of raising them (*see* § 7.3 *supra*), issuances of equity are not an exceptionally rare phenomenon. (It is simply that dividends and stock repurchases are much larger in size.) The commonality of equity issuances violates pecking order theory, since the instrument is clearly not used as means of last resort.[53] This is especially true with regard to smaller corporations.[54]

---

50. *See* S. Banerjee & R.W. Masulis, 'Ownership, Investment and Governance: The Costs and Benefits of Dual Class Shares' (2017), available at http://www.ssrn.com/; *see also* R.J. Gilson, 'Evaluating Dual Class Common Stock: The Relevance of Substitutes', 73 *Virginia Law Review* 807 (1987).
51. *See* S. Chaplinsky & G. Niehaus, 'The Role of Esops in Takeover Contests' 49 *Journal of Finance* 1451 (1994); *see also* W.H. Mikkelson & M.M. Partch, Valuation Effects of Security Offerings and the Issuance Process', 15 *Journal of Financial Economics* 31 (1986).
52. *See* H. DeAngelo & L. DeAngelo, *Capital Structure, Payout Policy and Financial Flexibility* (2006), available at http://www.ssrn.com/.
53. *See* E.F. Fama & K.R. French, 'Financing Decisions: Who Issues Stock?', 76 *Journal of Financial Economics* 549 (2005), making the fairly harsh claim that pecking-order theory is "dead".
54. *See* Z. Frank & V.K. Goyal, 'Testing the Pecking Order Theory of Capital Structure', 67 *Journal of Financial Economics* 217 (2003).

8.5 Life-cycle theory: a holistic alternative

8.5.1 Rationale

Both trade-off theory and pecking-order theory emphasize certain factors (either taxes, bankruptcy costs or information asymmetries) affecting the use of debt and equity. One factor could be dominant for a firm featuring specific characteristics or in some circumstances, yet prove less important under other conditions.[55] Frank and Goyal provide an elaborate overview on the theoretical correlations of debt and equity. In their view, leverage and growth are negatively related under trade-off theory, as growth firms lose most of their value when going into financial distress. By contrast, pecking order theory would indicate that growth and leverage are positively related, since the issuance of debt signals managerial confidence. Trade-off models are commonly understood as suggesting a positive relationship between leverage and firm size, considering that diversification is higher and the risk of default lower. They also predict a positive relationship between leverage and profitability, given the fact that more income should be offset by interest obligations. The opposite holds regarding pecking-order theory.[56] As may be concluded, neither trade-off theory nor the pecking order model has been completely and universally convincing. To fully comprehend a corporation's capital structure, a holistic framework is necessary.[57]

8.5.2 General concept and implications for dual class equity structures

To create a holistic capital structure framework, it should be recognized that both in trade-off and in pecking-order models, the maturity of the corporation is actually the determining factor.[58] Accordingly, investments should be

55. *See* Myers 2003, *supra* note 1, at 217-218.
56. *See* M.Z. Frank & V.K. Goyal, 'Capital Structure Decisions: Which Factors are Reliably Important?', 38 *Financial Management* 1 (2009), also discussing the impact of asset tangibility, industry debt ratios and expected inflation.
57. *See* DeAngelo & DeAngelo 2006, *supra* note 52, arguing that the literature "is now left with no empirically viable theory of capital structure"; *see also* Fama & French 2005, *supra* note 53 who, after having claimed that pecking-order theory is "dead", noted that trade-off theory also "has serious problems".
58. *See* H. DeAngelo, L. DeAngelo & R. Stulz, 'Seasoned Equity Offerings, Market Timing, and the Corporate Lifecycle', 95 *Journal of Financial Economics* 275 (2010) (observing that the life-cycle hypothesis, whilst not being able to fully explain equity issuances, provides a stronger argument than the alternative of issuers "timing the market" when stock prices are high); *see also* Leary & Roberts 2010, *supra* note 42 (advocating a broader pecking order model); Frank & Goyal 2009, *supra* note 56 (relating the use of debt and equity to firm size and growth as well as intangibles, which may be considered a proxy for growth); Fama & French 2005, *supra* note 53 (distinguishing between small and big firms); Shyam-Sunder & Myers 1999, *supra* note 44 (restricting their conclusions regarding the pecking order model

financed by instruments that reflect the corporation's current development, not those of the past or the distant future.[59] Originally, the life-cycle model was applied on savings patterns of natural persons. It was observed that individuals would typically accumulate wealth when employed, and subsequently consume savings when retired.[60] However, the concept may also be applied in a broader sense, with regard to corporations.[61] Several models with different degrees of attention to detail have been put forward, which is not to say that various periods in the existence of the corporation may be clearly separable.[62]

Following the life-cycle approach, the creation of a particular capital structure remains, in a sense, a trade-off. However, the weight of the factors involved may differ over time – dynamic trade-off models reflect this idea. Simultaneously, life-cycle theory echoes the pecking-order model, as it predicts that the corporation will continuously shifts its preferences to finance instruments which are cheaper on an overall basis – i.e. taking a broader view than the tax debt shield and bankruptcy costs – as it matures. One advantage of a life-cycle model is that it enables every corporation to adopt a tailored capital structure. Here, the nature of the firm can be relevant as well.[63] For instance, one would assume technology firms to initially predominantly opt for equity-based funding, as their intangible assets are of less use as collateral and retained earnings

---

to mature firms); A.N. Berger & U.F. Udell, 'The Economics of Small Business Finance: The Roles of Private Equity and Debt Markets in the Financial Growth Cycle', 22 *Journal of Banking & Finance* 613, 623 (1998).

59. *See* Z. Fluck, 'Capital Structure Decisions in Small and Large Firms: A Life-cycle Theory of Financing' (2001), available at http://www.ssrn.com/, arguing that different contracts exist between corporations and investors during various life-cycle stages, so that some options, unsustainable for small firms, become viable for large firms and vice versa.

60. Interestingly, the idea was first conceptualized by a student of Modigliani's. *See* F. Modigliani & R.H. Brumberg, *Utility Analysis and the Consumption Function: An Interpretation of Cross-Section Data* 388 (K.K. Kurihara, ed.); *see also* A. Ando & F. Modigliani, 'The "Life Cycle" Hypothesis of Saving: Aggregate Implications and Tests', 53 *The American Economic Review* 55 (1963); F. Modigliani, 'The Life Cycle Hypothesis of Saving, the Demand for Wealth and the Supply of Capital', 33 *Social Research* 160 (1966).

61. Indeed, some theories have considered the corporation as a real entity with a will of its own, expressed though the organs of the corporation. *See* § 21.2.2 *infra*, on the works of Von Gierke.

62. *See* E.L. Black, 'Life-Cycle Impacts on the Incremental Value Relevance of Earnings and Cash Flow Measures', 4 *Journal of Financial Statement Analysis* 40 (1998), who distinguishes between start-up, growth, maturity and decline; *see also* P.H. Friesen & D. Miller, 'A Longitudinal Study of the Corporate Life Cycle', 30 *Management Science* 1161 (1984), also considering the stage of revival; I. Adizes, 'Organizational Passages – Diagnosing and Treating Lifecycle Problems of Organisations', 8 *Organizational Dynamics* 3 (1979), making even more elaborate distinctions.

63. *See* S. Coleman & A. Robb, 'Capital Structure Theory and New Technology Firms: is There a Match?', 35 *Management Research Review* 106 (2012).

are usually absent.[64] Conversely, "brick and mortar" firms with more tangible assets might look upon the issuance of debt more favorably from an early stage onwards.

Crucially, life-cycle theory supports permitting a wide variety of forms of capital, including dual class equity structures. Doing so increases the chance of the corporation being able to deploy a financial structure which is appropriate to its needs at a given point in time, and creates the latitude necessary to respond swiftly to changing circumstances if necessary. Thus, the life-cycle perspective assumes a certain entrepreneurial dynamism in the funding mixture, and acknowledges that sources of corporate finance will likely differ over time, although this is not a goal in and by itself.

64. *See* Coleman & Robb 2012, *supra* note 63; *see also* M.G. Colombo & L. Grilli, 'Funding Gaps? Access to Bank Loans by High-Tech Start-Ups', 29 *Small Business Economics* 25 (2007).

Chapter 9. Dividends, retained earnings and dual class equity structures

9.1 Introduction

9.2 The modigliani-miller dividend irrelevance theorem

This PhD-thesis not only focuses on dual class equity structures in the traditional sense, i.e. concerning voting rights, but also views dual class equity structures in terms of profit entitlements (*see* § 1.3.2 *supra*). Here, I consider the various arguments for granting or withholding financial rights, by studying the reasons for distributing or retaining earnings ("dividend policy"). Again, my starting point is the scholarship of Modigliani and Miller. Several rationales for making a distribution can be distinguished. These are the clientele (§ 9.3), uncertainty (§ 9.4), signaling (§ 9.5) and agency (§ 9.6) models. I conclude Chapter 9 by arguing that these models should actually be reconsidered as a manifestation of the life-cycle perspective (§ 9.7).

9.2.1 General concept

Modigliani and Miller not only had certain views on the capital structure of the corporation (*see* § 8.2.1), but also made some groundbreaking observations regarding the distribution of dividends and the retention of earnings. Modigliani and Miller argued that in an economy of perfect capital markets, the value of a corporation must be independent of its dividend payments (Proposition III). Any distributions made reduce the terminal value of a stock, and these effects cancel each other out.[1] Assume Corporation X delivers € 100 in profits. If only € 60 is distributed, the remaining € 40 accrues to the shareholders in the form of a capital reserve, and vice versa. In this view, dividends and retained earnings are fully interchangeable. Consequently, opportunities for arbitrage do not exist, neither for managers nor for investors. Again, the value of a cor-

1. *See* M.H. Miller & F. Modigliani, ´Dividend Policy, Growth, and the Valuation of Shares´, 34 *Journal of Business* 411 (1961), noting this is "obvious once you think of it". For a recent analysis, *see* F. Allen & R. Michaely, *Payout Policy*, in *Handbook of the Economics of Finance* 339 (G.M. Constantinides, M. Harris & R. M. Stulz eds.); *see also* A. Kalay & M. Lemmon, *Payout Policy*, in *Handbook of Corporate Finance. Empirical Corporate Finance* 3 (B. Espen Eckbo ed.); J.S. Ang & S.J. Ciccone, *Dividend Irrelevance Theory* in *Dividends and Dividend Policy* 95 (H. Kent Baker ed.).

poration is determined only by the earnings power of its assets (*see* § 8.2.1 *supra*). Then, any distinction between dividend and retained earnings rights, as was made in Chapter 1, would be merely academic.

This calls into question why investors pay attention to dividends, and why corporations handle the issue with such care.[2] According to Modigliani and Miller, investors could simply create a "homemade dividend" by liquidating (a part of) their holdings if desired. Conversely, corporations in need of additional funding could obtain this, not by retaining earnings but simply by issuing more stock.[3]

9.2.2 Inverting the dividend irrelevance theorem

Modigliani and Miller's dividend irrelevance theorem assumes the existence of perfect markets, similar to their capital irrelevance theorems (*see* § 8.2.2 *supra*).[4] Therefore, I again discuss the principal perspectives that relax one or more of the assumptions underlying the dividend irrelevance point of view, as well as their implications. Doing so allows us once more to identify factors that actually do affect the value of the corporation.[5] Although the debate on dividend policy and capital structure are related, the arguments used are subtly different. Thus, the matter of distributions versus retentions equally requires our full and undivided attention. Given the topic of this PhD-thesis, I am especially interested in applying arguments derived from the dividend policy debate on the creation of instruments of which the profit enti-

2. Fischer Black famously called this the "dividend puzzle". *See* F. Black, 'The Dividend Puzzle', 2 *The Journal of Portfolio Management* 5 (1976), concluding that "The harder we look at the dividend picture, the more it seems like a puzzle, with pieces that just don't fit together".
3. *But see* P. Asquith & D.W. Mullins, 'Equity Issues and Offering Dilution', 15 *Journal of Financial Economics* 61 (1986), *see also* A. Shleifer, 'Do Demand Curves for Stocks Slope Down?', 41 *Journal of Finance* 579 (1986), both suggesting a finite demand for the securities issued by a single corporation.
4. Perhaps somewhat surprisingly, the dividend irrelevance theorem has actually been challenged in modern times, and not by the least of kind. *See* H. DeAngelo & L. DeAngelo, 'The Irrelevance of the MM Dividend Irrelevance Theorem', 79 *Journal of Financial Economics* 293 (2006), arguing that the joint effect of the assumptions of Modigliani and Miller (for instance, absence of bankruptcy and agency costs) is to mandate the full distribution of earnings, so that retention is impossible. This claim is controversial. *See* J.C. Handley, 'Dividend Policy: Reconciling DD with MM', 87 *Journal of Financial Economics* 528 (2008), contending that when stock repurchases are considered as negative share issuances, retention is possible and that DeAngelo and DeAngelo ignored related agency effects.
5. Some have argued that dividends should not merely be considered by economic standards, but rather ought to be considered as a social phenomenon. *See* G.M. Frankfurter & W.R. Lane, 'The Rationality of Dividends', 1 *International Review of Financial Analysis* 115 (1992), contending that dividends currently serve as a ritual, reaffirming residual shareholder rights in a universally understood manner. This view appears somewhat farfetched, and I will abstain from discussing it in more detail. For a similarly slightly desperate account, *see* Black 1976, *supra* note 2.

tlements are legally different (for instance, inferior liquidation surplus shares versus superior dividend shares) and not merely factually following investor choices. Importantly, Chapter 9 only considers the reasons for declaring a dividend or retaining earnings, not the question to which extent distributions can lawfully be made. This matter is addressed in § 16.4, § 22.4 and § 28.4 *infra*, respectively, as part of the comparative corporate governance analysis.

9.3 Taxes and clienteles

9.3.1 General concept

A first rationale for the payment of dividends could relate to the presence of taxes. Taxes are principally disregarded in Modigliani and Miller's dividend irrelevance theorem. Including them gives rise to some rather interesting observations.[6] Whenever (long term) capital gains are taxed at a lower rate than dividends, rational investors would prefer corporations not to make any dividend distributions, as doing so would merely lower their return. Instead, stock repurchases would be more cost-efficient. As there exists no legal obligation to dispose of securities, the realization of capital gains by sellers is voluntary; their taxation may be postponed.[7] However, differences in taxation do not necessarily undermine the dividend irrelevance theorem – according to advocates of the dividend irrelevance theorem, that is. In their view, investors with differing payout preferences may be distributed amongst corporations to constitute an appropriate clientele for each payout ratio.[8] Corporations having a higher payout ratio are thus more likely to attract investors with lower marginal tax rates and vice versa.[9] Consequently, managers could support the stock price by adopting a dividend policy that appeals to investors whose preferences are not yet served by other corporations.

6. Dividend clientele models focus on the effects of taxes, and thus may be compared to trade-off theory concerning corporate capital structure. *See* § 8.3 *supra*.
7. *See* Kalay & Lemmon 2008, *supra* note 1, at 11, noting that when taxes are deferred for 20 years at a discount rate of 10%, taxes are effectively reduced by 85%.
8. *See* Miller & Modigliani 1961, *supra* note 1.
9. A distinction can be made between static and dynamic clientele models. In static clientele models, investors only trade once, whereas in dynamic clientele models, investors can switch their positions. This allows for tax evasive strategies. *See* M.H. Miller & M.S. Scholes, 'Dividends and Taxes', 6 *Journal of Financial Economics* 333 (1978), noting that the tax disadvantages of dividends may be (partially) offset by interest deductions on borrowings and investing the proceeds in tax-sheltered accounts. However, dynamic models also introduce transaction costs, which reduce turnover. *See* R. Michaely, J-L. Vila & J. Wang, 'A Model of Trading Volume with Tax-Induced Heterogeneous Valuation and Transaction Costs', 5 *Journal of Financial Intermediation* 471 (1996). I will abstain from reviewing the distinction between static and dynamic clientele models in further detail.

Empirical research on the presence of clientele effects has taken into consideration a variety of factors and adopted a multitude of designs.[10] Some studies have focused on ex-dividend date trading behavior. When transaction costs are disregarded, the dividend should theoretically equal the stock's price drop (whether this prediction holds in practice remains a debate of its own). Accordingly, a dividend of € 5 should result in a drop in the share price of € 5. If the dividend and the price loss do not match, arbitrage opportunities will exist. If stocks are sold before the ex-dividend date, the tax liability rests more on the capital gain than on the dividend, and vice versa. This suggests that investors who retain their shares will have a lower effective tax rate. Elton and Gruber's findings were consistent with these expectations.[11] Petit's study, addressing after-tax costs of capital, similarly found that investors focus on either dividends or capital gains based on their tax status.[12] Additionally, based on an analysis of the Swedish stock market, Dahlquist, Robertson and Rydqvist observed a clientele effect by institutional investors. According to their findings, investment funds that face a higher tax rate on dividends as compared to capital gains shift their portfolios away from dividend paying stocks.[13] However, other studies observe that attracting a clientele composed of institutional investors virtually necessitates a dividend being paid. In fact, institutional ownership increases dividend payouts,[14] although such parties do not exhibit a strong preference for high-yielding stocks.[15] Naturally, not all issuing corporations have a tax-based institutional investor dividend clientele. However, if present, such a clientele may create comparative advantages in monitoring management, thus explaining the "stickiness" of dividends.[16]

---

10. For an overview, *see* S. Saaidi & S. Dutta, *Taxes and Clientele Effects* in *Dividends and Dividend Policy* 127 (H. Kent Baker ed.); *see also* Allen & Michaely 2003, *supra* note 1.
11. *See* E.J. Elton & M.J. Gruber, 'Marginal Stockholder Tax Rates and the Clientele Effect', 52 *The Review of Economics and Statistics* 68 (1970).
12. *See* R.R. Petit, 'Taxes, Transactions Costs and the Clientele Effect of Dividends', 5 *Journal of Financial Economics* 419 (1977) (finding a dividend clientele effect, although its influence on portfolio choice was "not large"). For a more recent version of this argument, *see* J.R. Graham, R. Michaely & M.R. Roberts, 'Do Price Discreteness and Transactions Costs Affect Stock Returns? Comparing Ex-Dividend Pricing Before and After Decimalization', 58 *Journal of Finance* 2611 (2003).
13. *See* M. Dahlquist, G. Robertsson & K. Rydqvist, 'Direct Evidence of Dividend Tax Clienteles', 28 *Journal of Empirical Finance* 1 (2014). The opposite – i.e. firms considering the preferences of their larger shareholders when adjusting the dividend – can be observed as well. *See* M. Holmen, J.D. Knopf & S. Peterson, 'Inside Shareholders' Effective Tax Rates and Dividends', 32 *Journal of Banking and Finance* 1860 (2008).
14. *See* A.D. Crane, S. Michenaud & J.P. Weston, 'The Effect of Institutional Ownership on Payout Policy: Evidence from Index Thresholds', 29 *Review of Financial Studies* 1377 (2016), finding that 1 % higher institutional ownership results in 8 % higher dividends.
15. *See* Y. Grinstein & R. Michaely, 'Institutional Holdings and Payout Policy', 60 *Journal of Finance* 1389 (2005), noting that institutional investors avoid corporations not making distributions; *see also* Petit 1977, *supra* note 12.
16. *See* F. Allen, A.E. Bernardo & I. Welch, 'A Theory of Dividends Based on Tax Clienteles', 55 *Journal of Finance* 2499 (2000); *see also* A. Shleifer & R.W. Vishny, 'Large Shareholders

9.3.2 Critiques on the tax and clientele models

Theoretically, the implications of the clientele model are not as straightforward as they may appear at first sight. Retail investors might effectively have no choice but to focus on dividend paying stocks if pursuing capital gains entails considerable transaction costs. Institutional investors could equally prefer dividends over capital gains, as they typically enjoy a tax-exempt dividend status.[17] Meanwhile, a high dividend might also be interpreted as a market signal that the distribution level is no longer sustainable.

Empirical studies of clientele models delivered unconvincing results. Black and Scholes, having formed stock portfolios and making long-term dividend estimates, concluded there would be no *ex ante* possibility for investors to determine whether the higher or lower payout stock would deliver superior total returns either before or after tax, whereas concentrating investments in either category of shares reduced diversification.[18] Conversely, Litzenberger and Ramaswamy made short-term estimates of dividends. Their findings actually did suggest that a clientele effect was present,[19] and a debate followed.[20] Interestingly, Kalay and Michaely argued that both studies were inconsistent with a tax clientele effect.[21] Moreover, Lewellen et al., using data obtained from a stock broker, observed that investors in higher tax brackets also hold substantial amounts of dividend paying stocks. They attribute differences in distribution preferences to age and retirement status instead of taxes.[22] More

---

and Corporate Control', 94 *Journal of Political Economy* 461 (1986).

17. *But see* J.B. Long, 'The Market Valuation of Cash Dividends: A Case to Consider', 6 *Journal of Financial Economics* 235 (1978), who discusses the peculiar case of Citizens Utilities. In 1956, this corporation created two classes of stock, which differed only in the sense that whereas Series A paid cash dividends, Series B paid stock dividends. Both payments were highly stable and predictable. The stock dividends were exempt from taxes and, additionally, 8-10 % higher. Nevertheless, the Series A (cash dividend) stock commanded a small premium.
18. *See* F. Black & M. Scholes, 'The Effects of Dividend Yield and Dividend Policy on Common Stock Prices and Returns', 1 *Journal of Financial Economics* 1 (1974).
19. *See* R. Litzenberger & K. Ramaswamy, 'The Effect of Personal Taxes and Dividends on Capital Asset Prices: Theory and Empirical Evidence', 7 *Journal of Financial Economics* 163 (1979); *see also* R. Litzenberger & K. Ramaswamy, 'Dividends, Short Selling Restrictions, Tax Induced Investor Clientele and Market Equilibrium', 35 *Journal of Finance* 469 (1980).
20. *See* R.H. Litzenberger & K. Ramaswamy, 'The Effects of Dividends on Common Stock Prices Tax Effects or Information Effects?', 37 *Journal of Finance* 429 (1982); *see also* M.H. Miller & M.S. Scholes, 'Dividends and Taxes: Some Empirical Evidence', 90 *The Journal of Political Economy* 1118 (1982).
21. A. Kalay & R. Michaely, 'Dividends and Taxes: A Re-Examination', 29 *Financial Management* 55 (2000), arguing that during the ex-dividend period, abnormal stock returns are high (but unrelated to the dividend yield), and attributing the differences in findings to the varying time-frames of the respective studies.
22. *See* W.G. Lewellen et al., 'Some Direct Evidence on the Dividend Clientele Phenomenon', 33 *Journal of Finance* 1385 (1978).

recently, Graham and Kumar have confirmed the findings of Lewellen et al.[23] They found that retail investors generally prefer non-dividend paying stocks. Holdings in this category are two times larger than investments in dividend paying shares. However, for older, low-income retail investors, the opposite was true. Age (primarily), tax and risk-aversion all appear to influence dividend preferences. As such, dividend clientele effects may have a life-cycle origin, at least as far as retail investors are concerned.[24] Importantly, the dividend life-cycle clientele is investor- rather than issuer-oriented.

9.4 Dividend uncertainty & behavioral approaches

9.4.1 General concept

The payment of dividends may also be explained based on an argument of uncertainty. The problem of uncertainty of future investments and profits is at the heart of the models of Lintner and Gordon. Following a series of interviews with financial executives, Lintner concluded that future dividends were considered both thoroughly and invariably in connection to the existing distribution rate. Only when the corporate earnings potential was deemed to have increased permanently, any improvements in the annual results would be reflected – partially – in the dividends, with further adjustments being made in subsequent years ("dividend smoothing"). Thus, managerial conservatism meant that distributions lagged earnings. Moreover, Lintner formulated a model of partial dividend adjustments involving a corporation-specific coefficient, based on the targeted payout ratio, changes in current earnings and the size of previous dividends.[25] In empirical studies, the model proved highly accurate.[26] It remains relevant, even today[27] and also outside the US.[28] The observed

23. *See* J. Graham & A. Kumar, 'Do Dividend Clienteles Exist? Evidence on Dividend Preferences of Retail Investors', 61 *Journal of Finance* 1305 (2006).
24. *See* Graham & Kumar 2006, *supra* note 23.
25. *See* J. Lintner, 'Distribution of Income of Corporations Among Dividends, Retained Earnings, and Taxes', 46 *American Economic Review* 97 (1956). For a contemporary discussion, *see* Ang & Ciccone 2009, *supra* note 1; *see also* Allen & Michaely 2003, *supra* note 1, at 349-351.
26. *See* E.F. Fama & H. Babiak, 'Dividend Policy: An Empirical Analysis', 63 *Journal of the American Statistical Association* 1132 (1968).
27. *See* M.T. Leary & R. Michaely, 'Determinants of Dividend Smoothing: Empirical Evidence', 24 *Review of Financial Studies* 3197 (2011), finding that smoothing still takes place, but mainly by larger, low-growth firms; *see also* A. Brav et al., 'Payout Policy in the 21st Century', 77 *Journal of Financial Economics* 483 (2005), concluding that the link between dividends and earnings still exists, albeit in a weaker form, as managers have come to favor the more flexible mechanism of stock repurchases (*see* § 7.3.1 *supra*) which were virtually absent in 1956.
28. *See* H. von Eije & W.L. Megginson, 'Dividends and Share Repurchases in the European Union', 89 *Journal of Financial Economics* 347 (2008); *see also* M. Goergen, L. Renneboog

dividend smoothing would result in consistent patterns of dividend payments, which the stock market was felt to put a premium on over erratic, short term fluctuations.[29] Consequently, a drop in earnings would not necessarily result in a direct dividend cut. However, the dividend would be maintained only if management was confident the adverse changes were temporary and could be endured until more favorable circumstances returned (*see* § 8.2.3 *supra*, regarding Royal Dutch Shell). Losses are a necessary but insufficient condition for dividend reductions,[30] which are more likely to occur when difficulties persist for 3 years or more. Absent binding debt covenants, dividends are more often decreased than entirely abolished. The longer the dividend history, the more reluctant managers become to cancel distributions.[31] In Lintner's view, not only a connection existed between investments and dividend policy; he even claimed that management decided on dividends first, and investments second.[32] Indeed, evidence suggests that such a connection exists.[33] As such, Lintner's concept of dividend smoothing contradicts much of residual dividend policy theory, which states that the dividend is merely a derivative of the amount of investments, causing unstable dividend over time.[34]

Gordon concurred with Lintner. In the 1950s, Gordon developed the dividend discount model, which posits that the value of a stock can be calculated by predicting the value of an infinite stream of future dividends and discounting these to present terms.[35] Building on this concept, Gordon argued

& L. Correia da Silva, 'When do German Firms Change Their Dividends?', 11 *Journal of Corporate Finance* 375 (2005), who find support for the Lintner-model in Germany but also observe, in contrast to the US, that a majority of the reductions or cancellations are temporary.

29. *See* Allen & Michaely 2003, *supra* note 1, at 349, showing that between 1972 and 1998, aggregate dividends only fell twice, by a very small degree, whereas aggregate earnings fell five times, to a greater extent. *But see* B.M. Lambrecht & S.C. Myers, 'A Lintner Model of Payout and Managerial Rents', 67 *Journal of Finance* 1761 (2012), arguing that dividend smoothing might simultaneously serve to smooth the managerial flow of perquisites.

30. *See* Goergen, Renneboog & Correia da Silva 2005, *supra* note 28; *see also* H. DeAngelo & L. DeAngelo, 'Dividend Policy and Financial Distress: An Empirical Investigation of Troubled NYSE Firms', 45 *Journal of Finance* 1415 (1990).

31. *See* H. DeAngelo, L. DeAngelo & D.J. Skinner, 'Dividends and Losses', 47 *Journal of Finance* 1837 (1992); *see also* DeAngelo & DeAngelo 1990, *supra* note 30.

32. *See* Lintner 1956, *supra* note 25. Recall that according to Modigliani and Miller, dividend and investment policy are fully separable. *See* § 8.2.2 *supra*.

33. *See* M.Z. Frank & V.K. Goyal, 'Capital Structure Decisions: Which Factors are Reliably Important?', 38 *Financial Management* 1 (2009); *see also* Allen & Michaely 2003, *supra* note 1.

34. *See* D.M. Smith, 'Residual Dividend Policy', in: *Dividends and Dividend Policy* 115 (H. Kent Baker ed.). Consistent with Lintner's findings, surveys held under financial executives failed to find support for the residual approach. *See* H. Kent Baker & D.M. Smith, 'In Search of a Residual Dividend Policy', 15 *Review of Financical Economics* 1 (2006); *see also* Brav et al. 2005, *supra* note 27; H. Kent Baker, G. Farrelly & R. Edelman, 'A Survey of Management Views on Dividend Policy', 14 *Financial Management* 78 (1985).

35. *See* M.J. Gordon & E. Shapiro, 'Capital Equipment Analysis: The Required Rate of Profit', 3 *Management Science* 102 (1956).

that risk-averse investors may well apply a progressive instead of a constant discount rate in valuing more distant future dividends.[36] Dividends of € 100, to be received in 3 years from now, may be discounted at a rate of 5 % annually, but dividends thereafter could be discounted at an annual rate of for instance 10 %. Consequently, the dividend in year 3 is worth € 86.40, but the dividend in year 4 only has a value of € 78.50. This is due to the fact that over time, the likelihood of poor performance increases. However, reducing near-term dividends whilst raising distant ones then becomes highly relevant for valuing stocks.[37] By extension, the same applies to dividend policy generally. Phrased differently, future growth is risky.[38]

The notion that some investors might prefer the relative predictability of dividends, as put forward by traditional finance scholars, appears surprisingly in line with modern behavioral insights.[39] (Thus, the distinction between traditional and behavioral finance may be smaller than some would believe.) These loosen the presumption of rationality of market actors (*see* § 2.2.5 *supra*). The behavioral disciplines provide various reasons for making dividend distributions. Mentally, investors may separate dividend income and capital gains, and treat them differently. This implies that more utility can be gained from receiving € 2 in dividends and € 8 in capital gains vis-a-vis a pure € 10 capital gain.[40] Additionally, sensitivity to losses is likely bigger than sensitivity to

36. In one of his subsequent papers, Lintner also studied the implications of uncertainty. He argued that, unless all shareholders had identical views regarding any future aspects of the corporation and alternative investment opportunities, a clear preference should exist over the payout ratio, as increasing it reduces the uncertainty associated with future distributions. *See* J. Lintner, 'Dividends, Earnings, Leverage, Stock Prices and the Supply of Capital to Corporations', 44 *The Review of Economics and Statistics* 243 (1962). Given the similarities, I have abstained from discussing the works of Walter. *See* J.E. Walter, 'Dividend Policy: Its Influence on the Value of the Enterprise', 18 *Journal of Finance* 280 (1963), who also noted the uncertainty of more distant dividend payments.
37. *See* M.J. Gordon, 'Dividends, Earnings and Stock Prices', 41 *Review of Economics and Statistics* 99 (1959); *see also* M.J. Gordon, 'The Savings, Investment and Valuation of the Corporation', 44 *Review of Economics and Statistics* 37 (1962); M.J. Gordon, 'Optimal Investment and Financing Policy', 18 *Journal of Finance* 264 (1963).
38. *See* M.J. Gordon, 'Corporate Finance under the MM Theorems', 18 *Financial Management* 19 (1989).
39. For a contemporary analysis, *see* M. Baker & J. Wurgler, *Behavioral Corporate Finance: An Updated Survey*, in *Handbook of the Economics of Finance* 357, 386 (G.M. Constantinides, M. Harris & R. M. Stulz eds.); *see also* N. Barberis & R. Thaler, *A Survey of Behavioral Finance*, in *Handbook of the Economics of Finance* 1053, 1109 (G.M. Constantinides, M. Harris & R. M. Stulz eds.); H. Shefrin, *Behavioral Explanations of Dividends*, in: *Dividends and Dividend Policy* 179 (H. Kent Baker ed.); I. Ben-Dadvid, *Dividend Policy Decisions*, in *Behavioral Finance: Investors, Corporations, and Markets* 435 (H. Kent Baker & J.R. Nofsinger eds.).
40. *See* R. Thaler & E. Johnson, 'Gambling With the House Money and Trying to Break Even: the Effects of Prior Outcomes on Risky Choice', 36 *Management Science* 643 (1990); *see also* D. Kahneman & A. Tversky, 'Prospect Theory: An Analysis of Decision Under Risk', 47 *Econometrica* 263 (1979).

gains of the same magnitude ("mental accounting").[41] Finally, restricting consumption to dividend income reduces temptations ("self-control") and serves to protect the principal.[42] A behavioral- or uncertainty-based approach to investing may equally stem from life-cycle considerations. Older investors have a shorter window of opportunity to realize a return on their investment and to make up for any losses.[43] This would give rise to a behavioral-based life-cycle dividend clientele, in addition to a tax-based life-cycle dividend clientele. This behavioral-based life-cycle dividend clientele is again investor- rather than issuer-oriented.

Until this point, § 9.3.1 has addressed the receivers of dividends. However, corporations equally apply behavioral insights when deciding upon distributions, and especially consider the preferences of their larger shareholders.[44] Over time, managers may initiate dividends when these are valued at a premium and omit them when such a premium is absent ("dividend catering").[45] The catering model can be extended to include increases and decreases.[46] In the US, dividend paying stocks commanded a premium from 1963 until 1967, whereas a discount applied from 1978 until 2000. In Germany, non-voting preference shares gained traction from 1973-1987, became widely popular from 1988-2002 and went out of vogue after 2003. Although total return of common and non-voting preference shares differed hardly from 1955 onwards (ranging from -0.2% to 0.1% on a monthly basis) large price swings (of up to 40 %) between the two types of securities can be observed.[47] Naturally, managers would be all too happy to issue the most equity instruments either with or without a fixed dividend if price differences of such magnitude are involved. In fact, it could be argued that a dividend premium reflects a (temporary) preference for "safer", stable dividend payers over non-dividend paying growth

41. *See* R.H. Thaler, 'Mental Accounting and Consumer Choice', 4 *Marketing Science* 199 (1985).
42. *See* H.M. Shefrin & M. Statman, 'Explaining Investor Preference for Cash Dividends', 13 *Journal of Financial Economics* 253 (1984), also discussing the regret that might be felt if stocks that are sold to fund consumption subsequently appreciate in value, and arguing there would be less regret if consumption is funded from dividends.
43. *See* Graham & Kumar 2006, *supra* note 23, finding that for older investors, consumption is positively related to dividends, a relationship that is weaker for younger investors; *see also* H.M. Shefrin & R.H. Thaler, 'The Behavioral Life-Cycle Hypothesis', 26 *Economic Enquiry* 609 (1988).
44. *See* Holmen, Knopf & Peterson 2008, *supra* note 13.
45. *See* M. Baker & J. Wurgler, 'A Catering Theory of Dividends', 59 *Journal of Finance* 1125 (2004); *see also* Long 1978; *supra* note 17.
46. *See* W. Li & E. Lie, 'Dividend Changes and Catering Incentives', 80 *Journal of Financial Economics* 293 (2006). *But see* G. Hoberg & N.R. Prabhala, 'Disappearing Dividends, Catering and Risk', 22 *The Review of Financial Studies* 79 (2009), arguing that business risks are a significant determinant of dividend omissions.
47. *See* S. Daske, *Vorzugsaktien in Deutschland. Historische und rechtliche Grundlagen, ökonomische Analyse, empirische Befunde* 441 (Springer, 2019).

firms.[48] In this sense, catering to investors by initiating a dividend has been considered a sign of maturity.[49]

9.4.2 *Critiques on uncertainty & behavioral models*

Taken together, the argument of Lintner and Gordon has been referred to as the "bird-in-hand" theory. Accordingly, investors prefer the relative predictability of dividends ("one bird in the hand") over the uncertainty of potential capital gains ("two birds in the bush").[50] From a traditional finance perspective, these models have been referred to as the "bird-in-hand" fallacy, as dividends received are frequently reinvested in stock of the corporation which declared them in the first place. In that case, their perceived safety diminishes. Moreover, it has been argued that what truly matters are not the risks associated with dividends, but instead the risks in relation to the long-term earning potential of the corporation's assets.[51]

9.5 Dividends as signals

9.5.1 *General concept*

A further reason to pay dividends relates to the possibility of using such distributions as signals. As the Modigliani and Miller dividend irrelevance

---

48. *See* Baker & Wurgler 2004, *supra* note 45.
49. *See* H. DeAngelo, L. DeAngelo & R.M. Stulz, 'Seasoned Equity Offerings, Market Timing, and the Corporate Lifecycle', 95 *Journal of Financial Economics* 275 (2010); *see also* L. Bulan, N. Subramanian & L. Tanlu, 'On the Timing of Dividend Initiations', 36 *Financial Management* 31 (2007).
50. The bird-in-hand concept has been derived from the *Fables*, as allegedly written by Aesop, a legendary 6th century BC Greek poet. One translation is the following:

    The Nightingale and the Hawk

    A Nightingale was sitting on a bough of an oak and signing, as her custom was. A hungry Hawk presently spied her, and darting to the spot seized her in his talons. He was just about to tear her to pieces when she begged him to spare her life: "I'm not big enough", she pleaded, "to make you a good meal: you ought to seek your prey among the bigger birds." The Hawk eyed her with some contempt. "You must think me very simple," said he, "if you suppose I am going to give up a certain prize on the chance of a better of which I see at present no signs."

    See A. Rackham, *Aesop's fables* 187 (Dover, 2010). Another of Aesop's *Fables* concerns the *leonina societas* (i.e. the partnership in which the lion excludes all others from profits). *See* A. Rackham, *Aesop's fables* 85 (Dover, 2010). Thus, Aesop has, perhaps unintentionally, made some rather important contributions to corporate law.
51. *See* D.R. Fischel 'The Law and Economics of Dividend Policy', 67 *Virginia Law Review* 699 (1981); *see also* S. Bhattacharya, 'Imperfect Information, Dividend Policy, and "The Bird in the Hand" Fallacy', 10 *Bell Journal of Economics* 259 (1979).

theorem assumes perfect markets, they also disregard information asymmetries.[52] Meanwhile, such asymmetries do exist, and dividends can be said to contain information, both on future cash flows[53] as well as (more indirectly) on sources and uses of corporate funding.[54] Managers with inside information can therefore use dividends to convey their knowledge to outside investors. In this fashion, dividends serve to remedy information asymmetries. This state of affairs might tempt every single corporation to increase its payout. However, dividends are not free.[55] Therefore, the signal cannot be easily replicated by less solvent corporations.[56] Thus, the value of the information channeled through the distribution might offset the costs involved with sending the signal (i.e. taxation).[57] Especially for dual class equity structure corporations, dividend signals could be credible, informative performance measures.[58]

9.5.2 Critiques on signaling models

As younger firms are most affected by information asymmetries, they especially could benefit from dividend signaling. However, developing businesses often lack the resources to transmit such messages.

The signaling hypothesis would imply that dividend adjustments – or at least those unanticipated by the market, *see* § 2.2.5 *supra* – should be followed by stock price changes in the same direction. Indeed, there exists abundant

---

52. The dividend signaling model may be compared to pecking-order theory concerning the corporate capital structure, as both focus on the importance of information. *See* § 8.4 *supra*.
53. *See* Bhattacharya 1979, *supra* note 51.
54. *See* M.H. Miller & K. Rock, 'Dividend Signaling under Asymmetric Information', 40 *Journal of Finance* 1031 (1985). Modigliani and Miller acknowledged the potential informational aspects of dividends at an early stage as well. *See* Modigliani & Miller 1961, *supra* note 1.
55. Various types of expenses have been identified. *See* Miller & Rock 1985, *supra* note 54, including the costs of foregone investments; *see also* Bhattacharya 1979, *supra* note 51, referring to the costs of outside financing.
56. On the signaling mechanism in general, *see* A. Kalay, 'Signaling, Information Content and the Reluctance to Cut Dividends', 15 *The Journal of Finance and Qualitative Analysis* 855 (1980); *see also* S.A. Ross, 'The Determination of Financial Structure: The Incentive-Signaling Approach', 8 *Bell Journal of Economics* 23 (1977). For a contemporary analysis of the dividend signaling models discussed, *see* Kalay & Lemmon 2008, *supra* note 1, at 37; *see also* G. Filbeck, 'Asymmetric Information and Signaling Theory', in: *Dividends and Dividend Policy* 163 (H. Kent Baker ed.).
57. *But see* Y. Amihud & M. Murgia, 'Dividends, Taxes and Signaling: Evidence from Germany', 52 *Journal of Finance* 397 (1997), finding that dividend increases stimulate share prices of German corporations, although in Germany, taxes on dividends are lower than those on capital gains. Thus, taxation is not necessary to make the signal credible.
58. *See* J. Francis, K. Schipper & L. Vincent, 'Earnings and Dividend Informativeness When Cash Flow Rights are Separated from Voting Rights', 39 *Journal of Accounting and Economics* 329 (2005).

empirical evidence confirming such price movements.[59] The bigger the dividend increase, the larger the price effect.[60] However, it has been observed that market responses to dividend adjustments, which are intended to remedy information asymmetries, are themselves asymmetric. The price effects of decreases and omissions are greater than those of increases and initiations.[61] Moreover, the dividend signal may be ambiguous. Some decreases and omissions could signal that a troubled corporation is actually undergoing a turnaround, whereas others may indicate bankruptcy is looming.[62] Additionally, dividend initiations and increases also affect the stock price in years following the announcement.[63] Such findings furthermore suggest that the signal, once received, may not be properly interpreted, as a correct understanding would cause a swifter price reaction. Similarly, excess returns are documented in the year preceding the adjustment.[64]

Another implication of the signaling hypothesis is that the direction of dividend and subsequent earnings (not: price) adjustments should be identical. Here, the empirical evidence is complicated as well. Initially, scholars failed to establish such a connection.[65] Subsequent studies have equally delivered

---

59. *See* G. Grullon, R. Michaely & B. Swaminathan, 'Are Dividend Changes a Sign of Firm Maturity?', 75 *Journal of Business* 387 (2002); *see also* R. Michaely, R.H. Thaler & K. Womack, 'Price Reactions to Dividend Initiations and Omissions: Overreaction or Drift?', 50 *Journal of Finance* 573 (1995); Kalay 1980, *supra* note 56 (concerning dividend reductions); J. Aharony & I. Swary, 'Quarterly Dividend and Earnings Announcements and Stockholders' Returns: an Empirical Analysis', 35 *Journal of Finance* 1 (1980); R.R. Petit, 'Dividend Announcements, Security Performance and Capital Market Efficiency', 27 *Journal of Finance* 993 (1972).
60. *See* D.J. Denis, D.K. Denis & A. Sarin, 'The Information Content of Dividend Changes: Cash Flow Signaling, Overinvestment, and Dividend Clienteles', 29 *The Journal of Financial and Qualitative Analysis* 567 (1994).
61. *See* S. Benartzi, R. Michaely & R.H. Thaler, 'Do Changes in Dividends Signal the Furture or The Past?', 52 *Journal of Finance* 1007 (1997); *see also* R. Michaely, R.H. Thaler & K.L. Womack, 'Price Reactions to Dividend Initiations and Omissions: Overreaction or Drift?', 50 *Journal of Finance* 573 (1995), finding average excess returns of 3.4 % for dividend initiations and 7 % for omissions. *But see* P. Asquith & D.W. Mullins, 'The Impact of Initiating Dividend Payments on Shareholders' Wealth', 56 *Journal of Business* 77 (1983), arguing that the price effects of initiations are bigger than those of increases as once distributions have commenced, investors anticipate future adjustments.
62. *See* Grullon, Michaely & Swaminathan 2002, *supra* note 59; *see also* Benartzi, Michaely & Thaler 1997, *supra* note 61. On the conceptual complications of dividend signals and proposed disclosure requirements to tackle the issue, *see* V.A. Brudney, 'Dividends, Discretion and Disclosure', 66 *Virginia Law Review* 85 (1980). *But* see Fischel 1981, *supra* note 51, arguing that if dividend signaling were inefficient, corporations would not be doing it.
63. *But see* Asquith & Mullins 1983, *supra* note 61.
64. *See* Benartzi, Michaely & Thaler 1997, *supra* note 61; *see also* Michaely, Thaler & Whomack 1995, *supra* note 61.
65. *See* S.H. Penman, 'The Predictive Content of Earnings Forecasts and Dividends', 38 *Journal of Finance* 1181 (1983); *see also* R. Watts, 'The Information Content of Dividends', 46 *Journal of Business* 191 (1973).

mixed results. Although incidentally, an increase in earnings following an increase of dividends has been reported,[66] much contemporary studies reject such a relationship. Instead, dividend raises are deemed to reflect that earnings have grown in the past.[67] Thus, dividend raises are increasingly linked to the corporation becoming more mature and the declining systematic risk of having to pursue growth opportunities.[68] As such, dividend signaling can be incorporated in a life-cycle perspective on dividends. Importantly, this life-cycle view concerns the issuing corporation, and not investors.

9.6 Agency considerations of dividends

9.6.1 General concept

Agency theory has extended the analysis of Modigliani and Miller (*see* § 8.2 and § 9.2 *supra*, respectively) by removing the (implicit) assumption of aligned interests.[69] From the agency perspective, the main argument is that dividends reduce the amount of free cash flow available for managers and controlling shareholders to pursue their private interests (*see* § 10.2.2 *infra*),[70] at least in the long term.[71] In this regard, debt provides for an even stronger enforcement mechanism, since interest payments are contractually binding, as opposed to dividends.[72] According to the agency view, the costs of managers and controlling shareholders pursuing their private interests more than offsets

66. *See* D. Nissim & A. Ziv, 'Dividend Changes and Future Profitability', 56 *Journal of Finance* 2111 (2001); *see also* Aharony & Swary 1980, *supra* note 59.
67. *See* G. Grullon et al., 'Dividend Changes do not Signal Changes in Future Profitability', 78 *Journal of Business* 1659 (2005); *see also* Grullon, Michaely & Swaminathan 2002, *supra* note 59; Benartzi, Michaely & Thaler 1997, *supra* note 61. *But see* R. Michaely, S. Rossi & M. Weber, 'Signaling Safety' (2019), available at http://www.ssrn.com/, arguing that dividends indicate reduced future earnings volatility (which may be related to past earnings increases).
68. *See* G. Grullon et al. 2005, *supra* note 67.
69. For an instructive agency analysis of dividends, *see* Allen & Michaely 2003, *supra* note 1, at 396; *see also* T. Mukherjee, *Agency Costs and the Free Cash Flow Hypothesis* in *Handbook of Corporate Finance. Empirical Corporate Finance* 26 (B. Espen Eckbo ed.). On agency theory in general, *see* § 3.2.2 *supra*.
70. *See* B.R. Cheffins, 'Dividends as a Substitute for Corporate Law: The Separation of Ownership and Control in the United Kingdom', 63 *Washington & Lee Law Review* 1273 (2006); *see also* R. La Porta et al., 'Agency Problems and Dividend Policies Around the World', 55 *Journal of Finance* 1 (2000).
71. For a practical example, *see* H. DeAngelo & L. DeAngelo, 'Controlling Stockholders and the Disciplinary Role of Corporate Payout Policy: A Study of the Times Mirror Company', 56 *Journal of Financial Economics* 153 (2000).
72. *See* M.C. Jensen & W.H. Meckling, 'Theory of the Firm. Managerial Behaviour, Agency Costs and Ownership Structure', 3 *Journal of Financial Economics* 305 (1976), suggesting the use of debt to prevent squandering.

the bankruptcy costs associated with excessive distributions – as distributions are generally not excessive at all.[73] Additionally, making distributions allows the corporation to stay in touch with capital markets, reassuring the monitoring of investment bankers and other gatekeepers.[74] Not paying any dividends would require managers of mature corporations to identify investment opportunities to a challenging extent.[75] These agency and bankruptcy considerations caused Goshen to advocate a rather sophisticated dividend mechanism of choice. Under his proposal, management should set the payout date and ratio, but shareholders would be allowed to choose individually on the proportion of cash and stock distributed.[76]

9.6.2 *Critiques on agency models*

One implication of the agency approach would be that dividend increases have a larger (positive) price-effect for more mature, cash rich firms. However, the empirical literature is (again) contradictory. Some studies indeed find support for such a presumption,[77] whereas others attribute the effect to the informational content of the dividend increase.[78] Moreover, different variants of agency theory exist in respect of dividends. La Porta, Lopez-de-Silanes, Shleifer and Vishny support the "outcome variant". Accordingly, dividends should be considered the result of a system of corporate law in which minority shareholders enjoy effective legal rights and remedies to effectuate cash distributions, whereas lower dividends will be accepted in case growth opportunities are present. La Porta, Lopez-de-Silanes, Shleifer and Vishny reject the

73. *See* A. Kalay, 'Stockholder-Bondholder Conflict and Dividend Constraint,' 14 *Journal of Financial Economics* 423 (1982), arguing that bond covenants constrain dividends and that corporations distribute even less dividends than allowed by covenants. *But see* § 7.3.1 *supra*, on stock market outflows.
74. *See* F.H. Easterbrook, 'Two Agency-Cost Explanations of Dividends', 74 *The American Economic Review* 650 (1984), assuming dispersed ownership and implying that lower dividends may be acceptable for closely-held corporations or in case a controlling shareholder monitors management; *see also* Allen, Bernardo & Welch 2000, *supra* note 16.
75. *See* DeAngelo, DeAngelo & Stulz 2010, *supra* note 49, arguing the 25 largest US dividend aristocrats (i.e. S&P 500 corporations which have increased their dividends for at least 25 consecutive years) would have had cash holdings of $ 1.8 trillion, which is $ 1.2 trillion in excess of their long-term debt in 2002.
76. *See* Z. Goshen, 'Shareholder Dividend Options', 104 *Yale Law Journal* 881 (1995).
77. *See* L.H.P. Lang & R.H. Litzenberger, 'Dividend Announcements: Cash Flow Signalling vs. Free Cash Flow Hypothesis?', 24 *Journal of Financial Economics* 181 (1989), observing that average returns are significantly higher for firms with a Tobin's Q of < 1 than those with a Tobin's Q of > 1. Generally on the Tobin's Q, *see* § 4.2.3 *supra*.
78. *See* P.S. Yoon & L.T. Starks, 'Signaling, Investment Opportunities, and Dividend Announcements', 8 *Review of Financial Studies* 995 (1995), finding no differences between corporations with lower and higher Tobin's Q once controlling for factors such as dividend yield and market value (which, as Yoon and Starks admit, may themselves also be related to the availability of investment opportunities).

"substitute variant" of agency theory in respect of dividends, which postulates that high dividends are to be expected in low governance regimes. In this view, making a credible dividend commitment serves the function of maintaining a reputation for fair shareholder treatment, preserving access to capital markets and stock liquidity.[79] One advocate of the substitute variant is Cheffins. He maintains that the model of La Porta, Lopez-de-Silanes, Shleifer and Vishny lacks explanatory power, at least for the 1950s-1980s in Britian. During this period, statutory investor protection was meaningfully weaker than it is today, yet dividends were nevertheless substantial.[80] Thus, agency theory is unclear as to which party holds the initiative to ensure the declaration of dividends.

9.7 Dividends as life-cycle effects

9.7.1 General concept and indirect evidence

In § 9.2-§ 9.6, I have discussed various reasons which might explain the payment of dividends. Although there is some merit in each of those theories, they all fail to capture reality in its entirety. This is, for instance, the case when considering the dividend as a signal (*see* § 9.5 *supra*). Moreover, the supporting evidence is often – if not always – inconclusive. Therefore, all theories discussed in § 9.2-§9.6 should be rejected. Instead, the position taken in this PhD-thesis is that dividends are best explained as a reflection of the life-cycle phase of the corporation. Despite the inevitable occasional inconsistencies, the evidence supporting the life-cycle approach appears rather wide-ranging, and builds on papers rooted in many of the existing approaches to dividend policy. For instance, tax-based dividend clienteles may have a life-cycle origin, oriented towards retail investors. The life-cycle cause holds as well when behavioral-based dividend clienteles are considered (*see* § 9.3 *supra*). Behavioral clienteles could be either investor- or issuer-oriented. Were dividends to be regarded as a signal, they are increasingly being interpreted as a confirmation of maturity, instead of a predicted increase in future cash flows (*see* § 9.5 *supra*). Agency theory is, by its very nature, oriented towards established, cash-rich corporations (*see* § 9.6 *supra*) and as such acknowledges the existence of different life-cycle stages as well. Importantly, the signaling and agency approaches to dividends solely focus on the life-cycle of the

79. *See* La Porta et al. 2000, *supra* note 70.
80. *See* Cheffins 2006, *supra* note 70. Note that Cheffins acknowledges that in this era, it was standard practice to provide shareholders with veto rights regarding dividend policy. For a proper comparison with the framework of La Porta, Lopez-de-Silanes, Shleifer and Vishny, such shareholder-friendly customs should be taken into consideration as well. *See* L.R. Dallas, 'Comment on Brian R. Cheffins, *Dividends as a Substitute for Corporate Law: The Separation of Ownership and Control in the United Kingdom*', 63 *Washington & Lee Law Review* 1339 (2006).

issuing corporation and not on the investor. The finding that dividend policy is tied to the corporate life-cycle is aligned with the findings on capital structure (*see* Chapter 8), further strengthening their credibility.

According to the life-cycle perspective, younger firms have a larger investment opportunity set, but do not generate sufficient profits to finance every single business venture. Using debt may accelerate growth whilst enabling insiders to retain control, but interest payments could also result in bankruptcy, due to cash flow unpredictability.[81] Especially for technology corporations, this is not without consequences, as the threat of a default would deter firm-specific investments by employees, who are quite regularly one of the most valuable assets. Additionally, successes of young businesses are more difficult to predict, so that information costs are higher. For older firms, the situation is virtually entirely the opposite. Therefore, as the firm matures, agency costs start to offset information and bankruptcy costs. To counter rising agency costs, dividends are initiated, even if this creates tax liabilities.[82]

9.7.2 *Direct evidence*

It could well be argued that the conclusion that dividends are a life-cycle phenomenon is merely the result of circumstantial evidence. However, following a study of Fama and French, a rapidly growing body of literature has developed which concerns itself with the life-cycle hypothesis in a more direct manner.[83] (Admittedly, this development has been confined to the field of financial economics, and the mainstream legal discipline has yet to follow.) Fama and French observed that the proportion of dividend paying NYSE, AMEX and NASDAQ corporations has fallen considerably over time, from 66.5 % in 1978 to 20.8 % in 1999. They attributed the disappearance of dividends, in addition to a general lower propensity to pay, to a proportionally larger number of small, less profitable growth corporations listed on the stock exchange.[84] Fama and French concluded that three firm characteristics

81. *See* Myers 2003, *supra* note 1, at 236-238.
82. *See* L.T. Bulan & N. Subramanian, 'The Firm Life Cycle Theory of Dividends', in: *Dividends and Dividend Policy* 201 (H. Kent Baker ed.); *see also* I. Ben-David, *Dividend Policy Decisions*, in *Behavioral Finance: Investors, Corporations and Markets* 435 (H. Kent Baker & J.R. Nofsinger eds.), both concluding that scholarship on the other dividend theories broadly conforms with the life-cycle approach.
83. *See* E.F. Fama & K.R. French, 'Disappearing Dividends: Changing Firm Characteristics or Lower Propensity to Pay?', 60 *Journal of Financial Economics* 3 (2001). For a subsequent study, *see* H. Kent Baker, G.E. Powell & E.T. Veit, 'Revisiting the Dividend Puzzle: Do All of the Pieces Now Fit?', 11 *Review of Financial Economics* 241, 256 (2002), arguing that "Concentrating on one piece of the puzzle at a time […] fails to provide a satisfactory resolution because the puzzle contains multiple pieces", thus advocating the development of firm-specific life-cycle models.
84. A body of listed corporations consisting to a larger degree of younger firms (for a certain period of time) is not necessarily inconsistent with the general narrative of the total number

affect the decision to pay dividends: profitability, investment opportunity and size.[85] Dividend payers are large and highly profitable corporations, whereas non-payers are smaller and not as profitable. Von Eije and Megginson obtained similar results concerning the European Union.[86] Meanwhile, in the early 2000s, following the maturing of many of the technology corporations which went public in the (early) 90s as part of the DotCom bubble, dividends reappeared.[87] These findings are consistent with the life-cycle hypothesis and indicate that not only individual corporations, but also stock markets in general may experience different life-cycles.

The observations of DeAngelo, DeAngelo and Stulz support the conclusions of Fama and French. DeAngelo, DeAngelo and Stulz find that corporations are more likely to declare dividends when retained earnings are larger in proportion to total equity, and less likely when a larger portion of equity is contributed by investors. In other words, dividends are increasingly supplied by a relatively small number of corporate powerhouses. However, whether or not a dividend is initiated depends on various factors, and a specific trigger does not exist.[88] Denis and Osobov, in turn, conclude that the observation that dividends are more likely when retained earnings make up for a larger portion of equity not only holds for US corporations, but also for those in Canada, the UK, France, Germany and Japan.[89]

9.7.3 *Implications for dual class equity structures*

Chapter 9 has some fundamental implications for shares carrying different profit entitlements. There are a plethora of situations in which paying a dividend may or may be rather sensible, or may not be sensible at all. It will not necessarily be clear *ex ante* how the situation for a particular corporation will develop. First and foremost, therefore, the law ought to be permissive and not prohibitive with regard to dual class profit entitlements. Especially, the law should enable the creation of non-pprofit participating stock. This observation relates particularly to the situation that shares only lack a dividend right

---

of listed firms declining. *See* § 7.3.1 *supra*, on the stock market as a failing mechanism for obtaining funding by young corporations.

85. *See* Fama & French 2001, *supra* note 83, at 6-11.
86. *See* Von Eije & Megginson 2008, *supra* note 86, relating dividend distributions to corporate age.
87. *See* B. Julio & D.L. Ikenberry, 'Reappearing Dividends', 16 *Journal of Applied Corporate Finance* 89 (2004).
88. *See* DeAngelo, DeAngelo & Stulz 2010, *supra* note 56; *see also* A.N. Berger & U.F. Udell, 'The Economics of Small Business Finance: The Roles of Private Equity and Debt Markets in the Financial Growth Cycle', 22 *Journal of Banking & Finance* 623 (1998).
89. *See* D.J. Denis & I. Osobov, 'Why do Firms Pay Dividends? International Evidence on the Determinants of Dividend Policy', 89 *Journal of Financial Economics* 62 (2008). *But see* Von Eije & Megginson 2008, *supra* note 86, who fail to observe a similar effect regarding the European Union.

(i.e. the entitlement of the holder of the security in respect of retained earnings remains present, *see* § 1.3.2). Indeed, eliminating the dividend obligation frees younger firms from a continuous financial burden and allows them to innovate. For the same reason, the concept of a mandatory dividend should be rejected, provided that economic activity is not plagued by agency costs.[90]

Second, the life-cycle perspective acknowledges that the corporate dividend structure is not static. Instead, changes should be expected to occur over time. Thus, it ought to be possible to convert shares with certain financial characteristics into stocks carrying other profit entitlements. To a certain extent, the administrative requirements in this respect should even be smoothed. This applies particularly concerning the conversion of non-dividend paying stocks into common shares, following the corporation successfully making the transition towards maturity and profitability. Doing so effectively creates securities of which the financial rights have been deferred, which again should be considered in light of the aim of stimulating smaller businesses to innovate.

90. *See* T.C. Martins & W. Novaes, 'Mandatory Dividend Rules: Do They Make it Harder for Firms to Invest?', 18 *Journal of Corporate Finance* 953 (2012).

Chapter 10. Voting rights and dual class equity structures

10.1 Introduction

The right to vote has been at the cornerstone of corporate law and economics for a long period of time, at least since it was tied to the residual nature of the shareholder claim (*see* § 2.3.5 *supra*). The right to vote has even been considered the most important power of shareholders.[1] Interestingly, financial-economic models aiming to establish the value of a stock, have traditionally payed little attention to the presence and distribution of voting rights. Modigliani and Miller, for instance, simply assumed the existence of only one class of common stock.[2] Similarly, the discounted cash flow models of Gordon (*see* § 9.4 *supra*) focus on the various distributions that a shareholder will receive over time. Only when wrapping up these calculations, a minor correction can be made to allow for differences in voting rights.[3] In fact, none of the dividend approaches discussed in Chapter 9, except for agency theory, devote substantial attention to the implications of the presence and distribution of shareholder' control. Fortunately, however, there exists abundant agency literature to compensate.

To obtain a better understanding of the value of the right to vote, I first analyze the theoretical complications that dual class equity structures give rise to (§ 10.2). Subsequently, I discuss the empirical effects of dual class equity structures on the value of an individual security (§ 10.3). I then continue by examining the empirical effects of dual class equity structures on a variety of topics. These include IPO underpricing, aggregate shareholder value (i.e. the value of the firm as a whole), corporate innovation and takeover situations (§ 10.4). Having contrasted the empirical effects of dual class equity structures with the

1. *See* L.A. Bebchuk, A. Cohen & A. Ferrell, 'What Matters in Corporate Governance?', 22 *Review of Financial Studies* 783 (2009); *see also* M. Burkart & S. Lee, 'One Share-One Vote: The Theory', 12 *Review of Finance* 1 (2008).
2. *See* F. Modigliani & M.H. Miller, 'The Cost of Capital, Corporation Finance and the Theory of Investment', 48 *American Economic Review* 261 (1958). In their subsequent articles, the matter is not considered.
3. *See* A. Damadoran, *Investment Valuation: Tools and Techniques for Determining the Value of Any Asset* 448-451 (Wiley, 2013).

costs of such mechanisms as implied by agency theory, and observing a certain discrepancy, I examine the potential advantages of dual class equity structures (§ 10.5). I finish Chapter 10 by observing that the life-cycle perspective not only governs capital structure and dividend policy, but also the distribution of voting rights. Life-cycle theory should replace agency theory as the dominant paradigm of corporate law and governance, inducing me to elaborate on the nature of the life-cycle (§ 10.6).

10.2 The costs of dual class equity structures: private benefits of control

10.2.1 The Wedge and Private Benefits of Control

From an agency perspective, it is argued that dual class equity structures create a difference between the shareholder's economic interest and his voting power. For instance, a controller holding 10 % of the equity may, through shares which carry 10 votes each, control 80 % of the total voting power.[4] Similarly, if a corporation's capital exists of 50 % voting and 50 % non-voting shares, an investor holding 10 % of the voting stock effectively control 20 % of the control power. The difference between the size of the equity stake and the amount of voting power is referred to as a "wedge". (Note that the wedge and concentrated control are not necessarily interchangeable concepts. A shareholder may hold 30 % of the common shares in a corporation with a single class equity structure, effectively granting him control, although not through a wedge.) The existence of a wedge incentivizes certain inefficiencies. The same may apply in case share ownership is more dispersed. Then, ownership and control are separated by definition (*see* § 2.2.3 *supra*). Executives may, whether or not simultaneously acting as a controlling shareholder, build corporate empires for the purpose of increasing their own salary, or appointing relatives. Parties could also make "soft" loans to themselves or controlled entities, or restrict distributions to increase the amount of funds to play around with. Without aiming to be exhaustive, a board member or controlling shareholder could alternatively grant himself a corporate opportunity (i.e. take an entrepreneurial chance that could benefit the corporation) or engage in tunneling. In the latter case, properties are transferred to controlled entities at below-market prices ("asset tunneling") or shares are issued to outsiders at inflated, or to

4. This specific example is derived from the situation at media-conglomerate ViacomCBS. National Amusement Industries, which is controlled by the Redstone family, owns an equity stake of 10 % but holds 80 % of the votes. *See* L.A. Bebchuk & K. Kastiel, 'The Perils of Small-Minority Controllers', 107 *Georgetown Law Journal* 1453 (2019) (discussing the situation prior to the Viacom-CBS remerger).

insiders at deflated prices ("equity tunneling").[5] Such "related party transactions" may appear legitimate – or at least their unfairness may be difficult to prove – and are not always detected.[6] The costs of related party transactions actions and other behavior are borne partly by the executives and/or controlling shareholder, and partly by outsiders, whilst their advantages accrue solely (or for a larger part) with the party who initiated them. As such, they create "private benefits of control".[7] Dual class equity structures aggravate this state of affairs, as they contribute to entrenchment. Contrary to a situation of dispersed ownership, dual class equity structures insulate a poorly performing party from (the consequences of) disciplining market forces that might remove him, including value-enhancing bidders.[8] It is this combination of the wedge, private benefits of control and entrenchment that is particularly problematic from an agency perspective. If a wedge exists, but the controller is not entrenched, he may be removed without delay. By contrast, if the controller is entrenched, but a wedge does not exist, the controller cannot be removed, yet the equity stake provides a powerful incentive to maximize the corporations' value.[9]

10.2.2 Prevalence of dual class equity structures

Despite the complications associated with wedges and entrenchment as predicted by agency theory, corporations featuring these characteristics are economically quite significant. The presence of differentiated voting rights roughly matches the general observations in relation to concentrated and dispersed ownership models (*see* § 2.2.3 *supra*). Meanwhile, dual class equity structures (or the firms that implemented them) appear on the rise as well in the US. A 2017 study of Bebchuk and Kastiel found that the value of these firms equaled 8 % of total market capitalization,[10] whilst obtaining

---

5. *See* V.A. Atanasov, B.S. Black & C.S. Ciccotello, 'Law and Tunneling', 37 *Journal of Corporation Law* 1 (2011); *see also* S. Djankov et al., 'The Law and Economics of Self-Dealing', 88 *Journal of Financial Economics* 430 (2008); S. Johnson et al., 'Tunneling', 90 *The American Economic Review* 22 (2000); M.J. Barclay & C.G. Holderness, 'Private Benefits from Control of Public Corporations', 25 *Journal of Financial Economics* 371 (1989).
6. For an extensive analysis of these dealings, *see* L. Enriques & T.H. Tröger, *The Law and Finance of Related Party Transactions* (Cambridge University Press, 2019).
7. *See* K. Geens & C. Clottens, 'One Share-One Vote: Fairness, Efficiency and (the Case for) EU Harmonisation Revisited' (2010), available at http://www.ssrn.com/, p. 9; *see also* Burkart & Lee 2008, *supra* note 1; L.A. Bebchuk, R. Kraakman & G. Triantis, 'Stock Pyramids, Cross-Ownership and Dual Class Equity: The Mechanisms and Agency Costs of Separating Control From Cash-Flow Rights 445 (R. Morck ed., 2000).
8. On the disciplining effects of market forces, *see* H.G. Manne, 'Mergers and the Market for Corporate Control', 73 *Journal of Political Economy* 110 (1965).
9. *See* Geens & Clottens 2010, *supra* note 7; Bebchuk, Kraakman & Triantis 2000, *supra* note 6.
10. *See* L.A. Bebchuk & K. Kastiel, 'The Untenable Case for Perpetual Dual-Class Stock', 103 *Virginia Law Review* 585 (2017).

a considerably higher figure for corporations conducting an IPO (24 %). Indeed, a paper of Gompers, Ishii and Metrick, published in 2010, cited a lower figure of 6 % of total market capitalization.[11] In continental Europe, differentiated voting rights have traditionally been even more common, reflecting concentrated ownership patterns. France, Italy, Germany and Sweden all provide classic examples. In 2014, the French *Loi Florange* actually made loyalty voting shares (also referred to as time-phased or tenured voting by US authors[12]) the default regime for listed companies, unless the AGM would decide to opt out (not: in). The French regime allows one additional vote to be cast for every share held for two consecutive years. Opting out required a 2/3-majority vote.[13] In Italy, loyalty shares were granted a statutory basis in 2014, following Fiat Chrysler Automobiles' reincorporation to the Netherlands (*see* § 28.4.3 *infra*). Accordingly, the AGM could opt in with a 2/3-majority vote, to prevent others from following suit.[14] Additionally, the use of non-voting preference shares has been widespread since the 1980s, with more than 1/3 of the listed corporations deploying the instrument.[15] In Germany, non-voting

11. *See* P.A. Gompers, J. Ishii & A. Metrick, 'Extreme Governance: An Analysis of Dual-Class Firms in the United States', 23 *Review of Financial Studies* 1051 (2010), observing that on average, insiders hold 60 % of the voting rights and 40 % of the cash flow rights; *see* also Burkart & Lee 2008, *supra* note 1 for similar findings. Alternatively, controllers may have come to prefer dual class equity structures over related mechanisms.
12. Time-phased voting entails that the number of votes a shareholder can cast increases based on the duration of his stock-ownership. *See* P.H. Edelman, W. Jiang & R.S. Thomas, 'Will Tenure Voting Give Corporate Managers Lifetime Tenure?' (2018), available at http://www.ssrn.com/ (considering time-phased voting as an intermediate dual class equity structure); *see also* D.J. Berger, S. Davidoff Solomon & A.J. Benjamin, 'Tenure Voting and the U.S. Public Company', 72 *The Business Lawyer* 295 (2017); L.L. Dallas & J.M. Barry, 'Long-Term Shareholders and Time-Phased Voting', 40 *Delaware Journal of Corporate Law* 541 (2015) (finding time-phased voting firms outperformed the market considerably).
13. *See* M. Becht, 'Loyalty Shares with Tenure Voting - Does the Default Rule Matter? Evidence from the Loi Florange Experiment' (2018), available at http://www.ssrn.com/; *see also* A.M. Pacces, 'Exit, Voice and Loyalty from the Perspective of Hedge Funds Activism in Corporate Governance', 10 *Erasmus Law Review* 199 (2016); J. Delvoie & C. Clottens, 'Accountability and Short-Termism: Some Notes on Loyalty Shares', 9 *Law and Financial Markets Review* 19 (2015). For an elaborate discussion from a Dutch perspective, *see* A.A. Bootsma, 'Loyaliteitsstemrecht in het Franse wetsvoorstel-Florange', 16 *Ondernemingsrecht* 218 (2014).
14. *See* M. Ventoruzzo, 'The Disappearing Taboo of Multiple Voting Shares: Regulatory Responses to the Migration of Chrysler-Fiat' (2015), available at http://www.ssrn.com/. In Belgium, the Code of Corporations (*Wetboek van Vennootschappen en Verenigingen*) enacted in 2019 equally enabled loyalty voting structures, by temporarily reducing the required majority for midstream recapitalizations. The matter has been discussed extensively in Belgian legal journals. Reference is made especially to the 2nd volume of the 2019 edition of the *Tijdschrift voor Rechtspersoon en Vennootschap – Revue pratique des sociétés*.
15. *See* A. Pajuste, 'Determinants and Consequences of the Unification of Dual-Class Shares' (2005), available at http://www.ssrn.com/, citing a figure of 35 % for 2001; *see also* L. Zingales, 'The Value of the Voting Right: A Study of the Milan Stock Exchange Experience',

preference shares have experienced various uprisings and downfalls in popularity, but the mechanism remains present.[16] For Sweden, almost half of the listed corporations have adopted a dual class equity structure, with the superior voting stock usually carrying 10 votes each.[17]

10.3 Valuing voting rights

10.3.1 General observations

Two approaches can be distinguished in the empirical literature on the value of the right to vote (or "voting premium"). The first considers price differences between listed stocks with superior and those with inferior voting rights, whereas the second focuses on price differences between privately sold control blocks and sales of listed stocks by marginal shareholders.[18] The first approach must cope with a relative scarcity in data, as not all corporations have implemented dual class equity structures, potential differences in dividends between superior and inferior voting stocks, and liquidity issues, given that some superior voting stocks are not publicly traded. The foregoing equally applies to analyses of the value of voting rights of the second type, which additionally have to deal with potentially different rationales for control block sales (for instance financial distress versus the ambition to fund other investments).[19] Indeed, the reason to sell may have considerable consequences for

---

7 *The Review of Financial Studies* 125 (1994); finding that as of 1994, 41 % of the listed corporations had issued non-voting preference shares.

16. *See* S. Daske, *Vorzugsaktien in Deutschland. Historische und rechtliche Grundlagen, ökonomische Analyse, empirische Befunde* 193-201 (Springer, 2019), observing that at the end of 2012, these securities represented 8 % of the aggregate German share capital, and had been issued by just over 40 corporations.
17. *See* R.J. Gilson, *The Nordic Model in an International Perspective: The Role of Ownership*, in *The Nordic Corporate Governance Model* 108 (P. Lekvall ed.), finding that as of 2010, 49 % of the Swedish listed companies had a dual class equity structure in place; *see also* Pajuste 2005, *supra* note 14 (46 % as per 2001); H. Cronqvist & M. Nilsson, 'Agency Costs of Controlling Minority Shareholders', 38 *The Journal of Financial and Qualitative Analysis* 695 (2003), citing a figure of 76 %. For a thorough analysis on dual class equity structures in the Swedish governance system, *see* A.M. Pacces, *Featuring Control Power* (RILE, 2007).
18. Naturally, this is not to say that other designs are inconceivable. For an example, *see* A. Kalay, O. Karakaş & S. Pant, 'The Market Value of Corporate Votes: Theory and Evidence from Option Prices', 69 *Journal of Finance* 1235 (2014), who construct synthetic non-voting stocks through put and call options with identical strike prices and expiration dates ("put-call parity") and subsequently compare the prices of these synthetic securities with shares that actually do carry the right to vote. Despite the difference in method, their conclusions are similar to the papers discussed here. On the discount incurred when selling a control block on the open market, *see* § 2.2.3 *supra*.
19. *See* Kalay, Karakas & Pant 2014, *supra* note 17; *see also* T. Nenova, 'The Value of Corporate Voting Rights and Control: A Cross-Country Analysis', 68 *Journal of Financial*

the proceeds of a transaction, as this affects the amount of time available to identify a suitable buyer (*see* § 2.2.5 *supra*). Regardless of the methodological design, price differences between superior and inferior voting stock in both cases reflect the potential for competition in the market for corporate control – a single vote becoming crucial to decide a bidding contest – and the scope of the private benefits of control imputed by the market.[20] For marginal shareholders, the right to vote, in itself, lacks any value. However, it can become quite relevant following the emergence of a party who attributes a positive value to control. Conversely, a shareholder who has already obtained control will not be interested in acquiring more votes.

Studies in the first category, focusing either on individual[21] or multiple[22] jurisdictions, typically estimate the value of the right to vote at 5 to 15 % of the share price.[23] Thus, non-voting shares are worth approximately 5 to 15 % less than common voting stocks of the same corporation. Analyses of the second category confirm these figures.[24] Importantly, the numbers are understood

---

Economics 325 (2003); Zingales 1994, *supra* note 14.

20. *See* S. Hauser & B. Lauterbach, 'The Value of Voting Rights to Majority Shareholders: Evidence from Dual-Class Stock Unifications', 17 *The Review of Financial Studies* 1167 (2004), who refer to the two approaches as the "outsider" and the "insider" perspective, respectively.
21. *See* R.C. Lease, J.J. McConnell & W.H. Mikkelson, 'The Market Value of Control in Publicly-traded Corporations', 11 *Journal of Financial Economics* 43 (1983), observing a 5 % premium for US listed firms; *see also* W. Megginson, 'Restricted Voting Stock, Acquisition Premiums, and the Market Value of Corporate Control', 25 *Financial Review* 175 (1990) (13 %, UK); B. Amoako-Adu & B.F. Smith, 'Dual Class Firms: Capitalization, Ownership Structure and Recapitalization Back Into Single Class', 25 *Journal of Banking & Finance* 1083 (2001) (10 %, Canada); L. Zingales, 'What Determines the Value of Corporate Votes', 110 *The Quarterly Journal of Economics* 1047 (1995) (10 %, US, of which up to 30 % can be attributed to the possibility of the vote becoming pivotal in a control contest); Hauser & Lauterbach 2004, *supra* note 20 (10 %, Israel); R.W. Masulis, C. Wang & F. Xie, 'Agency Problems at Dual-Class Companies', 64 *Journal of Finance* 1697 (2009) (3.6 %, US); S. Daske, *Vorzugsaktien in Deutschland. Historische und rechtliche Grundlagen, ökonomische Analyse, empirische Befunde* 590 (Springer, 2019) (15%, Germany, whilst noting price swings of up to 40 % between common and non-voting preference shares, but also arguing total return between the two types of securities differed hardly).
22. For a notable example, *see* Nenova 2003, *supra* note 19, conducting an analysis for 18 countries and observing higher outcomes for French whilst lower outcomes for German and Scandinavian civil law systems (*see* § 4.3.1 *supra*). Note that Nenova's study has a somewhat hybrid character, as the value of control blocks is not obtained from sales data, but instead derived from a comparison between stocks with superior and those with inferior voting rights.
23. For a more skeptical analysis, *see* Z. Goshen & A. Hamdani, 'Corporate Control and the Limits of Judicial Review' (2019), available at http://www.ssrn.com/, arguing the full, long-term magnitude of the exercise of voting rights is impossible to calculate.
24. Studies in this category have been less frequent. For a prominent example, *see* A. Dyck & L. Zingales, 'Private Benefits of Control: An International Comparison', 59 *Journal of Finance* 537 (2004) who, based on a study of 39 countries, obtain an average vote premium of 10 %, ranging from – 4 % (Japan) to + 65 % (Brazil).

to be a lower bound. First, the scope of perks is traditionally hard to assess. The parties involved prefer to keep a low profile on such matters. Second, adverse selection issues are prevalent. Indeed, controlling blocks that allow for larger private benefits of control than is obvious from the share price will not be sold. Third, some shareholder-specific non-monetary private benefits of control, such as prestige and personal satisfaction, may not be transferable. Thus, they are not reflected in the share price.[25]

10.3.2 Variance, mitigating & aggravating factors

Whereas the right to vote generally encompasses 5 to 15 % of a share's value, it should be stressed that exceptions to this rule of thumb are numerous. In fact, the right to vote may be worth either much less or much more than 5 to 15 %. For some of the Nordic countries such as Finland, as well as Japan, the value of the right to vote has been found to be rather small or even negative.[26] In the Netherlands, the right to vote has similarly been observed to carry little value, in and by itself (2 %).[27] Such small figures indicate that property rights of minority shareholders are protected quite effectively.[28] Conversely, in a well-known study, Zingales found that voting shares at the Milan Stock Exchange traded at a premium of over 80 % to non-voting stock, despite the latter benefiting from a dividend entitlement.[29] In other countries with weaker standards of investor protection, lower but nevertheless considerable percentages have equally been observed.[30] The more valuable the right to vote becomes, the more problematic it gets to conform to the financial-economic tradition (*see* § 10.1 *supra*) of disregarding the aspect of control.

The voting premium varies not only between jurisdictions but also across industries and over time. Traditionally, private benefits of control have been deemed present primarily in the newspaper and professional sports sectors. Control over a media business allows a party to influence the public opinion in his own interest. Winning a prestigious athletic trophy will result in great personal satisfaction, also for the owner of the victorious sports club.[31] As a

25. For an analysis of these issues, *see* R. Adams & D. Ferreira, 'One Share-One Vote: The Empirical Evidence', 12 *Review of Finance* 51 (2008); *see also* Pacces 2007, *supra* note 17; Dyck & Zingales 2004, *supra* note 24.
26. *See* Dyck & Zingales 2004, *supra* note 24; *see also* Nenova 2003, *supra* note 19; K. Rydqvist, 'Takeover Bids and the Relative Prices of Shares That Differ in Their Voting Rights', 20 *Journal of Banking & Finance* 1407 (1996).
27. *See* Dyck & Zingales 2004, *supra* note 24; *see also* Nenova 2003, *supra* note 19.
28. *See* Dyck & Zingales 2004, *supra* note 24.
29. *See* Zingales 1994, *supra* note 14.
30. *See* Dyck & Zingales 2004, *supra* note 24; *see also* Nenova 2003, *supra* note 19.
31. *See* H. Demsetz & K. Lehn, 'The Structure of Corporate Ownership: Causes and Consequences', 93 *Journal of Political Economy* 1155 (1985), arguing concentrated ownership exists in other sectors as well, and claiming that firm size and profit variance are determining the distribution of control rights.

result, one would expect stock price differences to appear especially at media or sports corporations. (Naturally, this does not rule out that control over a firm in another sector may not also create perks.) Additionally, private benefits of control may vary over time. As national systems of corporate governance develop, they may offer either more or less room for takeovers and/or private benefits of control.[32] The 1998 Draghi-reform in Italy, making it easier for minority shareholders to sue management, and the elimination of mandatory bid obligations in Brazil have both been linked to considerable changes in voting premiums.[33] Nenova distinguished between law enforcement (referring to the likeliness of a lawsuit being initiated), investor protection (disclosure and accounting standards), takeover rights (mandatory bid requirements) and articles of assocation' provisions (golden shares and poison pills) as causes for the existence of such premiums. Whilst the effect of these factors to voting power is complementary, adequate law enforcement is found especially relevant.[34] As Kroeze has observed, the presence of a specialized business court may make a particularly noteworthy contribution.[35] Dyck and Zingales also acknowledge the importance of the overall quality of the legal system. Simultaneously, they point to extralegal issues such as the presence of competitors, the role of the public opinion and the degree to which tax compliance is enforced as contributing to a lower voting premium.[36] Thus, there are actually many institutional factors playing a role in the protection of outside minority shareholders.

10.4 The effects of dual class equity structures

10.4.1 IPO underpricing

Dual class equity structures are adopted frequently prior to the IPO. This is typically considerably easier than implementing these mechanisms post-IPO ("midstream"). However, this state of affairs creates a certain theoretical tension. On the one hand, entrenching provisions have been argued to

32. The same can be inferred from the studies of La Porta, Lopez-de-Silanes, Shleifer & Vishny. *See* § 7.4.2 *supra*. Indeed, their works and the papers discussed in § 10.3.2 are related. However, note that La Porta, Lopez-de-Silanes, Shleifer & Vishny target capital markets development (which, they argue, requires reinforcing the position of outside minority shareholders), and only assess the existence of private benefits of control and voting premiums more indirectly.
33. *See* Dyck & Zingales 2004, *supra* note 24.
34. *See* Nenova 2003, *supra* note 19.
35. *See* M.J. Kroeze, 'The Dutch Companies and Business Court as a Specialized Court' (2006), available at http://www.ssrn.com/, observing specialized courts are efficient and effective, render decisions of higher quality and can devote more time to individual matters.
36. *See* Dyck & Zingales 2004, *supra* note 24; *see also* M. Holmén & J.D. Knopf, 'Minority Shareholder Protections and the Private Benefits of Control for Swedish Mergers', 39 *Journal of Financial and Qualitative Analysis* 167 (2004).

exacerbate agency costs and decrease shareholder value (*see* § 10.2.1 *supra*). In this view, going public with such a provision in place amounts to a self-imposed discount on the share price. On the other hand, a corporation's IPO articles of association are assumed to be drafted specifically with a view to maximizing shareholder value.[37] This would imply that dual class equity structures are value-enhancing.

In general, IPOs have been found to be concluded especially when valuations are elevated.[38] Some empirical studies have found that dual class equity structure corporations are less underpriced than their single class peers. This may be due to single class equity structure corporations lowering the IPO price as to increase dispersed ownership and thus to prevent effective discipline. For dual class equity structure corporations, this rationale is absent.[39] Other studies have observed that some dual class equity structure IPOs may be underpriced. However, in this respect, dual class equity structure IPOs are no different from, and the discount is not larger than is the case with, single class IPOs.[40] At least, these findings imply that dual class equity structures do not entail huge IPO discounts. As such, they may incentivize founders to go public, thus countering the decreasing number of listed corporations (*see* § 7.3 *supra*). Consequently, the argument that the entire debate on IPO underpricing is rather pointless – as such an effect, even if present, would merely shift returns from pre- to post-IPO investors – does not hold entirely.[41]

10.4.2 Shareholder value

Whether dual class equity structures have an increasing or decreasing effect on firm value is a complex and controversial matter.[42] In 2008, Adams and Ferreira conducted a thorough and nuanced review of then-existing empirical

37. Generally on the implications of dual class IPO articles of association, *see* L.C. Field & J.M. Karpoff, 'Takeover Defenses of IPO Firms', 57 *Journal of Finance* 2002 (1857); *see also* R.M. Daines & M. Klausner, 'Do IPO Charters Maximize Firm Value? Antitakeover Protection in IPOs', 17 *Journal of Law, Economics & Organization* 83 (2001).
38. *See* M. Baker & J. Wurgler, 'Market Timing and Capital Structure', 57 *Journal of Finance* 1 (2002).
39. *See* S.B. Smart & C.J. Zutter, 'Dual Class IPOs are Underpriced Less Severely', 43 *The Financial Review* 85 (2008); *see also* S.B. Smart & C.J. Zutter, 'Control as a Motivation for Underpricing: a Comparison of Dual and Single-class IPOs', 69 *Journal of Financial Economics* 85 (2003), in both instances finding a difference of 3 percentage points.
40. *See* A.W. Butler, M.O. Keefe & R. Kieschnick, 'Robust Determinants of IPO underpricing and Their Implications for IPO Research', 27 *Journal of Corporate Finance* 367 (2014) (reviewing the existing literature and identifying robust and non-robust variables to explain IPO returns).
41. *See* Smart & Zutter 2003, *supra* note 39.
42. This question is related to, but nevertheless subtly different from the issue addressed in § 10.3. There, it concerned the effect of (the presence or absence of) voting rights on the price of a single stock. By contrast, in § 10.4.2, I discuss the consequences of deviating from the principle of "one share, one vote" on total market value of the corporation.

studies. They concluded that "[O]verall, there is some support in the literature for the hypothesis that deviations from one share-one vote affect the value of outside equity negatively."[43]

Again, two empirical approaches can be distinguished. The first approach compares the value of shares of corporations with a "one share, one vote" structure with shares of corporations featuring a dual class equity structure. Masulis, Wang and Xie, considering US firms, found that as the wedge between economic and control rights increases, cash became less valuable to outside shareholders, CEOs received higher compensation, managers engaged in value-destroying acquisitions more often and capital expenditures contributed less to shareholder value.[44] In similar vein, Gompers, Ishii & Metrick concluded that the value of US firms is positively associated with insiders' cash-flow rights and negatively related to insiders' voting rights.[45] According to their findings, corporations with a dual class equity structure are relatively more levered. This may be due to an aversion to SEOs (as these would dilute control) or could act as a check on management. Additionally, such firms are concentrated in the technology and media industries, which may be caused by private benefits of control being larger in these sectors (*see* § 10.2 *supra*) or by higher information costs of outside minority shareholders, and possibly by both.[46]

Another branch of the empirical literature analyzes stock price reactions following announcements of changes in control structures. Pajuste analyzed data of 493 listed European firms during the 1996-2002 period. In this time window, 108 corporations abolished their dual class equity structure (an event referred to as "unification"). She shows that unifying firms experience an increase in market value compared to their own previous track record (not relative to the performance of other dual class equity structure corporations).[47] This is attributed to lower private benefits of control, increased market liquidity and a more diversified (institutional) investor base. As such, maintaining a dual class equity structure acts as a drag, preventing corporations from reaching their true

43. *See* Adams & Ferreira 2008, *supra* note 24, at 85. From a methodological point of view, it should be noted that studies conducting a regression analysis involving Tobin's Q often measure the value of outside equity only and disregard the value of private benefits to controllers, as their size is more difficult to establish. Theoretically, these should be included when calculating the value of the corporation. *See* Geens & Clottens 2010, *supra* note 6, at 15.
44. *See* Masulis, Wang & Xie 2009, *supra* note 21.
45. *See* Gompers, Ishii & Metrick 2010, *supra* note 10. For comparable conclusions, *see* H. Cronqvist & M. Nilsson, 'Agency Costs of Controlling Minority Shareholders', 38 *Journal of Financial and Quantitative Analysis* 695 (2003); *see also* S. Claessens et al., 'Disentangling the Incentive and Entrenchment Effects of Large Shareholdings', 57 *Journal of Finance* 2741 (2002).
46. *See* Gompers, Ishii & Metrick 2010, *supra* note 10.
47. *See* Pajuste 2005, *supra* note 14. For similar observations, *see* I. Dittmann & N. Ulbricht, 'Timing and Wealth Effects of German Dual Class Stock Unifications', 14 *European Financial Management* 163 (2008).

(shareholder value) potential. Firms that are likely to unify are dependent on SEO, are more inclined to make acquisitions and have higher industry growth rates.[48] Ironically, these are usually the primary arguments to introduce dual class equity structures in the first place. Similarly, the announcement of the introduction may give rise to negative stock price reactions.[49] However, Hauser and Lauterbach, analyzing 84 Israeli unifications, found that the consideration paid in respect of the right to vote is similar to what market prices imply. Then, unifcations would not have an (immediate) effect on firm value.[50] Some longitudinal studies present a similar picture.[51] By contrast, Dimitrov and Jain concluded that recapitalizations which introduce a dual class equity structure are value enhancing. Firms that implement them grow faster, as measured in sales and operating income, than their non-recapitalizing peers. In fact, recapitalizing firms experience positive abnormal returns of over 20 % in a period of 4 years following the announcement. These returns are even larger (50 %) for corporations that conduct subsequent equity offerings.[52] Indeed, not being able to raise funds without having to give up control might entail that certain projects with a positive Net Present Value will not be funded. Lehn, Netter & Poulsen similarly observed that introducing a dual class equity structure is shareholder value enhancing, and argue that such structures are a cheaper alternative to going private.[53]

Naturally, these findings should be considered in their proper context. For instance, market sentiment plays a role as well in the decision to maintain a dual class equity structure. Non-voting stocks may carry a fixed dividend preference. Consequently, these instruments could be considered as cheap in some circumstances but expensive in other situations, for instance a low interest rate environment.[54] Thus, macro-economic developments equally affect the introduction or abolition of a dual class equity structure. Moreover, dual class equity structure recapitalizations or unifications may be pursued for ulterior

48. *See* Pajuste 2005, *supra* note 14.
49. *See* G.A. Jarrell & A.B. Poulsen, 'Dual-Class Recapitalizations as Antitakeover Mechanisms: the Recent Evidence', 20 *Journal of Financial Economics* 129 (1988).
50. *See* Hauser & Lauterbach 2004, *supra* note 19.
51. *See* B. Lauterbach & Y. Yafeh, 'Long Term Changes in Voting Power and Control Structure Following the Unification of Ddual Class Shares', 17 *Journal of Corporate Finance* 215 (2011).
52. *See* V. Dimitrov & P.C. Jain, 'Recapitalization of One Class of Common Stock into Dual-Class: Growth and Long-Run Stock Returns', 12 *Journal of Corporate Finance* 342 (2006); *see also* M.M. Partch, 'The Creation of a Class of Limited Voting Common Stock and Shareholder Wealth', 18 *Journal of Financial Economics* 313 (1987).
53. *See* K. Lehn, J. Netter & A. Poulsen, 'Consolidating Corporate Control: Dual-Class Recapitalizations Versus Leveraged Buyouts', 27 *Journal of Financial Economics* 557 (1990); *see also* R.J. Gilson, 'Evaluating Dual Class Common Stock: The Relevance of Substitutes', 73 *Virginia Law Review* 807 (1987), arguing that with perfect markets, dual class recapitalizations equal an LBO, but that real-world information and transaction costs entail that transactions involving superior voting stock should be banned.
54. *See* Dittmann & Ulbricht 2008, *supra* note 47.

motives. Indeed, Italian controlling shareholders who simultaneously owned considerable blocks of inferior voting stock have been known to engage in reunifications without offering consideration in respect of the superior voting stock. Specifically, this strategy would be applied in case the appreciation of the inferior voting stocks would more than offset the depreciation of the superior voting stock.[55] If such an ulterior motive is present, total market capitalization will likely be affected negatively, at least in the short-term. Nevertheless, the traditional empirical evidence on dual class equity structures, on the whole, appears inconclusive.[56] However, even such an agnostic observation would support the rejection of a mandatory (top down) one-share, one-vote approach.[57] This policy was seriously contemplated by the European Commission and Commissioner McCreevy at the advent of the 21st century.[58]

10.4.3 Family firms

Whilst § 10.4.2 discussed the general shareholder value effects of dual class equity structures, it should be stressed that the backgrounds of these mechanisms may vary considerably. Most of the dual class equity structure corporations are family controlled.[59] Theoretically, family firms are somewhat complicated phenomena. Business scholars have traditionally claimed that such firms are plagued by inefficiencies, for instance due to a lack of professional management[60] and heightened susceptibility to private benefits of control

55. *See* M. Bigelli, V. Mehrotra & P. Raghavendra Rau, 'Why are Shareholders not Paid to Give up Their Voting Privileges? Unique Evidence From Italy', 17 *Journal of Corporate Finance* 1619 (2011).
56. *See* Adams & Ferreira 2008, *supra* note 24 at 84: "[T]he findings from the empirical literature on ownership disproportionality often disagree. This should not be viewed as a weakness of this literature. Different studies use different sample periods, often in different countries, and look at different mechanisms. […] The heterogeneity in the evidence suggests that the issue is complex and that simple conclusions may not be possible."
57. *See* J. Armour et al., *Beyond the Anatomy*, in *The Anatomy of Corporate Law: A Comparative and Functional Approach* 271 (J. Armour et al. eds), on the "backlash against the ubiquitous focus on shareholder voting rights."
58. *See* McCreevy's speech delivered at the House of Lords on December 6, 2007, available at http://www.europa.eu/; *see also* ISS/Sherman & Sterling/ECGI, *Report on the Proportionality Principle in the European Union* (2006), available at http://www.ec.europa.eu/.
59. *See* R.C. Anderson, E. Ottolenghi & D.M. Reeb, 'The Dual Class Premium: A Family Affair' (2017), available at http://www.ssrn.com/, claiming that families account for 89 % of the dual class equity structure corporations, with the remaining 11 % being legacy structures; *see also* H. DeAngelo & L. DeAngelo, 'Managerial Ownership Of Voting Rights: A Study of Public Corporations with Dual Classes of Common Stock', 14 *Journal of Financial Economics* 33 (1985), concluding that in almost all sample firms, superior voting stocks are held by managers and their families.
60. On the important role of managers, *see* A.D. Chandler, *The Visible Hand: The Managerial Revolution in American Business* (Belknap Press, 1977), describing that as transportation and communications costs declined in the 19th century, opportunities emerged for those who could take advantage of economies of scale in mass production.

(*see* § 10.2 *supra*), including by the appointment of relatives.[61] One the other hand, families might be able to mitigate conflicts of interest, including agency conflicts, to a certain degree, because of their more harmonious *modus operandi*.[62] Family businesses may or may not develop into a widely held corporation as they mature, depending on the need for external funding and the degree to which outside minority investors are protected against private benefits of control.[63]

Anderson, Ottolenghi & Reeb note that family-controlled dual class equity structure corporations tend to be relatively large and old. These businesses perform solidly: there exists an almost 2 percentage point difference in return on assets (10.3 % versus 8.5 %) as compared to firms with a single class equity structure.[64] Nevertheless, investors discount the specific combination of a dual class equity structure and family control. This discount disappears when these factors are no longer jointly present. However, the discount is so large (12 %) that it may offset expropriation risks: family-controlled dual class equity structure corporations deliver superior returns of 4 % annually, as compared to their single class counterparts. As a potential explanation for the discount appearing too steep, Anderson, Ottolenghi and Reeb point towards behavioral biases against unequal voting rights, instead of purely monetary concerns.[65]

In a different study, Villalonga and Amit find that family ownership creates shareholder value only when combined with control and management (as CEO or Chair). Dual class equity structures, stock pyramids, and voting agreements all reduce the founder's premium. Family management adds value when the founder serves as the CEO or Chair, but destroys value when descendants

61. Specifically in relation to family firms, *see* R.C. Anderson, A. Duru & D.M. Reeb, 'Founders, Heirs, and Corporate Opacity in the United States', 92 *Journal of Financial Economics* 205 (2009), finding such businesses less transparent than comparable firms with dispersed share ownership.
62. *See* R.W. Masulis, P.K. Pham & J. Zein, 'Family Business Groups around the World: Financing Advantages, Control Motivations, and Organizational Choices', 24 *Review of Financial Studies* 3556 (2011), observing that pyramidal corporate structures can also be considered more benevolently, and arguing that internal capital markets can fund projects that would have failed to materialize when external capital markets are not yet fully developed.
63. *See* J. Franks et al., 'The Life Cycle of Family Ownership: International Evidence', 25 *Review of Financial Studies* 1675 (2012); *see also* M. Burkart, F. Panunzi & A. Shleifer, 'Family Firms', 58 *Journal of Finance* 2167 (2003) (describing the trade-off between appointing professional management and retaining control). On differences between legal systems regarding the protection of outside minority shareholders, *see* § 7.4.3 *supra*.
64. *See* Anderson, Ottolenghi & Reeb 2017, *supra* note 57. For similar findings, *see* R.C. Anderson & D.M. Reeb, 'Founding-Family Ownership and Firm Performance: Evidence from the S&P 500', 58 *Journal of Finance* 1301 (2003). *But see* H. Cronqvist & M. Nilsson, 'Agency Costs of Controlling Minority Shareholders', 38 *Journal of Financial and Quantitative Analysis* 695 (2003), observing that return on assets is considerably lower for Swedish family firms with a dual class equity structure in place.
65. *See* Anderson, Ottolenghi & Reeb 2017, *supra* note 57.

act in that capacity.[66] Thus, agency problems for outside minority shareholders of family-controlled corporations may differ over time (because of the emergence of a so-called "idiot heir").[67] Consequently, Villalonga and Amit conclude that a one-size-fits-all approach concerning dual class equity structures should be discouraged.[68] Similarly, Bennedsen and Nielsen observe that for family corporations, the discount on firm value associated with dual class equity structures is higher when the equity stake of the controller is smaller and the scope of private benefits is larger. However, they fail to observe an adverse effect on operating performance, bankruptcy probability, dividend policy or growth.[69]

10.4.4 Innovation

One argument in favor of dual class equity structures is based on information asymmetries associated with younger firms (*see* § 9.7.1 *supra*). Then, it could be expected that the corporations which have implemented such mechanisms tend to be more innovative than comparable, single class firms.[70] However, one study found that the number of patent applications for corporations in US states that adopt statutory anti-takeover provisions drops 20 % in 2 years after the law was enacted. This suggests that managers who do not feel the threat of shareholder oversight become entrenched and lose their focus on innovative projects. Interestingly, after 4 years of the law being passed, the effect is virtually eliminated for corporations that have a monitoring shareholder (owning 5 % of the stock or more).[71] Meanwhile, another paper indicates that anti-takeover provisions affect firm value positively especially

66. *See* B. Villalonga & R. Amit, 'How do Family Ownership, Control and Management Affect Firm Value?', 80 *Journal of Financial Economics* 385 (2006). For similar conclusions regarding German family corporations, *see* C. Andrés, 'Large Shareholders and Firm Performance—An Empirical Examination of Founding-family Ownership', 14 *Journal of Corporate Finance* 431 (2008); *see also* R.C. Anderson & D.M. Reeb, 'Founding-Family Ownership and Firm Performance: Evidence from the S&P 500', 58 *Journal of Finance* 1301 (2003).
67. *See* D. Miller et al., 'Are Family Firms Really Superior Performers?', 13 *Journal of Corporate Finance* 829 (2007), distinguishing between "lone founder businesses", where no relatives are involved (which do generate superior value), and true family businesses (which do not).
68. *See* Villalonga & Amit 2006, *supra* note 64.
69. *See* M. Bennedsen & K.M. Nielsen, 'Incentive and Entrenchment Effects in European Ownership', 34 *Journal of Banking & Finance* 2212 (2010).
70. It should be stressed that a corporation's innovation power is not based solely on the legal system of its country of residence, but instead the result of a wide range of factors, as diverse as the level of education of employees and the size of the home market.
71. *See* J. Atanassov, 'Do Hostile Takeovers Stifle Innovation? Evidence from Antitakeover Legislation and Corporate Patenting', 68 *Journal of Finance* 1097 (2013).

for corporations involved in intensive innovation.[72] Corporations with more anti-takeover provisions in place are significantly more innovative. They not only generate more patents, but also more important ones. However, for non- or less-innovative firms, the effects of anti-takeover provisions are negative. These findings suggest that managers fear unsolicited acquirers to take advantage of novel ideas without incurring the appropriate costs.[73] Consequently, anti-takeover provisions, including dual class equity structures, should not be mandated for every single firm. However, they should be available as an optional extra, and may even be an effective default rule for technology firms.

10.4.5 Takeover situations

A takeover constitutes a fundamental development for any target corporation. Occasionally, the target wishes to turn the offer down, or prefers to negotiate further on its terms. Then, anti-takeover mechanisms, such as poison pills or staggered boards, may provide a useful tool. The general empirical literature on these mechanisms is vast, and too extensive to be discussed here in full.[74] Some studies, including those involving "anti-director shareholder rights indices" (*see* § 7.4.2 *supra*) have observed that anti-takeover provisions strictly reduce shareholder value. Others are agnostic[75] or offer a more positive version of accounts. Staggered boards, for instance, may be value-enhancing, but only for innovative firms.[76] A distinction has also been made between anti-takeover arrangements that can be unilaterally adopted by directors and bilateral mechanisms (which require shareholder approval, such supermajority requirements).

72. *See* T.J. Chemmanur & X. Tian, 'Do Anti-Takeover Provisions Spur Corporate Innovation? A Regression Discontinuity Analysis' (2017), available at http://www.ssrn.com/. Admittedly, their findings relate primarily to staggered boards and poison pills. However, they could arguably be applied by analogy to dual class equity structures.
73. *See* Chemmanur & Tian 2017, *supra* note 72.
74. For an extensive meta-analysis of theoretical and empirical studies on the effects of anti-takeover provisions on shareholder value, *see* M. Straska & H.G. Waller, 'Antitakeover Provisions and Shareholder Wealth: A Survey of the Literature', 49 *Journal of Financial & Quantitative Analysis* 933 (2014) (observing that "from 1980 to 2011, well over 1900 scholarly articles on antitakeover provisions were published in peer reviewed academic journals" but showing themselves reluctant to draw any definitive conclusions on their effects on shareholder value).
75. *See* Y. Amihud, M. Schmid & S. Davidoff Solomon, 'Settling the Staggered Board Debate', 166 *University of Pennsylvania Law Review* 1475 (2018), concluding that "a staggered board, its retention, and its removal are not random and exogenous but rather endogenous, being related to firm characteristics and performance. The effect of a staggered board is idiosyncratic; for some firms it increases value, while for other firms it is value-destroying."
76. *See* R. Daines, S. Xin Li & C.C.Y. Wang, 'Can Staggered Boards Improve Value? Evidence from the Massachusetts Natural Experiment' (2018), available at http://www.ssrn.com/; *see also* K.J.M. Cremers, L.P. Litov & S.M. Sepe, 'Staggered Boards and Long-Term Firm Value, Revisited', 126 *Journal of Financial Economics* 422 (2017). Effectively, this observation mirrors the findings of § 10.4.4.

The former decrease shareholder value, but the latter have a positive effect, as they increase the long-term commitment of shareholders.[77]

Dual class equity structures have also been considered a highly effective takeover deterrent.[78] Indeed, a controller who is not perfectly satisfied with the price offered in exchange for his shares may simply reject it, without having to fear losing his lock on power by being outvoted. Meanwhile, their theoretical implications are not entirely clear. Inferior voting stocks often trade at lower prices than superior voting stocks (*see* § 10.3 *supra*). As such, they effectively make target corporations cheaper for potential acquirers wishing to obtain the entirety of the equity. However, in the absence of statutory or contractual provisions to protect the holders of inferior voting stocks, they can even be disregarded completely for the purpose of obtaining control.[79] To offer some comfort, "coattail provisions" have been developed. In short, these entitle investors in inferior voting shares to participate on equal terms in the takeover offer, also with a view to the price per share.[80] Coattail provisions could be either optional or mandatory. However, mandating them inevitably makes the acquisition of control more expensive or, if the total takeover price remains constant, decreases the consideration received by the holder of superior voting shares. Consequently, he will be less likely to support the offer. In both cases, coattail provisions discourage an acquirer from actually launching a takeover offer, regardless of whether it concerns a value-decreasing or a value-increasing bid. Thus, such provisions ultimately contribute to entrenchment.[81]

---

77. *See* K.J.M. Cremers, S. Masconale & S.M. Sepe, 'Commitment and Entrenchment in Corporate Governance', 110 *Northwestern University Law Review* 727 (2016).
78. *See* Gompers, Ishii & Metrick 2010, *supra* note 10 (calling dual class stock "the most extreme example of anti-takeover protection"); *see also* Daines & Klauser 2001, *supra* note 37, arguing that "Dual class stock and staggered boards provide by far the strongest protection."
79. *See* C. At, M. Burkart & S. Lee, 'Security-voting Structure and Bidder Screening', 20 *Journal of Financial Intermediation* 458 (2011).
80. On such provisions, *see* Amoako-Adu & Smith (2001), *supra* note 21, focusing on the Canadian context, in which they are not the result of corporate law but are included in the listing requirements; *see also* S. Taylor & G. Whittred, 'Security Design and the Allocation of Voting Rights: Evidence from the Australian IPO Market', 4 *Journal of Corporate Finance* 107 (1998), analyzing the Australian situation; K. Rydqvist, 'Dual-Class Shares: a Review', 8 *Oxford Review of Economic Policy* 45 (1992), discussing takeovers in Sweden. Note that in a sense, a coattail provision may be viewed as a variant of the mandatory bid rule. On this mechanism, *see* L. Enriques, 'The Mandatory Bid Rule in the Takeover Directive: Harmonization without Foundation', 1 *European Company and Financial Law Review* 440 (2004).
81. *See* P. Davies, K. Hopt & W-G. Ringe, 'Control Transactions', in *The Anatomy of Corporate Law. A Comparative and Functional Approach* 205, 231-234 (R. Kraakman et al., 2017), L.A. Bebchuk, 'Efficient and Inefficient Sales of Corporate Control', 109 *Quarterly Journal of Economics* 957 (1994); *see also* M. Kahan, 'Sales of Corporate Control', 9 *Journal of Law, Economics, and Organization* 368 (1993).

However, not implementing coattail provisions (in the optional or in the mandatory form) is neither without complications. In that case, rational acquirers will focus their efforts solely on the securities that actually do enable them to obtain control (i.e. the superior voting stocks). However, the fact that they have to spend less also means they can engage more aggressively in the bidding process. In this scenario, a controller could receive a higher premium, but potentially at the expense of the shareholders of the acquiring corporation (the "bidder's curse").[82]

10.5 The benefits of dual class equity structures: idiosyncrasies

10.5.1 Introduction

The traditional argument against dual class equity structures is that these decrease shareholder value. Such mechanisms enable private benefits of control and entrenchment whereas they reduce accountability, in general as well as from takeovers (*see* § 10.2 *supra*). Instead, a proportional distribution of control rights would be more sensible. Allegedly, this approach results logically from the residual nature of shareholder ownership (*see* § 2.3.5 *supra*). Even if this were true, one could argue that the acquisition of inferior voting stock is a voluntary decision. The same applies for a vote in favor of a midstream implementation of a dual class equity structure. Adherents of the ECMH would also consider that these decisions are made by rational, informed investors in a free market economy (*see* § 2.2.5 *supra*). However, this leaves one fundamental question unanswered: are private benefits of control truly as detrimental to outside minority shareholders as a class as has been suggested?

10.5.2 Pacces' view

In a thorough and thought-provoking analysis, Pacces redefines our understanding of the matter. Instead of distinguishing between pecuniary and non-pecuniary private benefits of control[83] – certain forms of which, such as empire building, may not necessarily be harmless – he recognizes diversionary, distortionary and idiosyncratic private benefits of control.[84] The first and second category do not stimulate the creation of outside minority shareholder

82. On these theoretical issues (also distinguishing between controlled and dispersed ownership structures and single or multiple bidder cases), *see* Burkart & Lee 2008, *supra* note 1.
83. *See* R.J. Gilson, 'Controlling Shareholders and Corporate Governance: Complicating the Comparative Taxonomy', 119 *Harvard Law Review* 1641 (2006).
84. *See* Pacces 2007, *supra* note 17, at 92-93. For a related argument, *see* S. Cools, 'The Dividing Line Between Shareholder Democracy and Board Autonomy: Inherent Conflicts of Interest as Normative Criterion', 11 *European Company & Financial Law Review* 258, 273-274 (2004).

value. Meanwhile, Pacces also recognizes a third category of private benefits of control, in which no expropriation occurs. These idiosyncratic perks involve abstract psychological concepts, such as entrepreneurial talent, prestige and personal satisfaction. Undoubtedly, the presence or absence of such factors affects welfare (*see* § 3.2.1 *supra*). However, financial markets are not able to accurately price the returns resulting from such notions. Therefore, the contract between an entrepreneur and his investors is necessarily incomplete, at least initially. As the firm eventually proves successful, these idiosyncratic psychological elements develop into the contractable factor of corporate control.[85]

Rewarding idiosyncratic private benefits of control, as described by Pacces, incentivizes entrepreneurial firm-specific investments. Essentially, these perks constitute a form of deferred compensation contingent upon success. Whereas a private benefits of control-based structure could become inefficient over time (*ex post*), the firm would not have developed without them in the first place (*ex ante*).[86] As such, idiosyncratic private benefits of control may even benefit outside minority shareholders. Indeed, in addition to conceiving private benefits of control as compensation for block illiquidity and the inability to diversify holdings[87] or the price that is to be paid for focused management,[88] it can be argued that there exists a tradeoff between *ex ante* initiative and *ex post* supervision.[89] Monitoring by outside minority shareholders (either of the board or the controlling shareholder) deters entrepreneurial initiative,[90] because of the latent possibility of expropriation.[91] Parties can credibly commit to non-interference through either dispersed ownership or entrenchment. However, entrenchment is the more powerful option, as it definitively cements control, apart from the possibility of abolishing the entrenchment structure *ex post* by bargaining.[92]

85. *See* Pacces 2007, *supra* note 17, at 92-93.
86. *See* Pacces 2007, *supra* note 17, at 92-93.
87. *See* P. Bolton & E-L. von Thadden, 'Blocks, Liquidity, and Corporate Control', 53 *Journal of Finance* 1 (1998).
88. *See* Gilson 2006, *supra* note 83; R.J. Gilson & J.N. Gordon, 'Controlling Controlling Shareholders', 152 *University of Pennsylvania Law Review* 785 (2003), arguing that "some private benefits of control may be necessary to induce a party to play that role".
89. *See* M. Burkart, D. Gromb & F. Panunzi, 'Large Shareholders, Monitoring, and the Value of the Firm', 112 *Quarterly Journal of Economics* 693 (1997); *see also* DeAngelo & DeAngelo 1985, *supra* note 59.
90. *See* R.J. Gilson & A. Schwartz, 'Corporate Control and Credible Commitment', 43 *International Review of Law and Economics* 119 (2015); *see also* R.J. Gilson & A. Schwartz, 'Constraints on Private Benefits of Control: Ex Ante Control Mechanisms versus Ex Post Transaction Review', 169 *Journal of Institutional and Theoretical Economics* 160 (2013), both arguing that *ex post* review of rent seeking behavior by controllers is more efficient than *ex ante* control, as this would remove not only the negative but also the positive effects of private initiative.
91. *See* L.A. Bebchuk, 'Why Firms Adopt Anti-Takeover Provisions', 152 *Pennsylvania Law Review* 713 (2003).
92. *See* Pacces 2007, *supra* note 17, at 109-110; *see also* W.W. Bratton & J.A. McCahery, 'Incomplete Contracts Theories of the Firm and Comparative Corporate Governance', 2 *Theoretical Inquiries in Law* 745 (2001).

10.5.3 Goshen & hamdani's view

The argument of Goshen and Hamdani revolves around the concept of idiosyncratic vision. Similarly to the ideas of Pacces (*see* § 10.5.2 *supra*), the model of Goshen and Hamdani is based on idiosyncrasies, although it does not necessarily involve private benefits of control. Instead, their argument is based on the long-term effects of developing a certain business idea. Enabling an entrepreneur to retain control, for instance through a dual class equity structure, allows him to pursue business ventures which, in his view, will deliver excess returns.[93] (The entrepreneur's idea must not necessarily be objectively valuable. What is relevant is whether the plan has subjective merit.) Simultaneously, this eliminates the risk of outside minority shareholders objecting to the adopted course of action on a permanent basis.[94] Indeed, even when parties possess identical information, they may still have different convictions. Similarly, hold-up problems are largely resolved. In such situations, one party has made a prior commitment, which may induce another party to engage in obstructive behavior, with a view to extracting funds up to the value of the prior commitment.[95]

The analysis of Goshen and Hamdani on information asymmetries is particularly relevant for corporations which engage in long-term technological innovation. Currently, especially the (digital) technology and media sectors are involved in such innovation; the same is likely true for other industries for a varying but smaller degree. For innovative firms, news tends to be soft, i.e. limited to insiders and not fully captured by ill-informed outside minority investors, whose information costs are high.[96] A short-term drop in earnings could be easily misinterpreted as a sign of underperformance, when it in fact reflects a promising investment of which the value will not be realized until a later stage.[97] By implementing a capital structure which reflects the founders idiosyncratic vision, corporations can signal their long-term character

93. *See* Z. Goshen & A. Hamdani, 'Corporate Control and Idiosyncratic Vision', 125 *Yale Law Journal* 560 (2016).
94. *See* B.D. Jordan, S. Kim & M.H. Liu, 'Growth Opportunities, Short-Term Market Pressure, and Dual-class Share Structure', 41 *Journal of Corporate Finance* 304 (2016); *see also* Gilson & Schwartz 2013, *supra* note 90, suggesting that founders could serve as a high-powered performance monitor.
95. On the latent threat of opportunism, *see* O.E. Williamson, *Markets and Hierarchies, Analysis and Antitrust Implications: A Study in the Economics of Internal Organization* (Free Press, 1985).
96. *See* D. Lund, 'Nonvoting Shares and Efficient Corporate Governance', 71 *Stanford Law Review* 687 (2019).
97. *See* T.J. Chemmanur & Y. Jiao, 'Dual Class IPOs: a Theoretical Analysis', 36 *Journal of Banking & Finance* 305 (2012); *see also* DeAngelo & DeAngelo 1985, *supra* note 59; A.A. Alchian & H. Demsetz, 'Production, Information Costs, and Economic Organization', 62 *The American Economic Review* 777 (1972).

ex ante and attract a corresponding clientele.[98] On the other hand, outside minority investors prefer oversight to minimize the scope for diversionary and distortive private benefits of control. In the absence of the perfect dissemination of information, parties may become prone to opportunism, and interests of outside minority investors may be vulnerable to hold-ups as well.[99] Thus, a compromise between the extent to which a founder may pursue his idiosyncratic vision and the corresponding agency costs is required. In the negotiation process that follows, different types of financial and control rights are used as building blocks. Although both factors can be conceived as being part of distinct spectra, they are in fact act substitutes, and combining them creates a unique governance arrangement for each corporation.

10.5.4 Goshen & squire's view

In a subsequent paper, Goshen and Squire dwell further on the matter, by incorporating the trade-off between information, bankruptcy and agency costs into the more overarching goal of minimizing control costs. This concept includes not only agent costs, but also principal costs. To quote their eloquent formulation:

> "Principal costs occur when investors exercise control, and agent costs occur when managers exercise control. Both types of cost can be subdivided into competence costs, which arise from honest mistakes attributable to a lack of expertise, information, or talent, and conflict costs, which arise from the skewed incentives produced by the separation of ownership and control. […] Principal costs and agent costs are substitutes for each other: Any reallocation of control rights between investors and managers decreases one type of cost but increases the other. The rate of substitution is firm specific, based on factors such as the firm's business strategy, its industry, and the personal characteristics of its investors and managers. […] The implication is that law's proper role is to allow firms to select from a wide range of governance structures, rather than to mandate some structures and ban others."[100]

98. *See* S. Li, E.G. Maug & M. Schwartz-Ziv, 'When Shareholders Disagree: Trading After Shareholder Meetings' (2019), indicating increased stock turnover following AGMs due to dissenting investors liquidating their position, and arguing the event thus contributes to harmonized views. On dividend policy clienteles, *see* § 9.3 *supra*.
99. *See* Goshen & Hamdani 2016, *supra* note 93, at 581-582, using different terms to distinguish between the various categories of private benefits (they recognize mismanagement and takings).
100. *See* Z. Goshen & R. Squire, 'Principal Costs: A New Theory for Corporate Law and Governance', 117 *Columbia Law Review* 767 (2017).

Goshen and Squire's model explains the prevalence of dual class equity structures for long-term innovative technology corporations such as Alphabet and Facebook, by arguing that they suffer from mounting information costs in the form of agent competence costs. This induces maximum entrenchment. Agency "essentialists" only focus on one of the four types of costs that Goshen and Squire identify (i.e. agency conflict costs), whilst downplaying agent competence cost and disregarding both variants of principal costs entirely.[101] According to Goshen and Squire, statutory modifications solidifying the position of either directors or investors will not necessarily enhance shareholder value. An efficient outcome is achieved only to the extent that such changes reduce overall control costs, the combination of agent and principal costs. However, for corporations which already pursue this goal on their own initiative, all provisions that dictate deviations from the incumbent structure of control merely succeed in destroying shareholder value.

10.6 Towards a life-cycle perspective on voting rights

10.6.1 General concept

The corporate capital structure (*see* § 8.5 *supra*) and dividend policy (*see* § 9.7 *supra*) can be best explained by adopting a life-cycle perspective. One could wonder whether the same should not apply in respect of the distribution of voting rights. In fact, Goshen and Squire's theory of principal cost goes a long way towards a life-cycle voting rights model. They identify several dynamic instead of static factors – business strategy, industry and persons involved – and discuss the idea of an adaptive corporate governance structure.[102]

Consistent with these theoretical notions, the shareholder value effects of dual class equity structures have been found to differ along the corporate life-cycle in recent empirical studies.[103] Cremers, Lauterbach and Pajuste observe that, when executing the IPO, dual class equity structure firms are valued higher than corporations with only one class of stock outstanding, even if asset size and profitability are similar.[104] However, the premium decreases over time. In fact, it evaporates over 4 to 5 years and turns into a discount approximately 6 to 9

101. *See* Goshen & Squire 2017, *supra* note 100, at 771.
102. *See* Goshen & Squire 2017, *supra* note 100, at 813.
103. This might also (partially) explain contradictory findings in "classic" studies (*see* § 10.3 *supra*), as these often lacked a maturity-oriented design. For a notable exception, *see* Dittmann & Ulbricht 2008, *supra* note 47, arguing that "the general picture that emerges […] is that the introduction and the abolition of a dual class structure are two natural points of the life cycle of a firm."
104. *See* M. Cremers, B. Lauterbach & A. Pajuste, 'The Life-Cycle of Dual Class Firms' (2017), available at http://www.ssrn.com/, noting that evidence on the matter is "scarce, and really overdue given the recent interest in dual class firms."

years after the IPO. During this period, the wedge between equity and control rights increases. By contrast, a considerable minority of the dual class equity structure corporations (135 out of 607 firms, or 22 % of the sample) voluntarily unifies its capital structure. The occurrence of such an event is most probable 3 to 5 years after the IPO. Subsequently, its likelihood decreases. Cremers, Lauterbach and Pajuste conclude that many dual class equity structure corporations would probably not have gone public without such a mechanism in place (*see* § 7.3 *supra*). In their view, the findings offer considerable support for dual class equity structure IPOs.[105]

Dual class equity structures can also be considered in an anti-takeover context (*see* § 10.4.5 *supra*). Interestingly, anti-takeover provisions similarly appear to become more expensive as the firm ages.[106] Thus, dual class equity structures are not intrinsically detrimental to shareholder value. Instead, the question is rather how to abolish them in a timely manner, before their undesired effects set in.

10.6.2 The nature of the life-cycle

In my view, the corporate life-cycle not only governs corporate capital structure (*see* § 8.5 *supra*) and dividend policy (*see* § 9.7 *supra*), but also, in a general sense, the distribution of voting rights. Typically, the journey towards maturity results in a reduction of information and bankruptcy costs and an increase in agency costs. The importance of this observation can hardly be overstated, as it entails there exists a single, unified theory on the financial organization of the corporation. The consequence, from a legal point of view, is that the corporation has a property right to reorganize its equity structure, for without, it cannot exist, let alone flourish.

From a comparative point of view, it can be observed that the life-cycle approach is broader than the agency perspective. Indeed, life-cycle thinking acknowledges that in the earlier (start-up and scale-up) phases of the corporation, the joint initiative of founders and other parties involved is more important than their conflicts of interest. In fact, the absence of an overriding conflict of interest is a *conditio sine qua non* for the growth of small, ambitious firms. Conflicts of interest arise only as the corporation grows and becomes more politicized. Agency theory, having become the central paradigm of corporate

105. *See* Cremers, Lauterbach & Pajuste 2017, *supra* note 104. For a similar conclusion, *see* H. Kim & R. Michaely, 'Sticking around Too Long? Dynamics of the Benefits of Dual-Class Voting' (2019), available at http://www.ssrn.com/. *But see* W.H. Mikkelson, M.M. Partch & K. Shah, 'Ownership and Operating Performance of Companies that go Public', 44 *Journal of Financial Economics* 281 (1997), finding that performance does not decrease 10 years after the IPO.

106. *See* W.C. Johnson, J.M. Karpoff & S. Yi, 'The Lifecycle Effects of Firm Takeover Defenses' (2017), available at http://www.ssrn.com/, concluding that dual class equity structures reassure customers and joint venture partners.

law, is actually intended primarily for well-developed enterprises. However, its scholarly prominence means this basic feature is sometimes overlooked. Consequently, agency theory is applied beyond its capabilities.[107] Nevertheless, the life-cycle approach builds on agency theory to a certain extent, blending it with insights from stewardship theory (*see* § 3.2.2 *supra*). Although the life-cycle perspective focuses on (controlling) insiders rather than outside minority investors, it similarly views human behavior more positively, at least in the early stages, since it revolves around honest entrepreneurial activity. Moreover, the life-cycle perspective encompasses behavioral notions such as entrepreneurial talent, prestige and personal satisfaction. Meanwhile, it does not go as far as claiming that principal and agent interests are entirely long-term congruent. The life-cycle perspective also matches phenomena such as the "eclipse of the public corporation" and provides a compelling explanation. Accorrdingly, the corporations currently listed are rather mature, and that, for various reasons, the influx of younger growth corporations is insufficient (*see* § 7.3.1 *supra*). Moreover, the life-cycle perspective explains why innovative technology firms are often founder-centric. (For instance, Tesla's Elon Musk was granted a $ 2.6 billion stock options plan in 2018.[108]) The implication is that such businesses are still in the early stages of their life-cycle, and thus heavily reliant on those early involved to mitigate information costs.

Importantly, the corporate life-cycle perspective should not be confused with the corporation's age. Firms which experience exponential growth may quickly become highly institutionalized. In that case, they will pass multiple stages of maturity in quick succession.[109] The corporate life-cyle should neither be identified with the general economic conjuncture ("business cycle"). Similarly, the life-cycle perspective does not necessarily indicate that every single corporation will complete the consecutive maturity stages. Some firms' business models may ultimately not prove viable. For others, growth could stall once a certain size has been reached, as markets becomes saturated. Here, one could refer to mobile communications corporations, for which limitless expansion appeared just around the corner in the 1990s, only to see growth slow down considerably in the first decade of the new millennium. Whereas the life-cycle perspective typically predicts an S-shaped growth curve for businesses, it would

107. For similar observations, *see* S. Toms, 'The Life-Cycle of Corporate Governance', in *The Oxford Handbook of Corporate Governance* 349 (D.M. Wright et al., eds.), arguing the life-cycle perspective encompasses not only the monitoring role of corporate governance, which is the domain of agency theory, but also (more broadly) considers matters such as the use of resources and corporate strategy.

108. *See* R. Ferris & P. LeBeau, 'Elon Musk could make more than $50 billion from pay plan shareholders approved…but he has a lot to deliver' (2018), available at http://www.cnbc.com/.

109. Facebook would be an highly illustrative example of this particular point. Having only been founded in 2004, Facebook has grown sufficiently large to become the subject of many social and political discussions.

also be conceivable that a corporation repeatedly follows certain steps back and forth on the life-cycle ladder. This involves aging lines of business shrinking to irrelevance and initially smaller activities, with more promising growth aspects rising to prominence.[110] Indeed, the respective growth and decline rates of the various business units could entail either an increase or decrease in overall maturity. Firms restructure, some (almost) go bankrupt. Others will rise from their ashes and thrive once again. As such, the development of the corporate life-cycle will often be difficult to foresee, if not impossible to predict.

In this regard, Google's (currently: Alphabet) 2004 Founders' IPO Letter provides a peculiar yet highly instructive example.[111] Larry Page and Sergey Brin argued that their goal was to remain innovative, placing "bets" on promising new opportunities (generating "alpha") in a rapidly changing environment. Google's founders pledged to continue doing so, even if those opportunities appeared only remotely related to existing operations.[112] They also promised not to succumb to outside pressures to sacrifice long-term gains for quarterly results.[113] Whilst Page and Brin acknowledged that legacy businesses would provide relatively stable free cash flows, they also warned this was far less certain for subsequent ventures. This results in a firm that is continuously both constructing and deconstructing. Whereas this is sound business, it also means that information costs (or agent competence costs) may remain elevated for an extended period.[114] Meanwhile, the trade-off is not merely one-dimensional. For instance, corporate spin-offs open up the possibility of sudden wide-ranging shifts to the nature of the firm's operations.[115] Consequently, the trade-off between information, bankruptcy and agency costs may reverse drastically in

---

110. *See* A. Berger & G. Udell, 'The Economics of Small Business Finance: The Roles Of Private Equity And Debt Markets In The Financial Growth Cycle', 22 *Journal of Banking & Finance* 613 (1998).
111. *See* L. Page & S. Brin, '2004 Founders' IPO Letter' (2004), available at http://www.abc.xyz/.
112. "Our business environment changes rapidly and needs long term investment. We will not hesitate to place major bets on promising new opportunities. […] Do not be surprised if we place smaller bets in areas that seem very speculative or even strange when compared to our current businesses." *See* Page & Brin 2004, *supra* note 111.
113. "As a private company, we have concentrated on the long term, and this has served us well. As a public company, we will do the same. In our opinion, outside pressures too often tempt companies to sacrifice long term opportunities to meet quarterly market expectations. Sometimes this pressure has caused companies to manipulate financial results in order to "make their quarter." In Warren Buffett's words, "We won't 'smooth' quarterly or annual results: If earnings figures are lumpy when they reach headquarters, they will be lumpy when they reach you."" *See* Page & Brin 2004, *supra* note 111.
114. *See* Pacces 2007, *supra* note 17, at 94.
115. If a new, promising venture is spun off from a corporation subject to an existing sunset-provision (*see* § 11.3.3 *infra*), the timer of the sunset-provision should, in my view, (at least) be reset (if not cancelled altogether) because of the sudden increase in information and bankruptcy costs and decrease in agency costs.

a short amount of time.[116] The dynamic principal cost-model of Goshen and Squire reflects this.[117]

10.6.3 The life-cycle trade-off

I afford myself some brief final notes on the concepts of information and agency costs. Conceptually, information costs may refer to two types of expenditures. First, this involves the costs incurred by analyzing the value of a corporation's securities (*see* § 2.2.5 *supra*). Admittedly, determined shareholders can, to a certain degree, qualify as informed voters at a certain moment in time. However, information costs may also – more fundamentally – relate to the price of attempting to understand the long-term prospects of a firm's operational activities.[118] Outside minority shareholders may be especially at a disadvantage when attempting to predict the consequences of fundamental long-term developments, resulting from human ingenuity and socio-political change.[119] In this sense, information costs effectively constitute a "known unknown", which may be indefinitely large and whose size may be difficult to calculate. To illustrate, at the dawn of the 21st century, it would have been fairly complicated, if not nearly impossible, to predict whether Google or a competitor would dominate the internet search market, as the number of variables to consider is simply overwhelming. Meanwhile, it could well be argued that information costs (or agent competence costs) are not exactly new phenomena, confined to contemporary innovative technology corporations, but have been present in previous times as well. The advent of rail transportation and oil refineries in the (late) 19th century provides useful examples. Then, it could be observed that dual class equity structures should have been

116. Note that whereas the life-cycle perspective posits that firms should be permitted to introduce or cancel a dual class equity structure, even when already listed on the stock exchange, this theory carries little implications as to the requirements to which such a restructuring must be subjected. For an economic analysis in this regard, *see* Chapter 11; for legal-comparative analyses, *see* Chapter 17 and 23.

117. *See* Goshen & Squire 2017, *supra* note 100. The concept of principal cost appears somewhat more adjustable than that of idiosyncratic vision, as developed by Goshen & Hamdani 2016, *supra* note 93. Indeed, the founder's idiosyncratic vision is deemed part of the manager-shareholder contract, implying that dual class equity structure recapitalizations and unifications are possible only to the extent that the (unobservable) level of idiosyncratic vision changes, but not as a result of changes in corporate maturity generally.

118. Because life-cycle theory not only recognizes strategic information costs, but also investor information costs, life-cycle theory does not consider the corporation entirely in isolation from the financial markets in which it operates. However, what can be said is that life-cycle theory considers the firm on a standalone-basis, i.e. without regard to peer groups and similar relative financialist metrics. (Naturally, if a powerful competitor emerges, this will eventually affect the firm's life-cycle, for instance in the form of bankruptcy costs.)

119. *See* R. Frydman & M.D. Goldberg, *Beyond Mechanical Markets: Asset Price, Swings, Risk, and the Role of the State* (Princeton University Press, 2011). On the ECMH in general, *see* § 2.2.5 *supra*.

even more prevalent than has actually been the case. However, such a claim would ignore the fact that there exists a wide variety of factors determining the choice for a particular distribution of voting rights, including the degree of shareholder coordination (which was arguably lower for large parts of the 20th century), the presence of alternative entrenchment mechanisms, such as priority shares, and the degree to which rights of outside minority shareholder are adequately safeguarded as firms mature.

As far as agency costs are concerned, some scholars have argued that controlling shareholders tend to "unload" their economic interest over time whilst maintaining control power through superior voting stock, carrying ever more votes per share. Consequently, the wedge between the controller's equity stake and his voting interest increases. This implies agency costs will grow. In fact, they rise exponentially as the controller's equity interest decreases.[120] Restrictions on the maximum number of votes per share would constrain the wedge and limit associated agency costs. Whereas a controlling shareholder reducing his equity interest whilst retaining voting power changes the trade-off between information, bankruptcy and agency costs, the matter of curtailing the number of votes per share should still be considered holistically. Similar to the number of votes per share, information costs can theoretically be infinitely high. It would not seem desirable to distort the trade-off between information and agency costs in such cases, as this could prevent innovative entrepreneurial activity materializing. Thus, the economic analysis counsels against maximizing the number of votes per share, and against prohibiting non-voting shares. To the contrary, the life-cycle perspective first and foremost suggests that corporations should be granted latitude to set their own governance structure. Enabling a wide variety of equity instruments increases the chance that at least one type of security will match the corporation's requirements in relation to its life-cycle.

10.6.4 Comparing dual class equity structures and loyalty shares

In their archetypical form, dual class equity structures and loyalty mechanisms have largely the same effect – the concentration of voting power. However, one may well argue that the rationale to use either of those schemes varies subtly. In their traditional conception, loyalty mechanisms grant 1 additional vote per share (*see* § 10.2.2 *supra*), although intriguing alternatives have been presented, for instance by Oxford's Colin Mayer.[121] Thus, the archetypical loyalty

120. *See* Bebchuk & Kastiel 2018, *supra* note 10, referring to the controlling shareholders at Ford (economic interest in 1956: 12 %; 2015: 1.78 %) and Comcast (1978: 42 %; 2018: < 1 %) for anecdotal evidence and showing that the controller incurs an ever-decreasing portion of inefficient behavior whilst remaining able to extract private benefits of control of a similar magnitude. Thus, certain actions are inefficient for those with a 40 % economic interest but not for those with a 4 % interest.

121. In short, Mayer's original proposal involves allocating voting rights based on the *projected* rather than the *past* duration of investor share-ownerhsip (as is the case with loyalty shares).

instrument reduces pressure on controlling shareholders exerted by short-term oriented financial markets. When a controller is absent, loyalty instruments may also serve to counter collective action and free rider issues. However, in the face of a determined bidder, the market for corporate control can remain intact.[122] The case of Air France-KLM provides a fine illustration. For quite some time, the French government had effectively exercised control over the flag carrier, building on a 14 % equity interest which qualified for the loyalty vote bonus. In 2019, the Dutch government, fearing the transfer of strategic business units to France, intervened, and acquired a 14 % equity interest of its own. Consequently, the French state could no longer unilaterally exercise control.[123] By contrast, a dual class equity structure granting 10 or even 25 votes per share for each superior voting stock not only reduces market pressure but eliminates the existence of a market for corporate control in full and, in doing so, the relevance of any (potentially wide-ranging) information asymmetries.[124] Compared to loyalty shares, a dual class equity structure design may create a better fit with the life-cycle perspective on the corporation (*see* § 10.6 *supra*).[125] This perspective has some further implications as well. Whereas a sunset mechanism (*see* § 11.3.3 *infra*) could principally be an interesting option to complement a dual class equity structure – although important drawbacks remain when mandating sunset provisions – it would be incompatible with a loyalty scheme.[126] Indeed, the incentives – increasing

See C. Mayer, *Firm Commitment. Why the Corporation is Failing to us and how to Restore Trust in it* 208-209, 226-227 (Oxford University Press, 2013). Although admittedly rather imaginative, the mechanism is unfortunately not a panacea. Listed corporations would still be vulnerable to short-term investors such as hedge funds which may, for instance, acquire a comparatively small part of the equtity and state that their holding period is forever. (The listed corporation may in turn restrict the maximum holding period and thus the number of votes per share, but the fact that high-voting shares are still generally available on the stock market means that the problem still exists.)

122. *See* Edelman, Jiang & Thomas 2018, *supra* note 12; *see also* C.A. Hill & A.M. Pacces, 'The Neglected Role of Justification Under Uncertainty in Corporate Governance and Finance', 3 *Annals of Corporate Governance* 276 (2018), considering loyalty shares as an intermediate form of dual class equity structures.
123. *See* F. de Beaupuy, 'France Hits Out at Dutch in Feud Over Air France-KLM Holdings' (2019), available at http://www.bloomberg.com/.
124. This is even more the case when the general public can only participate by acquiring non-voting shares, as is the case with SnapChat.
125. The proposal of Mayer 2013, *supra* note 121, becomes especially interesting when considering it from a life-cycle perspective. Since the allocation of control power will be shifting on a permanent basis, it may very well be that the division of voting rights at some point matches the corporate life-cycle phase. At the same time, this harmonious state of affairs may cease to exist from on moment to another. Therefore, the main risk of Mayer's idea is that the board may have to change corporate investment policy all too often.
126. For this observation, *see* S. Cools & T.A. Keijzer, 'Over meervoudig stemrecht, loyaliteitsstemrecht, levenscycli en horizonbepalingen. Rechtseconomischce en rechtsvergelijkende beschouwingen', 21 *Ondernemingsrecht* 371 (2019); *see also* S. Cools & T.A. Keijzer, 'Dubbel stemrecht in combinatie met een horizonbepaling: een alternatief voor

and decreasing the number of votes after a certain period of time – contradict each other and require that management can convince outside minority outside minority shareholders that certain specific factors, of which the existence is confined to a pre-determined period of time, warrant a temporary transfer of control.[127]

Meanwhile, not all loyalty schemes will be created equal. There exist a number of issues to be considered. First, this concerns the term for the loyalty bonus to vest. Some legal systems, including France and Italy, have adopted a period of 2 years, but shorter or longer periods are equally conceivable. Some schemes award investors 1 additional vote in respect of every qualifying share owned. However, deviations, both downwards and upwards, are theoretically conceivable as well. The loyalty dividend can be funded both at the expense of non-participating investors or by increasing the total distributed amount. Relatedly, the corporation should consider whether it is desirable to limit the loyalty bonus for individual shareholders to a certain percentage of the outstanding share capital. The third matter is that of grandfathering. Particularly in case of a cross-border merger, the decision to relocate the corporate domicile will be sponsored by an existing controlling shareholder. Then, one might expect that pre-qualifying shareholders are grandfathered in, instead of the loyalty bonus being awarded only after a certain time period has lapsed.

When loyalty and multiple voting shares are not created in their archetypical form, differences between the two instruments may be smaller. Corporations may implement a system of tiered loyalty bonuses. For instance, the loyalty bonus can increase from 3 votes after 2 years to 9 votes after 5 years.[128] In this constellation, loyalty voting schemes not only reduce the pressure of financial markets, but also serve to gradually eliminate the consequences of information asymmetries. From a life-cycle perspective, this increases the risk – but does

---

het loyauteitsstemrecht?', 4 *Tijdschrift voor Rechtspersoon en Vennootschap – Revue pratique des sociétés* 239 (2019).

127. *But see* Hill & Pacces 2018, *supra* note 122, arguing such a mechanism may prove rather useful.

128. The recent case of Mediaset may serve as anecdotal evidence in this regard. In 2019, Italy-based Mediaset and Spanish Mediaset España announced their intentions of executing a cross-border merger into Media For Europe, incorporated in the Netherlands. The transaction was supported by Fininvest, which holds 44 % of the stock and is controlled by family of former Italian Prime Minister Berlusconi, but opposed by French-based Vivendi, which initially held an equity stake of 28.8 %. Dissatisfied investors could invoke an exit right, up until an aggregate amount of € 180 million. If the recapitalization were to materialize, shareholders who requested so prior to the AGM convened to authorize the transaction would obtain 2 additional votes. After 2 years, the A- class share would be converted into a B-class share carrying 4 additional votes which, in turn, subsequently converts into a C class share carrying 9 votes after 3 more years. *See* https://www.mediaset.it/investor/documenti/2019/notizia_9697_en.shtml for the announcement. The Amsterdam Court of Appeal eventually forbid Mediaset's recapitalization from going forward. *See* Gerechtshof Amsterdam 1 September 2020, ECLI:NL:GHAMS:2020:2379 (*Mediaset*), on which *see* § 28.4.3 *infra*.

not in itself establish – that the mechanism will become inefficient. Meanwhile, dual class equity structures may also contain a loyalty-component, if outside minority investors who hold non-voting shares for a certain period of time do obtain the right to vote. Then, the opposite applies with respect to market pressure and information asymmetries.

Chapter 11. Implications of the life-cycle approach

11.1 Introduction

The adaptation of a life-cycle perspective has consequences for a wide range of topics. These issues are analyzed in Chapter 11.

First, I discuss how a midstream introduction or cancellation of a dual class equity structure should actually be interpreted, in § 11.2. This concerns both intra-national as well as international midstream recapitalizations. Subsequently, I explore the requirements to which a midstream introduction or cancellation of a dual class equity structure should be subjected. Various alternatives are available. These are a majority-of-the-minority vote by disinterested outside minority shareholders, a qualified majority vote by the entire shareholder base, sunset provisions, or a right of exit for dissatisfied outside minority shareholders. After reviewing the merits of each of those options in § 11.3, I will conclude that the exit right holds the most potential. Third, I critically analyze the development, initiated in 2017, of excluding dual class equity structure corporations from stock indices. To that end, I dive into the mechanisms of stock indices and the fundaments of passive investing. I finish Chapter 11 by arguing that excluding dual class equity structure corporations from stock indices will likely reduce investor returns.

11.2 Midstream recapitalizations

11.2.1 Voting rights

Traditionally, midstream introductions of superior voting stock are considered problematic, as these restrict the control rights of existing shareholders, who may not have been able to foresee the move at the time of their investment. Moreover, outside minority investors may not be able to block the restructuring but are neither able to withdraw any equity before its announcement. Finally, the voting process suffers from collective action problems and related issues (*see* § 2.2.3 *supra*). Consequently, some stock market Listing Rules render superior voting stock midstream recapitalizations impermissible.[1] In light of the life-cycle perspective, this backlash appears principally unjustified. In fact, midstream governance changes occur all the time. Although a midstream introduction of a dual class equity structure is perhaps less likely than a unification from a life-cycle point of view, it should nevertheless be possible to conclude such a transaction. However, it could well be argued that compared to other midstream governance changes, a more thoughtful decision-making process and heightened judicial scrutiny are warranted. To that end, a variety of policy options are available. These include requiring a majority-of-the-minority vote by disinterested outside minority shareholders, a qualified majority vote by the entire shareholder base, sunset provisions, or a right of exit for dissatisfied outside minority shareholders (*see* § 11.3 *infra*). Such thresholds, if self-imposed, signal that the party who sponsors the proposal (i.e. the board or a controlling shareholder) considers it value-enhancing.[2]

For the purpose of safeguarding control rights of existing investors, the midstream introduction of inferior voting stock, in addition to common shares outstanding, is considered less of a problem.[3] Such a move gives existing (provided the inferior voting shares are issued as a dividend, instead of a replacement of shares outstanding) and prospective shareholders a choice to which extent they want to engage with a corporation.[4] Offering both voting and non-voting securities could very well enhance overall voting efficiency, as doing so caters to different investor preferences.[5] However, the fact that vested voting rights are

---

1. *See* S. 313.00 (A) and (B) of the NYSE Listed Company Manual and associated Guidance, available at http://www.wallstreet.cch.com/LCM/. The NASDAQ Listing Rules contain provisions of a similar nature. *See* http://nasdaq.cchwallstreet.com/NASDAQTools/.
2. *See* A.M. Pacces, 'Exit, Voice and Loyalty from the Perspective of Hedge Funds Activism in Corporate Governance', 9 *Erasmus Law Review* 199 (2016); *see also* K.J.M. Cremers, S. Masconale & S.M. Sepe, 'Commitment and Entrenchment in Corporate Governance', 110 *Northwestern University Law Review* 727 (2016), on the positive shareholder value effects of investor approval rights.
3. Note that in the absence of a controlling shareholder, the introduction of non-voting stock may be difficult to implement from a more practical point of view. This would require defying institutional parties, who typically oppose the disenfranchising of shareholder voting rights. S*ee* D.J. Berger, S. Davidoff Solomon & A.J. Benjamin, 'Tenure Voting and the U.S. Public Company', 72 *The Business Lawyer* 295 (2017).
4. Thus, the assumption behind issuing non-voting stock is that uncommitted shareholders sell their stock, or at least the voting part of it, whereas the creation of loyalty or time-phased voting stock is based on controller commitment.
5. *See* D. Lund, 'Nonvoting Shares and Efficient Corporate Governance', 71 *Stanford Law Review* 687 (2019) (noting that the mechanism of choice presupposes the listing of both common and inferior voting stock, not listing inferior voting stock only, as was the case with Snap); *see also* D. Lund, 'The Case Against Passive Shareholder Voting' (2017), 43 *Journal of Corporation Law* 493 (2018), on the choice between voting and non-voting stock as to discriminate between well-informed and ill-informed investors; E.B. Rock, 'Shareholder Eugenics in the Public Corporation', 97 *Cornell Law Review* 849 (2012). On voting efficiency in general, *see* M.C. Schouten, 'The Mechanisms of Voting Efficiency', 2010 *Columbia Business Law Review* 763 (2010).

respected does not entail outside minority investors will not face any governance risks at all from midstream introductions of non-voting stock. Indeed, the creation of such securities will remove the requirement for the controller to retain substantial equity stake whatsoever. After all, he could consistently issue non-voting stock to unload his economic interest, without consent of the holders of common stock being required or losing his lock on control. This would result in ever-increasing agency costs (*see* § 10.2.1 *supra*). Therefore, Bebchuk and Kastiel proposed more detailed disclosure measures concerning both the initial and the remaining total equity stake and voting power of the controlling shareholder.[6] The advantage of such a proposal is that it allows existing and future shareholders to make more informed investment decisions.

11.2.2 Profit entitlements

Midstream issuances of stocks carrying superior profit entitlements would be both highly controversial and visible, with public outcry and a sharp correction of the stock price as a likely outcome. (Admittedly, the idea is perhaps somewhat hypothetical for this very reason.) Meanwhile, midstream issuances of inferior profit participation stock would not expropriate the financial rights of outside minority shareholders. Depending on the terms offered, they might even dilute the economic interest of the controller, to the benefit of others. However, the value of stocks lacking financial rights will generally be rather low. Especially in the absence of a contest for control, the voting rights will attract little interest (*see* § 10.3 *supra*). Even if pre-emptive rights would be respected and outside minority shareholders were to receive a proportional number of inferior profit participating stocks, many of them would probably not be interested in retaining the security. By exiting their position, outside minority shareholders would allow the controller to acquire inferior profit participating stocks in the open market, cementing his position. Thus, identical regulatory frameworks should apply concerning restructurings taking place by superior and inferior voting stock and inferior profit participating stock.

11.2.3 Cross-border midstream recapitalizations

It could be argued that stock exchanges are willing to consider listings of corporations with a dual class equity structure in place, even if they are not too fond of such instruments, for the fear of missing out on a prestigious IPO.[7]

6. *See* L.A. Bebchuk & K. Kastiel, 'The Perils of Small-Minority Controllers', 107 *Georgetown Law Journal* 1453 (2019), noting that in many instances, the use of (a web of) holding entities makes it difficult to obtain these data.
7. Indeed, institutional parties have been complaining that participating in the IPO of a corporation with a dual class equity structure is a form of "Hobson's choice". The meaning of this concept has been eloquently outlined by Thomas Ward (1652-1708):

There exists some anecdotal evidence to support this view. For instance, Alibaba decided to conduct its IPO on the New York rather than the Hong Kong Stock Exchange, as the latter did not permit dual class equity structures (i.e. not even those in place prior to the IPO). Subsequently, the Hong Kong Stock Exchange modified its listing rules, to accommodate future dual class equity structure IPOs to a certain degree.[8] The Singapore Exchange did the same, to compete with its Hong Kong counterpart.[9] Similarly, Italy modified its corporate statute to permit loyalty or time-phased voting rights after Fiat had reincorporated in the Netherlands, to prevent other firms from taking the same path (*see* § 28.4.3 *infra*). Consequently, it could be said that stock exchanges and jurisdictions are competitively pressured to engage in what some perceive as undercutting the global investing climate.

However, such a conclusion would not necessarily be correct. Specifically, it could be at odds with the bonding hypothesis developed by Stulz[10] and Coffee.[11] Accordingly, firms that cross-list their securities on a foreign stock exchange with a more stringent set of investor protection measures in place than is the case in their country of origin constrain insiders from expropriating outside minority shareholders. It seems reasonable to assume that the respective authors primarily had the US stock markets in mind as a location for secondary offerings, but the idea could be applied by analogy to stock exchanges elsewhere or to other jurisdictions. The bonding hypothesis has received considerable empirical support.[12] If one were to embrace its general concept, it could be argued that any stock market or jurisdiction with a reputable system of corporate governance should attempt to attract reincorporations or cross-listings of dual class equity structure firms from markets or countries of which the corporate governance

---

"Where to elect there is but one,
'Tis Hobson's choice—take that, or none."

See T. Ward, *England's Reformation: a Poem, in Four Cantos* 373 (D.&J. Sadlier & Co., 1853).

8. *See* C. Shu, 'Alibaba's Shares Climb Almost 8% in Their First Morning of Trading on the Hong Kong Stock Exchange' (2019), available at http://www.techcrunch.com/.
9. *See* A. Tan, 'SGX Enters New Era as it Starts Dual-class Shares for Qualifying IPOs' (2018), available at http://www.businesstimes.com.sg/.
10. *See* R.M. Stulz, 'Globalization, Corporate Finance, and the Cost of Capital', 12 *Journal of Corporate Finance* 8 (1999).
11. *See* J.C. Coffee, 'Racing towards the Top? The Impact of Cross-Listings and Stock Market Competition on International Corporate Governance', 102 *Columbia Law Review* 1757 (2002); *see also* J.C. Coffee, 'The Future as History: The Prospects for Global Convergence in Corporate Governance and Its Implications', 93 *Northwestern University Law Review* 641 (1999).
12. *See* T. Foucault & L. Frésard, 'Cross-Listing, Investment Sensitivity to Stock Price, and the Learning Hypothesis', 25 *Review of Financial Studies* 3305 (2012); *see also* U. Lel & D.P. Miller, 'International Cross-Listing, Firm Performance, and Top Management Turnover: A Test of the Bonding Hypothesis', 63 *Journal of Finance* 1897 (2008), finding that corporations which have cross-listed to the US are more likely to fire poor performing CEOs.

system is less developed.[13] Indeed, even if the midstream implementation of a dual class equity structure would constitute a governance drawback – which could be disputed, *see* § 10.6 *supra* – the adaptation of a more sophisticated system of governance could still, on the whole, reduce control costs, benefiting outside minority shareholders.[14] This especially relates to the Netherlands, where market-imputed private benefits of control are rather low (*see* § 10.3.2 *supra*). The same could apply in case a corporation decides to relocate to a system of intermediate quality, provided that the initially applicable framework was even worse. In any case, the cross-border character of midstream dual class equity structure recapitalizations does not necessarily entail the undercutting of global corporate governance standards.

11.3 Comparing remedies to midstream dual class equity structure recapitalizations

11.3.1 Majority-of-the-minority vote

Requiring a majority-of-the-minority vote (as is typically the case in the US, see § 17.4 *infra*) or a qualified majority when implementing a new or modifying an existing dual class equity structure has the advantage of eliminating or reducing the conflict of interest of the party sponsoring the recapitalization. Meanwhile, such a requirement suffers from a host of complications, apart from the fact that it is not guaranteed outside minority shareholder will not act opportunistically. First, it eliminates or reduces the sponsor's idiosyncratic vision outside minority shareholders contracted into or, formulated differently, his contribution to decreasing information and control costs (*see* § 10.6 *supra*). Indeed, when attempting to exclude outside minority investors from future decision-making because of high information asymmetries on their side, it does not make sense to place the key in the hands of the parties that, exactly because of their incompetence, are best deemed to remain powerless.[15] Second,

13. Note that corporations may also elect to only reincorporate elsewhere, whilst retaining the existing stock market listing in the home state and vice versa. *See* § 28.4.3 *supra* for real-life examples derived from the Dutch situation. In that case, the idea of the cross-border aspect of the transaction reducing overall control costs assumes that the interplay between corporate statute and listing rules does not more than offset any efficiency gains achieved.
14. *See* C. Doidge, 'U.S. Cross-Listings and the Private Benefits of Control: Evidence from Dual-Class Firms', 72 *Journal of Financial Economics* 519 (2004), showing that non-U.S. firms which conduct a cross-listing have significantly higher voting premiums than non-U.S. firms that do not cross-list.
15. *See* J. Fisch & S. Davidoff Solomon, 'The Problem of Sunsets', 99 *Boston University Law Review* 1057 (2019); *see also see* A.M. Pacces, 'Procedural and Substantive Review of Related Party Transactions (RPTs): The Case for Non-Controlling Shareholder Dependent (NCS-Dependent) Directors' (2018), available at http://www.ssrn.com/, proposing to replace the majority-of-the-minority vote with outsider director scrutiny.

Rock has observed that, based on US transactions in the 2010-2017 period, the majority-of-the-minority vote is hardly put to use by (institutional) investors. These findings cast doubt on the viability of the mechanism in general, as it confirms there is no real market test for recapitalizations.[16] Indeed, upon announcement of a transaction, the overwhelming part of the listed securties is quickly bought by arbitrageurs, who typically have no incentive at all to frustrate a transaction.[17] Third, although a majority-of-the-minority vote may be understood as a signal that the proposed transaction will be beneficial for outside minority shareholders, the intentions of the sender and the receivers of the signal could very well differ. Perhaps, the controller is merely interested in obtaining a more favorable reception for his plans by showing his openness to external scrutiny, betting that a substantial review of the proposals will be more lenient. Fourth, voting-based thresholds merely offer procedural instead of substantive protection of outside minority shareholders' economic interests. A majority-of-the-minority vote which makes the wrong choice effectively leaves outside minority shareholders worse-off. From a life-cycle perspective, it should also be stressed that the corporation, and not the shareholders, possesses a property right to reorganize the capital structure (*see* § 10.6 *supra*).

11.3.2 Exit right

The only strategy which substantively protects outside minority shareholder interests in full is offering a fair value cash exit right.[18] Thus, dissatisfied parties would be compensated for the loss of their position.[19] Meanwhile, by not mandating a specific vote on the dual class equity structure recapitalization other than the one required to modify the articles of association – following the pre-existing distribution of voting powers – insiders retain the initiative and misunderstandings are prevented. As a result, their contribution to decreasing total control costs is acknowledged. Conceptually, a right of exit not only

16. *See* E.B. Rock, 'MOM Approval in a World of Active Shareholders' (2018), available at http://www.ssrn.com/, referring to the majority-of-the-minority vote as "chicken soup" ("it may not help, but it cannot hurt"). For similar findings regarding the Israeli stock market, *see* A. Hamdani & Y. Yafeh, 'Instiutional Investors as Minority Shareholders' 17 *Review of Finance* 691 (2013).
17. *See* J.D. Cox, T. Mondino & R.S. Thomas, 'Understanding the (Ir)Relevance of Shareholder Votes on M&A Deals' (2019), available at http://www.ssrn.com/.
18. *See* L. Enriques et al., 'Related Party Transactions', in *The Anatomy of Corporate Law. A Comparative and Functional Approach* 145, 152 (R. Kraakman et al., 2017), observing an exit right effectively serves as a put option.
19. Naturally, one could wonder whether minority investors do not take the possibility of a shareholder cementing his grip into account from the outset. In that view, no compensation in respect of midstream dual class equity structure recapitalizations might be due. However, not compensating minority investors at all for their foregone interest would probably be unacceptable from a political point of view, whilst simultaneously incentivizing opportunistic insider behavior.

provides for a more informed, but also for a more proportional outcome. Instead of the rather blunt "yes or no" result achieved under the majority-of-the-minority vote, the exit right basically serves as an "agreement to disagree". That line of reasoning is much more befitting to the nature of the corporation, which has long sailed past the phase of decision-making by unanimity (*see* Chapter 21, 21 and 27 *infra*) and is based on majority rather than minority rule.[20] The exit-right may also provide the corporation with a less myopic investor base and cause a realignment of interests. Indeed, such a move may dislodge any short-term investors who prefer an instant cash out over long term projects of which the results are uncertain.

An exit-right based strategy does not give outside minority investors a formal right to frustrate a dual class equity structure recapitalization in addition to the AGM vote. However, a sponsor may not be able to finance a dual class equity restructuring because of investors choosing an exit *en masse*. In this sense, the exit right effectively still serves as a vote of outside minority shareholders, but in a more passive constellation. Instead of having to opt in, outside minority shareholders have to opt out to frustrate the recapitalization. Indeed, if too many disinterested investors decide to tender their shares, because the terms offered are unattractive, a liquidity crisis may ensue. Thus, the exit right in fact creates a capital-market fairness test. As such, an exit right provides a latent but potentially powerful bite. Exit rights also have disadvantages, however. The main drawback is that they force investors to give up their position.

11.3.3 Sunset clauses

Bebchuk and Kastiel have observed that dual class equity structures present at the time of the IPO should not be allowed to remain in place perpetually. Their main argument is that the costs of a dual class equity structure tend to increase over time, whereas the benefits decrease.[21] Even if a controlling shareholder were to possess superior skills or knowledge at the IPO, these advantages are likely to erode, especially in the current dynamic business environment. This is compounded by the fact that controlling shareholders tend to unload their holdings over time, which increases the wedge between equity stake and voting power (*see* § 10.6.3 *supra*). Bebchuk and Kastiel additionally predict that private ordering approaches to resolve dual class equity structures (and reduce

20. For an argument in favor of exit rights, *see* R.J. Gilson & J.N. Gordon, 'Controlling Controlling Shareholders', 152 *University of Pennsylvania Law Review* 785 (2003); *see also* S.J. Grossman & O.D. Hart, 'One Share-One Vote and the Market for Corporate Control', 20 *Journal of Financial Economics* 175 (1988).
21. *See* L.A. Bebchuk & K. Kastiel, 'The Untenable Case for Perpetual Dual-Class Stock', 103 *Virginia Law Review* 585 (2017), featuring a dramatic presentation of the situation at Viacom. This corporation was still managed by Summer Redstone at the age of 92, despite alleged mental health issues. Consequently, Bebchuk and Kastiel paint a grim picture on the future of Snap with Evan Spiegel (27) and Bobby Murphy (29) at the helm.

the agency costs involved) will generally fail to provide a realistic alternative. Indeed, rational shareholders should reject a transaction (either a sale of the corporation as a whole or a unification of the dual class equity structure) that does not offer them compensation for their foregone private benefits of control.[22] Therefore, Bebchuk and Kastiel conclude a sunset mechanism should be mandatory, especially for future IPOs.[23] Sunset provisions entail that a dual class equity structure will be cancelled at some point in the future.[24] Such mechanisms can be designed in various ways. They could be triggered at a predetermined date (for instance 10 or 15 years after the IPO), because of a predefined event (the founder reaching a certain age or retirement) or when an ownership-threshold is violated (the equity stake of the insider decreasing below, say, 5 or 10 %).[25] Bebchuk and Kastiel clearly favor the first variant, as sunset mechanisms based on future events (age or retirement) may still allow the founder to retain control for an excessive period of time. Moreover, ownership-thresholds are, in their view, commonly set rather low in the US, and thus ineffective.[26] However, Bebchuk and Kastiel make an exception for dual class equity structures which continue to create value for outside minority shareholders. These could be extended by a majority-of-the-minority vote (*see* § 11.3.1 *supra*).

In principle, the abolition of dual class equity structures through sunset clauses could match the life-cycle perspective (*see* § 10.6 *supra*). Nevertheless, the idea of Bebchuk and Kastiel appears undercooked. I confine myself to making three life-cycle based observations. First, they focus entirely on controlling shareholders as natural persons. However, if the controller were an institutionalized organization which appointed professional management, leadership capabilities might not erode at all. Whilst the value of control can diminish over time and an "idiot heir" may occasionally arise (*see* § 10.4.3 *supra*), resulting in a considerable reduction of idiosyncratic vision, some organizations have proven highly capable in recruiting skilled representatives in succession.[27]

22. *See* Bebchuk & Kastiel 2017, *supra* note 21.
23. *See* Bebchuk & Kastiel 2017, *supra* note 21. Even if one were to support sunset mechanisms – I am generally skeptical of these instruments – it is not immediately obvious why sunset provisions should become mandatory. It could well be argued that the law must grant corporations discretion to determine its own governance arrangement at this particular point.
24. For an elaborate technical analysis of various types of sunsets, *see* A.W. Winden, 'Sunrise, Sunset: An Empirical and Theoretical Assessment of Dual-Class Stock Structures', 2018 *Columbia Business Law Review* 852 (2019).
25. *See* Winden 2019, observing that 54 % of the US equity-based sunsets are at 10 %; *see also* H. Kim & R. Michaely, 'Sticking around Too Long? Dynamics of the Benefits of Dual-Class Voting' (2019), available at http://www.ssrn.com/, favoring time-based sunsets, as these are straightforward and simple to implement.
26. *See* Bebchuk & Kastiel 2017, *supra* note 21.
27. In this respect, one could refer to Swedish corporations. *See* A.M. Pacces, *Featuring Control Power* (RILE, 2007). Other prominent examples may include Fiat Chrysler Automobiles, an originally Italian corporation where the Agnelli-appointed Sergio Marchionne orchestrated

Then, it may be sensible to retain this organization as a controlling shareholder for an extended period of time. Second, a mandatory cancellation of the dual class equity structure, especially if triggered merely by the lapse of time, age or retirement, could make a corporation suddenly quite vulnerable to opportunistic behavior by short-term investors. As such, it would deter (firm-specific) investments by founders and other long-term parties. As a remedy, the sunset could be drafted to abolish the dual class equity structure in smaller steps, for instance by reducing the number of votes per share by 1 per year. However, long-term investors may be incentivized to act opportunistically just prior to the cancellation of a dual class equity structure. Then, more gradually abolishing the dual class equity structure could incentivize and aggravate "endgame behavior".[28] Third, the life-cycle approach does not mandate that every individual corporation will complete the various consecutive life-cycle stages, or indicate how long a certain phase will take. Some of them may track back and forth between certain phases on the life-cycle ladder (*see* § 10.6.2 *supra*).[29] In this view, purely time-based sunsets are rather arbitrary in nature.[30] Also, sunrise clauses, to re-activate a dual-class equity structure, may be necessary just as much as sunset provisions allegedly are.[31]

Additionally, some of the other (not life-cycle oriented) arguments that Bebchuk and Kastiel invoke are clearly nonsensical. First, the empirical evidence does not one-sidedly suggest that takeovers of dual class equity structure corporations are non-existent as compared to single class firms. This implies that, when controllers receive an interesting proposition, they are at least somewhat open to negotiations,[32] and concluding an agreement beneficial to both insiders and outsiders may very well be possible. The same can be inferred from

---

a successful turnaround, and HAL Trust, which has been affectionately referred to as the "Dutch Berkshire Hathaway".

28. *See* Fisch & Davidoff Solomon 2019, *supra* note 15. One example could involve controlling shareholders merging "their" corporation into another firm to obtain compensation in respect of voting power.
29. Indeed, here it becomes especially apparent that maturity is a concept difficult to quantify. What metric is to be used in this regard? If free cash flow were the criterion of choice, how should one treat corporations which voluntarily elevate their capital expenditures? Similar complications arise when focusing on the amount of total sales or the number of employees.
30. *See* Fisch & Davidoff Solomon 2019, *supra* note 15.
31. A more conventional alternative to a sunrise provision would be for a PE-fund to take the listed corporation private. *See* K. Lehn, J. Netter & A. Poulsen, 'Consolidating Corporate Control: Dual-Class Recapitalizations Versus Leveraged Buyouts', 27 *Journal of Financial Economics* 557 (1990); *see also* R.J. Gilson, 'Evaluating Dual Class Common Stock: The Relevance of Substitutes', 73 *Virginia Law Review* 807 (1987), arguing that a dual class equity structure is a substitute to going private, albeit an imperfect one, as the controller receives a smaller stake of free cash flow.
32. *See* K. Kastiel, ' Against All Odds: Hedge Fund Activism in Controlled Companies', 2016 *Columbia Business Law Review* 60 (2016) (observing that in the 2005 to 2014 period, almost 15 % of controlled corporations in the Russell 3000 Stock Index faced an activist event); *see also* B. Amoako-Adu & B.F. Smith, 'Dual Class Firms: Capitalization,

the literature on dual class equity structure unifications (*see* § 10.3.2 *supra*). Second, whilst Bebchuk and Kastiel consider the deterrence of IPOs not so much of an issue,[33] the decreasing number of listed corporations is actually a real threat (*see* § 7.3.3 *supra*). Third, the complications in relation to a majority-of-the-minority vote governing the introduction of a dual class equity structure (*see* § 11.3.1 *supra*) equally apply concerning such a vote addressing the modification or extension of an existing dual class equity structure. Moreover, it could be argued that in this case, outside minority shareholders are in fact the conflicted party – why would they refuse to receive additional powers?[34]

To summarize, there exist important arguments against sunset mechanisms. However, Bebchuk and Kastiel not only advocate the voluntary use of sunsets, but even want to make these mandatory. Whereas adopting sunsets voluntarily should be permitted, mandating them would be a grave mistake. Indeed, corporations principally have the freedom to adopt their own system of corporate governance. This is not without reason, as it enables them to take idiosyncrasic factors into account. Why a different approach should be taken specifically with regards to sunsets is beyond me.

11.4 Index exclusion

11.4.1 A closer look at passive investing

More and more funds are invested passively, as most investors find it rather challenging to obtain market-beating returns, especially in the long run, by means of active investing. Passive investors choose explicitly not to engage in selecting individual stocks for pursuing a market-beating return but seek a market-based return instead (*see* § 2.2.1 *supra*). Passive investing takes place primarily in two forms. The first technique involves index trackers, which are traded at the end of each day. The second concerns ETFs, which are traded on a continuing basis. Passive instruments may replicate the underlying index either physically, by holding shares of index constituents, or synthetically. In case of the latter, the replication process involves other instruments, such as options and derivatives.[35] Additionally, at index trackers, deposits and

Ownership Structure and Recapitalization Back Into Single Class', 25 *Journal of Banking & Finance* 1083 (2001).

33. *See* Bebchuk & Kastiel 2017, *supra* note 21.
34. *See* S.J. Griffith & D.S. Lund, 'Conflicted Mutual Fund Voting in Corporate Law', 99 *Boston University Law Review* 1151 (2019), for a rather detailed typology of the various forms of conflict of interest.
35. *See* A.P. Fassas, 'Tracking Ability of ETFs: Physical versus Synthetic Replication', 5 *The Journal of Index Investing* 9 (2015). In both instances, the replication process succeeds largely but never entirely, due to administration and transaction costs and taxes, causing a so-called "tracking error".

withdrawals are settled by the tracker's administrator, who buys and sells stock on the secondary market. This gives rise to transaction costs for the remaining participants. However, for ETFs, mutations are dealt with by authorized participants (i.e. banks). Consequently, such parties are enabled to arbitrate on price differences between the ETF and the underlying stocks. As a result, transaction costs are not borne by the investors who retain their securities, but by the sellers instead.[36]

S&P Dow Jones, FTSE Russel and MSCI have all developed thorough methodologies for constructing the various indices. Market capitalization and stock liquidity have long been the main factors for index inclusion. The index weight of constituents with the highest market capitalization is considerably higher than that of constituents with a lower market capitalization. Importantly, such methodologies can have peculiar results. The 750th to 1,000th largest stocks will be included in the Russell 1000, and are given small index weights. The 1,001st to 1,250th largest stocks, with similar market capitalizations, have bigger index weights. Indeed, these constitute the largest corporations of the Russell 2000.[37] The index composers have recognized the oddity of this state of affairs themselves as well. This has caused the introduction of not only equal-weight indices, but also of indices based on region (developed, emerging and frontier markets), factors (volatility, momentum or value), or themes (defensive or cyclical; catholic or Islamic). In total, MSCI offers approximately 190,000 index products.[38]

The increase in passive ownership may have considerable implications for corporate governance. Undoubtedly, some would consider these changes beneficial. For passive investors, exiting a position in an individual corporation is impossible. (Naturally, this does not apply to liquidating the passive investment entirely.) Thus, passive investing may imply a more long-term oriented form of investing.[39] The rise in passive ownership has been associated with greater board independence, less anti-takeover provisions and less unequal voting

36. *See* A. Agapova, 'Conventional Mutual Index Funds Versus Exchange Traded Funds', 14 *Journal of Financial Markets* 323 (2011); *see also* L. Kostovetsky, 'Index Mutual Funds and Exchange-Traded Funds', 29 *The Journal of Portfolio Management* 80 (2003).
37. Also, the market capitalization of the Russell 1000 is almost 10 times that of the Russell 2000, whilst the value of index funds tracking the Russell 1000 is only 2-3 times larger. *See* I.R. Appel, T.A. Gormley & D.B. Keim, 'Passive Investors, Not Passive Owners', 121 *Journal of Financial Economics* 111 (2016).
38. *See* http://www.msci.com/indexes/, regarding MSCI; *see also* http://us.spindices.com/index-finder/ and http://www.ftse.com/products/indexmenu?/, concerning S&P Dow Jones and FTSE Russell, respectively.
39. *See* L.E. Strine, 'Can We Do Better by Ordinary Investors? A Pragmatic Reaction to the Dueling Ideological Mythologists of Corporate Law', 114 *Columbia Law Review* 449, 478 (2014) ("Precisely because index funds do not sell stocks in their target index, those funds have a unique interest in corporations pursuing fundamentally sound strategies that will generate the most durable wealth for stockholders").

structures.[40] It could facilitate short-term oriented hedge funds in raising support for their demands,[41] although there also existing disincentivizing factors in this regard.[42] Meanwhile, the most fundamental concerns pertain to the engagement of passive investors. It has been argued passive investors do not necessarily follow recommendations such as those made by ISS blindly, as passive investors may be able to free-ride on the information shared by in-house active investment funds.[43] Others have countered that index funds rarely vote against management on contentious agenda items, as they can hardly become truly informed voters.[44] Indeed, any incentives and resources to monitor management are largely absent, as passive investors face a collective action problem. The costs incurred for intervention are likely considerable, but will not meaningfully affect performance of a fund as a whole. At the same time, free-riding competitors will benefit equally from such moves.[45] On a wide range of governance issues, passive investors behave apathic.[46] The more nuanced position appears to be that efforts of passive investors can be beneficial, but only in relation to matters of low-cost voice. The value effects of their endeavors become negative insofar well-informed, high-cost governance efforts are required.[47]

---

40. *See* Appel, Gormley & Keim 2016, *supra* note 37, also noting they find little evidence on operating performance.
41. *See* I.R. Appel, T.A. Gormley & D.B. Keim, 'Standing on the Shoulders of Giants: The Effect of Passive Investors on Activism' (2016), available at http://www.ssrn.com/; *see also* A. Brav et al., 'Hedge Fund Activism, Corporate Governance, and Firm Performance', 63 *Journal of Finance* 1729 (2008).
42. *See* Lund 2017, *supra* note 5, arguing that passive funds are reluctant to support hedge funds, as doing so might jeopardize corporate pension funds inflows.
43. *See* P. Illiev & M. Lowry, 'Are Mutual Funds Active Voters?' 28 *Review of Financial Studies* 446 (2015); *see also* S. Choi, J. Fisch & M. Kahan, 'Who Calls the Shots? How Mutual Funds Vote on Director Elections', 3 *Harvard Business Law Review* 35 (2013); B.S. Black, 'Agents Watching Agents: The Promise of Institutional Investor Voice', 39 *UCLA Law Review* 811 (1992).
44. *See* D. Heath, 'Do Index Funds Monitor?' (2018), available at http://www.ssrn.com/; *see also* Lund 2017, *supra* note 5: "BlackRock employs about 20 people who work on governance issues at some 14,000 companies […] Given the number of companies the engagement teams are charged with overseeing, simply voting the shares, without even considering how to vote them, is an enormous task."
45. *But see* E.B. Rock & M. Kahan, 'Index Funds and Corporate Governance: Let Shareholders be Shareholders' (2018), available at http://www.ssrn.com/; *see also* J.E. Fisch, 'The New Titans of Wall Street: A Theoretical Framework for Passive Investors' Shareholders' (2018), available at http://www.ssrn.com/, both arguing that because of their sheer size, "the Big Three have among the strongest direct financial incentives to become informed" and to engage, thus actually benefiting other outside minority investors.
46. *See* L.A. Bebchuk & S. Hirst, 'Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy' (2018), available at http://www.ssrn.com/, analyzing matters such as director selection and securities litigation.
47. *See* C. Schmidt & R. Fahlenbrach, 'Do Exogenous Changes in Passive Institutional Ownership Affect Corporate Governance and Firm Value', 124 *Journal of Financial Economics* 285 (2017), finding that passive ownership is correlated to less independent directors and worse M&A-transactions.

An interesting, newly-emerging debate concerns the concentration of control at a limited number of corporations managing the index funds and ETFs. (These are to be distinguished from the firms which compose the indices.) Essentially, this is an anti-trust debate. BlackRock, Vanguard and StateStreet, jointly referred to as the “Big 3”, together represent 70 % of passive fund holdings.[48] Thus, horizontal market concentration has increased, a phenomenon referred to as “common ownership”.[49] Specifically, the allegation is that index managers are incentivized to induce investee firms to engage in anti-competitive actions, allowing rent-seeking through elevated profits. Naturally, index managers strongly deny such behavior.[50] Research on this matter, both theoretical and empirical, is still in its early stages, and more information is required to analyze whether there is any merit to this claim.

11.4.2 Passive investing versus dual class equity structures

Institutional investors advocate what they perceive as good corporate governance. Traditionally, the one-share, one-vote rule has been a fundamental aspect of this aspiration.[51] Indeed, institutional parties make substantially smaller investments in listed corporations that have implemented a dual class equity structure,[52] and may even cause such an instrument to disappear.[53] Institutionals are largely able to decide on asset allocation themselves, assuming they respect their fiduciary duties. However, complications arise when

48. *See* E.A. Posner, F.M. Scott Morton & E. Glen Weyl, ‘A Proposal to Limit the Anti-Competitive Power of Institutional Investors’, 81 *Antitrust Law Journal* 669 (2017); *see also* E.B. Rock & D.L. Rubinfield, ‘Defusing the Antitrust Threat to Institutional Investor Involvement in Corporate Governance’ (2017), available at http://www.ssrn.com/. Note that this is mainly a US development, which may or may not spread to other economies.
49. *See* J. Azar, M.C. Schmalz & I. Tecu, ‘Anticompetitive Effects of Common Ownership’, 73 *Journal of Finance* 1513 (2018) (focusing on the airline industry); *see also* J. Fichtner, E.M. Heemskerk & J. Garcia-Bernardo, ‘Hidden Power of the Big Three? Passive Index Funds, Re-Concentration of Corporate Ownership, and New Financial Risk’, 19 *Business and Politics* 298 (2017); E. Elhauge, ‘Horizontal Shareholding’, 109 *Harvard Law Review* 1267 (2016).
50. For a well-known example, *see* B. Novick, ‘Diversified Portfolios Do Not Reduce Competition’ (2019), available at http://www.corpgov.law.harvard.edu/.
51. The examples are numerous. For extensive overviews of statements of institutional parties, *see* Lund 2019, *supra* note 5; *see also* Bebchuk & Kastiel 2018, *supra* note 21; B.S. Sharfman, ‘A Private Ordering Defense of a Company's Right to Use Dual Class Share Structures in IPOs’, 63 *Vilanova Law Review* 1 (2018).
52. *See* K. Li, H. Ortiz-Molina & X. Zhao, ‘Do Voting Rights Affect Institutional Investment Decisions? Evidence from Dual-Class Firms’, 37 *Financial Management* 713 (2008), showing that institutional ownership in US dual class equity structure firms is 3.6 percentage points (11 %) lower than in single class firms. Meanwhile, unifying dual class equity structure corporations experience a significant increase in institutional ownership.
53. *See* F. Braggion & M. Giannetti, ‘Changing Corporate Governance Norms: Evidence from Dual Class Shares in the UK’, 37 *Journal of Financial Intermediation* 15 (2019), attributing this development to press influence.

institutional parties participate passively in stock indices which include dual class equity structure corporations. Then, they might be investing in such businesses unintentionally.[54] Especially following the Snap IPO in 2017, institutional investors have started to oppose the inclusion of dual class equity structure corporations in stock indices vehemently.[55]

The organizations responsible for constituting the most relevant stock indices – S&P Dow Jones, FTSE Russell and MSCI – partially catered to institutional investor's demands, following swift and low-key discussions. The measures adopted are the following.[56] The S&P Global BMI Indices and the S&P Total Market Index will continue to include dual class equity structure corporations in the future, since these indices represent the "universe of investment opportunities". For the S&P Composite 1500 and its components (S&P 500, S&P MidCap 400 en S&P SmallCap 600), this will no longer be the case. Substantial governances standards already apply in respect of those indices. Consequently, additional obligations are felt to be a smaller step.[57] Starting September 2017, inclusion in any of the FTSE Russell indices will require that the free float represents at least 5 % of the total voting power. In this regard, non-tradeable (superior voting) securities are also taken into account.[58] MSCI initially favored a similar approach concerning its GIMI and US equity indices, although a higher threshold of 25 % of the voting power was proposed. Meanwhile, MSCI's threshold would have included listed stock that was not part of the free float. For existing index constituents, the threshold would have been set

54. *See* A.N. Madhavan, *Exchange-Traded Funds and the New Dynamics of Investing* 66 (Oxford University Press, 2016) showing that 65 % of passive funds come from institutional investors. Note that institutional parties may have different index investing profiles.
55. In a letter dated May 3rd 2017, Norges Bank Investment Management, administrating almost $ 900 billion in assets, even went as far as stating that "Without any control rights in the form of votes on essential corporate matters, it is questionable whether the instruments can be described for indexing purposes as common equity shares." Interestingly, BlackRock stated that it "is a strong advocate for equal voting rights for all shareholders. However, we disagree with index providers' recent decisions to exclude certain companies from broad market indices due to governance concerns. Those decisions could limit our index-based clients' access to the investable universe of public companies and deprive them of opportunities for returns." *See* http://www.blackrock.com/.
56. For an extensive analysis, *see* S. Hirst & K. Kastiel, 'Corporate Governance by Index Exclusion', 99 *Boston University Law Review* 1229 (2019) (justifying the measure simply by referring to institutional investor dissatisfaction).
57. The consultative document (April 3rd, 2017) of S&P Dow Jones and a document outlining the measures adopted (31st July, 2017) can be found at http://www.us.spindices.com/ and http://www.spice-indices.com/, respectively.
58. *See* http://www.storage.pardot.com/ and http://www.ftse.com/ for the consultative document (May 2017) and the document outlining the implemented measures (26 July 2017), respectively. Note that 55 % of the respondents was in favor of a 25 % threshold, which was found too disruptive by FTSE Russell, as it would affect 155 instead of 32 listed corporations (*see* http://www.ftse.com/ for an indicative list). Additionally, respondents did not favor a clear policy option in respect of corporations failing to meet the voting power requirements. The current approach only received 29 % of the votes.

at 2/3 of 25 % (i.e. 16,67 %). Additionally, MSCI requested views on matters such as grandfathering and the treatment of stocks which carry minimal voting rights or only voting rights in respect of specific agenda items. Later, MSCI proposed a more comprehensive approach. Instead of removing listed corporations with a wedged capital structure (including, but not limited to, dual class equity structures) from the index, their index weight was to be adjusted downwards to reflect the unequal distribution of voting power.[59] This approach would prevent potentially arbitrary thresholds based on free float voting power (i.e. 5 %, 25 % or 50 %). It also acknowledged that, from a historical point of view, stocks have not necessarily granted voting rights. Shares that only carry conditional voting rights or only entail voting rights in respect of specific agenda items would be considered non-voting. The proposal affects 4-5 % of global equity markets, or 221 corporations, including Google, Facebook, Roche and Unilever. For individual countries, including the US, Sweden and the Netherlands, the figure was considerably higher (around 10 %). Interestingly, an exception was made for loyalty (or time phased) voting shares which, since the *Loi Florange* was enacted, are the default option for French corporations (*see* § 10.2.2 *supra*). Thus, the consequences of MSCI's proposal also could have been much more severe for French markets.

It is interesting to note that the (proposed) policies of S&P Dow Jones, FTSE Russell and MSCI differ widely from each other, especially given the short time-frames of the respective consultative procedures and the overlap of the parties involved. This implies that consensus amongst participants is lacking. To give just one additional example, grandfathering of incumbent dual class equity structure constituents will be provided for to a varying degree.[60] Given the rapidly increasing importance of passive investing at the expense of active investing, the proposals of index constructors might affect market prices of dual class equity structure corporations considerably.[61] Instruments including the Vanguard Russell 1000 Index Fund are based directly on the creations of index composers. In the future, they might be faced with buying restrictions in respect of certain stocks, or (absent grandfathering) could even be required to liquidate existing positions. Such expectations may push corporations into

59. *See* http://www.msci.com/ for the first (June 2017) consultative document, an intermediate conclusion and the second consultative document (both January 2018).
60. S&P Dow Jones will apply grandfathering indefinitely. MSCI and FTSE Russell have committed to grandfathering until 2021 and 2022 (!), respectively. Additionally, FTSE Russell has committed to a periodical review.
61. There exists a substantial body of literature on the price effects of index inclusion, because of changes in institutional demand, investor awareness and liquidity. For an example, *see* Y-C. Chang, H. Hong & I. Liskovich, 'Regression Discontinuity and the Price Effects of Stock Market Indexing', 28 *The Review of Financial Studies* 212 (2015), finding that additions to the Russell 2000 result in price increases and vice versa.

undesired and inefficient governance arrangements, as the fear of less for index weight is very real.[62]

11.4.3 Indexing and life-cycle critiques

Passive investors are principally interested in obtaining a market-based return. Thus, the institutional investor-induced switch towards a more active stock selecting process entails that index trackers and ETFs drift away from their purpose.[63] Relatedly, this creates the impression that index composers and/or institutional investors have it in their unilateral powers to foresee which corporations will be able to deliver superior long-term returns. This appears somewhat ambitious, as may be illustrated by comparing two dual class equity structure technology corporations. Facebook encountered substantial difficulties shortly after its IPO, only to make a stellar comeback afterwards.[64] Meanwhile, the IPO of Snap has so far failed to become a notable success.[65] It are exactly these hard-to-predict developments that passive investing – focusing on time in the market instead of timing the market – aims to eliminate.[66] The revised MSCI consultation also shows that achieving a perfect understanding of investor proportionality may prove elusive. The measures of S&P Dow Jones, FTSE Russel and MSCI are even more problematic due to the numerous interlinks that exist between index products and the potentially limited knowledge of investors on such matters.

From a life-cycle perspective, excluding dual class equity structure corporations appears equally unsophisticated.[67] Such mechanisms in fact signal that a firm is experiencing a phase of rapid growth, which typically involves high information costs (*see* § 10.6.3 *supra*). Thus, passive investors who cannot participate in dual class equity structure corporations are severely at risk of

62. *See* A. Betzer, I. van den Bongard & M. Goergen, 'Index Membership vs. Loss of Voting Power: The Unification of Dual-Class Shares' (2017), available at http://www.ssrn.com/, showing that a modification in the index selection rules by Deutsche Börse (from total market capitalization to market capitalization of the more liquid class of stock) induced many dual class unifications.
63. *See* T.A. Keijzer, 'Having your cake and eating it, too. Over het weren van dual class-structuren uit aandelenindices', 4 *Maandblad voor Ondernemingsrecht* 223 (2018).
64. Facebook has implemented a capital structure in which each A-class share carries 1 vote and each B-class share carries 10 votes. The stock price at the IPO (on May 18th 2012) was $ 38. At the end of August 2012, shares traded for only $ 18. As of September 2020, this has increased to approximately $ 260, despite wide-ranging privacy concerns.
65. Snap has created a capital structure in which (the listed) A-class shares have no voting rights, (employee-held) B-class shares have 1 vote each and (founder-held) C-class shares have 10 votes each. At the end of March 2nd 2017 (the day of the IPO), Snap traded at $ 24.50. As of September 2020, the share price was at $ 26.
66. *See* A. Winden & A.C. Baker, 'Dual-Class Index Exclusion' (2018), available at http://www.ssrn.com/.
67. *See* Keijzer 2018, *supra* note 63.

missing out on potentially lucrative developments.[68] Even if some of the dual class equity structure corporations included in the stock index ultimately were to fail, this would not matter as a long as a larger part would become successful.[69] This also relates to the limited nature of shareholder liability. Indeed, stocks effectively serve as a call option: investors face unlimited upside, but limited downside.[70]

The measures implemented by S&P Dow Jones, FTSE Russell and MSCI, whilst not without consequence, undoubtedly could have been much more severe, for instance by promptly removing all corporations which deviate in any way from the one share, one vote standard from all indices. From a policy perspective, the compromises might prove tolerable because of their limited effects (in case of MSCI, 4-5% of global equity).[71] Nevertheless, it would have been clearly preferable to keep dual class equity structure corporations eligible for inclusion in existing indices. If desired, new indices could have been designed specifically with a view to respecting the one share, one vote standard.[72] As such, denying dual class corporations index inclusion signals that corporate governance is becoming more of an end in itself instead of a means.[73]

It could even be observed that sound policy making would require the exact opposite of the measures implemented by S&P Dow Jones, FTSE and MSCI. Indeed, some scholars have argued that passive investors should only be able to acquire non-voting stock.[74] First, this relates to the governance effects of

---

68. *But see* Li, Ortiz-Molina & Zhao 2008, *supra* note 52, showing that to a certain degree, institutional parties have already accepted this state of affairs. (For retail investors, the situation could very well be different.)
69. *See* H. Markowitz, 'Portfolio Selection', 7 *Journal of Finance* 77 (1952).
70. *See* L.A. Bebchuk, R. Kraakman & G. Triantis, 'Stock Pyramids, *Cross-Ownership and Dual Class Equity: The Mechanisms and Agency Costs of Separating Control From Cash-Flow Rights* 445 (R. Morck ed., 2000); *see also* Z. Goshen & A. Hamdani, 'Corporate Control and the Limits of Judicial Review' 40 (2019), available at http://www.ssrn.com/. As a result, pursuing the favorite/long shot bias (i.e. overvaluing small chances and undervaluing likely events) may actually be sensible from an economic point of view, provided that the effects of such behavior are not externalized.
71. *See* Hirst & Kastiel 2019, *supra* note 56, considering the effect of the measures "limited, but non-zero".
72. However, this would have required benchmarking narrow (non-dual class) against broad indices, a contest the narrow indices might very well have lost. *See* Hirst & Kastiel 2019, *supra* note 56. Additionally, increased competition from index funds would have decreased costs and increased returns of mutual funds. *See* M. Cremers et al., 'Indexing and Active Fund Management: International Evidence', 120 *Journal of Financial Economics* 539 (2016).
73. *See* S.M. Bainbridge, 'Director Primacy: The Means and Ends of Corporate Governance', 97 *Northwestern University Law Review* 547 (2002) on the distinction between ends and means in corporate law.
74. *See* Lund 2017, *supra* note 5, suggesting a default no-voting rule for passive funds but making an opt-out possible or, alternatively, a pass-through voting rule (i.e. allowing the ultimate beneficial owner to cast the vote).

passive investing. Passive investors may not be appropriate monitors, and could even face incentives to not overly engage in oversight (*see* § 11.4.1 *supra*). The second argument is based on information asymmetries and catering to various investor (i.e. well-informed and ill-informed) preferences. Passive investing actively makes stock markets dumber. Thus, its rising popularity in fact stimulates the use of dual class equity structures. Indeed, passive investors are virtually the opposite of the "information traders".[75] Third, by enabling passive investors to choose between listed voting and non-voting stock, the issuing corporation would benefit from lower information costs. Meanwhile, investors who have acquired cheaper non-voting stock could secure higher dividend returns.[76] Fourth, the adverse effects of common ownership – if actually present – on corporate competition could further suggest that passive investors should only be able to acquire non-voting stock. Indeed, this step would diminish the influence passive investors have over corporate strategy.

75. For a discussion on this concept, *see* Z. Goshen & G. Parchomovsky, 'The Essential Role of Securities Regulation', 55 *Duke Law Journal* 711, 714 (2006).
76. *See* Lund 2019, *supra* note 5.

Chapter 12. Summary

12.1 The functions of financial systems and the stock market

In Chapter 7, I analyzed the functions of financial systems. The two most prominent types of financial institutions are stock exchanges and banks. As was observed in § 7.2, these systems primarily serve to facilitate the allocation of resources, across time and space, in an uncertain environment. The stimulation of risk sharing relates to both liquidity risk and idiosyncratic risk. The enabling of resource allocation allows capital to flow to its highest value use. By sharing risks and allocating capital, financial systems alleviate information and transaction costs.

It is popularly assumed that stock markets act as a tool for raising funds. However, most investments have traditionally been funded by retained earnings or debt, as was discussed in § 7.3. Starting in the 1970s-1980s, the amount of dividends declared and stocks repurchased has exceeded the amount of funds raised through IPOs and SEOs. Instead, stock markets ought to be considered as an exit platform. Meanwhile, stock markets find it difficult to play this role. Globally, there are 5,000 fewer listed corporations than one would expect. This "listing gap" may stem from the costs of IPO underpricing, regulatory costs, and the existence of alternative funding sources, including VC. Moreover, modern businesses are increasingly reliant on intangible assets, which may be more difficult to finance on public markets. Whereas the decision to go public hinges on many factors, the analysis of § 7.3 implies that the use of differentiated voting rights should be permitted, and perhaps even ought to be stimulated, to increase the attractiveness of stock markets.

However, the analysis on the relationship between finance and economic growth, in § 7.4, paints a different picture. The development of financial markets is correlated with economic growth, although correlation does not equate to causation, the relative importance of banks and stock exchanges may differ, and generalizations between countries and industries should be avoided. In the view of La Porta, Lopez-de-Silanes, Shleifer and Vishny, the "law matters" for the development of financial markets. Having sufficient safeguards to promote the interests of outside minority investors is necessary for the existence of active financial markets. As dual class equity structures are principally in conflict with the position of outside minority shareholders, the finance-growth debate suggests that such structures should not be stimulated, and perhaps even ought to be prohibited.

12.2 Capital structure and dual class equity structures

In Chapter 8, I analyzed dual class equity structures as part of the general corporate capital structure, building on the Modigliani and Miller irrelevance theorems. These were presented in § 8.2 and predict that a corporation's market value will remain constant, regardless of the mixture between debt and equity used. The theorems are based on a series of stringent assumptions. Relaxing them allowed us to identify factors that are actually do affect the value of the corporation.

The first "inversion" of the Modigliani and Miller irrelevance theorems is trade-off theory, which was analyzed in § 8.3. Trade-off theory suggests that capital structure of the corporation can be explained by two factors, being the tax advantages of debt and bankruptcy costs. The prudent use of leverage can increase the value of the corporation, but only up to the point that the marginal costs of bankruptcy offset the marginal benefits of the tax debt shield. Trade-off theory predicts that the use of dual class equity structures will not be widespread. Issuing inferior voting and inferior profit participating stock could diminish the probability of bankruptcy. However, it would appear questionable whether investors would be willing to acquire such securities in times of (looming) financial distress. Meanwhile, the validity of trade-off theory itself can be debated, as both the magnitude of the tax debt shield and bankruptcy costs have been disputed.

The second "inversion" concerns pecking-order theory, which was discussed in § 8.4. Pecking-order models focus on the existence of information asymmetries between managers and investors. According to pecking-order theory, rational managers will prefer deploying retained earnings over debt until that option has been depleted, as it is less risky and thus cheaper. Similarly, debt is preferred over equity until depleted. When management possesses favorable private information on the state of the corporation, it may refrain from issuing what it perceives as undervalued shares. Conversely, if management's private information were unfavorable, any decision to issue additional stock signals unwelcome news. Thus, equity issuances can only signal negative news, or will not occur at all. Pecking order theory implies that inferior voting shares should not at all be considered as a cheap "equity currency", but are instead amongst the most expensive sources of finance. Meanwhile, the validity of pecking-order theory is questionable, as the informational signal of an equity issuance may be smaller than assumed, and equity issuance are clearly not used as a means of last resort in practice.

Both trade-off theory and pecking-order theory emphasize certain factors (either taxes, bankruptcy costs or information asymmetries) affecting the use of debt and equity. One factor could be dominant for a firm featuring specific characteristics or in some circumstances, yet prove less important under other conditions. Therefore, in § 8.5, I developed an overarching capital structure framework based on the life-cycle of the corporation. Both in trade-off and in pecking-order models, the maturity of the corporation is actually the determining factor. Under the life-cycle approach, the creation of a particular capital structure remains a trade-off. Simultaneously, life-cycle theory echoes the pecking-order model, as it predicts that the corporation will continuously shifts its preferences to finance instruments which are cheaper on an overall basis. One advantage of a life-cycle model is that it enables every corporation to adopt a tailored capital structure. From a legal point of view, life-cycle theory supports permitting a wide variety of forms of capital, as doing so increases the chance of the corporation being able to deploy a financial structure which is appropriate to its needs.

12.3 Dividends, retained earnings and dual class equity structures

In addition to the general capital structure, I examined the implications of the scholarship on dividend policy for dual class equity structures, in Chapter 9. Modigliani and Miller have been influential in this respect as well. Here, their argument was that the value of a corporation must be independent of the distribution or retention of earnings. Again, relaxing assumptions underlying the dividend irrelevance theorem allows us to identify aspects of distributions that actually do affect the value of the corporation.

The matter of taxes was studied in § 9.3. Whenever (long term) capital gains are taxed at a lower rate than dividends, investors would rationally prefer corporations not to make any dividend distributions but to engage in share buybacks. Meanwhile, the marginal tax rate of investors can vary considerably. Investors with differing payout preferences could be distributed amongst corporations to constitute an appropriate clientele for each payout ratio. However, empirical studies of clientele models delivered unconvincing results. Some authors concluded there would be no *ex ante* possibility for investors to determine whether higher or lower payout stocks would deliver superior total returns before or after tax. Others observed that investors in higher tax brackets also hold substantial amounts of dividend paying stocks. Meanwhile, dividend clientele effects may have a life-cycle origin with regard to retail investors. Retail investors generally prefer non-dividend paying stocks. However, for older, low-income retail investors, the opposite is true.

The uncertainty approach, as discussed in § 9.4, forms the core of the models of Lintner and Gordon. Lintner concluded that corporations engaged in "dividend smoothing". Only when the corporate earnings potential was deemed to have increased permanently, any improvements in the annual results would be reflected – partially – in the dividends, with further adjustments being made in subsequent years. Consequently, a drop in earnings would not necessarily result in a direct dividend cut. Gordon concurred with Lintner's approach, arguing that risk-averse investors may very well apply a progressive – instead of a constant – discount rate in valuing more distant future dividends. These ideas appear surprisingly in line with modern behavioral insights. Corporations equally apply behavioral insights when deciding upon distributions. Managers initiate dividends when these are valued at a premium and omit them when such a premium is absent ("dividend catering"). Then, dividend premiums reflect a (temporary) preference for "safer", stable dividend payers over non-dividend paying growth firms. In this sense, catering to investors by initiating a dividend has been considered a sign of corporate maturity.

Dividends are furthermore said to contain information, both on future cash flows as well as sources and uses of corporate funds. Managers with inside information can employ dividends to convey their knowledge to outside investors. This argument is considered in § 9.5. The signaling hypothesis would imply that dividend adjustments should be followed by stock price changes in the same direction. However, the price effects of decreases and omissions are greater than those of increases and initiations. Moreover, the dividend signal may be ambiguous. If anything, dividend raises are deemed to reflect that earnings have grown in the past. Consequently, they are linked to the corporation becoming more mature, meaning that dividend signaling can be incorporated in a life-cycle perspective.

Dividends have also been considered from an agency perspective, as was described in § 9.6. From an agency point of view, the main argument has been that dividends reduce the amount of free cash flow available for managers and controlling shareholders alike to pursue their private interests. The costs of managers and controlling shareholders pursuing these interests more than offsets the bankruptcy costs associated with excessive distributions. However, different variants of agency theory exist in respect of dividends. According to La Porta, Lopez-de-Silanes, Shleifer and Vishny, high dividends should be considered the result of a protective system of corporate law (the "outcome variant"). Meanwhile, other scholars have advocated the "substitute variant". This view postulates that high dividends are to be expected low governance regimes, as a credible dividend commitment maintains a reputation for acceptable shareholder treatment. Thus, agency theory is unclear as to which party holds the initiative to ensure the declaration of dividends. Moreover, agency theory is designed principally for well-established businesses, meaning that it also contains a certain life-cycle element.

My conclusion is that each of the theories discussed in § 9.3-§ 9.6 should be rejected. Instead, dividends ought to be considered as a reflection of the life-cycle of the corporation, similar as its capital structure. This observation was presented in § 9.7. According to the life-cycle perspective, younger firms have a larger investment opportunity set, but do not generate sufficient profits to finance every single business venture. Using debt may accelerate growth whilst enabling insiders to retain control, but interest payments could also result in bankruptcy. Additionally, successes of young businesses are more difficult to predict, so that information costs are higher. For older firms, the situation is virtually entirely the opposite. Therefore, as the firm matures, agency costs start to offset information and bankruptcy costs. To counter rising agency costs, dividends are initiated, even if this creates tax liabilities. These findings suggest that the law ought to be permissive and not prohibitive in respect of shares with differentiated profit entitlements, particularly regarding shares lacking dividend rights. Additionally, it ought to be possible to convert shares with certain financial characteristics into stocks carrying other profit entitlements.

12.4 Voting rights and dual class equity structures

In Chapter 10, I studied the economic effects of superior and inferior voting rights. The right to vote has been at the cornerstone of corporate law and economics for a long period of time. However, financial-economic models aiming to establish the value of a stock, traditionally pay little attention to the presence and distribution of voting rights.

In § 10.2, I first examined the costs of dual class equity structures from a theoretical agency perspective. The existence of a wedge between equity interest and control gives rise to inefficiencies. The costs of private benefits of control are borne partly by the executives and/or controlling shareholder, and partly by outsiders, whilst their advantages accrue solely (or for a larger part) with their initiator. Dual class equity structures aggravate this state of affairs, as they contribute to entrenchment. If a wedge exists, but the controller is not entrenched, he may be removed without delay. By contrast, if the controller is entrenched, but a wedge does not exist, the equity stake provides a powerful incentive to maximize the corporations' value. Despite the complications associated with wedges and entrenchment under agency theory, corporations featuring these characteristics are not economically insignificant.

Then, in § 10.3, I studied the empirical literature on the value of the right to vote. For marginal shareholders, the right to vote, in itself, lacks any value. However, it can become quite relevant following the emergence of a party who attributes a positive value to control. Conversely, a shareholder who has already obtained control will not be interested in acquiring more votes. The value of the right to vote is typically estimated at 5 to 15 % of the share price, although these figures should be considered as a lower bound. Meanwhile, in certain jurisdictions, the right to vote may be worth either much less or much more than 5 to 15 %. Additionally, the voting premium can differ across time, as national systems of corporate governance develop, and between industries. Traditionally, private benefits of control have been deemed present primarily in the newspaper and professional sports sectors. The voting premium is also impacted by many country-specific institutional factors, including the adequacy of law enforcement.

Subsequently, in § 10.4, I took the analysis to a more granular level, examining the effects of dual class equity structures on IPO underpricing, going concern firm value, in general as well as in relation to family businesses, innovation and takeover situations. It is difficult to provide any definitive empirical answers to the question whether IPOs of dual class equity structure corporations are overvalued or undervalued. At least, the findings imply that dual class equity structures do not entail huge discounts. As such, they may incentivize founders to go public, thus countering the decreasing number of listed corporations. Whether dual class equity structures have an increasing or decreasing effect on firm value is similarly a controversial matter. Classic empirical studies are contradictory. This applies both when considering dual and single class firms and when analyzing the consequences of dual class equity structure recapitalizations and unifications. Dual class equity structure family firms may deliver better returns than their single class counterparts, although involvement in corporate management can be required. Additionally, descendants of the founder acting in the capacity of CEO or Chairman may destroy value. As far as innovation is concerned, the overall picture appears to indicate that anti-takeover provisions can have a positive effect, but primarily for innovative firms. Thus, dual class equity structures, should not be mandated for every single firm, but should be available as an optional extra, and may even be an effective default rule for technology firms. The empirical and theoretical evidence of dual class equity structures as anti-takeover provisions on shareholder value is again inconclusive. Inferior voting stocks often trade at lower prices than superior voting stocks and effectively make target corporations cheaper for potential acquirers. As a countermeasure, coattail provisions may be mandated. However, this approach inevitably makes the acquisition of control more expensive and/or decreases the likelihood of offers materializing. Meanwhile, not implementing coattail provisions entails a controller could receive a higher premium, but potentially at the expense of the shareholders of the acquiring corporation.

The advantages of dual class equity structures were discussed in § 10.5. Pacces identified idiosyncratic private benefits of control. These perks involve abstract psychological concepts, such as prestige and personal satisfaction. However, financial markets are not able to accurately price the returns resulting from such notions. As the firm eventually proves successful, these idiosyncratic psychological elements develop into the contractable factor of corporate control. Whereas a private benefits of control-based structure could become inefficient over time (*ex post*), the firm would not have developed without them in the first place (*ex ante*). Aditionally, Goshen and Hamdani argued that enabling an entrepreneur to retain control allows him to pursue his idiosyncratic visions. For innovative firms, news may not fully captured by ill-informed outside minority investors, whose information costs are high. By implementing a capital structure which reflects the founders idiosyncratic vision, corporations can signal their long-term character *ex ante* and attract a corresponding clientele. Finally, Goshen and Squire presented a model with the overarching goal of minimizing control costs, a concept which includes not only agent costs, but also principal costs.

I finished, in § 10.6, by concluding that not only the corporate capital structure and dividend policy can be best explained by adopting a life-cycle perspective, but that the same applies in respect of the distribution of voting rights. Indeed, recent empirical studies have found that the shareholder value effects of dual class equity structures differ along the corporate life-cycle. Accordingly, there exists a single, unified theory on the financial organization of the corporation. Consequently, the corporation must have a property right to reorganize its equity structure, for without, it cannot exist. Life-cycle theory incorporates certain elements from both agency theory and stewardship theory. Meanwhile, it should not be identified with the general economic conjuncture, or expected that every single corporation will complete the full road to maturity. Indeed, the life-cycle is not merely one-dimensional. As both information and agency costs can be colossal, the permitted number of votes per share should not be maximized, in order to not distort the trade-off between both factors.

12.5 Implications of the life-cycle approach

Finally, I considered the implications of the life-cycle framework for certain distinct aspects of dual class equity structures, in Chapter 11.

First, this concerned midstream recapitalizations, in general as well as in the cross-border variant, in § 11.2. Traditionally, midstream introductions of superior voting stock are considered problematic. In light of the life-cycle perspective, this backlash appears principally unjustified. Although a midstream introduction of a dual class equity structure is perhaps less likely than a unification from a life-cycle point of view, it should nevertheless be possible to conclude such a transaction. For the purpose of safeguarding control rights of existing investors, the midstream introduction of inferior voting stock, in addition to common shares outstanding, is considered less of a problem. However, the fact that vested voting rights are respected does not entail outside minority investors do not face any governance risks at all. Specifically, the creation of inferior voting stock may enable a controlling shareholder to unload his economic interest, thus giving rise to increased agency costs. Whilst midstream recapitalizations involving inferior profit participating stock should be permitted, an identical regulatory framework should apply as is the case concerning restructurings taking place by superior and inferior voting stock, as all of them are mechanisms to shift corporate control. Finally, cross-border midstream recapitalizations should not necessarily be considered as undercutting the global investing climate. The bonding hypothesis posits that firms that cross-list their securities on a foreign stock exchange with a more stringent set of investor protection measures than is the case in their country of origin constrain insiders from expropriating outside minority shareholders. Then, the adaptation of a more sophisticated system of governance could reduce control costs, benefiting outside minority shareholders.

As a second item, in § 11.3, I analyzed the merits of possible policy responses to midstream recapitalizations. These included a majority-of-the-minority (or qualified majority) vote, a shareholder exit right or sunset clauses. An exit right, compared to a majority-of-the-minority vote, has the advantage of offering substantive (instead of procedural) protection, retaining the insiders contribution to decreasing information costs and presenting a clear signal. Moreover, an exit right provides for a more proportional outcome. However, if too many disinterested investors decide to tender their shares, because the terms offered are unattractive, a liquidity crisis may ensue. As such, an exit right provides a latent but potentially powerful bite to protect outside minority shareholders. By contrast, Bebchuk and Kastiel have advocated the implementation of sunset provisions, to prevent dual class equity structures that were present at the time of the IPO from remaining in place perpetually. Sunset provisions could be triggered at a predetermined date, because of a predetermined event or when an ownership-threshold is violated. In principle, the abolition of dual class equity structures through sunset clauses matches the life-cycle approach. Nevertheless, the design of Bebchuk and Kastiel appears undercooked. For instance, their analysis focuses entirely on controllers as natural persons and ignores that a mandatory cancellation of dual class stock could make a corporation suddenly quite vulnerable. Furthermore, most corporations are effectively a composition of multiple enterprises, with different growth paths and product development lines of which the successes are uncertain.

Third, I discussed the issue of index inclusion of corporations with a dual class equity structure, in § 11.4. Following the Snap IPO in 2017, institutional parties have started to oppose the inclusion of dual class equity structure corporations in stock indices vehemently. S&P Dow Jones, FTSE Russell and MSCI have, following a swift and low-key consultation process, partially accepted the institutional demands. The measures adopted involve distinguishing between indices regarding index eligibility, creating a flee float voting power threshold or reducing index weight. Given the enormous size of the assets institutional parties manage and the rapidly increasing importance of passive investing, these developments might influence the market prices of dual class corporations considerably. I am rather critical of the initiatives of index composers, but not simply because of the possible price effects. First, the switch towards a more active selecting process entails that index trackers drift away from their original goal. Second, from a life-cycle perspective, excluding dual class corporations appears equally unsophisticated. Indeed, dual class equity structures in fact signal that a corporation is experiencing a phase of rapid growth. Passive investors are therefore at risk of missing out on these, potentially lucrative developments. In fact, it could even be argued that passive investors should only be able to acquire non-voting stock, the exact opposite of the measures implemented by S&P Dow Jones, FTSE Russell and MSCI. This follows not only from the lack of incentives passive investors face to monitor their investee corporations, but also from the possibility this offers to cater to various types of investors, whilst also stimulating competition between passive investing products.

Part III

– US Comparative Analysis –

Chapter 13. Introduction to Part III*

In Part III, I discuss dual class equity structures from a US comparative governance perspective. The rationale for this approach has been outlined in Chapters 3 and 4 (specifically, *see* § 3.3.3 and § 4.3 *supra*). The structure of Part III is as follows. In Chapter 14, I analyze the foundations of the US corporate legal system. To that end, I examine the division of powers between the federal government and the states, in § 14.2. Subsequently, I study the scope of state corporate law versus federal and state securities law, in § 14.3 and § 14.4, respectively. Finally, I consider some recent developments in this regard (§ 14.5).

Building on these findings, Chapter 15 contains a historical analysis on dual class equity structures in the US. Indeed, the historical aspect is an integral part of this PhD-thesis (*see* § 3.4 and 4.4 *supra*). To that end, I distinguish several periods during which the use of dual class equity structures spiked. After a start in the 19th century, an era which I discuss rather briefly (§ 15.2) following the attention paid to the development of long-distance US commerce in Chapter 14, I focus primarily on the 1920s and 1930s (§ 15.3) and the 1980s (§ 15.4). The current debate is covered as well, in § 15.5.

Subsequently, in Chapter 16, I study the current Delaware law and governance framework in relation to shareholder rights, in the absence of a dual calss equity structure recapitalization. First, I examine the character of the Delaware corporation, focusing on its purpose, personhood and flexible character, in § 16.2. Then, I discuss the position of the board, its fiduciary duties, independence requirements, and the standards applied by the Delaware courts for assessing director behavior, in § 16.3. Additionally, in § 16.4, I analyze shareholder voting rights and the position of the AGM, considering the general one share, one vote default rule and deviations from it, decision-making thresholds including quorums, and the proxy solicitation process. Finally, in § 16.5, I examine shareholder dividend entitlements, equal treatment and differential distributions, as well as financial requirements to make distributions and director liability.

---

*. Part III was written in part during and benefit greatly of my stay at Columbia Law School as Visiting Scholar (July – September 2018). Financial support of Stichting Organisatie van Effectenhandelaren te Rotterdam (STOER), Lex Mercatoria, Arie Tervoort Studiefonds and Erasmus Trustfonds is gratefully acknowledged.

Part III finishes the US comparative governance analysis with a discussion on the introduction and cancellation of dual class equity structures in the mid-stream phase, in Chapter 17. In that regard, I study older case law (§ 17.2) and subsequent private ordering initiatives (§ 17.3). Crucially, there have been fundamental developments in case law of the recent years. These cases are examined extensively (§ 17.4), applied specifically in relation to dual class equity structure recapitalizations (§ 17.5) and analyzed critically (§ 17.6). The findings of Part III are then summarized in Chapter 18.

Chapter 14. The US corporate law system

14.1 Introduction

In Chapter 14, I discuss the general structure of the US corporate governance system. To that end, I first examine the consitutitional division of powers between the federal government and the states, in § 14.2. My analysis in § 14.2 focuses on the role of the (Dormant) Commerce Clause in regulating (burdens imposed on) interstate trade and its influence on (unsolicited) takeovers. Subsequently, I study the scope of state corporate law, in § 14.3. The discussion in § 14.3 highlights the relevance of the internal affairs doctrine and discusses why New Jersey, and then Delaware became the dominant state for incorporation, whilst also reflecting upon the future of state competition for corporate charters. Subsequently, I examine federal and state securities laws and their interaction with corporate law, in § 14.4. Finally, I consider some recent developments with regard to the federal-state divide and discuss the importance of governance codes for the US legal landscape (§ 14.5).

14.2 Federal versus state law

14.2.1 The (dormant) commerce clause

Traditionally, securities laws are deemed to be enacted at the federal level, whereas corporate laws are considered to be drafted by the states. Whilst this distinction is not incorrect, it fails, for a number of reasons, to fully capture the complexity of the situation at hand. As the analysis in Chapter 14 will show, formerly separate domains of authority have become increasingly integrated.[1]

In the US, legislative power can be vested either in the federal government or in the states (or both, in case of concurrence), depending on the nature of the competency. Article I, Section 8 of the US Constitution lists the legislative powers assigned to the federal government. Sections 9 and 10 deny certain powers to the federal government and the states, respectively. Finally, the

1. *See* R.B. Thompson, *Delaware's Dominance: a Peculiar Illustration of American Federalism* in *Can Delaware Be Dethroned? Evaluating Delaware's Dominance of Corporate Law* 65-71 (S.M. Bainbridge et al. eds, 2018).

10th Amendment reserves all powers not assigned to the federal government or denied to the states to those states. According to Article I, Section 8, Clause 3 of the US Constitution, Congress is entitled to regulate commerce with foreign nations, between the states ("interstate") and with the "Indian tribes".[2] After the federal government has undertaken legislative action, any superfluous or conflicting state laws are pre-empted under the Supremacy Clause of the US Constitution (Article VI, Clause 2), provided that Congress intended to pre-empt those statutes.[3] This intention may be either explicit or implicit.[4] In the early stages of the existence of the US, the relevance of long-distance trade was rather limited. Indeed, merchants primarily conducted their operations on a smaller, intra-state level, although exceptions existed as well.[5]

Article I, Section 8, Clause 3 of the US Constitution not only empowers Congress to regulate interstate commerce, but also prohibits states from enacting legislation burdening or discriminating against such activity, even in the absence of federal regulation. This is the "Dormant" aspect of the Commerce Clause.[6] Certain topics in particular have given rise to great amounts of case law under the Dormant Commerce Clause. Relevant examples include taxes and health and safety requirements carefully drafted as to (formally) not burden or discriminate against interstate activity.[7] In its current interpretation, the Dormant Commerce Clause is based on a two-tiered standard of judicial review. The first tier focuses on state laws that discriminate in form or substance against interstate commerce or commercial actors. Sanctioning of those laws requires

---

2. Federal power over Native Americans has traditionally been considered both plenary and exclusive. *See* R.G. Natelson, 'The Original Understanding of the Indian Commerce Clause', 85 *Denver University Law Review* 201 (2007), advocating a much more narrow reading of Congressional power towards Native Americans, focused solely on trade.
3. *See* Florida Lime & Avocado Growers v. Paul*,* 373 U.S. 132 (1963) (upholding a California avocado minimum oil content prescription, hampering cultivators from Florida, as state statutes should be preempted only when compliance with both federal and state regulations is impossible); *see also* Rice v. Santa Fe Elevator, 331 U.S. 218 (1947) (on the relevance of federal statutes in fields of law traditionally occupied by the states).
4. For an elaborate analysis, *see* M.J. Garcia et al. (eds.), *The Constitution of the United States of America. Analysis and Interpretation* 271-290 (US Government Publishing Office, 2016); *see also* M.J. Kroeze & H.M. Vletter-van Dort, 'History and Future of Uniform Company Law in Europe' 5 *European Company Law* 114 (2008), comparing structures of cross-border commerce and concluding that, at least in 2008, the US framework was more developed.
5. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824). The case concerned a navigation monopoly granted by the state of New York. The US Supreme Court recognized the existence of a relationship between intra- and inter-state commerce. Consequently, Congressional power could also pertain to in-state businesses.
6. *See* Garcia et al. (eds.) 2016, *supra* note 4, at 176-182, 1767-1777.
7. For one example, *see* Minnesota v. Barber, 136 U.S. 313 (1890), in which a law requiring fresh meat sold inside the state to have been inspected by own officials within 24 hours of slaughter, even if it had taken place beyond state borders, was invalidated. For an extensive overview, *see* Garcia et al. (eds.) 2016, *supra* note 4, at 246-270.

the demonstration of a legitimate (non-protectionist) purpose and proportionality, meaning that less discriminatory measures are absent. In practice, this test is nearly always fatal.[8] The second tier considers state laws that, despite their non-discriminatory nature, nevertheless burden interstate commerce or commercial actors. Here, a more deferential balancing test is employed ("Pike-balancing"[9]). In this phase, it must be demonstrated that the interstate burdens are not clearly excessive in relation to the putative local benefits.[10]

As a whole, the (Dormant) Commerce Clause has been referred to as the "most important of […] powers granted to Congress",[11] due to its potentially wide-ranging scope.[12] Consequently, it is generally accepted that, from a constitutional point of view, the federal US government would be empowered to draft a unified system of corporate law, vacating conflicting and superfluous state statutes.[13] Although the opportunity has presented itself on multiple occasions (*see* § 15.3 and § 15.4 *infra*), Congress has, until now, deliberately opted not to.[14] The most recent development appears to have been the "The Accountable Capitalism Act", as proposed by Senator Warren in August 2018. It contains several policy measures, including introducing co-determination, but also mandates federal incorporation for businesses with annual revenues exceeding $ 1 billion. Effectively, the act would create a new distinction in US corporate law, in which smaller – although not necessarily private – corporations are governed by state law, and more mature – but not necessarily

8. *See* B.P. Denning, 'Reconstructing the Dormant Commerce Clause Doctrine', 50 *William and Mary Law Review* 417 (2008).
9. *See* Pike v. Bruce Church, 397 U.S. 137 (1970). Note that this approach can already be observed in earlier cases. For an example, *see* Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945).
10. *See* Denning 2008, *supra* note 8, arguing that whereas the two-tier model is conceptually simple, its application is highly complex, resulting in rather conflicting case law.
11. *See* W.H. Rehnquist, *The Supreme Court: How It Was, How It Is* 116 (William Morrow & Co., 1987).
12. Note that this potential does not necessarily have to be exploited in full. S*ee* Garcia et al. eds. (2016), *supra* note 4, at 176-182, noting that from 1880 to 1930, the US Supreme Court aimed to curb Federal power. Consequently, it held that the Commerce Clause did not pertain to activities such as mining (*see* Kidd v. Pearson, 128 U.S. 1 (1888)); insurance (*see* Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1869)) and the pivotal matter of baseball (*see* Federal Baseball League v. National League of Professional Baseball Clubs*,* 259 U.S. 200 (1922)). This restrictive interpretation was reconsidered following Roosevelt's New Deal.
13. *See* M. Kahan & E. Rock, 'Symbiotic Federalism and the Structure of Corporate Law', 58 *Vanderbilt Law Review* 1573, 1585 (2005), calling the argument against pre-emption "weak – indeed, nearly laughable"; *see also* S.M. Bainbridge, 'The Short Life and Resurrection of Sec Rule 19c-4', 69 *Washington University Law Quarterly* 565, 590 (1991), noting that "No one seriously doubts [Congress's ability to pre-empt, TK] under the Commerce Clause".
14. *But see* L.A. Bebchuk & A. Hamdani, 'Federal Corporate Law: Lessons from History', 106 *Columbia Law Review* 1793 (2006); *see also* M.J. Roe, 'Delaware's Competition', 117 *Harvard Law Review* 588 (2003), both arguing that because of the permanent threat of federal intervention, state law will mimic federal law.

public – corporations by federal law.[15] Given the fact that Warren suspended her candidacy for the US presidency, the proposal's future is uncertain, and if pursued, it would likey meet stiff resistance. (Neither is the Warren-proposal free from technical issues – which system of corporate law should apply for cyclical business, with highly volatile earnings?) However, Warren's proposal does signal that the debate on the federalization of the corporation is still ongoing and is no longer confined to securities law.

14.2.2 First generation anti-takeover statutes

The (Dormant) Commerce Clause gained considerable attention following the enactment of state-anti takeover laws, starting from the late 1960s onwards. These statutes (37 states adopted them) aimed to safeguard corporations that enjoyed a certain form of nexus to a particular state from unsolicited takeover attempts, by restricting the ability of out-of-state corporations to acquire their stock.[16] The anti-takeover laws were often broadly drafted, encompassing firms incorporated under own state law but, depending on the applicable nexus criteria, potentially those beyond state borders as well. For instance, they could be invoked by corporations of which 10 % of the share capital was held by resident shareholders.[17] Substantively, the statutes generally involved the following. First, a prospective buyer was required to notify the Secretary of State and the target corporation of his intentions and the material aspects of the tender offer 20 days prior to the proposal becoming effective. Second, the Secretary of State was empowered to call a hearing on the matter. However, a deadline for the hearing was not provided. Since finalizing the acquisition without the hearing was not possible, the transaction could effectively be postponed indefinitely. Third, the Secretary of State was permitted to review the fairness of the terms proposed.[18] Requirements such as these put state-anti takeover laws at odds with the Williams Act, a federal statute aimed at regulating tender offers.[19] The Williams Act has a more neutral character than the statutes adopted by the states, meaning it favors takeover targets to a lesser degree and also pays close attention to the interests of investors. As an additional complication, the SEC introduced Rule 14d-2(b) in 1979. It mandated that a tender offer should be made within 5 days of announcing the material

15. For an initial analysis, *see* M. Lipton, 'Corporate Governance; Stakeholder Primacy; Federal Incorporation' (2018), available at http://www.corpgov.law.harvard.edu/, praising the shift away from shareholder primacy.
16. *See* A.R. Pinto, 'Takeover Statutes: The Dormant Commerce Clause and State Corporate Law', 41 *University of Miami Law Review* 473 (1987).
17. *See* Pinto 1987, *supra* note 16.
18. *See* Pinto 1987, *supra* note 16.
19. Pub.L.90-439, 82 Stat. 455. Note that it has been ruled explicitly that the Williams Act permits the use of dual class equity structures. *See* Amanda Acquisition v. Universal Foods, 877 F.2d 496 (7th Cir. 1989).

aspects of the transaction. Consequently, complying with both federal law and state anti-takeover laws simultaneously was no longer possible. (Whether this was in fact the true purpose of Rule 14d-2(b) can only be speculated).

The matter became urgent when MITE initiated a tender offer for all outstanding shares of Chicago Rivet & Machine, domiciled in Illinois. A deeply divided US Supreme Court – 6 Justices dissented or concurred – ruled the Illinois state anti-takeover statute unconstitutional for (indirectly) violating the Dormant Commerce Clause.[20] Specifically, it was held that the law imposed a cost on investors, as they were deprived from the opportunity to obtain a control premium. Meanwhile, Illinois' anti-takeover law failed to provide a benefit, as "[t]he Williams Act provides these same substantive protections".[21] (Thus, *Edgar v. MITE* provides a fine example of Pike-balancing. *See* § 14.2.1 *supra*.) After the Illinois anti-takeover statute was ruled unconstitutional, and therefore vacated, many state-anti takeover laws shared its fate.[22]

14.3 State corporate law

14.3.1 The internal affairs doctrine

In the absence of a federal system of corporate law, the (Dormant) Commerce Clause does not indicate which laws govern the corporation. In this regard, the internal affairs doctrine is relevant. Accordingly, matters such as the election or appointment of directors, the issuance of stock and preemptive rights, directors' and shareholders' liability, mergers, acquisitions and liquidations are governed by the (case) law of the state of incorporation, regardless of the physical location of the corporation's activities.[23] As such, the internal

20. *See* Edgar v. MITE*,* 457 U.S. 624 (1982).
21. *See* Edgar v. MITE*,* 457 U.S. 624 (1982). For an analysis, *see* S.M. Bainbridge, 'State Takeover and Tender Offer Regulations Post-MITE: The Maryland, Ohio and Pennsylvania Attempts', 90 *Dickinson Law Review* 731, 740 (1986); *see also* M.G. Warren, 'Developments in State Takeover Regulation: MITE and Its Aftermath', 40 *The Business Lawyer* 671 (1985). For an extensive discussion from a Dutch perspective, *see* M.J. van Ginneken, *Vijandige overnames: de rol van de vennootschapsleiding in Nederland en de Verenigde Staten* 96-97 (Kluwer, 2010).
22. *See* D.R. Fischel, 'From *MITE* To *CTS*: State Anti-Takeover Statutes, the Williams Act, the Commerce Clause, and Insider Trading', 1987 *Supreme Court Review* 47, 50 (1987); *see also* J. Carroll, '*Edgar v. MITE Corp.*: The Death Knell for the Indiana Takeover Offers Act' 16 *Indiana Law Review* 517 (1983) (already predicting many statutes modeled after Illinois' example were implicated).
23. *See* Restatement (Second) of Conflict of Laws § 296-313 (1971). *But see* Sciabacucchi v. Salzberg, 2018 WL 6719718 (Del. Ch. 2018), a controversial ruling holding that securities claims are external in nature, and therefore not governed by the internal affairs doctrine. *See* J.E. Fisch & S. Davidoff Solomon, 'Centros, California's 'Women on Boards' Statute and the Scope of Regulatory Competition' (2019), available at http://www.ssrn.com/.

affairs doctrine acts as a choice of laws mechanism.[24] Meanwhile, a few states have imposed local requirements on foreign corporations not listed on a US stock exchange, in addition to their respective laws of incorporation. Notable examples include New York and California.[25] Such exceptions aside, the internal affairs doctrine is widely adhered to.

Interestingly, the internal affairs doctrine has experienced a rather significant transformation over time. Originally, its aim was to safeguard the state's territorial sovereignty and its legislative monopoly. In the 1830s, the US Supreme Court concluded that corporations had no legal existence outside the state that chartered them. Ruling otherwise would have the inconceivable result that a corporation could freely carry out its operations elsewhere.[26] Here, it should be considered that states frequently took actively part in financing and managing the newly chartered corporations.[27] Corporations that nevertheless endeavored to conduct business in multiple states – the archetypical example concerns the construction of a bridge or canal spanning the border – had to appease administrators to obtain multiple charters simultaneously. Only after the 1830s did railroads and other transport businesses grow sufficiently in size to expand beyond state borders on a permanent basis.[28] As this development gained traction, states initially attempted to enact laws aimed at favoring domestic

---

24. This approach raises the question which laws govern federally incorporated organizations. The US Supreme Court has held that in such instances, state law should not apply by means of analogy, as this would effectively create a federal system of corporate law. Instead, the law of the state that resembles the organization most closely should be applied. *See* Atherton v. FDIC*,* 519 U.S. 213 (1997). For an analysis, *see* S.C. Haan, 'Federalizing the Foreign Corporate Form', 85 *St. John's Law Review* 925, 944 (2011), critically observing "internal affairs of a federally-chartered entity [are, TK] governed by its federal charter in all material respects".
25. *See* New York Business Corporation Law S. 1317-1319; *see also* California Corporations Code S. 2115, both covering matters such as director liability, dividends and mergers. For an analysis, *see* D.A. DeMott, 'Perspectives on Choice of Law for Corporate Internal Affairs', 48 *Law and Contemporary Problems* 161 (1985), deeming the New York and California laws acceptable from a constitutional point of view the more they serve to protect actual local interests.
26. *See* Bank of Augusta v. Earle, 38 U.S. 519, 520 (1839), observing "[i]t is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created." As late as 1931, the US Supreme Court upheld a provision of the Virginia constitution effectively requiring a state charter. *See* Railway Express Agency v. Virginia, 282 U.S. 440 (1931).
27. *See* F. Tung, 'Before Competition: Origins of the Internal Affairs Doctrine', 32 *The Journal of Corporation Law* 33, 51-53 (2006). For instance, Pennsylvania's 1816 budget was funded for 40 % by dividends paid on the bank stocks it held. Such income further incentivized state control on incorporation practices.
28. *See* C. Wolmar, *The Great Railroad Revolution: The History of Trains in America* (Public Affairs, 2013). Almost 100 years later, this would give rise to the question whether railroad corporations should be enabled to incorporate federally. *See* W.W. Cook, 'Legal Possibilities of Federal Railroad Incorporation', 26 *Yale Law Journal* 207 (1917); *see also* M. Thelen, 'Federal Incorporation of Railroads', 5 *California Law Review* 273 (1917).

corporations whilst excluding foreign ones.[29] (Outright and fully subjecting foreign corporations to own state law may have been considered, but was ultimately rejected as overly intrusive.[30]) However, with economic integration progressing, this position became increasingly untenable. After all, implementing restrictive rules could scare away out-of-state investors, entailing a considerable loss of employment and tax revenues. Therefore, general corporation laws started to emerge. During the transition period, many states had a two-tiered incorporation system in place, allowing for either general incorporation or incorporation through a specific charter, with the latter often containing more favorable terms, for instance regarding authorized capital or life span, tax status or monopolistic position.[31] However, general incorporation laws provided the possibility to incorporate through a decision of the founders instead of by act. Consequently, the internal affairs doctrine became more associated with party autonomy and free choice.[32] Nevertheless, the doctrine for a long period of time only induced a modest form of charter competition, as state policies were not actively designed to attract foreign corporations. Indeed, it has been argued that the role of the internal affairs doctrine in relation to corporate charter competition (*see* § 14.3.3 *infra*) was not carefully planned nor, as is sometimes suggested, efficiency-wise inevitable.[33]

14.3.2 The rise of New Jersey

Since states are competent to shape their own system of corporate law under the internal affairs doctrine, the US corporation does not exist. The matter of applicable law became a prominent issue in the 1880s, when businesses other than railroads started to expand beyond state borders. John D. Rockefeller's Standard Oil Trust exemplifies this development. Through horizontal and vertical mergers, it amassed control over 95 % of US and 90 % of the global oil

29. Some, but not all, of these laws were voided by the Supreme Court, based on the (Dormant) Commerce Clause (*see* § 14.2.1 *supra*). *See* Welton v. Missouri, 91 U.S. 275 (1876), concerning a licensing fee for selling out-of-state goods.
30. This would have subjected each individual state to the laws of all others, making retaliation and thus federal intervention more probable. Additionally, there was the practical aspect of enforcement. *See* Clark v. Mut. Reserve Fund Life Association, 14 App. D.C. 154 (1899), observing "[i]t is a little difficult to imagine how a court in [the District of Columbia, TK] could restrain and direct the action of the corporation at its home office in the city of New York".
31. Sometimes a third option, entailing a general incorporation law for a certain industry (notably railroads), existed as well. *See* H.W. Stoke, 'Economic Influences Upon the Corporation Laws of New Jersey', 38 *Journal of Political Economy* 551, 561-566 (1930). A similar state of affairs can be observed in Germany. *See* § 21.2 *infra*.
32. *See* Fisch & Davidoff Solomon 2019, *supra* note 23.
33. *See* Tung 2006, *supra* note 27, at 54-57.

supply.[34] Because corporations were not recognized beyond their state borders (*see* § 14.3.1 *supra*) nor could own stock, controlling this vast economic empire was a complicated matter.[35] To address this problem, 40 corporations and partnerships merged into a secret trust arrangement in 1882.[36] It was managed by 9 trustees, and the (transferable) trust certificates entailed the right to vote on the election of directors.[37] Standard Oil's example soon met with widespread following.[38] However, the rise to power of these conglomerates, especially because of their monopolistic tendencies[39] and lack of democratic legitimacy, caused massive public discontent.[40] This culminated in various state enacting competition laws and Congress adopting the Sherman Antitrust (*sic*!) Act of 1890.[41] In 1892, the Standard Oil Trust was declared null and void by the Supreme Court of Ohio.[42]

---

34. *See* G. Segall, *John D. Rockefeller: Anointed with Oil* 62 (Oxford University Press, 2001). Rockefeller has remained a controversial figure, given that his business tactics, based on economies of scale, left many adversaries in ruins. For a critical account (in fact accelerating the break-up of Standard Oil), *see* I.M. Tabell, *The History of the Standard Oil Company* (McClure, Philips & Co., 1904). For a more positive view, due to Rockefeller's numerous philanthropic works, *see* A. Nevins, *John D. Rockefeller: The Heroic Age of American Enterprise* (Charles Scribner's Sons, 1940).
35. *See* J. Seligman, 'A Brief History of Delaware's General Corporation Law of 1899', 1 *Delaware Journal of Corporate Law* 249, 262 (1976), containing a detailed account of Rockefeller's dealings. ("Rockefeller used this railroad contract like a club, [threatening, TK] "to crush" any competitor which did not sell its refinery to his Standard Oil Company.")
36. *See* H. Fleischer & K. Horn, 'Berühmte Gesellschaftsverträge unter dem Brennglas: Das Standard Oil Trust Agreement von 1882', 83 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 507, 525 (2019).
37. For a lively analysis, *see* C.M. Yablon, 'The Historical Race. Competition for Corporate Charters and the Rise and Decline of New Jersey: 1880-1910', 32 *The Journal of Corporation Law* 323 (2007); *see also* Tung 2006, *supra* note 27, at 76-77. For a thorough comparison between the trust and the corporation, *see* J. Morley, 'The Common Law Corporation: the Power of the Trust in Anglo-American Business History', 116 *Columbia Law Review* 2145 (2016), arguing the US trust became popular as corporate forms, unlike those in the UK, were heavily governed by mandatory rules.
38. The "Greater Industrial Trusts" were Amalgamated Copper, American Smelting and Refining, American Sugar, Consolidated Tobacco and International Mercantile Marine. Additionally, there existed hundreds of smaller trusts, such as the Linseed Trust and, importantly, the Whiskey Trust. *See* Seligman 1976, *supra* note 35, at 263, 267.
39. In 1837, it was it ruled that the grant of a corporate charter did not simultaneously imply a monopoly. *See* Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 36 US 420 (1837).
40. *See* E.Q. Keasbey, 'New Jersey and the Great Corporations II', 13 *Harvard Law Revie* 264, 266 (1899) contending corporations did nothing fundamentally different compared to the past and that the public outcry was unfounded.
41. *See* 26 Stat. 209. For an overview of the extensive state-initiated litigation against the various trusts, *see* Yablon 2007, *supra* note 37, at 337-340; *see also* Tung 2006, *supra* note 27, at 77-78.
42. *See* State ex rel. Attorney v. Standard Oil, 49 Ohio St. 137, 30 N.E. 279 (1892).

By this time, New Jersey had become the preferred state to incorporate for a number of reasons. First, it had showed a strong commitment to enabling business. In 1875, New Jersey abolished the two-tiered system of general and specific (preferential) charters (*see* § 14.3.1 *supra*), opting for a single, permissive corporate statute instead. This statute permitted broadly drafted corporate goals ("any lawful purpose") and allowed for director meetings to be held and books to be kept out of state.[43] As from 1889 onwards, New Jersey's statute was furthermore amended to allow corporations to own stock, and businesses were permitted to incorporate without any in-state economic activities in 1892. In that same year, New Jersey's antitrust act was simply repealed.[44] Second, New Jersey enjoyed a strategic geographic location between New York and Pennsylvania.[45] Third, it benefited from the inspiring leadership of James B. Dill, an experienced corporate lawyer from New York. Dill and his fellow lawyers managed to convince the New Jersey governor that competing for charters and franchise taxes (i.e. levies calculated based on authorized capital instead of gross sales or profits) was a lucrative venture.[46] In 1892, he founded the Corporation Trust Company of New Jersey (in short CT Co.), which started to market the state's corporate law's numerous advantages and managed the administration of the trust corporations involved. Indeed, this was a highly concerted effort. New Jersey's Governor and Secretary of State both served as directors of CT Co. In turn, Dill was chiefly responsible for the technical aspects of New Jersey's statutes.[47] In 1899, Standard Oil reincorporated in New Jersey, although not as a trust but as a corporation.

---

43. *See* Yablon 2007, *supra* note 37, at 334. Abolishing the practice of granting favorable charters was apparently a bare necessity from a fiscal point of view, as railroad corporations could acquire property which, under their respective charter, were tax privileged, eating into the State's tax base. *See* Stoke 1930, *supra* note 31, at 568.
44. *See* Yablon 2007, *supra* note 37, at 333-349, arguing New Jersey was already leading the incorporation race in 1881 and discussing many of the reforms in the 1890s in great detail; *see also* Seligman 1976, *supra* note 35, at 265.
45. *See* Stoke 1930, *supra* note 31, at 551, noting that at the time, Pennsylvania equaled New York's economic activity.
46. Apparently, Dill obtained his inspiration from the Secretary of State of West Virginia, who set up shop in Manhattan with the government seal by his side, pitching his statute. *See* Tung 2006, *supra* note 27, at 79.
47. Admittedly, Dill also possessed remarkable psychological skill, as illustrated by the story about a journalist confronting Dill with the laws New Jersey had enacted and the "plain financial atrocities" they permitted:

    > "Dill then told Steffens about the criminal inside of the practices under the New Jersey legislation, a picture of such chicanery and fraud, of wild license and wrong-doing, that he dared not write it all down. Dill […] insisted that Steffens tell his editor to print the story. Later Dill told Steffens, by this point his friend, why he had given him the information. When you […] wrote as charges against us what financiers actually could and did do in Jersey […] you were advertising our business – free."

    See W.E. Kirk, 'A Case Study in Legislative Opportunism: How Delaware Used the Federal-State System to Attain Corporate Pre-Eminence', 10 *Journal of Corporation Law* 233, 248

Corporate consolidation increased dramatically between 1895 and 1904, and the effects of the "Great Merger Movement"[48] for New Jersey were obvious. In 1896, franchise tax revenues totaled $ 860,000. The figure rose to $1.8 million in 1900 and $ 3.4 million in 1904, meaning that the state's debt, even the part resulting from the US Civil War (1861-1865), could be extinguished and property taxes abolished, whilst the annual budget still showed a surplus.[49] (Ironically, the use of a franchise tax had not been a carefully planned measure. It was introduced in 1884, a full week after that year's regular tax bill had been passed, almost as an afterthought.) The dramatic increase in franchise tax revenues also meant charter competition increased. One especially notable case involved New York's state Attorney-General successfully suing a corporation to have its charter revoked for unlawfully participating in the Sugar Trust, only to see the business reincorporate immediately in New Jersey whilst continuing its New York activities.[50] Moreover, modifications to New Jersey's corporate statute in 1897 provided that laws of other states or countries could not lead to penal or contractual liability of directors or shareholders.[51] It were these and other actions that earned New Jersey the nickname of "Traitor State".[52]

14.3.3 The fall of new jersey and the rise of delaware

Delaware entered the race for corporate charters and franchise taxes at the dawn of the 20st century. As such it was nowhere unique, but rather one of many challengers. Competitors included West-Virginia, Kentucky, New York, Maryland and Maine.[53] In 1899, Delaware ratified a new and permissive general incorporation law, essentially enacting New Jersey's statute verbatim.[54] Not only did Delaware possess a better nickname – the "First State", due to

(1984); *see also* J. Dill, 'National Incorporation Laws for Trusts', 11 *Yale Law Journal* 273 (1902).

48. On this period of US economic history, *see* N.R. Lamoreaux, *The Great Merger Movement in American Business, 1895-1904* 98 (Cambridge University Press, 1988), detailing the economies of scale that could be achieved.
49. For detailed accounts, *see* C. Grandy, 'New Jersey Corporate Chartermongering, 1875-1929', 49 *The Journal of Economic History* 677, 682-683 (1989); *see also* Seligman 1976, *supra* note 35, at 267-268; Stoke 1930, *supra* note 31, at 574, arguing New Jersey obtained a nationwide 95 % market share.
50. *See* Tung 2006, *supra* note 27, at 80.
51. *See* Stoke 1930, *supra* note 31, at 576.
52. The term was coined by Steffens (*see* L. Steffens, 'New Jersey: A Traitor State', 25 *McClure's Magazine* 41, 42 (1905)) following his interview with Dill, on which *see* note 47 *supra*. Note that retaliation by other states was complicated, as the US Supreme Court had ruled in 1886 that corporations were citizens within the meaning of the Constitution. *See* Santa Clara County v. Southern Pacific Railroad, 118 U.S. 394 (1886).
53. *See* Yablon 2007, *supra* note 37, at 358-367; *see also* Seligman 1976, *supra* note 35, at 269, Stoke 1930, *supra* note 31, at 575-576; Keasbey 1899, *supra* note 40, at 383.
54. *See* Wilmington City Railway v. People's Railway, 47 A. 245, 254 (Del. Ch. 1900), ruling that Delaware's legislature had intended that lower courts should follow New Jersey

the fact that it was the quickest to ratify the US Constitution – it also offered lower incorporation fees and franchise taxes (75 % and 50 % of New Jersey's prices, respectively). However, Delaware did not simply compete based on cost-cutting. Its (case) laws emphasized excellence in governance from an early stage onwards and did not deny the responsibilities of directors.[55] This combination of price and quality clearly worked. Already in 1910, Delaware had almost caught up, incorporating 7 businesses for every 10 in New Jersey.[56] The situation came to a head in 1913, as US president-elect Thomas Woodrow Wilson faced nationwide public outcry on the role of "The Traitor State". Acting in his capacity as Governor of New Jersey, Wilson tightened the state's corporate laws.[57] Collectively, these sweeping reforms were known as the "Seven Sisters". As a result, corporations could no longer own stock in other corporations, with failure to comply resulting in fines and/or imprisonment, and the anti-trust act, abolished in 1892, was re-introduced.[58] Subsequently, New Jersey's competitive position began to deteriorate.[59] Although by 1917, New Jersey had repealed most of the "Seven Sisters" Acts, its incorporation monopoly would never return.[60] Indeed, Delaware had firmly taken control of the race for corporate charters.

Over the years, Delaware has consolidated its dominant position. This can be said, both in terms of the number of out-of-state businesses incorporating as well as in relation to the market value of these firms. Almost 1,200,000 business entities (and 66% of all US publicly listed corporations) are incorporated in Delaware.[61] In fact, Delaware's market power has increased consistently since

---

case law. In a few aspects, the 1899 Delaware statute provided more flexibility than its New Jersey counterpart, for instance by permitting capital contributions in kind.

55. *See* Lofland v. Cahall, 118 A. 1 (Del. 1922) ("Directors of a corporation are trustees for the stockholders, and […] the rules applicable to such a relation […] exact of them the utmost good faith and fair dealing."). For an analysis of this case, *see* S.S. Arsht, 'A History of Delaware Corporation Law', 1 *Delaware Journal of Corporate Law* 1, 9 (1976).
56. *See* Yablon 2007, *supra* note 37, at 361; *see also* Kirk 1984, *supra* note 47, at 254.
57. Since 1907, there had been bipartisan support for more stringent laws, including nominally from Wilson, but it was only his presidential election that made the pressure unsustainable. *See* Grandy 1989, *supra* note 49, at 689.
58. *See* Seligman 1976, *supra* note 35, at 270.
59. *See* Yablon 2007, *supra* note 37, at 330, eloquently observing that "Indeed, it is not too great an exaggeration to say that there has only been one dominant state corporate law throughout American history: New Jersey law. It is just that, after 1913, Delaware was perceived by corporate lawyers and promoters as a more reliable custodian of their conception of New Jersey law than New Jersey itself".
60. *See* Seligman 1976, *supra* note 35, at 270, adding that "any state that could elect Woodrow Wilson […] could never be fully trusted by big business again."
61. *See* the Delaware Division 2015 Annual Report, available at http://corp.delaware.gov/. Delaware's dominance also extends to partnerships. *See* C. Hurt, *The Private Ordering of Publicly Traded Partnerships* in *Can Delaware Be Dethroned? Evaluating Delaware's Dominance of Corporate Law* 201 (S.M. Bainbridge et al. eds, 2018).

the 1920s,[62] allowing the state to charge a premium for its services.[63] Consequently, the annual franchise tax paid by Delaware corporations has become an important source of state revenue.[64]

Traditionally, several factors are identified as contributing to Delaware's success. First, the Delaware General Corporation Law (DGCL) is revised annually.[65] To that end, the Council of the Section of Corporation Law of the Delaware State Bar Association makes recommendations to the legislature, subject to approval of the DSBA entire. The Council only consists of representatives of managers and shareholders, with the latter constituting the minority. Consequently, the legislative process is focused strictly on promoting manager and shareholder interests. Additionally, interests of a single corporation will not be able to shift the balance of powers.[66] Second, Delaware's judicial system deserves merit as well.[67] The Court of Chancery (Chancery), a court of equity,[68] is highly specialized in handling corporate disputes.[69] This has enabled the development of a stable yet living body of case law.[70] Furthermore, the Chancery is well-known for the speed of its decision-making,

62. *See* Tung 2006, *supra* note 27, at 42, finding a market share of NYSE corporations of 50 % in 1975 (1965: 30 %).
63. *See* M. Kahan & E. Kamar, 'Price Discrimination in the Market for Corporate Law', 86 *Cornell Law Review* 1205 (2001), analyzing the theory behind price differentiation in the market for incorporation.
64. Typically, franchise taxes account for more than 20 % of annual state budget. *See* L.A. Hamermesh, 'The Policy Foundations of Delaware Corporate Law', 106 *Columbia Law Review* 1749, 1754 (2006). In 2015, total franchise tax revenues for the first time ever exceeded $ 1 bn. *See* the Delaware Division 2015 Annual Report, available at http://corp.delaware.gov/.
65. Prior to 1967, the DGCL was revised frequently although not yearly. *See* Arsht 1976, *supra* note 55, at 17.
66. *See* Hamermesh 2006, *supra* note 64, at 1752-1758 for a detailed and instructive description of the composition of the Council and the annual process of drafting recommendations.
67. Thus, even if the plan of Senator Warren to federalize corporate law (*see* § 14.2.1 *supra*) were to succeed, Delaware could retain its current pre-eminence in regulating (through litigation) considerable parts of corporate law.
68. This entails the replacement of a jury by professional judges and that, in theory, such courts shall apply principles of equity instead of rules of law. *See* L.E. Strine, 'The Delaware Way: How We Do Corporate Law and Some of the New Challenges we (And Europe) Face', 30 *Delaware Journal of Corporate Law* 673, 681 (2005). For the English roots of the Chancery system, *see* W.T. Quillen & M. Hanrahan, 'A Short History of the Delaware Court of Chancery 1792-1992', 18 *Delaware Journal of Corporate Law* 819 (1993).
69. *See* M.J. Kroeze, 'The Dutch Companies and Business Court as a Specialized Court' (2006), available at http://www.ssrn.com/, highlighting advantages and disadvantages of specialized courts and comparing the Chancery with the Enterprise Chamber of the Amsterdam Court of Appeals.
70. *See* Strine 2005, *supra* note 68, at 683 ("The case at hand is decided and the law is thereby evolved incrementally. Although that can lead to […] some residual uncertainty, it also allows space for the judiciary to pull back […] if a prior decision turns out […] to have been unwise. And the overall body of case law coherently fills in a map that guides transactional and corporate governance advisors in charting a course […] that is relatively risk free.")

and the appellate system of Delaware leaves no room for circuit splits.[71] The influence of the Chancery is so wide-ranging that Delaware has been considered to have subscribed to a form of regulation through litigation.[72] Given all of those advantages, Delaware presents a relative safety option in a potentially time-constrained deal-making process.[73]

14.3.4 Second-generation anti-takeover statutes

Similar to the (Dormant) Commerce Clause, the internal affairs doctrine is inextricably linked to state anti-takeover activity.[74] One of the main reasons for the US Supreme Court not to uphold the Illinois statute (*see* § 14.2.2 *supra*) was that it did not require nexus with the home state through incorporation. Indeed, the necessary nexus could equally be constructed in other ways as well.[75] This observation gave rise to anti-takeover laws of the second generation. As second generation statutes were built on the internal affairs doctrine, they could be invoked only by firms in their state of incorporation. Meanwhile, anti-takeover protection remained widely available, as many states adopted second generation statutes.

Typically, second generation anti-takeover laws provided that after reaching a pre-defined equity threshold, the acquirer's stocks would lose their voting rights if shareholders of the target corporation did not approve the proposed transaction. Sometimes, it was further stipulated that when deciding on

71. For another highly instructive insider analysis, *see* R.J. Holland, 'Delaware's Business Courts: Litigation Leadership', 34 *The Journal of Corporation Law* 771, 773-778 (2009).
72. *See* S.J. Griffith, *Product Differentiation in the Market for Corporate Law* in *Can Delaware Be Dethroned? Evaluating Delaware's Dominance of Corporate Law* 17 (S.M. Bainbridge et al. eds, 2018); *see also* J.E. Fisch, 'The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters', 68 *University of Cincinnati Law Review* 1061 (2000).
73. *See* R. Anderson & J. Manns, 'The Delaware Delusion', 93 *North Carolina Law Review* 1049 (2015). Conversely, it has been noted that the choice to incorporate in Delaware is made by lawyers, opening up rent-seeking opportunities (i.e. by inducing complex and lucrative litigation). *See* J.R. Macey & G.P. Miller, 'Toward an Interest Group Theory of Delaware Corporate Law', 65 *Texas Law Review* 469 (1987). This thought appears particularly cynical.
74. Some scholars have also distinguished third or fourth generation statutes. *See* A.R. Pinto, 'The Constitution and the Market for Corporate Control: State Takeover Statutes After CTS Corp.', 29 *William & Mary Law Review* 699 (1988). Third-generation statutes typically do not target the acquisition of stock, as second-generation statutes do, but rather complicate their usage by requiring board approval and a vote of disinterested shareholders on proposed mergers. For an example, *see* S. 203 DGCL. Fourth-generation statutes require the disgorgement of profits achieved by short-term share-ownership. I will disregard third- and fourth-generation laws for the remainder of the analysis.
75. *See* Edgar v. MITE, 457 U.S. 624 (1982) ("[T]he proposed justification is somewhat incredible, since the Illinois Act applies to tender offers for any corporation for which 10% of the outstanding shares are held by Illinois residents […]. The Act thus applies to corporations that are not incorporated in Illinois and have their principal place of business in other States. Illinois has no interest in regulating […] foreign corporations.").

the acquisition, the votes of the potential acquirer were to be disregarded.[76] An Indiana act serves as the most prominent example of second generation anti-takeover statutes, as it formed the basis for the matter brought before the US Supreme Court.[77] In that case, Dynamics Corporation of America owned slightly less than 10 % of the shares of CTS. Then, it announced a tender offer for another 1 million shares of CTS, which would have raised Dynamics Corporation of America's equity interest above 20 % – the voting threshold of the Indiana statute. The US Supreme Court, reversing a ruling of the 7th Circuit Court of Appeals,[78] decided to uphold it.[79] Specifically, it ruled that the Indiana statute was pre not pre-empted because of inconsistency with the Williams Act. Indeed, the fact that the Indiana act contributed to the frustration of coercive "front-end loaded two-tier offers"[80] was considered to protect investors, thus furthering the purpose of the Williams Act. Moreover, the Indiana statute did not present a burden on interstate commerce. In fact, it was ruled that "[n]o principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations, including the authority to define the voting rights of shareholders."[81]

The US Supreme Court ruling implied that the internal affairs doctrine, perhaps read in conjunction with the (Dormant) Commerce Clause (*see* § 14.2.1 *supra*) and the Full Faith and Credit Clause,[82] enjoys a constitutional basis. As a matter of fact, the US Supreme Court has refused claims concerning a

---

76. Note that, in contrast to first generation anti-takeover statutes (*see* § 14.2.2 *supra*), the administration of the home state no longer had a role to play, and thus lacked the power to intervene and potentially frustrate a transaction.
77. Alternative second generation anti-takeover laws existed as well. These involved fair value requirements, the expansion of fiduciary duties to other parties than shareholders, and full disclosure. *See* Pinto 1988, *supra* note 74.
78. *See* Dynamics Corp. of America v. CTS, 794 F.2d 250 (7th Cir. 1986).
79. *See* CTS v. Dynamics Corp. of America, 481 U.S. 69 (1987).
80. These offers involve the acquirer making a bid to purchase a sufficient number of shares to effectively achieve control, followed by a simultaneously announced, less valuable bid for the remaining stocks, to be concluded later. Such a structure may force investors to accept the offer in the first round, for the fear of being worse-off otherwise.
81. *See* CTS v. Dynamics Corp. of America, 481 U.S. 69, 89 (1987). The relevant literature is too extensive to be covered here in full. For relevant analyses, *see* Bainbridge 1991, *supra* note 13, at 585; *see also* Pinto 1988, *supra* note 74; P.N. Cox, 'The Constitutional "Dynamics" of the Internal Affairs Rule-A Comment on CTS Corporation', 13 *Journal of Corporation Law* 317 (1988) (focusing mainly on Commerce Clause-aspects); D.C. Langevoort, 'The Supreme Court and the Politics of Corporate Takeovers: A Comment on CTS Corp. v. Dynamics Corp. of America', 101 *Harvard Law Review* 96 (1987) (criticizing the Supreme Court's "change of heart"); R.M. Buxbaum, 'The Threatened Constitutionalization of the Internal Affairs Doctrine in Corporation Law', 75 *California Law Review* 29 (1987) (arguing the internal affairs doctrine is not constitutionally mandated); Fischel 1987, *supra* note 22.
82. Article 4, Section 1 of the US Constitution, mandating that states respect the "public acts, records, and judicial proceedings of every other state." *See* Garcia 2016, *supra* note 4, at 929 et seq.

corporation's internal affairs.[83] Unsurprisingly, the Delaware Supreme Court has been particularly eager to embrace the constitutional argument,[84] even if this meant subjecting corporations from other states to Delaware law.[85] These rulings have been widely considered an attempt to solidify Delaware's dominant position in the market for corporate law (*see* § 14.3.3 *infra*).[86] Meanwhile, other scholars have denied a constitutional basis.[87] Effectively, the internal affairs doctrine not only acts as a choice of laws mechanism but, given the latent possibility of federal pre-emption (*see* § 14.2.1 *supra*), also contains a political component concerning the desirable division of power between federal and state authorities.[88]

14.3.5 The future of state competition

The welfare implications of the legislative competition between states are not self-evident. Cary famously argued that creating ever-laxer legal standards, in order to cater to managers at the expense of shareholders, would cause a race to the bottom.[89] Winter replied that an efficiently operating market would punish self-serving managers, so that competition would lead to an efficiency-enhancing race to the top.[90] In the modern debate, the race to the bottom-view has been represented most vocally by Bebchuk. He argued that

---

83. *See* Burks v. Lasker, 441 U.S. 471 (1979); *see also* Santa Fe Industries v. Green, 430 U.S. 462 (1977), both concerning derivative suits. For a discussion, *see* J.J. Park, *Delaware and Santa Fe Industries v. Green* in *Can Delaware be Dethroned? Evaluating Delaware's Dominance of Corporate Law* 101 (S.M. Bainbridge et al. eds, 2018).
84. *See* Draper v. Paul N. Gardner Defined Plan Trust*,* 625 A.2d 859 (Del. 1993); *see also* McDermott v. Lewis, 531 A.2d 206 (Del. 1987).
85. *See* Vantage Point Venture Partners 1996 v. Examen, 871 A.2d 1108 (Del. 2005). The case concerned a California corporation. Application of Delaware law resulted in a rejection of California law, which contains several deviations of the internal affairs doctrine. S*ee* § 14.3.1 *supra*. *But see* Sciabacucchi v. Salzberg, 2018 WL 6719718 (Del. Ch. 2018), where the Delaware Chancery Court effectively denounced the right to control securities claims.
86. *See* T.P. Glynn, 'Delaware's *VantagePoint*: The Empire Strikes Back in the Post-Post-Enron Era', 102 *Northwestern University Law Review* 91 (2008); *see also* M. Stevens, 'Internal Affairs Doctrine: California Versus Delaware in a Fight for the Right to Regulate Foreign Corporations,' 48 *Boston College Law Review* 1047 (2007).
87. *See* F. Stevelman, 'Regulatory Competition, Choice of Forum, and Delaware's Stake in Corporate Law', 34 *Delaware Journal of Corporate Law* 57, 75 (2009); *see also* Buxbaum 1987, *supra* note 81.
88. *See* R.M. Jones, 'Does Federalism Matter? Its Perplexing Role in the Corporate Governance Debate', 41 *Wake Forest Law Review* 879, 882 (2006), critically observing that "The problem with this [constitutional, TK] conception of internal affairs is that it is unavoidably circular. What constitute internal affairs are simply those matters that the federal government has permitted states to continue to regulate."
89. *See* W.L. Cary, 'Federalism and Corporate Law: Reflections upon Delaware', 83 *Yale Law Journal* 663 (1974).
90. *See* R.K. Winter, 'State Law, Shareholder Protection, and the Theory of the Corporation', 6 *The Journal of Legal Studies* 251 (1977).

without the possibility of federal intervention, state law would have provided considerably weaker investor protection,[91] and that competition, and thus the required checks to assure efficiency, are largely absent.[92] The race to the top view – in Bebchuk's own account the dominant school of thought – has been defended primarily by Romano. She concluded that competition is one of the elements of the US corporate governance system that should be cherished most.[93] In other publications, Romano has expanded on this line of thinking.[94] More nuanced views, such as that Delaware may have possessed a competitive edge in creating shareholder value, but that this is no longer the case,[95] or that state competition has actually no effects in this regard,[96] exists as well. The debate remains ongoing.[97]

Indeed, some states continue to actively challenge Delaware's position.[98] Especially Nevada has been a notable contestant.[99] Consequently, Nevada's market share has risen from 5.6 % in 2000 to 7 % in 2003, an increase of

91. *See* Bebchuk & Hamdani 2006, *supra* note 14; *see also* Roe 2003, *supra* note 14.
92. *See* L.A. Bebchuk & A. Hamdani, 'Vigorous Race or Leisurely Walk: Reconsidering the Competition over Corporate Charters', 112 *The Yale Law Journal* 553 (2002). For earlier work, *see* L.A. Bebchuk, A. Cohen & A. Ferrell, 'Does the Evidence Favor State Competition in Corporate Law?', 90 *California Law Review* 1777 (2002); *see also* L.A. Bebchuk & A. Ferrell, 'A New Approach to Takeover Law and Regulatory Competition', 87 *Virginia Law Review* 111 (2001); L.A. Bebchuk & A. Ferrell, 'Federalism and Corporate Law: The Race To Protect Managers from Takeovers', 99 *Columbia Law Review* 1168 (1999); L.A. Bebchuk, 'Federalism and the Corporation. The Desirable Limits on State Competition in Corporate Law', 105 *Harvard Law Review* 1435 (1992).
93. *See* R. Romano, *The Genius of American Corporate Law* (AEI Press, 1993).
94. *See* R. Romano, 'Empowering Investors: A Market Approach to Securities Regulation', 107 *Yale Law Journal* 2359 (1998); *see also* R. Romano, 'The State Competition Debate in Corporate Law', 8 *Cardozo Law Review* 709 (1987); R. Romano, 'Law as a Product: Some Pieces of the Incorporation Puzzle', *International Journal of Law, Economics & Organization* 225 (1985).
95. *See* G. Subramanian, 'The Disappearing Delaware Effect', 20 *Journal of Law, Economics & Organization* 32 (2004).
96. *See* Anderson & Manns 2015, *supra* note 73.
97. The literature on the shareholder value effects of charter competition is too extensive to be covered here in full. For an overview, *see* C.M. Yablon, 'The Historical Race. Competition for Corporate Charters and the Rise and Decline of New Jersey: 1880-1910', 32 *The Journal of Corporation Law* 323 (2007). For an analysis in the Dutch context, *see* M.A. Verbrugh, 'Concurrentie van vennootschapssystemen in Europa', 57 *Sociaal-economische wetgeving: tijdschrift voor Europees en economisch recht* 122 (2008).
98. *See* J. Haskell Murray, 'The Social Enterprise Law Market', 75 *Maryland Law Review* 541, 570 (2016), arguing that many states have sought niches, for instance targeting financial service providers or real estate investment trusts, to develop competitive advantages over Delaware's general corporate framework.
99. For a highly critical description of Nevada's legislative efforts, *see* M. Barzuza, 'Market Segmentation: The Rise of Nevada as a Liability-Free Jurisdiction', 98 *Virginia Law Review* 935 (2012).

25 %.[100] However, the businesses that incorporate in Nevada are primarily smaller firms. Moreover, from a geographical perspective, a majority of the US states has based its statute (partly) on the (Revised) Model Business Corporation Act ((R)MBCA). As such, the dominance of Delaware corporate law may be smaller than a preliminary analysis might imply. Meanwhile, there exists a constructive symbiosis between the DGCL and the (R)MBCA, with the former acting as the innovator and the latter as the refiner.[101] Although the federal government has – formally, *see* § 14.4.1 *infra* – opted to leave corporate law to the states, the threat of pre-emption is ever-present, as the proposal of Senator Warren illustrated. By some accounts, the risk of pre-emption has induced Delaware to enact legislation that is substantively similar as federally drafted laws would have been.

Nonetheless, the conclusion must be that Delaware's balancing act, both internally between shareholders and managers and externally with Washington, has succeeded, at least for the time being. The predominance of Delaware corporate law not only justifies but plainly necessitates taking the system into account for comparative purposes.[102] Consequently, this PhD-thesis primarily focuses on the DGCL. To the extent relevant the (R)MBCA will be studied as well.

14.4 Federal & state securities laws

14.4.1 Federal securities laws

Despite the importance of state law under the internal affairs doctrine, securities laws, enacted at federal level, influence the structure of corporate governance considerably. In this regard, the Securities Act of 1933 (SA 1933) and the Securities and Exchange Act of 1934[103] (SEA 1934) provide classic examples. Whereas the SA 1933 covers the process of "going public", the SEA 1934 relates to "remaining public". Disclosure is a pivotal aspect of

100. *But see* M. Kahan & E. Kamer, 'The Myth of State Competition in Corporate Law', 55 *Stanford Law Review* 679, 720 (2002), arguing "That Nevada is mentioned as a player in the market for public incorporations illustrates not the vigor of competition, but how tepid that market is".
101. *See* J.M. Gorris, L.A. Hamermesh & L.E. Strine, 'Delaware Corporate Law and The Model Business Corporation Act: a Study in Symbiosis', 74 *Law and Contemporary Problems* 107 (2011). For similar conclusions, *see* Armour, Black & Cheffins 2012, concluding Delaware law is part of the curriculum of most major US law schools, the (R)MBCA frequently refers to Delaware cases and courts in other states often follow Delaware case law.
102. For similar approaches by Dutch scholars, *see* Van Ginneken 2010, *supra* note 21, at 92; *see also* B.F. Assink, *Rechterlijke toetsing van bestuurlijk gedrag: binnen het vennootschapsrecht van Nederland en Delaware* 1 (Kluwer, 2007). For an even more holistically informed account, *see* M.J. Kroeze 2004, *supra* note 47, at 185.
103. *See* Pub.L.73-22, 48. Stat. 74 and Pub.L.73-291, 48. Stat. 881, respectively.

both acts. Under S. 5, 10, and 12(a) SA 1933, the public sale of securities is unlawful, unless a registration statement containing a prospectus has been declared effective (or an exemption applies). Moreover, S. 4 and 12 SEA 1934 mandate the institution of the SEC and provides the legal basis for the regulation of stock exchanges and trading systems, such as the NYSE and NASDAQ. Additionally, S. 13(a)(2) and S. 15(d) SEA 1934 impose a number of ongoing disclosure obligations on corporations listed on US stock exchanges and trading systems, notably concerning annual (form 10-K) and quarterly (form 10-Q) reports. Finally, the SEA 1934, in S. 13 (d) and 13(e), and S. 14(a) and 14(b) SEA 1934, regulates tender offers and proxy solicitation. Technically, these matters are an inextricable part of the internal affairs of the corporation. Absent political considerations, one would as such have expected them to be regulated at state instead of federal level. As a matter of fact, the SA 1933 and the SEA 1934 were essentially a compromise in the debate between state and federal incorporation that followed from the Great Depression in the 1930s.[104] Earlier attempts to federalize corporate law in the 1900s had failed.[105] In the 1970s and 1980s, proposals for federalization were put forward as well, but to no avail.[106]

In this respect, the Sarbanes-Oxley Act of 2002 and the Dodd-Frank Act of 2010[107] encompass a fundamental and wide-ranging intervention in the governance of listed corporations. Jointly, these acts have brought changes to the SA 1933 and the SEA 1934 which tilted the balance of power even further towards the federal US government and, thus, away from the states.[108] They were inspired by public outrage and popular backlash caused by governance scandals at the start of 21st century (Enron, Tyco, WorldCom, Xerox, Qwest) and the Financial Crisis. Indeed, a boom-bust trend of regulation can be observed

104. *See* A.C. Pritchard & R.B. Thompson, 'Securities Law and the New Deal Justices', 95 *Virginia Law Review* 841, 854 (2009); *see also* S. Thel, 'The Original Conception of Section 10(b) of the Securities Exchange Act', 42 *Stanford Law Review* 385 (1990); P.A. Loomis & B.K. Rubman, 'Corporate Governance in Historical Perspective', 8 *Hofstra Law Review* 141 (1979); W.O. Douglas & G.E. Bates, 'The Federal Securities Act of 1933', 43 *Yale Law Journal* 171 (1933).
105. *See* R.B. Thompson, 'Preemption and Federalism in Corporate Governance: Protecting Shareholder Rights to Vote, Sell and Sue, 62 *Law & Contemporary Problems* 215, 223 (1999).
106. *See* W.L. Cary, 'A Proposed Federal Corporate Minimum Standards Act', 29 *The Business Lawyer* 1101 (1974); *see also* Bainbridge 1991, *supra* note 13, mentioning Congress failed both in 1985 and in 1987 to implement proposed federal one share, one vote standards. For a more detailed analysis of the capital markets atmosphere of this era, *see* § 15.4 *infra*. On the recent proposal of Senator Warren, *see* § 14.2.1 *supra*.
107. *See* Pub.L.107-204, 116 Stat. 745 and Pub.L.111-203, 124 Stat. 1376, respectively.
108. *See* R. Romano, 'The Sarbanes-Oxley Act and the Making of Quack Corporate Governance', 114 *Yale Law Journal* 1521 (2005); *see also* Roe 2003, *supra* note 14; Bebchuk & Hamdani 2002, *supra* note 92.

that has lasted for at least 300 years.[109] On the one hand, this makes sense, as the law cannot foresee problems that have not yet materialized.[110] On the other hand, the deregulation usually taking place upon the gradual improvement of the economic climate following a crisis either entails that interest groups regain power[111] or suggests an initial overreaction.[112]

One important provision of the Sarbanes-Oxley Act is S. 301, which essentially mandates the institution of audit committees solely comprised of independent directors, as stock exchanges and trading systems are prohibited from listing corporations whose audit committees are not wholly independent. At least one of the member of the audit committee should be a financial expert. Additionally, S. 302 requires the CEO and CFO to certify that the annual and quarterly reports do not contain material misstatements or omissions and fairly present the financial condition and results. Relatedly, S. 404 requires a report confirmed by the external auditor supervising the internal control mechanisms.[113] Moreover, S. 402(a) prohibits loans to directors and officers.[114] Prominent commentators have critically received the Sarbanes-Oxley Act, pointing to its ineffectiveness and the administrative burdens it poses.[115] Thus, the legislation has increased the costs of going public, further tilting the balance towards staying private, as was observed in Chapter 3. The Dodd-Frank Act has implemented even more sweeping reforms. It has enjoyed a mixed

109. For a detailed historical account, *see* S. Banner, 'What Causes New Securities Regulation? 300 Years of Evidence', 75 *Washington University Law Quarterly* 849 (1997).
110. *See* J.C. Coffee, 'The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control', 111 *The Yale Law Journal* 1, 20 (2001).
111. *See* J.C. Coffee, 'The Political Economy of Dodd-Frank: Why Financial Reform Tends to be Frustrated and Systemic Risk Perpetuated', 97 *Cornell Law Review* 1019 (2012).
112. *See* S.M. Bainbridge, 'Dodd-Frank: Quack Federal Corporate Governance Round II', 95 *Minnesota Law Review* 1779 (2011); *see also* Glynn 2008, *supra* note 86, considering Delaware Supreme Court' Vantage Point ruling (*supra* note 85) as pushback after the dust of Sarbanes-Oxley had settled.
113. *See* J.A. Grundfest & S.E. Bochner, 'Fixing 404', 105 *Michigan Law Review* 1643 (2007); *see also See* D.C. Langevoort, 'Internal Controls after Sarbanes-Oxley: Revisiting Corporate Law's Duty of Care as Responsibility for Systems', 31 *Journal of Corporation Law* 949 (2006); W.J. Carney, 'The Costs of Being Public After Sarbanes-Oxley: the Irony of "Going Private"', 55 *Emory Law Journal* 141 (2006), all pointing to the considerable costs this entails.
114. *See* J.W. Barnard, 'Historical Quirks, Political Opportunism, and the Anti-Loan Provision of the Sarbanes-Oxley Act', 31 *Ohio Northern University Law Review* 325 (2005), claiming the provision can be easily evaded due to poor drafting.
115. For a general overview of the Sarbanes Oxley Act and a blistering critique, *see* Romano 2005, *supra* note 108, proposing a sunset by default. For an elaborate Dutch analysis, *see* M.J. van Ginneken, 'De 'Sarbanes-Oxley Act of 2002': Het Amerikaanse antwoord op Enron (I)', 5 *Ondernemingsrecht* 63 (2003); *see also* M.J. van Ginneken, 'De 'Sarbanes-Oxley Act of 2002': Het Amerikaanse antwoord op Enron (II)', 6 *Ondernemingsrecht* 150 (2004).

reception as well.[116] Accordingly, S. 951 enables investors to cast a non-binding advisory vote on the compensation of certain officers every three years. Subject to S. 952, members of the compensation committee should be independent. Furthermore, S. 954 stipulates the implementation of claw back-policies regarding compensation which is to be considered awarded erroneously, following a revision of the corporation's financial statements.[117] Moreover, S. 971 authorizes the SEC to draft a rule providing that shareholders who have held a 3 % equity interest for a period of 3 years obtain the right to nominate a director on the proxy card annually distributed by the corporation.[118] Finally, under S. 972, a combination of the CEO and Chair position should be disclosed and explained in the annual proxy statement.

14.4.2 Blue sky laws

Based on the analysis in § 14.4.1, it would appear that in recent times, US securities laws have become increasingly important vis-a-vis corporate law. However, states have enacted securities laws as well. Typically, these are referred to as "blue sky laws". The traditional explanation for this name is that one public representative exclaimed that the laws were necessary to prevent stock promotors from "selling building lots in the blue sky".[119] State securities laws, fueled by public outrage over highly speculative and fraudulent stock offerings, were introduced from 1911 until 1933, when the SA 1933 was enacted. The process started with Kansas and was eventually followed by 46 of the 47 other states that existed at time.[120] The Kansas statute gave authorities broad

116. *See* J.E. Fisch, 'Leave it to Delaware: Why Congress Should Stay out of Corporate Governance', 37 *Delaware Journal of Corporate Law* 731 (2013), criticizing the one-size-fits-all approach; *see also* Bainbridge 2011, *supra* note 13, at 1821 ("Without exception, the proposals lack strong empirical or theoretical justification. To the contrary, there are theoretical and empirical reasons to believe that each will be at best bootless and most will be affirmatively bad public policy."). For a more positive view, in light of curbed corporate lobbying, *see* Coffee 2012, *supra* note 111.

117. The stage for the modern US debate on executive compensation was set by Fried and Bebchuk. *See* J. Fried & L.A. Bebchuk, *Pay without Performance: The Unfulfilled Promise of Executive Compensation* (Harvard University Press, 2004). For an extensive discussion from a Dutch point of view, *see* E.C.H.J. Lokin, *De bezoldiging van bestuurders van beursgenoteerde vennootschappen* (Wolters Kluwer, 2018).

118. Note that the later drafted SEC Rule 14a-11 was struck down for being unconstitutional. *See* § 15.4.3 *infra*.

119. On the history of blue sky laws, *see* P.G. Mahoney, 'The Origins of Blue Sky Laws: A Test of Competing Hypotheses', 46 *Journal of Law & Economics* 229 (2003); *see also* J.R. Macey & G.P. Miller, 'Origin of the Blue Sky Laws', 70 *Texas Law Review* 347 (1991), both arguing that their enactment was supported by famers and small savings banks (which found it rather difficult to compete with the temptations stocks offered) but opposed by larger investment banks.

120. *See* Mahoney 2003, *supra* note 119, at 229; *see also* Macey & Miller 1991, *supra* note 119, at 359.

discretion to review securities issuances. State approval could be withheld if the issuer was subjectively deemed not "to do a fair and honest business" or "not to promise a fair return". This "merit review" is considerably more stringent than the disclosure-based approach of the SA 1933 and the SEA 1934.[121] Some blue sky laws contain provisions relating to the distribution of control rights of shareholders, as deviations from the one share, one vote standard have been felt to indicate the absence of the intention to conduct fair and honest business.[122] Despite Congressional legislative initiatives to regulate securities registrations – notably the SA 1933 – federal securities laws have been specifically constructed not to pre-empt blue sky laws. Presumably, the approach was taken to not antagonize the states and to create an additional layer of protection for investors.[123] Nevertheless, the importance of blue sky laws has diminished considerably. Consequently, the existence of blue sky laws does little to substantively change the picture of a gradual shift of power towards the federal legislator. Indeed, the National Securities Markets Improvement Act of 1996 provided a pre-emption in respect of securities listed on NYSE or NASDAQ (the marketplace exemption).[124] Additionally, National Securities Markets Improvement Act of 1996 and the JOBS Act of 2012 (*see* § 14.5.1 *infra*) pre-empted securities registrations of somewhat larger size, including "Regulation A+ Tier 2" offerings of up to $ 50 million.[125] In practice, this means that the scope of blue sky laws has been confined to securities registrations of particularly small size ("Rule 504" and "Rule 505", up to $ 5 million), although they are still of considerable importance with regard to fraudulent securities transactions.[126]

121. *See* R.S. Karmel, 'Blue-Sky Merit Regulation: Benefit to Investors or Burden on Commerce?', 53 *Brooklyn Law Review* 105 (1987).
122. *See* California Rule 260.140.1 and Texas Rule § 113.3(6), both principally adopting a one share, one vote rule. However, in response to the hostile takeover environment of the 1980s (*see* § 15.4 *infra*), exceptions have become accepted as well. *See* Karmel 1987, *supra* note 121, at 121-124.
123. *See* R.B. Campbell, 'Blue Sky Laws and the Recent Congressional Preemption Failure', 22 *Journal of Corporation Law* 176, 185-189 (1997), arguing that the Congress should have pre-empted blue sky laws to a larger degree.
124. Note that the Uniform Securities Act, a model act upon which many blue sky laws are built, already contained such an exemption in S. 402(a). For a discussion of relevant provisions of state law, *see* M.M. Jennings, B.K. Childers & R.J. Kudla, 'Federalism to an Advantage: the Demise of State Blue Sky Laws Under the Uniform Securities Act', 19 *Akron Law Review* 395, 396 (1986); *see also* J. Seligman, 'Equal Protection in Shareholder Voting Rights: The One Common Share, One Vote Controversy', 54 *George Washington Law Review* 695 (1986), at 705-706.
125. *See* R.B. Campbell, 'The Rule of Blue Sky Laws After NSMIA and the JOBS Act', 66 *Duke Law Journal* 605 (2016).
126. *See* Campbell 2016, *supra* note 126, at 626.

14.5 Recent developments in the federal-state divide

14.5.1 The JOBS acts

In recent years, the Jumpstart Our Business Startups (JOBS) Acts have been a pivotal federal vehicle to bring changes to the existing US governance framework of state corporate and blue sky laws, federal securities laws and stock exchange listing rules. These acts consist of the JOBS Act of 2012,[127] the "Fixing America's Surface Transportation Act" of 2015, commonly referred to as "JOBS 2.0"[128] and the "JOBS and Investor Confidence Act of 2018" ("JOBS 3.0"). One of their common goals is to facilitate public capital formation by lowering the costs of IPOs.[129] The JOBS Acts may also be considered part of post-crisis deregulation in respect of Sarbanes-Oxley and Dodd-Frank.[130] The JOBS Act of 2012 focuses on securities registrations, centering around the concept of the Emerging Growth Company. An Emerging Growth Company is defined as a corporation with annual gross revenues below $ 1 billion in its most recent fiscal year. Under S. 101, corporations can maintain Emerging Growth Company status for a maximum period of five years post-IPO, but lose it when gross revenues or non-convertible debt exceeds $ 1 billion, or when market capitalization exceeds $ 700 million, whichever comes earlier.[131] (These figures have subsequently been adjusted for inflation.)

Under a life-cycle perspective (*see* § 10.6 *supra*), there is indeed a case to be made for lightening regulatory capital markets burdens in respect of younger and smaller corporations. Acting in such a way may induce these firms to go public.[132] The inevitable downside of the JOBS Acts may be reduced

127. Pub.L. 112–106, 126 Stat. 306.
128. Pub.L. 114–94, 129 Stat. 1312.
129. Nevertheless, it should be stressed that these statutes consider many distinct topics, and their homogeneity should not be overestimated. For an analysis, *see* G. Pollner, E. Ising, & T. Hamlette, 'JOBS Act 3.0' (2018), available at http://www.corpgov.law.harvard.edu/. Particularly the JOBS Act 2.0 is an outlier, and is disregarded here.
130. *See* R.S. Karmel, 'Disclosure Reform - The SEC is Riding off in Two Directions at Once', 71 *The Business Lawyer* 781 (2016), discussing the conflicting goals faced by the SEC and proposing tiered regulatory burdens; *see also* C. Torres-Spelliscy, K. Fogel &R. El-Khatib, 'Running the D.C. Circuit Gauntlet on Cost-Benefit Analysis after Citizens United: Empirical Evidence from Sarbanes-Oxley and the Jobs Act', 9 *Duke Journal of Constitutional Law & Public Policy* 135, 172 (2014) (analyzing shareholder value effects of the enactment).
131. *See* Karmel 2016, *supra* note 130, at 817; *see also* T.B. Skelton, '2013 Jobs Act Review & Analysis of Emerging Growth Company IPOs', 15 *Transactions: The Tennessee Journal of Business Law* 455 (2014); M.D. Guttentag, 'Protection from What: Investor Protection and the JOBS Act', 13 *University of California Davis Business Law Journal* 207 (2013).
132. *See* Karmel 2016, *supra* note 130; *see also* J. Schwartz, 'The Law and Economics of Scaled Equity Market Regulation', 39 *Journal of Corporation Law* 37 (2014).

investor protection.[133] However, the effect of the JOBS Act of 2012 on the number of IPOs is theoretically ambiguous. One the one hand, it contains several incentives to go public. Importantly, the JOBS Act of 2012, through S. 102(a) and (b), reduced disclosure requirements concerning executive compensation and audited financial statements to two instead of three years. Furthermore, it allowed for draft registrations to be filed with the SEC on a confidential basis and, in S. 106(a) JOBS Act of 2012, provided an exemption from S. 404 Sarbanes Oxley Act, which mandates the confirmation of internal control mechanisms by the external auditor.[134] One the other hand, the JOBS Act of 2012, in S. 501, 502 and 601, contains certain measures which discourage corporations to public. For instance, it implements a higher threshold in respect of the number of stockholders which can invest before the startup must publicly register its securities (2,000, or 500 non-professional investors[135]). Moreover, directs IPO costs, for instance in the form of road show expenses, are not targeted by the JOBS Act of 2012, meaning they will likely not decrease.[136] Meanwhile, technological developments have further facilitated private offerings to professional investors, through digital trading platforms.[137] Since the JOBS Acts have not fully subscribed to life-cycle thinking, it should not come as a surprise that they have less effective in raising the number of listed corporations than hoped for (on the decreasing number of stock market listings, *see* § 7.3 *supra*).

14.5.2 Governance codes

Corporate governance codes are a less important feature of the US corporate landscape. This is not to say these initiatives are absent. Over time, various codes have been launched. A notable example includes the Commonsense Corporate Governance Principles, advocated by well-known public figures such as BlackRock's Larry Fink, JP Morgan Chase's Jamie Dimon and Berkshire

133. Indeed, there have been some concerns in this regard. *See* B. Hamel, 'An Examination of the Jumpstart Our Business Startups Act: How JOBS Act Exemptions May Help Startups and Hurt Investors', 17 *Houston Business and Tax Law Journal* 79 (2016); *see also* Guttentag 2013, *supra* note 131.
134. For a thorough analysis, *see* Karmel 2016, *supra* note 130, at 816-818; *see also* Skelton 2014, *supra* note 131, at 456-459. Note that the JOBS Act 3.0 allows all corporations to file confidentially and extends the S. 404 exemption beyond five years in respect of certain low-revenue companies. *See* Pollner, Ising & Hamlette 2018, *supra* note 129.
135. For a critical analysis of this aspect, *see* D.C. Langevoort & R.B. Thompson, 'Publicness in Contemporary Securities Regulation after the JOBS Act', 101 *Georgetown Law Journal* 337, 341 (2013), arguing record ownership is outdated and that Congress's response are reactive instead of proactive in nature in relation to technological changes.
136. *See* C. Berdejo, 'Going Public after the JOBS Act', 76 *Ohio State Law Journal* 1 (2015).
137. On the attractions of private placements, *see* C. Brummer, 'Disruptive Technology and Securities', 84 *Fordham Law Review* 977, 1021 (2015); *see also* Langevoort & Thompson 2013, *supra* note 135.

Hathaway's Warren Buffet. It was launched in 2017 and revised in 2018.[138] One could also refer to the initiatives of the American Law Institute,[139] the Business Roundtable[140] and the Council for Institutional Investors,[141] just to name a few.[142] All of these corporate governance codes represent different institutional actors. Thus, their scope and provisions vary widely. Some of the initiatives consider dual class equity structures not best practice and promote such instruments being phased out.[143] Others, notably the Business Roundtable Principles of Corporate Governance, do not take a firm position on the matter. Importantly, none of the initiatives are enshrined in federal or state law.[144] Moreover, because of their diverse backgrounds, none of the codes appeal to the corporate governance community as a whole. As such, it is at the discretion of the individual corporation which initiative is being subscribed to, and to what extent. Consequently, corporate governance codes are largely irrelevant for the US part of the comparative corporate governance analysis, and therefore disregarded.

138. Both editions are available at http://www.governanceprinciples.org/. For a discussion of the first editon, *see* D.A. Katz & L.A. McIntosh, 'Common-Sense Capitalism' (2017), available at http://www.corpgov.law.harvard.edu/.
139. *See* American Law Institute, *Principles of Corporate Governance: Analysis and Recommendations* (Thomson Reuters Westlaw, 2015).
140. *See* Business Roundtable, *Principles of Corporate Governance (2016)*, available at http://www.businessroundtable.org/.
141. *See* Council for Institutional Investors, *Corporate Governance Policies* (2019), available at http://www.cii.org/.
142. For an overview, *see* W.J.L. Calkoen, *The one-tier board in the changing and converging world of corporate governance: a comparative study of boardfs in the UK, the US and the Netherlands* 156-157 (Kluwer, 2012), arguing corporate governance codes do not fit particularly well with the US preference for hard law obligations.
143. *See* S. 3.3 of the Council for Institutional Investors Policies on Corporate Governance; *see also* S. III-b of the Commonsense Corporate Governance Principles.
144. For the different approaches adopted by the German and Dutch legislators, *see* § 20.6 and § 26.5 *infra*.

Chapter 15. A history of US dual class equity structures

15.1 Introduction

Chapter 15 contains a historical analysis on dual class equity structures in the US. I touch upon developments in the 19th century (§ 15.2), but primarily focus on the 1920s and 1930s (§ 15.3) and the 1980s (§ 15.4). For the 1920s and 1930s, I delve into the public outcry following the widespread use of various mechanisms to disenfranchise public investors, as well as the debate between Berle, Means and Dodd on the separation of ownership and control. For the 1980s, I examine the competition between stock exchanges and the resulting changes in their listing rules, as well as the intervention by the SEC and its effets. I finish Chapter 15 by analyzing the current debate on dual class equity structures, in § 15.5.

15.2 19th Century

The traditional Roman[1] and common law default rule had been "one man, one vote", regardless of the amount of capital contributed.[2] (Note that profits may have been portioned in proportion to paid-up capital.) As commerce flourished, two control models developed. From the outset, many manufacturing businesses adopted a system of "one share, one vote".[3] Conversely, corporations encompassing local infrastructure projects such as turnpikes, canals and bridges often featured degressive voting structures, meaning that for every additional share, the number of votes would grow in a decreasing manner. In themselves, these infrastructure activities generated little profits.

1. On the allocation of voting rights under Roman law, *see* E. Chancellor, *Devil Take the Hindmost, A History of Financial Speculation* 4-5 (Farrar, Straus, Giroux, 1999).
2. *See* Taylor v. Griswold*,* 14 New Jersey Law 222 (1834). Whereas the case was decided by the New Jersey Supreme Court, this was an intermediate body at the time, with the instance of last resort being the Court of Appeals.
3. *See* H. Hansmann & M. Pargendler, 'The Evolution of Shareholder Voting Rights: Separation of Ownership and Consumption', 123 *The Yale Law Journal* 948, 984 (2014); *see also* C.A. Dunlavy, 'Social Conceptions of the Corporation: Insights from the History of Shareholder Voting Rights', 63 *Washington & Lee Law Review* 1347 (2006).

However, the merit of the projects lay in the development of the surrounding land.[4] Thus, share-ownership and consumption coincided to a large degree.[5] According to Alexander Hamilton, degressive voting should be considered a "prudent mean"[6] between the "extreme alternatives" of "one man, one vote" and "one share, one vote".[7] (Nevertheless, it was not uncommon for corporations to require a minimum investment amount to actually grant the shareholder a vote.[8]) During this period, degressive voting served to deter competitors from taking over control and extracting rents through subsequent price hikes.[9] However, over time, local governments increasingly started constructing transportation networks themselves, and capital markets developed. Consequently, corporations transformed from local, quasi-charitable organizations to nationwide, profit-oriented businesses. A drastic shift from the regressive towards the proportional voting model took place. In the 1850s, proportional voting was firmly established, also in industries that had previously adhered to degressive structures.[10]

15.3 The first dual class debate: 1920s and 1930s

15.3.1 Banker control & stock exchange listing rules

In the first two decades of the 20th century, US corporations increasingly restricted investor control rights. This was arranged by issuing non-voting

---

4. *See* Hansmann & Pargendler 2014, *supra* note 3, at 952, discussing various forms of regressive voting. Such voting restrictions could be circumvented by instructing others, for instance acquaintances, relatives or attorneys, to cast the vote. For an overview of prevailing practices, *see* S. Williston, 'History of the Law of Business Corporations before 1800', 2 *Harvard Law Review* 1888 149, 157 (1888).
5. *See* Middlesex Turnpike v. Locke*,* 8 Mass. 267 (1811), where an investor was freed from his obligation to contribute funds for the development of a road after its trajectory had changed.
6. *See The Works of Alexander Hamilton* 388, 423 (Henry Cabot Lodge ed., 1904).
7. *See* Hansmann & Pargendler 2014, *supra* note 3, at 956, noting that in recent years, dual class equity structure IPOs have become increasingly common and that this development continues a 200-year long trend away from the "one man, one vote" standard. In current times, consumption and investment have become more separated, affecting the magnitude of both information and agency costs. *See* § 10.6 *supra*.
8. *See* D. Ratner, 'The Government of Business Corporations: Critical Reflections on the Rule of "One Share, One Vote"' 56 *Cornell Law Review* 1, 4-8 (1970), citing multiple examples. Interestingly, Ratner already distinguished between the "Mature" and the "Entrepreneurial" corporation and acknowledged the complications of abolishing pre-existing dual class equity structures that no longer serve their purpose.
9. *See* Hansmann & Pargendler 2014, *supra* note 3, at 953.
10. *See* Hansmann & Pargendler 2014, *supra* note 3, at 970; *see also* Dunlavy 2006, *supra* note 3, at 1358; W.H.S. Stevens, 'Stockholders' Voting Rights and the Centralization of Voting Control', 40 *Quarterly Journal of Economics* 353, 354 (1926), noting the general adherence to the one share, one vote standard. On the role of the (Dormant) Commerce Clause and the internal affairs doctrine in the 19th century US economy, *see* Chapter 14.

common or non-voting preferred stock, occasionally carrying contingent voting rights in case the dividend was not paid. Jointly, non-voting common and non-voting preferred shares represented substantial parts of corporate funding. In the years of rapid social and economic development following the end of the First World War, the "Roaring Twenties",[11] this trend grew even stronger. Stevens provides an especially elaborate overview.[12] His analysis indicated that prominent industrial corporations, including Standard Oil Company of Ohio, R.J. Reynolds and Bethlehem Steel, had all issued non-voting (preferred) shares. In 1925, R.J. Reynolds had $ 10,000,000 of common shares outstanding, along with $ 70,000,000 of non-voting common shares. For Bethlehem Steel, the figures are somewhat different but nevertheless substantial ($ 15,000,000 and $ 45,000,000, respectively). The same applied to iconic enterprises such as Procter & Gamble, E.I. du Pont de Nemours and Bethlehem Steel, along with dozens of smaller businesses.[13] Meanwhile, the most prominent example for policy purposes is presented by car-manufacturer Dodge Brothers. In 1925, it had issued bonds, non-voting preferred stock and non-voting common shares for a combined total of $ 130 million. However, an investment bank (Dillon Read) controlled the business, having subscribed to voting common stock for the mere amount of $ 2.25 million. Dodge Brothers and similar cases of "banker control"[14] drew heavy scholarly criticism, most notably from Harvard's professor Ripley. He identified various dubious practices, including the limitation of pre-emptive shareholder rights, waiver of managerial liability and misuse of holding entities. Most of all, he condemned the "the crowning infamy" of non-voting shares.[15] Although others responded in a less negative manner,[16] the issue of banker control became a concern to the national public opinion, to the extent that President

11. For an elaborate study of this era, *see* S.A. Kallen (eds.), *The Roaring Twenties* (Greenhaven, 2001).
12. *See* W.H.S. Stevens, 'Voting Rights of Capital Stock and Shareholders', 11 *The Journal of Business of the University of Chicago* 311, 335 (1938); *see also* Stevens 1926, *supra* note 10, both containing considerable empirical data. Preference shares offer more insolvency protection than common shares and served to convince hesitant investors to participate in the expanding stock market. *See* § 21.2 *infra*, for similar trends in Germany.
13. *See* Stevens 1938, *supra* note 12; *see also* Stevens 1926, *supra* note 10.
14. *See* A.A. Berle, 'Non-Voting Stock and Bankers' Control', 39 *Harvard Law Review* 673 (1926), exploring whether directors could be deemed to have fiduciary duties in respect of (debt and equity) investors that lacked voting rights; *see also* L.D. Brandeis, *Other People's Money and How the Bankers Use It* (Strokes, 1914).
15. *See* W.Z. Ripley, *Main Street and Wall Street* 77-107 (Little & Brown Company, 1927), comparing an exchange of the right to vote for preferred dividends to Esau's sale of his birthright to Jacob for "a mess of pottage". The outcry on "voting trusts" such as Standard Oil (*see* § 14.3.2 *supra*) provided fertile ground for the unrest as well.
16. *See* Stevens 1938, *supra* note 12, who did not principally object to non- or contingent-voting stocks but noted that relevant application thresholds were often too lenient, both concerning the required dividend coverage ratios and with a view to the length of the default period; *see also* C. Rohrlich, 'Corporate Voting: Majority Control' 7 *St. John's Law Review* 218 (1933)

Coolidge summoned Ripley to the White House to discuss policy options. Allegedly, Coolidge felt very much relieved when he was told the federal government lacked the constitutional power to intervene.[17]

However, others were to take a more active stance. In January 1926, the New York Stock Exchange (NYSE) announced it would "carefully" consider the presence of voting rights for future listings. As a result, Ripley claimed that non-voting stock was dead.[18] Nevertheless, between 1927 and 1932, almost 300 companies executed an IPO involving some form of inferior voting stock, a number substantively unchanged from the 1919-1926 period.[19] However, after stock markets crashed in October 1929 and the economy of the early 1930s entered the "Great Depression", appetite for dual class equity structures did decrease considerably. This allowed the NYSE to announce, in May 1940, that it had long prohibited the use of non-voting common stock and would continue to do so.[20]

The system of banning non-voting shares would function rather smoothly between the 1940s and 1980s, in the sense that such dual class equity structures were largely absent.[21] Occasionally, high-profile businesses would be granted an exception – the IPO of Ford Motor in 1956 is a notable example[22] – but generally, the ban was quite effective. The few corporations that had issued non-voting stock forcibly reclassified these securities into common stock. Non-complying others were delisted. One prominent example was Cannon Mills, which distributed one share of non-voting Class B stock for each common stock in 1947. When the NYSE failed to persuade Cannon Mills to cancel

---

arguing that a combination of voting and non-voting stock could allow for an efficient allocation of control. For a recent reiteration of this argument, *see* § 11.2.1 *supra*.

17. For a detailed analysis, *see* S.M. Bainbridge, 'The Short Life and Resurrection of SEC Rule 19c-4', 69 *Washington University Law Quarterly* 565 (1991); *see also* J. Seligman, 'Equal Protection in Shareholder Voting Rights: The One Common Share, One Vote Controversy', 54 *George Washington Law Review* 695 (1986).
18. *See* Ripley 1927, *supra* note 15, at 122.
19. *See* A. Dewing, *The Financial Policy of Corporations* 161 (Ronald Press, 1953).
20. *See* Bainbridge 1991, *supra* note 17; *see also* Seligman 1986, *supra* note 17.
21. *See* R.C. Lease, J.J. McConnell & W.H. Mikkelson, 'The Market Value of Control in Publicly-traded Corporations', 11 *Journal of Financial Economics* 43 (1983), observing merely 34 dual class stock equity structure corporations quoted on all US stock exchanges in the 1940-1978 period. For similar figures, *see* G.A. Jarrell & A.B. Poulsen, 'Dual-Class Recapitalizations as Antitakeover Mechanisms – The Recent Evidence' 20 *Journal of Financial Economics* 129 (1988), finding 97 dual class equity structures in the period of 1975-1987, of which 67 were introduced in the second half of the 1980s; *see also* M.M. Partch, 'The Creation of a Class of Limited Voting Common Stock and Shareholder Wealth', 18 *Journal of Financial Economics* 313 (1987); H. DeAngelo & L. DeAngelo, 'Managerial Ownership Of Voting Rights: A Study of Public Corporations with Dual Classes of Common Stock', 14 *Journal of Financial Economics* 33 (1985).
22. According to Ford Motor's Articles of Association, the Ford family holds 40 % of the voting power as long as it owns 61 million class B shares. Currently, these represent approximately 2 % of Ford Motor's equity. *See* L.A. Bebchuk & K. Kastiel, 'The Perils of Small-Minority Controllers', 107 *Georgetown Law Journal* 1453 (2019).

the Class B shares, its listing was suspended, albeit only in 1962. In other cases, NYSE acted more swiftly, for instance requiring American Cyanamid to reclassify its securities for the purpose of obtaining a listing and preventing the listed Sheaffer Pen from executing a dual class equity restructuring.[23]

15.3.2 Berle, means & dodd

The various techniques used in the 1920s to disenfranchise shareholders and the economic hardships of the Great Depression inspired a famous debate between Berle, Means and Dodd.[24] Assuming that ownership and control have become separated, to whom do the fiduciary duties of corporate directors relate? Berle argued that the position of corporate directors should be compared to that of trustees. In his view, the historically restricted but increasingly wide-ranging powers of directors ought to be exercised only for the benefit of the shareholders. Indeed, Berle was convicted that managerial power required a significant constraint.[25] Not only did management enjoy broad discretion, annual reports were also "distinguished for [their, TK] vagueness and generality and for [their, TK] capacity to conceal and suppress vital facts".[26] Having received a grant of the Rockefeller Foundation, Berle also analyzed the separation between ownership and control in collaboration with Means. Their data indicated that at the time, 33 % of US national wealth lay in the hands of 200 large corporations. For the 1950s, a figure of 70 % was projected. This estimate made the separation between ownership and control ever more problematic.[27] Dodd countered by arguing that corporations should acts as trustees for the community as a whole. He considered extensive additional regulation to achieve this goal unnecessary.[28] One of Dodd's arguments built on existing case law. In a well-known lawsuit, the US Supreme Court had permitted grain storage prices to be capped, since such businesses clearly

---

23. Additionally, shareholder litigation to prevent actions that might induce delisting was quite frequent. *See* Seligman 1986, *supra* note 17, at 699-700.
24. It is hard to overestimate the importance of this debate for US scholars. Few, if any of the corporate governance papers I read do not at least refer to it briefly. On the possible end of the Berle-Means corporation, *see* § 2.2.3 *supra*. For an extensive analysis from a Dutch perspective, *see* J.M. de Jongh, *Tussen* societas *en* universitas*. De beursvennootschap en haar aandeelhouders in historisch perspectief* 306-311 (Kluwer, 2014).
25. *See* A.A. Berle, 'Corporate Powers as Powers in Trust', 44 *Harvard Law Review* 1049, 1059 (1931), whose arguments included references to the landmark case of Dodge v. Ford, 170 N.W. 668 (Mich. 1919). There, distributions had not been made, presumably to share the funds retained with employees through wage-increases or customers (rebates).
26. *See* W.O. Douglas, 'Directors Who do not Direct', 47 *Harvard Law Review* 1305, 1324 (1934). Note that generally accepted accounting standards were largely absent.
27. *See* A.A. Berle & G.C. Means, *The Modern Corporation and Private Property* 37-40 (Macmillan, 1932).
28. *See* E.M. Dodd, 'For Whom are Corporate Managers Trustees?', 45 *Harvard Law Review* 1145, 1148-1153 (1932).

served the public interest.[29] In a somewhat personal response, Berle labeled management discretion as naive and academic, repeating his calls to impose strong, shareholder-focused fiduciary obligations on directors.[30] By 1935, Dodd again delivered a critical analysis of Berle's ideas. This time, his reasoning revolved around the impossibility to design effective legal standards to ensure managers adhered to the concept of shareholder primacy, given that self-dealing could be difficult to detect and because powerful managers might lobby legislation. Therefore, Dodd proposed to reconsider managers as civil servants instead of private employees, thus appealing to careerist's desire for prestige.[31] However, on this occasion, Berle did not respond.

15.3.3 The background of the berle, means & dodd debate

Importantly, it should be noted that Berle, Means and Dodd argued against the backdrop of the Great Depression.[32] Both sides aimed to develop appropriate policy measures to respond to this crisis. In 1932, it was expected that Roosevelt would formulate his answers based on the ideology of corporatism. Following corporatist dogma, representatives of societal interest groups, under the leadership of the government, jointly and cooperatively shape public policies. In a sense, the ideology can be considered a compromise between communism and capitalism.[33] As corporatism emphasizes the promotion of group instead of individual interests, directors are required to manage the corporation for the overarching benefit of society. Berle was intimately involved in the new administration, having been recruited into Roosevelt's "Brain Trust" advisory council. Whereas Berle's initial shareholder primacy argument[34] was concerned purely with corporate law, the book subsequently co-authored with Means related to public policy. Thus, shareholder interests

---

29. *See* Munn v. Illinois, 94 U.S. 113 (1877), observing that certain industries may, despite their private nature, affect the public good and finding that even if Congress is granted control over interstate commerce (*see* § 14.2.1 *supra*), a state could take action in the public interest.
30. *See* A.A. Berle, 'For Whom Corporate Managers are Trustees: A Note', 45 *Harvard Law Review* 1365, 1370 (1932) ("It must be conceded, at present, that relatively unbridled scope of corporate management has, to date, brought forward in the main seizure of power without recognition of responsibility-ambition without courage.")
31. *See* E.M. Dodd, 'Is Effective Enforcement of the Fiduciary Duties of Corporate Managers Practicable?', 2 *University of Chicago Law Review* 194 (1935).
32. For a vivid description of the debate, *see* W.W. Bratton & M.L. Wachter, 'Tracking Berle's Footsteps: The Trail of the Modern Corporation's Law Chapter', 33 *Seattle University Law Review* 849 (2010); *see also* W.W. Bratton & M.L. Wachter, 'Shareholder Primacy's Corporatist Origins: Adolf Berle and the Modern Corporation'. 34 *Journal of Corporation Law* 99 (2008).
33. *See* H.J. Wiarda, *Corporatism and Comparative Politics: The Other Great "Ism"* 40 (Routledge, 1997).
34. *See* Berle 1931, *supra* note 25.

were subordinated to those of the (broken) nation.[35] Therefore, Dodd's contention[36] came at a somewhat delicate moment. Effectively, it forced Berle to defend a position that he had "developed" considerably (one might also say abandoned) at the risk of politicizing the plans of the Roosevelt administration. By opposing wide-ranging regulation, Dodd essentially pushed for the corporatist vision that provided more influence to businesses over other interest groups.[37] By rejecting managerial discretion, Berle aimed to maintain a balance of power instead. In this sense, the debate could also be considered a struggle for political influence.[38] Berle would eventually emerge victorious.[39]

15.4 The second dual class debate: 1980s

15.4.1 The causes of change

Although the ban on non-voting shares had been quite successful (*see* § 15.3.1 *supra*), the late 1970s and 1980s witnessed two developments that jointly would cause a policy change. First, this concerned the advent of unsolicited takeovers and LBOs).[40] An unsolicited takeover involves the acquirer directly approaching the target corporation's shareholders instead of the board.[41] In case of an LBO, corporations are acquired using a small portion of equity and

35. Directors were expected to "set forth a program comprising fair wages, security to employees, reasonable service to their public, and stabilization of business." *See* Berle & Means 1932, *supra* note 27, at 353-356. Indeed, under these circumstances, the private (!) character of shareholder property can become a contentious matter.
36. *See* Dodd 1932, *supra* note 28.
37. *See* Dodd 1932, *supra* note 28, at 1157 ("Power over the lives of others tends to create on the part of those most worthy to exercise it a sense of responsibility.")
38. *See* Bratton & Wachter 2010, *supra* note 32; *see also* Bratton & Wachter 2008, *supra* note 32.
39. Later, Berle and Dodd would revisit their debate. Interestingly, this entailed a partial reversal of positions. Dodd, knowing that capitalism had not imploded, could safely abandon his corporatist views. Instead, he grew more skeptical of the powers of directors. *See* E.M. Dodd, 'The Modem Corporation, Private Property, and Recent Federal Legislation', 54 *Harvard Law Review* 917, 925-27 (1941). On the other hand, Berle somewhat preserved his idea of the regulatory welfare state, aimed at preventing future economic crises. Thus, he admitted, the argument had been settled squarely in favor of Dodd. *See* A. A. Berle, *The 20th Century Capitalist Revolution* 169 (Harcourt, Brace & Co. 1954). Nevertheless, sharply contrasting their positions is complicated, and referring to them as unilateral advocates of shareholder or stakeholder rights is an oversimplification. *See* Bratton & Wachter 2008, *supra* note 32.
40. Documents capturing the 1980s zeitgeist include B. Burrough & J. Helyar, *Barbarians at the Gate: The Fall of RJR Nabisco* (Harper & Row, 1989) and Norman Jewison's *Other People's Money* (1991), starring Danny DeVito.
41. For an influential analysis, *see* M. Lipton, 'Takeover Bids in the Target's Boardroom', 35 *The Business Lawyer* 101 (1979). Indeed, the 1980s were dominated by Lipton's famous creation, the shareholder rights plan (or "poison pill"), aiming to counter two-tier front-loaded offers. The poison pill was upheld in Moran v. Household International, 500 A.2d

a large amount of debt.[42] Since the costs of the latter are often lower (*see* § 8.4 *supra*), many LBOs are heavily debt-infused. These transactions have been quite controversial from a policy perspective. On the one hand, LBOs have been widely associated with job losses[43] and reduced R&D spending.[44] On the other, it has been argued that in the 1980s, such transactions served as a dieting mechanism, for the purpose of increasing the efficiency of organizations that had become overly complex as a result of excess conglomeratization.[45] Directors and founding families, realizing the implications of LBOs for their positions, were quick to deploy dual class equity structures in response.[46] Second, the 1980s would witness a considerable reduction in NYSE market power. Traditional NYSE advantages compared to AMEX and NASDAQ, such as greater liquidity and prestige, gradually disappeared.[47] Whereas NYSE had (quite) consistently attempted to ban non-voting shares, the positions of AMEX and NASDAQ were more uncertain. Although AMEX had prohibited non-voting stock in the past, its views concerning superior voting stock were rather fluid. NASDAQ, meanwhile, had never set any substantive voting standards at all. Both institutions were prepared to use their position as leverage with a view to enhancing competitiveness.[48]

1346 (Del. 1985), but strictly concerning coercive takeover tactics. Only in Paramount Communications v. Time, 571 A.2d 1140 (Del. 1989) was their use generally accepted.

42. On these transactions, *see* S.N. Kaplan & P. Strömberg, 'Leveraged Buyouts and Private Equity', 23 *Journal of Economic Perspectives* 121 (2009); *see also* E.R. Arzac, 'On the Capital Structure of Leveraged Buyouts', 21 *Financial Management* 16 (1992). For an extensive Dutch analysis, *see* J. Barneveld, *Financiering en vermogensonttrekking door aandeelhouders: een studie naar de grenzen aan de financieringsvrijheid van aandeelhouders in besloten verhoudingen naar Amerikaans, Duits en Nederlands recht* (Kluwer, 2014).
43. *See* S.J. Davis et al, 'Private Equity, Jobs, and Productivity', 104 *American Economic Review* 3596 (2013), observing that LBOs lead to large increases in both gross job creation and gross job destruction.
44. *See* J. Lerner, M. Sorensen & P. Strömberg, 'Private Equity and Long-Run Investment: The Case of Innovation', 66 *Journal of Finance* 445 (2011), reviewing the existing literature and studying almost 500 LBOs, finding no effects on long-term investments and even observing increased citation of patents of LBO firms.
45. *See* M. Jensen, 'Eclipse of the Public Corporation', 67 *Harvard Business Review* 61 (1989).
46. *See* Jarrell & Poulsen 1988, *supra* note 21; *see also* Partch 1987, *supra* note 21; DeAngelo & DeAngelo 1985, *supra* note 21; Lease, McConnell & Mikkelson 1983, *supra* note 21. Note that these midstream dual class equity structure recapitalizations, as proposed by management, may have required shareholder approval. For poison pills, this was not necessarily the case. As such, equating both mechanisms may not be entirely accurate.
47. *See* R.S. Karmel, 'The Future of Corporate Governance Listing Requirements', 54 *SMU Law Review* 325 (2001); *see also* J.C. Coffee, 'Regulating the Market for Corporate Control: A Critical Assessment of the Tender Offer's Role in Corporate Governance', 84 *Columbia Law Rerview* 1145, 1258 (1984).
48. *But see* D.R. Fischel, 'Organized Exchanges and the Regulation of Dual Class Common Stock', 54 *University of Chicago Law Review* 119 (1987), outlining the functioning of a stock exchange and arguing that some incentives (maximizing the number of listings and turnover) counter listing rules which intend to exploit shareholders.

15.4.2 AMEX's wang formula and nyse's response

An important signal was sent in 1976. That year, NYSE refused to list Wang Laboratories if its shareholders adopted a dual class equity structure recapitalization, consisting of common stock carrying one vote and common stock having one-tenth of a vote. Effectively, this constituted a voting ratio between both classes of shares of 10 to 1. However, AMEX accepted the request.[49] Meanwhile, it did impose certain conditions on the recapitalization. First, the owners of inferior voting stock should be entitled, as a class, to elect 25 % of the directors. Second, the superior to inferior voting ratio should not exceed 10 to 1. Thus, Wang Laboratories' original proposal regarding the division of voting power was effectively still on the table. Third, no additional shares (preferred, common or other) should be issued that could, in any way, diminish the voting rights of holders of the inferior class. Fourth, the superior voting shares were to lose their privileges, should the value of that class fall below a certain (unspecified) threshold of the total equity. Fifth, it was strongly recommended (although not formally required) to establish a dividend preference in respect of the inferior voting stock. Together, these conditions were known as the "Wang formula".[50]

With AMEX now permitting the listing of dual class equity structure corporations, NYSE felt itself pressurized to adjust its own listing rules in similar fashion. However, taking the disenfranchisement of shareholders too far might prompt federal legislation.[51] Again, the car manufacturing industry provided a high-profile case. In 1984, General Motors Corporation (GM) announced that it intended to issue stock carrying half a vote per share to finance the acquisition of Electronic Data Systems.[52] This step put GM in violation of NYSE's longstanding voting rights policy. However, delisting such an iconic American enterprise was not considered a realistic option. Thus, in June 1984, NYSE announced a temporary moratorium on the enforcement of its one share, one vote policy.[53] In January 1985, NYSE presented a response in the form

49. *See* Seligman 1986, *supra* note 17, at 704-705.
50. *See* Seligman 1986, *supra* note 17, at 704-705. Whilst some influential papers have considered a 10 to 1 ratio between superior and inferior voting stock the "normal" dual class equity structure (*see* P.A. Gompers, J. Ishii & A. Metrick, 'Extreme Governance: An Analysis of Dual-Class Firms in the United States', 23 *Review of Financial Studies* 1051 (2010)), they are typically unaware of the Wang-formula's long-lasting effects.
51. Also, some states considered revoking the marketplace exemption (in their blue sky laws, *see* § 14.4.2 supra) in case stock exchanges allowed dual class equity structure recapitalizations. *See* Seligman 1986, *supra* note 17, at 713-714.
52. For information of the transaction, *see* J.N. Gordon, 'Ties that Bond: Duel Class Common Stock and the Problem of Shareholder Choice', 76 *California Law Review* 3, 71 (1988). The following year, GM made a similarly structured offer for Hughes Aircraft. Both acquisitions are somewhat atypical examples of the atmosphere of the 1980s in the sense that non-voting stock served to finance takeovers, rather than to prevent them.
53. *See* Bainbridge 1991, *supra* note 17; *see also* Seligman 1986, *supra* note 17.

of modified listing rules. It was proposed to permit dual class equity structure recapitalizations, subject to the following conditions. First, the transaction should be approved by a 2/3 majority of all shareholders. Second, approval by a majority of the independent directors was required. Third, the superior to inferior voting ratio should not exceed 10 to 1. Fourth, the rights of holders of superior and inferior voting stock should be substantively the same, except for the right to vote.[54] NYSE's subsequently adopted proposal (in July 1986) allowed dual class capitalizations, provided that the scheme was approved by a majority of the corporation's publicly traded shares and its independent directors.[55] NYSE's formal policy change thus offered outside minority shareholders even fewer safeguards than the initial proposal, given that it no longer maximized the ratio between superior and inferior voting stock and did not specify that the rights of both classes of stock should be substantively identical, except for the vote. Importantly, stock exchanges would also be enabling dual class equity structures introduced at the IPO stage without any further restrictions. The use of such mechanisms spiked.[56]

15.4.3 The SEC intervenes; the business roundtable strikes back

Whereas stock exchanges are self-regulatory organizations under US law, any changes to their listing standards must be submitted to the SEC for approval, pursuant to S. 19(b) (1) SEA 1934. The SEC organized negotiations between the NYSE, AMEX and NASDAQ to have them adopt a joint one share, one vote policy voluntarily. After these negotiations broke down, the SEC adopted Rule 19c-4, in July 1988. This provision, applying to all three stock exchanges, prohibited the listing of corporations that restricted or disparately reduced voting rights of existing shareholders.[57] However, issuing additional non-voting stock was permitted, as such a recapitalization would not, in principle, affect the rights of existing investors.[58] Thus, Rule 19c-4 permitted equity raises

54. In July 1985, NASDAQ would similarly propose to allow dual class equity structure recapitalizations, subject to 2/3 majority approval, a 10-year sunset provision and a maximum superior to inferior voting ratio of 10 to 1. *See* Seligman 1986, *supra* note 17, at 692. In a sense, such a mechanism would have resembled the proposal of Hill and Pacces for temporary recapitalizations. *See* C.A. Hill & A.M. Pacces, 'The Neglected Role of Justification under Uncertainty in Corporate Governance and Finance', 3 *Annals of Corporate Governance* 276, 380 (2019).
55. *See* Bainbridge 1991, *supra* note 17; *see also* Seligman 1986, *supra* note 17.
56. *See* Bainbridge 1991, *supra* note 17, at 570; *see also* Jarrell & Poulsen 1988, *supra* note 21 (distinguishing between pre- and post-moratorium transactions and finding negative returns for the latter); Partch 1987, *supra* note 21.
57. Due to its wording, SEC Rule 19c-4 created some confusion as to whether poison pills were still permitted. Shareholders of the target corporation are often able to acquire stock at a lower price than the bidder.
58. *See* Gilson 1987, *supra* note 31, where this approach was first put forward. For similar findings, *see* S. Banerjee & R.W. Masulis, 'Ownership, Investment and Governance: The Costs and Benefits of Dual Class Shares' (2017), available at http://www.ssrn.com/.

to fund projects with a positive Net Present Value, whereas it removed any possible coercive elements from proposals to reclassify existing securities[59] (although in the eyes of some, it did not go far enough[60]). As a result, Rule 19c-4 would allow investors to distinguish between value-enhancing and value-destroying recapitalizations. Somewhat ironically, this entails that in the 1980s, non-voting stock became arguably the preferred deviation from the one share, one vote standard, whereas such instruments had received heavy criticism in the 1920s (*see* § 15.3.1 *supra*).

A heated scholarly debate followed, not only concerning the effects of dual class equity structures on shareholder value (*see* Chapter 10 *supra*), but also regarding the competency of the SEC under federal law to govern substantive matters of corporate governance. The main protagonists of this debate were Dent and Seligman. They focused primarily on the interpretation of S. 19(c) SEA 1934. At the time, S. 19(c) SEA 1934 provided that "The Commission […] may abrogate, add to and delete from […] the rules of a self-regulatory organization […] as the Commission deems necessary or appropriate to insure the fair administration of the self-regulatory organization […]." Seligman argued that this provision "probably" empowered the SEC to act as it did, also because S. 11A(a) (2) SEA 1934 authorizes the designation of securities qualified for trading in national markets and given that S. 14(a) SEA 1934 empowers the SEC to structure the proxy solicitation process, aimed at the free exercise of voting rights.[61] Dent disagreed, stating that the wording of S. 19(c) SEA 1934 was rather broad (put differently, vague) and that SEC could act only under specific grants of power.[62] Whereas under *Chevron*, a government agency's interpretation of a statute is respected if it is based on a permissible construction,[63] this

59. *See* Gordon 1988, *supra* note 52, at 48, comparing the issuance of additional non-voting stock to the conversion of voting into non-voting preferred stock. Gordon argued that, due to collective action problems (*see* § 2.2.3 *supra*), outside minority investors would assume the recapitalization in the form of a conversion to succeed. In that case, they might be coerced into settling for the increased preferred dividend associated with the inferior voting stock (a so-called "sweetener"). For issuances of additional non-voting shares, this coercive aspect would be absent.

60. *See* L. Lowenstein, 'Shareholder Voting Rights: A Response to SEC Rule 19c-4 and to Professor Gilson', 89 *Columbia Law Review* 979 (1989), complaining various ways existed to circumvent the scheme, referring to a proposal of American Express to exchange common stock for bonds, preferred stock and warrants.

61. *See* Seligman 1986, *supra* note 17, at 714-715, advocating a ban on dual class equity structures, which he considered the equivalent of price-fixing. Interestingly, Seligman expressed little confidence in sunset mechanisms (*see* § 11.3.3 *supra*), for the fear of opportunistic management behavior to prevent it from being triggered. This would entail (*ex ante*) less investor involvement and thus less screening of the decision to extend the mechanism. Instead, Seligman preferred a majority-of-the-minority vote (*see* § 11.3.1 *supra*).

62. *See* G. Dent, Dual Class Capitalization: A Reply to Professor Seligman, 54 *George Washington Law Review* 725, 727 (1986).

63. *See* Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

does not permit the agency to act arbitrarily or to exceed its statutory authority.[64] Additionally, Dent noted that Congress had explicitly designated all types of securities as being eligible for trading, whereas that the powers of the SEC to regulate proxy voting were aimed at disclosure vis-a-vis shareholders, and nothing more.[65]

In subsequent proceedings initiated by the Business Roundtable, an influential body of corporate executives to promote pro-business policies, SEC Rule 19c-4 was vacated.[66] The Court of Appeals for the District of Columbia Circuit observed that allowing a government agency to set the interpretation of the statutory provisions delimiting the agency's very own powers could give rise to complications.[67] Substantively, it was held that Congress had not included the competency to regulate the proxy process (S. 14(a) SEA 1934) in its broad grant of power to the SEC. The SEC had interpreted this as a tacit sign of approval to safeguard NYSE voting rights policies as existed at the time the SEA 1934 was enacted. However, the Circuit Court for the District of Columbia reasoned that if this were the case, the SEC would be able to establish a system of federal corporate law by using access to national capital markets as its enforcement mechanism.[68] This would go against the explicit intentions of Congress. Indeed, the Senate Committee on Banking and Currency had stated it had no intention of granting the SEC the power to interfere in corporate management. Instead, Congress merely aimed for disclosure provisions, allowing investors to cast an informed vote.[69] Furthermore, the US Supreme Court had previously acknowledged that principally, corporations are creatures of state law.[70] The Circuit Court for the District of Columbia also rejected (and, in fact, heavily criticized) the SEC's approach of fostering a national market system, as Congress' intention underlying S. 11A(a) (2) SEA 1934 was merely to break down unnecessary regulatory restrictions.[71] At a tactical level, this meant that the SEC had lost.

64. *See* Fidelity Federal Savings & Loan Association v. De La Cuesta, 458 U.S. 141 (1982).
65. *See* Dent 1986, *supra* note 62.
66. *See* Business Roundtable v. SEC, 905 F.2d 406 (D.C. Cir. 1990). For thorough analyses, *see* L. Johnson, 'Sovereignty over Corporate Stock', 16 *Delaware Journal of Corporate Law* 485 (1991), arguing the law concerning the distribution of voting rights must be adaptable to changing circumstances, which implies state competition; *see also* R.S. Karmel, 'Is It Time for a Federal Corporation Law', 57 *Brooklyn Law Review* 55 (1991), holding the opposite; Bainbridge 1991, *supra* note 17, concluding SEC Rule 19c-4 was correctly voided.
67. *See* New York Shipping Association v. Federal Maritime Commission, 854 F.2d 1338.
68. *See* Business Roundtable v. SEC, 905 F.2d 406 (D.C. Cir. 1990).
69. *See* Business Roundtable v. SEC, 905 F.2d 406 (D.C. Cir. 1990).
70. *See* Burks v. Lasker, 441 U.S. 471 (1979); *see also* Santa Fe Industries v. Green, 430 U.S. 462 (1977). On the internal affairs doctrine and the positions of the federal government and the states to shape corporate law, *see* § 14.2 and § 14.3 *supra*.
71. *See* Business Roundtable v. SEC, 905 F.2d 406 (D.C. Cir. 1990).

15.4.4 Stock exchange listing rules and corresponding guidance

Despite the unfavorable ruling of the Court of Appeals for the District of Columbia Circuit, NYSE and NASDAQ implemented Rule 19c-4 virtually verbatim in their listing rules. This was a voluntary act and therefore permitted. The NYSE even adopted Rule 19c-4 prior to the *Business Roundtable v. SEC* judgement being delivered, in S. 313 (A) of the NYSE Listed Company Manual (NLCM).[72] Consequently, from a strategic instead of tactical point of view, it appears the SEC had achieved a resounding victory. The principle that voting rights of existing shareholders cannot, through any issuance, be reduced or restricted, continues to apply until this very day. According to S. 313 (A) NLCM, midstream recapitalizations involving superior voting stock, time-phased voting (also known as tenure or loyalty voting, *see* § 10.6.4 *supra*), capped voting[73] and exchange offers[74] are prohibited. However, dual class equity structures in place prior to the IPO are permitted. Moreover, the issuance of additional superior voting stock is allowed in case of a pre-existing dual class equity structure, pursuant to S. 313.10 NLCM. It is also permitted to issue non-voting stock, provided that the common and non-voting shares are substantively similar, except for the right to vote. Furthermore, owners of non-voting stock are entitled to receive all shareholder communications, including proxy materials, following S. 313 (B) of the NYSE NLCM.[75]

There exists elaborate guidance on the application of S. 313 (A) NLCM, based on previous NYSE responses as to whether the introduction of a dual class equity structure was permitted in the circumstances at hand. At the introduction of S. 313 (A) NLCM, NYSE stated that it would "provide issuers with a certain degree of flexibility […], so long as there is a reasonable business justification […], and such transaction is not taken or proposed primarily with the intent to disenfranchise".[76] Accordingly, the midstream introduction of a dual class equity structure has been permitted to enable the spin-off of a listed

72. For its NASDAQ equivalent, *see* NASDAQ Rule 5640. For the remainder of the discussion, I focus on NYSE listing rules, given that these have been more developed over the years, also in the form of guidance. AMEX was acquired by NYSE in October 2008. As a result, its listing rules have no relevance for future corporate law.
73. A maximized number of votes, regardless of the size of the equity interest, effectively benefitting minority shareholders. *See* Hansmann & Pargendler 2014, *supra* note 3, for an elaborate historical analysis.
74. *See* Gordon 1988, *supra* note 52, on the coercive nature of such transactions due to collective action problems.
75. The possibility of issuing non-voting stock involves both the creation of a new class as well as the issuance of additional non-voting stock. Note that separate rules apply regarding (non-voting) preferred stock. *See* S. 313 (C) NLCM, which provides that holders of these securities should have the right (as a class) to elect a minimum of two directors upon defaulting on the preferred dividend for six subsequent quarters.
76. *See* Voting Rights Interpretations Under Listed Company Manual Section 313, available at http://www.nyse.com/.

subsidiary on a consolidated basis, for the purpose of avoiding a $ 1 billion tax liability.[77] Similarly, an emergency equity raise to prevent liquidity problems, involving the issuance of superior-voting preference shares having a predetermined life span of 12 years, was accepted.[78]

In those cases, the consequences of refusing a dual class equity structure recapitalization may have been rather obvious. However, there also exist less clear-cut examples. Certain transactions resulting in an increase in voting power of non-controlling insiders and controlling shareholders have been found not to disenfranchise outside minority shareholders, either because little control was gained, or due to the fact that control had already been achieved.[79] Perhaps even more surprising, the split of a single class of common shares into one listed class of superior voting stock and two listed classes of inferior voting stocks (the latter carrying superior dividend rights, a "sweetener"[80]), as proposed by a controlling shareholder, has been permitted as well. Crucially, all parties received identical portions of superior and inferior voting stock, and a one-way mechanism to convert superior into the inferior voting stock (but not the other way around) was absent. The presence of such a mechanism would have entailed that the transaction could have no other outcome than the voting power of the controlling shareholder growing over time. There are always some outside minority shareholders who, for whatever reason, wish to convert their holdings. Because this was not the case, the NYSE felt the transaction was not part of a grand design to disenfranchise investors.[81] Indeed, a proposal that included an unilateral conversion mechanism was rejected.[82] Similarly, the exchange of preference shares held by a controlling shareholder into additional superior voting stock was prohibited. The sole purpose of the transaction was to increase entrenchment.[83] Additionally, the NYSE objected that the

77. *See* S. 313 Interpretation No. 95-01. In this specific case, independent financial analysis had indicated that a standalone scenario would create superior shareholder value compared to the consolidated scenario.
78. *See* S. 313 Interpretation No. 96-03, where it was also taken into consideration that the investor had no previous business relationships with the investee corporation; *see also* S. 313 Interpretation No. 96-05.
79. *See* S. 313 Interpretation No. 96-04; *see also* S. 313 Interpretation No. 96-01. In that case, the controlling shareholder voluntarily agreed to cap his increase in voting power resulting from the recapitalization. (Given the circumstances, Interpretation No. 96-01 appears to pertain to Warrant Buffett's Berkshire Hathaway.) *See also* S. 313 Interpretation No. 10-01, where the controlling shareholder similarly agreed to keep his voting power constant following the restructuring, through the sale of a proportional number of superior voting shares.
80. *See* Gordon 1988, *supra* note 52.
81. *See* S. 313 Interpretation No. 96-02.
82. *See* S. 313 Interpretation No. 98-01. The rejected proposal actually presents an interesting case, as it concerned the conversion of the controller's superior voting stock into inferior voting stock. Usually, these transactions are structured the other way around. This proposal was put forward since the superior voting stock traded at a material discount to the inferior voting stock.
83. *See* S. 313 Interpretation No. 99-01.

issuance of superior voting stock should be executed through a capital-raise, either in the form of a stock dividend or a stock split, and not in the form of a conversion.

In conclusion, NYSE listing rules and corresponding guidance provide some room for maneuver. They do not only allow certain midstream recapitalizations involving inferior voting stock, but also those using superior voting stock, albeit only in certain circumstances. However, the NYSE scheme does not fully adhere to a life-cycle perspective, as only the introduction, and not the abolition of dual class equity structures is regulated. Meanwhile, life-cycle thinking indicates a certain dynamism in dealing with changes to the corporation's finances (*see* § 10.6 *supra*). The NYSE listing rules and corresponding guidance mainly target one-time conversion offers, as these are felt to coerce investors into accepting inferior voting preferred stock and thus reinforce entrenchment.[84] A different view could be put forward as well. Information asymmetries not only manifest themselves in the form of collective action problems – which have arguably diminished in size, due to the increased concentration of share-ownership, *see* § 10.2.2 *supra* – but also translate in disinformed voting. The resulting costs, in the form of suboptimal decision-making, are borne by the corporation. As such, a mechanism to convert common into inferior voting shares, perhaps by using a preferred dividend "sweetener", might also be considered a nudge,[85] to distinguish between more and less actively engaged investors, involving a trade-off between dividends and a potential takeover premium.[86]

15.5 The third dual class debate: 2000s – present

15.5.1 A repetition of moves?

It may well be argued that the current debate on dual class equity structures is, in fact, the third edition of a periodically repeated play. In this view, the 2004 IPO of Google (*see* § 17.3 *supra*) should be considered the starting point of the present cycle.[87] Notable subsequent developments include the dual class IPOs of LinkedIn, Groupon, TripAdvisor and Zynga (all 2011), Facebook (2012),

84. *See* Gordon 1988, *supra* note 52; *see also* Gilson 1987, *supra* note 58. Note that current NYSE listing rules and corresponding guidance do not rule out issuances of non-profit participating stock. In fact, applying the guidance by analogy suggests that such instruments are permitted, provided that conversion mechanisms are absent.
85. On this idea, *see* R.H. Thaler & C.R. Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (Yale University Press, 2008).
86. *See* D. Lund, 'Nonvoting Shares and Efficient Corporate Governance', 71 *Stanford Law Review* 687 (2019).
87. *See* L.A. Bebchuk & K. Kastiel, 'The Untenable Case for Perpetual Dual-Class Stock', 103 *Virginia Law Review* 585 (2017) ("Furthermore, since Google decided to use a dual-class structure for its 2004 IPO, a significant number of "hot" tech companies have followed its lead.")

SnapChat and Blue Apron (both 2017).[88] Indeed, the empirical evidence confirms the use of dual class equity structures is gaining ground.[89] It was the 2017 SnapChat IPO, in which public investors could solely subscribe to non-voting stock, that triggered institutional investors to initiate an inquiry to remove dual class equity structure corporations from stock indices, as composed by S&P Dow Jones, FTSE Russell and MSCI (*see* § 11.4 *supra*). Nevertheless, Dropbox conducted a dual class equity structure IPO in 2018, although it applied the Wang formula (*see* § 15.4.2 *supra*) and abstained from issuing non-voting stock only.

One could observe that not only the US debate on dual class equity structures itself is repetitive, but also that the positions taken are remarkably similar to those adopted previously. A number of scholars continue to plainly advocate granting outside minority shareholders more control rights. Befitting to the legacy of Harvard's professor Ripley in the 1920s (*see* § 15.3.1 *supra*), Bebchuk has undoubtedly been the most vocal of them. In one of his papers, he went as far as proposing to transfer the right to initiate decision-making from directors to shareholders.[90] In later works, he has highlighted the nature of agency costs of dual class equity structures.[91] Other authors, such as Lipton and Bainbridge, have been opposing Bebchuk's views passionately. Lipton has developed the "New Paradigm" of corporate governance, aspiring a more sustainable form of value creation.[92] He has taken a great personal interest in stressing the advantages of granting the board latitude in setting its priorities[93] and did not shy away from sharing his views, especially not when these conflicted

88. For a full overview, *see The Council of Institutional Investors Dual Class Companies List* (2018), available at http://www.cii.org/. (In 2018, Zynga's controlling shareholder voluntarily canceled the dual class equity structure.)
89. *See* Bebchuk & Kastiel 2017, *supra* note 87; *see also* P.A. Gompers, J. Ishii & A. Metrick, 'Extreme Governance: An Analysis of Dual-Class Firms in the United States', 23 *Review of Financial Studies* 1051 (2010), both observing a rise in dual class equity structure IPOs.
90. *See* L. Bebchuk, 'The Case for Increasing Shareholder Power', 118 *Harvard Law Review* 833 (2005), proposing a two-step (initial and confirming) mechanism for consecutive AGMs to shape decision-making. For a critical analysis, *see* P.K. Rowe, T.N. Mirvis & W. Savitt, 'Bebchuk's "Case for Increasing Shareholder Power": An Opposition' (2007), available at http://www.ssrn.com/, arguing such a scheme would be a huge gamble.
91. *See* Bebchuk & Kastiel 2019, *supra* note 22; see also L.A. Bebchuk & K. Kastiel, 'The Untenable Case for Perpetual Dual-Class Stock', 103 *Virginia Law Review* 585 (2017).
92. *See* M. Lipton, 'It's Time to Adopt the New Paradigm' (2019), available at http://www.corpgov.law.harvard.edu/.
93. *See* M.D. Goldhaber, 'Marty Lipton's War', 35 *The American Lawyer* 44 (2015), containing many poetic excerpts from a November 2012 debate between Lucian Bebchuk ("Vock-tell is wrong") and Martin Lipton ("The bawd is right'"). The meeting resulted in a paper by Bebchuk on the positive effects of activism. *See* L.A. Bebchuk, A. Brav & W. Jiang, 'The Long-Term Effects of Hedge Fund Activism', 115 *Columbia Law Review* 1085 (2015).

with Bebchuk.[94] Lipton's observations are rather similar to those expressed by Dodd in the 1930s when debating Berle (*see* § 15.3.2 *supra*). Bainbridge shares the same view with regard to the position of directors, but is perhaps slightly more oriented towards shareholder value maximization than Lipton is. Bainbridge argued that if a shareholder-centric approach were the more efficient model, it should be widely observable.[95] However, many investors mainly adopt passive investing strategies.[96] Thus, caution is advised when strengthening outside minority shareholder voting powers – if at all.[97]

15.5.2 The debate making progress

Despite the similarities between the current debate and previous iterations, important differences can be observed as well. This relates primarily to the reasons for using dual class equity structures. For the 1920s (*see* § 15.3 *supra*), various explanations can be put forward. Although entrenchment may have played a role, the Great Merger Movement (1895-1905), combined with a process of rapid economic expansion, could also entail that capital was in short supply. Then, the use of dual class equity structures would stem from pecking-order considerations (*see* § 8.4 *supra*), in which inferior voting shares are used as a source of funding of last resort. Alternatively, it would be conceivable that many businesses were experiencing the earlier stages of their life-cycle (*see* § 10.6 *supra*). For the 1980s (*see* § 15.4 *supra*), matters are less complicated. During this period, dual class equity structures served primarily to protect the private interests of established directors and their families. Currently, their goal is mostly to enable corporations and their founders to remain entrepreneurial and innovative in a rapidly changing environment, and not to succumb to information asymmetries and short-term pressures from outside minority shareholders. Consequently, the present reasons for using dual class equity structures appear at least as befitting to the

94. *See* M. Lipton, 'Current Thoughts About Activism' (2013), available at http://www.corpgov.law.harvard.edu/; *see also* M. Lipton, 'The Bebchuk Syllogism' (2013), available at http://www.corpgov.law.harvard.edu/; L. Bebchuk, A. Brav & W. Jiang, 'Don't Run Away from the Evidence: A Reply to Wachtell Lipton' (2013), available at http://www.corpgov.law.harvard.edu/; M. Lipton, 'Empiricism and Experience; Activism and Short-Termism; the Real World of Business' (2013), available at http://www.corpgov.law.harvard.edu/; L. Bebchuk, A. Brav & W. Jiang, 'Still Running Away from the Evidence: A Reply to Wachtell Lipton's Review of Empirical Work' (2014), available at http://www.corpgov.law.harvard.edu/.
95. *See* S.M. Bainbridge, 'Director Primacy: The Means and Ends of Corporate Governance', 97 *Northwestern University Law Review* 547 (2003).
96. *See* S.M. Bainbridge, 'Director Primacy and Shareholder Disempowerment', 119 *Harvard Law Review* 1735 (2006). On passive investing, *see* § 11.4.1 *supra*.
97. *See* S.M. Bainbridge, 'The Case for Limited Shareholder Voting Rights', 53 *UCLA Law Review* 601 (2006).

nature of the corporation, if not more, than those of the past.[98] The fact that the debate is heading in the right direction is underscored by the attention for sunset provisions (*see* § 11.3.3 *supra*) and the development of broader control cost models (*see* § 10.5.2, § 10.5.3 and § 10.5.4 *supra*), replacing narrow agency cost models. As a final confirmation of the progress made, the SEC has acknowledged the life-cycle framework and recognized the futility of short-term mandatory sunsets.[99] With the historical analysis complete, it is now time to turn our attention to the current Delaware framework in respect of the distribution of powers between the board and the corporation's investors.

98. This might also explain why institutional investors have remained hesitant to embrace dual class equity structures. Indeed, in the past, reasons for using these mechanisms have not consistently been convincing.

99. *See* R.J. Jackson, 'Perpetual Dual-Class Stock: The Case Against Corporate Royalty' (2018), available at http://www.corpgov.law.harvard.edu/.

Chapter 16. Current delaware corporate law

16.1 Introduction

In Chapter 16, I study the current Delaware law and governance framework in relation to shareholder rights, without a dual class equity structure recapitalization taking place. First, I examine the character of the Delaware corporation, focusing on its purpose, personhood and flexible character, in § 16.2. Then, I discuss the position of the board, its fiduciary duties, independence requirements, and the standards applied by the Delaware courts for assessing director behavior, in § 16.3. Additionally, in § 16.4, I analyze shareholder voting rights and the position of the AGM, considering the general one share, one vote default rule and deviations from it, decision-making thresholds including quorums, and the proxy solicitation process. Finally, in § 16.5, I examine shareholder dividend entitlements, equal financial treatment and differential distributions, as well as legal requirements to making distributions and director liability.

16.2 The character of the corporation

16.2.1 Corporate purpose: traditional doctrine and current developments

Although the DGCL is formally agnostic as to the goal of the corporation,[1] Delaware and US corporate governance have traditionally been considered to exemplify the shareholder value model.[2] Absent specific clauses in the certificate of incorporation, as amended (articles of association), the purpose of the corporation is to maximize shareholder value. Indeed, Friedman famously argued that "there is only one social responsibility of business […] to increase

1. *See* § 101 (b) DGCL, stating a corporation may be formed for "any lawful purpose". However, this formulation should be considered primarily as a response to narrowly drafted incorporation statutes of older times. *See* § 14.3.1 *supra*.
2. For an analysis, *see* E.P. Welch et al., *Folk on the Delaware General Corporate Law* § 102.4 (Wolters Kluwer, 2018). Statutes of other states may stipulate a different goal. However, in the US, they are less important. *See* § 14.3.3 *supra*.

its profits".[3] Hansman & Kraakmann predicted the downfall of systems that are oriented differently.[4] Historically, the ruling of the Michigan Supreme Court in *Dodge v. Ford Motor* has proven highly influential as well. The case concerned two minority investors, the Dodge brothers, objecting to a cut in dividend distributions, despite stellar profits posted by Ford Motor, for the purpose of funding higher employee wages and lower consumer prices. The Michigan Supreme Court ordered the shareholders were entitled to receive additional distributions.[5] Meanwhile, some scholars have been voicing different opinions. Johnson has stated that established Delaware case law is ambivalent as to the corporation's purpose.[6] Indeed, directors are generally under no obligation promote short-term shareholder value.[7] Stout and Macey have equally observed that the business judgement rule offers ample leeway in developing different long-term strategies.[8]

I do not – yet – share the view that Delaware law has fully abandoned the primacy of shareholder value maximization. The ideology is rooted too deeply in the case law of the courts,[9] at least for solvent businesses,[10] to already draw

---

3. *See* M. Friedman, *Capitalism and Freedom* 133 (Chicago University Press, 1962). For the legal-economic foundations of shareholder value maximization, *see* § 2.3.5 *supra*.
4. *See* H. Hansmann & R. Kraakman, 'The End of History for Corporate Law' (2001) 89 *Georgetown Law Journal* 439; *but see* H. Hansmann, 'How Close is The End of History?', 32 *The Journal of Corporation Law* 745, 747 (2006).
5. *See* Dodge v. Ford, 170 N.W. 668 (Mich. 1919). For a critical assessment, *see* L.A. Stout, 'Why We Should Stop Teaching Dodge v. Ford', *3 Virginia Law & Business Review* 163, 170 (2008), arguing the case constituted primarily a majority-minority conflict, and should not be viewed in relation to shareholder primacy, whilst adding that due to the shielding effect of the BJR, shareholder primacy is an aspirational rule, rather than a binding obligation; *see also* J.R. Macey, 'A Close Read of an Excellent Commentary on Dodge v. Ford', *3 Virginia Law & Business Review* 177 (2008), rejecting the first but accepting Stout's second argument.
6. *See* L.P.Q. Johnson, 'Unsettledness in Delaware Corporate Law: Business Judgment Rule, Corporate Purpose', 38 *Delaware Journal of Corporate Law* 405, 432 (2013).
7. *See* Air Products & Chemicals. v. Airgas, 16 A.3d 48 (Del. Ch. 2011); *see also* Paramount Communications v. Time, 571 A.2d 1140, 1150 (Del. 1989). In both cases, it was held that outside a Revlon-scenario (*see* § 16.3.4 *infra*), the board is not required to maximize the current stock price.
8. *See* Stout 2008, *supra* note 5; *see also* Macey 2008, *supra* note 5.
9. *See* Revlon v. MacAndrews & Forbes Holdings, 506 A.2d 173 (Del. 1986) (striking down a transaction that benefitted bondholders); *see also* Katz v. Oak Industries, 508 A.2d 873 (Del. Ch. 1986).
10. The risk of insolvency broadens the corporate goal. There exists a two-pronged approach. First, in the vicinity of insolvency, directors may consider the interests of non-shareholder constituents in a more pronounced manner, as to shield them from the obligation to make excessively risky investments to right the ship. *See* Equity-Linked Investors v. Adams, 705 A.2d 1040 (Del.Ch. 1997); *see also* Credit Lyonnais Bank Nederland v. Pathe Communications, 1991 WL 277613 (Del. Ch. 1991). At this stage, directors do not yet have fiduciary duties towards creditors. *See* North American Catholic Educational Programming Foundation v. Gheewalla, 2006 WL 2588971 (Del. Ch. Sept. 1, 2006). Second, when (effective) insolvency has been established, directors become required to promote the interests of

such a conclusion. The *eBay v. Newmark* case confirmed that shareholder value is still dominant.[11] That lawsuit actually bore a striking resemblance with *Dodge v. Ford*, as it struck down a shareholder rights plan aimed at benefiting consumers.[12] Other recent cases have equally shown that shareholder value maximization is still very much alive.[13] One advocate of shareholder value maximization was Chancellor Allen.[14] Another ardent proponent is Chief Justice Strine. However, Strine merely argued that under existing Delaware law, shareholder value is the focal point of directors' duties.[15] From a normative perspective, Strine does not oppose a shift towards a more holistic model.[16]

As opposed to the positive corporate goal, one might very well argue that the normative purpose of the Delaware corporation is currently undergoing a fundamental transformation.[17] In substantiating this claim, one could point to

---

creditors, who then are residual risk-bearers as well. *See* Blackmore Partners v. Link Energy, 2005 WL 2709639 (Del. Ch. 2005); *see also* Production Resources Group v. NCT Group, 863 A.2d. 772 (Del. Ch. 2004).

11. *See* eBay v. Newmark, 16 A.3d 1 (Del. Ch. 2010). For an extensive discussion, *see* Johnson 2013, *supra* note 6; *see also* D.A. Wishnick, 'Corporate Purposes in a Free Enterprise System: A Comment on eBay v. Newmark', 121 *Yale Law Journal* 2405 (2012).
12. This underscores the fact that the business judgement rule offers ample, but not unlimited leeway in shaping corporate strategy. *See* Stout 2008, *supra* note 5; *see also* Macey 2008, *supra* note 5.
13. S*ee* In re Trados Shareholder Litigation, 73 A.3d 17 (Del. Ch. 2013), stressing the importance of promoting the interests of common shareholders relative to the contractual interests of preferred shareholders.
14. *See* W.T. Allen, 'Ambiguity in Corporation Law', 22 *Delaware Journal of Corporate Law* 894, 896 (1997) (constructing shareholder value maximization as a remedy to investor passivity); *see also* W.T. Allen, 'Corporate Takeovers and Our Schizophrenic Conception of the Business Corporation', 14 *Cardozo Law Review* 261 (1992).
15. *See* L.E. Strine, 'Corporate Power is Corporate Purpose I: Evidence From my Hometown', 33 *Oxford Review of Economic Policy* 176 (2017), highlighting the struggles Wilmington and its local charities experienced when DuPont closed its headquarters, but nevertheless accepting that decision from a business perspective; *see also* L.E. Strine, 'The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law', 50 *Wake Forest Law Review* 761 (2015); L.E. Strine, 'Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit', 47 *Wake Forest Law Review* 135 (2012).
16. *See* L.E. Strine, 'Toward Fair and Sustainable Capitalism' (2019), available at http://www.ssrn.com/, containing a wide range of policy measures; *see also* Strine 2015, *supra* note 15, at 786 ("I am more than moderately sympathetic with those who argue that for-profit corporations should behave lawfully, responsibly, and ethically"); Strine 2012, *supra* note 15, at 152.
17. For similar observations from a Dutch perspective, *see* H.M. Vletter-van Dort & T.A. Keijzer,'Herziening Britse Corporate Governance Code: stof tot nadenken', 20 *Ondernemingsrecht* 321, 329 (2018); *see also* H.M. Vletter van-Dort, 'De aandeelhouder als hoeksteen van de beursvennootschap?', 20 *Ondernemingsrecht* 280, 286 (2018); K.H.M. de Roo, 'Directors' Fiduciary Duties Beyond the Nation State', 66 *Ars Aequi* 263 (2016); B.F. Assink, *Rechterlijke toetsing van bestuurlijk gedrag: binnen het vennootschapsrecht van Nederland en Delaware* 1 (Kluwer, 2007), at 80-83, noting a feeble tendency away from shareholder-centrism, which apparently has further gained traction.

several factors. First, many prominent US lawyers and scholars are increasingly advocating broadening the purpose of the corporation. Lipton arguably makes the best example in this regard, having developed the "New Paradigm" of corporate governance and continuing to push for its implementation.[18] Second, some of the largest (institutional) investors, including BlackRock, are increasingly demanding corporations to take environmental, social and governance criteria into consideration.[19] When principals themselves reconsider (and, in a sense, waive) their residual rights in such a fundamental manner, it would make little sense for agents not to follow suit. In fact, those agents have, for the first time in a long period, made largely similar proposals, by means of a statement of the Business Roundtable.[20] Third, the Accountable Capitalism Act, as proposed by Senator Warren (*see* § 14.2.1 *supra*) not only comprises the federalization of corporations with annual revenues in excess of $ 1 billion, but also proposes that 40 % of the directors of such corporations should be nominated by employees. If it ever were enacted, employee interests would become considerably more powerful vis-à-vis those of shareholders. Fourth, 2013 witnessed the adoption of statutory provisions in respect of public benefit corporations (PBCs), in § 361-368 DGCL. Compared to ordinary corporations, PBCs are more explicit in their intentions of promoting the common good.[21] Indeed, they expressly signal investors that managers are authorized to balance the stockholders pecuniary interests' with (i) the best interests of those materially affected by the corporation and (ii) specifically identified public benefits. If PBCs were to comprise a larger proportion of economic activity over time[22], Delaware's corporate legal system would change gradually from within.

---

18. *See* M. Lipton, 'It's Time to Adopt the New Paradigm' (2019), available at http://www.corpgov.law.harvard.edu/. For similar calls, *see* Johnson 2013, *supra* note 6; *see also* Stout 2008, *supra* note 5; M.M. Blair & L.A. Stout, 'A Team Production Theory of Corporate Law', 85 *Virginia Law Review* 248 (1999).
19. *See* L. Fink, 'Purpose & Profit' (2019), available at http://www.corpgov.law.harvard.edu/. For an account of the harmful effects of overly focusing onn shareholder value, *see* N. Lemann, *Transaction Man: The Rise of the Deal and the Decline of the American Dream* (Farrar, Straus and Giroux, 2019).
20. *See* 'Statement on the Purpose of a Corporation', available at http://www.businessroundtable.org/. For early analyses, *see* C. Posner, 'So Long to Shareholder Primacy' (2019), available at http://www.corpgov.law.harvard.edu/; *see also* B.M. Huber, J.A. Hall & L. Goldberg, 'Legal Implications of The Business Roundtable Statement on Corporate Purpose' (2019), available at http://www.corpgov.law.harvard.edu/.
21. For some of the initial literature on the treatment of PBCs under Delaware corporate law, *see* L.E. Strine, 'Making It Easier for Directors to Do the Right Thing', 4 *Harvard Business Law Review* 235 (2014); *see also* F.H. Alexander et al., 'M&A under Delaware's Public Benefit Corporation Statute: A Hypothetical Tour', 4 *Harvard Business Law Review* 255 (2014); J. Haskell Murray, 'Social Enterprise Innovation: Delaware's Public Benefit Corporation Law', 4 *Harvard Business Law Review* 345 (2014).
22. The economic importance of PBCs is still relatively limited. *See* D. Brakman Reiser & S.A. Dean, 'Financing the Benefit Corporation', 40 *Seattle University Law Review* 793 (2017).

Thus, Delaware corporate law is still focused on shareholder value maximization. However, the more the long-term aspect of shareholder value is emphasized, the easier it becomes to construe serving other stakeholders as beneficial to shareholders, and the smaller differences with other approachs to corporate purpose, such as long-term value creation in general, will be.[23]

16.2.2 Corporate personhood

Conventional Delaware wisdom stipulates that shareholder rights are contractual in nature. Thus, provisions in the articles of association should be interpreted similarly as contractual ones.[24] The Delaware courts have affirmed this position in many instances.[25] The same applies with regard to the bylaws.[26] The contractual view fits particularly well with aggregate theory. Accordingly, the corporation is a fictional construct, (merely) the sum of a series of explicitly and implicitly connected contracts, not a distinct entity. Traditionally, scholars have primarily focused on the contractual arrangements between shareholders. However, other constituents could, in principle, be included in the contractual framework as well.[27] Aggregate theory has been at the forefront of US scholarship on corporate personhood since the 1980s.[28] Arguably, economists have been its most loyal supporters.[29] This rise to prominence

23. Admittedly, this long-term focus has always been present, but it is currently receiving more attention than in the past. *See* Katz v. Oak Industries, 508 A.2d 873 (Del. Ch. 1986) ("It is the obligation of directors to attempt, within the law, to maximize the long-run interests of the corporation's stockholders").
24. *See* Gaskill v. Gladys Belle Oil, 145 A. 337 (Del. Ch. 1929); *see also* Morris v. American Public Utilities, 122 A. 696 (Del. Ch. 1923). For a critical analysis, *see* H. Hershkoff & M. Kahan, 'Forum Selection Provisions in Corporate Contracts', 93 *Washington Law Review* 265, 268 (2018), questioning the treatment of articles of association as contracts, given the role of the state and the limited degree of consent between all of the parties involved.
25. *See* Berlin v. Emerald Partners, 552 A.2d 482, 488 (Del. 1989); *see also* Shanghai Power v. Delaware Trust, 316 A.2d 589 (Del. Ch. 1974).
26. *See* ATP Tours v. Deutscher Tennis Bund, 91 A.3d 554, 558 (Del. 2014); *see also* Boilermakers Local 154 Retirement Fund v. Chevron, 73 A.3d 934 (Del. Ch. 2013); Airgas v. Air Products & Chemicals, 8 A.3d 1182, 1188 (Del. 2010); Harrah's Entertainment v. JCC Holding, 802 A.2d 294, 309 (Del. Ch. 2002).
27. *See* Blair & Stout 1999, *supra* note 18, arguing that pooling different "assets" (such as labor and capital) unlocks value, so that multiple corporate constituents should be recognized; *see also* D.K. Millon, 'Theories of the Corporation', 1990 *Duke Law Journal* 201 (1990). Some aggregate theory variants distinguish between nexus-for and nexus-of-contracts models. I will not.
28. *See* W.W. Bratton, 'The "Nexus of Contracts" Corporation: A Critical Appraisal', 74 *Cornell Law Review* 407 (1989); *see also* Lewis A. Kornhauser, 'The Nexus of Contracts Approach to Corporations: A Comment on Easterbrook and Fischel', *89 Columbia Law Review* 1449, 1449 (1989) ("critics and advocates agree that a revolution, under the banner "nexus of contracts," has in the last decade swept the legal theory of the corporation.").
29. For examples, *see* F.H. Easterbrook & D.R. Fischel, 'Voting in Corporate Law', 26 *The Journal of Law & Economics* 395 (1983); *see also* M.C. Jensen & W.H. Meckling, 'Theory

of aggregate theory followed an interruption of the scholarly debate that had lasted for almost 50 years. The lull can be largely attributed to an influential paper by Dewey, questioning the usefulness of corporate personhood theories altogether.[30]

Other theories on corporate personhood have also been put forward. Concession theory equally considers the corporation an artificial being, but one that is created by state law instead of by the contracting parties. The concession model was prevalent in the first half of the 19th century.[31] Concession theory reflected a state of affairs in which businesses were founded by specific acts of parliament, and the shift away from it illustrates that general incorporation statutes became more widely accessible (*see* § 14.3.1 *supra*). Based on real entity theory, the corporation is a being with attributes not found among the humans that constitute it and, moreover, a real thing.[32] During a certain period of time the idea, developed in Germany (*see* § 21.2.2 *infra*), found considerable reception in the US. In fact, real entity theory was the dominant school of US legal thought roughly between 1900 and the 1920s. This can be considered a response to increased managerialism following the rise of the Berle-Means corporation (*see* § 15.3.2 *supra*), reducing the decision-making power of incorporators.[33]

Despite the fact that state law determines corporate personhood, the US Supreme Court appears to hold some views on the matter of its own, although they are not articulated consistently. Two recent cases have especially reinvigorated the debate.[34] First, in *Citizens United*, which concerned election campaign finance, it was held that corporations enjoy free speech rights similar to those of natural persons. The US Supreme Court based its ruling, amongst other things, on the observation that a corporate entity is an "association of citizens".[35] This is an ambiguous statement. When construing the relationship between citizens as an implicit contract, *Citizens United* can be considered as

---

of the Firm. Managerial Behaviour, Agency Costs and Ownership Structure', 3 *Journal of Financial Economics* 305 (1976).

30. *See* J. Dewey, 'The Historic Background of Corporate Legal Personality', 35 *Yale Law Journal* 655, 669 (1926) ("each theory has been used to serve the same ends, and each has been used to serve opposing ends.")
31. *See* Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819). For recent assessments, *see* S.J. Padfield, 'Rehabilitating Concession Theory', 66 *Oklahoma Law Review* 327 (2014); *see also* W.W. Bratton, 'The New Economic Theory of the Firm: Critical Perspectives from History', 41 *Stanford Law Review* 1471 (1989).
32. *See* M.J. Phillips, 'Reappraising the Real Entity Theory of the Corporation', 21 *Florida State University Law Review* 1061 (1994); *see also* Millon 1990, *supra* note 27; Bratton 1989, *supra* note 28.
33. *See* R. Harris, 'The Transplantation of the Legal Discourse on Corporate Personality Theories: From German Codification to British Political Pluralism and American Big Business', 63 *Washington & Lee Law Review* 1421 (2006).
34. For an exhaustive overview of the literature, *see* E.C. Chaffee, 'The Origins of Corporate Social Responsibility', 85 *University of Cincinnati Law Review* 353 (2017).
35. *See* Citizens United v. Federal Election Commission, 558 U.S. 310, 356 (2010).

adhering to aggregate theory. However, the argument may also be considered a representation of real entity theory, when one emphasizes the importance of the collectivity as such and the importance of the right of free speech.[36] Second, in *Hobby Lobby*, which revolved around the Affordable Care Act and the obligation of employers to refund birth control measures, it was ruled that the legal entities are a "person" under the Religious Freedom Restoration Act.[37] In that case, the views of the US Supreme Court were more squarely in line with real entity theory. Moreover, *Hobby Lobby* provided additional leeway for corporations to support non-commercial causes, and consequently, embrace a long-term value creation model.[38] This finding reinforces the conclusion (*see* § 16.2.1 *supra*) that the pluralistic model is gaining ground from a normative point of view.[39] However, the ruling has also been criticized for enabling employers to infringe upon the private lives of their employees, disrupting social security.[40]

16.2.3 Mandatory versus enabling law

A legislator can either draft a mandatory or a permissive corporate statute. The DGCL is highly enabling in nature.[41] The articles of association may deviate from the default rule laid down in the DGCL, even if the relevant section itself does not expressly contains the "magic words" authorizing this.[42] Pursuant to § 102 (b) (1) DGCL, the articles of association can include any provision for conducting corporate affairs which is not "contrary to the laws of the state".[43]

---

36. For a critical analysis, *see* L.E. Strine & J.R. Macey, 'Citizens United as Bad Corporate Law' (2018), available at http://www.ssrn.com/, emphasizing the legally separate position of the corporation vis-à-vis the shareholders and its roots in state law, thus combining real entity and concession approaches; *see also* R.S. Avi-Yonah, 'Citizens United and the Corporate Form', 2010 *Wisconsin Law Review* 999, 1040 (2010), claiming (perhaps somewhat overambitious) that real entity theory has prevailed throughout US corporate history.
37. See Burwell v. Hobby Lobby Stores, 134 US 2751 (2014).
38. *See* Burwell v. Hobby Lobby Stores, 134 US 2751, 2771 (2014) ("Modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so").
39. For a positive analysis, *see* L.P.Q. Johnson, & D.K. Millon, 'Corporate Law after Hobby Lobby', 70 *The Business Lawyer* 1, 25 (2015); *see also* B. McDonnell, 'The Liberal Case for Hobby Lobby', 57 *Arizona Law Review* 777 (2015).
40. For a critical account, *see* L.E. Strine, 'A Job is Not a Hobby: The Judicial Revival of Corporate Paternalism and its Problematic Implications', 41 *Journal of Corporation Law* 71 (2015).
41. *See* L.E. Strine, 'The Delaware Way: How We Do Corporate Law and Some of the New Challenges we (And Europe) Face', 30 *Delaware Journal of Corporate Law* 673, 674-675 (2005).
42. *See* Jones Apparel Group v. Maxwell Shoe, 883 A2.d 837 (Del. Ch. 2004); *see also* Providence & Worcester v. Baker, 378 A.2d 121, 124 (Del. 1977).
43. *See* Sterling v. Mayflower Hotel, 93 A.2d 107 (Del. 1952), regarding a provision that permitted interested directors to be counted towards a quorum, despite common law rules to the contrary; *see also* Butler v. Newstone Copper, 93 A. 380 (Del. Ch. 1915), upholding

The relevant criterion in that regard is whether the provision creates a "result forbidden by settled rules of public policy".[44] The courts cannot lightly decide that public policy has been violated. They must apply a context-specific analysis to establish this has been the case.[45]

The permissive nature of the DGCL can also be considered as a reflection of the contractual approach to corporate personhood (*see* § 16.2.2 *supra*). Contractarians typically counsel against mandatory statutory provisions, as these would prevent parties from creating a tailored arrangement that suits them best in the circumstances at hand. Meanwhile, opportunistic modifications to the corporate governance arrangement are potentially even more damaging to the interests of outside minority shareholders than mandatory rules. Indeed, such rules will prevent the externalization of costs. As a result, it is necessary to balance mandatory and enabling provisions.[46] When it is acknowledged that default rules will make their way into aritcles of association in many instances – hence the term "sticky defaults"[47] – it may well be argued that the default rule should be restrictive (and therefore protective) in nature, provided there exists an opportunity to opt-out. Thus, the corporation can delete inefficient aspects from its corporate governance framework by a decision of the board or the AGM.[48] Indeed, if the default rule were not restrictive yet inefficient, it may persist in the corporation's articles of associatoin.

These observations on the permissive nature of the DGCL have given rise to some debate as to which specific aspects of corporate law should remain mandatory. Eisenberg has argued that for public corporations, only core fiduciary duties of directors and structural norms should be mandatory. He observes various necessary structural norms, including rules pertaining to director elections and financial disclosure.[49] Additionally, Eisenberg noted that for conflicted transactions on control over the corporation, outside minority shareholders should be able to tender their stock at fair value, thus proposing the

a provision authorizing liquidation if confirmed by a three quarter shareholder majority, rejecting the common law rule requiring unanimity.

44. *See* Sterling v. Mayflower Hotel*,* 93 A.2d 107 (Del. 1952). For an analysis, *see* E.P. Welch et al., *Folk on the Delaware General Corporate Law* § 102.9 (Wolters Kluwer, 2019).

45. For an elaborate analysis, *see* E.P. Welch & R.S. Saunders, 'Freedom and its Limits in the Delaware General Corporation Law', 33 *Delaware Journal of Corporate Law* 845 (2008).

46. *See* L.A. Bebchuk, 'Foreword: The Debate on Contractual Freedom in Corporate Law', 89 *Columbia Law Review* 1395 (1989).

47. *See* B.H. McDonnell, 'Sticky Defaults and Altering Rules in Corporate Law', 60 *Southern Methodist University Law Review* 383 (2007).

48. *See* L.A. Bebchuk & A. Hamdani, 'Optimal Defaults for Corporate Law Evolution', 96 *Northwestern University Law Review* 489 (2002), attributing the competence to opt-out of restrictive default rules to the shareholders.

49. *See* M.A. Eisenberg, 'The Structure of Corporation Law', 89 *Columbia Law Review* 1461 (1989). In similar vein, *see* Welch & Saunders 2008, *supra* note 45.

creation of an exit mechanism.[50] Meanwhile, Gordon finds that many features of Delaware corporate law, great and small, are mandatory, despite the considerable leeway it offers. Because important other parts are suppletory, there essentially exists a mixed system. Gordon shares the view that the introduction of a fair value tender right goes a long way in preventing and, if necessary, remedying the exploitation of shareholders resulting from corporations opting-out of mandatory rules.[51] By contrast, Coffee observed that the mandatory part of corporate law has shrunk considerably over time. He concluded that the only non-waivable shareholder right should be the review of corporate actions by the judiciary.[52]

16.3 The board

16.3.1 Position and composition

According to S. 141 DGCL, "[t]he business and affairs of every corporation […] shall be managed by or under the direction of a board of directors". This is a broad grant of powers.[53] Indeed, Delaware has traditionally been said to adhere to a board-centric governance model. The idea is that the decisions produced by a group, although not perfect, will ultimately be superior to those of an individual.[54] The board is responsible for the formulation of and delivering on strategic policies and day-to-day management. It has the right to propose decisions to the AGM on fundamental matters, including changes to the articles of association (S. 242 (b) (1) DGCL), mergers (S. 251 (b) DGCL), asset sales (S. 271 (a) DGCL) and dissolution (S. 275 (a) DGCL). The AGM usually possesses the right to approve board resolutions but typically lacks a

---

50. *See* Eisenberg 1989, *supra* note 49. Interestingly, Eisenberg adopted a life-cycle perspective, differentiating between mandatory director duties and structural rules based on the maturity of the corporation, distinguishing public, private and about-to-go-public life-cycle phases. For a similar approach, *see* C.A. Schwarz, *De impact van het vennootschappelijk belang: machtsverhoudingen, verantwoordelijkheid en aansprakelijkheid* (Boom, 2018).
51. *See* J.N. Gordon, 'Mandatory Structure of Corporate Law', 89 *Columbia Law Review* 1549 (1989), arguing the function of mandatory law is to safeguard outside investors from opportunism and to promote the public good.
52. *See* J.C. Coffee, 'The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role', 89 *Columbia Law Review* 1618 (1989).
53. *See* R.F. Balotti & J.A. Finkelstein, *Delaware Law of Corporations and Business Organizations* § 4.1 (Wolters Kluwer, 2018).
54. *See* S.M. Bainbridge, 'Why a Board? Group Decisionmaking in Corporate Governance', 55 *Vanderbilt Law Review* 1 (2002), also touching upon psychological factors such as group think (i.e. politeness being more appreciated than effective oversight), loafing (progressively passing on work to colleagues as the group increases in size) and monitoring costs, which may decrease the superiority of the collective over the individual.

right of initiative of its own. By contrast, changes to the bylaws may be initiated by the shareholders without board approval, pursuant to S. 109 DGCL.[55]

Under Delaware law, the typical board combines managerial and supervisory elements. It consists of the CEO, also acting as chair, and dependent and independent directors. The CEO leads the executive team of officers (dependent directors) and manages the corporation's business, placing him in a central position.[56] The monitoring function, such as the challenging of assumptions on which the executive management relies, is carried out by the board's independent directors.[57] Under S. 141 (b) DGCL, only natural persons are eligible for appointment. In principle, directors serve for a term of one year, which can be extended by reelection.[58] Directors are appointed and can be dismissed (also without cause[59]) by the AGM.[60] One level below the board commonly resides the executive committee (ExCo),[61] consisting of the CEO and senior-level officers. Conferring extensive authority upon the ExCo allows the board to retain its focus on strategic issues. Although "an informed decision to delegate […] is as much an exercise of business judgment as any other", the board may not effectively abdicate its statutory powers.[62]

55. *See* Frantz Manufacturing v. EAC Industries, 501 A.2d 401, 407 (Del. 1985). For an extensive analysis, *see* R.F. Balotti & J.A. Finkelstein, *Delaware Law of Corporations and Business Organizations* § 1.11 (Wolters Kluwer, 2018).
56. *See* M.L. Mace, *Directors: Myth and Reality* 78-79 (Harvard University Press, 1971), for anecdotal evidence.
57. *See* M.A. Eisenberg, 'Corporate Law and Social Norms', 99 *Columbia Law Review* 1253, 1278-1281 (1999); *see also* Grobow v. Perot, 539 A.2d 180, 191 (Del. 1988): "We view a board of directors with a majority of outside directors […] as being in the nature of overseers of management."
58. *See* S. 141 (d) and (k) DGCL. One exception is the "staggered board", i.e. a board partitioned into a maximum of 3 groups, whose respective one-year terms expire in annual succession. *See* K.J.M. Cremers, L.P. Litov & S.M. Sepe, 'Staggered Boards and Long-Term Firm Value, Revisited', 126 *Journal of Financial Economics* 422 (2017); *see also* R. Daines, S.X. Li & C.C.Y. Wang, 'Can Staggered Boards Improve Value? Evidence from the Massachusetts Natural Experiment' (2018), available at http://www.ssrn.com/, both observing rapid "destaggering" after 2005 following pressure from institutional investors. On the shareholder value effects of staggered boards, *see* § 10.4.5 *supra*.
59. In case of a staggered board, directors may only be removed for cause, unless the Articles of Association indicate otherwise. *See* Roven v. Cotter, 547 A.2d 603 (Del. Ch. 1988); *see also* R.F. Balotti & J.A. Finkelstein, *Delaware Law of Corporations and Business Organizations* § 4.4 (Wolters Kluwer, 2018).
60. *See* S. 141 (d), S. 211 (b) and S. 216 (3) DGCL. Under S. 141 (d) DGCL, owners of a class of stock can have the right to appoint one or more directors. *See* K. Kastiel, 'Against All Odds: Hedge Fund Activism in Controlled Companies', 2016 *Columbia Business Law Review* 60, 130-136 (2016). This enables either outsized control or minority protection.
61. *See* J.A. McMullen, 'Committees of the Board of Directors', 29 *The Business Lawyer* 755 (1974), substantiating his observations on the presence of ExCo's with considerable empirical data.
62. *See* Grimes v. Donald 673 A.2d 1207 (Del. 1996); *see also* Lehrman v. Cohen, 222 A.2d 800, 808 (Del. 1966). For an analysis, *see* R.F. Balotti & J.A. Finkelstein, *Delaware Law of*

In response to the scandals at the dawn of the 21st century (the most notable examples arguably being Enron and WorldCom) and the financial crisis that erupted in 2008, the US governance system has placed more emphasis on director independence and control instead of trust.[63] The Sarbanes-Oxley Act and the Dodd-Frank Act have essentially mandated the independence of all members of the Audit and Compensation Committees.[64] Under the current NYSE Listing Rules, the same applies for the Nomination Committee, and a majority of the board must be independent as well.[65] The trend of separating the positions of CEO and chair has also gained further traction. A frequently used alternative is the appointment of a senior independent director, who acts as a sounding board for the chair and as intermediary for other directors, especially when board performance is critical.[66] Indeed, the historically leading position of the CEO has weakened, both vis-à-vis fellow directors as well as investors.[67]

16.3.2 Fiduciary duties

The conduct of directors (and officers[68]) is governed by the three fiduciary duties of loyalty, care and good faith.[69] Some have described good faith

Corporations and Business Organizations § 4.10 (Wolters Kluwer, 2018); *see also Fletcher Cyclopedia of the Law of Corporations* § 552.20 (Thomson/West, 2018).

63. For a timely discussion, *see* J.N. Gordon, 'The Rise of Independent Directors in the United States, 1950-2005: of Shareholder Value and Stock Market Prices', 59 *Stanford Law Review* 1465, 1490-1496 (2007).
64. *See* S. 301 of the Sarbanes-Oxley Act and S. 952 of the Dodd-Frank Act. For an analysis, *see* § 14.4.1 *supra*.
65. *See* S. 303A.04, S. 303A.05 and S. 303A.06 NLCM; *see also* S. I (b) of the Commonsense Corporate Governance Principles. Note that the NLCM contains exceptions (in S. 303A.00) for controlled firms (as measured by the 50 % voting power threshold) in respect of the Nomination and Compensation Committees and the board as a whole. For an extensive analysis, *see Fletcher Cyclopedia of the Law of Corporations* § 549.10–§ 552 (Thomson/West, 2018).
66. *See* Gordon 2007, *supra* note 63, at 1494-1496.
67. *See* M. Kahan & E.B. Rock, 'Embattled CEOs', 88 *Texas Law Review* 989 (2010); *see also* Bainbridge 2002, *supra* note 54, at 9. *But see* S. V (b) of the Commonsense Corporate Governance Principles, which still makes a separation of the CEO and chair roles optional.
68. *See* Amalgamated Bank v. Yahoo!, 132 A.3d 752 (Del. Ch. 2016); *see also* Gantler v. Stephens, 965 A.2d 695 (Del. 2009) ("corporate officers owe fiduciary duties […] identical to those owed by corporate directors.") For an analysis, *see* D.A. DeMott, 'Corporate Officers as Agents', 74 *Washington & Lee Law Review* 847, 850-862 (2017).
69. A few scholars have claimed other fiduciary duties exist as well. See J. Velasco, 'How Many Fiduciary Duties are There in Corporate Law', 83 *Southern California Law Review* 1231, 1235 (2009), also recognizing a duty of objectivity and rationality. These ideas have not gained much ground. In some cases, the Delaware courts have defined a duty to disclose. *See* Lynch v. Vickers Energy, 383 A.2d 278, 281 (Del. 1978) (regarding a majority shareholder); *see also* TSC Industries v. Northway, 426 U.S. 438 (U.S. 1976) (concerning directors). However, this duty stems from the existing triad. *See* Pfeffer v. Redstone, 965 A.2d 676, 684 (Del. 2009); *see also* Malpiede v. Townson, 780 A.2d 1075, 1086 (Del. 2001); Malone v. Brincat,

poetically as "requiring an honesty of purpose." [70] The opposite, bad faith, has been defined as a decision, from an *ex ante* perspective, "so beyond the bounds of reasonable judgment that it seems essentially inexplicable on any other ground".[71] The duty of good faith is not only violated when a fiduciary engages in "conduct motivated by an actual intent to do harm" ("subjective bad faith"), but also when the "fiduciary acts with a purpose other than that of advancing the best interests of the corporation, with the intent to violate applicable positive law, or intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties" ("not good faith").[72] Nonetheless, meeting the burden of proof is not exactly an easy task.

Despite the pivotal position good faith occupies, it does not constitute a separate duty. Under settled case law, good faith is rather absorbed into the duty of loyalty.[73] Whereas violating the duty of loyalty may directly result in director liability, violating the duty of good faith can only indirectly have that effect (i.e. when the duty of loyalty has been violated simultaneously).[74] Violations of the duty of good faith, especially in the more radical variant of bad faith, are related to another doctrine to assess director behavior: corporate waste.[75] Waste permits the cancellation of transactions where the consideration is "so inadequate in value that no person of ordinary, sound business judgment would deem it worth what the corporation has paid".[76] Here, the burden of proof is rather onerous. Indeed, waste has been characterized as "a theoretical exception […] very rarely encountered in the world of real transactions".[77]

---

722 A.2d 5, 11 (Del. 1998). For a thorough discussion, *see* R.F. Balotti & J.A. Finkelstein, *Delaware Law of Corporations and Business Organizations* § 4.14-4.18 (Wolters Kluwer, 2018).

70. *See* In re Walt Disney, 906 A.2d 27, 67 (Del. 2006) (the well-known case concerning an allegedly excessive termination fee of $ 140 million Ovitz received for serving a one-year stint as President of Disney).
71. *See* In re Orchard Enterprises, 88 A.3d 1 (Del. Ch. 2014)*; see also* In re Alloy, C.A. No. 5626-VCP (Del. Ch. Oct. 13, 2011); In re J.P. Stevens & Co, 542 A.2d 770, 780 (Del. Ch. 1988); Citron v. Fairchild Camera & Instruments (Del. Ch. 1988); Sinclair Oil v. Levien (Del. 1971).
72. *See* In re Walt Disney, 906 A.2d 27, 64-67 (Del. 2006). For a detailed examination of this categorization, *see* R.F. Balotti & J.A. Finkelstein, *Delaware Law of Corporations and Business Organizations* § 4.17 (Wolters Kluwer, 2018).
73. *See* In re Novell, C.A. No. 6032-VCN (Del. Ch. 2014); *see also* Stone v. Ritter 911 A.2d 362 (Del. 2006). For an analysis, *see* L.E. Strine et al., 'Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law', 98 *The Georgetown Law Journal* 629 (2010).
74. However, breaching the duty of good faith whilst complying with the duty of loyalty is not possible. *See* Integrated Health Services v. Elkins (Del. Ch. 2004); *see also* Cede & Co. v. Technicolor, 634 A.2d 345, 361 (Del.1993).
75. *See* In re Walt Disney (Del. 2006); *see also* Integrated Health Services v. Elkins (Del. Ch. 2004); Brehm v. Eisner (Del. 2000) for a comparison.
76. *See* Saxe v. Brady, 184 A.2d 602, 610 (Del. 1962). Note waste may be ratified by a unanimous (!) investor vote.
77. *See* In re Lear, 967 A.2d 640, 657 (Del. Ch. 2008); *see also* Zupnick v. Goizueta (Del. Ch. 1997).

Second, directors are bound by the duty to exercise due care. The duty of care requires decision-making on an informed basis. Traditionally, the duty of care entailed that a director, when fulfilling his duties, should exercise a degree of care someone in similar circumstances would reasonably believe appropriate.[78] However, the courts have adopted a gross (not simple) negligence test as a standard of review in more recent times. Thus, a board member satisfies his duty of care, unless he shows "reckless indifference to or a deliberate disregard of the whole body of stockholders or actions which are without the bounds of reason".[79] Again, this is a high and, moreover, a highly context-specific mountain to climb.[80]

Arguably, the most well-known duty of care lawsuit is *Smith v. Van Gorkom*.[81] In that case, directors had approved the takeover of the corporation they governed in a short meeting, on the topic of which they had not been previously informed nor received any documentation. Meanwhile, the takeover implied a considerable premium to the stock price at the time and a superior offer did not materialize, even after a 90-day "go-shop" period, whereas the target board consisted of independent directors and the transaction had subsequently been approved by 90 % of the shareholders.[82] To the astonishment of many, the directors were nevertheless found to have breached their duty of care.[83]

---

78. *See* Graham v. Allis-Chalmers Manufacturing Company, 188 A.2d 125, 130 (Del. 1963), coining the formulation.
79. *See* Stone v. Ritter, 911 A.2d 362, 369 (Del. 2006); *see also* Benihana of Tokyo v. Benihana, 891 A.2d 150, 192 (Del. Ch. 2005); Brehm v. Eisner, 746 A.2d 244, 259 (Del. 2000); Cede v. Technicolor, 634 A.2d 345, 363 (Del. 1993); Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).
80. For an analysis, *see* W.T. Allen, J.B. Jacobs & L.E. Strine, 'Realigning the Standard of Review of Director Due Care with Delaware Public Policy: A Critique of Van Gorkom and its Progeny as a Standard of Review Problem', 96 *Northwestern University Law Review* 449(2002), characterizing the required acts as "an extreme departure from expected normative behavior".
81. *See* Smith v. Van Gorkom 488 A.2d 858 (Del. 1985).
82. The literature on the case is too extensive to be cited here in full. For a critical contemporary analysis, *see* D.R. Fischel, 'The Business Judgment Rule and the Trans Union Case', 40 *The Business Lawyer* 1437, 1455 (1985) ("one of the worst decisions in the history of corporate law"). The ruling can also be read as a rejection of the ECMH (*see* § 2.2.5 *supra*) and board passivity, as directors may not fare blindly on the stock price when assessing a takeover bid. For an elaborate Dutch analysis, *see* M.J. van Ginneken, *Vijandige overnames: de rol van de vennootschapsleiding in Nederland en de Verenigde Staten* 126-129 (Kluwer, 2010).
83. The effect of the judgment was that director liability insurance became considerably more expensive or even inaccessible. *See* R. Romano, 'Corporate Governance in the Aftermath of the Insurance Crisis', 39 *Emory Law Journal* 1155, 1160 (1990). Consequently, the DGCL was swiftly amended to provide, in § 102 (b) (7) DGCL, that monetary damages resulting from a director's breach of the duty of care could, through the Articles of Association, be reduced or eliminated. Many corporations have made use of this possibility. Note the duty of care itself may not be reduced or eliminated; § 102 (b) (7) DGCL merely concerns the monetary consequences of the breach. *See* Emerald Partners v. Berlin, 787 A.2d 85, 91 (Del. 2001). Moreover, the provision does not consider officers not holding a director-position.

Thus, they must examine any material information reasonably available.[84] This includes being informed on the internal and external developments that necessitate the issue being considered, consulting with independent legal and financial advisors and, if necessary, making reasonable inquiries on the proposed course of action.[85] Having become informed, directors must subsequently act with due care in exercising their duties.[86]

Crucially, Delaware case law does not address the merits of a business decision: due care has a procedural meaning only.[87] Especially in large-scale businesses, directors cannot possibly keep track of every single operational development. Indeed, the board is not required to read each contract it approves in detail, or be aware of all the particularities of anti-takeover mechanisms. Instead, directors must have "known what they were doing".[88] Although directors should take sufficient time to assess a proposal, time constraints may limit the amount of information directors can process. In such circumstances, notably takeovers or mergers, the Delaware courts will consider whether the board has rushed itself or whether the time limitations were due to external factors (for instance set by an offeror).[89]

The duty of care also incorporates the duty of oversight. Again, it does not constitute a separate duty as such. Applying the duty of oversight is somewhat counter-intuitive. Most Delaware case law only addresses actions and not inactions.[90] By contrast, a conscious decision to refrain from corporate acting may constitute a valid course of action as well.[91] However, this does not entail that directors should not assure themselves that adequate systems exist to

---

For an extensive analysis, *see* D.R. Honabach, 'Smith v. Van Gorkom: Managerial Liability and Exculpatory Clauses – A Proposal to Fill the Gap of the Missing Officer Protection', 45 *Washburn Law Journal* 307 (2006).

84. *See* Moran v. Household, 490 A.2d 1054, 1075 (Del. Ch. 1985); *see also* Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984). For a confirmation, *see* Singh v. Attenborough, 137 A.3d 151 (Del. 2016). For an elaborate discussion, *see* R.F. Balotti & J.A. Finkelstein, *Delaware Law of Corporations and Business Organizations* § 4.15 (Wolters Kluwer, 2018).
85. *See* R.F. Balotti & J.A. Finkelstein, *Delaware Law of Corporations and Business Organizations* § 4.15 (Wolters Kluwer, 2018).
86. *See* In re Walt Disney, 906 A.2d 27, 67 (Del. 2006); *see also* Citron v. Fairchild Camera & Instrument, 569 A.2d 53, 67 (Del. 1989); Moran v. Household, 490 A.2d 1054, 1075 (Del. Ch. 1985).
87. *See* Brehm v. Eisner, 746 A.2d 244, 259 (Del. 2000); *see also* Cede v. Technicolor, 634 A.2d 345, 363 (Del. 1993).
88. *See* Smith v. Van Gorkom, 488 A.2d 858, 873 (Del. 1985); *see also* Moran v. Household, 490 A.2d 1054, 1075 (Del. Ch. 1985). For recent confirmations, *see* In re Goldman Sachs, C.A. No. 5215-VCG (Del. Ch. 2011); *see also* In re Walt Disney, 906 A.2d 27, 67 (Del. 2006).
89. *See* McMullin v. Beran, 765 A.2d 910, 922 (Del. 2000); *see also* Citron v. Fairchild Camera & Instrument, 569 A.2d 53, 67 (Del. 1989); In re RJR Nabisco (Del. Ch. 1989); Weinberger v. UOP, 457 A.2d 701, 711 (Del. 1983).
90. *See* Grimes v. Donald (Del. 1996); *see also* Rales v. Blasband (Del. 1993).
91. *See* Rosenblatt v. Getty Oil (Del. 1985); *see also* Gimbel v. The Signal Companies (Del. Ch. 1974).

provide timely and accurate information and reports. Whilst *Caremark*[92] made director oversight duties more enforceable (giving rise to so-called "Caremark claims"), only a sustained or systematic oversight failure will be sufficient with a view to establishing director liability.[93] Hence, the degree of fault required is such that a violation of the duty of good faith and, thus, the duty of loyalty can be established.[94]

Third, the duty of loyalty requires a director to exclusively and independently promote the interests of the corporation and its (long-term) shareholders (*see* § 16.2.1 *supra*). He should subordinate his own interests to those of the corporation and its (long-term) shareholders, particularly if there exists a conflict between these interests.[95] This obligation is inextricably linked to the separation of ownership and control (*see* § 2.2.3 *supra*), which entails that the rewards of the shareholders are a derivative of the degree to which directors are successful. The duty of loyalty consists (positively) of an "affirmative duty to protect the interests of the corporation", but also (negatively) of an obligation "to refrain from conduct which would injure the corporation and its stockholders or deprive them of profit or advantage".[96] The Delaware courts have adopted a more activist stance in scrutinizing whether the duty of loyalty has been adhered to, especially in the negative variant, as opposed to the duty of care.[97] Establishing disloyal behavior does not require that the malefactor has obtained a benefit, and a director may be liable even in the absence of financial gain.[98] Conversely, related party transactions are not inherently wrong – this is merely the case when an agreement is concluded at the expense of the corporation.[99]

92. *See* In re Caremark International (Del. Ch. 1996). For similar later case, *see* Canadian Commercial Workers Industry Pension Plan v. Alden (Del. Ch. 2006); *see also* Guttman v. Huang (Del. Ch. 2003).
93. *See* Teachers' Retirement System of Louisiana v. Aidinoff (Del. Ch. 2006) ("the most difficult claim of all"); *see also* Canadian Commercial Workers Industry Pension Plan v. Alden (Del. Ch. 2006).
94. *See* In re Citigroup, 964 A.2d 106, 123 (Del. Ch. 2009); *see also* Stone v. Ritter, 911 A.2d 362, 369 (Del. 2006); Guttman v. Huang (Del. Ch. 2003). For an extensive analysis, *see* Allen, Jacobs & Strine 2002, *supra* note 80.
95. *See* Stone v. Ritter 911 A.2d 362 (Del. 2006); *see also* Cede & Co. v. Technicolor, 634 A.2d 345 (Del. 1993); Guth v. Loft, 5 A.2d 503 (Del. 1939). For an extensive analysis, *see* R.F. Balotti & J.A. Finkelstein, *Delaware Law of Corporations and Business Organizations* § 4.1 (Wolters Kluwer, 2018).
96. *See* Ivanhoe Partners v. Newmont Mining (Del. 1987); *see also* Guth v. Loft, 5 A.2d 503 (Del. 1939).
97. *See* Weinberger v. UOP (Del. 1983) ("There is no 'safe harbor' for […] divided loyalties"); *see also* § 16.3.4 *infra*.
98. *See* In re Tyson Foods (Del. Ch. 2007); *see also* ATR-Kim Eng Financial v. Araneta, WL 3783520 (Del. Ch. 2006).
99. *See* Oberly v. Kirby (Del. 1991); *see also* In re RJR Nabisco (Del. Ch. 1989); Weinberger v. UOP (Del. 1983). For an economic analysis of related party transactions, *see* § 10.2.1 *supra*.

16.3.3 Director independence & interestedness

Two important factors in order to establish whether the duty of loyalty has been complied with are independence and disinterestedness. Independence means that "a director's decision is based on the corporate merits of the subject before the board rather than extraneous considerations or influences."[100] The NYSE Listing Rules contain elaborate regulations regarding director independence, considering matters such as prior employment (as executive officer or internal or external auditor) and compensation, also in respect of direct relatives. Although qualifying as an independent director under the NLCM does not necessarily imply independence under the DGCL,[101] the NLCM was inspired by Delaware experiences, and they share many key factors.[102] It is up to the plaintiff to demonstrate that a director is no longer independent, which requires qualifying him as "beholden" to a party "or so under his influence that discretion would be sterilized".[103] This criterium mainly targets prior or ongoing business or family relationships.[104] Despite the more pronounced position of the Delaware courts in addressing questions of loyalty, showing "beholdenness" or "sterilization" remains a challenging test. A longstanding personal or business relationship is in itself insufficient to establish the absence of independence,[105] although the case law in this regard is highly contextual by nature.[106] However, in recent lawsuits, the Delaware courts appear to have adopted a more critical stance. One example concerns a case in which independent directors shared ownership of an aircraft with the controlling shareholder.[107] In another case, it was held that a director's business and personal relationships should not be viewed as entirely separate issues.[108] A common university background or involvement in the same charity have

100. *See* Chaffin v. GNI Group (Del. Ch. 1999); *see also* Cede & Co. v. Technicolor (Del. 1993); Aronson v. Lewis, 473 A.2d 805, 815-816 (Del. 1984).
101. *See* In re Oracle, 824 A.2d 917, 941 (Del. Ch. 2003).
102. *See* In re MFW, 67 A.3d 496 (Del. Ch. 2013).
103. *See* Aronson v. Lewis, 473 A.2d 805, 815-816 (Del. 1984), where the formulation was initially coined. For a recent confirmation, *see* In re KKR Financial Holdings, 101 A.3d 980 (Del. Ch. 2014).
104. *See* D. Lin, 'Beyond Beholden', 44 *Journal of Corporation Law* 515 (2019), arguing the law should be more forward looking and consider future appointments and directorships.
105. See Beam v. Stewart, 845 A.2d 1040, 1050 (Del. 2004) ("a relationship must be of a bias-producing nature").
106. For a somewhat more critical analysis concerning personal and business relationships, *see* Telxon v. Meyerson, 802 A.2d 257, 264 (Del. 2002). For an extensive analysis, *see* R.F. Balotti & J.A. Finkelstein, *Delaware Law of Corporations and Business Organizations* § 4.19 (Wolters Kluwer, 2018).
107. *See* Sandys v. Pincus, 152 A.3d 124 (Del. 2016), overturning Sandys v. Pincus, 2016 WL 769999 (Del. Ch. 2016).
108. *See* In re Sanchez (Del. 2016). Similarly, it has been held that a CFO could not independently decide on suing the CEO of the family business that made his 28-year long career and funded a college in his honor. *See* Marchand v. Barnhill, et al. (Del. 2019).

also been held relevant.[109] Ties must meet a materiality standard to be taken into consideration.[110] Materiality is not established based on a "reasonable person". Instead, the financial position of the director in the specific circumstances at hand should be examined,[111] further adding to the context-specificity of the case law in this regard. Importantly, the presence of a controlling shareholder or the fact that a director has been nominated by a particular investor do not lighten the burden of disproving independence.[112] Thus, a director is not necessarily non-independent simply because he is a shareholder as well. (In that case, his preferences may parallel those of other investors.) Similarly, the duty of loyalty is not necessarily implicated if a director owns a large amount of one class of stock and not of the other.[113]

By contrast, the concept of self-interestedness relates to directors who stand to gain monetarily from a material transaction to the exclusion and detriment of the shareholders or the corporation.[114] Hence, the concept of independence is broader than that of self-interest,[115] as it is not restricted to financial ties, but instead considers director "beholdenness" and "sterilization" in a more fundamental way.[116] Indeed, "the lack of a financial benefit […] does not shield a director from questions as to his loyalty." Again, a materiality standard, which does not consider a reasonable person but instead the specific functionary concerned, applies to determine whether a director is self-interested. When addressing self-interestedness, not the only transactions in which the director engages directly are relevant. Those of others, including close relatives, count

109. *See* In re Oracle, 824 A.2d 917, 942 (Del. Ch. 2003); *see also* Lewis v. Fuqua, 502 A.2d 962, 966-67 (Del. Ch. 1985).
110. *See* Cinerama v. Technicolor, 663 A.2d 1156, 1167 (Del. 1995).
111. *See* Cede & Co. v. Technicolor, 634 A.2d 345, 363 (Del. 1993).
112. *See* Benihana of Tokyo v. Benihana (Del. Ch. 2005); *see also* Beam v. Stewart, 845 A.2d 1040, 1054 (Del. 2004); Kahn v. Tremont (Del. 1997); Aronson v. Lewis (Del. 1984). For a critical analysis, *see* L.A. Bebchuk & A. Hamdani, 'Independent Directors and Controlling Shareholders', 165 *University of Pennsylvania Law Review* 1271 (2017), observing that a director will only be reelected with the controlling shareholder's approval, limiting his impartiality. For a response by the Delaware courts, *see* Tornetta v. Elon Musk, C.A. No. 0408-JRS (Del. Ch. 2019).
113. *See* Solomon v. Armstrong, 747 A.2d 1098, 1118 (Del. Ch. 1999); *see also* In re General Motors Class H, 734 A.2d 611, 618-19 (Del. Ch. 1999).
114. *See* In re Crimson Exploration, 2014 WL 5449419 (Del. Ch. 2014); *see also* Carsanaro v. Bloodhound Technologies, 65 A.3d 618 (Del Ch 2013); Orman v. Cullman (Del. Ch. 2002); In re RJR Nabisco (Del. Ch. 1989); Aronson v. Lewis, 473 A.2d 805, 815-816 (Del. 1984). *But see* Perlegos v. Atmel (Del. Ch. 2007).
115. A self-interested director cannot be independent. *See* Beam v. Stewart, 845 A.2d 1040, 1050 (Del. 2004). The converse applies as well. *See* Orman v. Cullman (Del. Ch. 2002).
116. *See* In re Oracle, 824 A.2d 917, 941 (Del. Ch. 2003). For an comparison of independence and interestedeness, *see* U. Rodrigues, 'The Fetishization of Independence', 33 *Journal of Corporation Law* 447, 464-469 (2008); *see also* W.B. Chandler & L.E. Strine, 'The New Federalism of the American Corporate Governance System: Preliminary Reflections of Two Residents of One Small State', 152 *University of Pennsylvania Law Review* 997-998 (2003).

as well.[117] Transactions by a controlling shareholder with the corporation are effectively also self-interested, if he receives something to the exclusion of, and detriment to, the minority stockholders.[118]

For the sake of completeness, it should be noted there exists a third, related concept, being that of self-dealing. This entails a director or shareholder standing on both sides of the transaction.[119] In such cases, self-interestedness is considered given.[120] However, self-dealing does not necessarily imply the director or shareholder will receive a benefit to the detriment and exclusion of others.[121] Conversely, even the fact that a director or shareholder is not standing on both sides of the transaction may make him self-interested. Thus, the notion of self-dealing is both broader and narrower than self-interest.[122]

16.3.4 BJR, EFS & EST

With Delaware corporate law essentially having adopted a model of regulation through litigation, an elaborate body of case law has developed to determine whether directors have discharged their responsibilities in accordance with their fiduciary duties. The principal standards of judicial review[123] are the business judgement rule (BJR), the enhanced scrutiny test (EST) and the entire fairness standard (EFS). The BJR is the least-intrusive default, whereas the EST and EFS are increasingly vigorous alternatives. The question which standard of judicial review applies can affect the substantive outcome of a case considerably,[124] and may very well constitute a major part of litigation. Indeed, the result determines the deference granted to corporate defendants.

---

117. *See* Cinerama v. Technicolor, 663 A.2d 1156, 1167 (Del. 1995); *see also* Cede & Co. v. Technicolor, 634 A.2d 345, 363-364 (Del. 1993) (on "incidental director interest").
118. *See* Solomon v. Armstrong (Del. Ch. 1999); *see also* Sinclair Oil v. Levien, 280 A.2d 717, 721-722 (Del. 1971).
119. *See* Cinerama v. Technicolor, 663 A.2d 1156, 1169 (Del. 1995).
120. *See* Orman v. Cullman (Del. Ch. 2002); *see also* Cede & Co. v. Technicolor. (Del. 1993).
121. *See* Sinclair Oil v. Levien, 280 A.2d 717, 721-722 (Del. 1971), involving a dividend proportionally payed to all shareholders, including the controller urgently in need of substantial amounts of cash.
122. *See* Cinerama v. Technicolor, 663 A.2d 1156, 1167 (Del. 1995); *see also* Cede & Co. v. Technicolor, 634 A.2d 345, 363-364 (Del. 1993). For an analysis, *see* Rodrigues 2008, *supra* note 116, at 467-469; *see also* Allen, Jacobs & Strine 2002, *supra* note 80, at 458, for a critical analysis.
123. "A standard of conduct states how an actor should conduct a given activity or play a given role. A standard of review states the test a court should apply when it reviews an actor's conduct to determine whether to impose liability or grant injunctive relief." *See* M.A. Eisenberg, 'The Divergence of Standards of Conduct and Standards of Review in Corporate Law', 62 *Fordham Law Review* 437 (1993). For a more recent iteration of this view, *see* W.T. Allen, J.B. Jacobs & L.E. Strine, 'Function over Form: A Reassessment of Standards of Review in Delaware Corporation Law', 26 *Delaware Journal of Corporate Law* 859, 867 (2001).
124. *See* Nixon v. Blackwell, 626 A.2d 1366, 1376 (Del. 1993) ("It is sometimes thought that the decision to apply the business judgment rule or the entire fairness test can be outcome determinative").

The BJR creates the "presumption that in making a business decision, the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company".[125] It falls upon the plaintiff to rebut the presumption. Absent well-plead allegations of "director self-interest, if not self-dealing, or that the directors either lacked good faith or failed to exercise due care", this presumption remains in place.[126] The BJR, long recognized as one of the fundaments of Delaware corporate law, serves multiple, interrelated goals.[127] For instance, it is based on idea of shielding directors from psychological fears of personal (economic) liability. As a result, they remain well-positioned to select investment projects with the highest risk adjusted rate of return.[128] Indeed, decisions that deliver bad returns are not necessarily bad decisions.[129] The BJR furthermore rests on doctrinal notions of preserving board autonomy[130] and preventing second-guessing of business-decisions by ill-equipped judges, who might potentially suffer from a hindsight bias as well.[131] Directors will not be found to have violated the duty of care unless gross negligence is proven nor will the duty of loyalty be deemed violated, unless a majority of the board (not: a single director) is interested or beholden to the controlling director or shareholder.[132] The case will come to a conclusion if the presumption of the BJR remains unrebutted

125. *See* Aronson v. Lewis, 473 A.2d 805, 815-816 (Del. 1984), coining this specific terminology. However, the BJR has a long common law tradition. For an earlier formulation, *see* Warshaw v. Calhoun, 221 A.2d 487 (Del. 1966). Note that only business decisions are covered by the BJR, but directors may also decide to be inactive.
126. *See* In re Orchard Enterprises, 88 A.3d 1 (Del. Ch. 2014)*; see also* Stone v. Ritter 911 A.2d 362 (Del. 2006); In re Walt Disney (Del. 2006); Brehm v. Eisner (Del. 2000); Cede v. Technicolor, 634 A.2d 345, 363 (Del. 1993); Citron v. Fairchild Camera & Instrument, 569 A.2d 53, 64 (Del. 1989).
127. *See Fletcher Cyclopedia of the Law of Corporations* § 1037 (Thomson Reuters, 2018), for a concise description. For a thorough analysis of the matter from a Dutch perspective, *see* M.J. Kroeze, *Bange bestuurders* (Kluwer, 2005,.
128. *But see* A. Brumbaugh, 'The Business Judgement Rule and the Diversified Investor: Encouraging Risk in Financial Institutions', 17 *UC Davis Business Law Journal* 2017 (171), arguing that because of systemic risks, directors of financial institutions should exercise more caution compared to directors in other industries.
129. *See* Pfeiffer v. Leedle, C.A. No. 7831-VCP (Del. Ch. 2013); *see also* Harbor Finance Partners v. Huizenga (Del. Ch. 1999); Gagliardi v. TriFoods International, 683 A.2d 1049, 1052 (Del. Ch. 1996).
130. *See* S.M. Bainbridge, 'Director Primacy and Shareholder Disempowerment', 119 *Harvard Law Review* 1735 (2006); *see also* S.M. Bainbridge, 'Director Primacy: The Means and Ends of Corporate Governance', 97 *Northwestern University Law Review* 547 (2002).
131. *See* Solash v. The Telex Corporation (Del. Ch. 1988); *see also* Joy v. North, 692 F.2d 880, 886 (2d. Cir. 1982) (an often-invoked non-Delaware precedent holding that business decisions are "not easily reconstructed in the courtroom"). For an influential version of this argument, *see* F.H. Easterbrook & D.R. Fischel, *The Economic Structure of Corporate Law* 94 (Harvard University Press, 1991).
132. *See* In re Loral Space & Communications, C.A. No. 2808-VCS (Del. Ch. Sept. 19, 2008); *see also* Kahn v. Tremont, 694 A.2d 422 (Del. 1997).

(absent the rather unlikely event of a waste claim being successful, *see* § 16.3.2 *supra*).[133] However, if a breach of the fiduciary duty of care or loyalty has been shown, the EFS becomes applicable.[134]

Enhanced scrutiny is the intermediate standard of judicial review under Delaware law.[135] It addresses situations in which a director's ability to independently advance the interests of shareholders could be called into question, but where the EFS would pose a too stringent test.[136] First, this concerns measures by the board in response to an actual or potential unsolicited takeover, which – if successful – may result in the removal of the incumbent directors.[137] In such a scenario, defendants must show reasonable grounds for the belief that a threat to (pre-existing) corporate policy and effectiveness was present.[138] Subsequently, they must prove that their response was proportional in relation to the threat perceived. Contrary to the BJR, the burden of proof rests on defendants, not plaintiffs.[139] The reasonableness and proportionality tests not only govern the introduction of anti-takeover mechanisms, but also their repeal. If both criteria of the EST are satisfied, as was the case for Unocal,[140] the BJR becomes

133. As such, the BJR offers "formidable protections". *See* Blasius Industries v. Atlas, 564 A.2d 651 (Del. Ch. 1988).
134. In some cases but not others, it is required for the claimant to allege facts pointing towards the unfairness of the transaction. *See* Solomon v. Pathe Communications (Del. 1996); *see also* Citron v. Fairchild Camera & Instruments (Del. 1989); Weinberger v. UOP, (Del. 1983). *But see* Brehm v. Eisner (Del. 2000).
135. *See* In re Rural Metro, 88 A.3d 54 (Del. Ch. 2014); *see also* Chen v. Howard-Anderson, 87 A.3d 648 (Del. Ch. 2014); In re Trados, 73 A.3d 17 (Del. Ch. 2013).
136. *See* In re Del Monte Foods, 25 A.3d 813, 830 (Del. Ch. 2011); *see also* Reis v. Hazelett Strip-Casting, 28 A.3d 442, 457 (Del. Ch. 2011); Air Products. & Chemicals v. Airgas, 16 A.3d 48, 94 (Del. Ch. 2011). For earlier case law, *see* Solomon v. Armstrong, 747 A.2d 1098, 1118 (Del. Ch. 1999); *see also* AC Acquisitions v. Anderson, Clayton & Co. (Del. Ch. 1986).
137. Traditionally, anti-takeover mechanisms had been governed by the BJR, but this state of affairs received staunch criticism. For an overview, *see Fletcher Cyclopedia of the Law of Corporations* § 1041.40 (Thomson/West, 2018); R.F. Balotti & J.A. Finkelstein, *Delaware Law of Corporations and Business Organizations* § 4.20 (Wolters Kluwer, 2018).
138. *See* Unocal v. Mesa Petroleum, 493 A.2d 946, 954-955 (Del. 1985). Mesa's ("two-tier front-end loaded") offer consisted of a price of $ 54 per share in cash for 37 % of Unocal's stock (it already owned 13 %), followed by an offer for the remainder of $ 54 per share in junk bonds. Unocal countered by a self-tender of $ 72 for 49 % of its stock, subject to of Mesa's offer succeeding. *See* S.M. Bainbridge, 'Unocal at 20: Director Primacy in Corporate Takeovers', 31 *Delaware Journal of Corporate Law* 769 (2006); *see also* A.G.T Moore, 'The Birth of *Unocal* – A Brief History', 31 *Delaware Journal of Corporate Law* 865 (2006), for an insider perspective.
139. *See* Pell v. Kill, 135 A.3d 764 (Del. Ch. 2016); *see also* In re Trados, 73 A.3d 17 (Del. Ch. 2013); Versata Enterprises v. Selectica, 5 A.3d 586 (Del 2010). For an analysis, *see See Fletcher Cyclopedia of the Law of Corporations* § 1041.40 (Thomson Reuters, 2018); *see also* J. Travis Laster, 'The Effect of Stockholder Approval on Enhanced Scrutiny', 40 *William Mitchell Law Review* 1443 (2014).
140. Note that Unocal's board consisted of a majority of independent directors, whereas the discriminatory part of the self-tender was required to protect Unocal's shareholders from the

(again) applicable. Otherwise, the EFS will apply.[141] The considerations of directors to refuse the bid may involve a wide variety of factors, including its price, nature or timing, as well as the position of non-shareholder constituencies (*see* § 16.2.1 *supra*).[142] The response of the board should not be "draconian" (coercive or preclusive), or impair the ability of shareholders to vote directors out.[143] Thus, the board enjoys considerable latitude in deploying anti-takeover mechanisms. It may also use multiple mechanisms simultaneously, including poison pills and staggered boards.[144]

A second variant of the EST applies in case of an impending sale, break-up (perhaps following a change in corporate strategy) or change of control. In such circumstances, the goal of the board is narrowed down to "maximization of the company's value at a sale for the stockholder's benefit".[145] It concerns current, not future shareholder value. Indeed, in self-initiated transactions as well, directors could be inclined to aim for retaining their position. The EST serves to expose such cases,[146] also in case there is only one bidder.[147] Importantly, in *Paramount v. QVC*, it was held that a merger of a corporation with dispersed ownership into a controlled corporation also constituted a change of control.[148] Conversely, if the acquiring corporation is already controlled, *Revlon* does not apply.[149] Whilst the archetypical situations may be well understood, what exactly constitutes a sale, break-up or change of control remains debated. Particularly, it has been discussed whether the form of consideration (cash or stock,

---

second tier of Mesa's offer and to prevent Mesa from effectively being subsidized. *See* Bainbridge 2006, *supra* note 138.

141. Claimants will usually find it most challenging to rebut the BJR after defendants have survived the EST. *See* Allen, Jacobs & Strine 2001, *supra* note 123, arguing that for anti-takeover mechanisms, one may suffice with the EST.
142. *See* Paramount Communications v. Time, (Del. 1990); *see also* Mills Acquisition Co. v. MacMillan, 559 A.2d 1261, 1282 (Del. 1989).
143. *See* Unitrin v. American General, 651 A.2d 1361, 1387-1390 (Del. 1995) (distinguishing between "opportunity loss", "structural coercion" and "substantive coercion" as threats susceptible for countermeasures). For an extensive discussion of permitted anti-takeover mechanisms, *see* R.F. Balotti & J.A. Finkelstein, *Delaware Law of Corporations and Business Organizations* § 4.20 (Wolters Kluwer, 2018).
144. *See* Air Products and Chemicals v. Airgas, 16 A.3d 48 (Del. Ch. 2011).
145. *See* Revlon v. MacAndrews & Forbes Holdings, 506 A.2d 173 (Del. 1986).
146. *See* Revlon v. MacAndrews & Forbes Holdings, 506 A.2d 173, 182 (Del. 1986) ("The whole question of defensive measures became moot. The directors' role changed from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company").
147. *See* Lyondell Chemicals v. Ryan, 970 A.2d 235, 242 (Del. 2009).
148. *See* Paramount Communications v. QVC Network, 637 A.2d 34, 47-48 (Del. 1994), supporting this conclusion with the argument there no longer existed a "large, fluid, changeable and changing market".
149. *See* In re Morton's Restaurant Group, 74 A.3d 656, 666 n.53 (Del. Ch. 2013). On control, *see* § 17.4.3 *infra*.

or a combination) is relevant in this regard.[150] In exercising its *Revlon*-duties, the board must prove i) the adequacy of the decision-making process, including its degree of informedness, also on available alternative transactions, and ii) the reasonableness of its actions with a view to ensuring the highest sale price given the circumstances at hand.[151] In a *Revlon*-setting, and similar to anti-takeover measures, it has been traditionally up to the board (i.e. the defendant, instead of the claimant) to prove the reasonableness of its actions. This requirement was viewed as somewhat although not overly more demanding than the BJR.[152] However, the landmark *Corwin*-ruling altered this state of affairs.[153] Accordingly, if a transaction is ratified by a majority-of-the-minority vote, the standard of review reverts back to the BJR.[154]

Finally, in case the board acted unilaterally for the i) primary purpose of ii) thwarting a shareholder vote, a more rigorous form of the EST applies. In *Blasius*, the board attempted to counter an insurgency by enlarging its staggered board and appointing "helpful" directors.[155] Thwarting a shareholder vote is justified if (i) the stockholders are about to reject a third-party merger proposal that the independent directors believe is in their best interests; (ii) information useful to the stockholders' decision-making process has not been considered adequately or not yet been publicly disclosed; and (iii) the acquirer will walk away without making a higher bid and that the opportunity to receive

150. For contrasting positions, *see* S.M. Bainbridge, 'The Geography of Revlon-Land', 81 *Fordham Law Review* 3277 (2012), arguing that even in case of an all-cash offer, there is no change of control as long as the acquirer is a public corporation with dispersed ownership; *see also* J. Travis Laster, '*Revlon* is a Standard of Review: Why it's True and What it Means', 19 *Fordham Journal of Corporate & Financial Law* 5 (2013), contending that both a cash and stock transaction may constitute a change-of-control.

151. *See* Paramount Communications v. QVC Network, 637 A.2d 34, 47-48 (Del. 1994). Thus, decisions do not have to be perfect. Additionally, note that reasonableness is understood as range-bound rather than a specific singular point. *See* In re Dollar Thrifty, 14 A.3d 573, 595 (Del. Ch. 2010).

152. For a comparison of the EST in the *Revlon*-variant with the BJR, *see* In re Netsmart Technologies (Del. Ch. 2007) (stressing there exists no single blueprint for *Revlon*-duties); *see also* In re Toys 'R' Us (Del. Ch. 2005).

153. *See* Corwin v. KKR Financial Holdings, 125 A.3d 304 (Del. 2015). For an insider case analysis, *see* J.R. Slights & M. Diller, '*Corwin v. KKR Financial Holdings LLC*–An After-Action Report', 24 *Fordham Journal of Corporate & Financial Law* 1 (2018). Previously, it was held that shareholder ratification can only be invoked regarding directors actions which do not legally require investor approval. *See* Gantler v. Stephens, 965 A.2d 695, 713 (Del. 2009).

154. For a broad discussion (also covering many of the other cases discussed in § 16.3.4), *see* Z. Goshen & S. Hannes, 'The Death of Corporate Law', 94 *New York University Law Review* 263 (2019); *see also* J.D. Cox & R.S. Thomas, 'Delaware's Retreat: Exploring Developing Fissures and Tectonic Shifts in Delaware Corporate Law', 42 *Delaware Journal of Corporate Law* 323 (2018).

155. *See* Blasius Industries v. Atlas (Del. Ch. 1988).

the bid will be irretrievably lost, if the stockholders vote no.[156] Under the *Blasius*-variant of the EST, the burden of proof rests on the plaintiff.[157] Whereas thwarting a shareholder vote is not *per se* invalid, the board – subsequent to the plaintiff meeting the aforementioned burden of proof – faces the lofty challenge of demonstrating a "compelling justification for such action."[158] This *Blasius*-standard has been confirmed to constitute a subspecies of the EST[159] (instead of the EFS), although it concerns arguably the most rigorous (and therefore uncommon) variant.[160]

The most far-reaching judicial standard of review is entire fairness. Its definition has remained substantively similar for almost 40 years. To quote *Weinberger*:[161]

> "When directors of a Delaware corporation are on both sides of a transaction, they are required to demonstrate their utmost good faith and the most scrupulous inherent fairness of the bargain. […] The concept of fairness has two basic aspects: fair dealing and fair price. The former embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained. The latter aspect of fairness relates to the economic and financial considerations of the proposed merger, including all relevant factors: assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of a company's stock. However, the test for fairness is not a bifurcated one as between fair dealing and price. All aspects of the issue must be examined as a whole since the question is one of entire fairness."

156. *See* In Mercier v. Inter-Tel (Delaware), 929 A.2d 786 (Del. Ch. 2007). For an extensive analysis, *see* R.F. Balotti & J.A. Finkelstein, *Delaware Law of Corporations and Business Organizations* § 4.21 (Wolters Kluwer, 2018).
157. *See* In re General Motors (Hughes), C.A. No. 20269 (Del. Ch. May 4, 2005). If the plaintiffs fail to meet this challenge, the BJR will apply.
158. For modern applications of Blasius, *see* Johnston v. Pedersen, 28 A.3d 1079, 1083 (Del. Ch. 2011); *see also* Yucaipa American Alliance Fund II. v. Riggio, 1 A.3d 310, 330–31 (Del. Ch. 2010).
159. *See* Keyser v. Curtis, C.A. No. 7109 (Del. Ch. 2012). This analysis addresses *Blasius* separately, disregarding takeover aspects. On the interaction with *Unocal*, *see* Pell v. Kill, 135 A.3d 764, 785 (Del. Ch. 2016); *see also* MM Cosmetics v. Liquid Audio, 813 A.2d 1118, 1130 (Del. 2003).
160. *See* State of Wisconsin Investment Board v. Peerless Systems (Del. Ch. 2000); *see also* Williams v. Geier (Del. 1996).
161. *See* Weinberger v. UOP, 457 A.2d 701 (Del. 1983). For more recent cases, *see* In re Trados, 73 A.3d 17 (Del. Ch. 2013); *see also* In re Walt Disney (Del. 2006); Cinerama v. Technicolor, 663 A.2d 1156, 1167 (Del. 1995).

Application of the EFS supports the case of claimants most strongly.[162] Although activation of the EFS does not have to be outcome definitive *per se*, it often will. Compared to the BJR, the criteria of fair dealing and fair price are more demanding from a substantive point of view. Additionally, the burden of proof switches from the plaintiff (i.e. shareholders) to the defendant (i.e. the board). Whereas under the BJR, a court will usually refuse to evaluate the merits or wisdom of a transaction, the EFS warrants active judicial review.[163] Any doubtful transactions will be held against the directors.[164] Traditionally, the EFS has been affiliated primarily with (breaches of) the duty of loyalty. Indeed, the BJR assumes director independence and disinterestedness (*see* § 16.3.3 *supra*). If these assumptions no longer hold, continuation of the presumptions of the BJR does not make sense. The EFS applies as well in case of a breach of the duty of care, but (eventual) director liability not simultaneously involving a breach of the duty of loyalty is uncommon.[165]

With respect to price, fairness is commonly understood as a range rather than a point.[166] Although fair dealing and fair price are both integral parts of the EFS, the latter aspect appears slightly more important.[167] Indeed, there exist numerous examples in which it has been held that, despite the absence of fair dealing, the price received was fair, and the EFS therefore having been met.[168] The opposite has not been the case as frequently.[169]

---

162. Meanwhile, *Corwin*, combined with some of the developments discussed in Chapter 17, means the Delaware courts are less likely to arrive at the EFS. *See* A. Licht, 'Farewell to Fairness: Towards Retiring Delaware's Entire Fairness Review' (2019), available at http://www.ssrn.com/.
163. The "honest belief that the transaction was entirely fair will not alone be sufficient". *See* AC Acquisitions v. Anderson, Clayton & Co. (Del. Ch. 1986).
164. *See* Allen, Jacobs & Strine 2001, *supra* note 123, at 461.
165. *See* In re Walt Disney (Del. 2006); *see also* Cinerama v. Technicolor, 663 A.2d 1156, 1167 (Del. 1995); Nixon v. Blackwell, 626 A.2d 1366, 1376 (Del. 1993); Cede & Co. v. Technicolor, (Del. 1993) (first holding that violation of the duty of care may cause the application of the EFS).
166. However, "where an entire fairness review is required […], common sense suggests that proof of fair price will generally require a showing that the terms of the transaction fit comfortably within the narrow range of that discretion, not at its outer boundaries." *See* Valeant Pharmaceuticals v. Jerney, 921 A.2d 732, 748 (Del. Ch. 2007).
167. *See* In re Trados, 73 A.3d 17, 76 (Del. Ch. 2013); Americas Mining v. Theriault, 51 A.3d 1213, 1244 (Del. 2012); eBay Domestic Holdings v. Newmark, 16 A.3d 1, 42 (Del. Ch. 2010) ("Price, however, is the paramount consideration because procedural aspects of the deal are circumstantial evidence of whether the price is fair.")
168. For notable examples, *see* Valeant Pharmaceuticals v. Jerney, 921 A.2d 732, 748 (Del. Ch. 2007) (discussing a plethora of governance failures but eventually concluding the price was fair); *see also* In re Emerging Communications (Del. Ch. 2004); Emerald Partners v. Berlin (Del. 2003).
169. For an exception, *see* Reis v. Hazelett Strip-Casting, 28 A.3d 442, 465 (Del. Ch. 2011) ("The fair price analysis is part of the entire fairness standard of review; it is not itself a remedial calculation"); *see also* Harbor Finance Partners v. Huizenga (Del. Ch. 1999).

16.3.5 Controlling shareholder-board relationship

The discussion in § 16.3.2-§ 16.3.4 largely focused on the fiduciary duties of directors to outside minority investors. In principle, such shareholders may further their own interests. This also applies to the investors' voting behavior.[170] Indeed, "[i]t is not objectionable that their motives may be for personal profit, or determined by whim or caprice."[171] However, for controlling shareholders, things are different (on qualifying as a controller, *see* § 17.4.3 *infra*). Such investors have a fiduciary duty towards outside minority shareholders.[172] The same applies for the directors nominated by the controlling shareholder.[173] They may not vote (or act) for the purpose of oppressing, defrauding or injuring outside minority investors.[174] Similar to directors, the controller's duties comprise a duty of loyalty and a duty of care.[175] Most cases of controlling shareholder fiduciary duties relate to the duty of loyalty.[176] A minority addresses the duty of care.[177] This is particularly the case when the corporation is sold to a "looter", i.e. an acquirer taking assets from the corporation without paying adequate consideration, to the detriment of outside minority investors.[178] The question then becomes whether the seller should have foreseen such a scenario at the time the transaction was concluded.[179]

170. *See* Williams v. Geier (Del. 1996); *see also* Unocal v. Mesa Petroleum (Del. 1985); Ringling Brothers-Barnum & Bailey Combined Shows v. Ringling, 53 A.2d 441 (Del. 1947).
171. *See* Bershad v. Curtis-Wright, 535 A.2d 840 (Del. 1987). For extensive analyses, *see Fletcher Cyclopedia of the Law of Corporations* § 2025 (Thomson/West, 2014); *see also* R.F. Balotti & J.A. Finkelstein, *Delaware Law of Corporations and Business Organizations* § 7.17 (Wolters Kluwer, 2018).
172. *See* Kahn v. Lynch Communications, 638 A.2d 1110, 1113-14 (Del. 1994); *see also* Citron v. Fairchild Camera & Instrument, 569 A.2d 53, 70 (Del. 1989); In re Sea-Land, C.A. No. 8453 (Del. Ch. 1988). For an elaborate analysis, *see Fletcher Cyclopedia of the Law of Corporations* § 5810 (Thomson/West, 2014).
173. *See* ATR-Kim Eng Financial v. Araneta, 930 A.2d 928 (Del. 2007); *see also* Weinberger v. UOP, 457 A.2d 701, 710-11 (Del. 1983) (holding that a breach by board representatives also constitutes a breach by the controller).
174. *See* Hall v. John S. Isaacs & Sons Farms, (Del. 1958); *see also* Allied Chemical & Dye Corporation v. Steel & Tube Corporation of America (Del. Ch. 1923).
175. "Thus, when a shareholder, who achieves power through the ownership of stock, exercises that power by directing the actions of the corporation, he assumes the duties of care and loyalty of a director of the corporation." *See* Cinerama v. Technicolor, 663 A.2d 1156, 1167 (Del. 1995).
176. *See* I. Anabtawi & L. Stout, 'Fiduciary Duties for Activist Shareholders', 60 *Stanford Law Review* 1256, 1265 (2008).
177. For an example, *see* Pfeffer v. Redstone, C.A. No. 2317-VCL (Del. Ch. 2008).
178. *See* Abraham v. Emerson Radio, 901 A.2d 751 (Del. Ch. 2006); *see also* Harris v. Carter, 582 A.2d 222 (Del. Ch. 1990).
179. For a critical analysis, *see* J. Dammann, 'The Controlling Shareholder's General Duty of Care: A Dogma that should be Abandoned' 2 *University of Illinois Review* 479 (2015), arguing that as controllers are heavily invested, a separate duty of care adds little, except for looting cases and dual class equity structures.

Meanwhile, there also exist certain exceptions to the fiduciary duties of the controller. For instance, these do not extend towards future shareholders.[180] Neither does a parent corporation owe a fiduciary duty to an intra-group subsidiary.[181]

Conversely, the board owns fiduciary duties towards its controlling shareholder. The recent NAI-CBS case illustrates this point. In 2005, it was announced that CBS and Viacom would be split in separate businesses. Through NAI, Summer Redstone is the controlling shareholder of both CBS and Viacom, holding a 10 % equity stake and 80 % of the voting rights.[182] However, in 2019, both corporations announced their intention to re-merge. The proposal of doing so caused considerable unrest, particularly amongst CBS. As a result, the board of CBS proposed to dilute its controlling shareholder NAI. In response, NAI amended the bylaws (*see* § 16.3.1 *supra*) to provide that any dividend should be approved by at least 90 % of the CBS directors. (Strictly speaking, the bylaw amendment thus did not serve to thwart a shareholder vote. *See* § 16.3.4 *supra*.) Nevertheless, CBS intended to pursue the recapitalization. In the case that followed, it was held that the board may not attempt to dilute the controlling shareholder, unless "truly extraordinary circumstances" arise.[183] Although the option of diluting the controller has occasionally been contemplated, with a view to safeguarding the interests of the corporation on a going concern basis or specific minority shareholders, this remains primarily a theoretical affair.[184] By contrast, it has been firmly established in existing case law that the controller may seek to pre-empt the dilutive threat.[185]

---

180. *See* Andarko Petroleum v. Panhandle E, 545 A.2d 1171, 1177 (Del. 1988).
181. *See* Trenwick America Litigation Trust v. Ernst & Young, (Del. Ch. 2006).
182. For a rather critical analysis of the NAI's corporate governance, *see* L.A. Bebchuk & K. Kastiel, 'The Untenable Case for Perpetual Dual-Class Stock', 103 *Virginia Law Review* 585 (2017).
183. *See* CBS v. National Amusements (Del. Ch. 2018). For an after-action analysis, *see* M.E. Kotler & M.E. McDonald, 'Lessons from the CBS-NAI Dispute, Part IV: A Temporary Restraining Order Against the Controlling Stockholder?' (2018), available at http://www.corpgov.law.harvard.edu/.
184. *See* Ford v. VMware, 2017 WL 1684089 (Del. Ch. 2017); *see also* Klaassen v. Allegro Development, 2013 WL 5967028 (Del. Ch. 2013) ("[A] board acting loyally may take action to oppose, constrain, or even dilute a large or controlling stockholder"); Black v. Hollinger International, 872 A.2d 559 (Del. 2005); Mendel v. Carrol, 651 A.2d 297, 306 (Del. Ch. 1994).
185. *See* Adlerstein v. Wertheimer, 2002 WL 205684 (Del. Ch. 2002) (where a board kept the controller in the dark on a potentially disenfranchising dilution); *see also* Frantz Manufacturing v. EAC Industries, 501 A.2d 401, 407 (Del. 1985) (which also involved a pre-emptive bylaw amendment).

16.4 Shareholders' right to vote & position of the agm

16.4.1 General framework

The basic provision governing stock is S. 151 DGCL. Importantly, this article does not define the concept of shares as such. Instead, it meticulously describes the specific types of equity securities that can lawfully be issued. The DGCL is revised (virtually) on an annual basis (*see* § 14.3.3 *supra*), and S. 151 DGCL is no exception in this regard. In 1969, S. 151 (e) DGCL was expanded to address convertible stock, and 1970 and 1973 witnessed the modification of S. 151 (b) DGCL, covering redeemable shares.[186] A joint characteristic of these and other changes has been that S. 151 DGCL became ever more flexible.[187] Indeed, the issuance of a wide range of instruments is currently permitted, entailing that the chances of a security not meeting the criteria laid down in S. 151 DGCL are rather small.[188] Instead, S. 151 DGCL and S. 102 (a) (4) DGCL merely contain the substantive requirement that the rights vested in a stock should be clearly set forth in the articles of association.

The exercise of the right to vote is addressed in S. 212 DGCL. This provision has remained substantively unchanged since 1901.[189] Accordingly, the one share, one vote mechanism acts as the default rule.[190] Indeed, the right to vote is one of the cornerstones of Delaware corporate governance.[191] Moreover, the right to vote has been characterized as a property right. A shareholder may use this right in his own interest (for controlling shareholders, *see* § 16.3.5 *supra*), and cannot be deprived of it or see it impaired against his consent,

186. *See Folk on the Delaware General Corporation Law: Fundamentals* § 151.9 (Welch et al. eds, 2013).
187. *See* Matulich v. Aegis Communications Group, 942 A.2d 596 (Del. 2008) ("Section 151(a) […] affords Delaware corporations the ability to provide for the flexible financing that is necessary to meet the unique funding needs of the enterprise and the requirements of diverse investors in today's competitive global capital markets.").
188. In such a scenario, a stock could very well be void, giving rise to all sorts of complications. *See* C.S. Bigler & S.B. Tillman, 'Void or Voidable?-Curing Defects in Stock Issuances Under Delaware Law', 63 *The Business Lawyer* 1109 (2008). Therefore, S. 204 and S. 205, which entered into effect as of April 1, 2014, allow for the ratification of putative stock. These provisions should be considered a response to Blades v. Wisehart, C.A. No. 5317-VCS, (Del. Ch. 2010). In that case, the Court of Chancery held that void stock could not be "repaired" merely based on grounds of equity.
189. *See* Brooks v. State, 79 A. 790 (Del. 1911).
190. All stocks carry equal voting rights, absent provisions to the contrary. *See* Matulich v. Aegis Communications Group, 942 A.2d 596 (Del. 2008) (on the rights of holders of preferred and common shares); *see also* Elliott Associates v. Avatex, 715 A.2d 843, 852-853 (Del. 1998) (voting rights may only be derogated clearly and expressly).
191. *See* Harrah's Entertainment v. JCC Holding, 802 A.2d 294 (Del. Ch. 2002); *see also* Blasius Industries v. Atlas (Del. Ch. 1988) ("The shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests"). On the residual nature of shareholder ownership, *see also* § 2.3.5 *supra*.

through amendment of the articles of association or bylaws.[192] This even applies if the securities offered in exchange are allegedly of superior value.[193] However, this does not necessarily imply that every individual investor should be conferred the right to vote; this power may also be withheld *ex ante*. Already in 1903, the requirement that every share should carry at least one vote, laid down in S. 9 (6) of Delaware's constitution, was abolished.[194] As a result, there exist several precedents confirming the general permissibility of non-voting stock.[195] One well-known example is *Providence & Worcester v. Baker*. Technically, this concerned a case of degressive voting, in the sense that the ownership of additional shares grants ever fewer additional votes. Meanwhile, that system may in practice have the effect of a certain portion of the stock becoming non-voting, inducing the Delaware Supreme Court to treat it as such.[196] Another example is *Topkis v. Delaware Hardware*.[197] Owners of non-voting stock do not have to be given notice regarding corporate meetings, although the corporation may still decide to grant meeting rights.[198] Superior voting rights are permitted as well under S. 151 DGCL. In fact, the US has seen a dramatic rise in dual class equity structures in recent years, following the 2004 IPO of Google (*see* § 15.5 *supra*). Delaware corporate law does not mandate the simultaneous listing of both superior or common voting and inferior voting stock, which might improve overall voting efficiency by catering to different investor preferences.[199]

Preferred stock especially constitutes a somewhat hybrid instrument. These securities grant the right to vote, unless this right has been explicitly withheld

---

192. *See* Seidman & Associates v. G.A. Financial, 837 A.2d 21 (Del. Ch. 2003); *see also* Preston v. Allison, 650 A.2d 646 (Del. 1994); Rosenmiller v. Bordes, 607 A.2d 465 (Del. Ch. 1991); Levin v. Metro-Goldwyn-Mayer, 221 A.2d 499 (Del. Ch. 1966).
193. For an elaborate analysis, *see Fletcher Cyclopedia of the Law of Corporations* § 2025 (Thomson/West, 2014); *see also* R.F. Balotti & J.A. Finkelstein, *Delaware Law of Corporations and Business Organizations* § 7.17 (Wolters Kluwer, 2018). On the requirements governing midstream dual class equity restructurings, *see* Chapter 17.
194. *See Fletcher Cyclopedia of the Law of Corporations* § 2026 (Thomson/West, 2014); *see also* § 14.3.2.
195. Note that in certain specific circumstances, for instance under the Investment Company Act of 1940 (S. 15 U.S.C. § 80a-18(i)) and the Bankruptcy Reform Act of 1978 (S. 11 U.S.C. § 1123(a)(6)), non-voting shares are prohibited.
196. *See* Providence & Worcester v. Baker*,* 378 A.2d 121 (Del. 1977), ruling that whereas the law was silent on non-voting stock, the Delaware General Assembly would have banned such instruments if intending to do so, but that the available evidence rather pointed to the contrary.
197. *See* Topkis v. Delware Hardware, 23 Del. Ch. 125 (Del. Ch. 1938), addressing a transfer of all voting power from a class of common stock to a class of formerly non-voting preferred stock. Note that vesting different voting rights in shares of the same class or series is not possible. *See* Lacos Land v Arden Group, 517 A.2d 271 (Del. Ch. 1986).
198. *See Fletcher Cyclopedia of the Law of Corporations* § 2007 (Thomson/West, 2014). For some investors, this would be a somewhat futile gesture; for others, it may create a certain sense of belonging.
199. *See* D. Lund, 'Nonvoting Shares and Efficient Corporate Governance', 71 *Stanford Law Review* 687 (2019).

in the articles of association.[200] For such instruments, voting rights can also be made conditional upon the non-payment of dividend, although this arrangement is by no means mandatory.[201] Conversely, preferred stock may also be given superior voting rights.[202] Thus, Delaware corporate law has principally adopted a *laissez-faire* approach regarding the distribution of voting rights, provided that all outstanding stock combined possess full voting powers.

16.4.2 Decision-making thresholds

For listed corporations, the number of votes an investor can cast is, in and by itself, meaningless. The right to vote only becomes relevant when considered in relation to decision-making thresholds (*see* § 1.2.2 *supra*). One potential threshold is the quorum. According to S. 216 DGCL, the articles of association or bylaws may contain a quorum of no less than 33.3 % of the voting stock. In fact, S. 310 NLCM even expresses a clear preference for a quorum of at least 50 %. Thus, non-voting stock is disregarded for reaching a quorum.[203] However, quorums are not necessarily one-dimensional in nature. Different quora may apply in respect of distinct voting items. They can, for instance, be higher in respect of remuneration policies and lower regarding takeover offers.[204] In the absence of an explicit provision to the contrary, the presence of a majority of the voting stock constitutes a quorum. This default rule applies by analogy insofar a separate vote of a class or series of stock is concerned. However, presence at a shareholder meeting, with a view to satisfying a quorum, does not necessarily imply an investor should exercise his voting rights – this remains a discretionary decision.[205]

Another example of a decision-making threshold is the supermajority requirement. Including such a requirement in the articles of association is permitted following S. 102 (b) (4) DGCL. Meanwhile, it has been debated whether an unanimity requirement is lawful. In practice, this would ensure the corporation becomes unmanageable, as it would grant every single investor a veto right.[206] Additionally, a prompt and steep increase of a supermajority, following the launch of an unsolicited takeover offer, has been found in violation

200. *See* Winston v. Mandor, 710 A.2d 835 (Del. Ch. 1997).
201. *See* Ellingwood v. Wolf's Head Oil Refining, 38 A.2d 743 (Del. 1944); *see also* § 15.3 *supra*, on 1920s practices.
202. *See* Waggoner v. Laster, 581 A.2d 1127 (Del 1990). For a discussion, *see Fletcher Cyclopedia of the Law of Corporations* § 2026 (Thomson/West, 2014). On the considerably stricter German approach, *see* Chapter 23.
203. *See* Italo Petroleum Corporation of America v. Producers' Oil Corporation of America, 174 A. 276, 280 (Del. 1934).
204. For an extensive analysis, *see Fletcher Cyclopedia of the Law of Corporations* § 2023 (Thomson/West, 2014).
205. *See* Berlin v. Emerald Partners, 552 A.2d 482, 493 (Del. 1988).
206. S*ee* R.F. Balotti & J.A. Finkelstein, *Delaware Law of Corporations and Business Organizations* § 7.24 (Wolters Kluwer, 2018), for an extensive discussion of case law. Such an

of both the *Unocal*- and *Blasius*-standards.[207] When the articles of association or bylaws do not contain a supermajority requirement, an absolute majority of the voting stock shall be sufficient to reach a decision on any given matter.

One important exception is laid down in S. 216 (3) DGCL. Directors are elected by the AGM pursuant to S. 211 (b) DGCL – in fact, this constitutes probably the most fundamental topic on which shareholder can exercise their powers. To be elected, directors traditionally needed to obtain a plurality instead of a majority of the votes. The difference lies therein that under a plurality mechanism, the winning candidate merely needs to obtain more votes than his closest competitor. Without competitors (i.e. if the number of candidates equals the number of board positions available), a single vote in favor would theoretically suffice for a candidate to get elected, regardless of the number of dissenters. Meanwhile, under a majority system, the number of votes in favor must exceed the number of votes against a nominee. (Both in plurality and majority voting systems, a large number of abstentions may in practice have the effect of a director's position becoming untenable.[208]) Plurality voting, combined with the structure of director elections under federal securities law (*see* § 16.4.3 *infra*) strongly discourages shareholder engagement. However, as a result of severe pressure from institutional investors, listed corporations have increasingly converted to the majority voting system.[209] A 2006 modification of the DGCL has further stimulated majority voting. Accordingly, a bylaw amendment adopted by shareholders which provides for majority voting in director elections shall not be amended (i.e. repealed) by the board.[210] Yet another system is that of cumulative voting (§ 214 DGCL). In the absence of express provision in the articles of association, a shareholder has no right to cumulate his votes. If provided, it allows a shareholder to cast all his votes in favor of a single nominee for the board, instead of spreading them out evenly between the various

---

approach would also appear rather unwise from a life-cycle perspective, which posits that the corporation should be able to respond to changing situations. *See* § 10.6 *supra*.

207. *See* Chesapeake v. Shore, 771 A.2d 293 (Del. Ch. 2000). On *Unocal* and *Blasius*, *see* § 16.3.4 *supra*.

208. *See* J.A. Grundfest, 'Just Vote No: A Minimalist Strategy for Dealing with Barbarians inside the Gates', 45 *Stanford Law Review* 857 (1993): "The effect of a "just vote no" campaign is thus purely symbolic: It will not oust incumbent directors or executives, nor will it upset the corporation's formal governance structure. Symbols, however, have consequences." Disney's Eisner makes for a prominent example: after achieving a 43 % abstention rate in 2004, he stepped down as chair (whilst retaining his position of CEO).

209. *See* M. Kahan & E.B. Rock, 'Embattled CEOs', 88 *Texas Law Review* 989 (2010), noting the "meteoric rise" in majority voting between 2005 and 2007, with only 1 S&P 100-firm retaining plurality voting.

210. *See* J.W. Verret, 'Pandora's Ballot Box, or a Proxy with Moxie? Majority Voting, Corporate Ballot Access, and the Legend of Martin Lipton Re-Examined', 62 *The Business Lawyer* 1007 (2007), also observing that in case of plurality voting, the practice of staggered boards limits the influence of shareholders even further.

candidates, as is the case under a system of majority voting.[211] Theoretically, plurality voting should strengthen the influence of minority shareholders, as it increases the chances of their designate of taking one of the available slots.[212] Meanwhile, its practical effects have been limited.[213]

16.4.3 Proxy solicitation

Each year, corporations make significant efforts to obtain sufficient shareholder proxy votes. By actively engaging in proxy solicitation, corporations attempt to see their directors reelected and thwart any investor insurgencies.[214] Moreover, there are several legal obligations inducing this course of action. First, this serves to comply with quorum and supermajority provisions (*see* § 16.3.2 *supra*). Second, § 402.04 NLCM mandates the solicitation of proxies by operational firms. The dance around the proxy solicitation process has been permanent from a regulatory perspective as well. Clayton's tenure as SEC Chair has further ignited the debate. On November 15, 2018, the SEC organized the "Roundtable of the Proxy Process", resulting in several changes to the existing proxy voting framework, some of which are discussed *infra*.[215]

The NYSE- and SEC-based framework[216] on proxy solicitation is basically the following.[217] SEC Rule 14a-3 mandates that no proxy solicitation shall be made, unless an investor has received a statement containing the

211. *See* J.N. Gordon, 'Institutions as Relational Investors: A New Look at Cumulative Voting', 94 *Columbia Law Review* 124 (1994), discussing the rise of the mechanism in the 1880s and its demise in the 1950s and 1980s, and noting that whilst cumulative voting may facilitate activists, it can also mitigate collective action problems (*see* § 2.2.3 *supra*).
212. For an extensive comparison, *see* M. Ventoruzzo, 'Empowering Shareholders in Directors' Elections: A Revolution in the Making', 8 *European Financial & Company Law Review* 105 (2011); *see also* Gordon 1994, *supra* note 211.
213. *See* S.J. Choi et al., 'Does Majority Voting Improve Board Accountability', 83 *University of Chicago Law Review* 1119 (2016) (observing that a director failing to secure reelection is even more rare under a majority than under a plurality standard); *see also* W.K. Sjostrom & Y.S. Kim, 'Majority Voting for the Election of Directors', 40 *Connecticut Law Review* 459 (2007), referring to plurality voting as "little more than smoke and mirror".
214. Also note that stock brokers may no longer vote uninstructed shares at their discretion insofar director elections are concerned, following the introduction of NYSE Rule 452 in 2010. Usually, these votes were cast in accordance with board recommendations. *See* Kahan & Rock 2010, *supra* note 209; *see also* Verret 2007, *supra* note 210.
215. For an outline of the items discussed, *see* E.L. Roisman, 'The Proxy Process Roundtable' (2018), available at http://www.corpgov.law.harvard.edu/.
216. Due to the prominence of stock exchange (NYSE) and SEC rules, the idea of state primacy in corporate law (*see* § 14.3.1 *supra*) is particularly under pressure in the proxy solicitation process.
217. The literature on proxy voting is vast, and worthy of a study of its own. For an extensive analysis, *see Fletcher Cyclopedia of the Law of Corporations* § 2049.10-§ 2063 (Thomson/West, 2014). The SEC Bulletins, in which the views of the SEC's staff are summarized, are available at http://www.sec.gov/interps/legal.shtml/.

proposals to be voted on during the AGM and the information specified in Schedule 14A.[218] Under SEC Rule 14a-4(b), the proxy statement should enable shareholders to cast their vote in favor or against an (individual[219]) agenda item, and to withhold their vote.[220] However, in case of director elections, shareholders traditionally only had the option of casting their vote in favor of a candidate or withholding it (on a per-director basis). The possibility to vote against was not included. Meanwhile, high abstention figures may also send a signal of disapproval. Moreover, majority voting has been on the rise. As a result, directors face greater incentives of obtaining an approval rate in excess of 50 % (*see* § 16.4.2 *supra*).

As an alternative to abstaining with a viewing to removing directors, shareholders may use corporate shareholder records to approach fellow investors with a proxy statement of their own, following SEC Rule 14a-7. The board does not enjoy great latitude to refuse distributing the competing proxy solicitation. However, given the costs of printing and distributing proxy statements, lobbying with (institutional) investors and seeking independent legal and financial advice, proxy contests are a rather costly affair to engage in.[221] Under the "Froessel Rule", named after the judge delivering the ruling, these costs are only reimbursed if the proxy contest is successful. Meanwhile, management is allowed to use corporate funds to finance its election campaign, regardless of the outcome.[222]

SEC Rule 14a-8 constitutes a potentially cheaper alternative to shareholder proxy solicitation. Accordingly, investors may put 1 item, not exceeding 500 words, on the agenda of the AGM. Successful shareholder proposals are included in the corporate proxy statement, as distributed by the board. A shareholder should have held an interest of 1 % or $ 2,000 of voting stock, whichever is smaller, for a continuous period of 1 year in order to be eligible

---

218. Under the SEC proposals following the Roundtable of the Proxy Process, a proxy advice will also be considered a form of proxy solicitation. As a result, ISS has sued the SEC. *See* Roisman 2018, *supra* note 215.
219. Prior to 1992, bundling agenda items was not prohibited. This practice is now banned (*see* SEC Rule 14a-4(b)(1)). *See* J.E. Fisch, 'From Legitimacy to Logic: Reconstructing Proxy Regulation', 46 *Vanderbilt Law Review* 1129 (1993).
220. Delaware law does not contain substantive requirements as to the form of the proxy. *See* Lobato v. Health Concepts IV, 606 A.2d 1343, 1347 (Del. Ch. 1991). However, a document must identify the shares which are voted upon and include some indication of authenticity. *See* Eliason v. Englehart, 733 A.2d 944, 946 (Del. 1999).
221. When Nelson Peltz's Trian Fund challenged Procter & Gamble in 2017, the (out-of-pocket) costs are estimated to have amounted to $ 60 million for both parties combined. Digitalization, once hailed as the future of lower proxy solicitation costs, has failed to make much of an impact. *See* J.N. Gordon, 'Proxy Contests in an Era of Increasing Shareholder Power: Forget Issuer Proxy Access and Focus on E-Proxy', 61 *Vanderbilt Law Review* 475 (2008).
222. *See* Rosenfeld v. Fairchild Engine & Airplane Corporation, 128 N.E.2d 291 (N.Y. Appeals 1955). Under a "Super Froessel Rule", both sides are compensated. *See* S. Cools, 'The Real Difference in Corporate Law between the United States and Continental Europe: Distribution of Powers', 30 *Delaware Journal of Corporate Law* 697 (2005).

to lodge a request.[223] (The SEC proposals published following the "Roundtable of the Proxy Process" increase this amount to $ 25,000.[224]) The focus on voting stock means that holders of non-voting shares, such as those of Snap, cannot launch a shareholder proposal campaign under SEC Rule 14a-8. The same applies for proxy solicitations under SEC Rule 14a-7. Similarly, the corporation may refuse to distribute proxy materials to holders of non-voting shares. Any proposals made pursuant to SEC Rule 14a-8 should be submitted at least 120 days prior to the AGM, and the investor making the request should continue to hold his stock until the very of the meeting. If this requirement is not complied with, all subsequent proposals made by the sponsor may be rejected for a period of 2 years. Because of the arguably low ($ 2,000 or $ 25,000) shareholder proposal thresholds, corporate America has long argued that SEC Rule 14a-8 has significant adverse effects on board autonomy. The Financial CHOICE Act, which passed the House of Representatives in 2017, intends to address this issue by putting investors more at distance. To that end, it eliminates the dollar threshold (S. 844), leaving only the 1 % threshold in place. Moreover, the required holding period is extended from 1 to 3 years. However, the status of the Financial CHOICE Act is currently uncertain, also in light of recent SEC proposals.

Additionally, there exists an extensive set of exceptions to SEC Rule 14a-8, permitting corporations to refuse the inclusion of a shareholder proposal in the proxy statement.[225] One important category encompasses topics not in the domain of shareholders under the law of the state of incorporation (SEC Rule 14a-8(i)(1)), such as proposals concerning poison pills. In most systems of corporate law, few matters have been brought explicitly in the domain of shareholders, prompting the SEC to suggest that investor proposals should not be drafted as a binding instruction to the board, but instead as a recommendation or suggestion.[226] Another exception relates to the corporation's ordinary business, as dealt with by management (SEC Rule 14a-8(i)(7)). The scope of the

---

223. Under Delaware law, a proxy contest may not become illusory. *See* Blasius Industries v. Atlas (Del. Ch. 1988). Dual class equity structures formally do not prevent a proxy contest, but rather determine its outcome.

224. Lower amounts apply in case of longer during share ownership. For a thorough report, *see* A. Friedman, K. Berrini & A. Rutherford, 'SEC Proposed Rule Amendments on Shareholder Proposals and Proxy Advisors: Implications for Issuers, Investors and Proxy Advisors' (2019), available at http://www.corpgov.law.harvard.edu/.

225. The practically important SEC No-Action Letters (which indicate the SEC will not challenge a corporation's refusal to include a shareholder proposal in the proxy statement) are available at http://www.sec.gov/divisions/corpfin/cf-noaction.shtml/ and http://www.sec.gov/divisions/corpfin/cffreqreq.shtml/, respectively.

226. *See* S.C. Haan, 'Shareholder Proposal Settlement and the Private Ordering of Public Elections', 126 *Yale Law Journal* 262, 273 (2016); *see also* J.E. Fisch, 'The Destructive Ambiguity of Federal Proxy Access', 61 *Emory Law Journal* 435, 441-452 (2012).

"ordinary business exception" has broadened considerably over the years.[227] Meanwhile, it has been acknowledged that reasons of public policy may necessitate an exception to the ordinary business exception.[228] (As a result, some scholars have argued the "ordinary business exception" has been interpreted more narrowly than it should.[229]) This would entail the main SEC Rule 14a-8 becomes again, meaning that shareholders actually can submit a proposal. However, following recent developments, the views of management have gained more weight when deciding whether a matter constitutes a point of public policy.[230] Further exceptions include a lack of economic relevance (SEC Rule 14a-8(i)(5)), which applies if the proposal relates to less than 5 % of corporate assets or earnings,[231] as well as the amount of dividends declared (SEC Rule 14a-8(i)(13)). Additionally, proposals that directly conflict with those made by the board (SEC Rule 14a-8(i)(9)) or resolutions constituting a resubmission of a proposal rejected in the last 5 years (SEC Rule 14a-8(i)(12)) may be excluded as well.[232] Finally, and most fundamentally, an exception applies regarding proposals to disqualify directors nominated for elections (SEC Rule 14a-8(i)(8)). Thus, dissident shareholders will have to follow SEC Rule 14a-7 if they intend to make any changes to the composition of the board. This provision was drafted after case law holding that SEC Rule 14a-8 permitted shareholders to submit proposals aiming to amend the bylaws with a view to providing direct proxy access (i.e. the inclusion of shareholder candidates in the corporate proxy forms).[233]

227. *See* M. Livingstone, 'The "Unordinary Business" Exclusion and Changes to Board Structure', 93 *Denver Law Review* 263 (2016).
228. *See* Medical Committee for Human Rights v. SEC, 432 F.2d 659 (D.C. Cir. 1970), holding that Dow Chemical could not refuse a proposal to end the production and sale of napalm. *See* S.W. Liebeler, 'A Proposal to Rescind the Shareholder Proposal Rule', 18 *Georgia Law Review* 425, 445 (1984).
229. *See* S.M. Bainbridge, 'Revitalizing SEC Rule 14a-8's Ordinary Business Exclusion: Preventing Shareholder Micromanagement by Proposal', 85 *Fordham Law Review* 705 (2016), discussing Trinity Church's initiative of trying to stop Walmart selling guns following mass shootings.
230. This is due to the fact that there exists a certain tension between the public policy and ordinary business exceptions. *See* SEC Staff Legal Bulletin No. 14I (2017). SLB 14l also addressed the economic relevance exception of SEC Rule 14a-8(i)(5). For an analysis, *see* S. Flow & M. Alcock, 'Analysis of SEC Shareholder Proposal Guidance' (2017), available at http://www.corpgov.law.harvard.edu/.
231. The provision was drafted following Medical Committee for Human Rights v. SEC, 432 F.2d 659 (D.C. Circuit 1970). *See* Liebeler 1984, *supra* note 228, at 445.
232. The SEC proposals of 2019 intends to raise the resubmission thresholds considerably. *See* Friedman, Berrini & Rutherford 2019, *supra* note 224. The Financial CHOICE Act would have done the same, underscoring the degree to which US policy-makers have turned away from shareholder engagement in recent years.
233. *See* AFSCME v. AIG, 462 F.3d 121, 130–31 (2d Cir. 2006); *see also* CA v. AFSCME Employees Pension Plan, 953 A.2d 227, 237 (Del. 2008). The cases have been codified in S. 112 DGCL. *See* D. Skeel, 'The Bylaw Puzzle in Delaware Corporate Law', 72 *The Business*

For the sake of completeness, it should be mentioned that in 2010, the SEC did create a direct avenue for shareholder control. Befitting to the zeitgeist of the early years of the 21st century, this meant investors could include board nominees in the proxy forms distributed by the corporation. According to SEC Rule 14a-11, any shareholder who had held at least 3% of a listed corporation's stock for a consecutive period of 3 years would have been eligible to nominate candidates for 1 board position or up to 25% of the board, whichever was greater.[234] Already in 2009 and 2003, the SEC had presented similar proposals. In 2003, it was proposed that a shareholder holding 5 % of the stock for a 2-year period would be entitled to nominate 1 to 3 directors (depending on the size of the board),[235] subject to and in the two consecutive years following a triggering event.[236] The specific idea received great criticism, was postponed, and when Chairman Donaldson stepped down in 2005, abandoned. However, the underlying movement was still very much alive. In 2009 another, slightly different proposal was launched. It did not contain triggering criteria, and featured a lower equity stake threshold (1-5 %, depending on market capitalization) and a shorter holding period (1 year) requirement.[237] Thus, SEC Rule 14a-11 as eventually enacted was considerably more restrictive compared to the 2009 proposal. In the end, all this would be of no importance. SEC Rule 14a-11 was promptly invalidated, even before it had entered into effect, for being unconstitutional.[238] This was due to its "arbitrary and capricious character", which translates as poor drafting combined with unestablished costs and benefits.[239]

Lawyer 1, 6-7 (2017); *see also* M.J. Roe, 'A Spatial Representation of Delaware-Washington Interaction in Corporate Lawmaking', 2012 *Columbia Business Law Review* 553 (2012).

234. For an extensive analysis, *see* M. Kahan & E.B. Rock, 'The Insignificance of Proxy Access', 97 *Virginia Law Review* 1347 (2011) (arguing most mutual and pension funds would not be interested in proxy access compared to contests and withhold campaigns, so that the proposal would have little effect); *see also* J.A. Grundfest, 'The SEC's Proposed Proxy Access Rules: Politics, Economics, and the Law', 65 *The Business Lawyer* 361 (2010).
235. The literature on the proposal is extensive. *See* L.A. Bebchuk, 'The Case for Shareholder Access to the Ballot', 59 *The Business Lawyer* 43 (2003) for the ideas' rationale; *see also* M. Lipton & S.A. Rosenblum, 'Election Contests In the Company's Proxy: An Idea Whose Time Has Not Come', 59 *The Business Lawyer* 67 (2003) for a critique.
236. The trigger events included 35 % of the investors withholding their vote, a direct proxy access proposal made by investors holding 1 % of the stock receiving majority approval, and the failure to adopt a proposal which had received majority approval. *See* Fisch 2012, *supra* not 226, at 442.
237. For a comparison between the 2010 measure and the 2009 and 2003 proposals, *see* Fisch 2012, *supra* note 226, at 441-452; *see also* Roe 2012, *supra* note 233; Ventoruzzo 2011, *supra* note 212.
238. *See* Business Roundtable and Chamber of Commerce v. SEC, 647 F.3d 1144 (2011). The SEC's regulatory competence was not principally called into question, given that S. 971 of the Dodd-Frank Act explicitly authorized the SEC to adopt rules regarding proxy access.
239. *See* Grundfest 2010, *supra* note 234, predicting this outcome (Note the author is a former SEC Commissioner.)

16.5 Shareholder dividend entitlements

16.5.1 General framework

Generating profits requires the financing of productive capabilities. Delaware corporate law enables founders to freely determine the amount of funds they require to start a business, as the DGCL does not impose any statutory minimum capital requirements.[240] Thus, individuals may start a business with funds of as little as $ 1, but also by using a considerably larger capital. This capital can be collected by issuing either par value or non-par value shares, pursuant to S. 151 DGCL (*see* § 16.4.1 *supra*). There are no minimum par value requirement, meaning that the differences between par and non-par value shares are minimal. For both par and non-par value stock, the board determines which part of the subscription price should be considered capital (S. 154 DGCL). The judgment of directors regarding the fairness of the consideration paid for the security is conclusive (S. 152 DGCL).

In principle, investors owning the same amount (par value) or number (non-par value) of stock are entitled to an equal amount of corporate dividends and retained earnings.[241] Delaware case law refers to dividends as "a distribution to stockholders out of earnings, profits, or undivided surplus constituting a return to the stockholders upon their investment."[242] This is a broad concept. What is crucial is the direct or indirect wealth transfer from the corporation to its shareholder, or the incurrence of indebtedness by the corporation for the benefit of the investor.[243] Dividends can come in various forms (cash, stock, bonds, in-kind, or a combination of the above) and may be cumulative, partially cumulative or non-cumulative. If multiple classes or series of stock exist, dividend entitlements between holders of various classes of stock may differ, but entitlements between holders of the same class or series of stock may not.[244]

Subject to the articles of association, the power to declare dividends rests solely with the board.[245] The claim of shareholders to the dividend only arises

240. These were abolished in 1967. Until then, the minimum capital requirement had been $ 1,000. *See* R.F. Balotti & J.A. Finkelstein, *Delaware Law of Corporations and Business Organizations* § 1.9 (Wolters Kluwer, 2018).
241. *See* Hannigan v. Italo Petroleum Corporation of America, 77 A.2d 209 (Del. 1949); *see also* Gaskill v. Gladys Belle Oil, 146 A. 337 (Del. Ch. 1929).
242. *See* In re IAC/InterActive, 948 A.2d 471 (Del. Ch. 2008); *see also* Lynam v. Gallagher, 526 A.2d 878 (Del. 1987); Fulweiler v. Spruance (Del. 1966); Penington v. Commonwealth Hotel Construction Corporation (Del. 1931).
243. For an overview of case law, *see* R.F. Balotti & J.A. Finkelstein, *Delaware Law of Corporations and Business Organizations* § 5.26 (Wolters Kluwer, 2018); *see also Fletcher Cyclopedia of the Law of Corporations* § 5318 (Thomson/West, 2014).
244. *See* Nixon v. Blackwell, A.2d 1366 (Del. 1993); *see also* Litle v. Waters, C.A. No. 12155 (Del. Ch. 1992).
245. *See* S. 170 DGCL; *see also* SEC Rule 14a-8 (13), permitting corporations to omit shareholder proposals relating to a specific amount of dividends from the proxy form, on which

following the board resolution in which the distribution is made. Despite their position as residual claimant (*see* § 2.3.5 *supra*), shareholders have no legal title against undistributed profits, even if they favor a declaration of dividends by overwhelming majority. Indeed, the board may also decide to retain earnings for future investments, or because of an expected deterioration in the economic circumstances.[246] Moreover, the decision to either distribute or retain earnings falls, in principle, under the scope of the BJR.[247] The EFS only applies in case the distribution is made to a controller, in preference over and to the detriment of other shareholders. Although the Delaware courts are competent to compel a distribution, that power is hardly, if ever, used, especially where it concerns listed corporations.[248] In practice, only fraud, bad faith or mismanagement can compel a distribution.[249] Whilst the withholding of dividends, induced by a controller, may constitute oppression and therefore a violation of fiduciary duties, that label is typically confined to situations involving minority shareholders in closed corporations.[250] Qualification of behavior as oppression involves a two-tier test. Actions should i) violate the reasonable expectations of the minority and be ii) burdensome, harsh, and wrongful. However, even with regard to close corporations, the US Supreme Court has held as well that firms in an earlier stage of the life-cycle (*see* § 10.6 *supra*) may adopt a more conservative distribution policy. Indeed, they will find it generally more difficult to access capital markets.[251] This board-centrist approach regarding dividends has been prevalent for a long time.[252]

---

see § 16.4.3 *supra*.

246. *See* Gabelli & Co. v. Liggett Group, 479 A.2d 276 (1984); *see also* Moskowitz v. Bantrell, 190 A.2d 749 (Del. 1963).

247. *See* Gabelli & Co. v. Liggett Group, 479 A.2d 276 (1984); *see also* Moskowitz v. Bantrell, 190 A.2d 749 (Del. 1963).

248. *See* Nixon v. Blackwell, A.2d 1366 (Del. 1993); *see also* Litle v. Waters, C.A. No. 12155 (Del. Ch. 1992). For a procedural analysis, *see Fletcher Cyclopedia of the Law of Corporations* § 5325 et seq. (Thomson/West, 2014).

249. *See* Litle v. Waters, C.A. No. 12155 (Del. Ch. 1992); *see also* Burton v. Exxon, 583 F. Supp. 405 (S.D.N.Y. 1984); Sinclair Oil v. Levien, 280 A.2d 717 (Del. 1971). On the concept of controlled corporations, *see* § 17.4.3 *infra*.

250. *See* D.K. Moll, 'Shareholder Oppression & Dividend Policy in the Close Corporation', 60 *Washington & Lee Law Review* 841 (2003); *see also* Dodge v. Ford Motor, 170 N.W. 668 (Mich. 1919), in which outside minority shareholders successfully sued for higher dividends (*see* § 16.2.1 *supra*). Note that at the time, Ford was not yet listed on the stock exchange; the corporation concluded its IPO only in 1956.

251. "Directors of a closely held, small corporation must bear in mind the relatively limited access of such an enterprise to capital markets. This may require a more conservative policy with respect to dividends than would expected of an established corporation". *See* United States v. Byrum, 408 U.S. 125 (1972).

252. *See* Z. Goshen, 'Shareholder Dividend Options', 104 *Yale Law Journal* 885 (1995) (observing that "the last one hundred years, there has not been a single case in which U.S. courts have ordered a management-controlled, publicly traded corporation to increase the dividend"); *see also* V. Brudney, 'Dividends, Discretion, and Disclosure', 66 *Virginia Law*

16.5.2 Financial requirements & director liability

Whether the board may actually exercise its power to declare a dividend depends on the financial position of the corporation. In this regard, a balance sheet test is employed, which is laid down in S. 154 DGCL. The test should show a surplus, meaning that net assets exceed the corporate capital, for a dividend distribution to be permitted. Indeed, the share capital itself cannot be distributed.[253] However, even in case of a deficit, the board may decide to declare a dividend, provided that the current or preceding fiscal year shows a profit. S. 170 DGCL forms the statutory basis for these "nimble dividends". The idea is that such distributions may be necessary to strengthen the shareholder base.[254] Moreover, the board enjoys great latitude in determining the value of the assets. It is not bound by general accepted accounting principles or other standards. Intangible assets may also be taken into account for calculating the size of corporate assets.[255] Thus, the balance sheet test does not necessarily prevent the distribution of unrealized, future profits, and its usefulness may be questioned. Additionally, distributions may not lead to insolvency. A corporation should remain able to meet its obligations, even after declaring the dividend. Insolvency has been described as "liabilities in excess of a reasonable market value of assets held"[256] or (slightly more forgiving) a "deficiency of assets below liabilities with no reasonable prospect that the business can be successfully continued".[257] Indeed, the insolvency-based approach does not imply a bright-line test. These safeguards notwithstanding, it remains possible that the board declares an excessively high dividend, in the sense that it does not satisfy the balance sheet or insolvency tests. A director who willfully or negligently approves of that dividend violates his fiduciary duties, and is liable for the full amount of the unlawful dividend paid.[258]

Review 85, 100-108 (1980) (concluding that, absent a visible conflict of interest, "the prevailing legal doctrine holds dividend policy to be a matter of managerial discretion").

253. *See* Frederick Hsu Living Trust v. ODN Holding, C.A. No. 12108-VCL (Del. Ch. 25 April, 2017), holding that a contractual obligation to redeem preferred shares does not absolve directors from their fiduciary duties.

254. *See* S. 154 and S. 170 DGCL. There has been some confusion in older case law regarding the concepts of "fiscal year" and "net profit". *See* R.F. Balotti & J.A. Finkelstein, *Delaware Law of Corporations and Business Organizations* § 5.26 (Wolters Kluwer, 2018); *see also* § 9.3 *supra* on dividend clienteles.

255. *See* SV Investment Partners v. ThoughtWorks, 7 A.3d 973, 988 (Del. Ch. 2010); *see also* Teachers' Retirement System of Louisiana v. Anschutz, C.A. No. 444-N (Del. Ch. 2004); Klang v. Smith's Food and Drug Centers, 702 A.2d 150, 152 (Del. 1997).

256. *See* Trenwick America Litigation Trust v. Ernst & Young, 906 A.2d 168, 195 (Del. Ch. 2006).

257. *See* Production Resources v. NCT Group, 863 A.2d 772, 782 (Del. Ch. 2004). On balance- and insolvency tests, *see also* § 6.40 (R)MBCA.

258. *See* S. 174 DGCL, which in (a) also provides for a 6-year window in which liability should be established and in (c) stipulates that a director may be subrogated if the shareholder was

16.5.3 Inferior and superior dividend rights

In principle, investors are entitled to an equal amount of corporate dividends and retained earnings.[259] This default rule often applies equally in case voting rights differ, for example through a dual class equity structure. For an instructive example, reference is made to the prospectus of Snap.[260] Despite the default rule, the Delaware Supreme Court has deemed the issuance of non-profit participating stock lawful. It did so in *Lehrman v. Cohen*.[261] In this particular case, the non-profit participating stock had been issued to the General Counsel for a nominal amount. Thus, he could elect himself to the board with a view to preventing deadlocks between the joint venture parties, which were both represented through an equal number of directors. Specifically, the Delaware Supreme Court ruled:

> "[T]here is nothing in § 218, either expressed or implied, which requires that all stock of a Delaware corporation must have both voting rights and proprietary interests. Indeed, public policy to the contrary seems clearly expressed by 8 Del. C. § 151(a)[5] which authorizes, in very broad terms, such voting powers and participating rights as may be stated in the certificate of incorporation. Non-voting stock is specifically authorized by § 151(a); and in the light thereof, consistency does not permit the conclusion, urged by the plaintiff, that the present public policy of this State condemns the separation of voting rights from beneficial stock ownership."[262]

Whilst *Lehrman v. Cohen* rests on a specific set of circumstances, the case, because of its generic formulation, has been interpreted broadly.[263] Especially because of the consistency argument, it should be assumed that the creation of stocks carrying either superior dividend or superior retained earnings rights would be permitted as well. Nevertheless, financial dual class equity structures have remained somewhat of an oddity, in contrast to control-based dual class equity structures.[264]

---

aware of the unlawful nature of the distribution. On the fiduciary duties of directors in the vicinity of insolvency and to creditors, *see* § 16.3.2 *supra*.

259. *See* Hannigan v. Italo Petroleum Corporation of America, 77 A.2d 209 (Del. 1949); *see also* Gaskill v. Gladys Belle Oil, 146 A. 337 (Del. Ch. 1929).
260. *See* http://www.sec.gov/Archives/edgar/data/1564408/000119312517029199/d270216ds1.htm/.
261. *See* Lehrman v. Cohen, 222 A.2d 800, 806-807 (Del. 1966).
262. *See* Lehrman v. Cohen, 222 A.2d 800, 806-807 (Del. 1966). Note that the company founded by Lehrman and Cohen was Giant Food, which was acquired by Dutch Royal Ahold in 1981.
263. S*ee* R.F. Balotti & J.A. Finkelstein, *Delaware Law of Corporations and Business Organizations* § 5.6 (Wolters Kluwer, 2018).
264. *See* Gompers, Ishii & Metrick 2010, *supra* note 89, in Table 1 for statistics regarding dual class voting and dividend structures at US public companies.

Whether Delaware corporate law allows for the creation of stocks which, according to the articles of association, lack both voting rights, dividend rights and retained earnings rights – perhaps the ultimate investor disenfranchisement[265] – is not entirely clear. It could be argued that denying investors these fundamental powers excessively undermines their position as residual claimant (*see* § 2.3.5 *supra*) and that consequently, such a security would be in conflict with "settled rules of public policy" (*see* § 16.2.3 *supra*). To my knowledge, this specific matter has never been brought before court. As a minimum, S. 151 DGCL mandates that the corporation shall have outstanding 1 or more share(s) that (together) have full voting powers and profit participation rights. This would imply that regarding all other stocks, such a disenfranchising combination would be permitted. Indeed, dual class equity structure corporations occasionally state they do not intend to declare dividends, not even in respect of the inferior or non-voting stock. Compensating for the absence of voting rights in the form of a preferential dividend treatment is not mandatory.[266] Effectively, although not legally, this creates non-voting shares lacking dividend rights.

This room for maneuver to disenfranchise investors, due to the absence of substantive criteria regarding the rights that must be vested in a share, may disturb (institutional) parties, and perhaps rightfully so. However, there exists no reason for widespread panic. Indeed, the rationales behind inferior control rights and inferior financial rights differ. Inferior voting stock will usually be issued to outside investors, as to prevent them from gaining control. Meanwhile, inferior financial stocks best fits the preferences of shareholders which have already obtained control, with a view to further cementing their position (*see* § 1.3.2 *supra*). Naturally, it would be conceivable that in practice, no dividend distributions are made in respect of inferior voting stock for an extended period of time. However, in that case, any profits realized accrue in the form of retained earnings. Shareholders, including the owners of inferior voting stock, will be able to achieve a capital gain by selling a part of their holdings, thus obtaining a homemade dividend (*see* § 9.2 *supra*).

265. Indeed, such an instrument would dwarf the one criticized by Ripley in 1926. *See* § 15.3.1 *supra*.
266. For an instructive example, reference is again made to the case of Snap. *See* § 11.4 *supra*.

Chapter 17. Dual class equity restructurings

17.1 Introduction

In Chapter 17, I reflect on the requirements for introducing or abolishing a dual class equity structure at a US listed corporation. To that end, I first study older case law, revolving around the seminal *Williams v. Geier*-string of cases (§ 17.2) and discuss a subsequent private ordering initiative by Google (§ 17.3). Meanwhile, there have been crucial developments in recent case law. In fact, it could well be argued that *MFW*-inspired case law has presented a new paradigm. These cases are examined extensively (§ 17.4), applied specifically in relation to dual class equity structure recapitalizations (§ 17.5) and analyzed critically (§ 17.6).

17.2 The pre-existing framework

17.2.1 An interplay of listing rules and the delaware general corporation law

The regulatory scheme in respect of dual class equity restructurings consists of two layers, being the listing rules of stock exchanges and statutory Delaware law. First, the NYSE listing rules should be taken into account. S. 313 (A) NLCM stipulates that vested voting rights cannot be reduced or restricted (*see* § 15.4.4 *supra*). Thus, introducing a dual class equity structure in the mid-stream phase is prohibited, regardless whether this is executed by issuing superior or time-phased (or tenure or loyalty) voting stock, introducing a capped voting mechanism or in the form of an exchange offer. However, in case of a pre-existing dual class equity structure, the issuance of additional superior voting stock is allowed (S. 313.10 NLCM). Moreover, it is permitted to issue non-voting stock, provided that the common and non-voting shares are substantively similar, except for the right to vote.[1] Under the elaborate guidance of the NYSE listing rules, it has furthermore been possible to split common shares into one listed class of superior voting stock and two listed classes of

1. Note shareholder approval is required in case an issuance exceeds 20 % of the equity. *See* S. 312.03 NLCM.

inferior voting stock, with the latter carrying superior dividend rights. In that case, the overriding arguments were that all parties received identical portions of superior and inferior voting stock, and that a one-way mechanism to convert superior into the inferior voting stock was absent.

Second, Delaware corporate law should be considered. As opposed to the stock exchange listing rules, the DGCL offers broad powers to amend the articles of association and introduce a dual class equity structure in the midstream phase. Although a shareholder may not be deprived of his competences or see them impaired against his consent, investors can denounce their rights by means of an AGM vote. (By contrast, NYSE listing rules prevent a reduction of shareholder rights, even if consent has been obtained.) For a proper understanding of the Delaware approach, it should be acknowledged that technically, a recapitalization can be implemented in various ways. For instance, a restructuring can be executed by issuing authorized but unissued superior (or inferior) voting shares. The board is principally empowered to issue stock, up to the amount authorized in the corporation's articles of association (S. 161 DGCL). Importantly, shareholder pre-emptive rights have weakened considerably over the years. In fact, investors have no such right by default (S. 102 (b) (3) DGCL).[2] Furthermore, the rights and preferences of outstanding shares can be modified. Inferior or common voting stock can be converted into common or superior voting shares, and superior or common voting stock can be split into common and inferior voting shares. These and other metamorphoses are all governed by S. 242 DGCL.[3] This provision requires a board proposal to amend the articles of association, followed by confirmation through a vote of the AGM.[4] There, an absolute majority suffices, subject to articles of association provisions to the contrary.[5] Finally, a stock split can also take place in the form of a dividend.[6] By distributing superior or inferior voting stock to existing investors, the number of issued shares increases, whilst the corporation's

---

2. For a critical analysis, *see* J.M. Fried & H. Spamann, 'Cheap-Stock Tunneling Around Preemptive Rights' (2018), available at http://www.ssrn.com/; *see also* J.C. Coffee, 'The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role', 89 *Columbia Law Review* 1618, 1639-1640 (1989). However, recall that S. 312.03 NLCM subjects issuances over 20 % of the equity to shareholder approval.
3. S. 242 DGCL also covers modifications in respect of financial entitlements of shareholders. As dual class voting structures are most common, the discussion focuses on such recapitalizations.
4. The Articles of Association may reserve the board's power to modify rights and preferences vested in any and all classes of shares. *See* S. 151 (a) DGCL. In that case, *ad hoc* AGM approval is not required. For the remainder of the discussion, I will disregard this possibility.
5. Note a controlling shareholder should honor his fiduciary duties when proposing an amendment which adversely affects existing investors. *See* In re Delphi, C.A. No. 7144-VCG (Del. Ch. 2012); *see also* § 17.5.2 *infra*.
6. In fact, NYSE has requested issuers to phrase their communications carefully to prevent confusion. *See* S. 703 NLCM, containing thresholds as to whether a restructuring qualifies as stock split or dividend. *See* R.F. Balotti & J.A. Finkelstein, *Delaware Law of Corporations and Business Organizations* § 8.11 (Wolters Kluwer, 2018).

market capitalization remains unchanged. As the recapitalization involves a dividend, S. 170 DGCL (*see* § 16.5.1 *supra*) applies, instead of S. 242 DGCL, which governs a change in existing investor rights. A modification of the articles of association may not be required, provided the shares to be distributed are already authorized by the articles. In that case, the AGM does not have the right to vote on the transaction. S. 170 DGCL and S. 242 DGCL are different procedures, and these should be followed strictly.[7]

If the board proposal, made pursuant to S. 242 DGCL, would alter the number of shares in a certain class or adversely affect the rights and preferences of holders of a class of stock, a class vote is required, in addition to the general vote of the AGM. This system applies by analogy in case the rights of some but not all holders of a certain class of stock are restricted.[8] The class vote should even be held if the shares concerned would be non-voting otherwise, for instance, when a proposal aims to restrict the dividend entitlement of non-voting stock. If three classes of stock exist, a proposal may potentially affect two of them. In that case, both affected classes of stock vote on a combined, one share, one vote basis, unless the articles of association provides otherwise.[9] The foregoing gives rise to the question under what circumstances rights of holders of a certain class of stock are deemed to be adversely affected. Here, the Delaware courts have adopted a rather deferential approach. From an early stage onwards, and consistent with the concept of majority rule and the life-cycle perspective (*see* § 10.6 *supra*), it has been recognized that amending the articles of association is an "inherent right" of the corporation.[10] Moreover, "[t]he position of a class or series of shares relative to other classes or series is not a power, preference, or special right."[11] In fact, and in stark contrast to the NYSE-approach, the vested rights doctrine in respect of dividends has been declared "dead". Indeed, the Delaware courts have ruled, on multiple occasions, that investors may be deprived of accrued but unpaid dividends.[12] (By contrast, depriving

7. *See* Blades v. Wisehart, C.A. No. 5317-VCS (Del. Ch. 2010), where a corporation attempted to avoid a vote of the AGM by arguing that such a step was not necessary if the transaction had been structured as a dividend.
8. *See* Matulich v. Aegis Communications Group, C.A. No. 2601-CC (Del. Ch. 2007).
9. *See* S. 242(b)(2); *see also* Matulich v. Aegis Communications Group, C.A. No. 2601-CC (Del. Ch. 2007) (rejecting the idea of a separate vote of approval for a smaller class of stock). For an instructive example, reference is again made to the prospectus filed by Snap in preparation for its 2017 IPO, at 155-156. *See* http://www.sec.gov/Archives/edgar/data/1564408/000119312517029199/d270216ds1.htm/.
10. *See* Delaware Railroad v. Tharp, 6 Del. 149, 174 (Del. 1855). Since voting rights have equally been considered a property right of investors, dual class recapitalizations may also be framed as a "clash of property rights".
11. *See* Hartford Accident & Indemnity v. W.S. Dickey Clay Manufacturing, 24 A.2d 315 (Del. Ch. 1942).
12. *See* Coyne v. Park & Tilford Distillers, 38 Del. Ch. 514, 154 A.2d 893 (Del. 1959); *see also* Federal United Corporation v. Havender, 24 Del. Ch. 318, 11 A.2d 331 (Del. 1940); Keller v. Wilson & Co., 21 Del. Ch. 13, 180 A. 584 (Del. Ch. 1935); Davis v. Louisville Gas & Electric, 16 Del. Ch. 157, 142 A. 654 (Del. Ch. 1928). For an analysis, *see* R.F. Balotti &

shareholders of dividends entitlements does require AGM approval.) Voting rights are similarly susceptible to modification.[13] Importantly, a class vote is not required in case a recapitalization affects voting rights of existing investors generally, for instance due to an equity raise, instead of those of a particular class of stock.[14] Moreover, the scope of class vote is has been interpreted narrowly.[15]

17.2.2 Williams v. Geier

In this regulatory jungle of state law and listing rules, *Williams v. Geier* has long been considered the seminal US case on dual class equity structure recapitalizations.[16] The lawsuit concerned the adoption of a time-phased (or tenure, or loyalty) voting plan (*see* § 10.6.4 *supra*) by Cincinnati Milacron. Investors would be granted nine additional votes per share after the scheme was approved (and thus, ten in total).[17] The AGM did indeed approve the plan. Under the proposal, the additional voting rights would be lost upon a transfer of stock, until the acquirer would again have held his shares for three consecutive years.[18] Notably, each shareholder qualified to participate in the recapitalization with his entire holdings. As such, the Delaware courts deemed self-dealing through a uniquely valuable, non-ratable benefit to the controlling shareholder not present. Although it was acknowledged that the dynamics of the mechanism would, in practice, have the effect of strengthening the grip of the controller, an entrenching motive was not established. Crucially, there was no evidence that a majority of the board was interested or dominated by the controller. Instead, the scheme was held to promote long-term value and planning. Moreover,

---

J.A. Finkelstein, *Delaware Law of Corporations and Business Organizations* § 8.2 (Wolters Kluwer, 2018).

13. *See* Morris v. American Public Utilities, 14 Del. Ch. 136, 122 A. 696 (Del. Ch. 1923); *see also* Maddock v. Vorclone, 17 Del. Ch. 39, 147 A. 255 (Del. Ch. 1929). This rather flexible approach differs night and day with the strict German legal framework. *See* Chapter 23.
14. *See* Orban v. Field, C.A. No. 12820 (Del. Ch. Dec. 30, 1993).
15. *See* Sullivan Money Management v. FLS Holdings, 628 A.2d 84 (Del. 1993); *see also* Warner Communications v. Chris-Craft Industries, C.A. No. 10965 (Del. Ch. 1989). For an analysis, *see* R.F. Balotti & J.A. Finkelstein, *Delaware Law of Corporations and Business Organizations* § 8.11 (Wolters Kluwer, 2018).
16. *See* Williams v. Geier, 671 A.2d 1368 (Del. 1996). In its ruling, the Delaware Supreme Court referred to Providence & Worcester v. Baker, 378 A.2d 121 (Del. 1977). *See* § 16.4.1 *supra*.
17. The case builds on a string of similar recapitalizations, which were all approved. *See* Hahn v. Carter-Wallace, C.A. No. 9097 (Del. Ch. Oct. 9, 1987); *see also* Weiss v. Rockwell International, C.A. No. 8811 (Del. Ch. Feb. 6, 1987); Sachs v. R.P. Scherer, C.A. No. 7537 (Del. Ch. Apr. 2, 1984); Societe Holding Ray D'Albion v. Saunders Leasing System, C.A. No. 6648 (Del. Ch. Dec. 16, 1981). For an analysis, *see* R.F. Balotti & J.A. Finkelstein, *Balotti and Finkelstein's Delaware Law of Corporations and Business Organizations* § 6.49 (Wolters Kluwer, 2018).
18. Thus, Williams v. Geier involved an instant recapitalization ("high/low") instead of a "low-high" model, of which the effects would are only felt after the vesting period has been fulfilled.

the mechanism had been approved by the AGM. Thus, the recapitalization was not scrutinized under the EFS or (a variant of) the EST, but instead subjected to review under the BJR.[19] Consequently, midstream dual class equity structure recapitalizations, especially those similar to *Williams v. Geier*, would be met with deference by the courts.

17.3 Google: pioneering under a regulatory vacuum

Williams v. Geier had existed for 15 years when Google executed a dual class midstream recapitalization is Google. In 2004, it had conducted an IPO, which featured class A stock, carrying 1 vote per share, and B class stock, with 10 votes per share (the economic rights of the different classes of shares were identical).[20] The scheme gave the Sergey Brin and Larry Page, the founders of Google, 56 % of total voting power, although they only held a 15 % equity interest. In 2011, the subsequent creation of non-voting class C stock was proposed. Technically, the C class shares were issued in the form of a proportional dividend; effectively, this constituted a stock split. The C class stock began trading in 2014. Although the move was considered highly controversial, Brin and Page pursued it nonetheless because even with the pre-existing dual class equity structure, their control power was slowly eroding over time. This was caused by the sale of B class stock to provide liquidity and semi-permanent issuances of A class stock to fund acquisitions and employee compensation. The creation of non-voting class C stock aimed to solve these issues and, thus, to retain Google's focus on long-term innovation.[21]

The procedural approach to the recapitalization was as follows. To alleviate potential conflicts of interest with outside minority investors, Google established a Special Committee consisting solely of independent directors.[22] The terms negotiated between, on the one hand, the Special Committee and, on the other, Brin and Page, included a Transfer Restriction Agreement (TRA). This entailed that the founders were required to dispose an equal amount of (superior voting) class B stock when selling (non-voting) class C stock. How-

19. For an elaborate analysis, *see* P. Lee, 'Protecting Public Shareholders: The Case of Google's Recapitalization', 5 *Harvard Business Law Review* 281, 295-299 (2015).
20. Note Google's 2004 IPO adhered to the "Wang-formula". *See* § 15.4.2 *supra*.
21. *See* Larry Page & Sergey Brin, 'Founders' Letter 2012' (2012), available at http://www.sec.gov/Archives/edgar/data/1288776/000119312512160666/d333341dex993.htm/.
22. For a highly critical evaluation of these events, *see* Lee 2015, *supra* note 19. Whereas his descriptive analysis is quite valuable, I am rather skeptical as to his normative observations. For a more nuanced discussion of Google's scheme, *see* Y-H. Lin, 'Controlling Controlling-Minority Shareholders: Corporate Governance and Leveraged Corporate Control', 2016 *Columbia Business Law Review* 453 (2016), arguing that whereas investors can discount individual articles of association provisions in the IPO stage, this later becomes more difficult.

ever, the Transfer Restriction Agreement would have been annulled upon the founders voting power decreasing to less than 34 %, and could also be waived or amended by a majority vote of independent directors.[23] Additionally, the terms provided that in case of a change of control, all stockholders would receive equal compensation (the Equal Treatment Amendment).[24] The Special Committee unanimously recommended the introduction of class C non-voting stock pursuant to these terms. As the DGCL does not strictly mandate a "majority-of-the-minority" vote to ratify such recapitalizations (*see* § 11.3.1 *supra*),[25] the participation of interested shareholders is allowed as well. The involvement of Brin and Page meant that the adoption of the proposal was guaranteed from the outset.[26] However, at the subsequent AGM, the holders of class A stock rejected the proposal by 85 % of the votes.

Unsurprisingly, dissatisfied shareholders sued Google. Eventually, a settlement was reached and subsequently approved by the Court of Chancery.[27] The agreement modified the terms previously negotiated in three respects. First, the Transfer Restriction Agreement could be waived or modified only if i) recommended by a committee solely consisting of independent directors, ii) approved unanimously by the board and iii) announced 30 days in advance, to allow for legal proceedings to be initiated. Any litigation would be conducted under the EFS.[28] Second, if more than 10 million C class shares were to be issued to finance an acquisition, independent directors would have to consider the effects of the transaction on the holders of class C stocks separately. Indeed, their stake might be diluted, and to a larger extent than A or B class stock, because inferior voting stock typically suffers from a discount compared to common shares (*see* § 10.3.1 *supra*). Third, and perhaps most interestingly, the settlement provided that Google (not the founders) would compensate the holders of class C stock (including the founders) for the average annual discount of these instruments compared to Class A stock (the true-up arrangement) through additional dividends. For every percent of discount exceeding 1 up to 5, shareholders are reimbursed for 20 %. In 2014, the average discount amounted to 1.65 %, and

23. *See* Lee 2015, *supra* note 19, at 285. In fact, this concerns a reverse equity-based sunset. *See* § 11.3.3 *supra*.
24. *See* Lee 2015, *supra* note 19, at 285, correctly noting this part of the agreement currently carries mere theoretical value, given that Google's market capitalization makes a takeover impossible.
25. Note the "majority-of-the-minority" vote does play an important role in Delaware case law. *See* § 11.3.1 *infra*.
26. As it concerned a pro rata distribution dividend, not for the purpose of entrenchment but to ensure long-term value, approved by the AGM, the transaction likely would have been reviewed under the BJR. *See* § 16.3.4 *supra*.
27. *See* In re Google Class C, No. 7469-CS (Del. Ch. 2013).
28. *See* Lee 2015, *supra* note 19, at 287, observing that the Transfer Restriction Agreement appears to contain a loophole in the sense that it is not reactivated when founders re-increase their voting power to over 34 %.

the estimated value of the additional dividends was $ 530 million.[29] Especially in light of the developments to be discussed shortly, Google's 2012 dual class equity structure recapitalization has a pragmatic, private ordering character. Additionally, it provides for a more substantive – not: procedural – set of remedies, due to the Equal Treatment Amendment and the true-up arrangement.

17.4 A new judicial paradigm

17.4.1 Kahn v. M&F Worldwide

Kahn v. M&F Worldwide (MFW)[30] may be considered a landmark decision regarding conflicted transactions in general, and dual class equity structure recapitalizations in particular.[31] The case revolved around MacAndrews & Forbes – a firm with a prominent place in US corporate history[32] – proposing to acquire the 56.6 % of M&F Worldwide stock it did not yet own. To that end, MacAndrews & Forbes offered $ 24 per share. A Special Committee consisting solely of independent directors was formed to negotiate the terms of the merger. After the Special Committee made a counter-offer for $ 30, an agreement was eventually reafched for $ 25. This represented a 47 % premium as compared to the pre-offer closing price of $ 16.96, and the merger was approved by 65 % of the unaffiliated shareholders, through a majority-of-the-minority vote (*see* § 11.3.1 *supra*). Both the formation of the Special Committee and the organization of the majority-of-the-minority vote were mandated by the offeror *ab initio* for the merger to go forward.[33]

In MFW, the Delaware Supreme Court endorsed application of the deferential BJR on a public-to-private transaction proposed by the controlling

29. *See* Lee 2015, *supra* note 19, at 289, concluding that the introduction of non-voting C class cost Google shareholders $ 7.7 billion. However, between the announcement of the scheme (in April 2012) and settlement approval (October 2013), Google's stock price rose roughly 75 % (versus a "mere" 33 % for NASDAQ).
30. *See* Kahn v. M&F Worldwide, 88 A.3d 635 (Del. 2014).
31. The term "conflicted transactions" is a catch-all phrase, covering situations where a majority of the board lacks independence, is self-interested or engages in self-dealing. It not only encompasses transactions in which a controlling shareholder stands on both sides of the transaction, but also cases where he competes with outside minority investors for compensation. In the second category, there exist three categories: i) the controller receiving greater consideration; ii) the controller takes a different form of compensation or iii) the controller extracts a "unique benefit". *See* In re Crimson Exploration, 2014 WL 5449419 (Del. Ch. 2014).
32. *See* Revlon v. MacAndrews & Forbes Holdings, 506 A.2d 173 (Del. 1986); *see also* § 16.3.4 *supra*.
33. *See* Kahn v. M&F Worldwide, 88 A.3d 635, 652-655 (Del. 2014).

shareholder, subject to certain conditions being met.[34] Judicial scrutiny of such mergers had previously been carried out solely under the much stricter EFS, following the seminal *Weinberger* case.[35] Moreover, the burden of proof under the EFS fell on the defendant, who thus found himself in a rather precarious situation.[36] The only exception was that, when the merger was subjected to either approval by an independent Special Committee or a majority-of-the-minority vote, the burden of proof would shift towards the plaintiff. Nevertheless, the EFS would still apply.[37] However, the effects of cumulating both mechanisms had remained unclear.[38] According to some commentators, MFW did not come as a total surprise. Indeed, then-Chancellor Strine had contemplated granting BJR review to transactions structured using both a Special Committee and the majority-of-the-minority vote in *Cox Communications*.[39] Meanwhile, only in MFW, it was explicitly held that in those circumstances, the BJR did apply.[40]

---

34. *See* Kahn v. M&F Worldwide, 88 A.3d 635, 645 (Del. 2014); *see also* In re MFW, 67 A.3d 496 (Del. Ch. 2013). For a comprehensive analysis, *see* T. Vos, 'Baby, It's Cold Outside…' – A Comparative and Economic Analysis of Freeze-Outs of Minority Shareholders', 15 *European Company and Financial Law Review* 148 (2018); *see also* I. Fiegenbaum, 'The Geography of MFW-Land', 41 *Delaware Journal of Corporate Law* 763 (2017); D. Wilson, 'Desirable Resistance: *Kahn V. M&F Worldwide* and the Fight for the Business Judgment Rule in Going-Private Mergers', 17 *University of Pennsylvania Journal of Business Law* 643 (2015).
35. *See* Weinberger v. UOP, 457 A.2d 701 (Del. 1983). The case serves as an iconic "how not to" for transactions with controlling shareholders, due to a plethora of conflicts of interests. Signal might have been willing to offer $ 24 per UOP stock, but UOP's board accepted $ 21. The fairness opinion was provided by a director who simultaneously served as investment banker and, in that capacity, negotiated with the corporation he governed on the fee the bank would charge for its services. Many aspects of the transaction remained undisclosed as well.
36. Before *Weinberger*, public-to-private transaction proposed by a controlling shareholder had been governed by the potentially more onerous "business purpose test". *See* Singer v. Magnavox, 380 A.2d 969 (Del. 1977); *see also* Tanzer v. International Gen. Industries, 379 A.2d 1121 (Del. 1977); Roland International v. Najjar, 407 A.2d 1032 (Del. 1979). However, it was not interpreted overly strictly. For a contemporary analysis, *see* E.J. Weiss, 'Balancing Interests in Cash-Out Mergers: The Promise of Weinberger v. UOP, Inc.', 8 *Delaware Journal of Corporate Law* 1 (1983).
37. *See* Kahn v. Lynch Communication Systems, 638 A.2d 1110, 1117 (Del. 1994); *see also* Rosenblatt v. Getty Oil, 493 A.2d 929, 937 (Del. 1985).
38. Plaintiffs argued that prior case law of the Delaware Supreme Court should be read to the effect that even in those circumstances, the BJR could not apply. *See* Kahn v. Lynch Communication Systems, 638 A.2d 1110, 1115 (Del. 1994) ("A controlling or dominating shareholder standing on both sides of a transaction, as in a parent-subsidiary context, bears the burden of proving its entire fairness"). The Court of Chancery rejected this claim, holding that the statement lacked precedential effect and was based on different facts and circumstances.
39. *See* In re Cox Communications, 879 A.2d 604, 618 (Del. Ch. 2005).
40. One may wonder where this leaves Google if it would ever waive or modify its TRA. Whereas Google is bound by contract to adhere to the EFS, the preceding negotiations were undoubtedly inspired by Weinberger case law. *See* § 16.3.4 *supra*.

In the subsequent *Corwin*-case, it was ruled that, when a merger is initiated by a shareholder who is not a controller, the transaction only requires a majority-of-the-minority vote to be subjected to the BJR.[41]

17.4.2 Dissecting the MFW-Framework

Thus, MFW posits two main criteria for applicability of the BJR: a majority-of-the-minority vote and Special Committee approval. In isolation, these "cleansing mechanisms" are not very effective. However, when combined, they replicate a shareholder value maximizing arm's length transaction, approved by both the board and a majority of all stockholders.[42] Combining a Special Committee and a majority-of-the-minority vote should not only allow, but in fact ought to ensure the BJR applies, as this rewards controllers for taking the steps necessary to protect the interests of outside minority shareholders.[43]

Both elements of the MFW-framework merit some further discussion. First, I analyze the majority-of-the-minority vote. In its current understanding, this vote requires a majority of the (disinterested, unaffiliated) shareholders,[44] meaning that abstentions effectively count as a no.[45] Although in practice, differences may be minimal, both forms of voting should conceptually be distinguished from each other. Some additional procedural requirements apply as well. The majority-of-the-minority vote should be (i) fully informed and (ii) may not be coerced.[46] To fully inform investors, MFW's proxy statement outlined the negotiating process and contained various range-based projections as to the value of the shares.[47] The controlling shareholder also showed a strong commitment

41. *See* Corwin v. KKR Financial Holdings, 125 A.3d 304, 308 (Del. 2015); *see also* J.R. Slights & M. Diller, '*Corwin v. KKR Financial Holdings LLC*–An After-Action Report', 24 *Fordham Journal of Corporate & Financial Law* 1 (2018).
42. *See* In re MFW, 67 A.3d 496, 528 (Del. Ch. 2013), noting that with only a Special Committee in place, there is a bargaining agent to address shareholders' collective action problems, but these cannot protect themselves. Conversely, shareholders actually can protect themselves by withholding their approval in a "majority-of-the-minority" vote but, absent an independent negotiator, the terms of the proposed deal will likely be poor.
43. Then-Chancellor Strine eloquently illustrated the matter through a witty and wonderfully effective comparison:

    > "Assume you have a teenager with math *and* English assignments due Monday morning. If you tell the teenager that she can go to the movies Saturday night if she completes her math *or* English homework Saturday morning, she is unlikely to do both assignments Saturday morning. She is likely to do only that which is necessary to get to go to the movies —*i.e.* complete one of the assignments—leaving her parents and siblings to endure her stressful last-minute scramble to finish the other Sunday night."

44. *See* Kahn v. M&F Worldwide, 88 A.3d 635, 645 (Del. 2014).
45. For a counting exercise, *see* In re PNB Holding WL 2403999 (Del. Ch. 2006).
46. This invalidates the vote's cleansing effect. *See* Corwin v. KKR Financial Holdings, 125 A.3d 304, 308 (Del. 2015).
47. For a bright example of an ill-informed shareholder vote, *see* In re Xura, C.A. No. 12698-VCS (Del. Ch. December 10, 2018), involving undisclosed private negotiations, post-transaction employment, and threats of removal.

not to engage in coercive behavior. To that end, he pledged not to bypass the Special Committee by contacting shareholders directly in the form of a tender offer. That would have impaired the negotiating position of the Special Committee considerably.[48]

Second, the MFW-framework requires approval of a Special Committee. The Special Committee must (i) consist solely of independent directors. Moreover, the members of the Special Committee (ii) have to honor their duty of care in negotiating a fair price.[49] Doing so distances the controlling shareholder from the decision-making process whilst also adding an additional layer of protection for outside minority investors. Finally, the Special Committee (iii) should be empowered to freely select its own advisors and to say no definitively. MFW's Special Committee received credit from the Court of Chancery for organizing pitches by various investment banks, thereby allowing them to compete on both strategy and fees. As further evidence that the Special Committee took its tasks seriously, it convened eight times and was presented many valuation projections (based on discounted cash flows, premiums paid, and other metrics) on each occasion, following constantly updated forecasts.[50] Additionally, MFW's Special Committee actively considered other strategic options, including shopping the corporation to other prospective buyers, although MacAndrews & Forbes had expressly stated it was not interested in selling its shares. Plaintiffs, for their part, heavily questioned the independence of the directors that formed the Special Committee, drawing an elaborate web of alleged business and social ties with the controller of MacAndrews & Forbes – but to no avail.[51]

To comply with the MFW-framework, both the negotiating position of the Special Committee and the plan to hold a majority-of-the-minority vote should be clear *ab initio*. However, later case law mitigates this requirement to a certain extent. In *Synutra*, the controlling shareholder's initial going private

48. For examples of coercion, *see* Sciabacucchi v. Charter Communications, C.A. No. 11418-VCG (Del. Ch. July 26, 2018) (combining multiple issues in a single agenda item); *see also* Kahn v. Lynch Communication Systems*,* 638 A.2d 1110, 1114-1119 (Del. 1994) (where the bidder stated that if the Special Committee did not accept his offer, a lower tender offer would follow); Lacos Land v. Arden, 517 A.2d 271 (Del. Ch. 1986) (there, the controller indicated that he would block transactions clearly in the corporation's interests if a recapitalization did not pass).
49. For an elaborate analysis on composition and functioning of the Special Committee, *see* A.R. Brownstein, B.M. Roth & E. Tetelbaum, 'Use of Special Committees in Conflict Transactions' (2019), available at http://www.corpgov.law.harvard.edu/; *see also* R.J. Gilson & J.N. Gordon, 'Controlling Controlling Shareholders', 152 *University of Pennsylvania Law Review* 785, 829-842 (2003).
50. Importantly, the final offer of $ 25 fell in each of the respective valuation ranges presented (which were indeed rather wide, ranging from $ 15 to $ 45). *See* Kahn v. M&F Worldwide, 88 A.3d 635, 651-654 (Del. 2014).
51. *See* In re MFW, 67 A.3d 496 (Del. Ch. 2013), even holding that one director, who had co-invested with MFW's controller at least since 1988, was independent, as the profits had made him "seriously rich".

proposal did not contain the two cleansing mechanisms.[52] The controller only stipulated these conditions would apply in a letter, delivered two weeks into the negotiating process. The letter was received shortly after the Special Committee had been formed, but before it had engaged with an investment bank or legal counsel. Additionally, price negotiations had not yet taken place. Chief Justice Strine elaborated that the main goal of preventing investor disenfranchisement is still achieved if the MFW-conditions are in place before any substantive negotiations are initiated.[53] Meanwhile, the Delaware Supreme Court warned that its benevolent approach should not be considered as an invitation to postpone a first, MFW-compliant offer until the bargaining process has effectively been finalized.[54]

17.4.3 Qualifying as controlling shareholder

The MFW-framework places great importance on the question under which circumstances a shareholder qualifies as controller. Indeed, if a controlling shareholder is absent, installing a Special Committee is not required to ensure BJR review.[55] Basically, there exist two scenarios.[56] First, a shareholder is in control when he holds in excess of 50 % of the voting rights. This situation is rather self-explanatory. Second, domination and control of the board's (not: operational) decision-making can transform a minority blockholder into a controlling shareholder.[57] This requires that the investor, as a practical

52. *See* Flood v. Synutra, No. 101, 2018 (Del. 2018). For earlier, similar case law, *see* Olenik v. Lodzinski, C.A. No. 2017-0414-JRS (Del. Ch. 2018); *see also* In re Martha Stewart Living Omnimedia, 2017 WL 3568089 (Del. Ch. 2017) (the MFW-conditions only have to be in place after a controller initiates negotiations on special "side-deals"); In re Books-A-Million, 2016 WL 5874974 (Del. Ch. 2016), 164 A.3d 56 (Del. 2017).
53. *See* Flood v. Synutra, No. 101, 2018 (Del. 2018). For an analysis, *see* R. Cooper, R. Zutshi & V. Richardson, 'Clarifying MFW's ab initio Condition' (2018), available at http://corpgov.law.harvard.edu/; *see also* D.E. Wolf & G. Zohari, 'Controlling Stockholder M&A Does Not Automatically Trigger Entire Fairness Review' (2018), available http://www.corpgov.law.harvard.edu/, arguing *Synutra* offers a short window of opportunity for controllers to test the market reaction to a non-MFW compliant bid, allowing them to contemplate how to proceed.
54. *See* Flood v. Synutra, No. 101, 2018 (Del. 2018). For a recent confirmation, *see* Olenik v. Lozinski (Del. 2019), ruling the *ab initio*-requirement had not been fulfilled, as over a 10 month period, "preliminary discussions" developed into "substantive economic negotiations", even though the actual price itself had not yet been discussed.
55. *See* Corwin v. KKR Financial Holdings, 125 A.3d 304, 308 (Del. 2015).
56. *See* Kahn v. Lynch Communication Systems, 638 A.2d 1110, 1113-1114 (Del. 1994); *see also* Weinstein Enterprises v. Orloff, 870 A.2d 499, 507 (Del. 2005). Complications may arise in case restrictions apply in relation to the exercise of voting rights or the appointment and removal of directors. However, this is beyond the scope of this PhD-thesis.
57. *See* Corwin v. KKR Financial Holdings, 125 A.3d 304, 308 (Del. 2015); *see also* In re KKR Financial Holdings, 101 A.3d 980 (Del. Ch. 2014); Citron v. Fairchild Camera & Instrument, 569 A.2d 53, 70 (Del. 1989). For an extensive analysis on achieving control, *see* A.M.

matter, is situated no differently than if he had majority voting control.[58] A highly contextual, fact-based analysis is required to determine whether the director's independent judgement has been impaired, either in general or with a view to a specific transaction.[59] Absent such evidence, the efficiencies gained by delegating management to a board counsel against viewing every single blockholder as controller.[60]

Inevitably, the resulting body of case law is rather difficult to interpret, and reconciling individual decisions to create a consistent framework poses a challenge. Some high-level examples may illustrate the relevant issues. In *Tesla*, Elon Musk was ruled to be a controller, despite only having a 22 % equity interest.[61] The case focused on the contemplated acquisition of SolarCity, of which the financial collapse was imminent and in which Musk similarly held a considerable equity interest (again approximately 22 %). In particular, the decision was grounded on the composition of Tesla's board, which consisted of several of Musk's VC co-investors and a family member, some of whom simultaneously served as director at SolarCity.[62] Musk, who not only founded Tesla but at the time also served as its chair and CEO, had additionally gained a reputation for dominating board meetings and ousting directors who proved insufficiently "helpful" to his cause.[63] Furthermore, Musk has been widely considered the main public representative of Tesla, especially on the internet. Finally, what may have cost Musk considerable judicial credit is that in the process of acquiring SolarCity, he violated many of the corporate governance practices established in MFW. To substantiate, Musk personally chaired the board meetings in which the acquisition of SolarCity was discussed, instead of recusing himself and deferring the matter to the Special Committee. He also selecting legal and financial advisors personally.[64] Thus, the fact that Musk formally abstained from voting on the eventual transaction was of little importance.

A similar example of board domination is presented by Oracle's acquisition of NetSuite. Larry Ellison held an equity stake of 28 % in Oracle, but also

---

Lipton, 'After *Corwin*: Down the Controlling Shareholder Rabbit Hole', 72 *Vanderbilt Law Review* 1977, 1987 (2019).

58. *See* In re Morton's Restaurant Group, 74 A.3d 656, 664–65 (Del. Ch. 2013); *see also* In re PNB Holding WL 2403999 (Del. Ch. 2006).
59. *See* In re Rouse Properties (Del. Ch. 2018); *see also* Corwin v. KKR Financial Holdings, 125 A.3d 304 (Del. 2015); In re Crimson Exploration, 2014 WL 5449419 (Del. Ch. 2014); In re Cox Communications, 879 A.2d 604 (Del. Ch. 2005).
60. *See* In re Crimson Exploration, 2014 WL 5449419 (Del. Ch. 2014); *see also* Citron v. Fairchild Camera & Instrument, 569 A.2d 53, 70 (Del. 1989).
61. *See* In re Tesla Motors (Del. Ch. 2018).
62. *See* In re Tesla Motors (Del. Ch. 2018).
63. *See* In re Tesla Motors (Del. Ch. 2018).
64. *See* In re Tesla Motors (Del. Ch. 2018). For a discussion, *see* S.A. Barshay, 'Elon Musk and the Control of Tesla' (2018), available at http://www.corpgov.law.harvard.edu/.

owned 45 % of the NetSuite shares.[65] Although formally, Ellison did commit to complying with the MFW-criteria, the effectiveness of the Special Committee was compromised. Indeed, its lead negotiator disobeyed specific instructions of fellow directors not to discuss the potential acquisition price when meeting with the NetSuite CEO (as negotiations had not yet formally been initiated). Thus, the negotiation range was set in advance. Moreover, she publicly confessed her agenda was no other than that of helping Ellison.[66]

The larger the interest of the minority blockholder, the more likely it is he will be deemed to be in control. Meanwhile, the criterion of outsized influence cannot be applied as if it were a mechanical formula. Control has been deemed present at rather low (17 %) equity stake levels, but has also been considered absent at relatively high levels.[67] One recent confirmation concerns *Rouse Properties*, involving an investor owning 33 % of the stock, who was nonetheless not deemed to be a controller. More specifically, it was ruled that a minority blockholder is "not considered to be a controlling stockholder unless it exercises […] formidable voting and managerial power." [68] Indeed, absent a combination of a foundational or board role, prominent public representation efforts and a documented history of board domination or director outings, most minority shareholders will not qualify as controlling shareholder. In order to tip the balance in their favor, these blockholders might want to interpret the MFW-framework even stricter than strictly necessary. This includes arranging for the Special Committee to be appointed in time (instead of overdue) and structuring the investment banking fees on a lump sum rather than a deal contingent basis. Additionally, the approach adopted by Dell springs to mind.[69] Whilst only owning a 16 % equity stake, his outsized influence arguably mirrored that of Musk and Ellison in many respects. However, Dell was not deemed a controller, not only because he complied fully with the MFW-framework, but also because he committed himself to participating in any other bid higher than his own.[70]

65. *See* In re Oracle (Del. Ch. 2018). For an extensive analysis, *see* E.B. Rock, 'MOM Approval in a World of Active Shareholders' (2018), available at http://www.ssrn.com/.
66. Conventional agency theory indicates that Ellison might be inclined to overpay for NetSuite, given his larger equity stake in that firm (45 %, versus 28 % in Oracle). However, a sizeable minority (17 %) of the NetSuite shareholders opposed the deal, as they deemed the consideration offered insufficient.
67. For an overview of recent case law on the status of controller, *see* In re Tesla Motors (Del. Ch. 2018); *see also* In re Crimson Exploration, 2014 WL 5449419 (Del. Ch. 2014).
68. *See* In re Rouse Properties (Del. Ch. 2018) (finding that Brookfield's influence did not come even "remotely close" to the level of control required to qualify as a controlling shareholder); *see also* In re Morton's Restaurant Group, 74 A.3d 656, 664–65 (Del. Ch. 2013).
69. *See* Dell, 177 A.3d 1 (Del. 2017). For an extensive analysis, *see* Rock 2018, *supra* note 64. For an analysis of the 2018 contemplated relisting involving dual class stock, *see* L.A. Bebchuk & K. Kastiel, 'The Perils of Dell's Low-Voting Stock' (2018), available at http://www.ssrn.com/.
70. Consequently, Dell effectively transformed the deal from a necessarily two-sided to a potentially one-sided transaction, thus lowering the degree to which the process was conflicted.

17.5 From MFW to dual class equity structure recapitalizations

17.5.1 Creating a dual class equity structure

MFW does not target the introduction or abolition of dual class equity structures in particular. Conversely, it could not be ruled out that MFW should be applied by analogy. In *EZCORP*, it was held that the MFW-framework encompasses not only mergers, but all transactions in which a controlling shareholder is involved.[71] This includes matters as diverse as asset leases,[72] consulting agreements[73] and settlement agreements following derivative suits.[74] Building on the general ruling of *EZCORP*, *NRG Yield* explicitly confirmed that MFW applies to the introduction of dual class equity structures in the midstream phase.[75] NRG Yield revolved around a parent corporation, NRG, which held 65 % of the voting power of its subsidiary, Yield, at the time of the 2012 IPO. In fact, Yield had issued two classes of stock: A-class shares, held by outside investors, and B-class shares, held by NRG. However, both the A- and the B-class shares granted 1 vote each.[76] (A fact that leaves one somewhat puzzled as to the actual purpose of this particular dual class equity structure.) Since Yield's business model was based on asset acquisition financed by SEOs, NRG's voting power had declined to 55 % in 2015, and a loss of control was imminent. To address this issue, Yield proposed to declare a proportional dividend (*see* § 17.2.1 *supra*), consisting of 1 non-voting stock for every share investors already held.[77] The transaction was conditioned upfront on a majority-of-the-minority vote and required approval by the Special Committee, complying with the MFW-framework. The Special Committee negotiated several amendments to the terms of the transaction, such as the inclusion of a true-up provision (*see* § 17.3 *supra*). Additionally, the newly created stocks would no longer be non-voting, but instead would allow their holder to cast 1/100th of a vote. According to the Special Committee, this meant that an equity stake-based sunset mechanism (*see* § 11.3.3 *supra*) had been put in place.[78]

71. *See* In re EZCORP, No. 9962-VCL (Del. Ch. 2016). Note that whereas EZCORP had a dual class equity structure in place, litigation focused on a consulting agreement concluded with EZCORP's controlling shareholder. Moreover, the EFS applied in full, since a majority-of-the-minority vote had not been held. For a similar case, *see* In re Martha Stewart Living Omnimedia, (Del. Ch. 2017), regarding side-deals concluded by the controlling shareholder.
72. *See* Summa v. Trans World Airline, 540 A.2d 403 (Del. 1988).
73. *See* Dweck v. Nasser, 2012 WL 161590 (Del. Ch. Jan. 18, 2012).
74. *See* In re MAXXAM, 659 A.2d 760 (Del. Ch. 1995).
75. *See* IRA Trust FBO Bobbie Ahmed v. Crane, No. 12742-CB (Del. Ch. 2017). For another critical analysis, *see* I. Fiegenbaum, 'The Controlling Shareholder Enforcement Gap' (2019), available at http://www.ssrn.com/, for an elaborate analysis.
76. *See* IRA Trust FBO Bobbie Ahmed v. Crane, No. 12742-CB (Del. Ch. 2017).
77. *See* IRA Trust FBO Bobbie Ahmed v. Crane, No. 12742-CB (Del. Ch. 2017).
78. *See* IRA Trust FBO Bobbie Ahmed v. Crane, No. 12742-CB (Del. Ch. 2017).

This modified proposal was accepted by both the Special Committee and a majority of the disinterested shareholders. During the lawsuit that followed, it was ruled that, although the transaction had been initiated by a controller and was therefore conflicted, all requirements of the MFW-framework were satisfied. Thus, the BJR applied.

Interestingly, the court held the (virtually) non-voting stock recapitalization was concluded to allow NRG to extract a uniquely valuable, non-ratable benefit (i.e. potentially perpetual control).[79] Meanwhile, in *Williams v. Geier*, a tenure voting plan had been adopted without the court establishing an entrenching motive, as the scheme was held to promote long-term value and planning.[80] Additionally, NRG Yield's control over the board was found self-evident, whereas in Williams. V. Geier, a majority of the board was independent.[81] Because of these different facts and circumstances, NRG Yield may be considered as a distinction from, and not overturning Williams v. Geier. As a result, is not entirely clear whether principally the EFS or the BJR applies when introducing a dual class equity structure.

17.5.2 Abolishing a dual class equity structure: differential consideration?

It must not only be possible to introduce, but also to abolsih a dual class equity structure in the midstream phase (*see* § 10.6 *supra*). Unifying the equity structure can take place either on a going concern basis, or by taking the corporation private. In both scenario's, there exists a potential conflict of interest to the detriment of outside minority shareholders. Notably, this involves controlling shareholders vesting voting rights in formerly inferior voting stock of which they own a considerable block, whilst not paying any compensation to the holders of superior voting shares (including themselves), because the gain realized on the non-voting stock offsets the losses incurred on the superior voting shares.[82] Given the wide scope of the MFW-framework (*see* § 17.4 *supra*), one would expect that it similarly applies to cancelling dual class equity structures in the midstream phase. One recent example, *Forest City*, illustrates this is indeed very much the case.[83] In Forest City, the controller had the right to

79. *See* IRA Trust FBO Bobbie Ahmed v. Crane*,* No. 12742-CB (Del. Ch. 2017).
80. *See* Williams v. Geier, 671 A.2d 1368 (Del. 1996).
81. Strictly speaking, one may doubt whether the domination of Yield's board by NRG was not muted by the fact that negotiations were conducted by the Special Committee and, consequently, if the transaction was still conflicted.
82. *See* M. Bigelli, V. Mehrotra & P. Raghavendra Rau, 'Why are Shareholders not Paid to Give up Their Voting Privileges? Unique Evidence from Italy', 17 *Journal of Corporate Finance* 1619 (2011).
83. For an analysis of this transaction, *see* E.A. Klingsberg, 'Index Eligibility as Governance Battlefield: Why the System is Not Broken and We Can Live With Dual Class Issuers' (2018), available at http://www.corpgov.law.harvard.edu/; *see also* B.S. Sharfman, 'A Private Ordering Defense of a Company's Right to Use Dual Class Share Structures in IPOs', 63 *Villanova Law Review* 30 (2018).

elect 75 % of the board, whilst merely owning 10 % of the equity. In 2016, a hedge fund informed Forest City's board of its wishes to cancel the dual class equity structure, because of an allegedly lagging stock price. The ensuing recapitalization was negotiated by a Special Committee, of which the members had been appointed by the holders of inferior voting shares. Additionally, the deal was subjected to a vote of approval by that class. There, disinterested shareholders consented to an exchange ratio of 1.31 common shares for every superior voting share held by the controller. Consequently, the blockholder received a 31 % premium as compared to the conversion rate available under the articles of association.

This case highlights what is arguably the most contentious matter when unifying a pre-existing dual class equity structure, namely whether the holder of superior voting shares should be entitled to receive higher compensation than the owner of inferior voting stock, to reflect the value of control. Phrased differently, the question is whether the holders of inferior voting stock ought to receive equal compensation through a coattail-provision (*see* § 10.4.5 *supra*), despite having less voting power per share than the owner of superior voting stock.[84] There exist different perspectives on this matter, also in Delaware case law. In principle, the controlling shareholder himself holds the right of initiative to abolish a dual class equity structure.[85] Although the duty of loyalty (*see* § 16.3.2 *supra*) as a rule indicates the equal treatment of investors, they are permitted to receive a control premium, whether this is because of the size of the block or the type of stocks it consists of.[86] (Naturally, a controller may voluntarily forego his premium, either in part or in whole.[87]) Such a state of affairs should be applauded, as this enables the removal of dual class equity structures that are no longer efficient, by buying of the controller.[88] However, in a number of prominent cases, it was held that the recapitalization had been implemented improperly. As a result, the blockholder's right to receive a control premium has become less self-evident.[89]

---

84. *See* A.W. Winden, 'Sunrise, Sunset: An Empirical and Theoretical Assessment of Dual-Class Stock Structures', 2018 *Columbia Business Law Review* 852 (2019); *see also* K. Smith, 'The Agency Costs of Equal Treatment Clauses', 127 *The Yale Law Journal Forum* 543, 544 (2017), both observing an increase in the use of such mechanisms in the US.
85. *See* CBS v. National Amusements, C.A. No. 2018-0342-AGB (Del. Ch. 2018); *see also* § 16.3.5 *supra*.
86. *See* Abraham v. Emerson Radio, 901 A.2d 751, 753 (Del. Ch. 2006) ("Under Delaware law, a controller remains free to sell its stock for a premium not shared with the other stockholders except in very narrow circumstances"); *see also* Gilson & Gordon 2003, *supra* note 48, at 794-795. For older case law, *see* Harris v. Carter, 582 A.2d 222, 234 (Del. Ch. 1990); *see also* In re Sea-Land, No. 8453, 1987 WL 11283 (Del. Ch. May 22, 1987).
87. *See* Jedwab v. MGM Grand Hotels, 509 A.2d 584, 598 (Del. Ch. 1986).
88. *See* Smith 2017, *supra* note 83, proposing to enable disparate consideration through the Articles of Association.
89. However, a controller may breach his fiduciary duties if the sale was made knowing that the purchaser intended to loot the target firm. *See* Harris v. Carter, 582 A.2d 222 (Del. Ch. 1990);

In *Levco*, the controller and holder of 50 % of the class B voting stock unloaded most of his holdings; he retained a 14 % equity interest.[90] Total compensation amounted to $ 100 million. Simultaneously, the dual class equity structure was abolished, by a debt-financed share buyback. The court held that equal treatment of shareholders was not mandatory. However, the resulting increase in debt might endanger the corporation's financial position. In this regard, it was held that the Special Committee had merely contemplated the effects of the transaction for the corporation in its entirety. Thus, it had failed to properly consider the interests of class A shareholders. This was corroborated by the fact that a fairness opinion on the terms of the transaction for the shareholders of that class had not been requested.[91]

TCI makes for another example.[92] The case revolved around a controlling shareholder selling his class-B superior voting stock to a third party. Although the controller's entitlement to higher compensation was not principally denied in *TCI*, the decision-making process on the 10 % or $ 376 million control premium was again held defective. The controller, telecom-mogul John Malone, had proclaimed *ab initio* (!) that he required a mark-up of (at least) 10 % compared to the common shares.[93] Furthermore, the Special Committee made a number of poor governance decisions in light of the subsequently developed MFW-framework. To illustrate, it did not seek independent legal or financial counsel and was bound to receive compensation – at Malone's instigation – contingent on the completion of the sale. Moreover, the Special Committee consisted of directors who mostly held superior voting B-class stock. The members of the Special Committee were actually uncertain which investors they represented: A- or B-class shareholders. In fact, the directors involved testified differently on this matter during trial.[94] Whilst the prices paid allegedly fell in the respective valuation ranges, the value of both classes of stock was viewed separately. What is needed, however, is an analysis of the fairness of the relative valuation of one class of stock over the other. In this regard, a fairness opinion was absent.

see also § 16.3.5 *supra*.

90. *See* Levco Alternative Fund v. Reader's Digest, 803 A2.d 428 (Del. 2002).

91. *See* Levco Alternative Fund v. Reader's Digest, 803 A2.d 428 (Del. 2002). For an analysis, *see* T. Wen, 'You Can't Sell Your Firm and Own it Too: Disallowing Dual-Class Stock Companies From Listing on the Securities Exchanges', 162 *University of Pennsylvania Law Review* 1495, 1511-1512 (2014).

92. *See* In re Tele-Communications Incorporated, C.A. No. 16470 (Del. Ch. 2005).

93. *See* In re Tele-Communications Incorporated, C.A. No. 16470 (Del. Ch. 2005). Note the 10 % control premium in respect of the B-class shares "only" cost the holders of inferior voting stock 1.2 % of their proceeds, given that the A-class stock represented the overwhelming majority of the corporate equity.

94. *See* In re Tele-Communications Incorporated, C.A. No. 16470 (Del. Ch. 2005).

A final case is offered by *Delphi*.[95] This case focused on Rosenkrantz as a controlling shareholder, having a 13 % equity interest comprised solely of 10 vote per share B-class stock. His control power was capped at 49.9 %, as a result of a voting agreement. In *Delphi*, the elementary governance failures encountered in *TCI* were absent, be it in respect of the counsel retained, the Special Committee's composition, or the form of consideration. To the contrary, it was explicitly determined that the Special Committee only represented the interests of inferior voting stockholders, and a relative fairness opinion was obtained.[96] However, this did not entail the negotiating process was free from flaws in other aspects. Rosenkrantz himself represented the corporation when meeting with the third-party bidder. Although the articles of association did contain a coattail provision, Rosenkrantz vigorously demanded to be compensated for his loss of control.[97] Even more stunning, he allegedly struck a gentleman's agreement with the bidder to sell one of his other businesses for a supposedly inflated price in case receiving differential consideration for his superior voting Delphi stock proved difficult. Eventually, the Special Committee and Rosenkrantz agreed to a certain (but reduced) premium.[98] The transaction – consisting of both an amendment to the articles of association as well as the merger itself – was approved by the disinterested shareholders. However, the Court of Chancery deemed this combined vote coercive. Nevertheless, it refused to issue an injunction preventing the transaction from going forward, as a superior offer was unlikely to materialize (the "tremendous" and even "colossal" acquisition premium was close to 100 %).[99] Furthermore, if the differential consideration would eventually be found improper, the matter could be remedied by paying damages.[100]

It should be noted that a selling controlling shareholder can obtain differential consideration in various ways. *Martha Stewart* is an instructive case in this regard. There, the controller engaged in multiple "side deals". These included an extension of the employment agreement post-takeover and an IP licensing agreement. However, these transactions merely served to continuate the pre-existing situation. Moreover, the share price offered by the bidder was raised after negotiations with the controller had taken place, suggesting that no funds were extracted from outside investors.[101] Meanwhile, in other cases, the

95. *See* In re Delphi, C.A. No. 7144-VCG (Del. Ch. 2012). For an analysis, *see* Wen 2014, *supra* note 90, at 1513-1515; *see also* Smith 2017, *supra* note 83, at 555-556.
96. *See* In re Delphi, C.A. No. 7144-VCG (Del. Ch. 2012).
97. *See* In re Delphi, C.A. No. 7144-VCG (Del. Ch. 2012). At the core, the Delphi conflict revolves around the question whether Rosenkrantz had already bargained away his control premium, by accepting the coattail provision, to receive a higher price at the IPO stage. If that were indeed the case, he would be selling the same voting rights twice.
98. *See* In re Delphi, C.A. No. 7144-VCG (Del. Ch. 2012).
99. *See* In re Delphi, C.A. No. 7144-VCG (Del. Ch. 2012).
100. *See* Thorpe v. CERBCO, 676 A.2d 436, 437 (Del. 1996).
101. *See* In re Martha Stewart Living Omnimedia, 2017 WL 3568089 (Del. Ch. 2017).

disparate consideration received by the controlling shareholder may effectively have been borne by the outside minority shareholders. One example was *John Q Hammons*. There, the differential consideration included a cash flow interest in the corporation taken private, lines of credit and indemnification of tax liabilities.[102] Such arrangements are equally covered by the MFW-framework.

17.6 Analyzing the MFW dual class restructuring framework

17.6.1 Enhanced doctrinal consistency

From a doctrinal legal perspective, it should be stressed MFW creates a level playing field between controller-sponsored tender offers and controller-sponsored mergers.[103] Prior to MFW, mergers initiated by a controlling shareholder were, in principle, subject to the EFS (*see* § 16.3.4 *supra*). However, in the *Siliconix* ruling of 2001, the Delaware courts had held that tender offers launched by a controlling shareholder were governed by the BJR.[104] This distinction might appear strange. The result of a merger and a tender offer – if successful – is substantively similar: a freeze-out of minority shareholders.[105] The divergence was rationalized by the fact that the decision to tender stock is made by individual investors (not by the board), whereas in case of a merger, the board is subject to fiduciary duties, which do not apply to individual shareholders following a tender offer.[106] The wisdom of this logic may be questioned. Shareholders may feel coerced to tender their shares, for the fear of being trapped with an illiquid investment if the deal proceeds without their consent, a risk that is absent for mergers. Moreover, controlling shareholders may be subject to fiduciary duties as well (*see* § 16.3.5 *supra*).[107] Noting the apparent inconsistency, a harmonization effort was made by the Delaware judiciary. For one part, this was achieved by toughening the standards in respect of tender offers; for another, this involved relaxing the criteria regarding mergers. In *Pure Resources*, then-Vice Chancellor Strine ruled that a controller-initiated tender

102. *See* In re John Q. Hammons Hotels, 2009 WL 3165613 (Del. Ch. Oct. 2, 2009).
103. *See* Wilson 2015, *supra* note 33, at 645, applauding the more consistent framework created by MFW.
104. *See* In re Siliconix, C.A. No. 18700, 2001 WL 716787 (Del. Ch. 2001).
105. The interest of minority shareholders lies not necessarily in receiving a control premium – which may be already discounted if a shareholder has gained *de facto* control – but rather in receiving their share of future synergies. A freeze-out allows controllers to recreate the "single owner standard" and achieve economies in administrative and nuisance costs. For an extensive analysis, *see* T. Vos, 'Baby, It's Cold Outside…' – A Comparative and Economic Analysis of Freeze-Outs of Minority Shareholders', 15 *European Company and Financial Law Review* 1 (2018).
106. *See* In re Siliconix, C.A. No. 18700, 2001 WL 716787 (Del. Ch. 2001).
107. On the dichotomy between mergers and tender offers, *see* Fiegenbaum 2017, *supra* note 33, at 793.

offer would only be deemed non-coercive if cumulatively (i) subjected to a non-waivable majority-of-the-minority tender (not: vote); (ii) the controlling stockholder committed to the swift execution of a subsequent merger at an identical price, should the 90% ownership threshold necessary to pursue the tender offer be met, and (iii) the controller did not make any retributive threats.[108] If these requirements were not complied with, the BJR would no longer apply.[109] By contrast, *Kahn v. Lynch* had ruled that conditioning approval of a controller-initiated merger on a majority-of-the-minority vote (or the use of a Special Committee) could switch the burden of proof under the EFS to the plaintiff.[110] As a result, *Pure Resources* already went some way towards harmonizing both types of transactions.[111] In addition, *CNX* established that if controllers wanted to avoid the EFS when launching a tender offer, installing a Special Committee was necessary.[112] Conversely, in *Cox Communications*, then-Chancellor Strine contemplated treating mergers more favorably than had been the case under *Kahn v. Lynch*, granting BJR review to transactions structured using both a Special Committee and the majority-of-the-minority vote.[113] Thus, *MFW* may be considered as the crown on the effort to harmonize the framework in respect of tender offers and mergers initiated by controlling shareholders, by requiring both a Special Committee and a majority-of-the-minority vote.[114]

17.6.2 Necessity of the majority-of-the-minority vote?

From a functional instead of doctrinal point of view, my feelings towards the MFW-framework are somewhat mixed. Although application of the BJR is no longer the default rule, as was the case under *Williams v. Geier*, but has become conditional instead, it has remained possible to introduce and abolish

108. *See* In re Pure Resources, 808 A.2d 421, 424-25 (Del. Ch. 2002). Note that in this particular case, the position of the Special Committee was relatively weak. (For instance, it could not definitively say not to the offer.) As such, it did not provide much potential for acting as a cleansing mechanism.
109. In the case at hand, BJR review was not granted, as director-shareholders were also included in the tender offer threshold. Consequently, these calculations did not take place on a majority-of-the-minority basis.
110. *See* Kahn v. Lynch Communication Systems, 638 A.2d 1110, 1117 (Del. 1994); *see also* § 16.3.4 *supra*.
111. *See* Gilson & Gordon 2003, *supra* note 48, at 827-832.
112. *See* In re CNX Gas, 4 A.3d 397 (Del. Ch. 2010).
113. *See* In re Cox Communications, 879 A.2d 604, 618 (Del. Ch. 2005).
114. *See* F. Restrepo & G. Subramanian, 'The Effect of Delaware Doctrine on Freezeout Structure & Outcomes: Evidence on the Unified Approach', 5 *Harvard Business Law Review* 205 (2015). It has been argued that high and undue litigation costs stemming from meritless lawsuits may also have played a role in adopting the MFW-framework, as the BJR has a chilling effect on plaintiffs. *See* Wilson 2015, *supra* note 33, at 666; *see also* B.S. Sharfman, 'Kahn v. M&F Worldwide Corporation: A Small but Significant Step Forward in the War Against Frivolous Shareholder Lawsuits', 40 *Journal of Corporation Law* 197 (2014).

dual class equity structures. This is undoubtedly positive. Indeed, such an enabling approach is befitting to the life-cycle perspective (*see* § 10.6 *supra*). The insertion of a well-informed yet independent negotiating agent – the Special Committee – is both rational and necessary with a view to creating proper safeguards, given the conflicts of interests surrounding the transaction.[115] However, some critical observations can be made as well. These objections primarily relate to the central position taken by the majority-of-the-minority vote. As discussed previously, my reservations about this mechanism are multifold (*see* § 11.3.1 *supra*). In short, a majority-of-the-minority vote eliminates or reduces the controlling shareholder's idiosyncratic vision,[116] is hardly used by institutional investors but instead hijacked by arbitrageurs, may be interpreted differently by the sender and receiver of the signal[117] and is procedural instead of substantive in nature. In fact, the majority-of-the-minority vote is a splendid example of path dependency in the US legal system. The mechanism appears to be a direct artefact from *Weinberger* (*see* § 16.3.4 *supra*).[118] That case revolved around a going private freeze-out of which the terms had not been negotiated by a Special Committee. Moreover, the acquirer held 50.5 % of the target corporation's stock, meaning that he had already assumed control. Only in those narrow circumstances does it become a strict necessity to exclude the controlling shareholder from voting on the transaction and to hold a majority-of-the-minority vote.[119] However, due to the pivotal role of the BJR in regulating corporate behavior, use of the majority-of-the-minority vote has become virtually mandatory. Some prominent scholars have coined this sudden and drastic shift towards market primacy as "the death of corporate law".[120]

115. Indeed, empirical evidence suggests the Special Committee carries more weight than the majority-of-the-minority vote. *See* G. Subramanian, 'Post-Siliconix Freeze-Outs: Theory and Evidence, 36 *Journal of Legal Studies* 1, 13 (2007).
116. *See* Z. Goshen & A. Hamdani, 'Corporate Control and the Limits of Judicial Review' (2019), available at http://www.ssrn.com/, specifically presenting the argument of idiosyncratic vision in the Delaware framework and arguing that, to enable parties to pursue this vision, the courts should allow BJR review of recapitalizations.
117. This is especially the case as it becomes increasingly common for corporations to subject themselves to both of the MFW-prongs, which may more and more be viewed as "going through the motions".
118. *See* Weinberger v. UOP, 457 A.2d 701 (Del. 1983).
119. Indeed, Gilson & Gordon 2003, *supra* note 48, consider the use of either a Special Committee or an appraisal right sufficient to protect the interests of outside minority shareholders.
120. *See* Z. Goshen & S. Hannes, 'The Death of Corporate Law', 94 *New York University Law Review* 263 (2019); *see also* J.D. Cox & R.S. Thomas, 'Delaware's Retreat: Exploring Developing Fissures and Tectonic Shifts in Delaware Corporate Law', 42 *Delaware Journal of Corporate Law* 323 (2018), for similar conclusions.

17.6.3 Absence of an exit right?

As was already mentioned, one of the deficiencies of the majority-of-the-minority vote is that it is rather procedural in nature (*see* § 11.3.1 *supra*). The only strategy which substantively protects outside minority shareholder interests in full is offering a cash exit right on a fair value basis, determined just prior to the announcement of the recapitalization. Under Delaware corporate law, the appraisal procedure (S. 262 DGCL) would be the most appropriate instrument to this end.[121] However, in a going concern situation, the introduction or abolition of a dual class equity structure does not grant an appraisal right. This right exists only in going private situations.[122] This is where the MFW-framework fails mostly. Here, it should be stressed that a midstream issuance of superior voting stock effectively constitutes a freeze-out, albeit only control-wise and not also cash-flow wise.[123] Similarly, if inferior voting stock is issued, the control premium an investor may receive in respect of his could theoretically decrease. Perhaps, the law ought to treat a dual class equity structure recapitalization as what it is and offer corresponding compensation, instead of a hollow but formally present right of consent in the form of a majority-of-the-minority vote.[124] Indeed, some authors, notably Fiegenbaum, have argued against an expansive reading of MFW to include going concern transactions exactly because of the absence of an exit right. In going concern situations, independent directors might (unconsciously) fear losing their position, preventing the

121. On appraisal procedures in MFW-structured squeeze-outs, *see* In re Books-A-Million, No. 11343-VCL (Del. Ch. 2016), holding that a controller may reject a third-party offer, even if this would leave outside shareholders better off. Indeed, a superior third-party offer does not necessarily imply the price proposed by the controller is inadequate, and any remaining concerns can be addressed in appraisal proceedings.

122. For a proposal to expand the scope of appraisal proceedings to dual class equity structure recapitalizations (and even any decision requiring AGM approval in general), *see* A.M. Lipton, 'Shareholder Divorce Court', 44 *Journal of Corporation Law* 297, 341-344 (2018), arguing this recognizes shareholder heterogeneity. For a modern classic, *see* B. Manning, 'The Shareholder 's Appraisal Remedy: An Essay for Frank Coker', 72 *Yale Law Journal* 223 (1962).

123. *See* Vos 2018, *supra* note 104. Under this analogy, a dual class equity structure listing constitutes a semi-IPO (cash flow but not control-wise), whereas a dual class equity structure unification compares to a semi-seasoned equity offering (control but not cash-flow wise).

124. Note that, if the dual class equity structure is abolished by means of a going private transaction instead of a going concern unification, the appraisal mechanism may be available nonetheless. However, recent case law has reduced the usefulness of appraisal proceedings considerably. In fact, it has been held that the "sale value resulting from a robust market check will often be the most reliable evidence of fair value". *See* Verition Partners Master Fund v. Aruba Networks, C.A. No. 11-448-VCL (Del. 2019); *see also* DFC Global v. Muirfield Value Partners, 172 A.3d 346, 366 (Del. 2017); Dell v. Magnetar Global Event Driven Master Fund, 177 A.3d 1 (Del. 2017).

transaction from being fully structured at arm's length.[125] Alternative legal remedies (notably, the derivative suit) are characterized by high procedural hurdles, discouraging many investors from pursuing their claim.[126] This makes the absence of a fair value cash exit right even more pressing.[127]

125. *See* Fiegenbaum 2017, *supra* note 33, at 789. For a general analysis of exit rights, *see* M.A. Eisenberg, 'The Structure of Corporation Law', 89 *Columbia Law Review* 1461 (1989)
126. *See* Fiegenbaum 2019, *supra* note 75, for an elaborate analysis.
127. Note that the most egregious cases of shareholder exploitation are still addressable even in the absence of a fair value cash exit right. For instance, fraud is not absolved by adhering to the MFW-standard. *See* In re Dole Food, C.A. 8703-VCL (Del. Ch. 2015), where the controlling shareholder had plotted an artificial drop in the share price in the period leading up to the offer.

Chapter 18. Summary

18.1 The US corporate legal landscape

Part III started with an outline of the US corporate legal landscape, in Chapter 14. As was discussed in § 14.2, US legislative power can be vested in either the federal government or the states. Under the (Dormant) Commerce Clause of the US Constitution, Congress is entitled to regulate commerce between the states. Therefore, the federal US government would be empowered to draft a uniform system of corporate law. Until now, it has chosen not to. Meanwhile, proposals such as Senator Warren's Accountable Capitalism Act highlight this deferential state of affairs is not set in stone. The (Dormant) Commerce Clause gained considerable attention following the enactment of state-anti takeover laws from the late 1960s onwards, which aimed to safeguard corporations that enjoyed a certain economic nexus to a particular state. However, in *Edgar v. MITE*, the US Supreme Court ruled that the state anti-takeover acts then in force conflicted with the federal Williams Act. As a result, these acts were vacated.

In the absence of a uniform national legal system, corporations are governed by the statute of their state of incorporation: the internal affairs doctrine. I analyzed this situation in § 14.3. Initially, the internal affairs doctrine served to safeguard the state's legislative monopoly. Only after the 1830s did railroads expand beyond state borders on a permanent basis. As a result, the internal affairs doctrine was viewed increasingly as a choice of laws mechanism. The question of applicable state law became a prominent one at the dawn of the 1880s. New Jersey, guided by the remarkably entrepreneurial mindset of James B. Dill and having adopted an enabling corporate statute which did not restrict corporate share ownership, had become the preferred state to incorporate. As a result, it reaped the benefits from the Great Merger Movement. However, New Jersey's fortunes turned in 1913, as US president-elect Thomas Woodrow Wilson faced nationwide public outcry on the role of "The Traitor State". In his capacity of Governor of New Jersey, Wilson tightened the state's corporate laws, only to see Delaware firmly take its place. Over the years, Delaware has consolidated its dominant position, both in terms of the number of out-of-state corporations attracted as with regard to their market value. Since then, the internal affairs doctrine played an important role in countering unsolicited takeover attempts. The US Supreme Court upheld incorporation-based anti-takeover statutes in *CTS v. Dynamics Corp. of America*.

Securities laws are also highly relevant for the governance framework of US corporations. I examined federal and state securities laws in § 14.4. Both of the main federal statutes, the SA 1933 and the SEA 1934, are primarily focused on investor disclosure. Additionally, they provide the legal basis for regulating stock exchanges and trading systems such as NYSE and NASDAQ, which prescribe many substantive governance standards through their listing rules. The Sarbanes-Oxley Act of 2002 and the Dodd-Frank Act of 2010 have tilted the balance of power even further towards federal law and, thus, away from the states. Moreover, these acts have put great emphasis on directors being independent. Historically, the states had enacted securities laws of their own. These "blue sky laws" have formally not been preempted in their entirety by federal initiatives, to create additional investor protection. However, in practice, the scope of blue sky laws has been confined to securities registrations of particularly small size.

In recent years, the puzzling relationship between corporate and securities law has been complicated further by periodic regulatory initiatives. These developments were discussed in § 14.5. First, this includes the JOBS Acts. One of their common goals is to facilitate corporations going public. Under a life-cycle perspective, there is indeed a case to be made for lightening regulatory capital markets burdens in respect of less mature firms, although this would likely come at the expense of investor protection. However, the effect of the JOBS Acts is theoretically ambiguous, as they contain both incentives and disincentives to go public. A second type of regulatory initiatives involves the proclamation of various corporate governance codes. However, in the US legal system, such codes are less relevant, as they represent different institutional actors, instead of the investment community as a whole, and are not enshrined in state or federal law.

18.2 US dual class stock from a historical perspective

Chapter 15 continued with a historical discussion of dual class equity structures. As was outlined in § 15.2, US corporations of the 19th century were stylized mostly according to the partnership model, in which all investors could cast one vote, regardless of the amount of capital contributed. Profits were portioned in proportion to the paid-up capital. As commerce flourished, two competing control models developed. Many manufacturing businesses adopted a one share, one vote mechanism, whereas corporations encompassing local infrastructure projects, such as turnpikes, canals and bridges, often featured degressive voting structures. Meanwhile, by the 1850s, proportional voting was firmly established, also in industries that had previously adhered to degressive structures.

In § 15.3, it was discussed that in the first two decades of the 20th century, investor control rights were increasingly restricted. This took place by issuing non- or contingent-voting preferred or non-voting common stock. In the Roaring Twenties, this trend grew even stronger. Arguably the most prominent example was car-manufacturer Dodge Brothers. These and other cases of "banker control" drew heavy scholarly criticism, especially from Harvard's professor Ripley. In his view, non-voting shares constituted the "crowning infamy" of shareholder disenfranchisement. Whilst US President Coolidge did not intervene, the NYSE effectively announced a moratorium on non-voting shares in 1926. In the wake of the Great Depression, interest for dual class IPOs faded. Against the background of the meager economic situation of the 1930s, Berle, Means and Dodd famously debated the purpose of the corporation. Berle was convicted that managerial power required a significant, substantive constraint. Dodd dissented, arguing that corporations should acts as trustees for society as a whole. This exchange of views addressed some of the most fundamental aspects of corporate law, but should also be considered as a wrestle for power in the Roosevelt administration.

In the late 1970s and 1980s, two developments jointly caused a policy change to lift the NYSE ban on non-voting shares. These developments and their consequences were discussed in § 15.4. First, the shift was due to the advent of unsolicited takeovers and LBOs and the widely felt desire of being able to counter such transactions. Second, the 1980s witnessed a considerable reduction in NYSE market power. Traditional advantages compared to competitors such as AMEX and NASDAQ, including greater liquidity and prestige, disappeared. As a result, NYSE was no longer capable of imposing voting rights standards. An important first signal was sent in 1976. When NYSE refused to list Wang Laboratories if its shareholders adopted a dual class equity structure, AMEX accepted. The conditions it set became known as the "Wang formula". Consequently, NYSE became under considerable pressure to adjust its listing rules in similar fashion. After SEC-initiated negotiations between NYSE, AMEX and NASDAQ to voluntarily adopt a joint one share, one vote policy had failed, the SEC adopted Rule 19c-4. This provision prohibited the listing of a corporation that restricted or disparately reduced the voting rights of existing shareholders, whilst permitting the issuance of non-voting stock. A heated debate ensued on the SEC's (disclosure-oriented) authority to adopt such a substantive corporate governance rule. In a lawsuit launched by the Business Roundtable, SEC Rule 19c-4 was vacated. However, NYSE and NASDAQ implemented Rule 19c-4 virtually verbatim in their listing rules. This was a voluntary act and therefore permitted. The principle that voting rights of existing shareholders cannot, through any issuance, be reduced or restricted, continues to apply until this very day. Importantly, dual class equity structures in place prior to the IPO are permitted. The issuance of additional superior voting stock is also allowed.

It may well be argued that the current debate on dual class equity structures is, in fact, the third edition of a periodically repeated play. In this view, the 2004 IPO of Google should be considered the starting point of the present cycle. The most recent developments were studied in § 15.5. To a certain extent, the debate has continued along familiar lines. Some scholars, most notably Harvard's Bebchuk, continue to unconditionally advocate additional control rights for outside minority shareholders. Other authors, such as Lipton and Bainbridge, have been opposing Bebchuk's views passionately. Meanwhile, the debate is making progress as well. Currently, the purpose of dual class equity structures is being considered in conjunction with life-cycling considerations, instead of managerial entrenchment (1980s) or plain economic expansion (1920s). As a result, the current reasons for using these mechanisms appear more befitting to the nature of the corporation, than those of the past. These ideas have also reached the SEC, which has acknowledged the life-cycle framework and has shown a certain willingness to take it into consideration when shaping policy.

18.3 The division of powers in delaware corporations

In Chapter 16, I described certain features of the relationship between the board and the corporation's shareholders according to current Delaware corporate law. To that end, I started by addressing the character of the corporation, in § 16.2. First, this involved the corporate purpose. US corporate governance has traditionally exemplified Friedman's shareholder value model. Recent cases confirm the Delaware courts still subscribe to shareholder value maximization, and prominent former justices hold the same view. However, from a normative perspective, the Delaware corporation is undergoing a fundamental transformation. Lawyers and scholars are increasingly advocating a broader corporate purpose. Moreover, many interest groups, including institutional investors (BlackRock) and directors (the Business Roundtable) are increasingly vocal in promoting environmental, social and governance criteria. Senator Warren's Accountable Capitalism Act, which proposes co-determination for large corporations, and the advent of legislation regarding PBCs also fit in the picture of a broadening corporate goal. Thus, the long-term aspect of shareholder value is increasingly being emphasized.

As a second characteristic, I studied Delaware's approach to corporate personhood. Conventional wisdom stipulates that shareholder rights are contractual in nature. The contractual view fits particularly well with aggregate theory. Accordingly, the corporation is a fictional construct, not a distinct entity. This view rose to prominence in the 1980s, alongside the law & economics movement. Whereas in the US, corporate law is mostly state law, the US Supreme Court holds some views on the matter as well. The rulings of *Citizens United* and (especially) *Hobby Lobby* are mostly consistent with real entity theory. According to this approach – the polar opposite to aggregate theory – the corporation is a real thing with attributes not found among the humans that constitute it. As such, the US views on corporate personhood are not particularly well-defined.

As a third characteristic of the Delaware corporation, I analyzed the balance between enabling and mandatory law. The DGCL is, on an overall basis, highly enabling in nature. The relevant criterion for declaring a provision of the articles of association void is whether it creates a "result forbidden by settled rules of public policy". The articles of association may deviate from the default rules of the DGCL, even if the section itself does not expressly contains the "magic words" authorizing this. Although different scholars have voiced different ideas as to what parts of Delaware corporate law should remain mandatory and which not, the core of evidently binding provisions is rather small.

In § 16.3, I subsequently studied the role of directors. According to S. 141 DGCL, the business of every corporation is managed by a board. The typical board combines managerial and supervisory aspects. One level below the board commonly resides the executive committee, consisting of the CEO and senior-level officers. The conduct of directors and officers is governed by the fiduciary duties of loyalty, care and good faith. Good faith has been described as "requiring an honesty of purpose". However, it does not constitute a separate duty. Rather, good faith is absorbed into the duty of loyalty. The duty of care incorporates the duty of oversight, requires decision making on an informed basis. Under the duty of care, the board is not required to read each contract it approves in detail or be aware of all its particularities. Instead, directors must have "known what they were doing". The duty of care also encompasses the duty of oversight. Accordingly, directors should not assure themselves that adequate systems exist to provide timely and accurate information and reports. Finally, the duty of loyalty requires a director to exclusively promote the interests of the corporation. He should subordinate his own interests, particularly if there conflict with the corporation's interests. Controlling shareholders also have fiduciary duties towards minority shareholders. Issues arise particularly in case the corporation is sold to a "looter". Similarly, the board owns fiduciary duties towards its controlling shareholder. The board may not attempt to dilute the controller, unless "truly extraordinary circumstances" arise.

The Delaware courts have adopted a more activist stance in scrutinizing whether the duty of loyalty has been adhered to, as opposed to the duty of care. Two important factors to establish whether the duty of loyalty has been complied with are independence and disinterestedness. The concept of independence is broader than that of self-interest, as it is not limited to financial ties. It is up to the plaintiff to demonstrate that the director is "beholden" to a party "or so under his influence that discretion would be sterilized". Although in recent cases, the Delaware courts have shown more willingness to intervene, this remains a challenging test, and the resulting body of case law is highly context-specific.

The principal standards of judicial review of director behavior are the BJR, the EST and the EFS. The BJR creates the "presumption that in making a business decision, the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company". It falls upon the plaintiff to rebut the presumption. Once a breach of fiduciary duties has been shown, the EFS becomes applicable.

Enhanced scrutiny is the intermediate standard of review. It addresses situations in which a director's independence could be called into question, but the EFS would be too stringent. Here, the burden of proof rests on defendants, not plaintiffs. First, the EST applies to defensive measures taken by the board. Under *Unocal*, such measures must pass a reasonableness and proportionality test. If both criteria are satisfied, the BJR becomes (again) applicable. Otherwise, the EFS will apply. A second variant of the EST governs impending sales, breakups or changes of control (*Revlon*). If a change of control is deemed present, the goal of the board is narrowed down to "maximization of the company's value at a sale for the stockholder's benefit". Traditionally, it has been up to the board to prove the adequacy of the decision-making process, including its degree of informedness, and the reasonableness of its actions with a view to ensuring the highest sale price. However, following *Corwin*, transactions ratified by a majority-of-the-minority vote will be reviewed under the BJR. Third, the EST applies in case the board acted for the primary purpose of thwarting a shareholder vote. Under *Blasius*, such a move is not *per se* invalid. However, the board faces the lofty challenge of demonstrating a "compelling justification."

The most far-reaching judicial standard of review is the EFS. Under *Weinberger*, directors are required to demonstrate "the most scrupulous inherent fairness of the bargain". Fairness has two components: fair dealing and fair price. Additionally, the burden of proof switches from the plaintiff to the defendant. Although fair dealing and fair price are both integral parts of the EFS, the latter aspect appears slightly more important.

Having addressed the role and duties of the board, I examined the position of individual shareholders and the AGM, in § 16.4. The right to vote is laid down in S. 151, which permits a very wide range of equity instruments to be issued, and S. 212 DGCL. In principle, every (common) share allows its holder to cast one vote at the AGM. The right to vote has been characterized as a property right. A shareholder may not be deprived of it or see it impaired against his consent. However, the right to vote may be withheld *ex ante*. There exist several precedents confirming the permissibility of non-voting stock, such as *Providence & Worcester v. Baker* and *Topkis v. Delware Hardware*. Superior voting shares are permitted as well.

Decision-making by the AGM can be subjected to various requirements. The articles of association or bylaws may contain a quorum of no less than 1/3 of the voting stock. Absent such a provision, the presence of a majority of the voting stock constitutes a quorum. Different quora may apply in respect of distinct voting items. Another example of a decision-making threshold is the supermajority requirement. Such a mechanisms is permitted, although it has been debated whether an unanimity requirement is lawful. Moreover, a prompt and steep increase of a supermajority following an unsolicited takeover attempt violates both *Unocal* and *Blasius*. Whereas decision-making in general takes place on a majority basis, director elections traditionally required a plurality of the votes.

Without competitors, a single vote is, in theory, sufficient for a candidate to get elected. However, following severe pressure from institutional investors, listed companies have increasingly converted to majority voting.

For listed corporations, the actual casting of votes usually takes place through the solicitation of proxies. This process is governed by the SEC Rules. Under SEC Rule 14a-3, investors shall receive a statement distributed by the corporation, containing the proposals which will be voted upon during the AGM. However, in case of director elections, shareholders traditionally only had the option of casting their vote in favor of a candidate or withholding it. As a remedy, investors may use shareholder records kept by the corporation to approach fellow investors with a proxy statement of their own, following SEC Rule 14a-7. Although the board may not refuse spreading these forms, soliciting proxies in this manner is rather costly. As a cheaper alternative, shareholders may attempt to put one item, not exceeding 500 words on the agenda of the AGM, under SEC Rule 14a-8. A shareholder should have held an interest of 1 % or $ 2,000 of voting stock (whichever is smaller) for a continuous period of one year in order to be eligible to lodge a request. The item should be submitted at least 120 days prior to the AGM. Meanwhile, an extensive set of exceptions allows corporations to disregard many shareholder proposals.

Finally, I considered the position of investors in relation to dividend distributions (§ 16.5). The DGCL does not impose any statutory minimum capital requirements, and a corporation may issue par value or non-par value shares. Under Delaware law, dividend is a broad concept: distributions may come in virtually all forms and sizes. The power to declare dividends rests solely with the board, and the decision itself falls under the scope of the BJR. As a result, distributions are hardly ever compelled by the courts, especially in case of listed corporations. Compelling a dividend would require that a situation qualifies as “minority oppression”. The maximum amount of dividend to be declared is calculated by a combined balance-sheet and insolvency test. However, the board enjoys great latitude in valuing the assets; it is not bound by general accepted accounting principles or other standards. In principle, investors are entitled to an equal amount of dividends and retained earnings, in proportion to the amount of capital contributed. If multiple classes or series of stock exist, dividend entitlements between holders of various classes of stock may differ, but entitlements between holders of the same class or series of stock may not. The use of non-dividend participating stock was approved by the Delaware Supreme Court in *Lehrman v. Cohen*. Theoretically, the creation of stocks carrying either superior dividend or superior retained earnings rights is permitted as well. Whether Delaware corporate law allows for the creation of stocks which formally lack both voting, dividend and retained earnings rights is not entirely clear.

18.4 Restructuring shareholder rights

In Chapter 17, I discussed the issue the analysis in Chapters 14 to 16 had been building up to: the legal requirements for introducing or abolishing a dual class equity structure, involving either control or financial rights. First, I drew the traditional regulatory framework regarding such recapitalizations, in § 17.2. According to NYSE listing rules, vested voting rights cannot be restricted. Thus, introducing a dual class equity structure involving superior voting stock is prohibited. However, in case of a pre-existing dual class equity structure, the issuance of additional superior voting stock is allowed. Moreover, it is permitted to issue non-voting stock. By contrast, under S. 242 DGCL, investors can allow another party to assume superior control or financial rights, by means of an AGM vote. In fact, the entire equity structure can be reshuffled, either by issuing additional stock, converting or splitting existing shares or distributing stock in the form of a dividend. If a proposal adversely affects the rights and preferences of specific holders of a class of stock, a class vote is required in addition to the AGM vote. However, the Delaware courts have generally been hesitant to rule that the position of a specific investor has been adversely affected, both with regard to control as well as with financial rights. As a final element, I discussed the seminal *Williams v. Geier* case. There, the Delaware Supreme Court ruled that a tenure voting plan approved by the AGM should be reviewed under the BJR instead of the EST or the EFS, as an entrenching motive was absent and no evidence was found that the board was interested or dominated by the controller.

Subsequently, I described Google's midstream introduction of non-voting shares, in § 17.3. To alleviate potential conflicts of interest with outside minority investors, Google's founders established a Special Committee. The initial terms tied the sale of multiple and non-voting stock and contained a coattail provision. The AGM approved the recapitalization, but solely because of the votes cast by Brin and Page. Dissatisfied shareholders sued, and the agreement was amended to provide that future litigation would take place under the EFS, directors would separately consider transactions diluting the non-voting shareholders and to include a true-up mechanism. The agreement, because of its many elements and in light of subsequent case law, has a strong private ordering character.

Recent case law on midstream dual class introductions has provided a new paradigm for introducing or abolishing a dual class equity structure. This case law was examined in § 17.4. In the landmark MFW ruling, the Delaware Supreme Court endorsed application of the BJR on public-to-private transactions proposed by a controlling shareholder, subject to certain conditions being met. These included the transaction i) *ab initio* ii) being negotiated by a properly empowered Special Committee, honoring its duty of care and consisting solely of independent directors and iii) approval of the transaction by a majority-of-the-minority vote. Prior case law subjected conflicted mergers proposed by controlling shareholders to the much stricter EFS, although later, the burden of proof switched to the plaintiff if either a Special Committee was in place or a majority-of-the-minority vote had been held. An investor qualifies as controlling shareholder when holding more than 50 % of the votes or because of "outsized influence". This typically requires a foundational or board role, public representation and a history of prior board dominance, although the matter is to be determined on a case-by-case basis.

As was discussed in § 17.5, the MFW-framework not only applies regarding conflicted public-to-private transactions, but also regarding the midstream introduction or abolition of control or financial dual class equity structures. In *EZCORP*, it was held that the MFW-framework encompassed all transactions with a controller involved. In *NRG Yield*, the Delaware Court of Chancery explicitly ruled that also with regard to dual class recapitalizations, MFW is applicable. As may be derived from the Forest City-case, the MFW-framework similarly applies when abolishing a dual class equity structure in the midstream phase. Arguably, the most contentious matter in that scenario is whether the holder of superior voting stock should be entitled to receive a higher price per share than other investors, to reflect the value of control. In principle, blockholders are permitted to receive a control premium. However, the use of "coattail provisions", which stipulate that owners of all class of stock must receive equal compensation, has become increasingly common. Moreover, differential compensation was ruled to have been improperly granted in a number of cases. In *Levco*, a buyback of share from the controlling shareholder endangered the financial position of the corporation as a whole. In *TCI*, compensation of the members of the Special Committee had been made contingent on the execution of a recapitalization, and it was unclear which class of shareholders they represented. Finally, from *Delphi*, it follows that if the controller obtains a higher price per share despite the articles of association containing a coattail provision, the sale of the corporation and the matter of differential compensation should be treated as separate agenda items.

Finally, I analyzed the effects of the MFW-framework, in § 17.6. Doctrinally, MFW creates a more consistent body of law, leveling the playing field between tender offers and mergers. Prior to MFW, mergers initiated by a controlling shareholder were subject to the EFS, whereas the Delaware courts had held in *Siliconix* that tender offers launched by a controlling shareholder were governed by the BJR. Both types of transactions are now covered by MFW. However, the MFW-framework also builds on the majority-of-the-minority vote. I have voiced my reservations against this mechanism elsewhere (*see* § 11.3.1 *supra*). Moreover, choosing this mechanism shows path dependency. In *Weinberger*, there was no real alternative to such a vote, as the terms of the transaction had not been negotiated by a Special Committee and the acquirer already held a majority of the shares. Currently, use of the majority-of-the-minority vote has become virtually mandatory, even outside *Weinberger*-situations, because of the pivotal role of the BJR in Delaware litigation. Finally, the MFW-framework does not contain an exit mechanism. This is where the MFW-scheme fails mostly, as a midstream issuance of superior stock effectively constitutes a partial freeze-out of outside minority shareholders.

Part IV

– German Comparative Analysis –

Chapter 19. Introduction to Part IV*

In Part IV, I discuss dual class equity structures from a German comparative governance perspective. The rationale for this approach has been outlined in Chapters 3 and 4 (specifically, *see* § 3.3.3 and § 4.3 *supra*). The structure of Part IV is as follows. In Chapter 20, I analyze the foundations of the German corporate legal system. Accordingly, I examine the historic and present position of the federal German legislator, in § 20.2. Subsequently, I study the legal entities to be taken in consideration for the comparative research, in § 20.3. Additionally, I consider two of the defining features of German corporate governance. These are employee co-determination (§ 20.4) and the regulation of economic groups (§ 20.5). Finally, in § 20.6, I discuss the relevance of the German Corporate Governance Code for the German legal order.

Building on these findings, Chapter 21 continues with a historical analysis on dual class equity structures in Germany. To that end, I distinguish several periods during which the use of dual class equity structures shifted rapidly. I start with an extensive discussion of the developments in the 19th century (§21.2), focusing especially on the 1830s and 1870s. For the 20th century, the analysis is geared primarily towards the "long 1920s", which includes events in the late 1910s and 1930s (§ 21.3), and the "long 1990s", also taking prior events in the 1980s and early 2000s into consideration (§ 21.4).

Subsequently, in Chapter 22, I study the current German law and governance framework in relation to shareholder rights, in the absence of a dual calss equity structure recapitalization. First, I examine the character of the German corporation, focusing on its purpose, approach to legal personhood and mandatory character of the governing statute, in § 22.2. Then, I discuss the position of the executive and supervisory board, its installation and removal, fiduciary duties of directors, their independence requirements, and the standards applied by the German courts for assessing director behavior, in § 22.3. Additionally, in § 22.4, I analyze shareholder control rights and the position of the AGM. To that end, I first discuss the scope and relevance of certain concepts, including par value and rights partitioning. Subsequently, I consider shareholder voting rights, the one share, one vote default rule and permitted deviations, as well as

---

*. Part IV was partly written during and benefit greatly of my stay at the Max Planck Institute for Comparative and International Private Law in Hamburg (April-June 2018). The financial support received is gratefully acknowledged.

the position of the AGM and convocation and agenda setting rights. Finally, in § 22.5, I examine the financial rights of shareholders. This includes matters of capital formation and retention, directors' powers to declare dividends, financial constraints in this regard and the possibility to create differentiated dividend entitlements amongst shareholders. Specifically, I pay close attention to non-voting preference shares, an instrument which has a longstanding tradition in financing German businesses.

Part IV finishes the German comparative governance analysis with a discussion of the introduction and unification of dual class equity structures in the midstream phase, in Chapter 23. In that regard, I study the requirements regarding the creation of non-voting preference shares (§ 23.2) and the criteria for abolishing non-voting preference shares and multiple voting shares (§ 23.3). Subsequently, I offer some critiques of the German regime regarding dual class equity structure recapitalizations, in § 23.4. The findings of Part IV are then summarized in Chapter 24.

Chapter 20. The German corporate law system

20.1 Introduction

In Chapter 20, I discuss the general structure of the German corporate governance system. To that end, I first examine the consitutitional division of powers between the federal government and the states and especially the historic and present position of the federal German legislator, in § 20.2. In § 20.3, I study the legal entities to be taken in consideration for the comparative research. As the observant reader will undoubtedly note, German corporate law poses some challenges in this regard, due to the wide range of legal entities it has on offer. Additionally, I consider two of the defining features of German corporate governance. These are employee co-determination (§ 20.4) and the regulation of economic groups (§ 20.5). Both are deepy rooted in German thinking an affect the system as a whole. Finally, in § 20.6, I discuss the relevance of the German Corporate Governance Code for the German legal order.

20.2 Federal versus state law – and beyond

In Germany as well, there exists a distribution of legislative powers between the Federal republic (*Bundesrepublik*) and the states (*Bundesländer*).[1] Under § 70 of the Basic Law (*Grundgesetz*), the states have residual legislative authority, whereas § 71 Grundgesetz attributes certain powers exclusively to the federal government.[2] Based on § 72 and § 74 (1) (1) and (11) Grundgesetz, the national government enjoys concurrent legislative competences regarding matters of civil and economic law.[3] Accordingly, the states have the authority to enact legislation in these domains when the federal government remains idle. However, the *Bundesrepublik* actually has opted to exercise its legislative

1. The federal character of the German republic is stipulated by § 20 (1) Grundgesetz. *See* M. Sachs, *Grundgesetz*, § 20, 55-73 (M. Sachs, ed.). On the comparable US situation, *see* § 14.2 *supra*.
2. For a general introduction to German constitutional law, *see* D.P. Currie, 'Republication – the Separation of Powers in the Federal Republic of Germany', 9 *German Law Journal* 2113, 2157 (2008).
3. For a commentary, *see* C. Degenhart, *Grundgesetz*, § 74, 4-9, 44-52 (M. Sachs, ed.).

powers.[4] Therefore, primarily legislation drafted at the Federal level must be taken into account for the German comparative part of the PhD-thesis.

A minor peculiarity in this regard is the Ministerial exception to allow the issuance of multiple voting shares (*see* § 21.3.2, § 21.4.1 and § 21.4.2 *infra*). More importantly, it should be acknowledged that German unity has not always been self-evident. Then, the question arises which legal system should be considered to represent the German nation. The historical analysis commences in the 19th century (*see* § 21.2 *supra*). During a part of this period, modern-day Germany consisted of a great number of independent and semi-autonomous countries and city-states. However, political and financial interests increasingly gravitated towards Prussia, which also absorbed more and more territories.[5] Therefore, I will chiefly analyze Prussian corporate law for the earlier phases of the historical analysis.[6] Naturally, the focus on Prussia should not be understood as the denouncing of legal developments elsewhere.[7] In later times, two separate Germanies existed. Obviously, the corporate law system of the German Democratic Republic (*Deutscher Demokratischer Republik*) is disregarded. This is not only due to its socialist nature, but also stems from the fact that formally, the German Democratic Republic was dissolved and its territories joined the Federal German Republic, instead of a new constitutional framework being drafted.

20.3 Relevant legal entities

20.3.1 Partnerships

This PhD-thesis focuses on Weberian Idealtype (*see* § 1.2.4 *supra*) of open, listed corporations. Other legal entities, including amalgams containing partnership elements such as LLCs and LLPs, are disregarded (*see* § 4.3.2 *supra*). German law poses a challenge in this regard, because of the variety of forms it has to offer.

The first category of legal entities under German law is partnerships. This includes the classic partnership (*Gesellschaft bürgerlichen Rechts*), governed

4. German laws can be accessed at http://www.gesetze-im-internet.de/. An English translation of the most relevant acts referred to in Part IV can be found at http://www.gesetze-im-internet.de/Teilliste_translations.html/.
5. For a concise yet occasionally romantic historical introduction, *see* S. Haffner, *The Rise and Fall of Prussia* (Weidenfeld & Nicolson, 1980).
6. *See* S. Daske, *Vorzugsaktien in Deutschland. Historische und rechtliche Grundlagen, ökonomische Analyse, empirische Befunde* 9 (Springer, 2019); *see also* T.W. Guinnane, 'German company law 1794-1897', in: *Research Handbook on the History of Corporate and Company Law* 170 (Harwell Wells, ed.), for similar approaches.
7. For a more holistic analysis, *see* P.C. Martin, 'Die Entstehung des preußischen Aktiengesetzes von 1843', 56 *Vierteljahrschrift für Sozial- und Wirtschaftsgeschichte* 499, 508-512 (1969).

by § 705-740 of the German Civil Code (*Bürgerliches Gesetzbuch*, BGB). Two variants of the classic partnership are the general partnership (*Offene Handelsgesellschaft*), and the limited partnership (*Kommanditgesellschaft*, KG).[8] According to § 161 HGB, the KG consists of one or more general partners (*komplementär*) carrying unlimited liability and one or more limited partners (*Kommanditisten*). Under German law, investors in partnerships possess considerable latitude to negotiate the terms of their cooperation. As a result, control and financial arrangements may differ considerably. The collaboration can either be most intimate or oriented towards the general investing public.[9] Usually, interests in German partnerships cannot be transferred (or traded) freely (§ 717 BGB).[10] The *PublikumsKG* constitutes an exception in this regard. *PublikumsKGs* are used mainly as (closed-end) investment vehicles, with the fund manager acting as the general partner to preserve control.[11] A comparatively recent addition to German partnership law is the LLP (*Partnerschaftsgesellschaft mit beschränkter Berufshaftung*, PartG mbB), implemented in 2013. The PartG mbB can only be formed by natural persons working in the liberal professions (*freie Berufe*).[12] Following the introduction of the PartG mbB, it can no longer be claimed that for all partnerships, at least some investors face unlimited liability, as has traditionally been the case.[13]

Meanwhile, German case law has allowed corporations – *see* § 20.3.2 *infra* – to act as general partner in KGs, starting from the early 20th century onwards.[14] This phenomenon, which initially served to avoid double taxation but may also

8. Besides § 705-740 BGB, the *Offene Handelsgesellschaft* is governed by § 105-160 Code of Commerce (*Handelsgesetzbuch*, HGB). In addition to these provisions, § 161-177a HGB apply to the KG.
9. *See* § 705 BGB (generally), § 709 BGB (control rights) and § 722 BGB (financial entitlements); *see also* § 109, § 119 and § 120 HGB. For a discussion of investor discretion at partnerships, *see* C. Schäfer, *Bürgerliches Gesetzbuch* § 705, 128-154 (J. Säcker et al., eds.); *see also* M. Roth, *Handelsgesetzbuch* § 109, 1-22 (A. Baumbach, K.J. Hopt et al., eds.).
10. Additionally, these partnerships are principally transparent for tax purposes. Accordingly, profits and losses (if any) are taxed at the individual partners themselves, not at the partnership. *See* § 15 Einkommenssteuergesetz. On the five characteristics of the corporation, *see* § 2.3 *supra*.
11. *See* Roth 2018, *supra* note 9, at § 177a (Attachment), 52-85.
12. *See* T. Tröger & L. Pfaffinger, 'Partnerschaftsgesellschaft mit beschränkter Berufshaftung: Eine kritische Bewertung deutscher Verteidigungsbemühungen im europäischen Wettbewerb der Verbandsrechtsordnungen', 68 *JuristenZeitung* 812 (2013), welcoming the reforms as German law contains other mechanisms to safeguard the position of creditors.
13. *See* § 8 (4) Partnerschaftsgesellschaftsgesetz. On unlimited liability at partnerships, *see* Bundesgerichtshof 24 November 2004 – XII ZR 113/01; *see also* Bundesgerichtshof 27 September 1999 – II ZR 371/98, holding that the mere addition "*mit beschränkter Berufshaftung*" to the name of a regular partnership does not limit liability.
14. *See* Reichsgericht 4 July 1922 – II B 2/22 (*Hanseatische Motorengesellschaft mbH & Co.*) For an analysis, *see* Roth 2018, *supra* note 9, at § 177a (Attachment), 4; *see also* M.A. Hofbauer, *Die GmbH & Co. KG in der Praxis: Recht und Besteuerung* 13-15 (Gabler, 1970) (discussing prior and conflicting case law of lower courts).

have entrepreneurial purposes, is referred to as *Grundtypvermischung*.[15] Consequently, there have existed strategies to mitigate investor liability, typically considered a defining feature of partnerships, for a long period of time. Following subsequent developments in European corporate law, legal entities (both corporations and partnerships) incorporated under the laws of other EU Member States can also act as a general partner. This has allowed for the creation of, for instance, a Dutch-infused BV & Co. KG.[16] Esprit, the German clothing company, offers a well-known example. Because of the possibility to create hybrid entities, the spectrum of available legal forms is magnified considerably. Thus, differences that have traditionally existed between open, listed corporations and partnerships under German law, including those in respect of asset partitioning and stock transferability (*see* § 2.3.1-§ 2.3.3 *supra*), have arguably diminished. Meanwhile, both types of legal entities have failed to become full equivalents. In this sense, the situation in Germany is not any different from the general framework, outlined in Chapter 4. As a result, partnerships and related figures should be disregarded for the remainder of the comparative German analysis.

20.3.2 Corporations

A second category of legal entities is that of corporations, of which the capital is divided into shares. Notably, this concerns the Public Limited Company (*Aktiengesellschaft*, AG), principally governed by the *Aktiengesetz* (AktG) and the Private Limited Company (*Gesellschaft mit beschränkter Haftung*, GmbH), primarily regulated by the *GmbH-Gesetz*. A variant of the AG for tax (but not for corporate) law purposes is the common interest AG (*gemeinnützige AG*). The common interest AG supports public, charitable or religious causes and enjoys a privileged status for a number of levies, including corporate income taxes.[17] In a sense, the common interest AG can be compared to the US PBC (*see* § 16.2.1 *supra*), although their activities (economic or charitable) and legal mechanism (long-term corporate purpose versus privileged tax status) will typically differ. An actual subtype of the AG is the small AG (*kleine AG*),

15. On this concept, *see* G. Zielinski, *Grundtypvermischungen und Handelsgesellschaftsrecht, Der Eintritt von Kapitalgenossenschaften in Personenhandelsgesellschaften, seine wirtschaftliche Bedeutung und rechtliche Zulässigkeit* (Elwert'sche Verlagsbuchhandlung, 1925).
16. *See* C. Teichmann, 'Die Auslandsgesellschaft & Co.', 43 *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 221 (2014), observing that foreign entities ought to remain recognizable, entailing that names of legal forms should not be translated, and that Swiss and Austrian corporations should disclose their non-German character.
17. For a thorough analysis, *see* I.J. Weber, *Die gemeinnützige Aktiengesellschaft* (Bucerius Law School Press, 2014), concluding that founding an upkeep costs of the common interest AG are relatively high, making it less attractive for smaller charities.

introduced in 1994 to alleviate regulatory burdens.[18] The small AG enabled the foundation of an AG by a single person (§ 2 and § 42 AktG) and eased requirements to convene the AGM (§ 121 (4) AktG). Moreover, the small AG is doctrinally important, as it opened up the legal form of the AG to non-listed corporations. Prior to the introduction of the small AG, non-listed corporations could only be incorporated in the form of a GmbH (or partnership).[19] In addition to the distinction between AGs and GmbHs, this has created a contrast between open and closed AGs.[20] Finally, one could refer to the Real-Estate-Investment-Trust AG, launched in 2007.[21] The Real-Estate-Investment-Trust AG specifically serves to invest in immovable property and enjoys certain tax advantages. The small AG and Real-Estate-Investment-Trust AG should not be considered a legal form of their own. Instead, they are modified versions of the basic AG, created for single goal. Because of their closed character and/or specific purpose, both the GmbH and the AG-variants such as the common interest AG, small AG and Real-Estate-Investment-Trust AG, should all be disregarded.

20.3.3 Everything is mixed up

The AG is not the only legal entity through which leading German firms regularly list their stocks on the exchange. This is the main complication for comparative purposes, setting Germany apart from many other jurisdictions. First, there is the *Societas Europaea* (SE), conceived by Piet Sanders, professor at the Erasmus School of Law, at the request of the European Union. The SE, already conceptualized in the late 1960s, came into existence in 2004.[22] (The stalemate caused by Germany's unwillingness to impair existing employee rights and the refusal of other EU Member States, notably the United Kingdom, to enhance them complicated negotiations on EU legislation regarding cross-border transactions for decades.[23]) Businesses may convert to

18. *See* Gesetz von 2.8.1994 fur kleine Aktiengesellschaften und zur Deregulierung des Aktienrechts, *Bundesgestzblatt* 1994, 1961.
19. For an discussion, *see* M. Hoffmann-Becking, 'Gesetz zur „kleinen AG" – unwesentliche Randkorrekturen oder grundlegende Reform?', 11 *Zeitschrift für Wirtschaftsrecht* 1 (1995); *see also* M. Lutter, 'Das neue 'Gesetz fur kleine Aktiengesellschaften und zur Deregulierung des Aktienrechts', 35 *Die Aktiengesellschaft* 429 (1994).
20. Nonetheless, the practical relevance of the small AG has been modest. *See* M. Henssler & H. Wiedemann, 'Die Aktiengesellschaft im System des deutschen Gesellschaftsrechts', in: Aktienrecht im Wandel 1, 25 (Mohr Siebeck, 2007) ("*auch heute noch die Ausnahme in der deutschen Gesellschaftslandschaft*").
21. *See* Gesetz über deutsche Immobilien-Aktiengesellschaften mit börsennotierten Anteilen, *Bundesgesetzblatt* 2007, 914.
22. *See* Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE).
23. *See* J. Wouters, 'European Company Law: *Quo Vadis*?', 37 *Common Market Law Review* 257, 261-264 (2000). Recently, some progress seems to have been made in this regard; *see*

this supranational legal form, for the purpose of obtaining a more European image and especially with a view to curbing the effects of national co-determination law.[24] Prominent corporations including Allianz, BASF, and SAP are all SEs. A second alternative is the Partnership limited by Shares (*Kommanditgesellschaft auf Aktien*, KGaA).[25] This legal form has been available since 1855. Initially, it served to circumvent the concession system then in force for the AG, according to which government consent had to be obtained to establish a corporation and obtain limited liability (*see* § 21.2 *infra*). The KGaA, similar to other partnership-based entities, can be constructed with either a German or EU (legal) person acting as general partner. Perhaps surprisingly, this has only been confirmed comparatively recently.[26] Use of the SE and KGaA legal form by (private and) public firms is not hypothetical. This may be illustrated by analyzing the composition of the leading German stock index, the DAX 30. At the start of 2018, in addition to 20 AGs and 6 SEs, the DAX 30 consisted of 1 KGaA (Merck), 1 SE & Co KGaA (Fresenius) and 2 AG & Co KGaAs (Fresenius Medical Care, a controlled although not wholly owned subsidiary of Fresenius, and Henkel).[27] The number of KGaAs, although still relatively small, has been increasing steadily in recent years, giving rise to considerable scholarly attention.[28]

---

§ 5.2 *supra*. Interestingly, former UK Prime Minister May vowed to make "Britain a country that truly works for everyone" in her inaugural speech. This apparently included introducing employee co-determination. In Provision 5, the UK Corporate Governance Code 2018 names 3 possible measures to strengthen the worker voice. *See* http://www.frc.org.uk/.

24. *See* H. Eidenmüller, A. Engert & L. Hornuf, 'How Does the Market React to the Societas Europaea?', 11 *European Business Organization Law Review* 35 (2010); *see also* H. Eidenmüller, A. Engert & L. Hornuf, 'Incorporating Under European Law: The Societas Europaea as a Vehicle for Legal Arbitrage', 10 *European Business Organization Law Review* 1 (2009). On co-determination, *see* § 20.4 *infra*.
25. *See* § 278 AktG et seq., on which J. Perlitt, *Münchener Kommentar zum Aktiengesetz* § 278, 1-410 (W. Goette & M. Habersack eds.); *see also* J. Koch, *Aktiengesetz* § 278, 1-23 (U. Hüffer & J. Koch eds.); G. Bachmann, *Aktiengesetz* § 141, 1-109 (G. Spindler & E. Stilz eds.).
26. *See* Bundesgerichtshof 24 February 1997 – II ZB 11/96; *see also* H.J. Priester, 'Die Kommanditgesellschaft auf Aktien ohne natürlichen Komplementär', 160 *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* 250 (1996). (The fact than a GmbH can act as *komplementär* of a KG is trite case law.)
27. For figures on the use of the SE in Germany, *see* Eidenmüller, Engert & Hornuf 2010, *supra* note 24, at 37 (observing that as of 2010, 38 publicly listed firms were SEs); *see also* Eidenmüller, Engert & Hornuf 2009, *supra* note 24.
28. *See* Daske 2019, *supra* note 6, at 206-207; *see also* M. Habersack, 'Zur Corporate Governance der Kapitalgesellschaft & Co. KGaA', 35 *Zeitschrift für Wirtschaftsrecht* 1453 (2019); U. Kornblum, 'Bundesweite Rechtstatsachen zum Unternehmens- und Gesellschaftsrecht (Stand 1.1.2017)', 115 *GmbH Rundschau* 739 (2017); T. Fett & D. Stütz, '20 Jahre Kapitalgesellschaft & Co. KGaA', 20 *Neue Zeitschrift für Gesellschaftsrecht* 1121 (2017); C. von Eiff & D. Otte, 'Die Kapitalgesellschaft & Co. KGaA – eine attraktive Gestaltungsmöglichkeit', 7 *Gesellschafts- und Wirtschaftsrecht* 246 (2015).

What is especially relevant for the topic of this PhD-thesis is that the distribution of control in financial rights in an SE or KGaA does not necessarily mimic that in an AGs. Whereas at the AG, rendering AGM decisions subject to the approval of another organ is not permitted, decisions of the KGaA's AGM can be made contingent on authorization by the general partners. Effectively, this creates a veto right, regardless of the size of the equity interest. Other avenues to retain control exist as well.[29] Similarly, § 56 of the SE Regulation contains a different capital requirement for the shareholder agenda right than § 122 (1) AktG does.[30] To ensure the feasibility of the German comparative part of the PhD-thesis, the analysis is geared primarily towards the AG, although it should be acknowledged that in doing so, a number of relevant strategies to concentrate control are disregarded.

20.4 Co-determination

20.4.1 Societal relevance

It would be an understatement to say that co-determination is an integral part of the German corporate law system. Co-determination deeply reflects social market (or Rhine) capitalism and a culture of cooperation. The system has been considered "the heart of industrial democracy"[31] and even "part of the national identity".[32] Whilst Germany is not the only EU Member State to embrace co-determination,[33] it has been the one to defend it most vigorously.

Although the Co-Determination Act (*Mitbestimmungsgesetz*, MitbestG) currently in force was enacted only in 1976, its origins may be traced as far as the reforms initiated by Kaiser Wilhem II and, before that, the Revolution of 1848.[34]

29. *See* J. Winzen, *Vorzugsaktie und KGaA − Instrumente zur Kontrollerhaltung bei der Eigenkapitalfinanzierung* 3, 111-114 (Peter Lang, 2014). Note that at the KGaA, and as opposed to the AG, the AGM can set the annual accounts and profit distribution. As such, this legal entity may not be unilaterally more in favor of the controlling shareholder.
30. On the agenda right under German law, *see* § 22.4.4 *infra*.
31. For this specific formulation, *see* K.J. Hopt & P.C. Leyens, 'Board Models in Europe - Recent Developments of Internal Corporate Governance Structures in Germany, the United Kingdom, France, and Italy', 1 *European Company and Financial Law Review* 135, 144 (2004).
32. This argument was raised in the *Erzberger*-case at the European Court of Justice. *See* § 20.4.2 *infra*.
33. For an instructive overview, *see* E. McGaughey, 'Good for Governance: Erzberger v TUI AG and the Codetermination Bargains' (2017), available at http://www.law.ox.ac.uk/; *see also* N. Kluge, 'Corporate governance with co-determination – a key element of the European social model', 11 *Transfer: European Review of Labour and Research* 163, 170 (2005).
34. For historical analyses, *see* J.J. du Plessis et al., *German Corporate Governance in International and European Context* 169-172 (Springer, 2017); *see also* T. Kuntz, 'German Corporate Law in the 20th Century', in: *Research Handbook on the History of Corporate and*

Co-determination comes with certain advantages. For instance, it assures that employees are thoroughly represented at the highest corporate organs. Thus, co-determination contributes to inclusive prosperity and induces more worker responsibility. Furthermore, it serves as an early warning system for social conflict and as a mechanism for crisis management.[35] However, co-determination has also long been alleged to create certain complexities.[36] Decision-making arguably becomes less focused[37] (also because of the size of the board[38]) and more politicized, with shareholder and employee representatives frequently having separate pre-meetings.[39] Information leakages during negotiations are not uncommon,[40] and the financial literacy of some representatives has been questioned.[41] Despite all these drawbacks, calls for reform have failed to gain considerable political traction.[42]

Company Law (H. Wells ed., 2017); E. McGaughey, 'The Codetermination Bargains: The History of German Corporate and Labour Law', 23 *Columbia Journal of European Law* 135 (2016); K. Pistor, 'Co-Determination in Germany: A Socio-Political Model with Governance Externalities', in: *Employees and Corporate Governance* (M. M. Blair & M. Roe eds., 1999); K.J. Hopt, *The German Two-Tier Board: Experiences, Theories, Reforms*, in *Comparative Corporate Governance* 227 (K.J. Hopt et al. eds., 1998); O. von Nell-Breuning, 'Wie kam es zur Montan-Mitbestimmung', 32 *Gewerkschaftliche Monatshefte* 386 (1981).

35. *See* O. Sandrock, 'German and International Perspectives of the German Model of Codetermination' 26 *European Business Law Review* 129 (2015); *see also* Hopt & Leyens 2004, *supra* note 31, at 144-146.
36. *See* Sandrock 2015, *supra* note 35; *see also* Du Plessis 2017, *supra* note 34, at 196-200; Hopt & Leyens 2004, *supra* note 31, at 144-146.
37. *See* A. von Werder, 'Überwachungseffizienz und Unternehmensmitbestimmung', 49 *Die Aktiengesellschaft* 166, 171 (2004). Generally on the position of the shareholder as residual owner and board accountability, *see* § 2.3.5 *supra*.
38. *See* M. Lutter, 'Comparative Corporate Governance: A German Perspective', 2 *International and Comparative Corporate Law Journal* 423, 426 (2001); *see also* Von Werder 2004, *supra* note 37, at 170.
39. *See* A. von Werder & T. Talaulicar, 'Kodex Report 2010: Die Akzeptanz der Empfehlungen und Anregungen des Deutschen Corporate Governance Kodex', 63 *Der Betrieb* 853, 860 (2010); *see also* T. Baums & K.E. Scott, 'Taking Shareholder Protection Seriously? Corporate Governance in the United States and Germany', 53 *American Journal on Comparative Law* 31, 55 (2005), noting certain topics are not raised in the presence of employee representatives.
40. *See* K.J. Hopt, 'Labor Representation on Corporate Boards: Impacts and Problems for Corporate Governance and Economic Integration in Europe', 14 *International Review of Law & Economics* 203, 206 (1994), describing a flagrant example of insider dealing by a trade union executive.
41. *See* Hopt & Leyens 2004, *supra* note 31, at 144-146.
42. One noteworthy proposal was presented by the *Arbeitskreis Unternehmerische Mitbestimmung* in 2009. *See* G. Bachmann et al., 'Entwurf einer Regelung zur Mitbestimmungsvereinbarung sowie zur Größe des mitbestimmten Aufsichtsrats', 30 *Zeitschrift für Wirtschaftsrecht* 885 (2009). The mechanism proposed involved conducting negotiations on the number of future employee representatives. This approach is similar to that of the SE, which indeed has been considered an instrument to avoid co-determination.

20.4.2 Technical design

In its current form, co-determination has two different aspects. First, entrepreneurial co-determination (*betriebliche mitbestimmung*) relates to the enterprise (*betrieb*) as an organizational unit. The establishment of a Works Council (*Betriebsrat*) becomes mandatory when an enterprise, in the ordinary course of business, has more than five employees, three of whom are eligible for election.[43] The Works Council has certain rights, including information and approval rights.[44] Second, corporate co-determination (*unternehmerische mitbestimmung*) involves the representation of employees in the supervisory board (*Aufsichtsrat*) of the firm.[45] The AG is required to constitute a supervisory board (§95 AktG), and there exist detailed technical provisions as to its composition. Insofar co-determination is concerned, these are laid down in the *Drittelbeteiligungsgesetz* (DrittelbG) for corporations with less than 2,000 employees and the MitbestG in relation to larger ones.[46] The supervisory board should consist of at least three members. The articles of association may prescribe a higher number, dividable by three. A first relevant factor for determining the size of the supervisory board is the amount of issued share capital. If the issued share capital is less than EUR 1.5 million, the maximum (not: actual) number of members is 9; between EUR 1.5 and EUR 10 million, 15; above EUR 10 million, 21.[47] Second, the size of the supervisory board is determined by the number of employees. As mentioned, the DrittelbG applies to corporations with less than 2,000 employees, whereas the MitbestG governs larger ones. For calculating the number of employees, a group approach applies.[48] Regarding corporate groups governed by the DrittelbG, one third of the supervisory board should consist of employee representatives. For larger

---

43. *See* § 1 Betriebsverfassungsgesetz (BetrVG). For a commentary, *see* R. Richardi, *Betriebsverfassungsgesetz* § 1, 1-151 (R. Richardi et al., eds.). A single corporation (as legal entity) may consist of several enterprises (organizations).
44. *See* § 80 and § 99 BetrVG. For a thorough analysis, *see* G. Thüsing, *Betriebsverfassungsgesetz*, § 80, 1-111, § 99, 1-347 (R. Richardi et al., eds.).
45. As opposed to notably the US and the UK, Germany has adopted a two instead of a one tier board model. *See* § 22.3.1 *infra*. The employee representatives are typically union officials. Although nominated by the workers, they are formally appointed by the AGM.
46. The Montan-Mitbestimmungsgesetz and the Montan-Mitbestimmungsergänzungsgesetz, which apply specifically to the historically important coal and steel industries, are disregarded given their limited (practical) scope. In these industries, even stronger co-determination rights existed. This served as an additional check on the abuse of economic power for political goals. *See* Von Nell-Breuning 1981, *supra* note 34. So-called *Tendenzbetriebe* (religious, charitative or political organizations) are similarly governed by different rules, and are equally disregarded.
47. *See* § 95 AktG, on which M. Habersack, *Münchener Kommentar zum Aktiengesetz* § 95, 1-95 (W. Goette & M. Habersack eds.); *see also* J. Koch, *Aktiengesetz* § 95, 1-7 (U. Hüffer & J. Koch eds.); G. Spindler, *Aktiengesetz* § 95, 1-26 (G. Spindler & E. Stilz eds.).
48. *See* § 5 MitbestG, on which H. Oetker, *Erfurter Kommentar zum Arbeitsrecht* § 5, 1-22 (R. Müller-Glöge, U. Preis & I. Schmidt eds.).

businesses, half of the supervisory board should be worker nominees. If a group has less than 10,000 employees, the supervisory board should consist of 12 members (of which 6 are employee representatives). At 10,000 to 20,000 employees, this number is 16 (8 worker nominees); at more than 20,000, 20 (10). The members of the supervisory board, both employee and shareholder representatives, jointly elect a chair and a deputy-chair (§ 27 MitbestG). To be elected as chair or deputy, candidates should obtain a majority of two thirds. If this majority is not reached in the first round, a second vote is held. There, shareholder representatives elect the chair and employee representatives the deputy-chair by absolute majority. As a result, the chair is usually a shareholder representative. Indeed, investors can resort to a second vote. This division of powers is not without consequences, as the chair has a casting vote in deadlock situations. However, use of this vote is rather uncommon as consensual decision-making is preferred.[49]

The technical and mandatory nature of German co-determination entails that it may not always be manifestly evident whether the supervisory board has been validly constituted.[50] Stakeholders, including the Management board, individual members of the supervisory board and individual shareholders, can file a request for evaluating of the composition of the supervisory board. This is the Status Procedure (*Statusverfahren*) laid down in § 97-99 AktG. Pursuant to § 21 MitbestG, employees (at least three) and the Works Council may furthermore initiate a procedure at the Labor Court (*Arbeitsgericht*) regarding allegedly defective elections of enterprise employee representatives. The demarcation between those two procedures is not always crystal clear either.

20.5 Group undertakings

20.5.1 Cross-holdings and banker influence

Another defining characteristic of German corporate law is its adaptation to concentrated control. Traditionally, Germany, Inc. (*Deutschland AG*) has been

---

49. *See* § 29 (2) MitbestG. Also, note that one of the employee representatives should be part of higher management. *See* § 15 (1) MitbestG, referring to the *leitende Angestellte of* § 5 (3) Betriebsverfassungsgesetz. Because of this and due to the casting vote of the chair, shareholder representatives arguably have a slight advantage over employee representatives in supervisory board. *See* M. Roth, 'Corporate Boards in Germany', in: *Corporate Boards in Law and Practice: A Comparative Analysis in Europe* 318 (P. Davies et al., eds.).
50. Note that based on § 7 MitbestG, only employees working at corporations or subsidiaries and branches thereof based in Germany are allowed to cast their vote or stand for election. In a recent case, the ECJ held that the current German co-determination system did not violate EU law. *See* ECJ 18 July 2017, ECLI:EU:C:2017:562 (*Erzberger*). For a critical reading, *see* T.A. Keijzer, O. Oost & M.J. van Ginneken, 'The ECJ Erzberger Case, An Analysis of German Co-determination and EU Law', 14 *European Company Law* 217 (2017), arguing considerations of political stability may have played a rol in reaching this decision.

considered the prime example of a blockholder governance system.[51] This system is based on bank rather than stock exchange finance (*see* § 7.2 *supra*) and cross-holdings.[52] The remedial measures adopted by the German legislator are important to study, since they may be applied by analogy in respect of dual class equity structures.

Cross-holdings emerged in the late 19th century, in largely similar fashion to the trusts of John D. Rockefeller and others in the US (*see* § 14.3.2 *supra*).[53] At the time, organizing economic activity through a group or conglomerate (*Konzern*) was seen as the sensible choice to make. Doing so facilitated expansion (through internal capital markets), insulated businesses from competition and conjunctural fluctuations and enabled tax evasion.[54] Certain circumstances idiosyncratic to Germany entailed that these interlocking structures could exist for an extended period of time. First, antitrust regulation came late. Second, the economic situation of the Weimar-era (*see* § 21.3.1 *infra*) meant that many corporations voluntarily chose to cooperate even more closely (or, conversely, were forced to merge).[55] Only post-1945 were some of the corporate empires broken up. However, this attempt was moderately effective, and did not prevent numerous families and other institutions from retaining sizeable blocks of shares.[56]

The effect of cross-holdings has been corroborated by the existence of banker control. Their influence manifested itself in multiple ways. For instance, bankers habitually manned the supervisory boards to a large degree (or at least the positions nominated by the shareholders, *see* § 20.4.2 *supra*). Moreover, banks and other financial institutions held sizeable minority positions in a great number of corporations.[57] Additionally, bankers were typically entitled to vote

---

51. On traditional ownership levels in Germany, *see* M. Becht & E. Boehmer, 'Voting Control in German Corporations', 23 *International Review of Law & Economics* 1 (2003); *see also* J.R. Franks & C.P. Mayer, 'Ownership and Control of German corporations', 14 *Review of Financial Studies* 943 (2001). Generally on ownership models, *see* § 10.2.2 *supra*.
52. For extensive introductions, *see* T.H. Tröger, 'Germany's Reluctance to Regulate Related Party Transactions' (2018), available at http://www.ssrn.com/; *see also* W-G. Ringe, 'Changing Law and Ownership Patterns in Germany: Corporate Governance and the Erosion of Deutschland AG', 63 *The American Journal of Comparative Law* 493 (2015).
53. *See* G. Spindler, 'Kriegsfolgen, Konzernbildung und Machtfrage als zentrale Aspekte der aktienrechtlichen Diskussion in der Weimarer Republik', in: *Aktienrecht im Wandel* 440 (Mohr Siebeck, 2007). Starting from 1877, corporations could own stock in legal entities, and cartels were deemed legal. *See* P. Muchlinski, 'The Development of German Corporate Law until 1990: An Historical Reappraisal', 14 *German Law Journal* 339, 358-359 (2013).
54. *See* Spindler 2007, *supra* note 53.
55. *See* H. Altmeppen, 'Die historischen Grundlagen des Konzernrechts', in: *Aktienrecht im Wandel* 1027 (Mohr Siebeck, 2007); *see also* C. Fohlin, *Finance Capitalism and Germany's Rise to Industrial Power* 30-44, 231-237, 301-304 (Cambridge University Press, 2007).
56. *See* Altmeppen 2007, *supra* note 55; *see also* Fohlin 2007, *supra* note 55, at 231-237, 301-304; Becht & Boehmer 2003, *supra* note 51; Franks & Mayer 2001, *supra* note 51.
57. *See* Ringe 2015, *supra* note 52; *see also* Becht & Boehmer 2003, *supra* note 51; Franks & Mayer 2001, *supra* note 51. For an atypical view, *see* Muchlinski 2013, *supra* note 53, at

the uninstructed custodial shares. Usually, these votes were cast in accordance with management preferences.[58] As a result, the corporation was not only a client of the bank but also supervised and (partially) beneficially owned by the bank. However, banker control has diminished considerably. This development should be attributed primarily to legal reforms initiated under the rule of Chancellor Schröder (1998-2005).[59] Accordingly, the capital gain taxes on banks disposing of their (control) blocks were sharply lowered.[60] In many cases, the investments had been made a long time ago, and with stock prices appreciating over time, taxation posed a comparatively high burden on a sale, effectively locking in continued share ownership.

20.5.2 Remedial measures

German corporate law contains many provisions to address the potential negative effects which outside minority shareholders and/or creditors might incur because of the controlling position of a blockholder (*Konzernrecht*).[61] These were introduced with the enactment of the Aktiengesetz of 1965 (*see* § 21.4.1 *infra*) and are laid down in § 15-§ 19 AktG and § 291-§ 328 AktG.[62] A distinction is made between *de facto* groups and the formal group.[63] A *de facto* group (*faktische Konzern*) exists when an enterprise (corporation, partnership or other legal entity) exerts, directly or indirectly, a controlling influence over another enterprise. Ownership of a majority of the shares creates the presumption of *de facto* control, but control can arise at lower ownership levels as

353-357; *see also* Fohlin 2007, *supra* note 55, both contending that bank control, whilst present, was mostly confined to specific industries (mining and energy) and subsided after the 1880s.

58. Currently, this practice is regulated by § 135 AktG. Accordingly, the bank should indicate the availability of alternatives, must develop an online form to revoke the proxy and has to disclose interlocking executive or supervisory board directorships, whilst bank proxy voting is prohibited altogether for equity stakes exceeding 20 %.
59. Specifically, this involved the abolishment of § 8b (2) Corporate Income Tax Act (*Körperschaftsteuergesetz*), which taxed domestic financial institutions selling shares of domestically incorporated corporations at 40 %. *See* A. Weber, 'An Empirical Analysis of the 2000 Corporate Tax Reform in Germany: Effects on Ownership and Control in Listed Companies', 29 *International Review of Law & Economics* 57 (2009). Generally on the governance reforms in the late 1990s and early 2000s, *see* § 21.4 *infra*.
60. *See* Ringe 2015, *supra* note 52, for a detailed analysis of the pre-existing situation and the changes taking place, observing that average bank ownership has decreased from 12-13 % in the 1990s to 9 % in 2003.
61. On the concept of private benefits of control in general, *see* § 10.2.1 *supra*; on the possible downsides and advantages, *see* § 10.3 and § 10.5 *supra*, respectively.
62. *See* Kuntz 2017, *supra* note 34; *see also* Altmeppen 2007, *supra* note 55.
63. A controller can be any shareholder, regardless of its legal form. *See* Bundesgerichtshof 29 March 1993 – II ZR 265/91; *see also* Bundesgerichtshof 8 May 1979 – KVR 1/78; Bundesgerichtshof 13 October 1977 – II ZR 123/76.

well (§ 17 AktG).[64] The formal group (*Vertragskonzern*) requires a contractual arrangement (*Unternehmensvertrag*, § 18 AktG). In principle, shareholders are not permitted to give detailed instructions to the executive board (§ 119 (2) AktG). However, in case of a contractual control agreement, the controlling shareholder is entitled to give instructions to the controlled corporation (*Beherrschungsvertrag*, § 291 AktG), even if those directions would be disadvantageous from the perspective of the latter (§ 308 AktG).[65] Alternatively, § 291 AktG can empower the controller to divert the controlled corporation's profits to its own coffers (*Gewinnabführungsvertrag*). Both control and financial group agreements entail that distributions effectuated by the controlled corporation do not qualify as a violation of the statutory rules on dividends.[66] Concluding such arrangements requires the approval of at least 75 % of the shareholders of each of the corporations involved (§ 293 AktG).[67]

For the controlling shareholder, group agreements come with certain costs. First, this includes having to cover the controlled corporation's losses on an annual basis, pursuant to § 302 AktG.[68] Second, the controller must offer an annual payment, equal to that of the expected dividends, based on past profitability and prospective distributions, to the investors who wish to retain their investment (*Ausgleich*, § 304 AktG).[69] However, this payment may also be

64. *See* § 17 AktG, on which W. Bayer, *Münchener Kommentar zum Aktiengesetz* § 17, 1-134 (W. Goette & M. Habersack eds.); *see also* J. Koch, *Aktiengesetz* § 17, 1-24 (U. Hüffer & J. Koch eds.); A. Schall, *Aktiengesetz* § 17, 1-56 (G. Spindler & E. Stilz eds.). For the broadly similar approach towards control in the US, *see* § 17.4.3 *supra*.
65. *See* § 308 AktG, on which H. Altmeppen, *Münchener Kommentar zum Aktiengesetz* § 308, 6-142 (W. Goette & M. Habersack eds.); *see also* J. Koch, *Aktiengesetz* § 308, 1-24 (U. Hüffer & J. Koch eds.); R. Veil, *Aktiengesetz* § 308, 1-40 (G. Spindler & E. Stilz eds.). In case of *de facto* control, the controlling shareholder is not permitted to give instructions, and is liable towards the controlled corporation for the damages caused. *See* § 311 AktG.
66. *See* § 291 (3) AktG, referring to § 57, § 58 and § 60 AktG. Note that the transfer of profits is bound to certain limits, even in case of an agreement in this regard. For an analysis of German dividend distribution law, *see* § 22.5 *infra.*
67. *See* § 293 AktG, on which H. Altmeppen, *Münchener Kommentar zum Aktiengesetz* § 293, 1-127 (W. Goette & M. Habersack eds.); *see also* J. Koch, *Aktiengesetz* § 293, 1-26 (U. Hüffer & J. Koch eds.); G. Bachmann, *Aktiengesetz* § 293, 1-42 (G. Spindler & E. Stilz eds.).
68. Similarly, § 311 AktG prohibits transactions that disadvantage a subsidiary without providing full compensation within a year. Importantly, the concept of "disadvantage" is interpreted broadly, meaning "any decrease of or specific risk to the corporation's financial situation or earning position that occurs as a result of the controlling corporation's influence. This requires that that a reasonable and diligent manager of an independent corporation would have behaved differently." *See* Bundesgerichtshof 19 May 2011 – II ZR 141/09; *see also* Bundesgerichtshof 12 December 2008 – II ZR 102/07. For an analysis, *see* T.H. Tröger, 'Germany's Reluctance to Regulate Related Party Transactions', in: L. Enriques & T.H. Tröger (eds.), *The Law and Finance of Related Party Transactions* 426, 435 (Oxford University Press, 2019).
69. *See* § 304 AktG, on which K. van Rossum, *Münchener Kommentar zum Aktiengesetz* § 304, 1-201 (W. Goette & M. Habersack eds.); *see also* J. Koch, *Aktiengesetz* § 304, 1-23

made in the form of shares of the controlling shareholder. Third, the conclusion of a group agreement creates an exit right for outside minority shareholders of the controlled corporation (*Abfindung*, § 305 AktG).[70] The compensation can be made either in stock or cash, and its amount is based on the pre-offer stock price. Both continuous and one-off payments may be challenged in court if deemed inadequate (§ 304 (3) and § 305 (4) AktG), and there have been examples of substantial increases.[71] As such, German corporate law conceptually offers much more potential to treat dual class equity structure recapitalizations as partial (control-wise) freeze-outs than Delaware corporate law does (*see* § 17.6.3 *supra*).

The revised Shareholder Rights Directive (SRD II) initially threatened to turn German law in respect of group undertakings upside down. Originally, it was proposed to subject all material related party transactions to a majority-of-the-minority vote (*see* § 11.3.1 *supra*), in addition to the obligations of § 302, § 304 and § 305 AktG.[72] In the final version of SRD II, the majority-of-the-minority vote has become a non-mandatory optionality.[73] Moreover, SRD II allows certain transactions to be exempted by the national legislator. This has enabled Germany to decide (in the *Gesetz zur Umsetzung der zweiten Aktionärsrechterichtlinie*, ARUG II) that all dealings already governed by a contractual group arrangement will require no additional scrutiny (§ 111a (3) (3) (a) AktG).[74]

(U. Hüffer & J. Koch eds.); R.Veil, *Aktiengesetz* § 304, 1-90 (G. Spindler & E. Stilz eds.).

70. *See* § 305 AktG, on which K. van Rossum, *Münchener Kommentar zum Aktiengesetz* § 305, 1-230 (W. Goette & M. Habersack eds.); *see also* J. Koch, *Aktiengesetz* § 305, 1-54 (U. Hüffer & J. Koch eds.); G. Spindler, *Aktiengesetz* § 305, 1-108 (G. Spindler & E. Stilz eds.).
71. For a well-known example, *see* Oberlandesgericht Frankfurt am Main 28 March 2014 – 21 W 15/11 (*Wella*), involving an initial price of € 74.45 in respect of common shares, which was subsequently increased to € 88.08.
72. For critical observations, *see* U.H. Schneider, 'Europarechtlicher Schutz vor nachteiligen Transaktionen mit nahe stehenden Unternehmen und Personen,' 25 *Europäische Zeitschrift für Wirtschaftsrecht* 641 (2014); *see also* H. Fleischer, 'Related Party Transactions bei börsennotierten Gesellschaften: Deutsches Aktien(konzern)recht und Europäische Reformvorschläge', 69 *Betriebs-Berater* 2691 (2014).
73. *See* Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as Regards the Encouragement of Long-term Shareholder Engagement, art. 9c.
74. *See* J. Schmidt, 'Related Party Transactions nach dem RegE zum ARUG II', 30 *Europäische Zeitschrift für Wirtschaftsrecht* 261 (2019).

20.6 The German corporate governance code

The German experience with corporate governance codes is fairly similar to that of other EU jurisdictions. In 2001, after a number of corporate scandals, the Government Corporate Governance Committee (*Regierungskommission* '*Corporate Governance – Unternehmensführung – Unternehmenskontrolle – Modernisierung des Aktienrechts*') was formed. Particularly noteworthy culprits were construction businesses Balsam AG and Philipp Holzmann AG.[75] The committee presented a series of proposals to improve checks and balances of listed firms, for the purpose of restoring trust in the Germany economy.[76] These included a modification of the system concerning the voidability of AGM decisions (*Anfechtungsklage*)[77], further risk management obligations in respect of the *Vorstand* (executive board), enhanced transparency and disclosure standards[78] and a codification of the German variant of the business judgement rule.[79] The first German Corporate Governance Code (*Deutscher Corporate Governance Kodex*, DCGK) was published in 2002.[80] The DCGK solely addresses listed corporations. It not only serves as a form of

75. For a brief discussion, *see* V. Rieble, 'Der Fall Holzmann und seine Lehren', 17 *Neue Zeitschrift für Arbeitsrecht* 225 (2000); *see also* M. Lutter, 'Professionalisierung der Aufsichtsräte', 48 *Neue Juristische Wochenschrift* 1133 (1995); G. Fey, 'Corporate Governance: Unternehmensüberwachung bei deutsche Aktiengesellschaften', 33 *Deutsches Steuerrecht* 1320 (1995).
76. *See* T. Baums (eds.), *Bericht der Regierungskommission Corporate Governance* 50-81 (Otto Schmidt, 2001).
77. For a discussion of the results, *see* J. Koch, 'Das Gesetz zur Unternehmensintegrität und Modernisierung des Anfechtungsrechts (UMAG)', 35 *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 769 (2006); G. Spindler, 'Haftung und Aktionärsklage nach dem neuen UMAG', 8 *Neue Zeitschrift für Gesellschaftsrecht* 865 (2005).
78. *See* U. Seibert, 'Das "TransPuG" – Gesetz zur weiteren Reform des Aktien- und Bilanzrechts, zu Transparenz und Publizität (Transparenz- und Publizitätsgesetz) – Diskussion im Gesetzgebungsverfahren und endgültige Fassung', 5 *Neue Zeitschrift für Gesellschaftsrecht* 608 (2002)
79. For a detailed analysis of the proposals Government Corporate Governance Committee, *see* C. Berrar, 'Zur Reform des AR nach den Vorschlägen der Regierungskommission "Corporate Governance"', 4 *Neue Zeitschrift für Gesellschaftsrecht* 1113 (2001). On the German business judgement rule, *see* § 22.3.3 *infra*. Note that all parties involved agreed beforehand to leave the German co-determination regime unaffected.
80. For a contemporary German discussion, *see* P. Ulmer, 'Der Deutsche Corporate Governance Kodex – ein neues Regulierungsinstrument für börsennotierte Aktiengesellschaften', 166 *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* 150 (2002); *see also* A. von Werder 'Der Deutsche Corporate Governance Kodex – Grunglagen und Einzelbestimmungen' 55 *Der Betrieb* 801 (2002); M. Lutter, 'Die Erklärung zum Corporate Governance Kodex gemäß § 161 AktG', 164 *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* 523 (2002). For an analysis in English, *see* Du Plessis et al. 2017, *supra* note 34.

self-regulation, but also aims to inform foreign investors, who hold considerable positions in German listed corporations, and to enhance their understanding of the local corporate governance framework.[81]

In the reviews that have followed since the DCGK was initially introduced, most recently in 2019, the structure of the DCGK has remained broadly intact.[82] The DCGK, in addition to more or less paraphrasing certain provisions of the AktG (*Grundsätze*), contains recommendations (*Empfehlungen*) and suggestions (*Anregungen*). Deviating from the *Grundsätze* is not possible.[83] The character of the remaining provisions is indicated by their formulations. Recommendations are worded stronger than suggestions, using "shall" (*soll*) and "should" (*sollte*), respectively. A "comply or explain" approach applies regarding recommendations; suggestions may be departed from without further explication. Pursuant to § 161 AktG, it is mandatory for the annual report to disclose the firm's compliance with the DCGK (*Entsprechenserklärung*).[84] As far as enforcement is concerned, it should be noted the DCGK is not embedded in the listing rules of Deutsche Bõrse. In case of non-compliance, delisting a corporation is therefore not an option. Instead, the market is supposed to correct undesirable behavior, by punishing the stock price.[85] Moreover, the provisions of the DCGK are not, as such, directly legally binding. Here, we can observe the German legal order clinging to its preference for "hard law" over softer forms such as self-regulation, also because of the DCGK's perceived lack of democratic legitimacy. The legal status of the DCGK has been debated extensively, without a definitive conclusion being reached.[86] Meanwhile, the DCGK may

81. On this function, *see* M. Vollertsen, *Corporate Governance der börsennotierten KGaA* 48-49 (Nomos, 2019); *see also* Du Plessis et al. 2017, *supra* note 34, at 18.
82. The various versions of the DCGK can be retrieved at http://www.dcgk.de/en/home.html/. The 2019 review mainly targeted director compensation (making variable elements more long-term oriented) and director independence (setting a catalogue of factors to be taken into account). For a discussion of the modifications, *see* H-U. Wilsing & L. Winkler, 'Deutscher Corporate Governance Kodex 2019 – ein Überblick', 74 *Betriebs-Berater* 1603 (2019).
83. Indeed, this would be a deviation of the law itself, which is generally not possible under the Aktiengesetz. *See* § 23 (5) AktG, on which *see* § 22.2.3 *infra*.
84. For a commentary, *see* W. Goette & H-J. Schaal, *Münchener Kommentar zum Aktiengesetz* § 161, 1-167 (W. Goette & M. Habersack eds.); *see also* J. Koch, *Aktiengesetz* § 161, 1-33 (U. Hüffer & J. Koch eds.); W. Bayer & P. Stolz, *Aktiengesetz* § 161, 1-83a (G. Spindler & E. Stilz eds.); Lutter 2002, *supra* note 80.
85. On this approach, *see* E. Nowak, R. Rott & T.G. Mahr, 'Wer den Kodex Nicht Einhält, den Bestraft der Kapitalmarkt?: Eine Empirische Analyse der Selbstregulierung und Kapitalmarktrelevanz des Deutschen Corporate Governance Kodex', 34 *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 252 (2005).
86. *See* W. Seidel, 'Der Deutsche Corporate Governance Kodex – eine private oder doch eine staatliche Regelung', 25 *Zeitschrift für Wirtschaftsrecht* 285 (2004); *see also* G. Borges, 'Selbregulierung im Gesellschaftsrecht – zur Bindung an Corporate Governance-Kodizes', 32 *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 508 (2003); W. Martin, 'Corporate Governance – Der Import angelsächsischer "Self-Regulation" im Widerstreit zum deutschen Parlamentsvorbehalt', 35 *Zeitschrift für Rechtspolitik* 59 (2002); Ulmer 2000, *supra* note 80, at 159.

indirectly influence the fiduciary duties of executive and supervisory directors. Therefore, by means of an excpetion, the absence of correct disclosures or the presence of incorrect disclosures can give rise to director liability. Indeed, the discharge of members of the executive and supervisory board can, under certain circumstances, be voidable if they have acted in violation of the declaration of compliance.[87] In this sense, the DCGK is not without relevance.

87. *See* German Supreme Court 16 February 2009 – II ZR 185/07 (*Kirch/Deutsche Bank*), involving statements by Deutsche Bank's CEO concerning Kirch Media Group's alleged poor credit score, at the time a client of the bank, which litigation was not disclosed in the corporation's annual report.

Chapter 21. A history of German dual class equity structures

21.1 Introduction

Chapter 21 continues with a historical analysis on dual class equity structures in Germany. As the discussion will illustrate, the German legislator has found it difficult to address mechanisms that deviate from the default rule of shareholder proportionality, taking different and often conflicting positions on the matter over time.

For my analysis, I again distinguish between several periods during which the use of dual class equity structures shifted rapidly. I start with an extensive discussion of the developments in the 19th century (§21.2), focusing especially on the 1830s and 1870s. During the 19th century, the German economy industrialized rapidly. As the observant reader will note, the discussion of § 21.2 focuses mostly on non-voting preference shares. For the 20th century, the analysis is geared primarily towards the "long 1920s", which includes events in the late 1910s and 1930s (§ 21.3), and the "long 1990s", also taking prior events and those in the 1980s and early 2000s into consideration (§ 21.4). In contrast to § 21.2, the discussion in § 21.3 and § 21.4 primarily addresses multiple voting shares.

21.2 19th Century

21.2.1 Railroads, Non-Voting preference shares and the praktieng 1843

The factors underlying the development of late 18th and early 19th century German and Prussian (*see* § 20.2 *supra*) corporate law were a marked increase in trade (navigation) and the spreading of the Enlightenment following the French revolution.[1] In the first parts of the 19th century, mainly insurance companies and infrastructure businesses were being incorporated. The latter category included toll roads, canals and railroads.[2] During this period, legal

1. *See* W. Raemisch, *Die Vorzugsaktie* 1-3 (Universität Würzburg, 1923). For an analysis of earlier phases of German and Prussian corporate law, *see* A. Cordes & K. Jahntz, 'Aktiengesellschaften vor 1807?', in: *Aktienrecht im Wandel* 1 (Mohr Siebeck, 2007).
2. Other industries which witnessed rapid growth included banking and mining. For an extensive overview, *see* K. Bösselmann, *Die Entwicklung des deutschen Aktienwesens im 19.*

personality was only granted on an individual and (local) monopoly basis by special charter (*Oktroi*), for which royal assent (*königlicher Genehmigung*) had to be requested.[3] Especially in the 1821-1825 and the 1836-1840 periods, the creation of new companies (not necessarily: corporations), as measured by their combined share capital, spiked.[4] Meanwhile, initiating a business, and especially the construction of railroads, required massive amounts of capital. To illustrate, the railroad company which operated a line from Cologne to Aachen had a share capital of 6 million Taler, versus an annual Prussian state budget of 55 million Taler – and there were other, far more expensive infrastructure projects.[5] The Prussian state, which could have provided at least some funding, was bound to the National Debt Decree (*Staatsschuldenedikt*) of 1820. Accordingly, the King could not issue additional national debt without the prior approval of Parliament. However, the obligation to create a Parliament had been handsomely ignored, whereas the need to fund innovation carried in itself insufficient weight to change course.[6] Although there existed a network of smaller private banks, these were unable to provide the necessary means.[7] Thus, the participation of outside, private investors was required. In this regard, the economic circumstances proved favorable. Following the reduction of Prussia's national debt, returns on savings accounts and corporate and state bonds had decreased sharply, and merely offered annual coupons of 2.5 % and 3.5 %, respectively. In the "low-interest environment" of the late 1830s, investing in less traditional securities presented an opportunity worth considering.[8] Yet, there were also serious technological and competitive risks.

Jahrhundert 76-94 (Berlin, 1939).

3. The situation in the US was rather similar, in the sense that state (naturally, not royal) assent had to be obtained. *See* § 14.3.1 *supra*. Note that in this era, a sharp distinction between joint stock companies in the legal form of a partnership and those in the legal form of a corporation was not always made.
4. For detailed figures, *see* H. Thieme, 'Statistische Materialien zur Konzessionierung von Aktiengesellschaften in Preussen bis 1867', 1 *Jahrbuch für Wirtschaftsgeschichte* 286-300 (1960); *see also* K. Bösselmann, *Zur Finanzierung der A.-G. vor 1850* 189-198 (De Gruyter, 1938).
5. This is reflected by the fact that this industry enjoyed its own statute. The Railroad Companies Act (*Gesetz über die Eisenbahn-Unternehmungen*) had been enacted in 1838. *See Gesetz-Sammlung* für die Königlichen Preußischen Staaten 1838, 505. For an analysis, *see* E. Kießling, 'Das Preußische Eisenbahngesetz von 1838', in: *Aktienrecht im Wandel* 126 (Mohr Siebeck, 2007); *see also* D. Hansemann, *Die Eisenbahnen und deren Aktionäre in ihrem Verhältniß zum Staat* (Renger'sche Verlagsbuchhandlung, 1837).
6. *See* Bösselmann 1938, *supra* note 4, at 2-4, adding that parts of the Prussian establishment were rather suspicious of the concept of the corporation due to its limited liability. As a result, it can be doubted whether the government would have been able to grant sizeable financial support, even if the National Debt Decree had not been issued.
7. *See* Bösselmann 1938, *supra* note 4, at 28-34.
8. On interest rate developments in 19th century Germany, *see* Bösselmann 1939, *supra* note 2, at 36-39 (Berlin, 1939). The effective absence of substitutes as a rationale for investing in stocks holds true in modern economics as well. This state of affairs has been described as TINA – "There Is No Alternative".

Seemingly revolutionary concepts, products and processes quickly became quickly outdated. Moreover, the continuation of previously granted monopolies was increasingly uncertain. As cherry on top of the cake, mismanagement was widespread.[9] A fine illustration is presented by the Berliner Patent-Papier-Fabrik. The printer of the state's banknotes had to be saved from insolvency just two years after its incorporation.[10] With prospective shareholders wisely demanding a level of security comparable to that of bondholders but project sponsors refusing to give up control, the instrument of non-voting preferences shares emerged as a compromise. Thus, one might argue these instruments served as a stepping stone in the maturization of financial markets – for similar reasons, the popularity of non-voting preference shares in the US surged, contributing to the phenomenon of banker control (*see* § 15.3.1 *supra*). At the time, the German non-voting preferences were referred to as priority shares (*Prioritätsaktien*) or priority bonds (*Prioritätsobligationen*).[11] The first issuance of priority shares was executed on March 13, 1839, by the *Berlin-Potsdamer Eisenbahngesellschaft*. Soon, many others followed.[12]

The rudimentary General State Laws (*Allgemeines Landrecht für die Preußischen Staaten*[13]) of 1794 and the comparatively more elaborate French

9. Almost immediately, director failures were linked to the separation of ownership and control. *See* Hansemann 1837, *supra* note 5, at 79, 110-118, observing the discrepancy between the theoretical and actual distribution of powers at the AGM and calling for the creation of a Shareholder Committee, which should have the right to approve important decisions. Thus, Hansemann preceded Berle and Means (*see* § 15.3.2 *supra*) by a century.

10. *See* W. Bayer, 'Grundkapital, Kapitalaufbringung, Kapitalerhaltung', in: *Aktienrecht im Wandel* 708, 713-714 (Mohr Siebeck, 2007); *see also* P.C. Martin, 'Die Entstehung des preußischen Aktiengesetzes von 1843', 56 *Vierteljahrschrift für Sozial- und Wirtschaftsgeschichte* 499, 502-506 (1969), citing numerous examples, including that of the Danzig-based Actien-Verein (*sic!*) behufs der Mühlfabrication, which had promised an annual dividend of 20-30 %.

11. It was not always abundantly clear whether the instruments constituted debt or equity. Interestingly, this uncertainty could persist without giving rise to any solvency questions. *See* S. Daske, *Vorzugsaktien in Deutschland. Historische und rechtliche Grundlagen, ökonomische Analyse, empirische Befunde* 16-20 (Springer, 2019). What is striking from a comparative point of view is not the rise to prominence of non-voting preference shares – a similar trend can be observed in the US, *see* § 15.3.1 *supra* – but rather that the mechanism has largely retained its position as pre-eminent German deviation from the one share, one vote standard over the years.

12. *See* Bösselmann 1938, *supra* note 4, at 21, noting that already in 1850, railroads dominated the stock exchanges. For a different version of accounts, *see* T. Bezzenberger, *Vorzugsaktien ohne Stimmrecht* 6-8 (Heymanns, 1991), mentioning 1844 as the year of the first issuance of priority shares.

13. On the superficial nature of the General State Laws, s*ee* T.W. Guinnane, 'German company law 1794-1897', in: *Research Handbook on the History of Corporate and Company Law* 170 (Harwell Wells, ed.), at 173, 179; *see also* C. Schubel, V*erbandssouveränität und Binnenorganisation der Handelsgesellschaften* 160 (Mohr Siebeck, 2003) ("*Das, wonach gesucht kann es eigentlich schon per definitionem nicht geben – auf die Aktiengesellschaft anwendbare allgemeine bestimmungen.*")

Code de Commerce of 1807 for the Rhine provinces[14] were both unfit to cope with these rapid economic developments. As a result, they were replaced by the Act on Joint Stock Companies (*Gesetz über die Aktiengesellschaften*) of 1843 (PrAktienG).[15] It maintained (in § 1 PrAktienG) the cumbersome obligation of obtaining royal assent. According to the ministerial instructions of 1845, this would only be granted if the corporation's proposed activities appeared useful to society as a whole ("*aus allgemeinen Gesichtspunkten nützlich*"). Meanwhile, the application process did became more standardized, with the *Konzession*-system replacing the *Oktroi*-based special charter approach. The *Konzession*-regime explicitly specified the conditions that had to be met for legal personality (§ 8 PrAktienG) and limited liability (§ 15 PrAktienG) to be granted.[16] Thus, the regulatory system was brought somewhat more in line with a general incorporation-approach, although it would going too far to claim that incorporating was reduced to a routine administrative procedure: the state could still refuse its blessing.[17]

Substantively, the PrAktienG contained little provisions as to a corporation's internal affairs, and the distribution of voting rights was left entirely to the charter. In practice, degressive voting was often combined with proportional voting. Accordingly, holders of a smaller number of shares were not eligible to vote, whereas holders of a larger number of shares did not receive additional votes beyond a certain investment.[18] However, the proportional model gained ground rapidly, and already in 1842, a well-known scholar of the time advocated a purely proportional approach.[19] We also witness the development of the first rules regarding capital formation and retention. These included § 17

14. "After years of French rule, many in what became Prussia's Rhineland province had little desire to join relatively backward Prussia. To mollify them, Prussia permitted the Rhineland to retain some local institutions." *See* Guinnane 2018, *supra* note 13, at 174 (also noting that in Westphalia, the General State Laws replaced the *Code de Commerce* in 1825); *see also* Bösselmann 1939, *supra* note 2, at 63-73.
15. *See* Gesetz-Sammlung für die Königlichen Preußischen Staaten 1843, 341; *see also* T. Baums, *Gesetz über die Aktiengesellschaften für die königlich preussischen Staaten vom 9. November 1843: Text und Materialien* (Scientia, 1981). For an extensive discussion, *see* E. Kießling, 'Das preußische Aktiengesetz von 1843', in: *Aktienrecht im Wandel* 193 (Mohr Siebeck, 2007); *see also* Schubel 2003, *supra* note 13, at 156-166; Martin 1969, *supra* note 10.
16. Indeed, the revised system did not entirely rule out chicanery. When David Hansemann (quoted at note 5 *supra*), a successful Rhineland businessman and liberal politician, attempted to found the Disconto Gesellschaft (one of the principal predecessors of Deutsche Bank), his Berlin rivals successfully frustrated the attempt for years. As a result, the business initially started as a partnership. *See* Guinnane 2018, *supra* note 13, at 179.
17. *See* Guinnane 2018, *supra* note 13, at 180; *see also* Schubel 2003, *supra* note 13, at 159. For an overview of broadly similar US developments towards general incorporation, *see* § 14.3.1 *supra*.
18. *See* Hansemann 1837, *supra* note 5, at 116, 141-142, 157-158.
19. *See* M. Pöhls, *Das Recht der Actiengesellschaften mit besonderer Rücksicht auf Eisenbahngesellschaften* 198 (Hoffmann & Campe, 1842). Again, note the emphasis on railroads.

(2) PrAktienG, according to which stocks entitling their holder to interest payments (*Zinsen*) before the corporation had started its operations were generally disallowed.[20] This provision aside, the PrAktienG appears to have been silent on the allocation of financial rights, meaning that dividend entitlements could be attributed freely amongst the shareholders.

21.2.2 Von savigny and von gierke

The main architect of the PrAktienG of 1843 had been Von Savigny. His Historical School advocated a revival of the study of Roman law. A legal historian by trade, Von Savigny had risen to legislative prominence in 1814. In his view, the law had been developing autonomously, meaning that codification should not take place without a solid understanding of the ideas of legal scholars of the past.[21] As to the character of the AG, Von Savigny supported the fictional (or concession) argument. Under this theory, corporations are treated as artificial human beings.[22] This approach was not only consistent with Roman traditions but also with contemporary practice, where a corporation with distinct legal personality could solely come into existence by government authorization (*see* § 21.2.1 *supra*). According to the fictional view, the corporation can only take part in legal transactions by virtue of representation. By fiction, the acts of directors and officers are considered acts of the legal entity and by fiction, decisions of a majority of the shareholders are attributed to the corporate entity. Interestingly, Von Savigny argued that decisions with far-reaching consequences could only be made on a unanimity basis, not by a simple majority. In the view of Von Savigny, such decisions included changing the Articles of Association, liquidating the corporation and making fundamental changes to the corporate assets.[23] Undoubtedly, these are momentous decisions. Nonetheless, the requirement of unanimity illustrates that the AG was still close to its partnership roots at this point in time.

---

20. Such fixed distributions were considered at odds with the residual financial nature of shares (*see* § 2.3.5 *supra*) and could jeopardize the startup-phase. For an overview, *see* Bayer 2007, *supra* note 10, at 717-719.
21. *See* F.C. von Savigny, *Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft* (Mohr und Zimmer, 1814).
22. *See* F.C. von Savigny, *System des heutigen Römischen Rechts II*, 236 (Veit, 1840) ("*Die Rechtsfähigkeit wurde oben dargestellt als zusammenfallend mit dem Begriff des einzelnen Menschen (§ 60). Wir betrachten sie jetzt als ausgedehnt auf künstliche, durch bloße Fiction angenommene Subjecte. Ein solches Subject nennen wir eine juristische Person, d. h. eine Person welche blos zu juristischen Zwecken angenommen wird*.")
23. *See* Von Savigny 1840, *supra* note 22, at 347-348, arguing that merely requiring a majority would grant current shareholders unlimited priority over their future successors. In this sense, Von Savigny was rather nuanced in his analysis – unequivocally applying fiction-theory would not have necessitated the recognition of an interest separate of that of the current shareholders.

The views of Von Savigny and his fellow authors were criticized chiefly by the members of the Germanist School, of whom the most notable representative was Von Gierke.[24] Similar to the Romanists, the Germanists had a taste for historical affairs. However, instead of Justinian's Code, they studied the traditional statutes and charters of German towns and communities. In particular, the Germanists were interested in the reality of social interactions, not legal technicalities. From their point of view, a corporate entity was not merely a fiction, but a living organism (*reale Verbandspersönlichkeit*) with rights and obligations of its own. Under the real entity theory, different organs, each with distinct competences and powers, jointly constitute a corporate body.[25] For his part, Von Gierke also recognized the concept of special rights (*Sonderrechte*), which (minority) shareholders could retain in spite of the wishes of the majority.[26] Meanwhile, and despite its name, the concept of special rights was initially interpreted rather broadly. At some point, even the general rule of equal treatment of shareholders was considered a special right.[27] The meaning of the concept of special rights is not without relevance, as even under current German law (*see* § 35 BGB), investors may not be deprived of such powers without consent. Thus, Von Gierke's thinking at this particular point was equally rooted in partnership theory, and the differences with Von Savigny may occasionally be in degree rather than in kind.

21.2.3 The ADHGB of 1861 and its Boom-Bust Progeny

Shortly before its 20th anniversary, the PrAktienG was replaced by the General German Commercial Code of 1861 (*Allgemeines Deutsches Handelsgesetzbuch*, ADHGB).[28] With Prussia pushing for German unification on a political level, the economic relevance of the German Custums Union (*Deutscher*

24. *See* O. von Gierke*, Die Genossenschaftstheorie und die Deutsche Rechtsprechung* 5, 603 (Weidmann, 1887).
25. *See* Von Gierke 1887, *supra* note 24, at 497-507. Thus, Von Gierke advocated board autonomy, rather than adhering to the traditional system in which the AGM held supreme power.
26. *See* Von Gierke 1887, *supra* note 24, at 174 et seq, distinguishing between the individual domain of shareholders (*verbandsfreie Individualsphäre*) and the social domain of the corporation (*gemeinheitlichen Sphären*), and arguing that *Sonderrechte* connected and were part of both domains.
27. *See* W. Schilling, 'Wandlungen des modernen Gesellschaftsrechts', 8 *JuristenZeitung* 489 (1953), containing an elaborate overview of case law and the doctrinal positions taken by various scholars.
28. *See* L. Pahlow, 'Aktienrecht und Aktiengesellschaft zwischen Revolution und Reichsgründung. Das Allgemeine Deutsche Handelsgesetzbuch von 1861', in: *Aktienrecht im Wandel* 237 (Mohr Siebeck, 2007).

Zollverein), which had been created in 1834, grew.[29] Consequently, businesses could increasingly choose to locate their corporate seat in the country with the most attractive legislative package and subsequently offer their goods and services elsewhere.[30] One well-known example concerns the Darmstädter Bank, founded in 1852 for the purpose of doing business in Frankfurt, some 30 kilometers north. To counter such arbitrage, various German states decided to ensure that at least some parts of their respective regulatory systems were harmonized. In 1857, the old market town of Nürnberg was symbolically chosen as the location for preparing new commercial legislation (*Nürnberger Konferenz*). This event resulted in the ADHGB of 1861. The act was grounded primarily on a Prussian proposal published just a few years earlier.[31] The two most controversial items were corporate personhood (*see* § 21.2.2 *supra*) and the *Konzession*-system. The requirement of any form of royal or state assent was vehemently opposed by the Hanseatic cities.[32] With the debate on this specific point threatening to jeopardize the success of the entire operation, a compromise was reached. The condition of government assent was accepted as a general rule (§ 208 ADHGB). However, states could opt out on an individual basis (§ 249 ADHGB). A minority chose to do so.[33] This matter aside, the PrAktienG of 1843, through the ADHGB of 1861, became the basis for German corporate law.[34]

The ADHGB of 1861 still adopted a somewhat ambivalent stance on legal personhood. Whereas § 213 ADHGB considered the AG as such the bearer of rights and obligations, § 216 ADHGB maintained that every shareholder owned a part of the equity.[35] Under the ADHGB, the AGM held supreme powers, although it was required to act in the interest of the corporation as a whole (§ 237 ADHGB). The statute was rather enabling in nature and contained little mandatory provisions,[36] despite the fact that the codification reflected

29. The *Zollverein*'s main predecessor was the *Norddeutscher Zollverein* (1828) between Prussia and Hessen, which merged with and incorporated numerous similar bodies in the subsequent decades, to the point that its economic effects were undeniable. *See* W.O. Henderson, *The Zollverein* (Cambridge University Press, 1939).
30. *See* Guinnane 2018, *supra* note 13, at 183. This former situation of German charter competition is actually quite similar to the current state of affairs in the US. *See* § 14.3 *supra*.
31. For an elaborate discussion, *see* Pahlow 2007, *supra* note 28; *see also* Schubel 2003, *supra* note 13, at 167-181.
32. There, the obligation of state assent was abolished well before 1861 (or had never existed, as there was no royal interest to protect). *See* Guinnane 2018, *supra* note 13, at 178. The *Hamburgischen See-Assekuranz-Compagnie*, founded in 1765, is traditionally considered the first modern German joint stock company, with the Hamburg City Council adopting a policy of "*Die Dinge gehen zu lassen, wie sie gingen*". *See* Martin 1969, *supra* note 10, at 511.
33. *See* Guinnane 2018, *supra* note 13, at 185-186; *see also* Schubel 2003, *supra* note 13, at 175-181.
34. *See* Martin 1969, *supra* note 10, at 513.
35. *See* Pahlow 2007, *supra* note 28, at 256-264.
36. *See* Pahlow 2007, *supra* note 28, at 265.

in part the fear of a (perceived) race to the bottom. For example, § 209 (9) ADHGB provided that the articles of association should stipulate the contracted voting rights, provided there were any. Although the one share, one vote standard was introduced as the statutory default rule – a novelty, it should be admitted – deviations were freely permitted (§ 224 ADHGB). Interest payments to shareholders (in that capacity) were banned altogether, not only in the startup phase (§ 217 (1) ADHGB). Otherwise, the law remained silent on the allocation of profit rights.

A few years thereafter, two seemingly unrelated factors jointly laid the foundation for severe a destabilization of the German economy. These – again – included the obligation of government assent and the German unification.[37] First, it quickly became apparent that the requirement of royal or state assent was severely hampering private initiative.[38] Following a series of proposals,[39] the mechanism, which had been so hotly debated just a few years before, was abolished by the *Aktienrechtsnovelle* of 1870.[40] The switch to a general incorporation approach resulted in a surge in industrial activity, the Founders Boom (*Gründerboom*).[41] All those involved in the legislative process were readily aware of the risk of a potential transitional crisis (*Übergangskrisis*). Indeed, sharply relaxing the conditions to incorporate could attract certain individuals of dubious repute. To combat abuse of creditors and outside minority investors, the *Aktienrechtsnovelle* of 1870 contained a broad set of remedies. First, they targeted the share capital. Under § 207a ADHGB, the minimum nominal value for bearer shares was set at 100 Thaler, so that smaller investors could not be lured into the temptations of the stock market too easily. Pursuant to § 209b

37. The abandonment of the silver standard by the German banking system has also been mentioned as a cause of the crisis. *See* J. Wiegand, 'Destabilizing the Global Monetary System: Germany's Adoption of the Gold Standard in the Early 1870s' (2019), available at http://www.ssrn.com/.

38. *See* Guinnane 2018, *supra* note 13, at 187-188, observing that *Konzession*-system was ineffective, restricted personal liberties and created legal uncertainty, since it did not apply to some partnerships nor, in respect of corporations, in all parts of Germany.

39. For a detailed documentation on the preparation of the *Aktienrechtsnovelle* of 1870 and plans developed in later years, *see* W. Schubert, 'Vom Konzessions- zum Normativsystem. Materialien zur Aktienrechtsnovelle 1870', 46 *Zeitschrift für Unternehmens- und Gesellschaftsrecht* (*Sonderheft 21*) 1-17 (2017).

40. *See* Gesetz, betreffend die Kommanditgesellschaften auf Aktien und die Aktiengesellschaften, Bundesgesetzblatt des Norddeutschen Bundes 1870, 375. For an extensive discussion, s*ee* J. Lieder, 'Die 1. Aktienrechtsnovelle vom 11. Juni 1870', in: *Aktienrecht im Wandel* 318, 325 (Mohr Siebeck, 2007); *see also* Pahlow 2007, *supra* note 28, at 260; Schubel 2003, *supra* note 13, at 245-286, also containing an extensive analysis of contemporary legal practice.

41. The number of corporations increased fivefold. Note that this figure includes existing firms previously driven in the legal form of a partnership being converted into corporations, instead of newly founded businesses. *See* E. Engel, *Die erwerbsthätigen juristischen Personen im preusisschen Staate, insbesondere die Actiengesellschaften* 15 *Zeitschrift des Königlich Preußischen Statistischen Bureaus* 449, 457 (1875).

ADHGB, special privileges granted to individual shareholders and in-kind contributions made by them had to be disclosed in the articles of association.[42] Second, the ADHGB mandated the institution of a supervisory board (§ 209 (6) ADHGB), which until then, had been optional. Third, it and contained criminal sanctions in case of non-compliance (§ 239 and § 249 ADHGB).[43] Another factor to undermine the economy was the unification of the various German states under Prussian rule, following the Franco-Prussian War of 1870-1871. The Prussian victory resulted from Bismarck's cunning diplomacy and superb logistical planning (involving rail) and tactical military genius by Von Moltke the Elder. In itself, the war did not cause long-lasting damage to the German economy. Similarly, the shift in the political position of the German countries did not result in great changes to the corporate legal framework. The ADHGB of 1861, as amended by the *Aktienrechtsnovelle* of 1870, remained in force. Meanwhile, the newly proclaimed German Empire was entitled to receive war reparations from France to the tune of ₣ 5 billion under the Treaty of Frankfurt of 1871.[44] Although it was estimated that payment would take 5 years, France was able to redeem its war debts as early as 1873. In turn, this prompted the German Imperial government to pay off its national debt, resulting in a massive inflow of funds into the economy.

In combination, the two developments caused a brief but sharp period of over-expansion, speculation, manipulation and outright fraud in railroads as well as in other industries, known as the Founders' Crisis (*Gründerkrach*).[45] In the process, German equity prices, which had initially nearly doubled, more than gave up their gains. They would not recover until the end of the decade.[46] Although German corporate law contained certain checks and balances to prevent chicaneries, especially those of the *Aktienrechtsnovelle* of 1870, there was not a single corporate constituency which failed its duties. Rather, almost every stakeholder displayed reckless short-term behavior. If the in-kind contributions made by professional swindlers (*gewerbsmäßige Gauner*) did not disappear entirely, they often proved much less valuable than the shares which had been granted in exchange.[47] supervisory boards were either greased into complacency or manned by the founders themselves, compromising their effec-

42. For an overview of other measures in the *Aktienrechtsnovelle* of 1870, *see* Guinnane 2018, *supra* note 13, at 190.
43. For this tripartite categorization, *see* Lieder 2007, *supra* note 40.
44. Using a retail price index to adjust for inflation, this would have amounted to $ 342 billion in 2011. Other metrics indicate an even higher amount. *See* J. Steinberg, *Bismarck: A Life* 329 (New York, 2011).
45. Note the German economy was not the only one affected: the downturn had a global character. In the US and especially the United Kingdom, the entire period of 1873-1896 has occasionally been referred to as the Great or Long Depression, until being overshadowed by the 1930s. *See* H. Rosenberg, 'Political and Social Consequences of the Great Depression of 1873-1896 in Central Europe', 13 *The Economic History Review* 58 (1943).
46. *See* Engel 1875, *supra* note 41, at 532.
47. *See* Engel 1875, *supra* note 41, at 469.

tiveness.[48] The lack of shareholder commitment was also criticized sharply.[49] Thus, the general conclusion was that the *Aktienrechtsnovelle* of 1870 had not achieved its goal of preventing a transitional crisis. The Founders' Crisis of 1873 caused severe backlash against the political establishment and economic liberalism. The calls for state intervention increased, the importance of cartels grew and banks became more important in financing enterprises relative to the stock market (*see* § 7.2 *supra*).

We can also observe a shift in the rationale for issuing non-voting preference shares (*Vorzugsaktien* in modern terminology). In the 1840s, these instruments primarily served to comfort outside investors participating in previously non-existent, rapidly expanding industries (*see* § 21.2.1 *supra*). By contrast, in the last decades of the 19th century, non-voting preference shares were mostly issued to fend off looming cases of insolvency.[50] The alternative – issuing common shares – was not possible, as the common stocks already outstanding typically traded below nominal value, and the law prohibited issuances below par. In fact, some corporations ended up with a share capital consisting almost exclusively of preference shares. This was a bit of a misnomer in these days, as due to the financial situation, hardly any dividends, let alone preferential distributions, were paid.[51] Nonetheless, the economic importance of non-voting preference shares in the pre-1914 period should not be exaggerated. Generally, these instruments comprised 4 % to 5 % of the outstanding share capital.

21.2.4 The aktienrechtsnovelle of 1884 and the handelsgesetzbuch of 1897

To prevent catastrophes such as the Founders' Crisis from reoccurring, the *Aktienrechtsnovelle* of 1884 was enacted.[52] It provided a wide-ranging reform of ADHGB of 1861, still the main body of German corporate law.[53] The severity of the situation is illustrated by the radical nature of the ideas put forward.

---

48. *See* Lieder 2007, *supra* note 40, at 361.
49. As observed eloquently by Von Jhering: "*dass den Actionären das Interesse ohne die Verfügung, dem Vorstande die Verfügung ohne das Interesse zufällt*." *See* R. von Jhering, *Der Zweck im Recht* 224-225 (Breitkopf & Härtel, 1877), thus preceding Berle and Means (*see* § 15.3.2 *supra*) by 50 years.
50. For a critical analysis, *see* E. Schmalenbach, 'Die Vorzugsaktie', 2 *Zeitschrift für handelswissenschaftliche Forschung* 241 (1908), suggesting that the use of preference shares actually prevented corporations from restructuring fully, thus advocating a ban on the instrument.
51. *See* Daske 2019, *supra* note 11, at 20-21, also noting that if all virtually shareholders are entitled to preferential treatment, the preference effectively becomes irrelevant
52. *See* Gesetz, betreffend die Kommanditgesellschaften auf Aktien und die Aktiengesellschaften, Deutsches Reichsgesetzblatt 1884, 123. For an extensive analysis, s*ee* S. Hofer, 'Das Aktiengesetz von 1884 – ein Lehrstück für prinzipielle Schutzkonzeptionen', in: Aktienrecht im Wandel 388 (Mohr Siebeck, 2007); *see also* W. Schubert & P. Hommelhoff (eds.), *Hundert Jahre modernes Aktienrecht. Eine Sammlung von Texten und Quellen zur Aktienrechtsreform 1884 mit zwei Einführungen* (De Gruyter, 1985).
53. *See* Schubert 2017, *supra* note 39, for an overview of the preparations.

Some suggested to abolish the figure of the AG entirely, due to the limited liability it offered to investors, or to make members of the executive board personally liable without limit. Others proposed doing nothing, thus allowing markets to mature.[54] Torn between such uncompromising views, the legislator embraced a more realistic approach.[55] Indeed, it was widely believed that the *Aktienrechtsnovelle* of 1870 lacked any real teeth and had been rushed.[56] Therefore, capital formation and retention provisions, particular those governing the earlier parts of the corporate life-cycle, were tightened. At the heart of this system lay § 209h ADHGB, pursuant to which the members of both the executive and supervisory board were required to confirm the appropriateness of the decision-making process on capital contributions in the startup phase, together with external auditors. Related measures included a ban on the concept of releasing investors from the obligation to fully pay up the shares' nominal value (*Aktienliberierung*) and an increase of the minimum nominal value to 1,000 Reichsmark (§ 207a ADHGB).[57] Additionally, the independence of the supervisory board was reinforced. Members were elected by the AGM (§ 224 ADHGB) and membership of the supervisory board was no longer compatible with that of the executive board (§ 225a ADHGB). Finally, control rights of minority shareholders were strengthened. Specifically, this involved the possibility for investors representing 10 % of the equity to petition the courts to inquire whether any irregularities had taken place (§ 222a ADHGB), the option for shareholders worth 20 % of the stock to demand compensation from founders or directors in the startup phase (§ 223 ADHGB) and convocation rights for investors representing 5 % of the equity (§ 237 ADHGB).[58] The possibility to freely allocate voting rights through the articles of association was also firmly restricted, with the revised § 190 ADHGB banning multiple voting shares and non-voting stock,[59] although not non-voting preference shares. For the first time, we can observe the legislator addressing the issue of differentiated financial rights. Under § 175a (4) ADHGB, issuing shares with superior

54. Importantly, the life-cycle perspective should not be understood as an argument in favor of plain deregulation. It can be interpreted as suggesting less stringent standards for younger firms, but may also be considered as indicating more intrusive governance rules for older businesses, depending on the situation. *See* § 10.6 *supra*.
55. *See* Guinnane 2018, *supra* note 13, at 191; *see also* Hofer 2007, *supra* note 52, at 390-402.
56. To quote Levin Goldschmidt, a well-known lawyer of the time: "*Die Novelle war sicherlich kein gesetzgeberisches Kunstwerk, sondern ein in der Eile gemachtes Nothgesetz*." *See* Schubert 2017, *supra* note 39, at 12.
57. *See* Bayer 2007, *supra* note 10, at 729. The figure of 1,000 Reichsmark amounted to 2.5 times the average annual income. Some scholars had gone even further, advocating thresholds of 5,000 or 10,000 Mark.
58. *See* Guinnane 2018, *supra* note 13, at 192-194; *see also* Hofer 2007, *supra* note 52 for a slightly different order.
59. "*Jede Aktie gewährt das Stimmrecht. Dasselbe wird nach den Aktienbeträgen ausgeübt.*" Note that this formulation left the possibility open of issuing shares with different nominal values, and thus varying voting rights.

or inferior dividend entitlements was permitted, provided that such classes of shares enjoyed a basis in the articles of association.

After the *Aktienrechtsnovelle* of 1884 was enacted, German corporate law entered a phase of relative tranquility. The changes brought by the Code of Commerce (*Handelsgesetzbuch*, HGB) of 1897 proved generally more modest than had been the case in previous instances of regulatory reform.[60] The most important modifications appear to have been theoretical ones, with the AG replacing the KGaA as the statutory default form of enterprise. Moreover, any remaining discussions on legal personality were put to rest, since the law provided that solely the AG was the legal bearer of rights and obligations. However, and of particular interest to this PhD-thesis is the fact that the ban on multiple voting stock, introduced only by the *Aktienrechtsnovelle* of 1884, was completely reversed.[61] (Meanwhile, the ban on non-voting shares remained in place.) The reversal intended to bolster control by outside minority shareholders and the position of the AGM in general. Since multiple voting shares had to constitute a separate class of stock, they were often combined with distinct financial characteristics in the form a dividend preference, thus creating multiple voting preference shares. Such instruments are potentially supercharged securities, benefiting from both superior control rights as well as from fixed distributions. Multiple voting preference shares became particularly well-known in 1906. In that year, mining company Hibernia, one of the predecessors of energy producer and distributor E.ON, succeeded in fending off an unsolicited takeover.[62] This was achieved by issuing multiple voting preference shares in the midstream phase to shareholders who supported a standalone scenario, but not to others (an "exclusionary issuance"). The story of Hibernia has multiple fascinating aspects. First, the fact that the attempt was unsolicited is, in itself, already remarkable by German standards. Successful hostile acquisitions were completed only in the 1990s (*see* § 21.4 *infra*). Second, and what sets this case truly apart, is the identity of the bidder: the offer had been made by the Prussian state.[63] Third, Hibernia was part of a cartel. As such, this was not a huge issue by contemporary standards – rather, it was common practice. The state's intervention was prompted by the fact that the cartel had acted to appease the narrow short-term interests of investors, by raising coal prices to a level that its prod-

60. *See* Guinnane 2018, *supra* note 13, at 195; *see also* L. Pahlow, 'Das Aktienrecht im Handelsgesetzbuch von 1897', in: *Aktienrecht im Wandel* 415, 423 (Mohr Siebeck, 2007) ("*keine grundlegenden Änderungen*").

61. *See* § 252 (1) HGB 1897: "Jede Aktie gewährt das Stimmrecht. […] *Werden mehrere Gattungen von Aktien ausgegeben, so kann der Gesellschatsvertrag den Aktien der einen Gattung ein höheres Stimmrecht beilegen als den Aktien einer anderen Gattung".*

62. *See* Raemisch 1923, *supra* note 1, at 16-17; *see also* Schmalenbach 1908, *supra* note 50, at 244.

63. *See* Raemisch 1923, *supra* note 1, at 16-17; *see also* Schmalenbach 1908, *supra* note 50, at 244.

uct became unaffordable for many ordinary consumers.[64] Fourth, the minister ordering the unsolicited takeover was a major Hibernia shareholder. Thus, he suffered from a blatant conflict of interest – but not from the corporation's share price, which skyrocketed. The extra-ordinary case of Hibernia aside, issuances of multiple voting shares remained something of an oddity until the 1920s.[65]

21.3 The first dual class debate: the long 1920s

21.3.1 Hyperinflation in the weimar republic

The use of multiple voting stock increased spectacularly in the early 1920s, following the First World War. To understand exactly why this was the case, we have to take a step back and analyze the general economic situation. Under the 1919 Versailles Treaty and the 1921 schemes of the London Reparations Commission, Germany was required to pay massive compensation: 132 billion Goldmarks, the modern equivalent of $ 450 billion.[66] As this obligation put a too heavy burden on the economy, Germany halted the payments.[67] Between 1923 and 1925, France and Belgium occupied the Ruhr-area – the heart of German industrial activity – as a form of retaliation.[68] These actions resulted in a sharp social-economic downturn and hyperinflation.[69] Increasingly, the

64. *See* Raemisch 1923, *supra* note 1, at 16-17; *see also* Schmalenbach 1908, *supra* note 50, at 244.
65. The absence of such dual class equity structures can also be attributed to the fact that occasionally, stock exchanges refused to list the corporations that had implemented them. *See* R. Passow, *Die Aktiengesellschaft: Eine wirtschaftswissenschaftliche Studie* 244 (Verlag Gustav Fischer, 1922). However, such actions do not seem to have been part of a longstanding policy, as was the case in the US (*see* § 15.3.1 *supra*). Also, note that German stock markets have traditionally been more decentralized, meaning that effectively enforcing a single policy was more difficult.
66. Keynes, who had been part of the British negotiating team, was especially critical of the treaty, characterizing it as a "Carthaginian Peace" ("*Diktatfrieden*"). *See* J.M. Keynes, *The Economic Consequences of the Peace* (Macmillan, 1920). His version of accounts would prove influential and continues to shape the public opinion.
67. Some recent scholarship has partly rehabilitated the economic aspects of the Versailles Treaty, arguing the peace imposed by Allied powers was more lenient than has often been considered. *See* N. Ferguson, 'The Balance of Payments Question: Versailles and After', in: M.F. Boemeke, G.D. Feldman & E. Glaser (eds.), *The Treaty of Versailles. A Reassessment After 75 Years* (Cambridge University Press, 1998), containing an extensive literature review and arguing all parties realistically expected maximum payments of 50 billion Goldmarks.
68. On these events, *see* C. Fischer, *The Ruhr Crisis 1923-1924* (Oxford University Press, 2003).
69. The Dawes-plan of 1924 aimed to curb the adverse effects of the Ruhr-occupation, and initially did enjoy some success, but only for a brief period of time. In short, the scheme involved US banks financing German bond issuances, which in turn could be used to fund war reparations.

capital necessary to fund businesses became scarce, also because the German National Bank (*Reichsbank*) restricted the total amount of credit financial institutions could supply (*Kreditstopp*). As a result, foreign investors more and more took over the role of financing German industries. Amongst them were many US businesses. This included car-manufacturers Ford, which opened production plants Berlin and Cologne, and General Motors, which acquired Opel.[70] To a certain degree, these interventions may be considered as the benevolent face of capitalism, with trade partners helping each other in times of difficulty. However, with stock prices having dropped 70 % to 98 %,[71] such investments could also be viewed as bargain hunting. Some directors and controlling shareholders resisted the idea of investors from abroad taking over the entire German economy (*Überfremdung*).[72] To deter outsized foreign control, various mechanisms were used. Certain corporations engaged in exclusionary issuances of common stock (*Vorratsaktien*) or, through crossholdings, formed cartels. Of these, industrial conglomerate Interessengemeinschaft (I.G.) Farben was arguably the most familiar name.[73] Other corporations created dual class equity structures using multiple voting preference shares.[74] Typically, the securities offered negligible dividend preferences, as to formally satisfy § 252 (2) HGB 1897 (*see* § 21.2.4 *supra*). It should be emphasized that multiple voting preference shares were used on a truly enormous scale. In 1925, more than half of the German listed corporations (842 out of 1,595) had issued these instruments, typically to members of the supervisory board or banks.[75] Mul-

70. *See* W. Link, *Die amerikanische Stabilisierungspolitik in Deutschland 1921 – 32* (Düsseldorf, 1970); *see also* W. Bosch, *Die Epochen der Kreditrestriktionspolitik der Deutschen Reichsbank 1924/1926* (Stuttgart, 1927). For an extensive English analysis, *see* T. Kuntz, 'German Corporate Law in the 20th Century', in: *Research Handbook on the History of Corporate and Company Law* (H. Wells ed., 2017).
71. For these figures, *see* U. Ronge, *Die langfristige Rendite deutscher Standardaktien: Konstruktion eines historischen Aktienindex ab Ultimo 1870 bis Ultimo 1959* 202 (Lang, 2002), presenting various calculation methods. For a different version of accounts, *see* C. Burhop, D. Chambers & B.R. Cheffins, 'Law, Politics and the Rise and Fall of German Stock Market Development, 1870-1938' (2015), available at http://www.ssrn.com/. The authors point towards the high number of IPOs. However, this does not necessarily contradict a sharp market decline, as it is well known that even the smallest of German investors participated in the stock market to preserve at least some of their purchase power.
72. For an influential argument, *see* E. Schmalenbach, *Finanzierungen* 254 (Gloeckner, 1928), warning that the German economy should not become "*Spielball ausländischer Finanzkräfte*".
73. *See* G. Spindler, 'Kriegsfolgen, Konzernbildung und Machtfrage als zentrale Aspekte der aktienrechtlichen Diskussion in der Weimarer Republik', in: *Aktienrecht im Wandel* 440 (W. Bayer & M. Habersack eds., 2007).
74. *See* Daske 2019, *supra* note 11, at 25, noting that S. 276d of the Versailles Treaty forbade any direct German measures against foreign share-ownership. As a result, general statutes to restrict foreign investments were not possible and pre-existing corporate law mechanisms posed the only realistic policy option.
75. However, the latter option was not entirely without risks, because German banks at the time were largely dependent on credit from abroad. Then, transferring voting power to such

tiple voting preference shares carrying as many as 20 or 250 votes per share were not uncommon,[76] further underscoring the severity of the economic situation. (The more votes per share, the less capital is needed.)

However, the alleged abuse of multiple voting preference stocks grew as well. Increasingly, these securities were seen as the instrument of "cliques" to deprive fellow shareholders of the chance of assuming control or to reduce board accountability.[77] One well-known case concerned Hamburg Süd, which operated a shipping business. In 1927, upon a threatened unsolicited takeover, it engaged in an exclusionary issuance of newly-created multiple voting shares to a consortium controlled by the board. Moreover, only 25 % of the freshly-issued stock's par value had to be paid upfront, whilst the existing shares traded at 220 % of the par value. The *Reichsgericht*, the German Supreme Court at the time, adopted a legalistic position and reasoned that none of the elements of the transaction violated the law.[78] Thus, the scheme was upheld, as was the case in similar instances.[79] Unsurprisingly, the question of how to deal with multiple voting stock and related instruments gained considerable scholarly attention. To illustrate, the matter was discussed at two meetings of the influential *Deutscher Juristentag*, the national lawyers convent. In both instances, the meeting failed to reach a unanimous conclusion.[80] Subsequently, the Department of Justice (*Reichsjustizministerium*) took the initiative. In 1930, it published a modest proposal for reform. The plan contained a wide range of measures, including enhanced ownership disclosure, mandatory auditing and restrictions on director loans. Moreover, it was suggested to ban exclusionary issuances of

---

institutions could aggravate foreign control. Additionally, banks were entitled to vote the uninstructed shares (*see* § 20.5.1 *supra*). Thus, financial institutions could be induced to engage in usurpation. *See* H. Konschewski, *Vorzugsaktie und Pluralstimmrecht* 65-66 (Breslau, 1921).

76. *See* Daske 2019, *supra* note 11, at 27-29 (noting that often, controllers held merely 1 % of the equity); *see also* W-G. Ringe, 'Deviations from Ownership-Control Proportionality—Economic Protectionism Revisited', in *Company Law and Economic Protectionism* 209, 217 (U. Bernitz & W-G. Ringe eds., 2010) (observing the issuance of shares carrying thousands of votes each); C. Fohlin, 'The History of Corporate Ownership and Control in Germany', in *A History of Corporate Governance Around the World* 223, 262 (R.K. Mock ed., 2005); Passow 1922, *supra* note 65, at 338.
77. *See* Schmalenbach 1928, *supra* note 50, at 256; *see also* Raemisch 1923, *supra* note 1, at 3, noting the transition of the preference shares instrument from providing growth funding (*see* § 21.2.1 *supra*) to ensuring control.
78. *See* Reichsgericht 13 December 1927 – II 401/27 (*Hamburg Süd*).
79. For other examples, *see* Reichsgericht 24 September 1929 – II 26/29; Reichsgericht 31 March 1931 – II 222/30; Reichsgericht 22 October 1937 – II 58/37. In short, contemporary case law focused on the question whether dual class stock could serve the corporate interest (not: that of the shareholders). For an analysis, *see* Konschewski 1921, *supra* note 75, at 38. This judicial position was influenced consideraby by the views of Rathenau. *See* § 21.3.3 *infra*.
80. *See* Kuntz 2017, *supra* note 70.

common stock (*Vorratsaktien*) but not multiple voting stock.[81] However, the proposal did not gain any ground. Meanwhile, stock exchanges became increasingly vocal in targeting dual class equity structures at this point, both with regard to IPOs as well as corporations already listed. Moreover, the articles of association more and more contained provisions that stipulated the cancellation of multiple voting preference shares pursuant to a capital (not: vote) based majority decision or (less frequent) after a predetermined period of time had lapsed. As such, German corporate law preceded the current (US) policy debate on sunset provisions (*see* § 11.3.3 *supra*) by almost 100 years.[82]

21.3.2 The dramatic 1930s

In the meantime, the German economy, which had only recently recovered from the worst of the Ruhr-crisis, was hit by the Wall Street Crash of 1929.[83] In August 1929, one of Germany's biggest insurers, the Frankfurter Allgemeine Versicherungs Aktiengesellschaft, collapsed. Just in November and December 1929 alone, more than 100 smaller financial institutions went bankrupt. In 1931, one of the largest banks in Germany at the time, the Darmstädter und Nationalbank, followed.[84] It was not uncommon for the bankruptcies to coincide with at least rumors of financial malpractice. Trading at the stock exchanges was halted for almost 10 consecutive months (!), from July 1931 to April 1932. Corporations intentionally misrepresented the size of their assets to mitigate the effects of rampant taxes.[85] In these apocalyptic circumstances, the call for legislative reform swelled. In September 1931, an Emergency Decree (*Notverordnung*) was issued by president Von Hindenburg to quickly address the most urgent issues.[86] Given the irregularities, accounting standards were toughened. Moreover, the position of the supervisory board

81. *See* Kuntz 2017, *supra* note 70.
82. *See* Schmalenbach 1928, *supra* note 50, at 257-262; *see also* Konschewski 1921, *supra* note 75, at 75. For an overview of the various types of sunset mechanisms, including time-based sunset provisions, *see* § 11.3.3 *supra*.
83. Consequently, the Young-plan, which had been drafted in 1929 and was adopted in 1930 to replace the Dawes-plan and further alleviate the burdens on the German economy, failed to have an impact.
84. *See* I. Schnabel, 'The German Twin Crisis of 1931', 64 *Journal of Economic History* 822 (2004), noting that in addition to a financial industry crisis, Germany (again) faced a hyperinflation crisis.
85. *See* Kuntz 2017, *supra* note 70, for a grim description of the economic circumstances of the time.
86. For a contemporary discussion, *see* R. Rosendorff, 'The New German Company Law and the English Companies Act, 1929', 14 *Journal of Comparative Legislation and International Law* 94 (1932); *see also* R. Rosendorff, 'The New German Company Law and the English Companies Act, 1929-II', 15 *Journal of Comparative Legislation and International Law* 112 (1933); R. Rosendorff, 'The New German Company Law and the English Companies Act, 1929-III', 15 *Journal of Comparative Legislation and International Law* 242 (1933).

was reassessed. At the time, this organ was deemed too powerful and to be overly engaging in managing the corporation, instead of keeping oversight.[87] Finally, minority shareholder rights were strengthened, although dual class equity structures were explicitly left unscathed. The need for an even further-reaching overhaul of corporate law was clearly felt. However, political developments, particularly the rise to power of the National Socialist Party, meant these plans remained stalled for some time.

The desire for reform culminated in the *Aktiengesetz* of 1937 (AktG 1937).[88] The roots of this statute were multifold. Undoubtedly, it benefited from the extensive legal-comparative studies which had already been initiated in the Weimar era by means of preparation.[89] The fascist government, through instruments such as the newly-created Academy for German Law (*Akademie für Deutsches Recht*) and the Keppler Circle discussion group, intended to leave its mark as well.[90] In fact, the regime's position towards the AG was fundamentally ambivalent. Some officials preferred a radical return to small-scale, artisanal manufactures and the abolishment of shareholder rights altogether, as these enabled speculation by anonymous investors. Moreover, the effortless income derived from securities was perceived as dishonorable. Furthermore, the AG, through the AGM, possessed a democratic character.[91] However, the regime ultimately could not do without a strong, well-developed industry, also with a view to the coming war effort. Meanwhile, incorporating was strongly discouraged, and became the privilege of a small, wealthy group.[92] The *Aktiengesetz*

87. For a more recent analysis, *see* P. Muchlinski, 'The Development of German Corporate Law until 1990: An Historical Reappraisal', 14 *German Law Journal* 339, 361-366 (noting that following the Emergency Decree, a new supervisory board was to be elected, with a maximum of 30 members, and that directors could hold 20 positions at maximum); *see also* S. Engelke & R. Maltschew, 'Weltwirtschaftskrise, Aktienskandale und Reaktionen des Gesetzgebers durch Notverordnungen im Jahre 1931', in: *Aktienrecht im Wandel* 570 (W. Bayer & M. Habersack eds., 2007).
88. *See* Gesetz, über Aktiengesellschaften und Kommanditgesellschaften auf Aktien, Reichsgesetzblatt 1937, 105.
89. *See* Kuntz 2017, *supra* note 70, noting it would be a misconception to view the 1937 "just as a Nazi brainchild"; *see also* J. Bähr, 'Unternehmens- und Kapitalmarktrecht im "Dritten Reich": Die Aktienrechtsreform und das Anleihestockgesetz', in: *Wirtschaftssteuerung durch Recht im Nationalsozialismus* 35 (J. Bähr & R. Banken eds., 2006) (arguing existing ideas were fitted in a new cadre).
90. *See* W. Bayer & S. Engelke, 'Die Revision des Aktienrechts durch das Aktiengesetz von 1937', in: *Aktienrecht im Wandel* 619 (W. Bayer & M. Habersack eds., 2007); *see also* B. Mertens, 'Das Aktiengesetz von 1937 – unpolitischer Schlussstein oder ideologischer Neuanfang?', 29 *Zeitschrift für Neue Rechtsgeschichte* 88, 98 (2007).
91. *See* Kuntz 2017, *supra* note 70, for an extensive account of some of the more radical arguments.
92. *See* Bayer & Engelke 2007, *supra* note 90, at 619. As a result, the number of listed corporations decreased by 50 %. *See* C. Fohlin, *Finance Capitalism and Germany's Rise to Industrial Power* 303 (Cambridge University Press, 2007). (The threshold raise in 1923 to 5 million in 1923 was due to hyperinflation.)

of 1937 required a minimum authorized share capital of 500,000 Reichsmark (§ 7 AkG 1937).

Two defining characteristics of the revised statute were the following.[93] First, the executive board (*Vorstand*) obtained a strong position. Previously, the AGM had been viewed as the corporation's supreme corporate organ. Now, the position of outside minority shareholders was severely weakened.[94] The rise to power of the executive board also meant a weakening of the position of the supervisory board. The term *Führerprinzip* caught on quickly to describe the new state of affairs.[95] Moreover, § 70 (2) AktG 1937 instructed the board to govern the corporation in the interests of the business and the common good (*Volk und Reich*).[96] This is the second relevant feature of the *Aktiengesetz* of 1937.[97] Although this provision can be read to imply a form of long-term value creation, it primarily resulted in an increase in government influence over economic activity.

As part of the legislative reforms, corporate decision-making was tied more strongly to investors' equity interests rather than their voting power. Accordingly, § 12 AktG 1937 was redrafted to provide that issuance of multiple voting stock were banned.[98] The same applied to exclusionary issuances of common shares (*Vorratsaktien*). Retaining these instruments could have compromised

93. For this view, *see* W. Kessler, 'The German Corporation Law of 1937', 4 *American Economic Review* 653 (1938).

94. A senior civil servant even called the AGM the "deposed king" (*abgesetzter König*). *See* F. Schlegelberger, *Die Erneuerung des deutschen Aktienrechts, Vortrag gehalten am 15. August 1935 vor der Industrie- und Handelskammer in Hamburg* (Vahlen, 1935). For an analysis, *see* Bayer & Engelke 2007, *supra* note 90, at 619.

95. Particularly after a speech delivered by Hjalmar Schacht, president of the German National Bank (*Reichsbank*) and Minister of Economic Affairs (*Reichswirtschaftsminister*). *See* H. Schacht, *Die deutsche Aktienrechtsreform; Ausführungen des Reichsbankpräsidenten und beauftragten Reichswirtschaftministers auf der 9. Vollsitzung der Akademie für Deutsches Recht im Rathaus zu Berlin, am 30. November 1935* (Reichsbank, 1935).

96. *See* A. Riechers, *Das 'Unternehmen an sich'* (Mohr Siebeck, 1996). Some have argued that the shift towards the executive board was based on a US law study. For a critical analysis, *see* Mertens 2007, *supra* note 90.

97. Importantly, corporate law was not the only mechanism by which the regime attempted to enhance its grip on the economy. Since 1934, two special financial markets acts (the *Kapitalanlagegesetz* and the *Anleihestockgesetz*) provided that dividends in excess of 6 % were transferred to Deutsche Golddiskontbank, which invested these funds in trust in government bonds to support the national debt. *See* Kuntz 2017, *supra* note 70; *see also* Bähr 2006, *supra* note 89.

98. Although existing cases were grandfathered, they would be abolished at a future, yet to be determined moment, and could anyway be cancelled by a decision requiring a capital-based majority of 75 % (not: 75 % of the votes), without a class vote (*Sonderbeschluß*) being required. Upon unifying the dual class equity structure, compensation was due. *See* § 8-11 Dritten Durchführungsverordnung zum AktG 1937. It is estimated that at least 25 % of the corporations pursued this route. Especially in the mining, industry and infrastructure industries, there was little change. *See* Daske 2019, *supra* note 11, at 32-33. On the somewhat similar structure 1998 KonTrAG, *see* § 21.4.2 *infra*.

the effectiveness of the *Führerprinzip*. (Meanwhile, such mechanisms would have been effective to further quench the allegedly shady minority interests.) § 12 (2) AktG 1937 contained an exception to the general ban on multiple voting shares. Under this provision, the Ministers for Economic Affairs and Justice, acting jointly, could authorize the use of such dual class equity structures, if required by the interest of the corporation. This concept has been referred to as the "Ministerial exception" (*ministerielle Ausnahmegenehmigung*).[99] Moreover, and as a legal primer, § 115-§ 117 AktG 1937 provided a statutory basis in respect of non-voting preference shares. Such stocks could be issued for up to 1/3 of the share capital. No minimum preference was mandated. The instrument was envisaged primarily to appeal to less engaged dividend investors, whilst enabling the corporation to obtain growth funding. As such, the security returned to its original 1840s purpose (*see* § 21.2.1 *supra*), and no longer acted as a control mechanism, as was the case in the 1920s (*see* § 21.3.1 *supra*).[100]

21.3.3 The views of rathenau and hausmann

On a more abstract level, the fact that the German legislator required quite some time to prohibit multiple voting shares may be attributed to the influence of the ideas of Walther Rathenau, a powerful (Jewish) industrialist and politician. In 1883, Rathenau's father Emil had founded the business which would eventually become the *Allgemeine Elektrizitäts-Gesellschaft* or AEG. The corporation specialized in electricity, at the time a newly emerging technology, and various applications based on this phenomenon. Soon, it expanded into neighboring markets such as generators, airplanes and automobiles, and by 1907, AEG had become the largest private corporation globally. In his seminal work, *Vom Aktienwesen* (1917), Walther Rathenau considered the corporation and its position in society.[101] The expansion of private, modest undertakings to country-wide, listed corporations corresponded to a change in the nature of the concepts and actors involved (*Substitution des Grundes*). Moreover, corporate growth had resulted in the depersonalization of property: instead of natural persons owning real assets, corporations held large, interlocking blocks of

99. Under § 114 (3) AktG 1937, the same approach applied to capped voting. In both cases, it was debated whether the federal or state ministers were the competent authority to grant the exception. Most scholars chose the latter option. For the 1965 legislative changes confirming this view, *see* § 21.4.1 *infra*.

100. For an extensive discussion on the status of non-voting preference shares under the AktG 1937, *see* Daske 2019, *supra* note 11, at 38-41 (concluding that ultimately, it was up to the issuing corporation to decide whether these securities constituted debt or equity);

101. *See* W. Rathenau, *Vom Aktienwesen – Eine Geschäftliche Betrachtung* (Berlin, 1917). For extensive analyses, *see* J.M. de Jongh, *Tussen* societas *en* universitas*. De beursvennootschap en haar aandeelhouders in historisch perspectief* 300-302, 303-304 (Kluwer, 2014); *see also* M. Gelter, 'Taming or Protecting the Modern Corporation – Shareholder-Stakeholder Debates in a Comparative Light', 7 *New York University Journal of Law & Business* 641, 680 (2011); *see also* Riechers 1996, *supra* note 96.

shares.[102] Rathenau came to view the listed corporation as a legal person with interests of its own (*Unternehmen an sich*). This entity should be integrated in (and subordinated to) the general economy (*Wirtschaft der Gesamtheit*), instead of remaining purely private property.[103] Rathenau had done exactly so with AEG in the 1914-1915 period.[104]

This *Substitution des Grundes* equally applied to investors. According to Rathenau, the closed, long-term, committed shareholder base had been joined by individuals of more questionable motive. At the time, it was not only customary for speculators to attempt to influence the share price, but also for competitors to acquire considerable blocks of shares and obtain price-sensitive information. As a result, Rathenau advocated a strong position of the executive and supervisory boards vis-à-vis minority interests. Similarly, he rejected the idea of a "shareholder democracy" and criticized the absence of a holding period requirement to cast a vote, as this strengthened the voice of outside minority shareholders.[105] One especially powerful method of achieving the preferred distribution of powers this was by issuing multiple voting shares. Ironically, Rathenau's ideas concerning state control over corporate activity (*Volk und Reich*) and a robust position of the executive board (*Führerprinzip*) would appeal especially to subsequent fascist governments.[106]

One of Rathenau's better known antagonists was Haussmann, who argued that the separation of ownership and control had not progressed to the extent depicted.[107] In his view, the development was confined to a few large corporations, "those of the AEG type". Additionally, Haussmann advocated a less subservient position of corporate law. Especially in the post-war economy, entrepreneurial activity should not be regulated solely for political purposes, but also

102. "*Dieses Verhältnis ber bedeutet die Entpersönlichung des Eigentums. Das ursprünglich persönlichste Verhältnis eines Menschen zu einer greifbaren, genau bekannten Sache ist zu einem unpersönlichen Anspruch auf einen theoretischen Ertrag geworden. Die Entpersönlichung des Besitzes bedeutet jedoch gleichzeitig die Objektivierung der Sache*." *See* Rathenau 1917, *supra* note 101, at 142. Berle and Means (*see* § 15.3.2 *supra*) must have been familiar with Rathenau's ideas, given that they referred to some of his later works.

103. "*Seine Fortbildung im gemeinwirtschaftlichen Sinne ist möglich, seine Rückbildung zur rein privatwirtschaftlichen Bindung oder Seine Aufteilung in kleine Privatpartikel ist undenkbar*." *See* Rathenau 1917, *supra* note 101, at 155; *see also* § 15.3.3 *supra*, on the New Deal-aspects of the Berle-Dodd debate.

104. For a critical account, *see* Muchlinski 2013, *supra* note 87, at 362, arguing Rathenau's measures were inefficient.

105. *See* Rathenau 1917, *supra* note 101, at 29. To some scholars, Rathenau's analysis "gives the impression of a director complaining about annoying shareholders rather than that of one developing an economic or social theory". *See* Gelter 2011, *supra* note 101, at 682. Meanwhile, from a life-cycle perspective (*see* § 10.6 *supra*), it could also be argued that the highly innovative AEG suffered from elevated information costs.

106. *See* Spindler 2007, *supra* note 73; *see also* Riechers 1996, *supra* note 96.

107. *See* F. Haussmann, *Vom Aktienwesen und vom Aktienrecht* 26 (Bensheimer, 1928). Indeed, Germany is traditionally depicted as the typical blockholder nation. *See* § 20.5.1 *supra*.

with the rights of shareholders in mind.[108] Nevertheless, he too recognized that growth affects the position of the corporation, as the executive and supervisory boards of larger firms become obliged to take the interests of third parties into consideration.[109] The concept of the *Unternehmen an sich* reflected this, and would prove particularly influential in the policy debate for years to come, as it limited the degree to which shareholders could pursue their own interests when exercising the right to vote.[110]

21.4 The second dual class debate: the late 1990s & early 2000s

21.4.1 Previous minor developments

The German debate on superior and inferior voting rights experienced a brief resurgence in the late 1950s and early 1960s, as part of the drafting of the *Aktiengesetz* of 1965 (AktG).[111] The reform was intended to restore an efficiently working capital market and was also noticeable for its regulation of group undertakings (*Konzernrecht*, *see* § 20.5 *supra*).[112] Moreover, the AktG increased the amount by which non-voting preference shares could be issued to 50 % of the equity, up from 33 % (§ 139 (2) AktG). The Ministerial exception regarding multiple voting shares, of which initially the abolishment had been proposed, was maintained yet restricted. In the revised constellation, this exception could be invoked only if necessary in light of the general interest, instead of the interest of the corporation. Finally, the authority to make an exception was confirmed (*see* § 21.3.2 *supra*) to be vested in the state minister, instead of the federal minister. From 1965 to 1989, 19 exceptions were

108. *See* Haussmann 1928, *supra* note 107, at 35. For commentaries, *see* Gelter 2011, *supra* note 101, at 684-685.
109. "*In der allgemeinsten Form pflegt man vom "Institutscharackter" der Aktiengesellschaft zu sprechen, um damit zum Ausdruck zu bringen, daß die in Aktiengesellschaftsform betriebenen privatwirtschaftlichen Unternehmungen, namentlich die Großunternehmungen,* auf ihre Bedeutung und Stellung im allgemeinen Wirtschaftsleben *Rücksicht zu nehmen haben*." *See* Haussmann 1928, *supra* note 107, at 42.
110. *See* Gelter 2011, *supra* note 101, at 685 et seq., for an overview of the scholarly positions taken.
111. *See* Aktiengesetz, Bundesgesetzblatt 1965, 1089. On the considerations of the German legislator, *see* BT-Drucksache IV/171, 98.
112. Other modifications focused on increasing the power of the supervisory board versus the executive board and the tightening of bank proxy voting. *See* B. Kropff, 'Reformbestrebungen im Nachkriegsdeutschland und die Aktienrechtsreform von 1965', in: *Aktienrecht im Wandel* 670 (Mohr Siebeck, 2007); *see also* D.F. Vagts, 'Reforming the "Modern" Corporation: Perspectives from the German', 80 *Harvard Law Review* 23 (1966).

made.[113] Non-voting preference shares similarly remained a marginal phenomenon until the 1980s, being used merely by 20 listed German corporations.[114]

In the 1980s, a sharp rise in the issuance of non-voting preference shares can be observed, and the number of corporations with such securities outstanding increased fourfold. The peak came in the late 1990s.[115] Especially from 1983 onwards, non-voting preference shares were increasingly issued on a standalone basis, not as part of a SEO in addition to common stock. The issuers were mostly family businesses executing an IPO. This development should be understood primarily as a response to the boom in unsolicited takeover attempts (LBOs and management buy outs) in the US (*see* § 15.4 *supra*), as there was actually little of such activity in Germany during this period.[116] Whilst § 12 AktG largely prevented already listed corporations from frustrating an offer by means of an exclusionary midstream issuance of multiple voting stock, newcomers could choose to solely listed non-voting preference shares. By doing so, outside bidders were prevented from the opportunity of assuming control, even theoretically.[117] Meanwhile, the shift in issuer behavior did not, for the time being, trigger a fundamental policy debate on the relevance of shareholder control rights in the corporation's governance framework.

21.4.2 Statutory changes: the 1998 konTraG

Things would heat up considerably in the late 1990s and early 2000s. In 1998, the Corporate Control and Transparancy Act (*Gesetz zur Kontrolle und Transparenz im Unternehmensbereich*, KonTraG) was enacted.[118] Following a series

113. *See* O. C. Brändel, 'Mehrstimmrechtsaktien – ein in Vergessenheit geratenes Instrument der Beherrschung und des Minderheitenschutzes?', in: *Festschrift für Karlheinz Quack zum 65. Geburtstag am 3. Januar 1991* 175 (H.P. Westermann & W. Rosener eds.) Data on years prior to 1965 is absent.
114. *See* D. Feddersen, 'Die Vorzugsaktie ohne Stimmrecht: Viel geschmähtes Relikt aus vergangenen Zeiten oder nützliches Finanzierungsinstrument?', in: M. Habersack et al. (eds.), *Festschrift für Peter Ulmer zum 70. Geburtstag am 2. Januar 2003* 105, 107 (De Gruyter, 2003).
115. *See* Daske 2019, *supra* note 11, at 194-200 for extensive empirical data, and noting that most issuers of non-voting preference shares must have been relatively small, given that the total market capitalization of these instruments only increased from 1.2 % in 1956 to 5.9 % in 1995, thereby correcting the image that in Germany, the use of non-voting preference shares is widespread; *see also* M. Senger & A. Vogelmann, 'Die Umwandlung von Vorzugsaktien in Stammaktien', 47 *Die Aktiengesellschaft* 193 (2002), observing that in the 1990s, 28 of the DAX 100 constituents had issued non-voting preference shares.
116. *See* Daske 2019, *supra* note 11, at 194-200. On the groundbreaking unsolicited takeover attempts in respect of Thyssen and Mannesmann, *see* § 21.4.4 *infra*.
117. German corporate law does not strictly mandate the simultaneous listing of both common and non-voting preference shares. Note that the German stock exchange listing rules do contain certain incentives to stimulate the listing of one class of stock only. *See* § 21.4.3 *infra*.
118. *See* Gesetz zur Kontrolle und Transparenz im Unternehmensbereich (KonTraG), Bundesgesetzblatt 1998, 786.

of high-profile corporate scandals (*see* § 20.6 *supra*) its goal was to contribute to restoring trust in the German economy. To that end, it aimed to strengthen the position of the supervisory board, imposed additional risk management obligations in respect of the executive board and introduced further transparency and auditing requirements.[119] With regard to multiple voting stock, the KonTraG abolished the Ministerial exception, meaning that future issuances became impossible. The exception-based mechanism was considered at odds with the expectations of the capital market, and not deemed to comply with the (draft) Fifth Company Law Directive.[120] Moreover, the KonTraG imposed a mandatory time-based sunset (*see* § 11.3.3 *supra*). It provided that incumbent dual class equity structures would cease to exist (with shares affected reverting back to common stock) on June 1st, 2003, if the AGM had not confirmed their continuation by a vote before this date.[121] If the AGM decided to cancel the dual class equity structure, compensation was due in respect of the superior voting rights (*see* § 23.3.4 *infra*). Once abolished, multiple voting rights could not be reinstated. As this element of the KonTraG had a rather empowering effect on outside minority shareholders, it may not come as a huge surprise that currently, there is not a single listed AG with multiple voting stock outstanding.[122]

21.4.3 Private initiatives: the measures of the german stock exchange

In addition to the KonTraG limiting the relevance of multiple voting shares, Deutsche Börse, the operator of Germany's stock exchange system, played an important role in constraining the use non-voting preference shares. To that end, it implemented two measures. First, in 1997, Deutsche Börse launched the New Market (*Neuer Markt*), to reflect the importance of and offer a specialized

119. For an analysis of the initial proposal, *see* B. Keller, 'Änderungen der Überwachung in Kapitalgesellschaften – Der Entwurf eines Gesetzes zur Kontrolle und Transparenz im Unternehmensbereich', 35 *Deutsches Steuerrecht* 1986 (1997). On the act itself, *see* U. Seibert, 'Control and Transparency in Business (KonTraG): Corporate Governance Reform in Germany', 10 *European Business Law Review* 70, 72 (1999); *see also* D. Zimmer, 'Das Gesetz zur Kontrolle und Transparenz im Unternehmensbereich', 51 *Neue Juristische Wochenschrift* 3521 (1998).
120. For the considerations of the German legislator, *see* BT-Drucksache 13/9712, 12.
121. *See* § 5 (1) Einführungsgesetz zum Aktiengesetz (EGAktG). There have been 10 cases in which the existence of multiple voting stock was extended. Currently, 4 corporations remain. *See* Daske 2019, *supra* note 11, at 199; *see also* M. Polte, *Aktiengattungen Eine rechtsvergleichende Untersuchung zum deutschen, US-amerikanischen und englischen Recht* 82 (Peter Lang, 2005).
122. It has been debated whether the ban on multiple voting stock extends towards unlisted AGs which, having obtained AGM approval to retain their preexisting dual class equity structure before June 1st, 2003, subsequently intend to execute a capital increase (partially) involving superior voting shares. *See* M. Milde-Büttcher, 'Mehrstimmrechte bei Kapitalerhöhungen aus AG-Gesellschaftsmitteln – Opfer der heißen Nadel des Gesetzgebers?', 54 *Betriebs-Berater* 1073 (1999), arguing such securities may still validly be issued.

trading venue to emerging internet businesses.[123] To induce younger firms to go public, the listing rules of the New Market were generally less stringent compared to those of the flagship Frankfurt Stock Exchange. However, the issuance of non-voting preference shares by companies listed at the New Market was prohibited.[124] Nevertheless, the New Market proved hugely popular – its core index, the NEMAX 50, gained more than 950 % between January 1st, 1998 and March 10th, 2000. Meanwhile, just two years later, the bursting of the DotCom-bubble resulted in a bloodbath. By October 2002, the NEMAX 50 had dropped 96.8 %, losing € 200 billion in the process, only to be abolished in 2003.[125] (Note that the TecDAX 30 has been considered the NEMAX 50's successor, and has been considerably more resilient.) Such anecdotal evidence finely illustrates that permitting concentrated control is not the sole determining factor when going public; the valuation aspect may carry at least as much weight. The events furthermore highlight that stimulating innovation is not a game where everybody wins – in fact, there are substantial financial risks involved.

Second, in August 2000, Deutsche Börse announced a modification of its listing rules, to become effective almost 2 years later. Accordingly, the index weight of a corporation was to be based on the value of only one class of stock, instead of the aggregate value of all classes of outstanding shares, as had traditionally been the case.[126] Thus, listed corporations of which the share capital consisted of two classes of stock faced a loss in index weight, particularly in case their market capitalization was divided rather evenly between the various types of shares. One prominent example was software developer SAP, whose weight in the DAX stock index would have decreased by almost 40 % (from

123. *See* H-P. Burghof & A. Hunger, 'The *Neuer Markt*: An (Overly) Risky Asset Of Germany's Financial System', in: G. Giudici & P. Roosenboom (eds.), *The Rise and Fall of Europe's New Stock Markets* 295 (Emerald, 2004); *see also* O. Kersting, 'Der Neuer Markt der Deutsche Börse AG', 42 *Die Aktiengesellschaft* 222 (1997).

124. *See* Daske 2019, *supra* note 11, at 197; *see also* Wirth & Arnold 2002, *supra* note 17, at 861. From a life-cycle perspective (*see* § 10.6 *supra*), my feelings towards such a requirement are negative. Although a mandatory dividend preference may crush a young corporation, because it cannot service the periodic payments, German corporate law does not mandate a minimum preference percentage. As such, the financial burden imposed may be minimal. However, this still leaves the matter of elevated information costs untouched.

125. *See* H. Zschäpitz, 'Fünf Jahre danach. Wie der Neue Markt die Deutschen traumatisierte' (2008), available at http://www.morgenpost.de/ ("*Die mit einem Börsenwert von 22 Milliarden Euro ehemals wertvollste Firma am Neuen Markt, Broadvision, ist heute nicht einmal mehr 100 Millionen Euro wert. […] Die 13 Milliarden Euro schwere Mediengesellschaft EM.TV, firmiert nun unter EM.Sport Media und bringt nach einer kräftigen Kapitalspritze inzwischen wieder 200 Millionen Euro auf die Börsenwaage*.").

126. The provision is currently laid down in § 4.1.1.2 of the German Stock Exchange listing rules (*Leitfaden zu den Aktienindizes der Deutsche Börse AG*). For a description, *see* Feddersen 2003, *supra* note 114, at 109, *see also* Wirth & Arnold 2002, *supra* note 17; B. Pellens & F. Hildebrandt, 'Vorzugsaktien vor dem Hintergrund der Corporate Governance-Diskussion', 46 *Die Aktiengesellschaft* 57, 67 (2001).

9.51 % to 5.64 %).[127] With the shift to passive investing and the advent of ETFs and index trackers, index weight has become increasingly relevant to issuers (*see* § 11.4 *supra*).[128] Having to choose between Scylla and Charybdis, many of Germany's leading corporates, including METRO, RWE, Lufthansa and SAP decided to uniform their equity structure, albeit in different ways. (For SAP, this was especially painful, as the CEO had solemnly vowed to retain the non-voting preference shares, even after Deutsche Börse had made its plans public.[129]) Whereas Lufthansa granted voting rights to its holders of non-voting preference shares free of charge, RWE presented investors the opportunity to acquire the right to vote.[130] At the time, the nudge towards the dissolution of non-voting preference shares enjoyed considerable support from the German financial establishment.[131] To a certain degree, this seems surprising, as it implies that members of the executive and supervisory board as well as controlling shareholders voluntarily sought to subject themselves to a governance framework in which they were more vulnerable to investor voice and activist campaigns. What is probably less of a shocker is that following the change in Deutsche Börse's listing rules, the number of listed companies with non-voting preference shares outstanding fell considerably, almost to pre-1980 levels.[132]

21.4.4 Shifting tides in the new millennium?

Some have argued that unsolicited takeover attempts in respect of German national icons re-injected protectionist sentiments into German corporate

127. *See* Betzer, Van den Bongard & Goergen 2017, *supra* note 128.
128. For a legal-economic analysis of Deutsche Börse's measures, *see* A. Betzer, I. van den Bongard & M. Goergen, 'Index membership vs. loss of voting power: The unification of dual-class shares', 49 *Journal of International Financial Markets, Institutions and Money* 140 (2017); *see also* I. Dittmann & N. Ulbricht, 'Timing and Wealth Effects of German Dual Class Stock Unifications', 14 *European Financial Management* 163 (2008). On the (contemplated) exclusion of dual class companies from stock indices, *see* § 11.4 *supra*.
129. *See* B. Johann & J. Masuhr, 'Lukrative Wette' (2001), available at http://www.focus.de/ ("*Noch vor gut einem Jahr hagelte es Dementis. "Es wird weiter Vorzugsaktien geben", beschied SAP-Vorstandssprecher Hasso Plattner Spekulationen, wonach ein Tausch der Vorzüge in Stammaktien bevorstehe.*").
130. The variety in approaches to capital structure unifications could indicate either the success of tailor-made solutions or the exploitation of shareholders. For an extensive analysis of the requirements for dual class equity structure introductions and cancellations under German law, *see* Chapter 23.
131. *See* Seibert 1999, *supra* note 119, at 72.
132. *See* Daske 2019, *supra* note 11, at 194, noting an almost constant decline since 1992 to 36 corporations in 2017; *see also* Senger & Vogelmann 2002, *supra* note 115, at 193, observing that only 18 DAX 100 companies had such instruments in place.

law.[133] Controversial moves have included the successful[134] bid on steel-manufacturer Thyssen (launched in 1997, by competitor Krupp-Hoesch) and particularly the acquisition of telecom-oriented conglomerate Mannesmann (initiated in 1999, by English Vodafone AirTouch, often referred to as the first successful foreign hostile takeover in Germany [135]). Whilst this may have been the case, the analysis in § 21.4.1-§ 21.4.3 shows that the pro-minority shareholder movement continued to hold momentum for at least a few more years. The first DCGK, published in 2002, offers a similar picture.[136] With an elegant inevitability, the DCGK 2002 stated that multiple voting and non-voting preference shares do not exist.[137] However, only shortly thereafter, the German government vehemently opposed the introduction of (a mandatory variant of) the board neutrality rule in the Takeover Directive.[138] Indeed, in the absence of economic anti-takeover safeguards such as cross-holdings and without defensive measures in the form of multiple and non-voting preference shares, a prohibition on post-bid negotiating would have left German listed corporations rather vulnerable to opportunistic bidders.[139]

---

133. *See* M. Pargendler, 'The Grip of Nationalism on Corporate Law' (2019), available at http://www.ssrn.com/; *see also* M. Habersack, 'The Non-Frustration Rule and the Mandatory Bid Rule – Cornerstones of European Takeover Law?', 15 *European Company and Financial Law Review* 1,4 (2018) (discussing the "Mannesmann trauma"). For a contemporary analysis, *see* T. Drygala, 'Die neue Deutsche Übernahmeskepsis und ihre Auswirkungen auf die Vorstandspflichten nach § 33 WpÜG', 4 *Neue Zeitschrift für Gesellschaftsrecht* 1861 (2001).
134. Note that in the early 1990s, Italian tire-manufacturer Pirelli had sought to acquire Continental, but failed. *See* J.P. Hicks, 'Continental, Still Digesting General Tire, Battles Pirelli' (1991), available http://www.wsj.com/. On the Hibernia-case, *see* § 21.2.4 *supra*.
135. The transaction is still the largest ever in terms of consideration paid. *See* G. Naik & A. Raghavan, 'Vodafone, Mannesmann Set Takeover At $180.95 Billion After Long Struggle' (2000), available at http://www.wsj.com/; *see also* F. Hubik, '15 Jahre Mannesmann-Übernahme. Wie der "Haifisch" das "Hirn" besiegte' (2015), available http://www.handelsblatt.com/. Certain terms of the transaction were highly controversial. *See* § 22.3.2 *infra*.
136. Other contemporary initiatives to rebalance the position of (minority) shareholders included the Transparancy and Publicity Act (*Transparenz- und Publizitätsgesetz*, TransPuG) of 2002 and the Corporate Integrity and Derivative Action Modernization Act (*Gesetz zur Unternehmensintegrität und Modernisierung des Anfechtungsrechts*, UMAG) of 2005. *See* § 22.3.3 *infra*.
137. *See* § 2.1.2 DGCK 2002: *Aktien mit Mehrstimmrechten oder Vorzugsstimmrechten ("golden shares") sowie Höchststimmrechte bestehen nicht.* The same provision could be found in the DCGK 2017, but the condensed DCGK 2019 no longer contains this rule.
138. For the original provision, *see* Art. 9 of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids.
139. The literature on the (German role in the) drafting of the Takeover Directive is exhaustive. *See* Habersack 2018, *supra* note 133; *see also* V. Edwards, 'The Directive on Takeover Bids – Not Worth the Paper It's Written On?', 1 *European Company and Financial Law Review* 416, 425 (2004), noting the late German change of heart "departed" from the common position agreed upon by the Member States.

This reversal aptly summarizes the position of German policy makers on dual class equity structures, which has remained a reluctant one for at least the last 100 years. Multiple voting shares and non-voting (preference) shares have been permitted, banned, reintroduced and marginalized by successive legislator. Currently, multiple voting shares are an entirely marginal phenomenon. By contrast, non-voting preference shares are no longer viewed as negatively as once was the case, and the instrument appears to be experiencing somewhat of a revival. Indeed, in 2009, the established medical supplier Fresenius SE decided to issue non-voting preference shares, only to be followed in Volkswagen in 2010 – with the latter even favoring this security over its common stock to be included in the DAX.[140] Subsequently, the 2015 IPO of car parts company Schaeffler, which decided to offer only non-voting preference shares to the investing public, was met with great interest from institutional investors. In this regard, it is striking that the comparable 2017 IPO of Snap Inc., which caused a heated policy debate amongst Anglo-American investors (*see* § 15.5 *supra*), has gone by virtually unnoticed in the otherwise well-informed German academia.[141] However, the revival of non-voting preference shares remains a modest one. Whether a more fundamental shift will take place, similar to that of the 1920s or 1980s, remains to be seen.

140. *See* K. Bentel & G. Walter, *Dual Class Shares* 7 (2016), available at http://scholarship.law.upenn.edu/ (observing the switch was due to the simultaneous appreciation of non-voting preference shares and the price decline of common stock, whilst also pointing to the fact that the free float of the latter decreased below the 10 % threshold set by Deutsche Börse for index inclusion); *see also* D. Anschütz, 'Unternehmensfinanzierung durch Vorzugsaktien', 9 *Bucerius Law Journal* 9 (2015).
141. As of 2020, I have not been able to retrieve any capital market-related publications on the matter in Beck Online. Perhaps just as striking, there are many papers on the privacy implications of technology corporations such as Snap and others.

Chapter 22. Current German corporate law

22.1 Introduction

In Chapter 22, I study the current German law and governance framework in relation to shareholder rights, in the absence of a dual calss equity structure recapitalization. First, I examine the character of the German corporation, focusing on its purpose, approach to legal personhood and mandatory character of the governing statute, in § 22.2. Then, I discuss the position of the executive and supervisory board, its installation and removal, fiduciary duties of directors, their independence requirements, and the standards applied by the German courts for assessing director behavior, in § 22.3. Additionally, in § 22.4, I analyze shareholder control rights and the position of the AGM. I consider shareholder voting rights, the one share, one vote default rule and permitted deviations, as well as the position of the AGM and convocation and agenda setting rights. Finally, in § 22.5, I examine the financial rights of shareholders. This includes matters of capital formation and retention, directors' powers to declare dividends, financial constraints and the possibility to differentiate between the dividend entitlements of shareholders. Specifically, I pay close attention to non-voting preference shares, an instrument which has a longstanding tradition in financing German businesses.

22.2 The character of the AG

22.2.1 Corporate purpose

As opposed to the US legal system, which traditionally has been primarily shareholder-oriented (*see* § 16.2.1 *supra*), German corporate law is said to reflect more of a "stakeholder" approach. This claim is supported by strong constitutional arguments.[1] From a corporate law perspective, it is often observed that the executive board (*Vorstand*) has an inherent, inextricable responsibility

1. On the use of property, *see* article 14 (2) Grundgesetz, which postulates apodictically: "*Eigentum verpflichtet. Sein Gebrauch soll zugleich dem Wohle der Allgemeinheit dienen*." The social character of the German state also enjoys a solid constitutional. *See* article 20 (1) Grundgesetz; *see also a*rticle 28 (1) Grundgesetz.

to govern the corporation (§ 76 (1) AktG).[2] Here, a distinction is made between the corporation as a legal entity and the enterprise as a functional body. The corporation only counts shareholders as its members (*ein interessenmonistischer Verband der Kapitalgeber*). However, at the entrepreneurial level, a multitude of interests can be observed (*ein interessenpluralistischer Organismus*).[3] It is the interest of the enterprise (*Unternehmensinteresse*) that the executive board should promote. This holistic concept includes shareholders, but also employees and creditors, as § 4.1.1 DCGK 2017 illustrates.[4] Importantly, there exists no hierarchical order between the interests of the various corporate constituencies.[5] The board is not under any obligation to put shareholders first, nor is it required to (altruistically) promote the general interest (*Gemeinwohl*).[6] Instead, the executive board should weigh the various stakes against each other on a case-by-case basis. As a result, it enjoys a broad base of powers[7] and can readily fund academic, cultural, political or other charitable activities if it wishes to do so.[8] The purpose of the corporation under German law is often summarized by stating that the executive board should govern the corporation to assure the business' continued existence and its robust earning capacity (*der Bestand des Unternehmens zu sichern und für*

2. For an analysis, *see* G. Spindler, *Münchener Kommentar zum Aktiengesetz* § 76, 1-188 (W. Goette & M. Habersack eds.); *see also* J. Koch, *Aktiengesetz* § 76, 1-80 (U. Hüffer & J. Koch eds.); H. Fleischer, *Kommentar zum Aktiengesetz* § 76, 1-150 (G. Spindler & E. Stilz eds.). On the (executive and supervisory) board of the AG, *see* § 22.3.1 *infra*.
3. *See* G. Spindler, *Kommentar zum Aktiengesetz* § 76, 60 (G. Spindler & E. Stilz, eds.): "*Kennzeichnend […] ist seine pluralistische Struktur*".
4. "*Der Vorstand leitet das Unternehmen in eigener Verantwortung im Unternehmensinteresse, also unter Berücksichtigung der Belange der Aktionäre, seiner Arbeitnehmer und der sonstigen dem Unternehmen verbundenen Gruppen (Stakeholder) mit dem Ziel nachhaltiger Wertschöpfung*". On the position of employees, *see* § 20.4 *supra*.
5. *See* P.O. Mülbert, 'Soziale Verantwortung von Unternehmen im Gesellschaftsrecht', 54 *Die Aktiengesellschaft* 766 (2009).
6. An obligation to promote the general interest can be found in § 76 (1) AktG's predecessor, § 70 (1) AktG 1937: "*Der Vorstand hat unter eigener Verantwortung die Gesellschaft zu leiten, wie das Wohl des Betriebes und seiner Gefolgschaft und der gemeine Nutzen von Volk und Reich es fordern*." *See* § 21.3.2 *supra*. Although the German legislator stated that by introducing § 76 (1) AktG, it did not intend to bring any substantive changes, it is widely held that there exists no obligation for the executive board to consider the general interest by default as the overriding one. *See* W. Zöllner, 'Unternehmensinnenrecht: Gibt es das?', 48 *Die Aktiengesellschaft* 2, 7 (2003); *see also* F. Rittner, 'Zur Verantwortung des Vorstands nach § 76 Abs. 1 AktG 1965', 16 *Die Aktiengesellschaft* 113 (1973).
7. *See* C. Kuhner, 'Unternehmensinteresse vs. Shareholder Value als Leitmaxime kapitalmarktorientierter Aktiengesellschaften', 33 *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 244, 247 (2004); *see also* Zöllner 2003, *supra* note 6, at 3; K.J. Hopt, 'Aktionärskreis und Vorstandsneutralität', 22 *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 534, 536 (1993).
8. *See* Bundesgerichtshof 6 December 2001 – 1 StR 215/01; *see also* H. Fleischer, 'Unternehmensspenden und Leitungsermessen des Vorstands im Aktienrecht', 46 *Die Aktiengesellschaft* 171 (2001).

eine dauerhafte Rentabilität zu sorgen).[9] The effects of this perspective on corporate purpose can not only be found in § 4.1.1 DCGK 2017, but elsewhere as well. A noticeable example involves § 87 (1) AktG, which addresses the remuneration of the executive board and ties it to long-term corporate performance.[10]

Meanwhile, numerous German scholars have expressed their frustration at the failure of defining a yardstick corresponding to the purpose of the AG, with a view to assessing executive board performance. The arguments presented are mostly based on general agency theory,[11] and highlight the shortcomings of stakeholder models from this point of view (*see* § 2.3.5 *supra*). Particularly in the late 1990s and early 2000s, with the pro-outside minority shareholder movement at its peak (*see* § 21.4 *supra*), there have been doctrinal developments towards the shareholder-value approach, even in German corporate governance thinking.[12] One example by the legislator concerns the Corporate Control and Transparancy Act (*Gesetz zur Kontrolle und Transparenz im Unternehmensbereich*, *see* § 21.4.2 *supra*) of 1998. Its enactment facilitated the award of stock options to management and share buybacks.[13] During this period, some German courts and scholars actually held that the purpose of the AG had developed into enlightened shareholder value.[14] I am skeptical as to this conclusion. Even if true, it would concern a distinctly German variant of

9. *See* Oberlandesgericht Hamm 10 May 1995 – 8 U 59/94 (*Harpener/Omni I*). For an analysis, *see* U. Hüffer, 'Das Leitungsermessen des Vorstands in der Aktiengesellschaft', in: *Festschrift für Thomas Raiser zum 70. Geburtstag* 163, 168 (R. Damm, P. Heermann & R. Veil eds., 2005); *see also* W. Junge, 'Das Unternehmensinteresse', in: *Festschrift für E. von Caemmerer* 547 (H.C. Ficker et al., eds., 1978) for similar yet subtly different formulated concepts.
10. "*Die Vergütungsstruktur ist bei börsennotierten Gesellschaften auf eine nachhaltige und langfristige Entwicklung der Gesellschaft auszurichten*.".
11. *See* G. Spindler, 'Corporate Social Responsibility in der AG – Mythos oder Realität?', in: *Festschrift für Peter Hommelhoff zum 70. Geburtstag* 1133, 1139 (B. Erle et al., eds., 2012); *see also* K.J Hopt, 'Vergleichende Corporate Governance – Forschung und internationale Regulierung', 175 *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* 444, 477 (2011) (viewing shareholders are the residual risk-bearers); Mülbert 2009, *supra* note 5, at 771-772 (pointing to the risk of giving management "carte blanche" to implement every single measure conceivable).
12. *See* Zöllner 2003, *supra* note 6, at 11; *see also* P. Ulmer, 'Aktienrecht im Wandel – Entwicklungslinien und Diskussionsschwerpunkte', 202 *Archiv für die civilistische Praxis* 129, 176 (2002); P.O. Mülbert, 'Shareholder Value aus rechtlicher Sicht', 26 *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 129 (1997).
13. *See* BT-Drucksache 13/9712, 11 for the arguments put forward by the German legislator. ("*Dies bedingt eine stärkere Orientierung an einer langfristigen Wertsteigerung für die Anteilseigner.*")
14. *See* Oberlandesgericht Frankfurt 17 August 2011 – 13 U 100/10; *see also* M. Kort, 'Vorstandshandeln im Spannungsverhältnis zwischen Unternehmensinteresse und Aktionärsinteressen', 57 *Die Aktiengesellschaft* 605 (2012).

the concept, as the executive board has retained full discretion in subordinating the interests of investors.[15]

22.2.2 Corporate personhood

A second aspect of the character of the AG concerns its approach to corporate personhood. Interestingly, the wording of § 2 AktG refers to the articles of association as a contract (*Gesellschaftsvertrag*).[16] Accordingly, one could be inclined to think that German corporate law adheres to fictional or aggregate theory, in which the corporation is the sum of a series of explicitly and implicitly connected contracts. However, this would be a misconception. § 2 AktG can be understood both narrowly and broadly. Only in the broad sense is the AG deemed a contractual agreement (*Gesellschaft im weiteren Sinne*). Following § 1 AktG, the AG is deemed a corporate body (*Körperschaft*) for doctrinal purposes, based on the archetype of the association (*Verein*), as defined in § 21 BGB, instead of a partnership (*Personengesellschaft*).[17] Indeed, the AG acts under its own name, instead of those of the partners, and investor decision-making is based on majority instead of unanimity rule. Perhaps unsurprising given the acceptance of the view of the corporation as a body distinct from the shareholders, German corporate law has subscribed to real entity theory (*Organtheorie* or *Theorie der realen Verbandsperson*). In this view, the corporation is not merely a fiction, but a living organism with rights and obligations of its own. Different organs, each with distinct competences and powers, jointly form a single organization. This body more than a sum of the (human) parts that constitute it.[18]

The dominance of the real entity perspective in German legal thought may be considered as a confirmation of the influence of Von Gierke's scholarship.[19] Indeed, the ADHGB of 1861, drafted prior to the publication of Von Gierke's works, still presented a compromise on corporate personhood. On the one hand, it stated that the AG had rights and obligations of its own (§ 213 ADHGB). On

---

15. Indeed, in its traditional (English) understanding, the interests of other corporate constituents may only be promoted to the extent beneficial to shareholders. *See* S. 172 Companies Act 2006. For a summary of the views on corporate purpose in the German literature, *see* G. Spindler, *Münchener Kommentar zum Aktiengesetz* § 76, 76 (W. Goette & M. Habersack eds.).
16. *"An der Feststellung des Gesellschaftsvertrags (der Satzung) müssen sich eine oder mehrere Personen beteiligen, welche die Aktien gegen Einlagen übernehmen."*
17. Meanwhile, § 21 BGB should not be understood as implying that legal provisions applicable to associations govern the corporation by analogy. This claim can only be made, with caution, if the *Aktiengesetz* is silent on the matter. *See* K. Heider, *Münchener Kommentar zum Aktiengesetz* § 1, 13-15 (W. Goette & M. Habersack eds.).
18. *See* O. von Gierke*, Die Genossenschaftstheorie und die Deutsche Rechtsprechung* 497-507 (Weidmann, 1887).
19. On the different views of Von Gierke and Von Savigny, *see* § 21.2.2 *supra*. To prevent the analysis from becoming overly repetitive, the discussion in § 22.2.2 is somewhat more brief.

the other hand, it provided that the shareholders were the owners of the corporate equity, instead of the corporation itself (§ 216 ADHGB). The applicability of the real entity theory has been confirmed numerous times by the German courts[20] and its supremacy is widely accepted by scholars.[21] As a result, the issue of corporate personhood has received less attention than has been the case in recent times in the US (*see* § 16.2.2 *supra*).

22.2.3 Mandatory versus enabling Law

A third aspect to characterize the AG involves the statutory balance between mandatory and enabling law. The *Aktiengesetz* principally has a compulsory character (*Satzungsstrenge*). Pursuant to § 23 (5) AktG, the articles of association may only deviate from the law if provided by the act itself. This is not often the case, despite some attempts for reform.[22] Moreover, clauses complementing the *Aktiengesetz* (i.e. those addressing a matter on which the statute is silent) are permitted solely in case the law does not address the matter exhaustively. As such, German corporate law has adopted a somewhat hybrid approach, given that the statute governing the closed GmbH has a predominantly enabling nature (*Satzungsfreiheit*).[23] This difference in treatment follows from the separation between ownership and control (*Trennung von Leitungsmacht und wirtschaftliche Teilhabe*)[24] of which the presence is mostly felt in listed corporations. It serves to protect outside minority shareholders by providing legal certainty.[25]

Traditionally, the mandatory approach has applied in respect of both listed and unlisted AGs: there existed a single, unified legal system regarding open corporations (*Aktieneinheitsrecht*). This approach served to retain the contrast between the GmbH and the AG. Moreover, the absence of special rights granted to individual shareholders (*Sonderrechte*) was deemed to facilitate future

20. *See* Bundesgerichtshof 8 July 1986 – VI ZR 47/85; *see also* Reichsgericht 9 December 1929 – 142/29 VI.
21. *See* K. Heider, *Münchener Kommentar zum Aktiengesetz* § 1, 8-19 (W. Goette & M. Habersack eds.); *see also* J. Koch, *Aktiengesetz* § 1, 2-9 (U. Hüffer & J. Koch eds.); T. Fock, *Kommentar zum Aktiengesetz* § 1, 8-12 (G. Spindler & E. Stilz eds.)
22. In 2001, the Government Committee on Corporate Governance (*see* § 20.6 *supra*) proposed to reassess the necessity of § 23 (5) AktG for each individual section of the *Aktiengesetz*. Apparently, this suggestion has not been (fully) implemented.
23. *See* § 45 (1) GmbH-Gesetz, stipulating that the corporation's internal affairs, including shareholder rights, are governed by the Articles of Association. For an instructive example, *see* Bundesgerichtshof 7 July 1954 – II ZR 342/53, ruling that shares lacking (cumulatively) both dividend and voting rights may validly be issued, provided the entitlement to the liquidation-surplus remains intact.
24. *See* § 2.2.3 *supra*; *see also* § 15.3.2 *supra*, for economic and US perspectives on this phenomenon, respectively.
25. *See* A. Pentz, *Münchener Kommentar zum Aktiengesetz* § 23, 1-249 (W. Goette & M. Habersack eds.); *see also* J. Koch, *Aktiengesetz* § 23, 34-38a (U. Hüffer & J. Koch eds.); P. Limmer, *Kommentar zum Aktiengesetz* § 23, 1-47 (G. Spindler & E. Stilz eds.).

IPOs, as this state of affairs made it less likely that a single party could retain a lock on control.[26] However, in 1988 a proposal was presented to develop a legal framework with a more gradual structure, recognizing three categories (private, open and large) of AGs.[27] Eventually, this proposal resulted in the introduction of the small AG (*kleine AG*) in 1994 (*see* § 20.3.2 *supra*).[28] The reform enabled the foundation of an AG by a single person (§ 2 and § 42 AktG), eased requirements to convene the AGM (§ 121 (4) AktG), and opened up the legal form of the AG to non-listed corporations. These changes have created a contrast between open and closed AGs and reinforced the enabling element of German corporate law. Moreover, 1998 witnessed the enactment of the KonTraG (*see* § 21.4.2 *supra*).[29] The KonTrAG introduced a statutory definition of the listed AG in § 3 (2) AktG.[30] Meanwhile, the implications of the KonTrAG for the balance between mandatory and enabling law are ambiguous. On the one hand, listed AGs may face more obligations or less flexibility than non-listed AGs.[31] A relevant example includes § 87 (1) AktG, regarding the remuneration of members of the executive board, which may only be long-term in nature. On the other hand, certain aspects of the *Aktiengesetz* may also provide more flexibility for listed AGs. In this regard, one could refer to § 186 (3) AktG, which sets aside the pre-emptive rights of investors for issuances of up to 10 % of the outstanding shares. Reforms such as those of 1994 and 1998 have eroded the traditional system of *Aktieneinheitsrecht* considerably. In fact, the current *Aktiengesetz* has been characterized as being written primarily for corporations requiring public capital.[32] Meanwhile, a proposal to create entirely

---

26. *See* W. Bayer, 'Stärkere Differenzierungen zwischen börsennotierten und nichtbörsennotierten Aktiengesellschaften?' – 67. DJT (2008)', in W. Bayer (ed.), *Gesellschafts- und Kapitalmarktrecht in den Beratungen des Deutschen Juristentages* 693, 711 (Jenaer Wissenschaftliche Verlagsgesellschaft, 2010); *see also* C. Schäfer, 'Besondere Regelungen für börsennotierte und für nicht börsennotierte Gesellschaften', 61 *Neue Juristische Wochenschrift* 2536, 2543 (2008).
27. *See* H. Albach et al., *Deregulierung des Aktienrechts: das Drei-Stufen-Modell* (Bertelsmann Stiftung, 1988).
28. *See* Gesetz für kleine Aktiengesellschaften und zur Deregulierung des Aktienrechts, *Bundesgesetzblatt* 1994, 1961.
29. *See* Gesetz zur Kontrolle und Transparenz im Unternehmensbereich (KonTraG), Bundesgesetzblatt 1998, 786.
30. "*Börsennotiert im Sinne dieses Gesetzes sind Gesellschaften, deren Aktien zu einem Markt zugelassen sind, der von staatlich anerkannten Stellen geregelt und überwacht wird, regelmäßig stattfindet und für das Publikum mittelbar oder unmittelbar zugänglich ist*."
31. Another distinction is that between capital market-oriented and non-capital market-oriented AGs. *See* § 264d HGB. Compared to being listed, the criterion of capital market orientation is wider, as it for instance also includes corporations of which not stocks but other types of securities are traded.
32. This is compounded by the fact that securities laws are eating into matters traditionally reserved to corporate law. *See* H-D. Assmann, 'Überlagerung und Komplementierung des Aktienrechts nach dem Aktiengesetz 1965 durch Kapitalmarktrecht', 56 *Die Aktiengesellschaft* 597 (2015); *see also* H. Fleischer, 'Das Aktienrecht und das neue Kapitalmarktrecht', 22 *Zeitschrift für Wirtschaftsrecht* 451 (2006).

different sets of legal rules for listed and unlisted AGs, which also might have included changes to the compulsory character of the *Aktiengesetz*, was rejected by the influential national lawyers convent (*Deutscher Juristentag*) in 2008.[33] As a result, the predominantly mandatory nature of German corporate law, based on § 23 (5) AktG, has remained substantively unchanged.

22.3 The executive and supervisory board

22.3.1 Position and composition

According to § 76 (1) AktG, the executive board (*Vorstand*) bears an inextricable responsibility for governing the corporation.[34] A similar provision can be found in § 4.1.1 DCGK 2017.[35] As such, the executive board enjoys a strong, principally independent position vis-à-vis shareholders.[36] It follows, also from § 77 AktG and § 4.1.2 DCGK 2017, that the executive board is responsible for determining and executing corporate strategy (*Unternehmenspolitik*) as well as managing the daily affairs (*Geschäftsführung*). Germany adheres to a two tier board system, which is traditionally contrasted with the one tier system prevalent in the US (*see* § 16.3.1 *supra*).[37] The supervisory board (*Aufsichtsrat*) oversees executive board actions (§ 111 (1) AktG) and gives advice.[38] The simultaneous membership of the both organs is not permitted (§ 105 AktG). Although the supervisory board should respect the autonomy of the executive

33. For reports, *see* Bayer 2010, *supra* note 26; *see also* J. Schmidt, 'Reforms in German Stock Corporation Law – The 67th German Jurists Forum', 9 *European Business Organization Law Review* 637 (2008); Schäfer 2008, *supra* note 26.
34. *See* G. Spindler, *Münchener Kommentar zum Aktiengesetz* § 76, 1-188 (W. Goette & M. Habersack eds.); *see also* J. Koch, *Aktiengesetz* § 76, 1-80 (U. Hüffer & J. Koch eds.); H. Fleischer, *Kommentar zum Aktiengesetz* § 76, 1-150 (G. Spindler & E. Stilz eds.). On the relevance of § 76 AktG for purpose of the AG, *see* § 22.2.1 *supra*.
35. "*Der Vorstand leitet das Unternehmen in eigener Verantwortung im Unternehmensinteresse* […]".
36. *See* W. Bayer & S. Engelke, 'Die Revision des Aktienrechts durch das Aktiengesetz von 1937', in: *Aktienrecht im Wandel* 619, 643 (W. Bayer & M. Habersack eds., 2007) (on the background of § 76 AktG); *see also* M. Hoffmann-Becking, 'Zur rechtlichen Organisation der Zusammenarbeit im Vorstand der AG', 27 *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 497 (1998).
37. For an extensive (historical) comparison, *see* M. Roth, 'Corporate Boards in Germany', in Corporate Boards in Law and Practice: A Comparative Analysis in Europe 256, 275-310 (P. Davies et al., eds.); *see also* K.J. Hopt, 'The German Two-Tier Board: Experience, Theories, Reforms' in: *Comparative Corporate Governance – The State of the Art and Emerging Research* 228 (K.J. Hopt et al., eds.).
38. *See* Bundesgerichtshof, 4 July 1994 – II ZR 197/93; *see also* Bundesgerichtshof 25 March 1991 – II ZR 188/89 (both on the relationship between consultancy agreements and simultaneous supervisory board membership). A similar provision can be found in § 5.1.1 DCGK 2017.

directors and must refrain from effectively managing the corporation, it has a veto right regarding fundamental transactions.[39] The supervisory board may play a rather crucial role in times of corporate distress, effectively acting as a "co-deciding control organ". Jointly, the executive and supervisory board are referred to as the Administration (*Verwaltung*). Both executive and supervisory board resolutions require a majority basis.[40] The executive board has the non-exclusive right to call a shareholder meeting (§ 119 and § 121 AktG). In principle, the agenda for an AGM is set by the executive and supervisory board jointly (§ 124 (3) AktG). An AGM decision, for instance a modification of the articles of association, may not be made contingent on approval by another corporate organ, such as the executive or supervisory board.[41]

Executive board members are appointed by the supervisory board, for a term of up to 5 years. Their contract can be extended once, similarly for a 5-year period (§ 84 (1) AktG).[42] Members of the supervisory board – other than employee representatives, *see* § 20.4.2 *supra* – are appointed by the AGM, for a term up to the fourth subsequent AGM (§ 101 and § 102 AktG). Unless the articles of association provide otherwise, a simple majority of the votes cast is sufficient to be elected as either supervisory or executive director, and no quorum requirements apply.[43] Traditionally, the influence of the AGM on the supervisory board elections has been constrained by the practice of list voting (*Blockwahl*). Accordingly, the shareholder who wished to reject a single candidate had to vote against the entire list of nominees to voice his opposition.[44] Both this system and its polar opposite, that of individual voting (*Einzelwahl*),

39. *See* § 111 (4) AktG. Note that the DCGK is more focused on effective cooperation between the executive and supervisory board (*see* § 3.1 and § 3.3 DCGK) than on separating their respective powers.
40. *See* § 77 (1) AktG; *see also* § 108 AktG. Although this approach is perhaps unsurprising by modern standards, it means that the *Führerprinzip* previously in force (§ 70 (2) AktG 1937, on which § 21.3.2 *supra*), permitting minority- or even individual decisions, has been abolished. Moreover, § 108 (2) mandates a quorum of 3 members of the supervisory board, giving rise to complications for smaller bodies when a member has become incapacitated. *See* Bundesgerichtshof 2 April 2007 – II ZR 325/05, benevolently allowing a conflicted official to participate in the vote.
41. *See* W. Timm, 'Die Mitwirkung des Aufsichtsrates bei unternehmensstrukturellen Entscheidungen', 33 *Der Betrieb* 1201 (1980).
42. However, note that § 5.1.2 DCGK 2017 stipulates that for first-time appointments, the five-year period should not be strictly adhered to (i.e. the term in office should be shorter). *See* N. Paschos & K. von der Linden, 'Vorzeitige Wiederbestellung von Vorstandsmitgliedern', 57 *Die Aktiengesellschaft* 736 (2012).
43. An exception is laid down in § 100 (2) AktG, which provides that in case a candidate has been a member of the executive board during (a part of) the previous 2 years, an appointment as supervisory director is only possible following a motion by the shareholders, with a 25 % quorum present. *See* E. Sünner, 'Die Wahl von ausscheidenden Vorstandsmitgliedern in den Aufsichtsrat' 55 *Die Aktiengesellschaft* 111 (2010).
44. *See* G. Henn, *Handbuch des Aktienrechts* 414-415 (C.F. Müller, 2007); *see also* § 16.4.2 *supra* on similar US changes.

are permitted.[45] However, the latter approach has become more and more common in recent years.[46] In each instance, only natural persons are eligible for appointment (§ 76 (3) and § 101 (1) AktG). Upon installation, the Executive and the supervisory board each take collective decisions (*Kollegialorgan*). Consequently, the Chair of the executive board (*Vorstandsvorsitzender*) is – at least from a legal perspective – not empowered to give binding instructions to his colleagues, as this would circumvent the principle of joint responsibility.[47] Members of the supervisory board can, in the absence of a 75 % majority of the votes, only be removed for cause (*wichtiger Grund*, § 103 AktG).[48] Members of the executive board can be dismissed by the supervisory board (§ 84 AktG) and by a simple majority of the votes cast at the AGM.[49] (However, a decision of the AGM to remove an executive director is still effectuated by the supervisory board). Although the creation of an executive committee is not principally prohibited – in fact, these bodies are somewhat common amongst larger corporations – some German scholars, with their taste for theoretical rigor, finds themselves stretched in dealing with the issue.[50] Indeed, it has been argued that the executive committee cannot fully take over the function of the executive board or perform the tasks it has been attributed. In this view, having an executive committee is not permitted to the extent that it impairs the executive board's independent position.[51] Similarly, the supervisory board may form nomination and audit committees, but these may not usurp its monitoring powers.[52]

45. *See* C. Höpfner, 'Der fehlerhafte Aufsichtsrat. Zur Anwendbarkeit der Lehre vom fehlerhaft bestellten Organ auf die Beschlussfassung im Aufsichtsrat', 45 *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 505, 534-536 (2016), analyzing the implications of both systems for satisfying board gender quota.
46. The shift may be attributed to Landgericht München I 15 April 2004 - 5 HK O 10813/03 (*HypoVereinsbank*), where was held that German corporate law permits list voting only in case if this procedure is accepted by all those present at the AGM. The DCGK has also embraced individual voting (*see* § 5.4.3 DCGK 2017).
47. *See* T. Raiser, 'Klagebefugnisse einzelner Aufsichtsratsmitglieder', 18 *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 52 (1989), discussing the case of Adam Opel AG, where the employee representatives in the supervisory board failed to obtain sufficient votes (9 to 10) to file a complaint against the executive board.
48. *See* M. Habersack, *Münchener Kommentar zum Aktiengesetz* § 103, 1-64 (W. Goette & M. Habersack eds.); *see also* J. Koch, *Aktiengesetz* § 103, 1-18 (U. Hüffer & J. Koch eds.); G. Spindler, *Kommentar zum Aktiengesetz* § 103, 1-67 (G. Spindler & E. Stilz eds.).
49. *See* G. Spindler, *Münchener Kommentar zum Aktiengesetz* § 84, 1-287 (W. Goette & M. Habersack eds.); *see also* J. Koch, *Aktiengesetz* § 84, 1-55 (U. Hüffer & J. Koch eds.); H. Fleischer, *Kommentar zum Aktiengesetz* § 84, 1-174 (G. Spindler & E. Stilz eds.).
50. *See* G. Spindler, *Münchener Kommentar zum Aktiengesetz* § 76, 9 (W. Goette & M. Habersack eds.) ("*Sie mögen zwar im Einzelfall gebildet werden*").
51. *See* G. Spindler, *Münchener Kommentar zum Aktiengesetz* § 76, 9 (W. Goette & M. Habersack eds.); *see also* Hoffmann-Becking 1998, *supra* note 36, at 510. For a more permissive interpretation, *see* J. Götz, 'Corporate Governance multinationaler Konzerne und deutsches Unternehmensrecht', 32 *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 1, 14-17 (2003).
52. *See* § 107 (3) AktG, stressing that committees may "prepare decisions" (*Beschlüsse vorzubereiten*) and can make "recommendations and proposals" (*Empfehlungen oder Vorschläge*).

Some final notes on the interaction between the executive and supervisory board. Roth stresses that in practice, members of the executive board (or at least those representing the shareholders) frequently attend supervisory board meetings in full length. Thus, differences between a (German) two tier and a (US) one tier board model might be smaller than a mere theoretical analysis would suggest.[53] Hopt in particular has noted that substantively, there may exist quite some similarities.[54] In fact, the *Deutscher Juristentag*, the national lawyers convent, proposed to introduce a statutory regime to facilitate the use of one tier boards in 2012.[55] Although the *Deutscher Juristentag* is a rather well-respected institution, this proposal does not appear to have gained the necessary momentum. The DCGK, which once provided that one and two tier boards can be equally successful, now simply stipulates that German corporations adhere to the two Tier model.[56] Co-determination in particular has frustrated any attempts for further harmonization.[57] Indeed, the German board system no longer appears to be developing as enthusiastically towards the Anglo-American model as some argued it did at the start of the 21st century. Therefore, convergence will have to be achieved mainly within pre-existing board structures.[58]

---

53. *See* Roth 2013, *supra* note 37, at 296. Others point to improvements in information flows to the supervisory board, decreasing the gap with non-executive directors in a one tier board. *See* J. Lieder, 'The German Supervisory board on Its Way to Professionalism', 11 *German Law Journal* 115, 119-120 (2010).
54. For an overview, *see* K.J. Hopt, 'The German Law of and Experience with the Supervisory Board' 5 (2016), available at http://papers.ssrn.com/ at 7, referring to matters such as delegation of management tasks, information streams between the executive and supervisory functions, and director independence; *see also* P. Davies & K. J. Hopt, 'Corporate Boards in Europe – Accountability and Convergence', 61 *The American Journal of Comparative Law* 301 (2013) ("The two different models that at first sight look completely different are functionally much less different").
55. For a brief overview of this initiative, *see* M. Roth, 'Wirtschaftsrecht auf dem Deutschen Juristentag 2012', 15 *Neue Zeitschrift für Gesellschaftsrecht* 881, 885 (2012). Interestingly, a similar proposal had been rejected 4 years earlier. *See* Roth 2013, *supra* note 37, at 280.
56. *See* § 1 (4) and (8) DCGK 2017. Although the DCGK acknowledges that businesses that have converted to an SE may opt for a one tier approach, Germany has principally shied away from allowing corporations to choose between one and two tier models. *See* Hopt 2016, *supra* note 54, at 7-8; *see also* K.J. Hopt & P.C. Leyens, 'Board Models in Europe - Recent Developments of Internal Corporate Governance Structures in Germany, the United Kingdom, France, and Italy', 1 *European Company and Financial Law Review* 135, 163 (2004).
57. *See* Hopt 2016, *supra* note 54, at 8; *see also* Hopt & Leyens 2004, *supra* note 56; P.C. Leyens, 'Deutscher Aufsichtsrat und U.S.-Board: ein- oder zweistufiges Verwaltungssystem? Zum Stand der rechtsvergleichenden Corporate Governance-Debatte', 67 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 57, 105 (2001); J. Wouters, 'European Company Law: *Quo Vadis*?', 37 *Common Market Law Review* 257, 261-264 (2000). On the German system of co-determination, *see* § 20.4 *supra*.
58. *See* P. Davies, 'Struktur der Unternehmensführung in Großbritannien und Deutschland: Konvergenz oder fortbestehende Divergenz?', 30 *Zeitschrift für Unternehmens- und*

22.3.2 Fiduciary duties

Under § 93 (1) AktG, members of the executive board are required to act carefully (*Sorgfaltspflichten*).[59] Because of § 116 AktG, the same applies in respect of members of the supervisory board. This general duty can be broken down in a number of (theoretically) distinct obligations.[60] These include a duty of care (*Sorgfaltspflicht*), the related duty of oversight (*Überwachungspflicht*), and a duty of loyalty (*Treuepflicht*). Typically German constructs, such as a duty to act lawfully (*Legalitätspflicht*), have been considered as well. Case law on these duties is present, although not always abundantly so.[61] Although the DCGK could be helpful in interpreting these duties, it only offers limited guidance. Moreover, scholars have been debating its legal status (*see* § 20.6 *supra*).

In its narrower constellation, the duty of care (*Sorgfaltspflicht*) requires executive and supervisory directors to act as would have been appropriate for officials employed by a corporation of similar magnitude and with a comparable number of employees, active in the same industry.[62] Whether these peers actually display such behavior is irrelevant. The fact that negligence is common in a certain economic environment cannot result in exoneration. Whereas inexperience or unfitness cannot benefit a director in his attempts to prevent liability, he will be held responsible for not applying specific skills or knowledge he happens to possess.[63] Thus, the duty of care sets a (largely) objective, proportional standard for director actions. This standard is more demanding than the one imposed on the ordinary businessman pursuant to § 276 BGB. Accordingly, a debtor should merely exercise "reasonable care" (*im Verkehr erforderliche*

Gesellschaftsrecht 268, 293 (2001), already distinguishing between convergence in substance and convergence in form.

59. "*Die Vorstandsmitglieder haben bei ihrer Geschäftsführung die Sorgfalt eines ordentlichen und gewissenhaften Geschäftsleiters anzuwenden.*"

60. For an analysis, *see* G. Spindler, *Münchener Kommentar zum Aktiengesetz* § 93, 1-444 (W. Goette & M. Habersack eds.); *see also* J. Koch, *Aktiengesetz* § 93, 1-92 (U. Hüffer & J. Koch eds.); H. Fleischer, *Kommentar zum Aktiengesetz* § 93, 1-323 (G. Spindler & E. Stilz eds.). A systematic discussion is also presented by B. Pfterner, *Unternehmerische Entscheidungen des Vorstands* (Mohr Siebeck, 2017).

61. Moreover, US sources – not only Delaware law, but equally the Corporate Governance Principles, as (re)drafted by the American Law Institute – have been major sources of inspiration for German law at this point. *See* W. Goette, 'Organisationspflichten in Kapitalgesellschaften zwischen Rechtspflicht und Opportunität', 175 *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht* 388, 395 (2011). As a result, I will not be analyzing the German system of executive and supervisory board member duties as extensively as its US counterpart (*see* § 16.3.2 *supra*).

62. *See* Oberlandesgericht Stuttgart 20 September 2000 – 20 U 87/99; *see also* Bundesgerichtshof 20 February 1995 – II ZR 143/93. Note that this case law is based on the legal framework of private corporations, but is typically deemed to apply regarding open, listed firms as well.

63. *See* Oberlandesgericht Stuttgart 20 September 2000 – 20 U 87/99; *see also* Bundesgerichtshof 20 February 1995 – II ZR 143/93.

Sorgfalt). The difference in treatment is due to the fiduciary character of the relationship between (executive and supervisory) directors and shareholders.[64]

Additionally, the duty of loyalty (*Treuepflicht*) requires members of the executive or supervisory board to act, to the best of their knowledge, in the interest of the corporation, without regards to personal interests.[65] The *Aktiengesetz* has not explicitly codified the duty of loyalty, although many of its provisions hint at the existence of such a duty.[66] Meanwhile, the DCGK does provide a definition of the duty of loyalty.[67] Moreover, the concept has long been part of German private law.[68] The duty of loyalty covers a wide variety of cases, including related party transactions (*Eigengeschäfte*), corporate opportunities (*Geschäftschancen*) and inside information.[69] A violation of the duty of loyalty may result in civil liability for the damages incurred by the shareholders (or the profits made by the executive or supervisory directors). Under § 266 (1) of the Criminal Code (*Strafgesetzbuch*), such behavior (*Untreue*) can even give rise to criminal sanctions. The most well-known example of this possibility is presented by the Mannesmann takeover in 2000 (*see* § 21.4.4 *supra*). The terms of this transaction, despite having been approved by the AGM, were strongly contested. The main issue of controversy were the generous, non-stipulated severance packages (*freiwilliger Sonderzahlungen*) of € 60 million in aggregate, received by senior Mannesmann officials.[70] In the view of the prosecutor, these payments may have served to facilitate takeover negotiations. In 2005, the *Bundesgerichtshof* (German Supreme Court) voided an earlier acquittal, ruling these premiums constituted waste.[71] Eventually, the case was settled.

64. G. Spindler, *Münchener Kommentar zum Aktiengesetz* § 93, 1-44 (W. Goette & M. Habersack eds.); *see also* J. Koch, *Aktiengesetz* § 93, 1-92 (U. Hüffer & J. Koch eds.); H. Fleischer, *Kommentar zum Aktiengesetz* § 93, 1-323 (G. Spindler & E. Stilz eds.).
65. *See* Bundesgerichtshof 21 February 1983 – II ZR 183/82; *see also* Bundesgerichtshof 21 December 1979 – II ZR 244/78; Bundesgerichtshof 10 February 1977 – II ZR 79/75; Bundesgerichtshof 8 May 1967 – II ZR 126/65; (again originating mainly from the sphere of private corporations).
66. *See* J. Lieder, 'Die Treuepflicht Der Vorstandsmitglieder', 2016 *Journal of Commercial and Intellectual Property Law* 41 (2016); *see also* H. Fleischer, *Handbuch des Vorstandsrechts*, § 9, 1-47 (C.H. Beck, 2006) for an extensive analysis.
67. *See* § 4.3.1 and § 5.5.1 DCGK 2017, addressing supervisory and executive directors, respectively ("*Vorstandsmitglieder sind dem Unternehmensinteresse verpflichtet. Sie dürfen bei ihren Entscheidungen keine persönlichen Interessen verfolgen, unterliegen während ihrer Tätigkeit für das Unternehmen einem umfassenden Wettbewerbsverbot und dürfen Geschäftschancen, die dem Unternehmen zustehen, nicht für sich nutzen*.")
68. *See* A. Hueck, *Der Treuegedanke im modernen Privatrecht* (Bayerischen Akademie der Wissenschaften, 1947), distinguishing between the general concept of *Treu und Glauben* and its corporate legal variant.
69. *See* Lieder 2016, *supra* note 66, at 43-45; *see also* Roth 2013, *supra* note 37, at 324-327.
70. *See* M. Hoffmann-Becking, 'Vorstandsvergütungen nach Mannesmann', 9 *Neue Zeitschrift für Gesellschaftsrecht* 127 (2006); *see also* H. Fleischer, 'Konzernuntreue zwischen Straf- und Gesellschaftsrecht', 57 *Neue Juristische Wochenschrift* 2867 (2004).
71. *See* Bundesgerichtshof 21 December 2005 – 3 StR 470/04 (*Mannesmann*). However, it also observed that "*nicht die Verletzung jeder Sorgfaltspflicht bei der Entscheidungsfindung für*

As a mirror to the directors' fiduciary duty towards shareholders, investors have a fiduciary duty towards the corporation and their fellow investors.[72] Additionally, controlling shareholders are bound by a fiduciary towards outside minority shareholders.[73] However, this general obligation is superseded at least partially by provisions of German law in respect of corporate group undertakings (*see* § 20.5 *supra*).[74] Moreover, scholars have recognized that some decisions, by their very nature, cannot serve to assure the business' continued existence and its robust earnings capacity (*see* § 22.2.1 *supra*). A notable example includes the decision to liquidate the corporation to prevent future losses[75] or a change of control resulting in a loss of tax credits.

22.3.3 Business judgement rule

Whether executive and supervisory directors have acted in accordance with their fiduciary duties is determined under a German variant of the US BJR, laid down in § 93 (1) AktG.[76] The German variant of the BJR (GBJR) was introduced only in 2005,[77] but is typically considered a confirmation of existing case law.[78] Despite the apparent conceptual similarities, it should be stressed

ein nach § 266 Abs. 1 StGB tatbestandsmäßiges Verhalten ausreicht".

72. *See* Bundesgerichtshof 20 March 1995 – II ZR 205/94 (*Girmes*), concerning a shareholder who constituted a blocking minority and refused to accept to accept the terms of a debt-equity swap, even though the creditors had indicated they were not willing to reopen the negotiations on the situation of the distressed corporation.
73. *See* S. Daske, *Vorzugsaktien in Deutschland. Historische und rechtliche Grundlagen, ökonomische Analyse, empirische Befunde* 72 (Springer, 2019) ("*Die Treuepflicht […] wächst mit zunehmender Einflussmöglichkeit eines Gesellschafters, da damit zugleich die Möglichkeit der negativen Interessenbeeinträchtigung […] wächst*."); *see also* D. Kunze, *Positive Stimmpflichten im Kapitalgesellschaftsrecht* 118-120 (Lang, 2004).
74. For an extensive overview, *see* A. Cahn, "The Shareholders' Fiduciary Duty in German Company Law", in: H.S. Birkmose, *Shareholders' Duties* 347, 352 (2017).
75. *See* Bundesgerichtshof 20 March 1995 – II ZR 205/94 (*Girmes*).
76. "*Eine Pflichtverletzung liegt nicht vor, wenn das Vorstandsmitglied bei einer unternehmerischen Entscheidung vernünftigerweise annehmen durfte, auf der Grundlage angemessener Information zum Wohle der Gesellschaft zu handeln*". For a similar definition, *see* § 3.8 DCGK 2017.
77. As part of the Corporate Integrity and Derivative Action Modernization Act (*Gesetz zur Unternehmensintegrität und Modernisierung des Anfechtungsrechts* (*UMAG*)), *Bundesgesetzblatt* 2005, 2802. For a German analysis, *see* J. Koch, 'Das Gesetz zur Unternehmensintegrität und Modernisierung des Anfechtungsrechts (UMAG) – ein Überblick', 35 *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 769 (2006). For an extensive discussion from a Dutch perspective, *see* B.F. Assink, 'Over de 'business judgment rule' - Enige recente ontwikkelingen in het vennootschapsrecht van met name Duitsland en Delaware', 8 *Ondernemingsrecht* 75 (2006); *see also* B.F. Assink, 'Enige beschouwingen over Duitse ontwerpwetgeving, de Amerikaanse 'business judgment rule' en ontwikkelingen in het Nederlandse vennootschapsrecht', 7 *Ondernemingsrecht* 372 (2005).
78. *See* Bundesgerichtshof 21 April 1997 – II ZR 175/95 (*ARAG/Garmenbeck*): "*Eine Schadenersatzpflicht […] kann erst in Betracht kommen, wenn die Grenzen, in denen sich ein von Verantwortungsbewußtsein getragenes, ausschließlich am Unternehmenswohl orientiertes,*

that important differences between the respective schemes exist as well. For instance, under the GBJR, executive and supervisory directors owe fiduciary duties to the corporation (*Wohl der Gesellschaft*), not to its shareholders.[79] This is befitting to the purpose of the AG (*see* § 22.2.1 *supra*). Moreover, the GBJR acts simultaneously as a behavioral (*Verhaltenspflicht*) and as a liability standard (*Verschuldensmaßstab*). In the US legal system, the BJR only acts as a standard of judicial review (*see* § 16.3.4 *supra*). Furthermore, it is presumed that the executive and supervisory directors have culpably violated their duties when a claim is brought before court.[80] This is perhaps the most striking difference between the US and German variants of the BJR. Indeed, the US BJR takes an entirely different position regarding the allocation of the burden of proof.[81] Additionally, German courts have demonstrated that they will not shy away from reviewing (in)actions by the supervisory board substantively, particularly if the issue at hand relates to the organ's control function. In such situations, the supervisory board lacks discretion to act.[82] This approach has resulted in multiple cases in which members of the supervisory board were held liable and scholars advocating more judicial restraint.[83] Although taking out insurance against liability risks is permitted, executive and supervi-

---

auf sorgfältiger Ermittlung der Entscheidungsgrundlagen beruhendes unternehmerisches Handeln bewegen muß, in unverantwortlicher Weise überspannt worden ist oder das Verhalten des Vorstand aus anderen Gründen als pflichtwidrig gelten muß." For a discussion of this case, *see* Goette 2011, *supra* note 61, at 395; *see also* M. Roth, 'Outside Director Liability: German Stock Corporation Law in Transatlantic Perspective', 8 *Journal of Corporate Law Studies* 337, 340-344, 364-369 (2008).

79. *See* Bundesgerichtshof 21 April 1997 – II ZR 175/95 (*ARAG/Garmenbeck*). *But see* Koch 2006, *supra* note 77, at 790, arguing that the requirement to promote the interests of the corporation will only affect rather disproportional director decisions.

80. *See* Bundesgerichtshof 15 January 2013 – II ZR 90/11; *see also* Bundesgerichtshof 4 November 2002 – II ZR 224/00, ruling that a corporation only has to prove there exists a possibility of the damage being caused by a (supervisory or executive) director.

81. Some have argued that this unfavorable presumption does not apply against former members of the executive and supervisory board, as they no longer have access to exculpatory information. *See* M. Foerster, 'Beweislastverteilung und Einsichtsrecht bei Inanspruchnahme ausgeschiedener Organmitglieder', 176 *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht* 211, 245-247 (2011).

82. *See* Bundesgerichtshof 21 April 1997 – II ZR 175/95 (*ARAG/Garmenbeck*), holding that there exists no business discretion for monitoring responsibilities. *But see* M. Roth, 'Outside Director Liability: German Stock Corporation Law in Transatlantic Perspective', 8 *Journal of Corporate Law Studies* 337, 364-369 (2008), arguing that the absence of supervisory director discretion should be viewed in light of the specific and rather outrageous and circumstances of the case at hand, which involved an unsecured loan to a former electrician whose company ran a pyramid scheme.

83. *See* M. Hoffmann-Becking, 'Das Recht des Aufsichtsrats zur Prüfung durch Sachverständige nach § 111 Abs. 2 Satz 2 AktG', 40 *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 136, 145 (2011), in fact proposing a decrease in supervisory board information rights in exchange for a more benevolent liability regime.

sory directors should bear at least 10 % of the damages.[84] Finally, the GBJR is not part of a larger judicial scheme, since it does not provide switch-over possibilities involving the EST or the EFS. Instead, the GBJR constitutes the only review phase. Because of all the differences between the Delaware and German systems, one can legitimately wonder whether the two BJR mechanisms are actually that similar.

22.3.4 Director independence & interestedness

German law similarly presupposes supervisory director independence, and therefore disinterestedness, when granting discretion through the GBJR.[85] Strictly speaking, the *Aktiengesetz* does not define director independence itself. However, § 111a (1) (2) AktG, introduced in 2019, following the implementation of SRD II (*see* § 20.5.2 *supra*), conforms to criteria provided by EU Regulations. The DCGK does contain a definition of independence. However, it states that only a "sufficient" number of supervisory directors should match the criterion. Therefore, a majority of independent directors is not required.[86] This hesitation may stem from the presence of employee representatives in the supervisory boards, as their independence has traditionally been doubted by most scholars.[87] Whatever the case may be, the DCGK states that a supervisory director (i.e. a shareholder representative) who becomes interested should resign (§ 5.5.3 DCGK 2017). This point of view appears rather radical, especially when considering the interest of the corporation to act on a going concern basis. The provision is also considerably more intrusive than similar remedies in other governance systems (for Delaware corporate law, *see* § 16.3.3 *supra*). By contrast, the *Aktiengesetz* adopts a more lenient position. Accordingly, whether a conflict of interest exists is largely decided by the Chair of the supervisory board.[88] Meanwhile, related party transactions

84. *See* § 93 (2) AktG; *see also* § 3.8 DCGK 2017, mentioning 1.5 years of remuneration as an alternative to 10 % of the damages, whichever is higher.
85. The case for independence has been embraced only hesitantly, as German boards continue to emphasize experience and skill. *See* Tröger 2019, *supra* note 77, at 439; *see also* Roth 2013, *supra* note 37, at 303-304, referring extensively to empirical figures on lagging independence.
86. *See* § 5.4.2 DCGK 2017, stipulating that supervisory board members are to be considered non-independent in particular if they have a personal or business relationship with the corporation, its governing bodies or (a corporation affiliated with) a controlling shareholder. *See* U. Hüffer, 'Die Unabhängigkeit von Aufsichtsratsmitgliedern nach Ziffer 5-4-2 DCGK', 27 *Zeitschrift für Wirtschaftsrecht* 637 (2006) for an analysis. A proposal for a far more detailed list was rejected in 2012. *See* Roth 2013, *supra* note 37, at 307-308, 357-357.
87. This is not only based on the conceptual conflict of interest between shareholders and employees, but also because of a potential pre-existing employment relationship of the official concerned. *See* R. Köstler, 'Die Mitbestimmung in der SE', 32 *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 800 (2003).
88. Exceptions apply in relation to corporate opportunities (§ 88 AktG), loans provided by the corporation (§ 89 and § 115 AktG) and consulting agreements (§ 114 AktG). Additionally,

involving in excess of 1.5 % of the assets require approval by the supervisory board, pursuant to § 111b AktG. A supervisory director who is involved in the conflicted transaction cannot participate in the decision-making by the supervisory board on the matter. If the supervisory board decides to withhold its approval, the executive board may approach the AGM with the same request.[89]

The German approach of (negatively) eliminating conflicted directors somewhat mirrors the Delaware strategy of (positively) composing a Special Committee of independent officials (*see* § 17.4.2 *supra*). The eventual outcome under both scenarios could, in practice, be largely identical. Whenever a director is found to be interested, a body of well-informed, unconflicted corporate officials decides on (the conditions of) the transaction. Then, the main difference between the German and the Delaware systems of treating conflicted transactions lies in the fact that under German law, the absence of interested directors is sufficient to warrant BJR review. By contrast, Delaware law additionally requires a majority-of-the-minority shareholder vote to obtain this result.

22.4 Shareholders' right to vote & position of the AGM

22.4.1 The concept of par value and its implications

As opposed to the Delaware system (*see* § 16.5.1 *supra*), the concept of par (or nominal) value plays a highly visible role for the allocation of control and profit rights under German corporate law. The matter is governed by § 8 AktG. This provision does not, as such, define what constitutes a share.[90] Rather, it stipulates that raising the amount of capital necessary to conduct business operations can be achieved by issuing either par value shares (*Nennbetragsaktien*) or non-par value shares (*Stückaktien*).[91] Germany has long maintained high minimum par value requirements, causing optically impressive prices on the stock market. In doing so, policy makers tried to discourage socially weaker parties from risking the little funds they possessed in the stock

German group undertakings law (*see* § 16.5.1 *supra*) provides that the supervisory board receives a report on transactions with affiliated parties in the previous year. However, this report does not have to be disclosed. *See* Roth 2013, *supra* note 37, at 324-327.

89. Non-disclosure of the conflict of interest to the AGM may render the decision of the supervisory board voidable. *See* Bundesgerichtshof 21 September 2009 – II ZR 174/08 (*Springer*); *see also* Bundesgerichtshof 16 February 2009 – II ZR 185/07 (*Kirch/Deutsche Bank*).
90. The instrument has been described as embodying the position of the investor. *See* S. Mock, *Großkommentar Aktiengesetz* § 8, 68 (H. Hirte, P.O. Mülbert & M. Roth eds.).
91. *See* K. Heider, *Münchener Kommentar zum Aktiengesetz* § 8, 1-86 (W. Goette & M. Habersack eds.); *see also* J. Koch, *Aktiengesetz* § 8, 1-24 (U. Hüffer & J. Koch eds.); S. Vatter, *Kommentar zum Aktiengesetz* § 8, 1-48 (G. Spindler & E. Stilz eds.). For a recent confirmation, *see* Landgericht München I 06 November 2014 – 5 HKO 679/14.

markets.[92] The possibility to issue non-par value stock dates back only to 1998, despite already having been contemplated in the 1950s[93] and a privately developed draft legislative proposal being published in 1963.[94] Formally, the 1998 introduction of non-par value shares was justified for the purpose of facilitating currency exchange issues, stemming from the looming introduction of the Euro and the simultaneous abolishment of the German Mark.[95] Even in the post-1998 constellation, the German legislator has not fully embraced non-par value stock. Since the number of shares is tied to the amount of the authorized share capital, it is still possible to calculate an artificial par value (*fiktiver Nennbetrag*) in respect of formally non-par value stock (*unechte nennwertlose Aktien*). If the fully issued share capital amounts to € 1,000,000 and 100,000 stocks have been created, the artificial nominal amount is € 10 per share. The creation of genuine non-par value stocks, which lack any relationship with the authorized share capital, is not permitted. Indeed, doing so would have required abolishing the concept of the authorized share capital.

The (artificial) par value of stocks is strictly regulated. The amount should be at least € 1, pursuant to § 8 (2) and (3) AktG. Shares with an (artificial) par value below € 1 are void.[96] Additionally, the amount of par value stock should be expressed in round Euros, meaning that fractional amounts (for instance € 1.50

92. The *Aktienrechtsnovelle* of 1884 prescribed a minimal par value of 1,000 Mark (§ 207a ADHGB), a requirement that was continued by § 180 HGB 1897 and § 8 AktG 1937. In 1949, this amount was lowered to 100 DM. Subsequently, it was reduced to 50 DM in 1965, 5 DM in 1994 and € 1 in 1998. At the dawn of the 21st century, with financial markets allegedly having become more developed, the goal of administrators shifted to granting as many individuals as possible access to and enabling them to benefit from those markets (*Volkskapitalismus*). *See* K. Heider, *Münchener Kommentar zum Aktiengesetz* § 8, 2-6, 14-17 (W. Goette & M. Habersack eds.)

93. In chronological order, *see* U.R. Siebel, 'Für und wider die Quotenaktie', 7 *Zeitschrift für das gesamte Kreditwesen* 92 (1954); *see also* E. Boesebeck, 'Eine Lanze für die nennwertlose Aktie', 12 *Der Betrieb* 309 (1959); C.P. Claussen, 'Die Aktie ohne Nennbetrag ist die richtigere', 8 *Die Aktiengesellschaft* 237 (1963). The latter two articles analyzed contemporary English corporate law.

94. *See* G. Jahr & W. Stützel, *Aktien ohne Nennbetrag: ein Beitrag zur Uberwindung von Missverständnissen im Aktienwesen* (Knapp, 1963).

95. *See* K. Heider, 'Einführung der nennwertlosen Aktie in Deutschland anläßlich der Umstellung des Gesellschaftsrecht auf den Euro', 43 *Die Aktiengesellschaft* 1 (1998); *see also* H. Schröer, 'Zur Einführung der unechten nennwertlosen Aktie aus Anlaß der Europäischen Währungsunion', 14 *Zeitschrift für Wirtschaftsrecht* 221 (1997); J. Ekkenga, 'Vorzüge und Nachteile der nennwertlosen Aktie', 49 *Wertpapier Mitteilungen* 1645 (1997). For earlier papers,. *see* U. Seibert, 'Gesetzentwurf zur Herabsetzung des Nennbetrags der Aktien', 38 *Die Aktiengesellschaft* 315 (1993); *see also* H. Hirte, 'Der Nennwert der Aktie – EG-Vorgaben und Situation in anderen Ländern', 43 *Wertpapier Mitteilungen* 753 (1991).

96. It has been disputed whether the entire position of the shareholder as member of the corporation is void, or whether this merely concerns the stock's securitization. This also depends on whether the firm is yet to be registered with the Chamber of Commerce or its data has already been duly recorded. *See* K. Heider, *Münchener Kommentar zum Aktiengesetz* § 8, 63-79 (W. Goette & M. Habersack eds.); *see also* J. Koch, *Aktiengesetz* § 8, 7-10 (U. Hüffer

or € 1.01) are not permitted. In fact, violation of these provisions constitutes an administrative offense (§ 405 (4) AktG), punishable by a fine of up to € 25,000 for the issuer.[97] Moreover, the co-existence of par and non-par value stock is not permitted.[98] Pursuant to § 179 AktG, switching from one type of stock to the other (par value shares to artificial par value stock or vice versa) requires modification of the articles of association. Such a reclassification has to be approved by the AGM by a majority comprising 75 % of the represented share capital.[99] Whereas the issuance of stock of a different par value is permitted (for instance € 5, € 10 and € 100), issuing shares of which the artificial par value varies is not allowed. This relatively rigid system is intended to strengthen the robustness of financial markets, by preventing the existence of "penny stocks". In similar fashion, the scheme serves to facilitate the transparent pricing of equity instruments ("*eine Standardisierung des Produkts Aktie*"). However, whether these arguments are fully convincing has been debated.[100]

22.4.2 The ban on the partitioning of shareholder rights

Additionally, § 8 (5) AktG contains a prohibition on the partitioning of shareholder membership rights amongst multiple parties (*Abspaltungsverbot*). This ban covers a wide range of investor competences and concerns one of the fundamental tenets of German corporate law.[101] § 8 (5) AktG addresses both the corporation itself and its shareholders. Accordingly, membership rights may not be divided over two or more parties (*Aufspaltung* or *Realteilung*).

& J. Koch eds.); S. Vatter, *Kommentar zum Aktiengesetz* § 8, 31-37 (G. Spindler & E. Stilz eds.).

97. In principle, there exists no ceiling as to a shares' maximum (artificial) par value. However, setting an excessively high amount, for the purpose of disabling outside minority investors to retain their position (effectively constituting a freeze-out), may constitute a breach of good faith (*Treuepflicht*, *see* § 22.3.2 *supra*). *See* Bundesgerichtshof 5 July 1999 – II ZR 126/98. For a critical analysis, *see* J. Vetter, 'Verpflichting zur Schaffung von 1 Euro-Aktien', 45 *Die Aktiengesellschaft* 193 (2000).
98. *See* § 8 (1) AktG; *see also* § 23 (3) (3) and § 23 (3) (4) AktG, on the requirements in respect of the Articles of Association. For a recent case in this regard, *see* Landgericht München I 6 November 2014, 5 HK O 679/14.
99. Regarding § 179 AktG, *see* U. Stein, *Münchener Kommentar zum Aktiengesetz* § 179, 1-262 (W. Goette & M. Habersack eds.); *see also* J. Koch, *Aktiengesetz* § 179, 1-39 (U. Hüffer & J. Koch eds.); T. Holzborn, *Aktiengesetz* § 179, 1-205 (G. Spindler & E. Stilz eds.).
100. Indeed, a low minimum nominal value does not necessarily cause a low market price (*but see* Seibert 1993, *supra* note 95, on the opposite situation). Moreover, it can be doubted whether investors are not already aware of the information conveyed, including the size of their equity stake. *See* S. Mock, *Großkommentar Aktiengesetz* § 8, 1-6 (H. Hirte, P.O. Mülbert & M. Roth eds.).
101. For an extensive analysis, *see* S. Mock, *Großkommentar Aktiengesetz* § 8, 185-208 (H. Hirte, P.O. Mülbert & M. Roth eds.); *see also* K. Heider, *Münchener Kommentar zum Aktiengesetz* § 8, 87-108 (W. Goette & M. Habersack eds.); S. Vatter, *Kommentar zum Aktiengesetz* § 8, 49-80 (G. Spindler & E. Stilz eds.).

Similarly, control rights (*Verwaltungsrechte*) may not be detached from financial rights (*Vermögensrechte*) and attributed to another party (*Abtrennung*).[102] The doctrinal idea behind § 8 (5) AktG is that if such a mechanism were absent, many of the mandatory aspects of German corporate law (*see* § 22.2.3 *supra*) could be easily avoided. Functionally, the provision ensures the standardization of securities, reassuring financial markets whilst limiting the degree to which investors can pursue their private interests. Allegedly, the creation of tailored instruments would enable market distortions. Following § 134 BGB, violation of § 8 (5) AktG renders the resulting legal relationships void. The *Abspaltungsverbot* is not without teeth. According to well-established case law, a pledgee lacks the right to convene the AGM.[103] Similarly, it has been ruled that the right to participate in corporate profits may not be transferred.[104]

Theoretically, the scope of the *Abspaltungsverbot* could be extremely broad. However, the prohibition is, in practice, usually interpreted as only covering a transfer of shareholder rights in the abstract sense. Agreements regarding financial or control rights for a pre-defined amount of time are not affected. As a result, the restriction does not apply concerning, for instance, a specific, determinable amount of dividend, which has become due by setting and approving the annual accounts (§ 174 AktG).[105] Therefore, the practical relevance of the *Abspaltungsverbot* should not be overestimated. Merely, it covers the formal (legal) partitioning of shareholder membership rights. However, the substantive (economic or contractual) perspective is largely disregarded. Consequently, basic arrangements such as stock splits – assuming these do not violate the requirements regarding the minimum (artificial) par value, *see* § 22.4.1 *supra* – and joint stock ownership, as well as more complicated structures, including securities lending and depository receipts, are all permitted. To illiustrate, the *Abspaltungsverbot* failed to warn Volkswagen of the takeover attempt by Porsche, as the latter operated largely under the radar by acquiring stock derivatives.[106]

102. *See* Bundesgerichtshof 17 November 1986 – II ZR 96/86, where a transfer of stock had been disguised as a proxy agreement.
103. *See* Oberlandesgericht Celle 4 February 2015, 9 W 14/15.
104. *See* Bundesgerichtshof 24 January 1957 – II ZR 208/55.
105. *See* Bundesgerichtshof 28 October 1993 – IX ZR 21/93; *see also* Bundesgerichtshof 24 January 1957 – II ZR 208/55; Bundesgerichtshof 8 October 1952 – II ZR 313/51 (payment of cumulative dividends overdue due to previous losses).
106. *See* G. Bachmann, 'Rechtsfragen der Wertpapierleihe', 173 *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* 596, 610 (2009). *But see* C.H. Seibt, 'Verbandssouveränität und Abspaltungsverbot im Aktien- und Kapitalmarktrecht – Revisited: Hidden Ownership, Empty Voting und andere Kleinigkeiten', 39 *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 795, 814 (2010), arguing to the contrary that the *Abspaltungsverbot* contributes to a reduction of agency costs, arising from the use of equity derivatives, as these enable investors to fixate on their own interests.

22.4.3 Shareholder voting rights

Shares carrying identical membership rights and obligations constitute a class (*Gattung*).[107] Pursuant to § 53a AktG, all holders of shares of the same class should be treated equally. This obligation rests on the corporation, not on the investors.[108] Relevant aspects with a view to determining whether a separate class of stock exists include differences in profit entitlements and the right to vote. A similar indicator is the presence of specific, additional commitments undertaken by a certain shareholder (*Nebenleistungspflichte*). However, purely quantitative matters, notably a different (artificial) par value (*(fiktiver) Nennbetrag*), are insufficient to – in and by themselves – create a separate class of stock.

The matter of voting rights is addressed specifically in § 12 and § 134 AktG. Under German corporate law as well, the right to vote is considered the most important control right ("*wichtigste mitgliedschaftliche Verwaltungsrecht*").[109] German corporate law relates the number of votes to be cast proportionally to the share's (fictional) par value (*Kapitalprinzip*).[110] If two classes of stock have been issued, A class shares with a nominal value of € 10 and B-class shares with a nominal value of € 5, the A-class stocks carry twice as many votes as the B-class stocks. In principle, the aim of the shareholder when participating in the decision-making process or the duration of his share-ownership are irrelevant for the existence of the right to vote. Importantly, the possibilities to deviate from this proportionality-based approach are limited.[111] Despite the fact that § 11 AktG allows for different classes of stock to be created, § 12 (1) and (2) AktG renders the issuance of non-voting stock – at least in principle – and

---

107. *See* K. Heider, *Münchener Kommentar zum Aktiengesetz* § 11, 1-60 (W. Goette & M. Habersack eds.); *see also*
J. Koch, *Aktiengesetz* § 11, 1-6 (U. Hüffer & J. Koch eds.); S. Vatter, *Kommentar zum Aktiengesetz* § 11, 1-36 (G. Spindler & E. Stilz eds.).
108. For an extensive discussion, *see* D.A. Verse, *Der Gleichbehandlungsgrundsatz Im Recht Der Kapitalgesellschaften* (Mohr Siebeck, 2006). Since § 53a AktG has its origins in EU-law, and to prevent the discussion from becoming overly repetitive, the concept of equal treatment is discussed in more detail in the Dutch comparative governance analysis. *See* § 28.4 *infra*.
109. *See* Bundesgerichtshof 19 December 1977 – II ZR 136/76 (*Mannesmann*), on the introduction of a capped voting system by a majority vote instead of individual shareholder consent.
110. S*ee* S. Mock, *Großkommentar Aktiengesetz* § 12, 1-74 (H. Hirte, P.O. Mülbert & M. Roth eds.); *see also* K. Heider, *Münchener Kommentar zum Aktiengesetz* § 12, 1-47 (W. Goette & M. Habersack eds.); S. Vatter, *Kommentar zum Aktiengesetz* § 12, 1-31 (G. Spindler & E. Stilz eds.). With regard to the *travaux préparatoires* of § 12 AktG 1965, *see* BT-Drucksache IV/3295. For a contemporary inquiry, *see* Seibt 2010, *supra* note 106, at 814.
111. Here, the *Abspaltungsverbot* (*see* § 22.4.2 *supra*) is felt as well. Conversely, it is not possible to grant non-shareholders the right to vote. *See* Oberlandesgericht Düsseldorf 22 July 1993 – 6 U 84/92 (holding that the exercise of voting rights not possible merely pursuant to a share purchase agreement, in the absence of actual share ownership); *see also* Bundesgerichtshof 17 November 1986 – II ZR 96/86.

multiple voting stock (*Mehrstimmrechte*) void. Similarly, § 2.1.2 of the DCGK 2017 prohibits the use of multiple voting shares. The most important exception involves non-voting preference shares (*Vorzugsaktien*), which is discussed later (*see* § 22.5.3 *infra*).[112]

In its current form, § 12 AktG prohibits the use of multiple voting stock (*Mehrstimmrechte*, *see* § 21.3.2 *supra*). This restriction equally extends to loyalty shares (*see* § 10.6.4 *supra*), despite the fact that in some variants, the mechanism leaves the system of one share, one vote formally intact, by granting a qualifying shareholder an additional share, not merely an additional vote.[113] In respect of the few non-listed AGs which may still have grandfathered multiple voting stock outstanding (*see* § 21.4.2 *infra*), § 152 AktG has adopted a disclosure-based strategy. Accordingly, the annual report's balance sheet should mention the aggregate number of votes which can be cast on the multiple voting shares. The use of multiple voting stock is constrained on another, more fundamental level as well. Some AGM decisions merely require a majority of the votes, for instance the appointment of the supervisory board (§ 101 AktG), discharge of executive and supervisory directors (*Entlastung*, § 120 AktG) and the distribution of profits (§ 174 AktG). However, other AGM resolutions principally require a capital-based majority. This includes equally momentous governance decisions such as the modification of the articles of association (§ 179 AktG), capital increases (§ 182 and § 193 AktG) and liquidation (§ 262 AktG). The typical capital-based majority is 75 %.[114] Consequently, a shareholder who exercises control by virtue of multiple voting stock may be able to implement some decisions of his preference, if these require a vote-based majority, but not necessarily all of them, as some items will necessitate a qualified majority of the capital.[115] Conversely, a controlling shareholder may be able to frustrate some of the decisions that go against his interests. Depending on the size of his equity stake, he could represent a capital-based minority in excess of 25 %,

---

112. Note that § 134 AktG also permits capped or degressive voting (*Höchststimmrechte*). Such a mechanism constrains the influence of the largest shareholder, to the advantage of (outside) minority shareholders. Thus, capped voting could be used as an anti-takeover mechanism. However, as of 1998, the instrument can no longer be applied by listed corporations. As such, a detailed examination is beyond the scope of this thesis.

113. *See* P. Cronheim, 'Loyal Lawyers and Loyalty Shares', in: C. Cascante, A. Spahlinger & S. Wilske, *Global Wisdom on Business Transactions, International Law and Dispute Resolution (Festschrift Wegen)* 197 (C.H. Beck, 2010).

114. Given the relatively strict default rules on capital representation, quora and supermajority requirements are a somewhat marginal phenomenon in German corporate law, although they are nonetheless generally permitted.

115. German corporate law, under certain circumstances, permits shareholders to vote their shares differently in respect of a single item (*uneinheitliche Stimmabgabe*). However, casting votes vested in the same multiple voting stock in a different manner is not permitted. See D. Heckelmann, 'Die uneinheitliche Abstimmung bei Kapitalgesellschaften', 170 *Archiv für die civilistische Praxis* 306, 332 (1970).

sufficient to block some (but not all) decisions (*Sperrminorität*), provided the controller does not violate his *Treuepflicht* (*see* § 22.3.2 *supra*.)

22.4.4 The position of the AGM

The rights of the AGM are outlined in § 119 AktG. Its competences notably include the right to decide on the appointment of (shareholder representatives in) the supervisory board, the distribution of profits, the modification of the articles of association and the increase or reduction of the issued share capital. Conversely, the AGM may only decide on matters in the domain of the executive board at its explicit request. Absent a basis in § 119 AktG or the articles of association, the AGM lacks a right of initiative on any given topic. Thus, German corporate law provides a strong separation of powers between the competences of the AGM and those of the (executive and supervisory) board (*freies ermessen*).[116] This state of affairs is reinforced by the *Satzungsstrenge* of § 23 (5) AktG (*see* § 22.2.3 *supra*). Consequently, there exists comparatively little latitude to grant additional powers to the AGM, to the extent doing so would deprive another corporate organ of the authority conferred upon it by the *Aktiengesetz*.

One well-known exception to the foregoing involves the *Holzmuller*-doctrine, first developed in a ruling of 1982. The case concerned a holding corporation, with interests in the shipping and logging industries, transferring 80 % of its assets into a subsidiary of which it held virtually all the shares. Based on the *Aktiengesetz*, consent of the AGM was not strictly required to pursue the transaction. Indeed, the transaction arguably did not change the position of the shareholders of the parent corporation from an economic perspective. However, it did shift certain competences (those currently laid down in § 119 AktG) from the parent's AGM to its executive and supervisory board. In the view of the *Bundesgerichtshof*, the German Supreme Court, the reorganization therefore enabled the executive and supervisory board to undermine the membership rights of the shareholders at the parent (*Mediatisierung*). This could be arranged, for instance, through the conclusion of control agreements (*Unternehmensverträge*, *see* § 20.5.2 *supra*) or stock issuances concluded at favorable terms. The *Bundesgerichtshof* ruled that when shareholder membership rights are affected so deeply, and with German corporate law offering insufficient remedies, the AGM has an (unwritten) right of approval.[117] The *Holzmuller*-doctrine was subsequently refined in the *Gelatine*-ruling

---

116. For an analysis of § 119 AktG, *see* D. Kubis, *Münchener Kommentar zum Aktiengesetz* § 119, 1-206 (W. Goette & M. Habersack eds.); *see also* J. Koch, *Aktiengesetz* § 119, 1-41 (U. Hüffer & J. Koch eds.); J. Hoffmann, *Kommentar zum Aktiengesetz* § 119, 1-54 (G. Spindler & E. Stilz eds.).

117. *See* Bundesgerichtshof 25 February 1982 – II ZR 174/80 (*Holzmüller*). ("*Es gibt jedoch Entscheidungen, die […] aber so tief in die Mitgliedsrechte der Aktionäre under deren im*

of 2004.[118] In that case, a parent corporation transferred a directly held equity stake, accounting for approximately 10 % of the group sales and the consolidated balance sheet, to a subsidiary.[119] The *Bundesgerichtshof* held – more narrowly – that approval should be obtained merely when a decision relates to a core competence of the AGM, and practically resembles a situation that can only be achieved through a modification of the articles of association. Nevertheless, some uncertainties remain as to the exact scope of the doctrine.[120]

The executive board has the non-exclusive right to convene an AGM and, together with the supervisory board, to set its agenda, pursuant to § 119 and § 121 AktG. However, under § 122 (1) AktG, investor(s) whose equity stake exceeds 5 % may also demand for an AGM to be held, provided that (i) the request states the purpose and reasons of the meeting and (ii) the shareholders filing it have held their securities for at least 90 days. The articles of association may provide for a threshold lower than 5 %. Similarly, § 122 (2) AktG stipulates that shareholders may demand to add certain individual items to the agenda. Shareholder agenda proposals similarly require an equity stake of 5 % or (alternatively) holdings with a value in excess of € 500,000.[121] Such shareholder agenda items should be made at least 30 days prior to the AGM. The proposal must be included in the convocation message or published upon receipt.[122] Likewise, notice of an AGM should be given at least 30 days

---

Anteilseigentum verkörpertes Vermögensinteresse eingreifen, daß der Vorstand vernüftigerweise nicht annehmen kann, er dürfte sie ausschließlich eigener Verantwortung treffen, ohne die Hauptversammlung zu beteiligen. In solchen Fälle verletzt der Vorstand seine Sorgfaltpflicht, wenn er von der Möglichkeit des § 119 Abs. 2 AktG, keinen Gebrauch macht.")

118. *See* Bundesgerichtshof 26 April 2004 – II ZR 155/02 (*Gelatine*). For a discussion, *see* M. Habersack, 'Mitwirkungsrechte der Aktionäre nach Macroton und Gelatine', 50 *Die Aktiengesellschaft* 137 (2005); *see also* T. Liebscher, 'Ungeschriebene Hauptversammlungszuständigkeiten im Lichte von Holzmüller, Macrotron und Gelatine', 34 *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 1 (2005); H. Fleischer, 'Ungeschriebene Hauptversammlungszuständigkeiten im Aktienrecht: Von "Holzmüller" zu "Gelatine"', 57 *Neue Juristische Wochtenschrift* 2335 (2004).
119. For an English analysis, *see* M. Löbbe, 'Corporate Groups: Competences of the Shareholders' Meeting and Minority Protection – the German Federal Court of Justice's recent Gelatine and Macrotron Cases Redefine the Holzmüller Doctrine', 5 *German Law Journal* 1057 (2004).
120. *See see* D. Kubis, *Münchener Kommentar zum Aktiengesetz* § 119, 1-206 (W. Goette & M. Habersack eds.); *see also* J. Koch, *Aktiengesetz* § 119, 1-41 (U. Hüffer & J. Koch eds.); J. Hoffmann, *Kommentar zum Aktiengesetz* § 119, 1-54 (G. Spindler & E. Stilz eds.), for extensive analyses of related cases and similar issues.
121. Note that the convocation and agenda rights of § 122 AktG are restricted to those matters on which the AGM enjoys decision making competences under § 119 AktG. For an analysis, *see* D. Kubis, *Münchener Kommentar zum Aktiengesetz* § 122, 1-100 (W. Goette & M. Habersack eds.); *see also* J. Koch, *Aktiengesetz* § 122, 1-14 (U. Hüffer & J. Koch eds.); O. Rieckers, *Kommentar zum Aktiengesetz* § 122, 1-71 (G. Spindler & E. Stilz eds.).
122. *See* § 124 AktG. If § 122 AktG is not complied with, the respective shareholders may be authorized by the court to call the AGM or to publish the agenda items themselves (§ 122 (3) AktG).

in advance, following § 123 AktG. The articles of association may, in turn, provide that the intention of attending the AGM or exercising the right to vote requires notice from the part of the shareholders. This period is then added to the 30 day executive board notice period.

22.5 Shareholder dividend entitlements

22.5.1 General framework, financial requirements & director liability

The AG requires a minimum legal capital (*Mindestnennbetrag des Grundkapitals*) of € 50,000 (§ 7 AktG).[123] The actual amount should be specified in the articles of association. Conceptually, the legal capital serves both as a seriousness-test (*Seriositätsschwelle*) and as a risk commitment device of shareholders to creditors.[124] To build on the framework regarding the formation of legal capital, there exists an elaborate body of provisions in relation to capital retention.[125] These clauses contain certain abstract minima and maxima with a view to the amount of dividend distributions. In addition to acting as a seriousness-test and a risk commitment device, capital retention provisions serve to protect the interests of outside minority shareholders against actions of insiders.[126] Because of § 23 (5) AktG (*see* § 22.2.3 *supra*), German law regarding capital formation and retention has a largely mandatory character. Consequently, shareholders do not necessarily hold full discretionary powers concerning the distribution of profits. The prime example involves § 58 (2) AktG. Accordingly, the executive board (*Vorstand*) and supervisory board (*Aufsichtsrat*) may unilaterally choose, without prior consultation of the AGM, to reserve up to half of the annual net income (*Jahresüberschuß*, § 275 HGB). The AGM is authorized to decide on the remainder.[127] The articles of association can provide that the executive and supervisory board may reserve a

123. *See* K. Heider, *Münchener Kommentar zum Aktiengesetz* § 7, 1-35 (W. Goette & M. Habersack eds.); *see also* J. Koch, *Aktiengesetz* § 7, 1-6 (U. Hüffer & J. Koch eds.); I. Drescher, *Kommentar zum Aktiengesetz* § 7, 1-3 (G. Spindler & E. Stilz eds.). For specific industries, different rules may apply. A fine example is presented by real estate corporations. *See* § 4 REITG, mentioning a figure of € 15 million.
124. For a critical analysis of the risk commitment argument in the German context, *see* H. Eidenmüller & A. Engert, 'Die angemessene Höhe des Grundkapitals der Aktiengesellschaft', 50 *Die Aktiengesellschaft* 97, 105 (2005).
125. The minimum legal capital of the *Aktiengesellschaft* has varied considerably during the 20th century, along similar lines as the shares' minimum nominal value. *See* § 21.3 and § 21.4 *supra*.
126. *See* Bundesgerichtshof 21 July 2003 – II ZR 109/02.
127. "*Das Recht auf Gewinnbeteiligung [...] wird allgemein als das wichtigste mitgliedschaftliche Vermögensrecht des Aktionärs bezeichnet. Angesichts der rechtspolitisch umstrittenen Regelung [in § 58 AktG, TK] ist diese Feststellung fragwürdig*." *See* W. Bayer, *Münchener Kommentar zum Aktiengesetz* § 58, 96 (W. Goette & M. Habersack eds.).

smaller or larger part of the annual profits: a minimum or maximum does not exist.[128] However, the total amount of this reserve (*Gewinnrücklage*) should not exceed 50 % of the issued share capital.[129] In this sense, § 58 (2) AktG attempts to strike a balance between the interest of the corporation to fund its operations using internal finance (*Selbstfinanzierung*) and the interest of the shareholders to receive a return on their investments (*Kapitalrendite*).[130] Another example of limited shareholder powers in relation to profit distribution concerns § 150 AktG, which mandates the creation of a statutory reserve to counter losses (*gesetzliche Rücklage*). This reserve should comprise 10 % of the issued share capital and must be formed by retaining 5 % of the profits on an annual basis. The articles of association may stipulate an amount exceeding 10 %. The 5 % loss-reserve contribution is deducted before the proforma annual profit is determined, as are losses carried forward from previous years.[131] § 254 (1) AktG provides a (partial) remedy against insider-friendly possibilities to retain earnings. It stipulates that investors may initiate a lawsuit if dividend reservations exceed what is necessary, according to the *Aktiengesetz* or under the articles of association.[132] However, this possibility exists only when the distributions are below 4 % of the shares' par value, and even then, the executive and supervisory board may refuse to make a distribution if this strategy is required to assure the continued existence of the corporation for the foreseeable future.

The German legal system contains a number of additional peculiarities as well. First, this involves interim dividends. Although these distributions are

---

128. Sometimes, it is even stipulated that the annual profit may be reserved in its entirety. *See* C. Strothotte, *Die Gewinnverwendung in Aktiengesellschaften* 335-338 (Carl Heymans, 2014). For a real life example, *see* Bundesgerichtshof 1 March 1971 – II ZR 53/69.

129. *See* § 58 (1) and (2) AktG. For an analysis, *see* W. Bayer, *Münchener Kommentar zum Aktiengesetz* § 58, 1-137 (W. Goette & M. Habersack eds.); *see also* J. Koch, *Aktiengesetz* § 58, 1-31 (U. Hüffer & J. Koch eds.); A. Cahn & M.A. Schild von Spannenberg, *Kommentar zum Aktiengesetz* § 58, 1-112 (G. Spindler & E. Stilz eds.).

130. The power to decide on the reservation of (up to 50 %) of the annual profits can also be vested in the AGM which, if that avenue is pursued, is not bound by any executive board proposals (§ 58 (1) AktG). Contrary to the option of earnings retention by the executive and supervisory board, this alternative requires an explicit basis in the Articles of Association. Meanwhile, the AGM is not bound by the ceiling of the reserve representing 50 % of the shareholder equity, although it should act in the interest of the corporation (§ 76 AktG, *see* § 22.2.1 *supra*). In practice, the Articles of Association usually prefer empowering the executive and supervisory board over the AGM for determining corporate dividend policy.

131. *See* § 150 AktG. For an analysis, *see* J. Hennrichs & M. Pöschke, *Münchener Kommentar zum Aktiengesetz* § 150, 1-45 (W. Goette & M. Habersack eds.); *see also* J. Koch, *Aktiengesetz* § 150, 1-13 (U. Hüffer & J. Koch eds.); R. Euler & G. Sabel, *Kommentar zum Aktiengesetz* § 150, 1-31 (G. Spindler & E. Stilz eds.).

132. *See* § 254 AktG. For an analysis, *see* J. Koch, *Münchener Kommentar zum Aktiengesetz* § 254, 1-21 (W. Goette & M. Habersack eds.); *see also* J. Koch, *Aktiengesetz* § 254, 1-9 (U. Hüffer & J. Koch eds.); E. Stilz, *Kommentar zum Aktiengesetz* § 254, 1-19 (G. Spindler & E. Stilz eds.).

permitted under § 59 (1) and (2) AktG,[133] strict conditions apply.[134] Such payments can be made only (i) if permitted explicitly by the articles of association and (ii) after the preliminary balance sheet and annual accounts for the most recent fiscal year have shown a net profit (*Jahresüberschuß*).[135] Moreover, the interim dividend is maximized at 50 % of that annual profit, after accounting for the earnings retention obligations of § 58 and § 150 AktG or, alternatively, 50 % of the most recent fiscal year's increase in freely available shareholder equity (*Bilanzgewinn*), whichever is lower.[136] An interim dividend requires an executive board proposal, to be approved by the supervisory board. The AGM cannot unilaterally declare an interim dividend. A second oddity concerns § 57 (2) AktG, which explicitly prohibits the corporation from (indirectly) making or even negotiating interest payments (*Zinsen*) to shareholders in that capacity.[137] Obligations to that extent are void under § 134 BGB.[138] Interest is defined as a payment of which the amount is pre-determined or pre-determinable, and which should be made regardless of the amount of shareholder equity.[139] This prohibition similarly applies to guaranteed dividends, as these are deemed contrary to the nature of an equity instrument (*ein Widerspruch in sich*).

If the law or articles of association do not prevent the distribution of profits, investors are principally and directly entitled to receiving the increase in freely available shareholder equity (*Bilanzgewinn*, as defined in § 158 AktG).

133. For an analysis, *see* W. Bayer, *Münchener Kommentar zum Aktiengesetz* § 59, 1-21 (W. Goette & M. Habersack eds.); *see also* J. Koch, *Aktiengesetz* § 59, 1-5 (U. Hüffer & J. Koch eds.); A. Cahn, *Kommentar zum Aktiengesetz* § 59, 1-19 (G. Spindler & E. Stilz eds.)

134. For a rare example of defective interim dividends, *see* Reichsgericht 20 February 1923 – II 36/22.

135. Due to the requirement of preliminary balance sheets and annual accounts being available, the dividend effectively lacks an interim character. Other aspects of § 59 AktG have been perceived as rather strict as well. Therefore, the practical relevance of interim dividends has remained limited. For a proposal to enable semi-annual and quarterly dividends, *see* U.R. Siebel & S. Gebauer, 'Interimsdividende', 44 *Die Aktiengesellschaft* 385 (1999).

136. Although profitability and changes in corporate equity are usually intertwined, this is not a strict necessity. Depreciations and amortizations, for instance, do not affect the annual profit, but do affect the size of the equity.

137. Naturally, shareholders may still demand interest if providing a loan. Such investments are not an entirely theoretical affair, as is illustrated by the fact that the subordination of shareholder loans (*Gesellschafterdarlehen*) is well-developed under German (corporate) law, particularly in the domain of the private corporation (GmbH). For an analysis of the reforms following the financial crisis in this regard, *see* H. Altmeppen, 'Das neue Recht der Gesellschafterdarlehen in der Praxis', 61 *Neue Juristische Wochenschrift* 3601 (2008).

138. *See* § 57 (2) AktG. For an analysis, *see* W. Bayer, *Münchener Kommentar zum Aktiengesetz* § 57, 194-212 (W. Goette & M. Habersack eds.); *see also* J. Koch, *Aktiengesetz* § 57, 30 (U. Huffer & J. Koch eds.); A. Cahn & M.A. Schild von Spannenberg, *Kommentar zum Aktiengesetz* § 57, 83-84 (G. Spindler & E. Stilz eds.).

139. *See* T. Baums, 'Das Zinsverbot im Aktienrecht', in: K.P. Berger et al. (eds.), *Zivil- und Wirtschaftsrecht im europäischen und globalen Kontext: Festschrift für Norbert Horn zum 70. Geburtstag* 249, 263 (De Gruyter, 2006), for this definition and a historical analysis of § 57 (2) AktG.

This follows from § 58 (4) AktG. Thus, whether a distribution can be made effectively involves a balance sheet test, which must show net assets exceeding the corporate capital and reserves. executive (§ 93 (3) (1) and (2) AktG) and supervisory (§ 116 AktG) directors are personally and collectively liable for the deficit. Moreover, shareholders are required to restitute distributions made in violation of the *Aktiengesetz* to the corporation – on a proportionate basis, instead of the aggregate – unless it concerns a cash dividend, received in good faith (§ 62 (1) AktG).

22.5.2 Inferior and superior dividend rights

Once the distributable amount (*auszuschüttende Betrag*) has been determined by the AGM (§ 174 (2) (2) AktG), the question arises of how to allocate these funds amongst shareholders. According to § 60 AktG, the dividend per share is calculated in proportion to the investor's stake in the issued share capital (in case of *Nennbetragsaktien*) or according to the number of stocks held (*Stückaktien*).[140] However, the articles of association may provide for a different profit calculation basis. This state of affairs has traditionally been justified by arguing that with the size of the distributable amount fixed by an extensive body of provisions of the *Aktiengesetz* (*see* § 21.5.1 *supra*), the issue of profit allocation only affects the position of shareholders as a class, not the solvability of the corporation or the position of creditors or employees. Unsurprisingly, many different profit distribution schemes have been put forward.[141] However, it has been argued that long-term holding or AGM-presence bonuses are prohibited.[142] Moreover, a shareholder cannot, in a general sense, denounce his dividend entitlements entirely[143] or transfer these to another party (due to the *Abspaltungsverbot*, *see* § 22.4.2 *supra*). Meanwhile, there have been examples in the past of controlling shareholders who, in less prosperous years, opted for a stock instead of a cash dividend, rather than denouncing their entitlement altogether – so that minority shareholders could receive their cash distribution without delay.[144] Additionally, investors can waive their financial entitlements contractually, not perpetually but for a pre-determined period of times.

140. For an analysis, *see* W. Bayer, *Münchener Kommentar zum Aktiengesetz* § 60, 1-40 (W. Goette & M. Habersack eds.); *see also* J. Koch, *Aktiengesetz* § 60, 1-12 (U. Hüffer & J. Koch eds.); A. Cahn, *Kommentar zum Aktiengesetz* § 60, 1-30 (G. Spindler & E. Stilz eds.). On the distinction between *Nennbetragsaktien* and *Stückaktien* and the relevance of the (artificial) par value, *see* § 22.4.1 *supra*.
141. *See* Bundesgerichtshof 28 June 1982 – II ZR 69/81 (stressing the priority of the Articles of Association).
142. *See* H. Fleischer, 'Zweifelsfragen der verdeckten Gewinnausschüttung im Aktienrecht', 59 *Wertpapier Mitteilungen* 909, 914 (2007).
143. *See* Bundesgerichtshof 14 September 1998 – II ZR 172/97.
144. *See* J. König, 'Der Dividendenverzicht des Mehrheitsaktionärs – Dogmatische Einordnung und praktische Durchführung', 46 *Die Aktiengesellschaft* 399 (2001).

Since this involves a deep intervention in core shareholder membership rights – arranged in the form of a consensual contract – individual approval by the affected investors is required.

22.5.3 Non-voting preference shares: financial aspects

Arguably, the theoretically and practically most relevant exception to the general German framework regarding voting and profit rights is laid down in § 139 AktG. Although multiple voting shares are banned, non-voting shares may validly be issued – despite the fact that from a functional point of view, both instruments mirror each other – provided that the non-voting shares carry a preferred dividend.[145] Such securities are typically referred to as non-voting preference shares (*Vorzugsaktien*)[146] and are exempted from the ban on interest payments (*Zinsen*) or guaranteed dividends. Their creation and issuance requires a basis in the articles of association.[147] Non-voting preference shares can represent up to 50 % of the issued share capital (§ 139 (2) AktG). This maximum should be complied with, also in case an issuance of *Vorzugsaktien* is followed by a subsequent reduction of share capital.[148] § 139 AktG curbs the possibilities for creating a wedge between an investor's equity interest and his voting power (*see* § 10.2.1 *supra*), as it only permits a modest deviation from the one share, one vote standard. Indeed, a shareholder should provide at least 25 % of the issued share capital + 1 share, if he wishes to control the AGM.[149] Moreover, certain provisions of the *Aktiengesetz* require decision-making by a majority of 75 %. One example involves § 179 AktG, which addresses modifications of the articles of association (*see* § 23.2.1 *infra*). To pre-empt any potential complications regarding these and similar matters, a controller should retain an even larger part of the equity (37.5 % of the issued

145. The issuance of preference shares with voting rights is permitted as well. However, in these cases, the provisions of § 139-§ 141 AktG will not apply. *See* R. Loges & W. Distler, 'Gestaltungsmöglichkeiten durch Aktiengattungen', 22 *Zeitschrift für Wirtschaftsrecht* 467 (2002).
146. For extensive data on the use of non-voting preference shares, *see* Daske 2019, *supra* note 73, at 193-201, observing that at the end of 2012, these securities represented 8 % of the aggregate German share capital, and had been issued by just over 40 listed corporations.
147. *See* Oberlandesgericht Schleswig 27 May 2004 – 5 U 2/04.
148. The 50 % threshold relates to the non-voting preference shares' nominal value, not to their nominal value and share premium (*Nachschüsse*) combined. As such, one could conceive of a situation in which these securities represent in excess of 50 % of investor contributions (i.e. if no share premium is due when subscribing to common shares, and a premium would be due when acquiring non-voting preference shares). However, this approach is generally considered contrary to the nature of the framework on *Vorzugsaktien*.
149. Assuming the maximum number of preference shares has been issued, which renders 50 % of the capital non-voting, the controller must retain the majority of the other 50 % of the share capital – i.e. 25 % of the total + 1 stock.

share capital + 1 share).[150] These calculations highlight the use of non-voting preference shares as a mechanism to thwart the threat of an (unsolicited) acquisition.[151] In fact, German corporate law recognizes no obligation to list both common and non-voting preference shares on the stock exchange (although Deutsche Börse's listing rules induce such behavior, *see* § 21.4.3 *supra*). Thus, a controlling shareholder may elect to only issue non-voting preference shares, allowing him to veto any potential takeovers.

Non-voting preference shares come in many different forms.[152] The default scenario is that of a dividend, for instance 5 % of the nominal value, distributed prior to other investors receiving a part of the corporate profits (*Vorzugsdividende*).[153] The more common type is that *partizipierende Vorzugsaktie*. The holder of such instruments receives an advance payment and is entitled to a part of the remaining profits as well. However, these funds are to be shared with the owners of common shares. This process can be repeated multiple times, by creating scaled dividend entitlements (*Mehrdividende* or *Zusatzdividende*).[154] Conversely, the dividend entitlement of the holder of non-voting preference shares can also be capped (*Höchtsdividende*). The preferential treatment may include the repayment of capital in case of liquidation. However, this is not strictly required.[155]

The existence of a dividend preference is mandatory – it is both a precondition and a justification for the absence of the right to vote. In case the articles of association, for whatever reason, do not grant such a preference, the respective provisions are null and void. Moreover, this entails that the right to vote exists rather than being absent.[156] Furthermore, the size of the dividend preference must be set forward in the articles of association in an objective manner. Permitted metrics include a percentage of the shares' (artificial) nominal value, a predetermined amount in Euros or a fluctuating quantity, such as (a premium

150. Non-voting preference shares are generally not counted for capital-based majorities. The figure of 37.5 % + 1 share represents a majority in excess of 75 % of the (common) voting shares.
151. For such considerations, *see* B. Hennerkes & P. May, 'Überlegungen zur Rechtsformwahl im Familienunternehmen', 42 *Der Betrieb* 537 (1988).
152. *See* K. Heider, *Münchener Kommentar zum Aktiengesetz* § 139, 1-29 (W. Goette & M. Habersack eds.); *see also* J. Koch, *Aktiengesetz* § 139, 1-23 (U. Hüffer & J. Koch eds.); M. Bormann, *Kommentar zum Aktiengesetz* § 139, 1-51 (G. Spindler & E. Stilz eds.).
153. For detailed analyses in German, *see* Daske 2019, *supra* note 73, at 86-92; *see also* U.R. Siebel, 'Vorzugsaktien als „Hybride" Finanzierungsform und ihre Grenzen', 161 *Zeitschrift für das Gesamte Handels- und Wirtschaftsrecht* 628 (1997). For a Anglo-German perspective (albeit rather superficial), *see* K. Bentel & G. Walter, *Dual Class Shares* 2-3 (2016), available at http://scholarship.law.upenn.edu/.
154. *See* M. Polte, *Aktiengattungen Eine rechtsvergleichende Untersuchung zum deutschen, US-amerikanischen und englischen Recht* 61-63 (Peter Lang, 2005); *see also* T. Bezzenberger, *Vorzugsaktien ohne Stimmrecht* 51 (Heymanns, 1991).
155. For numerous practical examples, *see* Daske 2019, *supra* note 73, at 87-88.
156. *See* Bezzenberger 1991, *supra* note 154, at 83. *But see* Daske 2019, *supra* note 73, at 86-92, arguing the provisions are merely voidable pursuant to § 243 AktG.

over) the interest rate set by the German or European Central Bank. By contrast, parameters based on (a percentage of) the annual profits are prohibited.[157] Similarly, letting the executive and/or supervisory board determine the dividend preference on a year-by-year basis is not permitted. Although granting a dividend preference to holders of *Vorzugsaktien* is mandatory, there are no minimum requirements concerning its size. Theoretically, an amount of € 0,01 would suffice.[158] In case multiple classes of non-voting preference shares exist, the articles of association may establish a hierarchy regarding the order in which (overdue) dividends will be distributed.[159]

Given that distributions may only be made out of realized profits (*see* § 22.5.1 *supra*), it would be conceivable that in some years, satisfying the dividend obligations towards holders of non-voting preference shares is impossible. Traditionally, German corporate law has provided that under these circumstances, the financial entitlements of investors do not expire. Instead, the overdue dividends should be paid – in chronological order of the claims arising – in subsequent years, provided that the required profits have been realized (carry forward, *Kumulativdividende*).[160] However, the *Aktienrechtsnovelle* of 2016 modified this state of affairs.[161] Consequently, carry forward remains the default rule regarding *Vorzugsdividende*. However, the articles of association may provide for an opt-out. By contrast, no carry forward exists in respect of *Mehrdividende*, at least in principle. Here, the articles of association may provide an opt-in.[162]

157. *See* Bezzenberger 1991, *supra* note 154, at 44. If such an approach were allowed, no privileged financial entitlement would exist in case a fiscal year showed a loss, which would be contrary to the nature of a preference.
158. *See* J.J. Sieger & K. Hasselbach, '„Tracking Stock" im deutschen Aktien- und Kapitalmarktrecht', 46 *Die Aktiengesellschaft* 391, 395 (2001). For a different (albeit minority) view, *see* E. Wälzholz, 'Besonderheiten der Satzungsgestaltung bei der Familien-AG (Teil II)', 42 *Deutsches Steuerrecht* 819, 821 (2004).
159. *See* Siebel 1997, *supra* note 153, at 655; *see also* Bezzenberger 1991, *supra* note 154, at 75.
160. The claim regarding overdue preferential dividends is not legally enforceable until the AGM has declared a distribution. (Any other doctrine might trigger insolvency.) Up until then, the entitlement typically remains an abstract part of general shareholder membership rights. *See* R. von Godin, 'Das Nachbezugsrecht stimmrechtsloser Vorzugsaktien', 5 *Der Betrieb* 1077 (1952). Meanwhile, and despite the *Abspaltungsgebot* (*see* § 22.4.2 *supra*), § 140 (3) AktG authorizes the Articles of Association to designate the dividend claim as being separately tradeable. *See* Bundesgerichtshof 15 April 2010 – IX ZR 188/09.
161. On the *Aktienrechtsnovelle* of 2016, *see* S. Harbarth & H. Freiherr von Plettenberg, 'Aktienrechtsnovelle 2016: Punktuelle Fortentwicklung des Aktienrechts', 5 *Die Aktiengesellschaft* 145, 152 (2016); *see also* C. Götze, 'Aktienrechtsnovelle – und ein (vorläufiges) Ende!', 19 *Neue Zeitschrift für Gesellschaftsrecht* 48 (2016) (stressing that in existing cases, for which no provisions to the contrary have been included in the Articles of Association, the carry forward remains applicable); N. Paschos & S. Goslar, 'Die Aktienrechtsnovelle 2016 – Ein Überblick', 69 *Neue Juristische Wochenschrift* 359, 361 (2016) (on the opt-in rule regarding *Mehrdividende*).
162. Meanwhile, proposals to exclude the latent right to vote of holders of non-voting preference shares were dismissed without serious reflection. *See* Harbarth & Freiherr von Plettenberg 2016, *supra* note 161, at 153.

This reform sought to make non-voting preference shares a more attractive funding option for financial institutions, as it enabled them to register the proceeds of such issuances as additional tier one capital.[163] Although preferential dividends could also be made conditional under the pre-existing system, it has been argued that allowing management to decide on the suspension of the dividend was not permitted, as this would render the preference moot.[164]

22.5.4 Non-voting preference shares: control aspects

Whereas German corporate law prohibits multiple voting shares (§ 12 AktG), the use of non-voting preference shares is permitted and recognied by the law. One might argue this is somewhat surprising, given that non-voting and multiple voting shares essentially aim to achieve the same. Indeed, both instruments serve to disenfranchise outside minority shareholders, either by allocating control to insiders or by withholding control from outsiders (*see* § 1.3.1 *supra*). However, to my knowledge, this apparent consistency has not given rise to any sort of debate in recent years in Germany.

According to § 140 (1) AktG, non-voting preference shares convey the same rights as common shares, except for the right to vote.[165] The issuance of non-voting preference shares with limited voting rights (i.e. restricted to certain AGM agenda items) is not permitted: voting rights must be fully absent.[166] Consequently, holders of such instruments do not have the right to vote on, for instance, control agreements (*Unternehmensverträge*, *see* § 20.5.2 *supra*), mergers and takeover offers, or *Holzmüller*-cases (*see* § 22.4.4 *supra*). Furthermore, non-voting preference shares are, in principle, disregarded for calculating AGM vote and capital-based majorities. However, holders of these securities are not entirely without control rights. To substantiate, non-voting preference shares are taken into consideration for determining whether a sufficient part of the issued share capital supports a request to convene an AGM or to add an investor proposal to its agenda (§ 122 AktG, *see* § 22.4.4 *supra*). Furthermore, the right to participate in (§ 123 AktG),[167] be invited to (§ 125 AktG), make proposals during (§ 126 AktG), receive information (§ 128 AktG) and ask questions (§ 131 (5) AktG) at the AGM, and to challenge its decisions, are

163. On the relevance of the carry forward and the preference dividend for qualification as additional tier one capital, *see* § 28 (1) (h) (1) and § 52 (1) (l) (iii) Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012.
164. *See* Bezzenberger 1991, *supra* note 154, at 77.
165. *See* A. Arnold, *Münchener Kommentar zum Aktiengesetz* § 140, 1-19 (W. Goette & M. Habersack eds.); *see also* J. Koch, *Aktiengesetz* § 140, 1-10 (U. Hüffer & J. Koch eds.). For relevant case law, *see* Bundesgerichtshof 5 October 1992 – II ZR 172/91; *see also* Bundesgerichtshof 7 July 1954 – II ZR 342/53.
166. *See* Siebel 1997, *supra* note 153, at 651; *see also* Bezzenberger 1991, *supra* note 154, at 88.
167. *See* Bundesgerichtshof 14 July 1954 – II ZR 342/53.

all present.[168] The same applies in respect of pre-emptive powers in relation to share issuances (§ 186 AktG)[169] and the right to challenge dividend starvation (§ 254 AktG).

Perhaps most importantly, § 140 (2) AktG provides that the right to vote is reinstated in case the cumulative dividend (either *Vorzugsdividende* or *Mehrdividende*) has been (partially) in arrears for one year and the total amount is not paid out in full in the subsequent year. Thus, the total potential waiting period is two year. In case a penalty on dividend omittances were absent, the holders of non-voting preference shares would find themselves at the mercy of the AGM. Meanwhile, the moment at which the revival of voting rights becomes effective may vary. If the supervisory board determines that the increase in shareholder equity (*Bilanzgewinn*) is inadequate to cover the preferred dividend, the right to vote is reinstated at the subsequent AGM. By contrast, when the AGM itself determines the insufficiency of the *Bilanzgewinn*, the right to vote revives for the very next item on the agenda.[170] Despite the revival of the right to vote, the common and non-voting preference shares remain distinct securities, constituting a class of their own, and decision-making still requires a class vote. The reinstated vote can be exercised until the entire deficit has been eliminated and the corresponding payments have been received by the creditor.[171] The revival of the voting right also results in the reinstatement of related shareholder membership rights, such as inclusion in vote and capital-based majority calculations.

168. For extensive overviews of the competences of owners of non-voting preference shares, *see* Daske 2019, *supra* note 73, at 73-75; *see also* A. Arnold, *Münchener Kommentar zum Aktiengesetz* § 140, 3 (W. Goette & M. Habersack eds.); Siebel 1997, *supra* note 153, at 648.

169. It has been debated whether pre-emptive rights of holders of non-voting preference and common shares are confined to their own class of stock (*Gattungsbezugsrecht* or *gekreuzter Bezugsrechtsausschluss*) or that holders of common and non-voting preference shares have pre-emptive powers regarding both classes (*Mischbezugsrecht*). The relevance of the distinction lies in the latent right to vote vested in non-voting preference shares, as discussed later in § 22.5.4, which entails that an issuance of non-voting preference shares may help seed a future change of control. An extensive discussion of the matter is beyond the scope of this thesis. Historically, legal practice has favored the option of pre-emptive powers in both directions. *See* Daske 2019, *supra* note 73, at 93-102; *see also* Bezzenberger 1991, *supra* note 154, at 151-165; C. Münch, 'Der gekreuzte Bezugsrechtsausschluß im Recht der Aktiengesellschaft', 46 *Der Betrieb* 769 (1993).

170. *See* § 172 (1) and (2) AktG. Note that it has been disputed when the right to vote is reinstated in case the increase in shareholder equity would, in principle, be sufficient to cover dividend obligations to holders of non-voting preference stocks, but the AGM decides not to pay investors in full. *See* Daske 2019, *supra* note 73, at 57.

171. With regard to non-cumulative dividends (again, either *Vorzugsdividende* or *Mehrdividende*), the right to vote continues to exist until the first year during which said dividend is paid in full.

Chapter 23. Dual class equity restructurings

23.1 Introduction

In Chapter 23, I analyze the requirements under German corporate law for introducing or abolishing a dual class equity structure.

According to German corporate law, a dual class equity structure can only be created using non-voting preference shares (*Vorzugsaktien*). Indeed, issuing multiple voting stock is no longer permitted (*see* § 21.3.2 *supra*). Nonetheless, several scenarios can be distinguished when introducing non-voting preference shares. These are the situation that prior to the introduction of non-voting preference shares, only a single class of common stock exists, and the situation that non-voting preference shares are issued, with both common and non-voting preference shares already outstanding. These two situations are addressed in § 23.2.

German corporate law also provides a statutory framework in respect of unifications of dual class equity structures. Again, several scenarios can be distinguished. These are the situation that the dual class equity structure consists of non-voting preference shares and the situation that the dual class equity structure consists of multiple voting shares. Unifications involving non-voting preference shares and multiple voting shares are discussed in § 23.3. I also analyze to what extent investors can obtain a higher price per share than their fellow investors.

As the attentive reader will undoubtedly note, the German framework in respect of non-voting preference shares is highly technical and complex in nature, and occasionally produces unfair outcomes, rooted in doctrinal-systematic inconsistencies. (The same is to a large extent true regarding multiple voting shares, but this is less of an issue going forward.) I will reflect on the drawbacks of the German system in more detail in § 23.4.

23.2 Creating a dual class equity structure

23.2.1 Issuing non-voting preference shares

Functionally, modifications of the equity structure are treated somewhat similar to changes of the articles of association. § 179 and § 182 AktG apply for such general alterations of the corporate governance framework. § 179

(2) AktG decrees AGM decision-making by a default majority of 75 % of the represented share capital (not: votes).[1] The articles of association may stipulate a majority higher or lower than 75 %. Consequently, German corporate law principally does not treat the issuance of inferior voting stock as a conflicted transaction, since all shareholders can participate in the voting process. § 179 (3) AktG mandates that if rights specific to holders of a certain class of stock (*Sonderrechte*) are adversely affected, a class vote (*Sonderbeschluss*) is needed.[2] The class vote equally requires, by default, a 75 % capital majority (§ 138 AktG).[3] On that occasion, investors whose rights are eroded also have the right to vote, even if their shares are non-voting otherwise. Interested shareholders are eligible to participate in the voting as well. Meanwhile, issuing stock not only involves a modification of the articles of association, but also an equity raise. In this regard, § 182 (2) AktG provides that the approval of each class of shareholders should be obtained, voting or non-voting. The class vote should be held regardless of the size of the class, and regardless whether the rights of investors are adversely affected or not.[4] Again, the necessary default majority is 75 % of the capital of each class of shares, and the articles of association may deviate from § 182 (2) AktG.[5]

Along these lines, § 141 (2) and (3) AktG contain some specific rules in relation to the introduction of non-voting preference shares.[6] § 141 AktG principally excludes application of § 179 and § 182 AktG. However, it is equally based on a 75 % capital majority requirement. In contrast to § 182 AktG, § 141

---

1. Meanwhile, § 133 AktG states that AGM decision-making is based on a majority of the votes. This provision is not superseded by § 179 or § 182 AktG. Thus, both majority requirements (i.e. 50 % + 1 of the votes and 75 % of the represented share capital) apply simultaneously. Indeed, their joint goal is to limit deviations from the *Kapitalprinzip*. Here, I will focus on § 179 and § 182 AktG, as these provisions contain more onerous majorities.
2. Regarding § 179 AktG, *see* U. Stein, *Münchener Kommentar zum Aktiengesetz* § 179, 1-262 (W. Goette & M. Habersack eds.); *see also* J. Koch, *Aktiengesetz* § 179, 1-39 (U. Hüffer & J. Koch eds.); T. Holzborn, *Aktiengesetz* § 179, 1-205 (G. Spindler & E. Stilz eds.).
3. The class vote may be held either before or after the AGM, provided there exists sufficient temporal nexus (*zeitlichen Zusammenhang*) with the AGM decision-making. In general, a three-month period is deemed acceptable. *See* U. Stein, *Münchener Kommentar zum Aktiengesetz* § 179, 198-201.
4. For a discussion of § 182 AktG, *see* J. Schürnbrand, *Münchener Kommentar zum Aktiengesetz* § 182, 1-129 (W. Goette & M. Habersack eds.); *see also* J. Koch, *Aktiengesetz* § 182, 1-35 (U. Hüffer & J. Koch eds.); W. Servatius, *Aktiengesetz* § 182, 1-85 (G. Spindler & E. Stilz eds.).
5. Both with regard to § 179 and § 182 AktG, the required majority may not be set at such a high level that in practice, modifying the Articles of Association becomes impossible (*faktisch unmöglich*). Particularly for listed corporations, this may entail that a unanimity requirement is not allowed. If the Articles of Association are nonetheless drafted to be unchangeable, they can be altered pursuant to § 140 BGB, by unanimity.
6. On § 141 AktG, s*ee* A. Arnold, *Münchener Kommentar zum Aktiengesetz* § 141, 1-60 (W. Goette & M. Habersack eds.); *see also* J. Koch, *Aktiengesetz* § 141, 1-23 (U. Hüffer & J. Koch eds.); M. Bormann, *Aktiengesetz* § 141, 1-66 (G. Spindler & E. Stilz eds.). Preference shares which actually do carry the right to vote are not covered by § 141 AktG.

AktG only provides a class vote for the shareholders whose rights are restricted. Since the provision attempts to strike a balance between protecting the rights of existing shareholder and enabling a reorganization of the corporate equity structure, a majority smaller or larger than 75 % is not permitted.[7] Importantly, § 141 (2) and (3) AktG exclusively serve to safeguard dividend entitlements. Other shareholder rights are not covered.[8]

23.2.2 The "adversely affected" criterium

A central question for the discussion in § 23.2.1 is under what circumstances a proposed modification of the governance framework should be held to adversely affect existing shareholder rights (*benachteiligung*). Indeed, this determines whether shareholders are entitled to a class vote or not. In an abstract sense, existing shareholder rights are eroded if the new provision(s) of the articles of association offer less membership rights or impose more obligations than the previous one(s).[9] However, an additional threshoild applies regarding the severity of the intervention. Certain proposals entail a direct intervention in existing investor rights (*unmittelbare Beeinträchtigung*). Others may only indirectly have an unfavorable effect (*mittelbare Beeinträchtigung*).[10] Direct interventions always give rise to a class vote; indirect interventions must be designated to do so. Typical examples of non-designated indirect interventions – even though they might involve a modification of the articles of association – include decisions to liquidate (§ 262 AktG)[11] or (de)merge[12] the corporation. Other indirect interventions involve changes

7. On this aspect of § 141 AktG, *see* T. Bezzenberger, *Vorzugsaktien ohne Stimmrecht* 165 (Heymanns, 1991).
8. If § 141 AktG cannot be invoked, § 179 (3) AktG may still apply, provided that a shareholder right characteristic for a particular class of stock (*Sonderrecht*) is involved. *See* Bezzenberger 1991, *supra* note 7, at 133-147. Note that § 139-141 AktG overrule § 35 BGB, according to which cancellation of *Sonderrechte* requires individual consent.
9. *See* Oberlandesgericht Celle 7 May 2008 – 9 U 165/07; *see also* Oberlandesgericht Köln 20 September 2001 – 18 U 125/01 (*METRO*).
10. The distinction is derived from the *Aktienrechtsnovelle* 1884 (*see* § 21.2.4 *supra*). *See* W. Schubert & P. Hommelhoff (eds.), *Hundert Jahre modernes Aktienrecht* 404, 423 (De Gruyter, 1985). For a contemporary analysis, *see* M. Bock, 'Nachzahlbare Vorzugsdividende und Sonderbeschluss bei Aktienzusammenlegungen', 18 *Neuze Zeitschrift für Gesellschaftsrecht* 824, 825 (2015), observing that by disregarding certain indirect measures, the law lacks teeth.
11. Whilst as a result, preference dividends will no longer be paid, this is only a consequence, rather than the goal of the decision to liquidate. *See* Oberlandesgericht Frankfurt 23 December 1992 – 21 U 143/91; *see also* Bezzenberger 1991, *supra* note 7, at 124.
12. Holders of non-voting preference shares in the acquiring corporation retain their pre-existing position. *See* Oberlandesgericht Schleswig 15 October 2007 – 5 W 50/07. Holders of non-voting preference shares in the disappearing party are awarded such instruments in the acquirer automatically, pursuant to § 20 AktG and § 23 Reorganization Act (*Umwandlungsgesetz*). *See* Oberlandesgericht Düsseldorf 22 June 2017 – I-6 AktG 1/17 (*METRO/*

relating to the retention of earnings,[13] the conclusion of a control agreement (*Unternehemensvertag*, § 291 AktG), a squeeze-out of outside minority shareholders (§ 327a AktG) or the delisting of non-voting preference shares.[14] In those cases, no rights typical for the class of non-voting preference shareholders are involved. Indeed, a proposed modification of the governance framework should have the subjective goal of intervening in existing shareholder rights to be considered relevant.[15] At heart, the concept of indirect intervention involves a balancing test, to determine whether the interest of some parties to modify the Articles of Association outweighs that of others to continue the existing relationship. Meanwhile, the category of designated indirect interventions is not entirely meaningless. This test mostly focuses on the relative instead of the absolute position of shareholders. As a result, it even mandates a class vote in respect of measures that strengthen the rights vested in a certain class of stock whilst leaving those in another class intact.[16] Moreover, a class vote cannot be avoided by combining various measures that simultaneously strengthen and impair existing shareholder rights, arguing that on balance, their effect is neutral or even (slightly) positive.[17] Indeed, a modification of the Articles of Association can have different effects on different shareholders (*see* § 2.2.5 *supra*), and may be positive for certain investors but negative for others. Instead, the presence of a single adverse element in a reorganization of the capital structure triggers the obligation to hold a class vote.

Ceconomy). Individual shareholder consent is required only in case the acquirer does not award similar equity instruments (§ 128 Umwandlungsgesetz) or if the corporation is converted into a partnership (§ 233, § 240 and § 252 Umwandlungsgesetz, because of personal liability risks), although some argue that specifically in case of a KGaA, a class vote suffices. *See* S. Daske, *Vorzugsaktien in Deutschland. Historische und rechtliche Grundlagen, ökonomische Analyse, empirische Befunde* 16-20 (Springer, 2019), at 76.

13. *See* Bezzenberger 1991, *supra* note 7, at 125.
14. Indeed, delisting may impair a stock's tradability, but it does not, as such affect the preference dividend. *See* Oberlandesgericht Celle 7 May 2008 – 9 U 165/07 (overruling Landgericht Hannover 29 August 2007 – 23 O 139/06).
15. *See* Oberlandesgericht Düsseldorf 22 June 2017 – I-6 AktG 1/17 (holding that merely economic decisions, which may ultimately decrease the funds available for distribution, are not covered); *see also* Oberlandesgericht Köln 20 September 2001 – 18 U 125/01 (*METRO*); Oberlandesgericht Frankfurt, 23 December 1992 – 21 U 143/91. Some scholars do not go as far as actually requiring intent. *But see* Oberlandesgericht Hamm 17 March 2005 – 27 W 3/05.
16. *See* Oberlandesgericht Celle 7 May 2008 – 9 U 165/07; *see also* Oberlandesgericht Köln 20 September 2001 – 18 U 125/01 (*METRO*); Landgericht Köln 7 March 2001 – 91 O 131/00 (*METRO*).
17. *See* G. Wirth & M. Arnold, 'Umwandlung von Vorzugsaktien in Stammaktien', 31 *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 859, 871 (2002); *see also* M. Senger & A. Vogelmann, 'Die Umwandlung von Vorzugsaktien in Stammaktien', 47 *Die Aktiengesellschaft* 193, 195 (2002).

The current state of the law regarding designated indirect interventions is the following.[18] Under § 141 (2) AktG, the decision to issue additional *Vorzugsaktien* requires the authorization of existing holders of non-voting preference shares – by a majority of 75 % of the class – if the newly created instruments carry preferential profit rights equal[19] or superior to the ones already outstanding. Conversely, no class vote is needed in respect of the creation of common shares[20] or inferior non-voting preference stock. Neither is this the case if only the general, but not the preferential profit entitlement of the newly issued non-voting preference shares exceeds that of the existing non-voting preference shares. The same holds true when the freshly issued non-voting preference stocks carry a right which has not been vested in the shares previously issued, such as a preference concerning the liquidation surplus[21] or the right to vote. Furthermore, a class vote may be omitted if the right to issue superior non-voting preference shares has been reserved in the Articles of Association at the time of issuance[22] and pre-emptive powers have not been excluded.[23] In principle, the reservation applies in respect of all future issuances of superior non-voting preference shares, not simply the following one, although its duration can be limited in time. Pre-emptive rights may be cancelled or restricted,

18. Meanwhile, German scholars have recognized that the concepts of direct and indirect intervention may not always carry great distinctiveness. To prevent the voidability of the decision-making process, it has become practice to hold a vote of all classes of outstanding stock. *See* Wirth & Arnold 2002, *supra* note 17, at 867.
19. German scholars typically justify this view by arguing that even if dividend preferences of old and new non-voting instruments are exactly equal, corporate profits have to be partitioned amongst a larger number of shares, whilst it is uncertain whether the equity issuance will actually result in a profit increase. *See* Daske 2019, *supra* note 12, at 61. However, assuming that the raised capital will not generate the income necessary to offset the increased dividend expenses is a rather extreme variant of pecking order theory (*see* § 8.4 *supra*). Such an outcome appears unlikely. Instead, one could argue that, since common stocks carry more risk than (non-voting) preference stock, the required return will be commensurately higher. Then, it would be inconsistent from a substantive point of view to mandate approval for subsequent issuances of superior non-voting preference shares, but not for common stock.
20. *See* Bezzenberger 1991, *supra* note 7, at 140, 160, arguing that any other arrangement would effectively grant holders of non-voting preference shares a vote in the AGM.
21. Without a provision to the contrary in the Articles of Association, the liquidation surplus is not considered part of the dividend preference in the sense of § 141 AktG. *See* Oberlandesgericht Frankfurt 23 December 1992 – 21 U 143/91. Naturally, § 141 (2) and (3) AktG do apply in case a preference in this regard has been granted explicitly.
22. On the situation at the SE, *see* B. Vins, *Die Ausgabe konkurrierender Vorzugsaktien bei der SE* 277-279 (Nomos, 2014), arguing that despite the wording to the contrary, the right to issue superior non-voting preference shares can also be reserved if this legal entity is used.
23. *See* Bundesgerichtshof 29 June 1987 – II ZR 242/86 (ruling that a generally formulated reservation of rights set forward in the proposal submitted to the AGM to issue non-voting preference shares is not sufficient). Note that under this exception, reserving the right to restrict or cancel an existing dividend preference is not permitted.

but this requires class vote approval on its own.[24] The class vote requirements of § 141 (2) AktG apply equally in case the right to vote has been reinstated due to dividends being in arrears.[25]

23.2.3 Converting stock in non-voting preference shares

The second option German corporate law offers to create non-voting preference shares, either pre-IPO or in the midstream phase, involves the conversion of part of the sole pre-existing class of common stock into non-voting preference shares. In case an offer to that extent is made to all shareholders under identical conditions and in respect of the same proportion of their holdings, the requirements regarding a modification of the Articles of Association (§ 179 AktG) apply, and a class vote is not necessary.[26] Indeed, in that case, there exists no tension with the principle of equal treatment of investors, as laid down in § 53a AktG (*see* § 22.4.1 *supra*).[27] However, if the conversion offer only targets some but not all shareholders, the general opinion amongst scholars is that a 75 % capital majority is insufficient to justify the loss of the right to vote, even if compensated by a dividend preference. Instead, individual shareholder consent is needed.[28] Moreover, approval of the holders of common stock whose shares are not converted is required as well. These obligations are justified by the notion that the shareholder should be able to select his investment instrument of choice freely and without coercion.[29] If the investor decides to convert his common stock into non-voting preference shares, the

24. Specific rules govern conditional capital increases (*bedingte Kapitalerhöhung*), for instance through warrants, convertible bonds or stock options. The same is true in case a prior authorization to increase the corporate capital, without non-voting preference shares outstanding, is superseded by the subsequent issuance of such instruments.
In those situations, a 75 % class vote requirement may apply as well. A more elaborate analysis is beyond the scope of this thesis. S*ee* Bezzenberger 1991, *supra* note 7, at 157-168.
25. *See* K. Frei & H. Hirte, 'Vorzugsaktionäre und Kapitalerhöhung', 42 *Der Betrieb* 2465, 2469 (1989). As such, § 182 AktG, which mandates a vote for every class of stock regardless whether the shareholders are affected or not, does not apply. For a different view, *see* W. Krauel & B. Weng, 'Das Erfordernis von Sonderbeschlüssen stimmrechtsloser Vorzugsaktionäre bei Kapitalerhöhungen und Kapitalherabsetzungen', 48 *Die Aktiengesellschaft* 561 (2003).
26. Meanwhile, in the situation that a general offer is made to convert common stock (or inferior non-voting preference shares) into superior non-voting preference shares, a vote by both classes is required.
27. *See* A. Arnold, *Münchener Kommentar zum Aktiengesetz* § 139, 6 (W. Goette & M. Habersack eds.).
28. *See* Daske 2019, *supra* note 12, at 55; *see also* M. Polte, *Aktiengattungen Eine rechtsvergleichende Untersuchung zum deutschen, US-amerikanischen und englischen Recht* 91 (Peter Lang, 2005); Bezzenberger 1991, *supra* note 7, at 130-133.
29. *See* Daske 2019, *supra* note 12, at 55; *see also* Polte 2005, *supra* note 28, at 91; Bezzenberger 1991, *supra* note 7, at 130-133. For a judicial confirmation, *see*; Bundesgerichtshof 19 December 1977 – II ZR 136/76 (*Mannesmann*).

pre-existing right to vote should be cancelled in full. Limited voting rights concerning specific agenda items are not permitted (*see* § 22.4.2 *supra*).

It should be noted that an existing dual class equity structure involving non-voting preference shares can also be modified by reducing the preferential dividend entitlement.[30] This is a direct intervention in shareholder rights (*unmittelbare Beeinträchtigung*, *see* § 23.2.3 *supra*). Pursuant to § 141 (1) AktG, such a decrease in investor rights similarly requires approval by 75 % of the holders of non-voting preference shares.[31] § 141 (1) AktG covers a variety of situations. Obviously, this includes a cut in the preference dividend itself (either *Vorzugsdividende* or *Mehrdividende*). Some other cases are addressed as well. First, this concerns the carry forward of cumulative dividends (*Nachzahlbarkeit*) towards shareholders, even if merely affected in part, for instance by proposing that only the dividends of the 3 most recent fiscal years will be considered. After all, the carry forward of cumulative dividends determines under which conditions the right to vote is reinstated.[32] Second, this involves decisions that render a previously unconditional preference dividend conditional.[33] The right to reduce the dividend preference cannot be reserved at the time of the issuance. Meanwhile, proposals that aim to amend the dividend preference in advance, but enter into effect only after a certain period of time has passed (*frist*)[34] or a condition has been fulfilled (*bedingung*)[35] are permitted, but are similarly governed by § 141 (1) AktG.[36]

30. Note that in practice, stock issuances and conversions may be combined. In that case, it is even more likely that the AGM as well as all classes of stock will hold a vote. As such, discussing modifications of shareholder rights separately serves mostly analytical purposes only, and may not necessarily reflect legal practice.
31. If, in the opposite scenario, the dividend rights of non-voting preference shareholders are enhanced, the decision of the AGM to modify the Articles of Association is seen as the class vote, making a separate second vote redundant. *See* Daske 2019, *supra* note 12.
32. *See* C. Götze, 'Aktienrechtsnovelle – und ein (vorläufiges) Ende!', 19 *Neue Zeitschrift für Gesellschaftsrecht* 48 (2016); *see also* Bezzenberger 1991, *supra* note 7, at 125. On the carry forward of cumulative dividends, *see* § 22.5.3 *supra*.
33. *See* Oberlandesgericht Frankfurt 23 December 1992 – 21 U 143/91; *see also* Bezzenberger 1991, *supra* note 7, at 126.
34. For an analysis of temporary modifications of the dividend preference, *see* U. Eckhardt, 'Satzungsänderungen auf Grund des neuen Aktiengesetzes', 20 *Neue Juristische Wochenschrift* 369, 372 (1967).
35. The condition should be objective in nature, and may not be susceptible to manipulation by the AGM or the executive board. A conditional modification of the Articles of Association can only be registered with the Chamber of Commerce once the condition has been met (*unechter bedingung*). Registering a changed version of the Articles of Association prior to the condition having been fulfilled (*echter bedingung*) is not permitted. *See* B. Grunewald, 'Rückverlagerung von Entscheidungskompetenzen der Hauptversammlung auf den Vorstand', 35 *Die Aktiengesellschaft* 133, 138 (1990).
36. *See* Daske 2019, *supra* note 12, at 66-67; *see also* Polte 2005, *supra* note 28, at 128.

23.3 Abolishing a dual class equity structure

23.3.1 Non-voting preference shares

German corporate law presents two possibilities for dual class equity structure reunifications in the midstream phase. First, this relates to the removal of non-voting preference shares. Non-voting preference shares can either be cancelled or converted into common stock.[37] In both cases, accrued but unpaid dividends will be lost to the owner of the security. The option of conversion is the more conventional choice, as it is more cost-effective for the issuing corporation. Indeed, the conversion mechanism does not require funding for share buybacks, and the corresponding legal constraints do not apply.[38] A recent announcement by energy producer and distributor RWE may be considered as anecdotal evidence in this regard. In RWE's case, the non-voting preference shares constituted 6.3 % of the equity. The corporation proposed to execute the conversion in common shares on a 1:1 basis, with no additional compensation being paid (or due).[39] Both the conversion and the cancellation of non-voting preference shares require approval of the existing holders of common stock, by a majority of 75 % of the share capital. Indeed, the rights of common stockholders are eroded, given the dilution in voting power.[40] In similar fashion, the approval of existing holders of non-voting preference shares has to be obtained, because of the loss of the dividend preference (§ 141 (1) and (3) AktG).[41] This also means shareholders are not under the obligation to convert their non-voting preference shares: doing so remains entirely voluntary.

---

37. For the sake of completeness, it should be noted that § 141 (4) AktG provides for a functionally similar form of reunification. Accordingly, the full and total annulment of the dividend preference – which should be distinguished from a dividend reduction, *see* § 23.2.3 *supra* – also triggers the conversion of non-voting preference shares into common stock. Either the *Vorzugsdividende* or the *Mehrdividende* (or both) should be removed for § 141 (4) AktG to apply. After the *Aktienrechtsnovelle* of 2016 entered into force, cancellation of the carry forward of cumulative dividends is no longer sufficient for § 141 (4) AktG to be triggered.
38. Pursuant to § 71 (7) and (8) AktG, a corporation may hold a maximum of 10 % of its own share capital. Note that an AGM decision to reduce the share capital requires a 75 % majority (§ 222 AktG). However, this provision is again superseded by § 139-141 AktG. For an extensive overview of the considerations to either cancel or convert, *see* Daske 2019, note 12, at 116-124, 263.
39. *See* P.T. Hasler, 'RWE wandelt endlich die Vorzüge in Stämme um' (2018), available at http://www.gevestor.de/. This was RWE's second attempt to cancel its non-voting preferences shares. On the 2008 offer and the matter of differential consideration, *see* § 23.3.5 *infra*.
40. *See* Senger & Vogelmann 2002, *supra* note 17, at 195; *see also* Wirth & Arnold 2002, *supra* note 17, at 871; Oberlandesgericht Köln 20 September 2001 – 18 U 125/01 (*METRO*).
41. *See* Daske 2019, note 12, at 109-110, also noting that if the right to vote of non-voting preference shareholders has been reinstated, the holders of common stock should additionally hold a separate class vote, bringing the total number of votes required to pursue a unification of the equity structure up to three.

23.3.2 Differential consideration for non-voting preference shares

The matter of differential consideration relates to the question whether the holders of common shares should be entitled to receive higher compensation than the owners of non-voting preference shares, to reflect the value of control. Phrased differently, the question is whether the holders of non-voting preference shares ought to receive equal compensation through a coattail-provision (*see* § 10.5.4 *supra*), despite having less voting power per share. In principle, the conversion of non-voting preference shares in common stock does not give rise to any obligation to indemnify shareholders of either class. In fact, some scholars have observed that the recapitalization, by its very nature, already contains a compensative element. Indeed, the common stocks received by the (former) holders of non-voting preference shares often trade at a higher price. Conversely, the holders of common shares no longer have to (indirectly) bear the dividend preference.[42] Even in case the common stocks trade lower than the *Vorzugsaktien* – which happens occasionally, but not frequently[43] – no compensation is due. Under those circumstances, the right to vote is still deemed to compensate the (former) holders of non-voting preference shares sufficiently. Again, the corporation itself is not authorized to compensate shareholders of either class (*see* § 22.2.3 *supra*). Meanwhile, a corporation can choose to demand a premium from the holders of non-voting preference shares – particularly if these securities trade at a considerable discount[44] – or from the owners of common stock.[45] The corporation is free to propose the size of the premium, which may reflect the price difference between common and non-voting preference shares, either fully or in part. However, the fact that the liability of investors is limited to the subscription price (§ 54 AktG) means that they are under no obligation to make any additional payments, either to the corporation or to their fellow investors. This is highlighted by unification of the capital structure of METRO, a leading retailer, in 2000. In that case, the holders of non-voting preference shares paid 75 % of the price difference between the two classes of stock.[46] This actually resulted in a lawsuit initiated by a holder of common shares, who believed that the holders of non-voting preference shares had been allowed to convert their securities too cheap.[47]

42. *See* Bezzenberger 1991, *supra* note 7, at 128, adding that the fact that investors can, through a class-vote, freely decide whether they want to convert creates another argument for rejecting mandatory compensation.
43. For an exhaustive analysis of the price differences between non-voting preference shares and common stock, *see* Daske 2019, *supra* note 12, at 441-596; *see also* Senger & Vogelmann 2002, *supra* note 17, at 196; A. Jung & F. Wachtler, 'Die Kursdifferenz zwischen Stamm- und Vorzugsaktien', 46 *Die Aktiengesellschaft* 513 (2001).
44. *See* Daske 2019, note 12, at 114; *see also* Wirth & Arnold 2002, *supra* note 17, at 868-870.
45. *See* Senger & Vogelmann 2002, *supra* note 17, at 198-201.
46. *See* Daske 2019, note 12, at 114; *see also* Wirth & Arnold 2002, *supra* note 17, at 868-870.
47. Oberlandesgericht Köln 20 September 2001 – 18 U 125/01 (*METRO*).

Another potentially contentious matter concerns the treatment of different classes of stock in case of a takeover. According to § 29 Securities Acquisition and Takeover Act (*Wertpapiererwerbs- und Übernahmegesetz*, WpÜG), a bidder gains control over a target corporation by acquiring 30 % of the voting rights, not by obtaining 30 % of the equity.[48] If the acquirer succeeds in assuming control, he can subsequently conclude a control agreement (*Beherrschungsvertrag*) with the corporation (§ 291 AktG, *see* § 20.5.2 *supra*). Such a move may or may not be followed by a squeeze-out. If the threshold of 30 % of the equity would be interpreted strictly, a prospective acquirer may wish to restrict his bid to common (and, hypothetically, multiple voting) stock.[49] Phrased differently, he could theoretically elect to simply ignore the holders of non-voting preference shares, and not make an offer in respect of these securities. However, doing so is not permitted: the bid should be extended to holders of non-voting preference shares as well.[50] Mandatory public offers (*pflichtangebote*) may not target only a part of the outstanding share capital (§ 32 WpÜG). The obligation equally applies in case solely unlisted (common) shares are acquired: then, the holders of non-voting preference shares have the right to tag along. This state of affairs is justified by the fact that of all the membership rights vested in common stock, non-voting preference shares only lack the right to vote, but not the entitlement to a control premium.[51] Such a view may appear counter-intuitive, given that the control premium reflects, by definition, the value of the voting right. However, under German corporate law, some important decisions necessitate a class vote, requiring the approval of 75 % of the share capital. As a result, certain outside minority shareholders may be able to block modifications to the corporation's governance framework (*Sperrminorität, see* § 22.4.3 *supra*). Then, allowing the holders of non-voting preference shares to participate in the control premium is not so much of an anomaly. Importantly, the fact that an offer should be extended to all classes of stock does not mean that holders of common and non-voting preference shares are entitled to identical compensation.

The situation of a public offer is somewhat related to that of a shareholder assuming power in the form of a control agreement (*Beherrschungsvertrag*) with the corporation (*see* § 20.5.2 *supra*). In German group undertakings law, control

---

48. For the origins of the 30 %-criterion, *see* art. 5 (3) of the Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on Takeover Bids.
49. Also note that under § 21 (1) Securities Trading Act (*Wertpapierhandelsgesetz*), no disclosure thresholds exist in relation to the acquisition of non-voting preference shares, provided that the right to vote has not been reinstated. *See* § 22.4.2 *supra*, on the (attempted) stealth acquisition of VW by Porsche.
50. For an analysis, *see* T. Tröger, 'Unternehmensübernahmen im deutschen Recht (II) – Übernahmeangebote, Pflichtangebote, Squeeze Out', 12 *Deutsche Zeitschrift für Wirtschafts- und Insolvenzrecht* 397 (2002).
51. The entitlement even exists in case the non-voting preference shares were initially issued to thwart a takeover. *See* C. von Bülow, *Kölner Kommentar zum WpÜG*, § 35, nr. 85 (H. Hirte & C. von Bülow eds.); *see also* C. Faden, *Das Pflichtangebot nach dem Wertpapiererwerbs- und Übernahmegesetz (WpÜG)* 229-230 (Cuvillier, 2008).

has both a capital and a voting-power component. Since obtaining non-voting preference shares involves the acquisition of equity but not influence, doing so only gives rise to a refutable and not an irrefutable presumption of control.[52] However, a successful change of control – involving sufficient common shares – creates a compensation (*Ausgleich*) or exit (*Abfindung*) right, also for holders of non-voting preferences shares. Thus, there exists an abundant body of case law regarding the valuation of common and non-voting preference shares,[53] but only in the sphere of control agreements and not resulting from dual class equity structure unifications. Two methods are conceivable for determining the value of non-voting preference shares. These include a discounted cash flow analysis (*Ertragswert*)[54] and a comparison of the stock prices of common and non-voting preference shares of a series of comparable listed corporations (*Vergleichswert*).[55] Usually, the stock market price serves as a floor for valuation purposes.[56] Both methods may also be combined. Then, the discounted cash flow sets a range for determining the non-voting preference share's value, with changes subsequently made based on the specific characteristics of the corporation at hand, allowing for a tailor-made outcome.[57]

23.3.3 Multiple voting shares

Under German corporate law, the second possible avenue for a midstream reunification of dual class equity structures involves the abolition of multiple voting stock. These instruments, which may or may not carry a dividend preference but will simply be referred to as multiple voting shares, are mainly a legacy issue of the 1920s (*see* § 21.3.1 *supra*). New issuances of multiple voting shares have been principally restricted for an extended period of time and were only permitted subject to approval by the Minister of the state where the corporation was registered (the rare "Ministerial exception", *see* § 21.3.2 *supra*). The KonTraG,[58] enacted in 1998 (*see* § 21.4.2 *supra*), abolished the

52. *See* § 16 AktG, on which W. Bayer, *Münchener Kommentar zum Aktiengesetz* § 16, 1-52 (W. Goette & M. Habersack eds.); *see also* J. Koch, *Aktiengesetz* § 16, 1-14 (U. Hüffer & J. Koch eds.); A. Schall, *Aktiengesetz* § 16, 1-41 (G. Spindler & E. Stilz eds.).
53. For examples, in addition to the cases mentioned in Chapter 23, *see* Landgericht München I 31 July 2015 – 5 HKO 16371/13 (*MAN*); *see also* Oberlandesgericht Frankfurt am Main 28 March 2014, 21 W 15/11 (*Wella*).
54. *See* Bundesgerichtshof 29 September 2015 – II ZB 23/14.
55. *See* Oberlandesgericht Düsseldorf 10 June 2009 – I-26 W 1/07, ruling that the price differences presented a "*besonders gutes Indiz*" for the different value of both classes of stock.
56. *See* Bundesverfassungsgericht 27 April 1999 – 1 BvR 1613/94 (*DAT/Altana*).
57. *See* Daske 2019, *supra* note 12, at 267-279. For a rather rigid proposal, *see* L. Körner, *Die angemessene Gegenleistung für Vorzugs- und Stammaktien nach dem WpÜG* (Lang, 2006), proposing to impose a flat 15 % discount on the price offered for common stock to determine the value of non-voting preference shares.
58. *See* Gesetz zur Kontrolle und Transparenz im Unternehmensbereich (KonTraG), Bundesgesetzblatt 1998, 786.

Ministerial exception. As a result, future issuances of multiple voting shares were no longer possible. Furthermore, the *Einführungsgesetz zum Aktiengesetz* (EGAktG), which was introduced simultaneously, targeted existing multiple voting shares. To that effect, the EGAktG contained two mechanisms. First, it stipulated that incumbent dual class equity structures would revert back to a one share, one vote standard on June 1st, 2003, if their continued existence had not been confirmed before this date (§ 5 (1) EGAktG).[59] Confirmation could be obtained by a vote achieving a supermajority of 75 % of the share capital (again, not votes). Holders of multiple voting shares were excluded from the decision-making, but other insiders (for instance relatives) holding common shares were not.[60] This approach may be characterized as a "modified majority-of-the-minority vote" (*see* § 11.3.1 *supra*). It is rather at odds with the traditional German approach in respect of non-voting preference share recapitalizations (*see* § 23.2 and § 23.3.1 *supra*), which is based on class votes of affected investors and in which interested shareholders are not excluded from the voting process. Second, both before and after June 1st, 2003, the AGM may abolish dual class equity structures by a simple majority of the represented share capital (50 % + 1 share), instead of 75 %. Consequently, the EGAktG deviates again from established German recapitalization law, by not requiring a class vote. Under the second regime, holders of multiple voting shares can participate in the decision-making process. However, their involvement is limited to the extent warranted by the *Kapitalprinzip* (*see* § 22.4.3 *supra*). Accordingly, holders of A and B class stocks with a nominal value of € 10 each can both cast one vote per share, even if the B class stocks would carry 10 votes per share otherwise. The option of cancelling multiple voting shares by a simple AGM majority (the second option) is even available in case the pre-existing control structure had been approved by outside minority shareholders prior to June 1st, 2003 (the first option). Every investor is permitted to make a request for putting the item of unifying the capital structure on the agenda of the AGM, regardless of the size of his equity stake (§ 5 (2) EGAktG).[61] Therefore, abolishing a multiple voting structure is considerably easier than continuing it. Once abolished, multiple voting rights cannot be reinstated.

---

59. There have been 10 cases in which the existence of multiple voting shares was extended, of which currently 4 corporations remain. *See* Daske 2019, *supra* note 12, at 199; *see also* Polte 2005, *supra* note 28, at 82.
60. This enabled certain families to retain their multiple voting shares. For an example, *see* Landgericht Memmingen 12 February 2001 – 2 H O 1748/00 (*Gruschwitz Textilwerke*), where it was held that the German legislator had not intended for insiders other than the holder of multiple voting shares to be excluded.
61. For an extensive analysis, *see* S. Mock, *Großkommentar Aktiengesetz* § 12, 39-73 (H. Hirte, P.O. Mülbert & M. Roth eds.); *see also* K. Heider, *Münchener Kommentar zum Aktiengesetz* § 12, 38-47 (W. Goette & M. Habersack eds.); J. Koch, *Aktiengesetz* § 12, 8-15 (U. Hüffer & J. Koch eds.); S. Vatter, *Kommentar zum Aktiengesetz* § 12, 16-32 (G. Spindler & E. Stilz eds.)

23.3.4 *Differential compensation for multiple voting shares under the EGAktG*

Shareholders of whom the multiple voting rights have been cancelled pursuant to the EGAktG– either before or after June 1st, 2003 – can claim compensation.[62] The indemnification only covers foregone control rights in excess of one vote per share. Indeed, other rights vested in the (formerly multiple voting) share, for instance the single remaining vote or the dividend entitlement, are not affected. The compensation is to be borne by the corporation (§ 5 (3) EGAktG).[63] Interestingly, an earlier draft of the EGAktG was much more restrictive in respect of damages. It stipulated that shareholders would only be indemnified for their loss of control in case they had made some kind of special contribution to the corporation, other than capital. However, this approach was met with sharp criticism, because it did not respect the constitutionally enshrined[64] right to property.[65] As a result, the final version of the EGAktG stated that compensation was due. Meanwhile, it did not mandate its calculation method or the amount payable. This choice was justified by the German legislator by referring to wide variety of situations that could arise, which uniform rules would find it hard to deal with. Nevertheless, the EGAktG mentions various factors – in a non-exhaustive manner – that may be considered for calculating the amount of compensation.[66] First, this includes the origins of

62. I refrain from discussing whether in the German M&A context, multiple voting shares warrant a higher price than common or non-voting preference shares. Indeed, there are currently no corporations with such securities outstanding listed on the stock exchange. *See* Daske 2019, *supra* note 12, at 199. Meanwhile, the analysis in § 23.3.3- § 23.3.4 suggests that if one of the very few private corporations with a multiple voting dual class equity structure in place would go public, granting differential consideration would be very much possible.
63. For excellent discussions, *see* A. Arnold, 'Entschädigung von Mehrstimmrechten nach § 5 EGAktG', 41 *Deutsches Steuerrecht* 784 (2003); *see also* S. Schulz, 'Die Ausgleichsanspruch für erloschene und beseitigte Mehrstimmrechte gem. § 5 III EGAktG', 5 *Neue Zeitschrift für Gesellschaftsrecht* 996 (2002).
64. *See* art. 1 of the Protocol to the European Convention on Human Rights; *see also* art. 14 Grundgesetz.
65. *See* W. Zöllner & P. Hanau, 'Die verfassungsrechtlichen Grenzen der Beseitigung von Mehrstimmrechten bei Aktiengesellschaften', 42 *Die Aktiengesellschaft* 206 (1997) (arguing that any compensation paid should be borne by the German state rather than the corporation involved, as the decision to abolish multiple voting stock was made by the legislator); *see also* W. Kluth, 'Abschaffung von Mehrstimmrechtsaktien verfassungswidrig?', 14 *Zeitschrift für Wirtschaftsrecht* 1217 (1997) (distinguishing three voting power-based categories of shareholders and arguing in favor of compensation of investors who can potentially block certain decisions); W. Zöllner & U. Noack, 'One Share – One Vote?' 36 *Die Aktiengesellschaft* 117 (1991) (maintaining that the general interest exception, as laid down in the European Convention on Human Rights, provides a shaky basis to cancel multiple voting rights.)
66. *See* BT-Drucksache 13/10038, 28. For an English analysis, *see* U. Seibert, 'Control and Transparency in Business (KonTraG): Corporate Governance Reform in Germany', 10 *European Business Law Review* 70, 72 (1999).

the multiple voting rights and the corresponding contributions made. (This is the element that had been the principal deciding factor in the draft version of the EGAktG.) In this regard, it is relevant when the multiple voting shares have been issued. Under the *Aktiengesetz* of 1937, the Ministerial exception could solely be invoked if the creation of multiple voting shares was considered to serve to interests of the corporation (*see* § 21.3.2 *supra*). Therefore, issuance after the *Aktiengesetz* of 1937 entered into force may not count as a compensation-enhancing factor. Prior to that date, the use of multiple voting shares was principally permitted. For such issuances, the question is whether the corresponding capital contributions exceeded those made regarding common stock. Contributions in kind (*Sacheinlagen*) of a quantifiable value, including a business or brand name which still forms the basis of the present-day corporation, may create an entitlement to additional compensation.[67] A second factor for determining the amount of damages in respect of multiple voting shares relates to the tradability and/or transferability of the securities. Usually, the tradability and/or transferability of these instruments will be limited, which reduces the magnitude of the compensation.[68] The third component is the total control power affected. This includes both the absolute and relative relevance of the voting rights. The aspect of absolute voting power considers the number of votes vested in the multiple voting shares in relation to the maximum number of votes of all outstanding shares combined. The matter of relative voting power involves the possibility to initiate or prevent decision-making. In this regard, the Articles of Association of the corporation concerned should be studied, to analyze whether they contain certain quorums, supermajority requirements or similar provisions.[69] Fourth, provisions in the Articles of Association specifically addressing the multiple voting shares themselves should be taken into account.[70] These provisions may, for instance, complicate or facilitate the abolition of multiple voting stock. Such arrangements have a value effect as well. Interestingly, Hering and Olbrich have argued that multiple voting shares are only valuable to the extent that they ensure elevated dividends for their owner.[71] However, this is a narrow,

67. *See* Schulz 2002, *supra* note 63, at 1001, observing that this angle necessitates an analysis of the consideration paid by previous stockowners and its relation to market value which, obviously, creates administrative issues.
68. *But see* Schulz 2002, *supra* note 63, at 1002, arguing that since only the value of the right to vote, and not the value of the share itself should be calculated, the aspects of tradability and/or transferability should be disregarded.
69. On the distinction between absolute and relative control power in the context of German multiple voting shares, *see* S. Daske & O. Ehrhardt, 'Kursunterschiede und Renditen deutscher Stamm- und Vorzugsaktien', 16 *Financial Markets and Portfolio Management* 179 (2002). For a general analysis of the value of voting rights, *see* § 10.3 *supra*.
70. On the value effects of provisions in the Articles of Association, *see* Schulz 2002, *supra* note 63, at 1003.
71. For the more recent version of this argument, *see* T. Hering & M. Olbrich, 'Bewertung von Mehrstimmrechten: Zum Unsicherheitsproblem bei der Entschädigung nach § 5 EGAktG.

overly financial perspective, as it ignores other aspects that affect corporate performance, including idiosyncratic vision (*see* § 10.5.4 *supra*). The argument of Hering and Olbrich also gives rise to the question of how to produce the required evidence that dividends will decrease following cancellation of the multiple voting stock.[72]

23.3.5 Differential compensation for multiple voting shares in practice

The preceding analysis indicates that German corporate law principally permits differential consideration in respect of multiple voting shares. However, blending all the aforementioned factors together is not exactly an easy task.

Some listed corporations have three different classes of stock outstanding – multiple voting shares, common shares and non-voting preference shares. Often, but not always, the multiple voting stock will be non-tradable and/or non-transferable. If the securities are indeed illiquid, their market price cannot be established. Whether such a corporation could, as a remedy, simply determine the fair value of the multiple voting stocks by comparing price differences between common and non-voting preference shares and extrapolating these findings to account for the number of votes has been controversial.[73] Indeed, using price data from a single corporation heightens the distortionary effects of statistical outliers. Conversely, such an approach allows for a tailor-made valuation, focusing on firm-specific characteristics. Meanwhile, using price data obtained by comparing classes of stock of a number of listed similar corporations has been accepted, although perhaps not warmly embraced. (This method largely overlaps with the one applied regarding non-voting preference shares, as part of *Konzernrecht*-valuation exercises.) An additional advantage is that the method can equally be applied by firms of common and non-voting preference shares are not simultaneously listed.[74]

Any compensation due may be paid in cash, on a lump sum basis or in a number of installments, stock, or by a combination of both.[75] An interesting, real-life example in this regard is presented by energy producer and distributer RWE. In 1998, RWE pursued a reorganization of its capital structure. This involved

---

Anmerkungen zum Beitrag von Arnold, DStR 2003, 784-788', 41 *Deutsches Steuerrecht* 1579 (2003). Thus, multiple voting rights may have a negative value.

72. *See* A. Arnold, 'Das Unsicherheitsproblem bei der Entschädigung von Mehrstimmrechten – eine Replik', 41 *Deutsches Steuerrecht* 1671 (2003); *see also* Arnold 2003, *supra* note 63, at 787; Schulz 2002, *supra* note 63 (all arguing that Hering & Oblrich's approach, though conceptually appealing, is practically unfeasible).
73. *See* K. Heider, *Münchener Kommentar zum Aktiengesetz* § 12, 38-47 (W. Goette & M. Habersack eds.); *see also* J. Koch, *Aktiengesetz* § 12, 8-14 (U. Hüffer & J. Koch eds.); S. Vatter, *Kommentar zum Aktiengesetz* § 12, 16-31 (G. Spindler & E. Stilz eds.).
74. *See* Arnold 2003, *supra* note 63, at 787; *see also* Schulz 2002, *supra* note 63, at 1006.
75. *See* K. Heider, *Münchener Kommentar zum Aktiengesetz* § 12, 38-47 (W. Goette & M. Habersack eds.); *see also* J. Koch, *Aktiengesetz* § 12, 8-14 (U. Hüffer & J. Koch eds.); S. Vatter, *Kommentar zum Aktiengesetz* § 12, 16-31 (G. Spindler & E. Stilz eds.).

the reclassification of both multiple voting shares and non-voting preference shares into common stock. Amongst the owners of multiple voting shares were many municipalities, which had historically been closely involved in the founding of RWE. As part of this operation, holders of non-voting preference shares could acquire the right to convert their securities into common shares. The proceeds of this sale were granted to the municipalities, in exchange for the cancellation of the multiple voting shares.[76]

However, it should be stressed that applying the EGAktG not necessarily has to result in differential consideration for the holders of multiple voting shares. Indeed, and reminiscent of the draft version of the EGAktG, the German legislator observed that the scenario of very little or no compensation being due was, although somewhat of an exception, still a possibility.[77] Differential consideration must be withheld when the (superior) value of the multiple voting shares, as compared to the common or non-voting preference shares, cannot be established.[78] On the one hand, this limitation rules out the possibility of assigning a negative value to multiple voting stock.[79] On the other, it also allows for the scenario that holders of these instruments will effectively be deprived of their controlling position without any reward whatsoever. Indeed, the burden of proof rests on the holder of multiple voting shares. Investors in Siemens make a prime example in this regard.[80] In other cases as well, the German courts have appeared rather reluctant to award sizeable compensation for multiple voting rights.[81] As a result, certain scholars have cautioned that it may be pragmatic

76. *See* Wirth & Arnold 2002, *supra* note 17, at 869; *see also* Schulz 2002, *supra* note 63, at 1005. This would be RWE's first attempt to cancel its non-voting preference shares. However, not all investors accepted the offer. In 2018, a second attempt was made to resolve the issue. *See* § 23.3.2 *supra*.

77. *See* BT-Drucksache 13/10038, 28 ("*im Einzelfall auch gegen Null tendieren könne*").

78. *See* Oberlandesgericht München 19 October 2006 – 31 Wx 92/05 (*Fränkisches Überlandwerk*).

79. Such an outcome were possible, if the value of the multiple voting shares would be calculated by comparing market prices of non-voting preference shares and common stock, with the former trading higher. This is not an entirely theoretical affair. *See* Daske 2019, *supra* note 12, for an extensive analysis of historical price differences.

80. *See* Bayerische Oberste Landesgericht 31 July 2002 – 3Z BR 362/01 (ruling that because of a lack of liquidity, the additional value of the multiple voting rights could not be determined. Therefore, no entitlement to compensation existed); *see also* Landgericht München I 14 September 2001 – 5 HKO 16369/99 (which had, as a court of first instance, fixed the compensation at € 0.70 per share, based on the average discount percentage of non-voting preference shares vis-à-vis common stock of a number of German listed corporations in the 1988-1999 period).

81. *See* Oberlandesgericht München 19 October 2006 – 31 Wx 92/05 (*Fränkisches Überlandwerk*). There, the multiple voting (preference) shares carried 3,200 votes each, representing 36 % of the voting power. Even when a single vote was estimated to represent only 2.5 % to 4.5 % of the value of a common share and after applying a discount of 33 % because of the sheer number of votes, corporate finance specialists determined the value of the security at approximately € 10.400. This amount should be compared with an average market price for the common shares of € 155. The court refused to accept these findings and ruled that

to offer at least some form of compensation. In their view, doing so facilitates multiple voting shares being phased out.[82]

23.4 Analyzing the dual class restructuring framework

23.4.1 Non-Voting preference shares: an instrument idiosyncratic to Germany

Compared to US strategies to mitigate the effects of concentrated control, such as majority-of-the-minority mechanisms (*see* § 11.3.1 *supra*) or sunsets provisions (*see* § 11.3.3 *supra*), German law attempts to provide remedies at a more fundamental level. By granting a preferential dividend, it targets the corporation's free cash flow – at least in principle, when one disregards the possible switch-over regarding the right to vote (*see* § 22.5.4 *supra*). Indeed, one could argue that, if excess funds are (mandatorily) slimmed down to more responsible levels, the actual distribution of powers to allocate corporate resources becomes less significant. After all, there exists less room for maneuver (i.e. funding) for executive and supervisory directors and/or controllers to engage in inefficient projects (*see* § 9.6 *supra*).

However, the focus on non-voting preference shares, largely to the exclusion of other options, has some more tangible downsides as well. From a life-cycle perspective, it should be noted that non-voting preference shares, because of the mandatory nature of the coupon, effectively resemble bonds. Debt-based finance may pose a challenge to younger firms, given that their free cash flow is surrounded by uncertainty, and could be insufficient to cover interest and/or principal repayments (*see* § 9.7.3 *supra*). Non-voting preference shares appear primarily suited for companies that have progressed somewhat on the life-cycle ladder – benefiting from relatively stable cash flows and partially lower information costs – but are yet to reach full maturity. Presumably, these criteria would particularly apply to family businesses. Indeed, the *Mittelstand* is traditionally said to constitute the economic backbone of Germany.[83] Therefore, whilst non-voting preference shares may be a rather sensible addition to the

---

the value of the multiple voting shares was equal to that of the common shares, whilst also holding that § 53a AktG did not mandate a different outcome, nor that the option of being able to block certain decisions (*Sperrminorität*) carried any value.

82. *See* T. Hering & M. Olbrich, 'Zur Bewertung von Mehrstimmrechten', 53 *Zeitschrift für betriebswirtschaftliche Forschung* 20 (2001).

83. *See* T. Giersch, 'Marktführer. Deutschlands geheime Champions', *Handelsblatt* 16 August 2012 ("*Kennen Sie die Firma M+C Schiffer? Nein? Aber Sie haben deren Produkte sicherlich schon in der Hand gehabt. [...] Die Firma stellt nur Zahnbürsten her – eine Million pro Tag*."); *see also* U.R. Siebel, 'Vorzugsaktien als „Hybride" Finanzierungsform und ihre Grenzen', 161 *Zeitschrift für das Gesamte Handels- und Wirtschaftsrecht* 628 (1997), at 631.

German macro-economic situation, it is not manifestly evident that the transplant will be useful elsewhere.

23.4.2 Non-Voting preference shares: reactive instead of proactive

If a corporate crisis actually were to arise, it would take up to two years before the holders of *Vorzugsaktien* would be granted the right to vote, allowing them intervene (*see* § 22.5.4 *supra*). This seems an eternity for a situation that deserves a swift response. Yet, it may be questioned whether bringing a sizeable number of less informed dividend investors to the decision-making table in a time of corporate distress is the appropriate medicine. As a result, members of the executive and/or supervisory board or the controller may feel tempted to engage in strategic behavior with a view to avoiding the reinstatement of the right to vote. Unfortunately, these actions could well aggravate existing financial difficulties or strain relations between executive and/or supervisory directors.[84]

The amount of the dividend preference is another complicating factor. In a low or even negative interest environment, previously issued non-voting preference shares can become expensive fairly quickly. By contrast, an issuer will see itself challenged in securing sufficient funding at acceptable costs in a higher interest period. However, adapting to these changing circumstances may very well require a class vote, as it could threaten vested interests of existing investors (*see* § 23.2 and § 23.3 *supra*). If the concept of non-voting preference shares were to be embraced, it would seem for advisable for the governing legal framework to retain some flexibility with regard to the size of the preference. This would allow the dividend preference to fluctuate over time – although given the expected development of free cash flows, in a generally increasing direction.[85] However, this requires quite some micro-management from all constituents involved[86] and could aggravate existing conflicts of interests between directors and shareholders. Hence, the cure could prove worse than the disease.

---

84. Consider a corporation at the brink of financial distress, which has been in arrears with dividends in year 1. In year 2, it could sell some of its assets at fire sale prices to potentially avoid the reactivation for the right to vote, even if this may also aggravate the issue in year 3. Admittedly, under some circumstances, the right to vote is reactivated as soon as it becomes manifestly evident that the preference dividend will not be paid for a second time in succession, despite a formal decision to that extent not yet having been made. *See* § 22.5.4 *supra*.
85. This idea was essentially pursued by Google when it implemented the true-up arrangement. *See* § 17.3 *supra*. Whereas compensation in respect of the discount of inferior voting stock was fixed in relative terms, an absolutely larger discount – because of a rising stock price – means that the compensating dividend will grow.
86. In fact, it could be debated whether existing German corporate law permits such a mechanism. Arguably, a gradually increasing dividend may be replicated using a web of upfront and conditional changes to the Articles of Association. *See* § 22.2.3 *supra*, on *befriste* and *bedingte Satzungsänderungen*. Here as well, one could wonder whether such a system would not be overly complicated. Whereas Google's true-up arrangement could be of use, it

23.4.3 Non-Voting preference shares: loopholes & absence of exit right

Although the German approval-based system to introduce non-voting preference shares, may be viewed as rather rigid and detailed, as was discussed in § 23.4.1-§ 23.4.2, its outcomes have been generally quite predictable: depriving investors directly or indirectly of their pre-existing rights requires the consent of a qualified majority of those affected. However, this system has produced some peculiarities as well, at least from a functional point of view.[87] Once the non-voting preference shares have been issued, certain loopholes come into play, whereas the German judiciary has lacked the instruments, either tailored or more generic, to intervene. For instance, a class vote is not necessary in case of a reverse stock split.[88] Meanwhile, this approach only makes sense insofar the dividend preference is based on a percentage of the par value, instead of an absolute amount. Otherwise, holders of non-voting preference shares will be worse off following the transaction. (Indeed, a dividend payment of € 5 originating from one share with a par value of € 200 is worth less than two distributions of € 5 on shares with a nominal value of € 100 each.) Another flaw relates to the proportional buyback of common and non-voting preference shares, combined with the simultaneous issuance of common stock. No prior shareholder authorization is required for such a reorganization of the capital structure,[89] despite the fact that it may shift the balance of power in the corporation, potentially to the detriment of loyal investors. Although no change of control occurs, the mandatory dividend can be considered as a check on free cash flow agency costs. Then, removing this constraint may increase managerial leeway considerably.[90] A further issue concerns the declaration of a stock dividend. Such a distribution results in a corresponding reduction of the preference percentage.[91] Finally, and most strikingly, German corporate law does not treat an outright reduction of the non-voting preference shares' nominal

has, to my knowledge, not yet been applied by listed German corporations. Thus, its status is uncertain.

87. Similarly, it remains odd that German law has prohibited multiple voting shares whilst permitting non-voting preference shares, and that this state of affairs has given rise to so little debate. It appears that both mechanisms are viewed as separate worlds. At least from a functional point of view, this presumption is not entirely correct.
88. *See* Oberlandesgericht Frankfurt 23 December 1992 – 21 U 143/91, holding that the transaction did not interfere with the dividend preference, but only with the basis on which the preferential dividend was calculated.
89. *See* Oberlandesgericht Frankfurt 23 December 1992 – 21 U 143/91.
90. On agency costs of free cash flow, *see* § 9.6 *supra*; on investor loyalty, *see* § 10.6.4 *supra*.
91. *See* Oberlandesgericht Stuttgart 11 February 1992 – 10 U 313/90 (*Hugo Boss*); *see also* Bezzenberger 1991, *supra* note 7, at 79-80. The argument goes that the preference dividend only serves to compensate the absence of voting rights. Then, granting additional financial entitlements through a distribution of stock would constitute an undue advantage. However, the merits of this claim should be disputed, since holders of common shares who receive a stock dividend see their total future distributions increase as well.

value as a matter for which approval is required. This even applies if the figure is used as a basis on which the dividend percentage is calculated, instead of the dividend being expressed as an absolute number.[92] Effectively, these and other loopholes puts the holders of non-voting preference shares at the mercy of the executive and supervisory board, as the dividend preference could be wiped out entirely at a moment of the directors' choosing.[93] The fact that the recapitalizations outlined in § 23.4.3 were sanctioned by the courts also indicates that the other remedies which minority shareholders have at their disposal, for instance the right to appeals AGM decisions (§ 245 AktG), are insufficient to properly safeguard their interests.

In situations where the creation of non-voting preference shares does require a class vote, German corporate law recognizes no statutory obligation to grant dissenting owners of common or non-voting preference stock compensation (*Ausgleich*) or an exit right (*Abfindung*).[94] These remedies are absent, regardless whether it concerns a first issuance or a SEO.[95] Similarly, a reduction of the preference dividend is does not create an compensation or exit right.[96] This state of affairs is justified by the fact that it are the affected shareholders themselves who, through a 75 % qualified majority class vote, decide to pursue the recapitalization.[97] In fact, § 57 (1) AktG prohibits the corporation from granting any compensation, as this would constitute an unauthorized repayment of capital.[98]

---

92. *See* Oberlandesgericht Stuttgart 11 February 1992 – 10 U 313/90 (*Hugo Boss*), ruling that the dividend preference percentage and the base on which it is calculated are separate concepts, and should be distinguished from each other. Note that this situation somewhat mirrors the reverse stock split.
93. *See* Krauel & Weng 2003, supra note 25; *see also* Bezzenberger 1991, supra note 7, at 172-174, convincingly arguing that a reduction of the nominal value should result in a corresponding increase of the dividend percentage.
94. One may argue that the issuance of non-voting preference shares cannot result in a change of (voting) control and that, consequently, granting a compensation or exit right would be superfluous. In this regard, it is repeated that the mandatory dividend may play an important role – these payments could drain the corporation from resources, meaning that outside minority shareholders will receive less future distributions.
95. Note that an exception may apply in case the reorganization of the equity structure is part of a more far-reaching restructuring in the form of a (cross-border) conversion or merger. In those situations, an exit right may exist. *See* § 29, § 122i and § 207 Umwandlungsgesetz.
96. *See* Landgericht Krefeld 20 December 2006 – 11 O 70/06. In this specific instance, the non-voting preference shares were trading higher than the common stock.
97. *See* Daske 2019, *supra* note 12, at 111-113; *see also* Bezzenberger 1991, *supra* note 7, at 128.
98. *See* Wirth & Arnold 2002, *supra* note 17, at 872.

Chapter 24. Summary

24.1 The German corporate legal landscape

Part IV started with an outline of the German corporate law and governance landscape, in Chapter 20. In Germany, the debate on federal (*Bundesrepublik*) and state (*Bundesländer*) legislative power has been less pressing, as was discussed in §20.2. The federal government has been and still is the primary legislative actor, and state level actions only play a minor role. By contrast, German unity has historically not always been self-evident. With a view to the (19th century) historical analysis, I decided to focus on Prussian corporate law, as political and financial interests gravitated towards Prussia.

More serious challenges for comparative purposes emerged when selecting a relevant legal entity to take into consideration. This issue was analyzed in § 20.3. Indeed, German (corporate) law has a wide variety of legal forms to offer. A first category involves partnerships. The limited liability typically associated with those entities is less of a defining feature than one might be inclined to believe. German (or foreign) legal entities with limited liability have long been permitted to act as general partner (*Grundtypvermischung*). A second category of legal forms is that of corporations. The main complication for the comparative research is that whilst this PhD-thesis focuses on Weberian Idealtype of open, listed corporations, the AG is not the only legal entity through which leading German firms list their stocks on the exchange. Notable alternatives include the SE and the KGaA. Especially the use of the KGaA has been increasing in recent years. Crucially, the distribution of control in financial rights in an SE or KGaA does not necessarily mimic that of an AG. For practical purposes, the analysis has nonetheless been geared towards the AG, which is for all intents and purposes still the legal entity used by most listed firms.

The discussion continued with an examination of German co-determination law, in § 20.4. Arguably, Germany is the most prominent representative of employee co-determination. The idea is deeply embedded in the legal system, reflecting social market (or Rhine) capitalism. Co-determination assures that employees are represented in the highest corporate organs, enhances inclusive prosperity and serves as an early warning system for social conflict. However, it has also long been alleged to create certain complexities, including less-focused and more politicized decision-making. From a technical perspective, co-determination has two aspects. First, entrepreneurial co-determination (*betriebliche* *mitbestimmung*) relates to the enterprise (*betrieb*) as a smaller organizational unit. Second, corporate co-determination (*unternehmerische mitbestimmung*) concerns the representation of employees in the supervisory board. There exist detailed provisions as to its composition. The size of the supervisory board is determined based on the amount of issued share capital and the number of employees. The technical and mandatory nature of these provisions entails that it is not always self-evident whether the supervisory board has been validly constituted.

Another defining feature of German corporate governance is its adaptation to concentrated control. This matter was addressed in § 20.5. The system is based on bank (rather than stock exchange) finance and cross-holdings. Cross-holdings emerged in the late 19th century, in similar fashion to the trusts of John D. Rockefeller and others in the US. The effects of cross-holdings have been corroborated by the existence of banker control. Banks and their employees manned supervisory boards and held sizeable minority interests. Although banker control has diminished considerably in the post-2000 era, German corporate law still contains many provisions to address the potential negative effects of blockholder actions (*Konzernrecht*). If an investor assumes control over a corporation, he may conclude a control agreement (*Beherrschungsvertrag*) or profit diversion agreement (*Gewinnabführungsvertrag*). However, such agreements also come with certain costs to the controlling shareholder. For instance, he has to cover the corporate losses, must offer an annual compensatory payment equal to the expected dividends (*Ausgleich*) and has to grant an exit right to outside minority shareholders (*Abfindung*).

To wrap up Chapter 20, the relevance of the DCGK was discussed, in § 20.6. The first Code was published in 2002, after a number of high-profile scandals. The Code not only serves as a form of self-regulation, but also aims to inform foreign investors about country-specific aspects of German capital markets. The Code contains basic principles (*Grundsätze*), recommendations (*Empfehlungen*) and suggestions (*Anregungen*). Deviating from the *Grundsätze* is not possible. A "comply or explain" approach applies regarding recommendations; suggestions may be departed from without further explication. Pursuant to § 161 AktG, it is mandatory for the annual report to disclose the firm's compliance with the Code. The Code is not directly legally binding, nor is it embedded in the Listing Rules or is delisting a possible sanction in case of non-compliance. Nevertheless, the Code may indirectly affect the behavior of corporate actors, and has been known to shape, in exceptional cases, the fiduciary duties of executive and supervisory directors. Therefore, the Code was taken into account throughout the comparative German analysis.

24.2 German dual class stock from a historical perspective

Chapter 21 proceeded with a discussion on the historical use of dual class equity structures in Germany. I started my analysis at the dawn of the 19th century, in § 21.2. In the 1830s, innovative businesses, especially railroads, required massive funds. However, the Prussian state nor smaller merchant banks were able to provide these. Thus, the involvement of outside private investors was required. To insulate themselves from ferocious competition and widespread mismanagement, shareholders demanded a level of security comparable to that of bondholders. With project initiators refusing to give up control, non-voting preferences shares emerged as a compromise.

In response to such financial innovations, the PrAktienG of 1843 was drafted. Its main architect had been Von Savigny, an adherent of the fictional (or concessionist) view. The ideas of Von Savigny and his fellows were criticized by members of the Germanist School, notably Von Gierke. They held that a corporate entity was not merely a fiction, but a living organism (*reale Verbandspersönlichkeit*) with rights and obligations of its own. Perhaps unsurprisingly given Von Savigny's involvement, the statute of 1843 maintained the requirement of obtaining royal assent. Substantively, it contained few provisions as to a corporation's internal affairs, and the division of voting rights and financial entitlements was left entirely to the charter. Some authors of this period started advocating a proportional, instead of a degressive approach to voting rights, as had been common previously. In 1861, the ADHGB superseded the Act on Joint Stock Companies of 1843. The enactment of the General German Commercial Code resulted from a perceived fear for a race to the bottom. With the German unification progressively realized, businesses could increasingly relocate to the country which offered the most attractive legislative package. To counter such regulatory arbitrage, legislative harmonization was required. Nevertheless, the General German Commercial Code was still rather enabling in nature and contained little mandatory provisions as to the allocation of control and financial rights. The main point of debate was the condition of royal assent to incorporate. Following a fierce debate, this requirement was accepted as a general rule. However, states had the opportunity to opt out on an individual basis.

The requirement of obtaining royal assent was abolished in the early 1870s. The reform resulted in a surge in industrial activity, the *Gründerboom*. The *Aktienrechtsnovelle* of 1870 contained a broad set of remedies to pre-empt the resulting threat of irrational exuberance. Simultaneously, Germany was unified under Prussian rule, following the Franco-Prussian War of 1870-1871. The subsequent payment of war reparations by France caused a massive inflow of funds into the German economy. In 1873, this resulted in a brief but sharp crisis, known as the *Gründerkrach*. During this period, we can also observe a shift in the rationale for issuing non-voting preference shares. In the 1830s and 1840s, these securities primarily served to finance innovative industries whilst comforting outside investors. In the last decades of the 19th century, non-voting preference shares were mostly issued to fend off looming cases of insolvency. However, non-voting preference shares generally comprised only 4 % to 5 % of the stock market.

To prevent catastrophes such as the *Gründerkrach* from reoccurring, the *Aktienrechtsnovelle* of 1884 implemented sweeping reforms. Accordingly, capital formation and retention provisions were tightened, the independence of the supervisory board was reinforced and control rights of minority shareholders were strengthened. The possibility to freely allocate voting rights was firmly restricted, with multiple voting and non-voting shares, although curiously not non-voting preference shares. By contrast, issuing shares with superior or inferior dividend entitlements continued to be permitted. After the *Aktienrechtsnovelle* of 1884 was enacted, German corporate law entered a phase of tranquility. The changes brought by the HGB of 1897 proved more modest than had been the case in previous instances of reform. Interestingly, the ban on multiple voting stock, which had been introduced only 1884, was completely reversed.

I continued by discussing the use of dual class equity structures in the long 1920s (§ 21.3). The use of multiple voting stock increased spectacularly following the First World War. With Germany not paying the massive Versailles Treaty war reparations, France and Belgium occupied the Ruhr-industrial area. This resulted in a drastic social-economic downturn. It also enabled foreign investors to acquire large stakes in German corporations at low prices. German actors resorted to all kinds of measures to combat outsized foreign influence (*Überfremdung*). Issuing multiple voting shares to parties friendly to management and/or the controlling shareholder was a widely used tactic. In 1925, more than half of the German listed corporations had issued multiple voting stocks. However, the abuse associated with these securities grew as well. The *Reichsgericht*, the German Supreme Court at the time, did not intervene. The national lawyers convent (*Deutscher Juristentag*) discussed the issue twice but failed to reach a conclusion. The Department of Justice (*Reichsjustizministerium*) then seized the initiative, but its proposals failed to gain sufficient ground. This changed in the early 1930s, as the Wall Street Crash of 1929 hit Germany. The desire for reform eventually culminated in the *Aktiengesetz* of 1937. Being rooted in a variety of sources and backgrounds, the statute increased the minimum share capital, strengthened the position of the executive board (the *Führerprinzip*) and instructed the board to govern the corporation in the (perceived) interests of the business and the common good (*Volk und Reich*). Moreover, it principally banned multiple voting stock (§ 12 AktG 1937). However, the Ministers for Economic Affairs and Justice, acting jointly, could grant an exception, if required by the interest of the corporation. The fact that the German legislator was slow to prohibit multiple voting shares may be considered in conjunction with the ideas of Walther Rathenau, a powerful industrialist and politician. In his view, the closed, long term, committed shareholder base had vanished. Rathenau advocated a strong position of the controlling shareholder and/or directors vis-à-vis minority interests, to weed out the possibility of speculators and competitors obtaining control over the firm.

As was shown in § 21.4, the German debate on shareholder control rights resumed in earnest in the 1980s. This was mainly a response to the US boom in unsolicited takeovers – there was little of such activity in Germany itself during this period. Especially from 1983 onwards, a sharp rise in the issuance of non-voting preference shares can be observed. Newcomers to the stock exchange could choose solely to list non-voting preference shares, as this prevented outside bidders from assuming control. Things would heat up even more in the late 1990s and early 2000s. Following a series of corporate scandals, the Corporate Control and Transparancy Act (*Gesetz zur Kontrolle und Transparenz im Unternehmensbereich*), put forward in 1998, abolished the Ministerial exception to issue multiple voting shares. Furthermore, it stipulated that incumbent structures would cease to exist on June 1st, 2003, if the AGM had not confirmed their continuation before this date. Similarly, Deutsche Börse played an important role with regard to non-voting preference shares. First, in 1997, it launched the Neuer Markt, to offer a suitable forum to emerging internet businesses. The issuance of non-voting preference shares by corporations listed at this venue was prohibited. Second, in August 2000, Deutsche Börse announced that index weight was to be based on the value of only one class of stock, instead of the aggregate value of all classes of stock combined. Subsequently, many of Germany's leading corporates decided to unify their equity structures. As a result, the number of listed companies with non-voting preference shares outstanding fell considerably, almost to pre-1980 levels. Meanwhile, unsolicited takeover attempts in respect of German national icons in the late 1990s have reawakened protectionist sentiments to a certain extent. Consequently, non-voting preference shares appear to be experiencing a modest revival, as several issuances in recent years illustrate. Whether a more fundamental shift will take place, similar to that of the 1920s or 1980s, remains to be seen.

24.3 The division of powers in german corporations

In Chapter 22, I described certain features of the relationship between the board and the corporation's shareholders. To that end, I first addressed the character of the corporation, in § 22.2. To start, this involved the corporate purpose. German corporate law is traditionally said to reflect more of a "stakeholder" approach. Indeed, the executive board should promote the interest of the business, which includes not only shareholders, but also employees and other constituencies. There exists no hierarchical order between the various interests. The Board should assure the business' continued existence and its robust earnings capacity. As a second characteristic of the corporation, I studied the debate regarding corporate personhood. The adherence to real entity theory, according to which the corporation is considered a being more than a sum of the (human) parts that constitute it, may be considered as a confirmation of the influence of Von Gierke's scholarship. In fact, the applicability of this doctrine is widely accepted by scholars and has been confirmed numerous times by the courts. As a third trait of the corporation, I analyzed the balance between mandatory and enabling law. The *Aktiengesetz* principally has a binding character. Pursuant to § 23 (5) AktG, there only exist limited possibilities to deviate from the statute in the Articles of Association. This rigid position is a consequence of the separation between ownership and control. Meanwhile, the *Aktiengesetz* also contains certain provisions which apply exclusively for listed corporations. These can either contain additional obligations or provide such firms with more flexibility compared to their non-listed counterparts.

Subsequently, I discussed the role of executive and supervisory directors, in § 22.3. Under § 76 (1) AktG, the executive board bears an inextricable responsibility for governing the corporation. Meanwhile, the supervisory board oversees executive board actions and gives advice. Executive board members are appointed by the supervisory board, for a period of up to 5 years. For their part, members of the supervisory board are appointed by the AGM, up to the fourth subsequent meeting. A simple majority is sufficient to get elected. Traditionally, the influence of the AGM has been limited by the fact that the shareholder wishing to reject a single nominee has to vote against the entire list (*Blockwahl*). However, the system of individual voting (*Einzelwahl*) has become more common in recent years. Members of the supervisory board can, in the absence of a 75 % majority of the votes, only be removed for cause. Members of the executive board can be dismissed by the supervisory board or, alternatively, by a simple majority of the votes cast at the AGM.

Members of the executive and supervisory board are required to act carefully (*Sorgfaltspflichten*), pursuant to § 93 (1) AktG. This general duty can again be broken down in a number of distinct obligations, including a duty of care, the related duty of oversight, and a duty of loyalty. Whether executive and supervisory directors have carried out their duties appropriately is determined under a German variant of the US business judgement rule (§ 93 (1) AktG). However, important differences exist with the original. For instance, the German business judgement rule acts simultaneously as a behavioral and as a liability standard, and puts the burden of proof on executive and supervisory directors.

Meanwhile, and similar to its US counterpart, German law presupposes supervisory director independence, and therefore disinterestedness, when granting deference through the business judgement rule. If an executive director is conflicted, the corporation should be represented by the supervisory board (§ 112 AktG). If a supervisory director is conflicted, the official may not participate in the discussion leading up to and the voting on the issue at hand (§ 109 (2) AktG). A violation of the duty of loyalty could result in civil liability for the damages incurred (or profits made) and even in criminal sanctions (§ 266 (1) Strafgesetzbuch).

Having examined the role and duties of the executive and supervisory board, I studied the control rights of individual shareholders and the position of the AGM, in § 22.4. German corporate law, through § 8 AktG, distinguishes between par-value shares (*Nennbetragsaktien*) and non-par value shares (*Stückaktien*). The (fictional) par value of shares is strictly regulated and plays a highly visible role for the allocation of control and profit rights. The (fictional) par value of a stock should be at least € 1.. Additionally, § 8 AktG contains a ban on the partitioning of shareholder membership rights (*Abspaltungsverbot*), including the right to vote. If such a mechanism were absent, many of the mandatory provisions of German corporate law could be easily circumvented, and securities would become less standardized. Importantly, the *Abspaltungsverbot* only encompasses shareholder membership rights in the abstract sense. Its scope is in practice rather limited and does not affect, for instance, mechanisms such as derivatives, securities lending or depository receipts.

The matter of voting rights is governed by § 12 and § 134 AktG. German corporate law relates the number of votes in a proportional manner to the share's (fictional) par value (*Kapitalprinzip*). The issuance of multiple voting stock (*Mehrstimmrechte*) and loyalty shares is prohibited. For corporations that have previously issued multiple voting stock, the annual report should disclose the aggregate number of votes. Meanwhile, some decisions not only require a majority of the votes but also a majority of the represented share capital. To the extent this is the case, multiple voting shares are less useful in ensuring a lock on control. The decision-making rights of shareholders as united in the AGM, are outlined in § 119 AktG. There are also certain matters in the sphere of competence of the executive board. On these issues, the AGM may only decide at the executive board's explicit request. One well-known exception follows from the *Holzmuller*-doctrine. In that case, a holding corporation transferred 80 % of its assets to a subsidiary. As a result, certain competences shifted from the parent corporation's AGM to its executive and supervisory board. When shareholder rights are affected in this manner, the AGM holds an unwritten right of approval.

As a final element of Chapter 22, I analyzed the financial rights of shareholders, in § 22.5. German corporate law contains a sizeable body of provisions in relation to the formation and retention of capital and the distribution of dividends. Pursuant to § 7 AktG, the minimum legal capital of the AG is € 50,000. Moreover, § 58 (2) AktG stipulates that the executive and supervisory board may choose to reserve up to half of the annual profit (*Gewinnrücklage*). However, the total amount of this reserve should not exceed 50 % of the issued share capital. Similarly, § 150 AktG mandates the creation of a loss reserve of 10 % of the issued share capital, by retaining 5 % of the annual net income (*gesetzliche Rücklage*). To prevent dividend starvation by insiders, § 254 AktG grants outside minority investors an entitlement to judicial review in case the dividends fall below 4 %. Whether a distribution can lawfully be made is determined by a balance sheet test. If declaring a dividend is indeed possible, the shareholder's entitlement is calculated, in principle, in proportion to the (artificial) par value of the securities held (§ 60 AktG). The Articles of Association may provide for a different calculation basis. Interim dividends are permitted, but only if a number of onerous conditions are met.

The most relevant exception to the foregoing is laid down in § 139 AktG. Accordingly, shares which carry a dividend preference may be issued without voting rights. The issuance of preference shares with limited voting rights is not permitted: voting rights must be fully absent. These securities may constitute up to 50 % of the issued share capital. The dividend preference can be designed in many ways, but the size of the dividend preference must be set forward in the Articles of Association in an objective manner. Although the dividend preference is mandatory, there exist no minimum thresholds concerning. Non-voting preference shares are, in principle, disregarded for calculating vote and capital-based majority requirements. By contrast, these instruments should be taken into consideration for determining whether a sufficiently large part of the issued share capital supports a request to convene an AGM or to add a proposal to the agenda. Given that distributions may only be made out of realized profits, it would be conceivable that in some years, the obligations towards holders of non-voting preference shares cannot be satisfied. Such dividend entitlements of investors do not expire automatically. Instead, the overdue dividends should be paid in the subsequent years during which the required profits have been realized. The right to vote is typically reinstated in case the dividend has been (partially) in arrears for one year and the total amount is not paid out in full in the subsequent year. The revival of the right to vote also results in the reinstatement of related shareholder membership rights, such as inclusion in vote and capital-based majority thresholds.

24.4 Restructuring shareholder rights

To conclude the comparative German analysis, I discussed the criteria for restructuring shareholder control and profit rights, in Chapter 23. This analysis should be viewed as the synthesis of Chapters 20 to 22. In § 23.2, I examined the legal requirements for issuing non-voting preference shares. Various scenarios can be distinguished. Such securities can be introduced directly or created through the conversion of common stock. Pursuant to § 141 (2) and (3) AktG, the issuance of non-voting shares requires approval by a majority of 75 % of the represented share capital (not: votes). Moreover, § 141 AktG provides a class vote (with a similar majority) for the shareholders whose rights are restricted because of the issuance. This provision only covers dividend rights, and no other shareholder membership powers. Therefore, a central question is under what circumstances a modification of the governance framework counts as an adverse effect on existing financial entitlements of shareholders (*benachteiligung*). The archetypical example of a qualified indirect intervention is the issuance of non-voting preference shares which carry preferential profit rights equal or superior to the ones already outstanding. Furthermore, common stock can be converted into non-voting preference shares. If the offer targets all investors, the required majority is again 75 %. However, if the proposal only addresses some but not all shareholders, a 75 % capital majority is insufficient. Instead, individual shareholder consent, by both holders of common and non-voting preference shares, is needed. Finally, an existing dual class equity can be modified by reducing the preferential dividend entitlement. This is a direct intervention in shareholder rights, which equally needs approval through a 75 % class vote.

By contrast, the cancellation of a dual class equity structure may either involve the abolishment of non-voting preference shares or the abolishment of multiple voting stock. This situation was analyzed in § 23.3. Non-voting preference shares can be cancelled or converted into common shares. Both conversion and cancellation require approval by existing holders of common stock and non-voting preference shares, by a 75 % capital majority. In principle, the conversion of non-voting preference shares into common stock (or vice versa) does not give rise to any obligation to indemnify shareholders of either class. Meanwhile, a corporation can choose voluntarily to demand a premium from holders of either class of stock to effectuate the conversion, and is free to propose the size of the premium. Another potentially contentious matter concerns the treatment of holders of different types of stock in case of a takeover. According to § 29 WpÜG, any offer should be extended to holders of non-voting preference shares as well. The obligation equally applies in case solely unlisted (common) shares are acquired. Importantly, the foregoing does not mean that holders of common and non-voting preference are entitled to identical compensation. The situation of a public offer is somewhat related to that of a shareholder assuming power in the form of a control agreement (*Beherrschungsvertrag*) with the corporation. A successful change of control creates a compensation (*Ausgleich*) or exit (*Abfindung*) right for outside minority shareholders. This state of affairs has given rise to an abundant body of case law regarding the valuation of (common and) non-voting preference shares. Two frequently applied methods are the Discounted Cash Flow-analysis (*Ertragswert*) and a comparison of market prices of common and non-voting preference shares of a series of similar listed corporations (*Vergleichswert*).

Additionally, there is the issue of abolishing multiple voting stock. These securities ceased to exist on June 1st, 2003, if a corporation's AGM has not confirmed their continuation before this date by a 75 % capital-based majority. Holders of multiple voting shares were excluded from this vote. Additionally, both before and after June 1st, 2003, the AGM may abolish dual class equity structures by a simple majority of the represented share capital. Under the second regime, holders of multiple voting shares can participate in the decision-making process. However, their involvement is limited to the extent warranted by the *Kapitalprinzip*. Despite some initial resistance by the German government, shareholders of whom the multiple voting rights have been cancelled are entitled to compensation from the corporation. Various factors, including the origins of the multiple voting rights, transferability of the securities and the total voting power affected, should be considered for valuation purposes. In practice, the compensation is often calculated by applying the relative approach (*Vergleichswert*). Any compensation due may be paid in cash, on a lump sum basis or in a number of installments, stock, or otherwise. However, the courts have been skeptical of granting holders of multiple voting shares any consideration. In fact, case law indicates there is also a considerable chance of no compensation being granted at all.

Although the German system regarding dual class equity structure recapitalizations is detailed and sophisticated, it does not operate smoothly. The shortcomings of the German system were discussed in § 23.4. From a life-cycle perspective, preference shares, to a certain degree, resemble bonds. This poses a challenge, due to the uncertainty of younger firms' ability to generate cash flow. Presumably, non-voting preference shares would be particularly suitable for family businesses, which are the backbone of the German economy. Precisely for this reason however, their transplantability to jurisidctions featuring a different socio-economic situation may be questioned. Moreover, if a corporate crisis actually were to arise, it would take up to two whole years before the holders of *Vorzugsaktien* would be granted the right to vote, allowing them intervene. The size of the dividend preference is another complicating factor. In a low or even negative interest environment, previously issued non-voting preference shares can become expensive fairly quickly and vice versa. Furthermore, some situations which may thoroughly affect the position of holders of non-voting preference shares are not covered (and therefore protected) by a class vote, due to doctrinal inconsistencies. Finally, German corporate law recognizes no obligation to grant dissenting owners of common or non-voting preference stocks compensation or an exit right following an introduction of non-voting preference shares, even though this might entail an important reshuffeling of economic interests.

Due to the foregoing, I am hesitant to conclude that non-voting preference shares are preferable over dual class (superior and inferior) voting stock as an instrument to allocate control over the corporation. Indeed, the issue of control should be addressed directly, through voting rights, rather than indirectly by means of a financial-rights based mechanism. In fact, introducing dividend payments into the corporate control equation adds another layer of complexity. Meanwhile, both approaches are not mutually exclusive. In case the statutory regime to govern non-voting preference shares were more enabling in nature, it could serve as a viable alternative to a dual class equity structures. Undoubtedly, there will exist some corporations for which the dividend-based approach is more appealing than the voting-based approach, due to idiosyncrasies.

Part V

– Dutch Comparative Analysis –

Chapter 25. Introduction to part V

In Part V, I discuss dual class equity structures from a Dutch comparative governance perspective. The rationale for this approach has been outlined in Chapters 3 and 4 (specifically, *see see* § 3.3.3 and § 4.3 *supra*). The structure of Part V is as follows. In Chapter 26, I analyze the foundations of the Dutch corporate legal system. Accordingly, I examine position of the Dutch legislator and the relevance of ideas exchanged between the various parts of the Kingdom of the Netherlands, in § 26.2. Subsequently, I study the legal entities to be taken in consideration for the comparative research, in § 26.3, as well as, adopting a more normative point-of-view, how close and open corporations should relate to each other. Additionally, I consider the defining feature of the Dutch corporate law: the principle of reasonableness and fairness (§ 26.4). Finally, in § 26.5, I discuss the relevance of the Dutch Corporate Governance Code for the Dutch legal order.

Building on these initial observations, Chapter 27 continues with a historical analysis of dual class equity structures in the Netherlands. To that end, I distinguish several periods during which the position of investors underwent fundamental changes. I start with an extensive discussion of the developments in the 19th century (§ 27.2), focusing especially on early and late 1800s. For the 20th century, the analysis is geared primarily towards the 1920s (§ 27.3) and the "long 1990s", which also includes events that occurred in the late 1980s (§ 27.4).

Subsequently, in Chapter 28, I study the current Dutch legal framework in the usual order. Therefore, I first examine the character of the Dutch corporation, focusing on its purpose, approach to legal personhood and semi-mandatory character of the governing statute, in § 28.2. Then, I discuss the position and composition of the executive and/or supervisory board, its installation and removal, fiduciary duties of directors, the standards applied by the Dutch courts for assessing their behavior, and the criteria for director independence, in § 28.3. Additionally, in § 28.4, I analyze shareholder control rights and the position of the AGM. To that end, I first discuss the scope and relevance of certain concepts, including par value and equal treatment. Subsequently, I consider shareholder voting rights, as well as various deviations from the one share, one vote default rule, including depository receipts, loyalty shares and multiple voting shares. This § 28.4 also studies the position of the AGM and convocation and agenda setting rights. Finally, in § 28.5, I examine shareholders' financial rights. This includes matters of capital formation and retention, directors' powers to declare dividends, financial constraints in this regard and the possibilities to create classes of stock carrying different financial entitlements. The findings of Part V are summarized in Chapter 29.

Contrary to the US (*see* Chapter 17) and German (*see* Chapter 23) comparative governance analyses, the study of the Dutch legal system does not present a discussion of the requirements regarding midstream introductions and cancellations of dual class equity structures. As opposed to the US, the Dutch legal order does not offer an elaborate case law scheme to address dual class equity structure recapitalizations. Contrary to Germany, the Dutch system does not provide a detailed statutory regime. Therefore, I omit what would have been a somewhat superfluous discussion. However, the attentive reader will note that, as scholarly balm for any wounded feelings, Chapter 30 briefly outlines the current state of affairs and how to go forward. Moreover, Chapter 31 not only contains the general conclusions of this PhD-thesis, but also a normative analysis of dual class equity structure recapitalizations in the Dutch legal order.

Chapter 26. The Dutch corporate law system

26.1 Introduction

In Chapter 26, I analyze the foundations of Dutch corporate governance. Accordingly, I examine position of the Dutch legislator and the exchange of innovative ideas between the various parts of the Kingdom of the Netherlands, in § 26.2. Subsequently, I study the legal entities to be taken in consideration for the comparative research, in § 26.3, as well as, adopting a more normative point-of-view, how close and open corporations should relate to each other. Additionally, I consider the defining feature of the Dutch corporate law: the principle of reasonableness and fairness (§ 26.4). Finally, in § 26.5, I discuss the relevance of the Dutch Corporate Governance Code.

26.2 Federal versus state law: the Dutch way

The Netherlands are a decentralized unitary state (*gedecentraliseerde eenheidsstaat*). However, according to art. 81 of the Dutch Constitution, there exists a single national legislative authority.[1] Amongst a wide range of statutes, the central Dutch legislator has enacted the Dutch Civil Code (*Burgerlijk Wetboek*, BW).[2] Book 2 of the Dutch Civil Code is the main legal body to govern corporations.

Meanwhile, the foregoing solely addresses the Netherlands as a part of Continental Europe. From a constitutional perspective, the Netherlands may also be considered as a constituent state of the Kingdom of the Netherlands (Kingdom). In addition to Holland proper, the Kingdom consists of Aruba, Curaçao and Sint Maarten (jointly the former Dutch Antilles, an entity which was abolished in 2010[3]). The Kingdom has its own statute, the Charter for the Kingdom of

1. *See* J.L.W. Broeksteeg, *Tekst & Commentaar Grondwet en Statuut* § 81, 1-4 (P.P.W. Bovend'Eert et al. eds., 2018).
2. *See* Vaststelling van de hoofdstukken 1 en 6 van de Invoeringswet Boek 2 N.B.W., *Stb*. 1976, 228; *see also* Vaststelling hoofdstukken 1, 2, 3, 4, en 5 van de Invoeringswet Boek 2 N.B.W., *Stb*. 1976, 229. *See* https://zoek.officielebekendmakingen.nl/uitgebreidzoeken/parlementair/ for parliamentary papers and memoranda of the Dutch legislator from 1814 onwards.
3. The Dutch Antilles, as a single country within the Kingdom, have ceased to exist. Instead, Sint Maarten, Aruba and Curaçao have become separate countries. *See* Rijkswet wijziging

the Netherlands (Charter).[4] This document governs the relationship between the various countries. It should be distinguished from the Dutch Constitution, which merely addresses the Continental European part of the Kingdom. Under art. 39 (1) of the Charter, matters of civil and commercial law should be harmonized as far as possible. This is the principle of legislative concordance (*concordantiebeginsel*).[5] Any proposal containing "drastic" amendments to existing legislation shall, according art. 39 (2) of the Charter, not be enacted before governments of the other constituent countries of the Kingdom have had the opportunity to express their views. However, this procedure is intentionally non-enforceable, and violations cannot be penalized. Thus, although the laws of the Netherlands and the former Dutch Antilles tend(ed) to resemble each other, there was and is no binding obligation for utter alignment.[6] Meanwhile, the *Hoge Raad* (Dutch Supreme Court) has been designated as the highest judicial body for the entire Kingdom, the Continental European part of the Kingdom and the former Dutch Antilles alike.[7] However, the Dutch Supreme Court may, depending on the circumstances, equally reject concordantic interpretation of legal provisions,[8] although scholars continue to debate under which specific circumstances doing so is allowed.[9]

All this not only provides fertile ground for fascinating constitutional debate, but has actual corporate law implications as well. Instead of adopting Book 2 of the Dutch Civil Code, the former Dutch Antilles have enacted corporate statutes of their own. In fact, the corporate statutes of the former Dutch Antil-

---

Statuut in verband met de opheffing van de Nederlandse Antillen, *Stb*. 2010, 333.

4. On the history of the Charter, *see* J.M. Saleh, *50 Jaar Statuut van het Koninkrijk: in vrijheid en verscheidenheid verbonden of tot elkaar veroordeeld* (Universiteit Utrecht, 2006); *see also* G. Oostindie & I. Klinkers, *Decolonising the Caribbean: Dutch Policies in a Comparative Perspective* (Amsterdam University Press, 2003).
5. For a constitutional analysis of the implications of S. 39 of the Charter, *see* E. van Keeken, 'De toekomst van het concordantiebeginsel', 8 *Caribisch Juristenblad* 189 (2019); *see also* L.J.J. Rogier, 'Het einde van het concordantiebeginsel?', 177 *Rechtsgeleerd Magazijn Themis* 124, 127 (2016); C. Borman, *Het statuut voor het Koninkrijk* 193 (Deventer, 2012); M. Lang, *Die Entwicklung des Unternehmensrechts der Niederländischen Antillen* 19, 39 (Münster, 2001).
6. *See* Van Keeken 2019, *supra* note 5, at 192; *see also* Rogier 2016, *supra* note 5; Borman 2012, *supra* note 5, at 193; Lang 2001, *supra* note 5, at 39.
7. *See* art. 23 Statute and art. 1 (1) Rijkswet rechtsmacht Hoge Raad voor Aruba, Curaçao, Sint Maarten en voor Bonaire, Sint Eustatius en Saba. The Dutch Supreme Court has subscribed to this view on its position. *See* Hoge Raad 14 February 1997, ECLI:NL:HR:1997:ZC2280.
8. *See* Conclusion by the Attorney-General to the Dutch Supreme Court 26 October 2012, ECLI:NL:PHR:2013:BY1880 (*Austria/APA*), observing concordanctic interpretation should be refused in case i) a legislator intended to deviate from an existing norm set by another legislator, ii) the statutory provisions conflict with each other or iii) relevant social norms are rather different; *see also* Hoge Raad 13 April 2007, ECLI:NL:HR:2007:AZ6095 (regarding marriage requirements).
9. For instance, it is not entirely clear whether concordantic interpretation is permitted when one legal system is silent on a matter whereas another is not. For analyses of this discussion, *See* Van Keeken 2019, *supra* note 5, at 192; *see also* Rogier 2016, *supra* note 5.

les have been noted by scholars for being (even) more flexible than Book 2 of the Dutch Civil Code.[10] This may be attributed to US corporate law (*see* Part 2), which has been influencing the statutes of the former Dutch Antilles for an extended period of time. Understandably, local legislators have been catering to the numerous American investors present in the Caribbean by offering a recognizable "product".[11] Consequently, the exchange of legal ideas between the various parts of the Kingdom has not been a one-way affair originating from Europe, at least not as far as corporate matters are concerned: various concepts have made their way from the former Dutch Antilles to Holland.[12] In similar vein, the Dutch Supreme Court is frequently adjudicated by corporate lawyers from Aruba, Curaçao or Sint Maarten.[13]

As a result, the corporate laws of the former Dutch Antilles are discussed wherever relevant for the Dutch legal analysis. The bodies of corporate law of the various parts of the former Dutch Antilles are largely identical. To the extent differences exist, I focus on the laws of Curaçao. These are the most modern, having been reviewed in 2012.[14] Moreover, Curaçao is an acceptable choice in terms of relevance, as its economy carries the most weight and is the largest compared to the two other countries.[15]

10. For authoritative observations, *see* P. van Schilfgaarde, 'Concordantie in het privaatrecht', 130 *Weekblad voor Privaatrecht, Notariaat en Registratie* 318 (1999); *see also* C. Honée, 'Moet Boek 2 worden ingevoerd?', 130 *Weekblad voor Privaatrecht, Notariaat en Registratie* 373 (1999).
11. *See* Van Schilfgaarde 1999, *supra* note 10; *see also* Honée 1999, *supra* note 10, both mentioning the absence of rigid legal provisions of EU origin, for instance regarding capital protection, as an additional factor for the flexibility of the statutes of the former Dutch Antilles. On the market for incorporation, *see* § 14.5 *supra*.
12. One example involves the reform of the Dutch statute in respect of the private limited company, completed in 2012 (*see* § 26.3.1 *infra*). As part of the preparations, the Working Group Corporate Law Concordance (*Werkgroep Concordantie Rechtspersonenrecht*) was established, making numerous recommendations inspired by the laws of the former Dutch Antilles. *See* T.A. Keijzer & L. in 't Veld, ''Slechts' aanspraak op het liquidatie-overschot: onvoldoende om van een BV-aandeel te kunnen spreken?', 18 *Ondernemingsrecht* 168 (2016).
13. For relevant examples, *see* Hoge Raad 8 March 2019, ECLI:NL:HR:2019:316 (concerning the admissibility of evidence for establishing mismanagement); *see also* Hoge Raad 9 January 2015, ECLI:NL:HR:2015:38 (on the dismissal of directors of a one tier board).
14. These modifications were actually triggered by the Dutch reform of the statute governing private limited companies (*see* note 12 *supra*), thus finely illustrating the reciprocity of legal developments. For an analysis of the 2012 changes by the Curaçao legislator, *see* B. Boersma & H. Sprenger, 'Ingrijpende herziening van het Curaçaose rechtspersonenrecht een feit', 14 *Ondernemingsrecht* 685 (2012).
15. As of 2018, Curaçao's GDP amounted to $ 3.13 billion, versus $ 2.70 billion for Aruba and approximately $ 500 million for Sint Maarten, based on World Bank data.

26.3 Relevant legal entities

26.3.1 Open versus closed corporations

Traditionally, Dutch law has provided two corporate entities specifically designed for engaging in entrepreneurial activity. These are the public limited company (*naamloze vennootschap*, NV), governed by art. 2:64-2:174a BW and the private limited company (*besloten vennootschap*, BV), covered by art. 2:175-2:284a BW.[16] Whereas the NV is open in nature, the BV has a closed character. As such, the situation is principally rather straightforward: solely the legal framework governing the NV must be taken into consideration for the PhD-thesis (*see* § 4.3.2 *supra*).

Meanwhile, drawing such a conclusion would ignore the fact that a fundamental policy debate is taking place on the relationship between the BV and the NV. The BV was initially introduced, in 1971, as a virtually verbatim copy of the NV.[17] Raaijmakers has especially been critical of this state of affairs.[18] The BV became considerably more enabling following the reform of 2012,[19] thus obtaining a profile of its own (the Flex BV).[20] This development prompted the Corporate Law Committee (*Commissie Vennootschapsrecht*), an advisory body of eminent scholars, to analyze to which degree the statute governing the NV should be similarly deregulated, whether there were grounds for maintaining two separate legal frameworks at all and, if that were indeed the case, whether both entities must retain a distinct character. The Corporate Law Committee

---

16. Naturally, Dutch law is also familiar with partnerships. However, contrary to the situation in Germany (*see* § 20.3 *supra*), it is not common for (leading) Dutch listed corporations to be run in the form of a hybrid corporation-partnership combination.
17. The main goal of the BV-statute was enabling entrepreneurs to evade annual reporting obligations which the First Company Law Directive of 1968 imposed on the NV. *See* M. van Olffen & G.J.C. Rensen, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands burgerlijk recht. 2. Rechtspersonenrecht. Deel IIa. NV en BV. Oprichting, vermogen en aandelen* § 7, 15 (Wolters Kluwer, 2019); *see also* M.J. Kroeze, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 2. Rechtspersonenrecht. Deel I. De rechtspersoon* § 150 (Wolters Kluwer, 2015).
18. *See* M.J.G.C. Raaijmakers, ‘’Besloten’ vennootschappen: quasi-nv of quasi-vof? Enkele rechtsvergelijkende notities’, 43 *Ars Aequi* 76 (1994); *see also* M.J.G.C. Raaijmakers, *Rechtspersonen tussen contract en instituut* (Kluwer, 1987).
19. For an analysis of the possibilities under the revised legal framework, *see* M. Cremers, 'Hoe flexibiliseer je een BV?', 14 *Ondernemingsrecht* 603 (2012); *see also* H.J. Portengen, 'Interne verhoudingen – flex bv', 138 *Weekblad voor Privaatrecht, Notariaat en Registratie* 940 (2007).
20. For a thorough overview of the legislative process, *see* H. Koster, *De Flex BV* (Kluwer, 2013); *see also* F.J.P. van den Ingh & R.G.J. Nowak, *Vereenvoudiging en flexibilisering BV-recht deel I. De pre-parlementaire geschiedenis* (Kluwer, 2006); R.G.J. Nowak & A.M. Memmens, *Vereenvoudiging en flexibilisering deel II. De parlementaire geschiedenis* (Kluwer, 2012). For the avoidance of doubt, it should be noted that the "Flex BV" is not a distinct legal entity or variant of a regular BV; it merely involves a buzzword.

published its report in 2013. It recognized various motives for organizations to adopt the legal form of an NV, including i) becoming an open and/or listed corporation, ii) being required to do so by law, for instance securities laws, and iii) prestige.[21] The Corporate Law Committee concluded that the direction of future NV-law depended on the users for which the statute should be written. Since a clear path forward could not be provided, the Corporate Law Committee advised caution with regard to making fundamental changes to the statute for the NV, at least until more experience had been gained with the reforms implemented as part of the Flex-BV. However, it did identify some quick wins.[22]

One private institution which has participated actively in the debate on the rights of shareholders of Dutch listed NV's is Eumedion, an association of institutional investors. In its draft Position Paper of October 2015, Eumedion observed increasingly concentrated patterns of share ownership.[23] Feeling that corporate checks-and-balances were under threat, Eumedion initially proposed to limit the increase in voting rights, resulting from an introduction of loyalty or multiple voting shares, to 5 % in excess of the investor's equity stake.[24] In the final version of its Position Paper, published in June 2016, Eumedion presented a rather different proposal. Instead of maximizing the increase in control power, it advocated a majority-of-the-minority vote (*see* § 11.3.1 *supra*) on the decision the implement a loyalty or multiple voting structure. Moreover, Eumedion argued that in certain circumstances, such a vote could be ineffective – for instance if the loyalty or multiple voting structure was implemented prior to the IPO or as part of a cross-border merger. Principally, therefore, Eumedion advocated the use of sunset provisions (*see* § 11.3.3 *supra*), proposing a default sunset period of 3 to 5 years.[25]

---

21. *See* Commissie Vennootschapsrecht, 'Advies NV-recht van 15 juli 2013' 2 (2013), available at http://www.rijksoverheid.nl/documenten/brieven/2013/07/18/advies-nv-recht-15-juli-2013/. For an extensive overview, *see* M.A. Verbrugh, 'Van de NV naar de BV naar de NV?', 64 *Ars Aequi* 263 (2014). In Verbrugh's view, the legislator must decide whether to cater towards the preferences of NVs established pre- or post-2012. For the former, a flexible legal framework was absent when the decision to incorporate was originally made, suggesting that NV law should be deregulated as well. For the latter, the opposite is true.
22. *See* Commissie Vennootschapsrecht 2013, *supra* note 21, at 2-3, for an overview of the proposed measures.
23. To a considerable degree, Eumedion was referring to the use of loyalty shares, discussed elsewhere in this PhD-thesis (*see* § 28.4.3 *infra*).
24. For a similar proposal, *see* J.M. de Jongh, 'Het loyaliteitsstemrecht. Een terreinverkenning', 11 *Ondernemingsrecht* 442 (2009). *But see* A.A. Bootsma, 'Loyaliteitsdividend, bijzondere stemrechtaandelen en de positie van minderheidsaandeelhouders. Midstream or IPO introduction, that's the question', 2 *Maandblad voor Ondernemingsrecht* 151 (2016), convincingly arguing against arbitrary voting rights limitations.
25. The draft Eumedion Position Paper (October 2015) and the final version (June 2016) are both available at http://www.eumedion.nl/nl/kennisbank/. VNO-NCW and VEUO, representing issuer interests, were particularly harsh in their criticisms, arguing a majority-of-the-minority vote and a sunset provision were at odds with the principles of legal certainty and violated the right to property (Article 1 of Protocol No. 1 to the European Convention on

In 2016 and 2018, the Minister of Justice (the Minister) provided some policy observations, largely in response to the Corporate Law Committee recommendations of 2013 and the Eumedion Position Papers of 2015 and 2016. In the 2016 letter, the Minister stated that the aim of any reform of Dutch corporate law must be the creation of a competitive legal system. First and foremost, this objective was understood as requiring a flexible legal framework.[26] The Minister accepted the minor proposals made by the Corporate Law Committee, discussed shareholder rights extensively and formally welcomed a more flexible statute, but chose not to elaborate specifically on the future position of the (listed) NV vis-à-vis the BV. This may be attributed to the then-pending review of the SRD II, whilst also serving to buy the legislator time for further discussions with relevant stakeholders.[27] By contrast, in 2018, a wide range of specific measures to modernize the statute of the NV was put forward.[28] Moreover, the Minister acknowledged the possibility of various NVs having a wholly different character, because of the presence or absence of a listing on the stock exchange and variances in the investor base. Furthermore, it was announced that future reforms would be aimed at the open (and presumably: listed) variant of the NV, featuring dispersed share ownership (*see* § 2.2.3 *supra*).

The relationship between the NV and the BV has also received considerable attention from scholars. The academic debate has, to a considerable extent, focused on the subtly different issue of whether a separate statute should be drafted to govern listed NVs, as opposed to unlisted NVs. Hijink[29] as well as Raaijmakers and Raaijmakers[30] have argued in favor of a distinct code. Other leading scholars have observed that it ought to be possible for the BV to be listed on the stock exchange (*see* § 26.3.2 *infra*). This strategy would render a

Human Rights). I generally do not share these observations: if the Articles of Association mandate a majority-of-the-minority vote and/or sunset provision, that would be perfectly foreseeable. However, this would be different if Eumedion's proposals would be implemented without grandfathering in existing situations.

26. Other goals included maintaining the balance of powers between investors and directors, stimulating corporate disclosure, countering the abuse of limited liability and retaining sufficient possibilities for swift and efficient judicial intervention. *See Kamerstukken II* 2016/17, 29752, nr. 9, p. 5. The memorandum echoed a previous announcement. *See Kamerstukken II* 2003/04, 29752, nr. 2.
27. *See Kamerstukken II* 2016/17, 29752, nr. 9, p. 19-21.
28. *See Kamerstukken II* 2018/19, 29752, nr. 12, p. 14. The measures contemplated related to, amongst others, non-par value shares, director remuneration, partnership law and cross-border mergers and conversions.
29. For a particularly determined argument, *see* J.B.S. Hijink, 'Regulering van de beursvennootschap: over Deel 5 Wft als rommelkamer en ontwikkelingen buiten Boek 2 BW', 21 *Ondernemingsrecht* 834 (2019) (pointing to the fragmentation of legal provisions relevant for listed corporations); *see also* A.A. Bootsma & J.B.S. Hijink, 'De beurs-NV in den vreemde. Een perspectief op modernisering van het NV-recht', 16 *Ondernemingsrecht* 85 (2014).
30. *See* G.T.M.J. Raaijmakers & M.J.G.C. Raaijmakers, 'De NV in 2020', 16 *Ondernemingsrecht* 53 (2014).

separate statute for the listed NV redundant, entailing that the BV becomes the sole corporate entity under Dutch law principally focused at entrepreneurial activity. In fact, this approach may be considered the polar opposite of having a distinct legal framework for the listed NV.[31]

26.3.2 Something is mixed up

Meanwhile, the Flex BV has not solely affected closed corporations, as one might perhaps be inclined to think. As part of the 2012 reform of the BV statute, the requirement of obtaining consent from fellow shareholders to dispose of shares, as previously laid down in art. 2:195 BW, was abolished.[32] Consequently, BV shares can be traded freely, and it became theoretically possible for a BV to become listed on the stock exchange. Such an entity has been referred to as a "listed BV" (*beurs-bv*) in Dutch scholarship.[33] As a result, one could argue that not only the legal framework of closed, but also that of open corporations (although not necessarily that of the NV!) has become more enabling and less rigid (*see* § 28.2.3 *infra*). This does not concern a mere academic possibility. In 2016, FastNed became the first BV to list depository receipts of its shares (*see* § 28.4.2 *infra*) on a regulated market.[34] For the time being, this development has failed to gain further momentum: there has not been an explosion of listed BVs. However, the implications for the structure of Dutch corporate law are numerous. Indeed, if listed businesses were to use the more lenient legal framework of the BV instead of the more rigid structure of the NV, the position of outside minority investors could be severely weakened. Relevant differences between the (listed) BV and the NV include, for instance, the authority to execute stock issuances and the existence of pre-emptive rights of shareholders.[35] By contrast, certain aspects of the statute for the (listed) BV

31. *See* H.J. de Kluiver & M. Wyckaert, 'Regulering van de beurs-NV en de beurs-BV in België en Nederland', in: J. Barneveld et al., *Ondernemingsrecht in de Lage Landen. Wat kunnen wij van de Belgen leren?* 163 (Wolters Kluwer, 2020); *see also* B.J. de Jong, 'Lessen uit het vernieuwde Britse vennootschapsrecht voor de modernisering van het Nederlandse NV-recht', 16 *Ondernemingsrecht* 61 (2014).
32. Technically, art. 2:195 BW stipulated that the Articles of Association of a BV should impose either i) an obligation to obtain approval from a corporate organ (presumably the AGM) in respect of the sale or ii) a right of first refusal for fellow shareholders. *See* Van Olffen & Rensen 2019, *supra* note 17, at § 379-394; *see also* Koster 2013, *supra* note 20, at 13-19.
33. *See* A.A. Bootsma, J.B.S. Hijink & L. in 't Veld, 'De eerste beurs-BV. Certificaten van aandelen in Fastned BV toegelaten tot de handel op de nieuwe gereglementeerde markt van Nx'change', 18 *Ondernemingsrecht* 555 (2016), coining the term.
34. *See* Bootsma, Hijink & In 't Veld 2016, *supra* note 33. Note that the possibility of a BV becoming listed on the stock exchange had been foreseen (and was rejected) by Winter in 2005. *See* J.W. Winter, 'BV, NV en beursvennootschap', in: P. van Schilfgaarde et al. (eds.), *Vereenvoudiging en flexibilisering van het Nederlandse BV-recht* 107 (Kluwer, 2005).
35. *See* Bootsma, Hijink & In 't Veld 2016, *supra* note 33.

are more empowering for outside minority shareholders than its NV counterpart. This is true, for instance, with regard to the equity threshold for shareholder AGM proposals and AGM convocation rights.[36]

The Dutch legislator has nonetheless acknowledged the risks which the wider adaptation of the BV-framework by listed corporations might pose. Instead of engaging in a fundamental debate on the relationship between the BV and NV, it has embraced the fact that SRD II applies to all listed corporations, regardless of their legal form. Accordingly, the implementation of SRD II in Dutch corporate law has been used to stipulate, in art. 2:187 BW, that certain parts of the NV-statute will also apply to the BV by means of analogy.[37] This covers matters such as shareholder convocation and AGM proposal rights, remuneration policies and related party transactions. However, the legislator has stopped shy of declaring the entirety of the NV-framework applicable. This means that, at least for the time being, the listed BV remains somewhat of a legal vacuum. Meanwhile, the NV continues to be, by a distance, the most relevant entity for open, listed corporations. Therefore, the comparative Dutch analysis is strictly geared towards this legal form, although doing so entails disregarding certain current developments.

26.3.3 How it should be: a life-cycle perspective

Life-cycle theory (*see* § 10.6 *supra*) may add a new perspective to the debate on the relationship between the BV and the NV, whether listed or unlisted. First, and as has been observed previously, this concept implies that the corporate legal framework governing the allocation control and financial rights should be primarily enabling and facilitative in nature, especially for younger corporations. Statutory requirements in respect of more mature corporations may be more demanding, but should not become overly strict, as doing so could prevent the corporation from becoming listed on the stock exchange (*see* § 7.3.3 *supra*). Second, life-cycle theory strongly suggests that, if the Dutch legislator were to retain the current approach of two co-existing legal

---

36. *See* Bootsma, Hijink & In ’t Veld 2016, *supra* note 33.
37. *See Kamerstukken II* 2018/19, 35058, nr. 3. For extensive analyses of the consequences of SRD II for the Dutch legal order, *see* M.A. Verbrugh & C.A. Schwarz, ‘Leidt de herziene Aandeelhoudersrichtlijn tot meer langetermijnbetrokkenheid van aandeelhouders?’, 21 *Ondernemingsrecht* 863 (2019); *see also* B.F. Assink & L. Timmerman, ‘Langeter~~mi-~~jnbetrokkenheid van aandeelhouders’, 21 *Ondernemingsrecht* 865 (2019); R. Abma, ‘De positie en rol van institutionele beleggers’, 21 *Ondernemingsrecht* 873 (2019); E.C.H.J. Lokin, ‘Implementatie van de herziene Aandeelhoudersrechtenrichtlijn: het bezoldigingsbeleid’, 21 *Ondernemingsrecht* 881 (2019); J.M. de Jongh, ‘Tegenstrijdig belang en transacties met verbonden partijen’, 21 *Ondernemingsrecht* 892 (2019); H.M. Vletter-van Dort, ‘De bedenktijd: naïef of noodzaak?’, 21 *Ondernemingsrecht* 899 (2019); G.T.M.J. Raaijmakers & M.R.S.S. Soliman, ‘De implementatie van de herziene Aandeelhoudersrechtenrichtlijn’, 21 *Ondernemingsrecht* 908 (2019).

frameworks, there should be a well-designed, clear and effective procedure to facilitate the conversion of a BV into an NV (and, but less likely, vice versa. Preferably, the system should also be extended to include partnerships.) [38] Since, from a life-cycle perspective, it may well be argued that the BV should be enabled to issue shares carrying superior and/or inferior voting and/or profit rights, the law should equally provide a well-developed scheme for the treatment of these securities when converting such a corporation into an NV. In this regard, a fine "how not to" example is provided by the Belgian legislator. The Code of Companies and Associations (*Wetboek van Vennootschappen en Verenigingen*, WVV), as newly enacted in 2019, lets private corporations freely allocate shareholder voting rights (art. 5:42 WVV). Meanwhile, listed corporations can only issue shares which carry 2 votes each at most (art. 7:53 § 1 WVV). This provision, although arguably drafted for the purpose of stimulating corporations to go public, may actually have the opposite effect, locking in the private character of businesses and thus creating an unnecessary bump in the path to corporate maturity.[39]

26.4 Reasonableness & fairness

26.4.1 Meaning

Arguably, the concept of reasonableness and fairness (*redelijkheid en billijkheid*), as laid down in art. 2:8 BW, is the most defining feature of Dutch corporate law.[40] The notion consists of two interrelated elements. Art. 2:8 (1) BW

38. Note that life-cycle theory does not necessarily carry strong implications for the choice between a system consisting of a single or multiple legal entities. A legal framework consisting of one corporate form prevents the conversion issues, but may also result in an overly generic and blunt legal system and vice versa.
39. This is aggravated by the fact that multiple voting shares issued by private corporations under Belgian law cannot be grandfathered in when converting the firm to a public corporation. Instead, such securities must mandatorily be cancelled, after which replacement shares (carrying one vote each) can be issued. *See* art. 7:53 § 4 WVV. For a discussion of the Belgian framework, *see* J. Delvoie & S. Declercq, 'De invoering van meervoudig stemrecht en loyauteitsstemrecht in bestaande vennootschappen', 4 *Tijdschrift voor Rechtspersoon en Vennootschap – Revue pratique des sociétés* 129, 148 (2019); *see also* S. Cools & T.A. Keijzer, 'Dubbel stemrecht in combinatie met een horizonbepaling: een alternatief voor het loyauteitsstemrecht?', 4 *Tijdschrift voor Rechtspersoon en Vennootschap – Revue pratique des sociétés* 239 (2019).
40. In his influential inaugural Rotterdam lecture, Timmerman adopted a more granular analysis and identified 8 principles (and 2 emerging ones) of Dutch corporate law. These included disclosure of material information, freedom of restructuring legal entities and absence of private interests for directors. However, Timmerman also observed that these principles were not absolute. They may cease to apply due to considerations of reasonableness and fairness. *See* L. Timmerman, 'Principles of Prevailing Dutch Company Law', 11 *European Business Organization Law Review* 609 (2010); *see also* L. Timmerman, 'Grondslagen van

contains the behavioral aspect. Accordingly, parties should act reasonable and fair towards each other.[41] By contrast, art. 2:8 (2) BW presents the derogatory element of reasonableness and fairness. Any rule of law, either in the form of an act, custom, or as laid down in the Articles of Association, bylaws or corporate resolutions, shall be inapplicable to the extent that it delivers an inconceivable outcome (*naar maatstaven van redelijkheid en billijkheid onaanvaardbaar*). Thus, art. 2:8 (2) BW sets a rather high threshold for judicial intervention. Indeed, the relevant criterion is not whether any particular situation is less than ideal or undesirable, but rather whether it is in inconceivable. In the absence of extra-ordinary circumstances, the chances of successfully invoking art. 2:8 (2) BW are quite slim. Indeed, this may entail the judiciary (partially) setting aside obligations lawfully accepted by a party and disregarding the (legitimate) expectations of the counterparty.[42]

The two elements of art. 2:8 BW apply to both the corporation itself and those institutionally involved, either by virtue of the law or the Articles of Association. Therefore, art. 2:8 BW addresses the firm's shareholders and owners of depository receipts (*see* § 28.4.2 *infra*),[43] but also its executive and/or supervisory directors and Works Council as well as, depending on the Articles of Association concerned, other stakeholders, for instance holders of profit sharing certificates (*winstbewijzen*).[44] Thus, the mechanism of reasonableness and fairness not only (vertically) covers the relationship between the corporation

---

geldend ondernemingsrecht', 11 *Ondernemingsrecht* 4 (2009). For commentaries, *see* J.M. Blanco Fernández, 'Timmerman's grondslagen: reactie op de oratie', 11 *Ondernemingsrecht* 24 (2009); *see also* H.J. de Kluiver, 'Vennootschappelijke repliek op Timmerman's grondslagen', 11 *Ondernemingsrecht* 17 (2009).

41. Pursuant to art. 1374 (3) of the former Dutch Civil Code, parties were under the obligation to act in (objective) good faith. Based on the *travaux préparatoires* to art. 2:8 BW, the criteria of good faith and reasonableness and fairness are deemed to be substantively similar. *See* C.J. van Zeben, *Parlementaire geschiedenis van het nieuwe burgerlijk wetboek: parlementaire stukken. Boek 2 Rechtspersonen* 136 (Kluwer, 1963).

42. *See* J.M.M. Maeijer, 'De corrigerende werking van de redelijkheid en billijkheid', in: *Goed en trouw: opstellen aangeboden aan W.C.L. van der Grinten ter gelegenheid van zijn afscheid als hoogleraar aan de Katholieke Universiteit Nijmegen* 31 (E.A.A. Luijten & W.C.L. van der Grinten, eds.)

43. It should be noted that some authors have distinguished between depository receipts of which the creation has been approved by the corporation itself (presumably through a decision of the AGM) and instruments for which this has not been the case. The argument goes that only holders of the first type of securities qualify as being institutionally involved. This debate is beyond the scope of this PhD-thesis. Especially for open, listed corporations, the creation of depository receipts will usually, if not always be supported by the issuing entity.

44. It has been debated whether the Works Council (*Ondernemingsraad*) can invoke art. 2:8 BW. Most scholars assume the Works Council is indeed empowered to do so. Indeed, the Works Council has the right to present its views on certain decisions, and must give its consent to others, pursuant to art. 25 and 27 of the Works Councils Act (*Wet op de Ondernemingsraden*). *See* Kroeze 2015, *supra* note 17, at § 225. Although supervisory boards under Dutch law do feature an element of co-determination, this aspect is generally less pronounced than is the case under German law (*see* § 20.4.2 *supra*), whilst there are also quite some

and its stakeholders, but also extends (horizontally) to actions of one stakeholder to another. Decisions made by corporate organs in violation of art. 2:8 BW are voidable, pursuant to art. 2:15 (1) (b) BW.[45]

The two-pronged concept of reasonableness and fairness is ingrained in Dutch private law. In fact, art. 2:8 BW is merely the corporate law variant of art. 6:2 BW and 6:248 BW, which contain similar provisions in relation to contracts in general.[46] Dutch labor law similarly presents a pendant of the requirement of reasonableness and fairness, as laid down in art. 7:613 BW.[47] As such, it is hard to overestimate the importance of this notion. Applying the concept or reasonableness and fairness requires an analysis of all circumstances at hand. Generally relevant factors include, for instance, i) the societal position of the conflicting parties, ii) the nature of their interests, iii) previously issued lines of conduct and iv) the severity of the disadvantage to be suffered in the absence of judicial intervention.[48] Following aspect i), a smaller, less-sophisticated party will find it comparatively more feasible to have a contractual provision declared void than a well-organized business conglomerate. This is especially the case if the clause would impose considerable adverse effects for the socially disadvantaged party (*see* aspect iv). With a view to the topic of this PhD-thesis, one meaningful factor for applying art. 2:8 BW is whether a corporation is open and listed on the stock exchange, or closed and more focused on personal element of collaboration (BV). In the latter scenario, the idea of reasonableness and fairness will have its presence more being felt than in case of the former.[49] Another relevant aspect is whether a certain investor can be qualified as a controlling shareholder (*see* § 2.2.3 *infra*).[50] Every investor, including a

exceptions and exemptions. Therefore, the matter is not discussed as a defining characteristic of Dutch corporate law.

45. For an extensive study on resolutions under Dutch corporate law, *see* K.A.M. van Vught, *Het besluit van de rechtspersoon* (Wolters Kluwer, 2020).

46. *See* C.H. Sieburgh, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 6. Verbintenissenrecht. Deel I. De verbintenis in het algemeen, eerste gedeelte* § 55-59 (Wolters Kluwer, 2016); *see also* A.S. Hartkamp & C.H. Sieburgh, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 6. Verbintenissenrecht. Deel III. Algemeen overeenkomstenrecht* § 391-457 (Kluwer, 2014).

47. *See* G.J.J. Heerma van Voss, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 7. Bijzondere overeenkomsten. Deel V. Arbeidsovereenkomst* § 68 (Wolters Kluwer, 2015).

48. For an extensive overview, *see* P.T.J. Wolters, *Alle omstandigheden van het geval. Een onderzoek naar de omstandigheden die de werking van de redelijkheid en billijkheid beïnvloeden* (Kluwer, 2013).

49. *See* M.J. Kroeze, 'Ontklonen', 11 *Ondernemingsrecht* 495 (2009), arguing that the reform of the BV-statute (*see* § 26.3.1 *supra*) will render the concept of reasonableness and fairness less relevant for listed corporations and more important for closed corporations.

50. *See* P. van Schilfgaarde, De redelijkheid en billijkheid in het ondernemingsrecht 224-246 (Wolters Kluwer, 2016); *see also* B. Kemp, *Aandeelhoudersverantwoordelijkheid: De positie en rol van de aandeelhouder en aandeelhoudersvergadering* (Kluwer, 2015); M. Koelemeijer, *Redelijkheid en billijkheid in kapitaalvennootschappen: beschouwingen*

controller, may exercise his shareholder rights to pursue his own his interests, perhaps even at the expense of other corporate constituents. However, such actions are only permitted to the extent that they comply with the requirement of reasonableness and fairness.[51] Since the legitimate interests of other parties should be respected, the corporation has a duty to consider the interests of all its investors. For his part, a controlling investor may owe a special duty of care to his fellow (minority) investors.[52] This is particularly the case when an exit opportunity is (effectively) absent, for instance in freeze-out proceedings. At the same time, outside minority shareholders do not have a vested right to continued share-ownership. They have bought a minority position knowing that they are not masters of their own fate.[53] A special duty of care towards outside minority shareholders may also exist when family members are involved, as in that case, the transaction could suffer from a a conflict of interest (*see* § 28.3.4 *infra*).[54]

In conclusion, Dutch corporate law has a fundamentally different basis than the ideas put forward by agency theory, which views business activity primarily from a conflict-based point of view (*see* § 3.2.2 *supra*). Because of the mitigating effects of art. 2:8 BW, the costs of selfish behavior, as identified by agency theory, should also be less pressing for Dutch corporations, at least theoretically.

26.4.2 Practical examples

Many of the issues that foreign legal systems address by applying director and shareholder fiduciary duties (*see* § 16.3.2 *supra* for a notable example) or a tailor-made legal regime are solved under Dutch corporate law by applying the concept of reasonableness and fairness. As a result, Dutch corporate law may somewhat resemble Pandora's box for outsiders. Viewed differently, art. 2:8 BW grants the judiciary some (although not unlimited) latitude to achieve

rond aandeelhouders en bestuurders in rechtsvergelijkend perspectief 81-192 (Kluwer, 1999).

51. For the classic trinity of cases, *see* Hoge Raad 19 February 1960, ECLI:NL:HR:1960:AG2044 (*Aurora*); *see also* Hoge Raad 13 November 1959, ECLI:NL:HR:1959:AG2043 (*Distilleerderij Melchers*); Hoge Raad 30 June 1944, ECLI:NL:HR:1944:BG9449 (*Wennex*).
52. For a different view, *see* W.J. Slagter, 'De metamorfose van de aandeelhouder', 88 *Nederlands Juristenblad* 2036 (2012), arguing that only the AGM, and not the individual shareholder, is bound by art. 2:8 BW. For convincing rebuttals, *see* J.M. de Jongh, 'Aandeelhouders gebonden aan eisen redelijkheid en billijkheid', 88 *Nederlands Juristenblad* 2622 (2012); *see also* B. Kemp, 'Normering van aandeelhouders. Redelijkheid en billijkheid of misbruik van bevoegdheid?', 89 *Nederlands Juristenblad* 818 (2013).
53. *See* Hoge Raad 14 September 2007, ECLI:NL:HR:2007:BA4887 (*Versatel*), ruling that despite the statutory 95 % threshold to initiate freeze-out proceedings not having been met, controlling majority shareholders are permitted to engage in functionally similar triangular mergers, provided there exist legitimate business purposes to do so (such as operational and tax reasons) as the transaction might otherwise violate art. 2:8 BW.
54. *See* Hoge Raad 1 March 2002, ECLI:NL:HR:2002:AD9857 (*Zwagerman Beheer*).

justice on a case-by-case basis. Some guidance may be helpful to obtain a clearer understanding of the mechanism.

References in case law to the behavioral aspect of reasonableness and fairness, as laid down in art. 2:8 (1) BW, are quite numerous.[55] An often-cited example involves *Willemsen Beheer/NOM*, relating to director liability.[56] Dutch corporate law attempts to stimulate entrepreneurialism by insulating directors from personal liability claims to a certain degree. The relevant criterion for such claims to be awarded is that of a "serious reproach" (*ernstig verwijt*).[57] Following *Willemsen Beheer/NOM*, this standard applies not only in case the personal liability claim is made by the corporation (formerly) governed by the director ("internal liability") but also in case the claim is launched by a shareholder ("external liability").[58] This state of affairs was justified in important part based on art. 2:8 BW. Indeed, share-ownership is, to a certain degree, a voluntary decision. Then, granting investors an easier route to launch personal liability claims than the corporation involved would appear unjustified.[59] A second application of the behavioral element of reasonableness and fairness concerns *PCM*, a well-known Dutch newspaper conglomerate. In 2004, PCM saw a majority of its shares (52.5 %) being acquired by a PE investor. Merely 3 years later, in 2007, the investor decided to sell his stake. The exact order of events is difficult to summarize briefly, but suffice it to say that PCM's equity had vanished, whilst interest costs had increased tenfold.[60] In 2010, in proceedings to determine whether the PE investor had committed mismanagement, the court observed that the obligation to act in accordance with art. 2:8 BW applied not

55. Some cases relating to the reorganization of the corporate capital structure are not mentioned here, but instead discussed in more detail later; *see* § § 28.4.2 and § 28.4.2 *supra*.
56. *See* Hoge Raad 20 June 2008, ECLI:NL:HR:2008:BC4959 (*Willemsen Beheer/NOM*). For a discussion of this case in light of art. 2:8 BW, *see* Van Schilfgaarde 2016, *supra* note 50, at 124-128.
57. *See* art. 2:9 (2) BW. This liability threshold is more demanding than that of an ordinary tort. For authoritative discussions, *see* B.F. Assink, *Rechterlijke toetsing van bestuurlijk gedrag: binnen het vennootschapsrecht van Nederland en Delaware* (Kluwer, 2007) (extensively analyzing case law on the "serious reproach" criterion); *see also* M.J. Kroeze, *Bange bestuurders* (Kluwer, 2005), examining the (psychological) foundations of this standard. On the position of (executive and supervisory) directors under Dutch corporate law, *see* § 28.3 *infra*.
58. On this ruling, *see* D.A.M.H.W. Strik, 'Ernstige verwijtbaarheid: tussen onrechtmatigheid en toerekenbaarheid Over de 'inkleuring' van art. 6:162 BW door art. 2:9 BW', 11 *Ondernemingsrecht* 660 (2009); *see also* B.I. Kraaipoel, 'De maatstaf voor bestuurdersaansprakelijkheid tegenover een individuele aandeelhouder: overeenkomstig art. 2:9 BW', 21 *Bedrijfsjuridische Berichten* 339 (2008).
59. Although the matter was not raised at the *Hoge Raad*, the shareholder claim constituted a derivative suit. On such claims under Dutch corporate law, *see* M.J. Kroeze, *Afgeleide schade en afgeleide actie* (Kluwer, 2004).
60. For an extensive analysis of the investigative report, *see* J. Barneveld, 'PCM & private equity – Over de rol van het vennootschappelijk belang bij vermogensonttrekkingen', 140 *Weekblad voor Privaatrecht, Notariaat en Registratie* 230 (2009).

only to existing investors, but equally to future shareholders.[61] A third example concerns insurer *Delta Lloyd*.[62] In 2004, Dutch corporate law was amended to provide that supervisory directors were, in principle, appointed by the AGM, instead of on a co-opting basis by existing members of the supervisory board. However, the legislator allowed individual corporations to retain the pre-existing model.[63] An AGM proposal to this extent was rejected by Delta Lloyd's majority shareholder, UK-based Aviva PLC. In the legal proceedings that followed, Aviva was instructed by the court to vote in favor of continuing the co-optation model at a future AGM, based on grounds of reasonableness and fairness.[64]

By contrast, cases in which the derogative element of reasonableness and fairness of art. 2:8 (2) BW has been invoked successfully are far less numerous. An older yet still cited example involves *Weduwe Mante*.[65] The case revolved around a widowed investor who owned a sufficiently large block of shares to prevent a proposed modification of the Articles of Association, which served to dilute said investor. Since she did not attend the AGM – having not (properly) been given notice – the proposal was adopted. Eventually, the widow initiated a lawsuit to have the AGM resolution declared void. However, art. 46a of the Dutch Code of Commerce (*Wetboek van Koophandel*, WvK), which was then in force, contained an expiry period of 6 months. This period had already lapsed. Nonetheless, the *Hoge Raad* set aside art. 46a WvK, primarily based on considerations of reasonableness and fairness. What is interesting is that at the time, this concept lacked an explicit statutory basis, illustrating the degree to which it is embedded in Dutch legal theory. A more recent example concerns the *Fortis*-case. In the wake of the financial crisis of 2008, the Dutch government decided to nationalize parts of the Fortis-group. This bank had bitten off more than it could chew by acquiring ABN AMRO, together with its partners, for a total consideration of approximately € 70 billion.[66] Meanwhile,

---

61. *See* Gerechtshof Amsterdam (Ondernemingskamer) 27 May 2010, ECLI:NL:GHAMS:2010:BM5928 (*PCM*). For a thorough discussion, *see* J. Barneveld, *Financiering en vermogensonttrekking door aandeelhouders: een studie naar de grenzen aan de financieringsvrijheid van aandeelhouders in besloten verhoudingen naar Amerikaans,*
Duits en Nederlands recht 413-415 (Kluwer, 2014).
62. *See* Rechtbank Amsterdam 26 March 2008, ECLI:NL:RBAMS:2008:BD1330 (*Delta Lloyd*).
63. *See* art. 2:158 (2) and (12) BW. In general, the 2004 reforms sought to enhance shareholder power. For an elaborate discussion, *see* Overkleeft 2017, *supra* note 25, at 323-344.
64. *See* Rechtbank Amsterdam 26 March 2008, ECLI:NL:RBAMS:2008:BD1330 (*Delta Lloyd*).
65. *See* Hoge Raad 30 October 1964, ECLI:NL:HR:1964:AB6473 (*Weduwe Mante*). For an excellent discussion, *see* Van Schilfgaarde 2016, *supra* note 50, at 239-241; *see also* Kemp 2015, *supra* note 50, at 178-179; J.M. de Jongh, *Tussen societas en universitas. De beursvennootschap en haar aandeelhouders in historisch perspectief* 340 (Kluwer, 2014).
66. *See* D. Quinn, 'Dutch Treat: Netherlands Judiciary only Goes Halfway towards Adopting Delaware Trilogy in Takeover Context', 41 *Vanderbilt Journal of Transnational Law* 1211

art. 2:107a BW stipulates that the AGM must be consulted for acquisitions and disposals relating to in excess of 1/3 of the corporate assets.[67] There are no statutory exceptions to this rule. Nonetheless, the court denied application of art. 2:107a BW.[68] Given the exceptional economic circumstances, it was imperative for the decision-making process to proceed with the utmost speed. Similarly, conditioning the financial support provided by the Dutch government on subsequent AGM approval was not deemed realistic, as such a move would be insufficient to suppress uncertainty amongst investors.[69]

26.5 The Dutch corporate governance code[70]

Similar to many of its foreign counterparts, the Dutch corporate governance Code (the Code) originates from the 1990s. The roots of the Code are often traced back to the 40 Recommendations (*Veertig Aanbevelingen*), made by the Peters Committee in 1997.[71] The 1992 UK Corporate Governance Code has traditionally been viewed as a major source of inspiration for the

(2008); *see also* C. de Groot, A. van Nood & F. Lambert, 'The ABN AMRO Ruling: Some Commentaries' 4 *European Company Law* 168 (2007).

67. *See* G. van Solinge & M.P. Nieuwe Weme, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands burgerlijk recht. 2. Rechtspersonenrecht. Deel IIb. NV en BV. Corporate Governance* § 17-24 (Wolters Kluwer, 2019); *see also* A.G.H. Klaassen, *Bevoegdheden van de algemene vergadering van aandeelhouders. Historische, concernrechtelijke en rechtsvergelijkende beschouwingen, in het bijzonder over structuurwijzigingen* 67 (Kluwer, 2007).
68. *See* Rechtbank Amsterdam 18 May 2011, ECLI:NL:RBAMS:2011:BQ4815 (*FortisEffect c.s./Staat*).
69. Interestingly, the relationship between the notion of reasonableness and fairness and art. 2:107a BW also played a role in the takeover of ABN AMRO itself. There, the question was whether ABN AMRO was required to consult its AGM regarding the disposal of its US LaSalle activities. (This move served to block one of the bidders for ABN AMRO.) Although the sale of LaSalle represented less than 33 % of ABN AMRO's assets, the total amount of consideration paid was nonetheless substantial (€ 21 billion). The *Hoge Raad* ruled that the AGM lacked a right of approval. *See* Hoge Raad 13 July 2007, ECLI:NL:HR:2007:BA7972 (*ABN AMRO*). Thus, the *Hoge Raad* overturned a prior decision by the Enterprise Chamber of the Amsterdam Court of Appeals. *See* Gerechtshof Amsterdam (OK) 3 May 2007, ECLI:NL:GHAMS:2007:BA4395 (*ABN AMRO*). For extensive discussions, *see* Overkleeft 2017, *supra* note 25, at 399-426; *see also* De Jongh 2014, *supra* note 65, at 440-458.
70. In 2016, I was seconded to provide technical assistance for the then-upcoming review of the Code. I would like to express my sincere gratitude to my PhD Supervisors and former colleagues of the Dutch Ministry of Economic Affairs for making this experience possible. The views expressed in this PhD-thesis are solely my own and do not necessarily reflect those of the Monitoring Committee Corporate Governance and/or its members.
71. For an exhaustive discussion of the motives for installing the Peters Committee and the tone of 1990s corporate governance, *see* F.G.K. Overkleeft, *De positie van aandeelhouders in beursvennootschappen. Een analyse van recht, gebeurtenissen en ideeën* 128-138 (Wolters Kluwer, 2017); *see also* De Jongh 2014, *supra* note 65, at 440-458.

40 Recommendations.[72] The Peters Committee aimed to improve the governance of listed corporations and, to that end, made numerous recommendations to strengthen the position of investors.[73] In the wake of several severe accounting scandals, abroad (*see* § 14.4.1 and § 20.6 *supra*) as well as domestic (WorldOnline, KPNQwest, Royal Ahold) and fueled by the generally held view that shareholder empowerment had been insufficient, the 40 Recommendations were replaced by the first edition of the Code, in 2003.[74] The 2003 Code was subsequently replaced by the 2008 Code. As one may conclude, the Code is not revised at predetermined periodic intervals, although monitoring takes place on an annual basis.[75] The most recent Code dates from 2016.[76]

The legal status of the Dutch Code is somewhat similar to its German counterpart. The Dutch Code equally enjoys a statutory basis, in art. 2:391 (5) BW, and is not part of the stock exchange (Euronext Amsterdam) listing rules. The Code consists of fundamental Principles (*Principes*) and more detailed Best Practices. It is based on a comply-or-explain approach; corporations may deviate from both Principles and Best Practices, assuming that such deviations are sufficiently motivated.[77] The provisions of the Code are not, as such, directly legally binding to corporations and/or their investors. However, the Code is deemed to reflect generally accepted Dutch governance views.[78] Depending on the circumstances at hand, parties may be required to comply with the Code, in

72. This was already very much the case in the early 1990 and remains true today. For a recent argument to this extent, *see* H.M. Vletter-van Dort & T.A. Keijzer, 'Herziening Britse Corporate Governance Code: stof tot nadenken', 20 *Ondernemingsrecht* 321 (2018).
73. For instance, the Peters Committee stated that the executive and supervisory board should enjoy the trust of the AGM (Recommendation 28). For a more detailed analysis of AGM rights, *see* § 28.4.5 *infra*.
74. *See* Overkleeft 2017, *supra* note 25, at 301-323. For contemporary discussions, *see* M.J.G.C. Raaijmakers, 'Zelfregulering van corporate governance van beursondernemingen', 135 *Weekblad voor Privaatrecht, Notariaat en Registratie* 67 (2004); *see also* M.W. den Boogert, 'Corporate governance in een stroomversnelling', 5 *Ondernemingsrecht* 406 (2003).
75. For an overview of the 2018 Monitoring Report, *see* S. Rietveld, 'Slotdocument Monitoring Commissie: terugblik, maar vooral ook vooruitkijken', 4 *Maandblad voor Ondernemingsrecht* 157 (2018).
76. *See* R. Kleipool, M. van Olffen & B. Roelvink, *Corporate Governance in the Netherlands: A practical guide to the new Corporate Governance Code* (Eleven International Publishing, 2018); *see also* R.H. Kleipool & M. van Olffen, 'De Nederlandse Corporate Governance Code 2016', 19 *Ondernemingsrecht* 316 (2016) (both discussing the final version of the 2016 Code); S. Rietveld & M. Cremers, 'Herziening van de Corporate Governance Code: een overzicht van de wijzigingen, 18 *Ondernemingsrecht* 318 (2016), analyzing the proposed changes. For an English version, admittedly lacking many of the nuances present in the original, *see* http://www.mccg.nl/.
77. For an extensive analysis on this mechanism, *see* J.G.C.M. Galle, *Consensus on the Comply or Explain Principle Within the EU Corporate Governance Framework: Legal And Empirical Research* (Kluwer, 2012).
78. *See* Hoge Raad 9 July 2010, ECLI:NL:HR:2010:BM0976 (*ASMI*). For an analysis, *see* M.J. van Ginneken, *Vijandige overnames: de rol van de vennootschapsleiding in Nederland en de Verenigde Staten* 63-72 (Kluwer, 2010).

order not to violate art. 2:8 BW (*see* § 26.4 *supra*). The *Cryo-Save* case offers a well-known confirmation in this regard.[79] Even if some scholars have argued that the Code is irrelevant from a legal point of view, [80] its effects on institutionally involved actors are difficult to deny. Therefore, and also because the Code contains a number of Principles and Best Practices in relation to the position of shareholders (*see* § 28.4 *infra*), the instrument is considered as an integral part of the Dutch corporate law and governance analysis.[81]

79. *See* Gerechtshof Amsterdam (OK) 6 September 2013, ECLI:NL:GHAMS:2013:2836 (*Cryo-Save*). For a thorough discussion, *see* K.H.M. de Roo, 'De Corporate Governance Code en het drijfzand van de open norm', 65 *Ars Aequi* 257 (2015); *see also* § 28.4.5 *infra*.
80. *See* S.M. Bartman, 'De Code-Tabaksblat; een juridisch lichtgewicht', 6 *Ondernemingsrecht* 123 (2004).
81. Meanwhile, it has been questioned whether these elements of the Code have been that effective in addressing investor behavior. For a rightfully critical account, *see* H.M. Vletter-van Dort, 'De aandeelhouder als hoeksteen van de beursvennootschap?', 20 *Ondernemingsrecht* 280 (2018), observing the legislator has simultaneously attempted to stimulate investors to engage with the corporation as well as to keep them at bay.

Chapter 27. A history of dutch dual class equity structures

27.1 Introduction

Chapter 27 continues with a historical analysis of dual class equity structures in the Netherlands. As per custom, I start with an extensive discussion of the developments in the 19th century (§ 27.2). In particular, I focused on events in the early and late 1800s – the decline of the VOC and the resulting implosion of the Dutch socio-economic positon on the global theatre, as well as the slow road to recovery. For the 20th century, the analysis is geared primarily towards the 1920s (§ 27.3), when the Dutch economy experienced considerable growth, and the "long 1990s". This period is noticeable for an ingenous proposal to create a statutory basis in respect of non-voting preference shares, but ultimately witnessed the empowerment of outside minority investors (§ 27.4).

27.2 19th Century

27.2.1 The decline of the vereenigde oostindische compagnie

As has been outlined previously (*see* § 4.4 *supra*), the legal-historical analysis of listed corporations, as laid down in this PhD-thesis, commences in the 19th century. The Dutch analysis poses no exception in this regard, even though the Dutch East India Company (*Vereenigde Oostindische Compagnie* or VOC), established by Charter (*Octrooi*) on March 20, 1602, would have provided an excellent excuse for a different approach.[1] At its inception the VOC, not only incorporated but also heavily backed by the Dutch Republic, obtained a monopoly for 21 years. The VOC owed its existence to the merger of various locally founded predecessors which had already been trading with the

1. Meanwhile, the VOC cannot be properly considered the first modern listed corporation. Through the Charter, it had the power to make arrests (art. 43), construct fortifications and wage wars in name of the Dutch Republic (art. 35). Rather, the VOC was a semi-governmental body serving geopolitical purposes with distinct capitalistic elements, and the organization should be viewed in its own socio-economic context. The analysis of the VOC's economic successes should not be understood as a denial of the cruel treatment of local populations.

Far East.[2] Amsterdam received 8 out of 17 positions in the *Heeren XVII*, the organization's strategic management body, making it the most powerful constituency, but lacking a majority.[3] The VOC not only signifies a pivotal point in the history of Dutch corporate law,[4] but has been considered a pre-eminent precursor of listed corporations by scholars globally.[5] To finance the VOC's large-scale operations, investors were allowed to make unlimited contributions (art. 10 Charter). In reflection of the Dutch Republic's wealth at the time,[6] the initial share capital came in at the staggering amount of 6.45 million guilders. Importantly, the VOC had permanent instead of temporary access to these funds, and thus did not have to be disbanded after every single voyage. The market for the corresponding securities – and their derivatives – quickly became highly liquid.[7] Moreover, an analysis of financial and control rights of VOC-investors would have offered some intriguing points for further reflection, especially in light of this PhD-thesis. Strategic decisions were made by the *Heeren XVII* and carried out by its 78 (later: 60) representatives (*bewindhebbers*). As far as economic interests were concerned, participants were granted some comfort, albeit minimal by modern standards. For instance, art. 17 Charter stipulated that dividends would be distributed once earnings amounting to 5 % of the paid-in share capital had been realized. However, this provision

2. Internal competition was not only deemed bad for business, but also impaired the ability to effectively dislodge the Portuguese and Spanish from their vested positions, obtained following the Treaties of Tordesillas (1494) and Zaragoza (1529). Especially the Land's Advocate (*Landsadvocaat*) of the Dutch Republic, Johan van Oldenbarnevelt, had been vigorously pushing for the creation of the VOC at the political level.
3. The issue of "board seat" allocation complicated merger negotiations for an extensive period of time. For classic studies on the origins of the VOC, *see* E.J.J. van der Heijden, *De ontwikkeling van de Naamlooze Vennootschap in Nederland voor de codificatie* 67 (Van der Vecht, 1908); *see also* S. van Brakel, *De Hollandsche handelscompagnieën der zeventiende eeuw* 17-18, 41-42 (Martinus Nijhoff, 1908).
4. For modern Dutch corporate legal-historical studies on the VOC, *see* J.M. de Jongh, *Tussen societas en universitas. De beursvennootschap en haar aandeelhouders in historisch perspectief* (Kluwer, 2014); *see also* H.M. Punt, *Het vennootschapsrecht van Holland* (Kluwer, 2010); P. Frentrop, *Corporate Governance* (1602 – 2002) (Prometheus, 2002). The analysis in § 27.2 is based in important part on De Jongh's authoritative analysis.
5. For insightful English discussions, *see* O. Gelderblom, A. de Jong & J. Jonker, 'The Formative Years of the Modern Corporation: The Dutch East India Company VOC, 1602–1623', 73 *The Journal of Economic History* 1050 (2013); *see also* E. Gepken-Jager, G. van Solinge & L. Timmerman, *VOC 1602-2002. 400 Years of Company Law* (Kluwer Law International, 2005), containing an English translation of the Charter of 1602.
6. For a broad thematic analysis, *see* J. de Vries & A. van der Woude, *The First Modern Economy. Success, Failure and Perseverance of the Dutch Economy, 1500-1815* (Cambridge University Press, 1997).
7. *See* De Jongh 2014, *supra* note 4, at 72-73; *see also* L.O. Petram, *The world's first stock exchange: how the Amsterdam market for Dutch East India Company shares became a modern securities market, 1602-1700* 20-24, 36-52 (Universiteit van Amsterdam, 2011); Frentrop 2002, *supra* note 4, at 65; Van Brakel 1908, *supra* note 3, at 165.

was never adhered to.[8] Especially its infancy, the VOC was required to invest large amounts of funds, and profits were small.[9] In 1610, a dividend was declared for the first time, amounting to 75 % of the shares' nominal value[10] – but only to appease dissatisfied investors.[11] By contrast, in later years, distributions were actually made quite regularly.[12] With regard to control rights, participants were even worse off. Voting rights were completely absent – only larger investors could ascent to the role of *bewindhebber* – as were periodic disclosure rights.[13] Instead, most if not all powers were vested in the *Heeren XVII*. Although the Charter mandated the publication of the VOC's accounts both 10 and 20 years after its inception and granted participants the right to dissolve the company (art. 7 Charter), attempts to enforce these rights were thoroughly obstructed.[14] Particularly in 1622, this gave rise to severe discontent.[15] In fact, the Province of Holland had to intervene in order to prevent investors from launching suits to seek disclosure and/or dissolution. In 1623, the Charter of the VOC was renewed for a period of 21 years, after modifications had been made to the regulation of related party transactions and a supervisory body – the *Heeren XI* – had been created. Promises regarding disclosure had been made as well, but these would not be kept. Eventually, the unrest amongst investors faded away nonetheless.

Interestingly, moving forward almost 200 years in time after the VOC was established only affects the topic of the debate in degree rather than in kind. At

8. *See* E. Gepken-Jager, 'Verenigde Oost-Indische Compagnie (VOC)', in: *VOC 1602-2002. 400 Years of Company Law* 41, 63 (E. Gepken-Jager, G. van Solinge & L. Timmerman eds., 2005).
9. Expenditures in relation to armed conflicts especially mounted. Moreover, the Dutch Republic, a powerful stakeholder, had little interest in weakening its basis of power, whereas the VOC's administrators favored the retention of earnings to fund expansion. *See* De Jongh 2014, *supra* note 4, at 74; *see also* Petram 2011, *supra* note 7, at 28-30; Van Brakel 1908, *supra* note 3, at 21.
10. Note the administrators engaged in dealings that in modern times would qualify as insider trading or related party transactions, allowing them to obtain an income regardless of the payment of a dividend or salary. On the (faulty) governance structure of the VOC, *see* De Jongh 2014, *supra* note 4, at 83-89; *see also* Frentrop 2002, *supra* note 4, at 69-71.
11. *See* De Jongh 2014, *supra* note 4, at 76-79 (observing some participants engaged in short selling and others started competing with the VOC to exert pressure); *see also* Gepken-Jager 2005, *supra* note 8, at 70-71; Frentrop 2002, *supra* note 4, at 78-80.
12. *See* De Jongh 2014, *supra* note 4, at 79; *see also* Gepken-Jager 2005, *supra* note 8, at 44, Frentrop 2002, *supra* note 4, at 65, 83. Note that these observations are consistent with the life-cycle perspective (*see* § 10.6 *supra*).
13. *See* Gepken-Jager 2005, *supra* note 8, at 44; *see also* Frentrop 2002, at 65, 89; Van Brakel 1908, *supra* note 3, at 62.
14. *See* De Jongh 2014, *supra* note 4, at 78-83, 89-102, observing the push for accountability was mainly initiated by larger investors, meaning that outside minority participants were left on their own.
15. *See* J.M. de Jongh, 'Shareholder Activists Avant la Lettre: The "Complaining Participants" in the Dutch East India Company, 1622–1625', in: J.G.S. Koppell (eds.), *Origins of Shareholder Advocacy* 61 (Palgrave Macmillan, 2011).

the dawn of the 19th century, despite various other developments in the intermediate period, the VOC again found itself at the center of attention. Excessive distributions meant that the VOC's financial position had progressively decayed.[16] For almost all decades starting from the early 1700s, dividends exceeded net income, meaning that working capital had to be freed up to sustain the dividend.[17] This precarious financial situation was exacerbated by the Fourth Anglo-Dutch War of 1780-1784. Following the conflict, the VOC lost many of its colonial possessions. As a result, the VOC could no longer enforce its monopoly on the spice trade.[18] State-sponsored revitalization plans failed. After the French-backed regime change of 1795, in which stadtholder (*stadhouder*) William V of Orange was removed from power, the newly proclaimed Batavian Republic found itself once again at war with England, dealing the final blow to navigation and trade. In 1798, the VOC was nationalized, with the government assuming the organization's then-colossal debt of 134 million guilders.[19]

27.2.2 The French period and its aftermath

The collapse of the VOC could be considered symptomatic for the position of the Netherlands on the global political-economic theatre. In 1806, the Batavian Republic was converted into the Kingdom of Holland. Napoleon Bonaparte installed his brother Louis as its nominal monarch.[20] In 1810, when Napoleon Bonaparte had grown tired of Louis developing all too warm feelings for his subjects, the Kingdom of Holland was simply disbanded and incorporated in the French Empire. This situation lasted until 1813. With the French Empire disintegrating, William I, son of former stadtholder William V of Orange, was crowned as first King of the Netherlands, which at the time also encompassed modern-day Belgium.[21] Although the French Period is a relatively brief part of Dutch history, it is traditionally considered a distinct era of its own. Many regimes succeeded each other in quick succession. Nonetheless, there were

16. By that time, an initial investment of F.100 in 1602 would have netted a total return of F. 360,000. *See* A. de Jong & A. Roëll, 'Financing and Control in The Netherlands: A Historical Perspective', in: *A History of Corporate Governance around the World: Family Business Groups to Professional Managers* 467 (R.K. Morck, ed., 2005).
17. *See* J. Barneveld, *Financiering en vermogensonttrekking door aandeelhouders: een studie naar de grenzen aan de financieringsvrijheid van aandeelhouders in besloten verhoudingen naar Amerikaans, Duits en Nederlands recht* 352 (Kluwer, 2014), also discussing the difficulty of declaring interim-dividends with fleets still at sea.
18. *See* De Jongh 2014, *supra* note 4, at 177-178; *see also* H.J. den Heijer, *De geoctrooieerde Compagnie* 186-205 (Kluwer, 2005).
19. *See* Van der Heijden 1908, *supra* note 3, at 47, 57.
20. For an extensive historical discussion of the French Period, *see* S. Schama, *Patriots and Liberators. Revolution in the Netherlands, 1780-1813* (Harper Collins, 1992).
21. *See* H.T. Colenbrander & N. Beets, *Vestiging van het Koninkrijk (1813-1815)* (Meulenhoff, 1927).

important legislative reforms. In 1809, Louis enacted the Code Napoleon for the Kingdom of Holland (*Wetboek Napoleon, ingerigt voor het Koningrijk Holland*). The initiative underscores the ambition of Louis of maintaining an independent position vis-à-vis his senior brother.[22] Whereas Napoleon Bonaparte had intended for Louis to simply adopt the Code Napoleon already in force in the French Empire, Louis pursued a different approach. Indeed, certain differences can be observed between the respective bodies of law.[23] From a corporate law perspective, Louis similarly launched an initiative of his own.[24] In 1809, the draft Code of Commerce for the Kingdom of Holland (*Wetboek van Koophandel voor het Koningrijk Holland*, WvKKH) was presented, although it would never be enacted. The main disparity with its French counterpart lay in the fact that the WvKKH did not mandate a government concession to form a *naamlooze compagnieschap*, the contemporary equivalent of an NV.[25] However, the legislative usurpation lasted only briefly as in 1811, the Code Napoleon and *Code de Commerce* (CdC) entered into force in the newly-annexed parts of the French Empire.[26] When the Kingdom of the Netherlands regained its independence, the French legislation was not immediately abolished, but remained in force on an interim basis. Although considered by many the products of an oppressor, this temporary situation would actually last for quite some time.[27] As far as the CdC is concerned, this may be attributed its fungibility: for instance, the CdC contained no provisions, let alone mandatory ones, on the distribution of voting rights or

22. *See* G. Meijer & S.Y.Th. Meijer, 'Influence of the Code Civil in the Netherlands', 14 *European Journal of Law & Economics* 227, 229 (2002), referring to letters by Louis to Napoleon, claiming that imposing French law without accommodating to local circumstances was impossible.
23. These were especially numerous regarding family law. Note that the *Wetboek Napoleon, ingerigt voor het Koningrijk Holland* was inspired by the draft-proposal by Van der Linden, presented in 1808, which had its roots mainly the Dutch tradition. *See* P. van den Berg, 'Codificatie en staatsvorming in de tijd van Lodewijk Napoleon', 30 *De Negentiende Eeuw* 159, 160-166 (2006).
24. *See* De Jongh 2014, *supra* note 4, at 180-181, quoting Louis Napoleon as instructing his legislative civil servants to make good use, rather than to slavishly follow the French *Code de Commerce*.
25. *See* De Jongh 2014, *supra* note 4, at 181; *see also* F.M. Huussen-de Groot, *Rechtspersonen in de negentiende eeuw. Een studie van privaatrechtelijke rechtspersonen in de negentiende-eeuwse wetgeving van Frankrijk, Nederland en Duitsland* 80-84, 116 (W.E.J. Tjeenk Willink, 1976).
26. *See* J.H.A. Lokin, 'De receptie van de Code civil in de Noordelijke Nederlanden', 21 *Groninger Opmerkingen en Mededelingen* 1, 6 (2004). The concession system was justified by the relevance of corporations to the general interest. *See* L.E. Visser, *Op welke wijze behooren de voorschriften van het Wetboek van Koophandel betreffende samenstelling en behoud van het kapitaal der Naamlooze Vennootschap te worden herzien?* (Belinfante, 1902).
27. *See* Van den Berg 2006, *supra* note 23, at 174; *see also* Lokin 2004, *supra* note 26, at 7, for an overview of the attempted reforms after 1813.

dividends. Although the existence of the AGM was presupposed, it was not a mandatory organ.[28]

The new monarch, William I, faced a number of challenges. The Dutch economy suffered from a mounting national debt, an inheritance from the years under French rule.[29] In 1830, this secession of the industrialized Belgian lands further exacerbated the situation.[30] William I initiated several programs to improve the welfare of his (European) subjects. One of his instruments to stimulate the Dutch economy was the establishment, in 1824, of the *Nederlandsche Handel-Maatschappij* (NHM), a predecessor of the current ABN AMRO bank.[31] As the intended successor to the VOC (*see* § 27.2.1 *supra*), the NHM's purpose was to revitalize trade and navigation. Similarly to the VOC, financial interests of investors were safeguarded more strongly than their control rights. William I was actually so convinced of the successes of the NHM that he guaranteed an annual yearly dividend of 4.5 %. The 60 largest investors could attend the AGM. Voting rights existed concerning a limited number of topics, including corporate dissolution and modifications of the Articles of Association. However, these could only be exercised by Dutch investors, who owned registered shares and had held them for a period of at least 6 months.[32] The voting took place on a one man, one vote basis.

---

28. *See* De Jongh 2014, *supra* note 4, at 181; *see also* Frentrop 2002, *supra* note 4, at 158.
29. In 1808 and 1809, the Kingdom of Holland had defaulted on its obligations. In 1810, Napoleon Bonaparte ordered the Tiercering of the Dutch national debt, which then stood at approximately 1.2 billion guilders. *See* J.L. van Zanden & A. van Riel, *The Strictures of Inheritance. The Dutch economy in the nineteenth century* 51 (Princeton University Press, 2004). Although no debt was written off, only 1/3 of the interest due would be paid. Accordingly, many investors experienced a drastic cut in their income. Given the dire financial situation, King William I had no choice but to continue this arrangement. *See* Wet van 14 mei 1814 tot herstel der Nationale Schuld en tot vinding der Fondsen benoodigd tot stijving van 's Lands Kas, (*Stb*. 1814, 58).
30. *See* Van Zanden & Van Riel 2004, *supra* note 29, at 103, observing the fiscal policies of the time effectively subsidized the northern parts of the Kingdom at the expense of the southern lands.
31. Another involved the *Algemeene Nederlandsche Maatschappij ter Begunstiging van de Volksvlijt*. For an overview of the initiatives of William I, *see* Van Zanden & Van Riel 2004, *supra* note 29, at 85, 121. For an exhaustive discussion of the history of the NHM, *see* T. de Graaf, *Voor Handel en Maatschappij. Geschiedenis van de Nederlandsche Handel-Maatschappij, 1824-1964* (Universiteit Utrecht, 2012).
32. For an extensive analysis of NHM's governance structure, *see* De Jongh 2014, *supra* note 4, at 182-184, 250-257, also describing that in 1827, NHM effectively pursued a dual-class equity structure recapitalization by forcing investors to choose between the guaranteed dividend and stock market tradability. A prolonged court-battle followed, mostly focusing on procedural matters. Eventually, the Dutch Supreme Court sided with William I, observing that the choice of shareholders between either of the options was entirely voluntary and did not violate the principle of reasonableness and fairness. *See* Hoge Raad 30 June 1846, *Weekblad van het Regt* 723.

After a difficult start, the NHM indeed enjoy considerable economic successes.[33] Through other means as well, William I attempted to strengthen (his grip on) the Dutch economy. The requirement of government approval (art. 37, 40 and 45 CdC) for incorporating an NV, although formally in place since 1811, had not posed a noticeable obstacle in practice. This changed in the 1830s, as the legislative reforms which had been pursued since the end of the Frence Period eventually proved more fruitful.[34] In 1833, a newly-revised Code of Commerce (*Wetboek van Koophandel*, WvK) was presented. The draft-WvK proposed not only a concession system for incorporating firms, but also outlined a scheme of continuous governmental supervision. In fact, these measures were already implemented by a royal decree (*Koninklijk Besluit*) issued in the same year.[35] Consequently, any violations of the Articles of Association would result in corporate dissolution, following art. 37, 40 and 45 CdC, which were still in force at the time. Apparently, these standards were inspired, to a certain degree, by a call for stricter regulation by Van Limburg Stirum, a high-ranking civil servant, some years prior. Specifically, he strived for better creditor protection and the preention oligarchic practices – for instance, lifetime and even last will director appointments – which granted insiders an almost perpetual lock on control.[36] In similar vein, he advocated a degressive system of allocating voting rights.[37] As would become the case in Germany (*see* § 21.2.3 *supra*), the concession system became a highly contentious matter. Most notably, Van Hall passionately argued against continued governmental supervision, advocating a *laissez-faire* approach, more suited to the merchant classes.[38] In his view, few if any corporations featured substantial groups of outsiders, due to the typically private character of the NV. For similar reasons, Van Hall supported a proportional

33. Note that the dealings of the NHM, especially the Cultivation System (*Cultuurstelsel*) under which a portion of agricultural production was earmarked for exports, have also drawn sharp criticism for the hardships they imposed on indigenous peoples. For a well-known example, *see* Multatuli, *Max Havelaar, of De koffij-veilingen der Nederlandsche Handel-Maatschappij* (De Ruyter, 1860).
34. *See* De Jongh 2014, *supra* note 4, at 185-186 (also describing that policy criteria for granting a charter were toughened considerably, in favour of outside minority shareholders); *see also* Van Zanden & Van Riel 2004, *supra* note 29, at 160; Huussen-De Groot 1976, *supra* note 25, at 120.
35. *See* Koninklijk Besluit 1 December 1833, *Stb*. 1833, 60. Existing corporations were partially grandfathered. For them, the Royal Decree only entered into force after the AGM would decide to modify the Articles of Association.
36. *See* Th.H. van Limburg Stirum, *Iets over de naamlooze maatschappijen* 110, 125 (Van Cleeff, 1829).
37. *See* Van Limburg Stirum 1829, *supra* note 36, at 113. At the same time, Van Limburg Stirum accepted that some corporations only granted the right to vote to their largest shareholders, as had been the case at the NHM.
38. *See* F.A. van Hall, *Verdediging van de Onafhankelijkheid des Handels, bij het oprigten van naamlooze maatschappijen* (Erven H. Gartman, 1834).

distribution of voting.[39] In 1835, politicians reached a compromise, although the WvK only entered into force in 1838.[40] The government concession to incorporate would be granted by default, provided that certain predefined requirements were met.[41] Once granted, a concession could no longer be retracted. Moreover, a director liability mechanism replaced the system of continuous governmental supervision. To counter widespread oligarchic practices, the AGM was, in art. 44 WvK, granted the right to appoint directors. The presence of a supervisory board was permitted but not required, and the WvK was silent on executive director appointment rights.[42]

However, and most interestingly with a view to the topic of this PhD-thesis, is that degressive voting obtained a statutory basis. Art. 54 WvK provided that in case 100 or more shares had been issued, no investor would be allowed to cast more than 6 votes.[43] This actually constitutes a remarkable development. Both in the US (*see* § 15.2 *supra*) and Germany (*see* § 21.2.1 *supra*), proportional voting had been on the rise at the expense of degressive voting. In the Netherlands as well, investors would seek to curb the effects of art. 54 WvK, and the use of stooges was commonplace.[44] With regard to the financial rights of investors, we can also observe some notable developments. Under art. 50 and 51 WvK, founders were required to provide at least 20 % of the authorized share capital, and at least 10 % of the authorized share capital should be issued and paid-up. Pursuant to art. 47 WvK, the corporation was considered

---

39. *See* Van Hall 1834, *supra* note 38, at 180-181. For an extensive analysis of the views of Van Limburg Stirum and Van Hall, *see* De Jongh 2014, *supra* note 4, at 185-195.
40. The reception of the WvK has been mixed. For some, it was clear and concise. *See* P.J. Dortmond, *Van der Heijden Handboek voor de naamloze en de besloten vennootschap* 10 (Kluwer, 2013). For others, the WvK hardly merited to be named an act of parliament. *See* J. Wiarda et al. (eds.), *Molengraaff Bundel* 81 (W.E.J. Tjeenk~~n~~ Willink, 1978).
41. This, in the views of some leading scholars of the time, again relegated the concession requirement to a formality. *See* J.G. Kist & L.E. Visser, *Beginselen van Handelsrecht volgens de Nederlandsche wet. Handsverbintenissen uit overeenkomst. Deel 3* 446 (Belinfante, 1914).
42. For an extensive analysis, *see* De Jongh 2014, *supra* note 4, at 241-250.
43. A modified version of art. 54 WvK can still be observed in art. 2:118 (5) of the Dutch Civil Code currently in force. For its interpretation, *see* § 28.4.2 *infra*. Note that since the allocation of voting rights could otherwise be left to the charter, the issuance of non-voting shares was still permitted. Apparently, these instruments were not widely used.
44. This practice would continue well into the 20th century. *See* E.J.J. van der Heijden, 'Kunststroo', 7 *De Naamlooze Vennootschap* 321 (1928), detailing how ENKA, one of the principal predecessors of AkzoNobel, had founded 860 subsidiaries for the sole purpose of being able to cast 5160 votes at the AGM. Other mechanisms included the use of multiple voting founders shares and setting a minimum threshold in terms of amounts invested before the right to vote could be obtained. *See* D. van Houten, *Het stemrecht in de naamlooze vennootschap* 27, 52, 74-76 (Mouton, 1889). Note that the latter mechanism was banned from 1881 onwards.

disbanded once losses amounting to 75 % of the capital had been incurred.[45] Although this was not explicitly specified, and as such different arrangements may have been possible, the WvK assumed the proportional distribution of dividends.[46] Paying interest fees to stockholders – in respect of the paid-in share capital – was not permitted.[47]

27.2.3 Subsequent developments & legislative efforts

After the enactment of the WvK in 1838, the Dutch economy initially entered a period of mild decline. The national debt continued to constitute a problem, only to be contained in the 1860s.[48] Consequently, government funding of innovative industries, including railroads, was limited. Although the Cultivation System brough in large and stable revenues from the East Indies, these also disincentivized new ventures, whilst its governance suffered from inefficiencies and corruption.[49] As a result, the Dutch economy did not industrialize as fast as many of its peers (*see* § 14.3.1 and § 21.2.1 *supra*). This was reflected in the modest number of freshly incorporated NVs,[50] although it should be acknowledged that the limited partnership (*commanditaire vennootschap*, CV) still constituted a viable alternative to the NV at this time.[51] In the 1860s, the narrative changed. Railroads became an increasingly common mode of transportation. Many businesses previously operated in the form of a limited partnership were converted into an NV, over time creating a better-developed and

45. This had also been a proposal of Van Limburg Stirum, further illustrating the influence of his works. *See* Van Limburg Stirum 1829, *supra* note 36, at 119.
46. *See* W.L.P.A. Molengraaff, *Leidraad bij de beoefening van het Nederlandsche Handelsrecht. Eerste Deel* 238 (De Erven F. Bohm, 1919).
47. *See* A. de Pinto, *Handleiding tot het wetboek van koophandel* 68 (Van der Post, 1876). For a thorough discussion of the financial rights of shareholders under the WvK, *see* Barneveld 2014, *supra* note 17, at 353-359.
48. *See* Van Zanden & Van Riel 2004, *supra* note 29, at 176. On the origins of this debt, *see* § 27.2.2 *supra*.
49. *See* Van Zanden & Van Riel 2004, *supra* note 29, at 115, 174, 223.
50. *See* J. Jonker, *Merchants, Bankers, Middlemen. The Amsterdam money market during the First half of the 19th century* 257-258 (Neha, 1996), finding that in the 1860-1880 period, the number of NVs grew from 284 to 511.
51. The CV compared favourably to the NV for several reasons. First, obtaining a government concession to incorporate a CV was not required. Second, art. 54 WvK, which mandated degressive voting (*see* § 27.2.2 *supra*) only applied to NVs and not to CVs. *See* De Jongh 2014, *supra* note 4, at 202-203; *see also* Van Houten 1889, *supra* note 44, at 82. Currently, the CV poses less of a practical alternative to the NV, and is used predominantly by smaller firms and investment funds. *See* § 26.3.1 *supra*.

more liquid capital market.[52] Towards the end of the 19th century, the Dutch economy was in full swing.[53]

In reflection of these developments, various legal reforms were initiated. From the 1860s onwards, the concession system for incorporating an NV was gradually enforced less strictly.[54] In 1871, Minister of Justice Jolles presented a proposal to revise the WvK (Wetboek van Koophandel draft Jolles, WvKJ).[55] For one part, it aimed to abolish the concession system. Jolles' draft also contained several measures to reinforce the position of investors.[56] Doctrinally, the AGM was referred to as the supreme corporate organ.[57] This is an interesting characterization. It would also appear slightly at odds with reality, given the longstanding and widespread use of oligarchic provisions (*see* § 27.2.2 *supra*). Inspired by § 237 ADHGB (*see* § 21.2.4 *supra*), holders of 10 % of the equity would be granted the right to convene an AGM (art. 34 WvKJ). Degressive voting (art. 54 WvK) would be replaced by proportional voting, although the Articles of Association could provide otherwise (art. 36 WvKJ).[58] For some observers, Jolles' design lacked teeth, whereas it antagonized others. The resulting controversy meant that the proposal was quickly withdrawn. The Kist-committee, of which the findings were presented in 1890, hardly fared any better, as

52. *See* De Jongh 2014, *supra* note 4, at 205-207 (observing that the stock exchange replaced highly efficient informal networks); *see also* Van Zanden & Van Riel 2004, *supra* note 29, at 203, 299, 301; Frentrop 2002, *supra* note 4, at 208 (arguing that in the Netherlands as well, preference shares served as an intermediate instrument, facilitating the transition from bonds to stocks. Contrary to the situation in Germany, these securities have not retained their prominent position); Jonker 1996, *supra* note 50, at 159, noting that stocks were not trading continuously, at least initially, meaning these markets still had a somewhat informal character.
53. *See* Van Zanden & Van Riel 2004, *supra* note 29, at 295-299.
54. *See* F.S. van Nierop, *De vennootschap met beperkte aansprakelijkheid, volgens het Engelsche recht* (Gebr. Binger, 1866); *see also* A. de Pinto, *Handleiding tot het Wetboek van Koophandel* 54 (Belinfante, 1841), both calling for the cancellation of the concession system. For a discussion, *see* De Jongh 2014, *supra* note 4, at 210.
55. *See Kamerstukken II* 1871/72, 65, nr. 2 and *Kamerstukken II* 1871/72, 65, nr. 3. For a contemporary analysis, *see* C.A. Cosman & M. Mees, *Welke beginselen moet ene wettelijke regeling der Naamlooze Vennootschappen huldigen ten aanzien van het kapitaal der vennootschap* (Belinfante, 1872).
56. These included an obligation to publish the Articles of Association (art. 9 WvkJ), the introduction of fiduciary duties for directors ("*bonus pater familias*", art. 26 WvkJ) and corresponding director liability provisions. For an extensive description, *see* J.M. de Jongh, *Twee eeuwen tegenstrijdig belang* 27 (Boom, 2019).
57. *See Kamerstukken II* 1871/72, 65, nr. 3, p. 968. For a discussion, *see* Huussen-de Groot 1976, *supra* note 25, at 125. Nonetheless, the AGM was still required to observe the legitimate interests of others. *See* Kist & Visser 1914, *supra* note 41, at 489-494.
58. Note that certain fundamental resolutions, including modification of the corporation's purpose, mergers and dissolution, required unanimity, unless the Articles of Association provided otherwise. *See* art. 38 WvKJ. Meanwhile, AGM decisions made by investors representing less than half of the share capital could be revisited and reversed at the next meeting, upon request by the board or investors holding 10 % of the equity. *See* art. 39 WvKJ.

it suffered from internal disagreements on fundamental issues.[59] The Kist-committee draft (WvKK) was more strict than Jolles' proposal had been.[60] This may be attributed to a severe accounting scandal (the *Pincoffs-affaire* of 1879), which had hit the Netherlands, and Rotterdam in particular.[61] Moreover, Levy had criticized the separation between ownership and control, and had been advocating additional powers for outside minority shareholders.[62] Nonetheless, there was also some continuity compared to Jolles' proposal. In the draft of the Kist-Committee, the AGM was still characterized as the highest corporate organ (art. 71 WvKK). Proportional voting was still to become the default rule (art. 72 WvKK). Non-voting shares, although permitted, would carry meeting rights (art. 76 WvKK).[63] Despite all the efforts its members had undoubtedly made, the Kist-committee's proposal was never formally submitted to the legislator for consideration. As a result, the Netherlands entered the 20th century with the WvK of 1838 still in force.

27.3 The first dual class debate: 1920s and 1930s

27.3.1 Effects of mandatory degressive voting

Making good use of the favourable economic tide, Dutch businesses continued to expand, especially in the 1890s and 1910s. Meanwhile, art. 54 WvK still

59. *See* J.G. Kist et al., *Ontwerpen van wetten op de vennootschappen en andere, met toelichtingen, den Koning aangeboden door de Staatscommissie, ingesteld bij Zijner Majesteits besluit van 22 november 1879, no. 26* (Belinfante, 1890). For starters, the committee was divided over the technique of codification. According to some of its members, especially Molengraaff, the Wetboek van Koophandel should be part of the general BW. In the view of others, most notably Kist, commercial law merited a statute of its own.
60. This may be illustrated by the fact that the draft addressed related party transactions (art. 73 and 94 WvKK) and introduced inquiry proceedings (*enquêteprocedure*, art. 100 WvKK), enabling a judge to investigate corporate policy and analyse any potential wrongdoings. *See* De Jongh 2019, *supra* note 4, at 29-30.
61. For a vivid description, *see* De Jongh 2019, *supra* note 4, at 9-12. In short, Pincoffs had hidden the huge losses his *Afrikaansche Handels Vereeniging* (AHV) had incurred, and attempted to keep this business afloat by incorporating another firm, the *Rotterdamsche Handelsvereeniging* (RHV), which provided considerable loans to the AHV. Upon discovery of these facts, both the AHV and the RHV entered into liquidation.
62. One of the measures suggested was the inquiry procedure. *See* I.A. Levy, *Actiënrecht; Bijdrage tot de herziening onzer handelswet*, 80-82 (Belinfante, 1884). Another position was taken by Goudsmit, who recognized the separation between ownership and control, but argued that investors of listed corporations fundamentally lacked engagement. *See* M. Th. Goudsmit, 'De aandeelenmaatschappij en haar bestuur', 30 *Nieuwe bijdragen voor rechtsgeleerdheid en wetgeving* 190, 196-204 (1880). For an extensive analysis, *see* De Jongh 2014, *supra* note 4 218-222. Similar to the debate between Rathenau and Hausmann (*see* § 21.3.3 *supra*), the views of Levy and Goudsmit illustrate the relativity of the innovations presented by Berle and Means (*see* § 15.3.2 *supra*).
63. *See* Kist et al. 1890, *supra* note 59, at 102.

imposed restrictions on the distribution of voting rights (*see* § 27.2.2 *supra*). Mandatory degressive voting was particularly undesirable during this period of time, for a number of reasons. First, it disincentivized IPOs and secondary stock issuances, as these would dilute the voting power of founders and controlling shareholders (*see* § 7.3.3 *supra*). In other words, mandatory degressive voting constrained funding at a time of rapid economic expansion. Second, mandatory degressive voting put Dutch corporations at a disadvantage compared to jurisdictions that had subscribed to more liberal regimes, including the United States (*see* § 15.3 *supra*), Germany (to a certain degree, *see* § 21.3 *supra*) and the United Kingdom (UK).[64] Thus, a level playing field was absent, and the threat of foreign investors taking over considerable parts of the Dutch economy was perceived as a realistic one. This was exacerbated by the fact that the economy had not yet experienced a merger boom of similar magnitude to those which had taken place elsewhere. As a result, Dutch firms were typically much smaller than their foreign competitors, making for easy prey.[65]

It was the *Überfremdung* argument (for Germany, *see* § 21.3.1 *supra*) that made the *Koninklijke Maatschappij tot Exploitatie van Petroleumbronnen in Nederlandsch-Indië*, one of the principal predecessors of Royal Dutch Shell, resort to drastic measures. In 1898, it proposed a modification of the Articles of Association, for the purpose of creating 4 % preference shares. Although the instruments were presented as preference shares, scholars have typically referred to them as priority shares, due to the control rights involved. First, the stocks could be issued solely to Dutch citizens or corporations.[66] Moreover, the holders of these securities had the right to make binding nominations for executive and supervisory director positions. Finally, they could veto future modifications of the Articles of Association as well as decisions to dissolve

64. Note that dual class equity structures were widely used in the UK until the 1950s and 1960s, during which period these instruments quickly fell out of favour. *See* F. Braggion & M. Giannetti, 'Changing Corporate Governance Norms: Evidence from Dual Class Shares in the UK', 37 *Journal of Financial Intermediation* 15 (2019).
65. For the US, *see* § 14.3.2 *supra*; with regard to Germany, *see* § 21.2.1 *supra*. This lack of concentration may be attributed to the delayed industrialization (*see* § 27.2.3 *supra*). In the Netherlands, the merger boom would not occur until the 1970s. *See* K.E. Sluyterman, *Kerende kansen. Het Nederlandse bedrijfsleven in de twintigste eeuw* 34, 48, 205-206 (Boom, 2003); *see also* R. Polak, *Wering van vreemden invloed uit nationale ondernemingen* 40 (J.H. de Bussy, 1918).
66. *See* J. Jonker & J.L. van Zanden, *Van Nieuwkomer tot marktleider, 1890-1939. Geschiedenis van Koninklijke Shell, deel 1* 35-36 (Boom, 2007), describing that in 1897, Royal Dutch Shell refused a takeover by Standard Oil, which resulted in a steep and sudden decline of the stock price. This caused severe unrest, as Rockefeller was widely known for his aggressive takeover tactics (*see* § 14.3.2 *supra*). Tensions rose further when Standard Oil launched a recommended offer on fellow Dutch oil exploration firm Moeara Enim. After a meeting with Royal Dutch Shell's chairman, the Dutch Minister of the Colonies informed the directors of Moeara Enim that a sale to a foreign competitor might not be accepted. The threat was a complete and utter bluff due to the diplomatic repercussions that would inevitably follow if it were carried out, but worked nonetheless.

the corporation and issue equity.[67] Two tumultuous AGMs followed, but the proposal was accepted.[68] As a result, an acquirer, even one who had obtained the overwhelming majority of Royal Dutch Shell's common equity, would find it rather difficult to obtain control over the firm's operations. Effectively, this entailed a revival of the oligarchic practices which art. 44 WvK had sought to eradicate, by stipulating that directors had to be appointed by the AGM (*see* § 27.2.2 *supra*).[69] Since only the issuance of a small number of priority shares was required, the mechanism was moreover highly cost-effective.

In the absence of proportional voting (let alone dual class equity structures), mechanisms such as those deployed by Royal Dutch Shell became an increasingly common substitute with a view to concentrating control.[70] The development especially gained traction after 1917, when the guidelines issued by the Ministry of Justice were amended to the permit priority shares and, thus, binding director nomination rights on a general basis instead of by exception, as had been the case with Royal Dutch Shell.[71] Other well-known strategies at the time included the use of stooges (*see* § 27.2.2 *supra*), the insertion of quorums and supermajority requirements in the Articles of Association, and the issuance of

67. *See* De Jongh 2014, *supra* note 4, at 274-276; *see also* Jonker & Van Zanden 2007, *supra* note 66, at 36; Frentrop 2002, *supra* note 4, at 218.
68. For historical analyses, *see* J.H.F.J. Cremers, *Prioriteitsaandelen* 31-33 (Kluwer, 1971); *see also* G.J. Boelens, *Oligarchische Clausules in statuten van naamlooze vennootschappen* 10 (Kok, 1946) (advocating concentration of control, as decision-making by a small group of insiders would best serve the interests of investors generally); A.S. Oppenheim, 'De oligarchische clausule' 56 *Weekblad voor Privaatrecht, Notariaat en Registratie* 44, 46 (1926); C.W. Star Busmann, 'De autocratische of oligarchische clausule in de statuten van de naamlooze vennootschappen', 45 *Vragen des Tijds* 31 (1919); Polak 1918, *supra* note 65, at 127.
69. Note that the renewed use of oligarchic mechanisms also addressed the issue of funding requirements necessarily resulting in a loss of control. Indeed, the number of Dutch listed corporations almost increased six fold between 1890 and 1920, from 88 to 510, whereas the issued share capital increased eight fold, from F. 292 million to F. 2,479 million. *See* De Jongh 2014, *supra* note 4, at 280; Frentrop 2002, *supra* note 4, at 244; E. Tekenbroek, *De verhouding tusschen de aandeelhouders en de bestuurders bij de publieke naamlooze vennootschap in Nederland: een onderzoek naar de ontwikkeling der publieke naamlooze vennootschap in Nederland* 75-76 (Universiteits-Boekencentrale, 1923).
70. *See* M.J. Denijs, *Het stemrecht in de Naamlooze Vennootschap naar Nederlands Recht* 105-123 (H.J. Paris, 1936). Priority shares would continued to be used frequently by Dutch listed corporations until early 21st century. In 1992, 42 % had a priority share-based mechanism in place, a figure that by 2014 had declined to 13 %. *See* A.A. Bootsma et al., *Bescherming bij Nederlandse beursvennootschappen* (2015), available at http://mccg.nl/; *see also* C. van der Elst, A. de Jong & T. Raaijmakers, *Een overzicht van juridische en economische dimensies van de kwetsbaarheid van Nederlandse beursvennootschappen* (2007), available at http://www.research.tilburguniversity.edu/.
71. Note that even after 1917, the guidelines still required that the AGM should be granted the unencumbered right to remove directors. The policy change nonetheless caused a sharp debate in the House of Commons (*Tweede Kamer*). *See Handelingen Tweede Kamer* 1917–1918, 2508. For analyses, *see* De Jongh 2014, *supra* note 4, at 277; *see also* Tekenbroek 1923, *supra* note 69, at 72-73.

depository receipts instead of shares (*see* § 28.4.2 *infra*).[72] However, all these mechanisms had to cope with art. 54 WvK, which mandated degressive voting – a drawback from which the priority share mechanism did not suffer. Perhaps surprisingly to agency-focused scholars, the use of priority shares did not give rise to numerous instances of abuse of power. Here, it should be taken into consideration that especially at that time, social exclusion – from a rather small group of corporate executives – was potentially the most severe punishment of all, incentivizing prudent behaviour.[73]

Naturally, practices regarding priority shares received criticism as well. Some observers continued to emphasize that the AGM held supreme power in the NV.[74] Others did not denounce the priority shares mechanism per se but argued that, in the absence of a provision in the Articles of Association regarding the modification of said Articles, decisions in that regard required unanimity.[75] However, over time, the power of these arguments waned. Indeed, many prominent Dutch scholars, perhaps even a surprisingly large number of them, supported the use of priority shares. In the face of the First World War, countering outsized foreign influence continued to be an important rationale, as had already been the case at Royal Dutch Shell.[76] Others pointed to the advantages of an enabling system of corporate law or argued that the use of priority shares

72. *See* Cremers 1971, *supra* note 68, at 8-16 (observing that another strategy was the use of nationality requirements regarding executive and supervisory directors); *see also* Polak 1918, *supra* note 65, at 59.
73. *See* De Jongh 2014, *supra* note 4, at 282-285; *see also* B.R. Cheffins, 'Dividends as a Substitute for Corporate Law: The Separation of Ownership and Control in the United Kingdom', 63 *Washington & Lee Law Review* 1273 (2006) (for similar observations regarding dividend distributions in the UK of the 1950s, which were made regularly despite the absence of a statutory obligation to that extent). If priority shares acted as substitutes for dual class equity structures, then studies reporting a the decline in the use of these instruments (*see* note 70 *supra*) not only highlight the scepticism with which institutional investors view these mechanisms, but also society's ongoing individualization.
74. *See* F.G. Scheltema, *Het gewijzigd ontwerp van wet op de naamlooze vennootschappen* (Belinfante, 1926), observing that the shareholder was more than a mere financier and should be granted governance rights accordingly. For a recent reiteration of this argument, *see* B. Kemp & A.S. Renshof, 'Het gebruik van oligarchische clausules bij benoeming en ontslag door Nederlandse beursvennootschappen', 6 *Maandblad voor Ondernemingsrecht* 51 (2020).
75. Note that the WvK at the time did not contain a statutory provision on this issue. *See* P. Scholten, 'Wijziging van Statuten', 37 *Weekblad voor Privaatrecht, Notariaat en Registratie* 1940 (1907); *see also* J. Drost, *Rechten van aandeelhouders in naamlooze vennootschappen* 55 (Daamen, 1903).
76. *See* Boelens 1946, *supra* note 68, at 9 (unequivocally advocating the use of priority shares for the purpose of averting foreign influence, even in the absence of an unsolicited takeover); *see also* Oppenheim 1926, *supra* note 68, at 46; Star Busmann 1919, *supra* note 68, at 31, 39; Polak 1918, *supra* note 65, at 40.

was a fact that investors could factor into their decision-making process[77] and had not proven to be a matter of grave concern.[78]

27.3.2 The wetboek van koophandel of 1928

Over time the WvK, which had already been enacted in 1838, became outdated. As a result, calls for modernization grew ever stronger.[79] Both in 1903 and 1904, Minister of Justice Loeff pledged to review the WvK.[80] However, only in 1910 did his successor, Nelissen, succeed in presenting a review of the WvK (WvKN).[81] The proposal was principled upon i) transparency regarding the distribution of powers between corporate constituents, ii) capital protection in relation to payments in kind, iii) liability of founders and directors and iv) protection of minority interests. Despite these noble aspirations, the provisions of the WvKN in practice still drew heavily on the report of the Kist-Committee, of which the findings had been published in 1890 (*see* § 27.2.3 *supra*). The Dutch House of Commons took almost 10 years to deliberate on Nelissen's draft, without much result.[82] The WvKN, had it been enacted, would have abolished the requirement of government consent to incorporate. It also would have provided a statutory basis for binding executive and supervisory director nominations made by holders of priority shares (art. 48c and 51d WvKN) and replaced degressive with proportional voting (art. 46a WvKN). Simultaneously, the WvKN would have provided minority shareholders with numerous instruments to address majority oppression. Stock issuances in excess of 10 % of the issued share capital would be subjected to AGM approval (art. 43 and 43b WvKN). Investors representing 10 % of the equity could not only convene an AGM (art. 45b WvKN), but also initiate inquiry proceedings to have the judiciary analyse corporate policy (art. 52d-52g WvKN). The WvKN even would have enabled investors with holdings of this size to (retrospectively) challenge decisions of and modifications of the Articles of Association made

77. *See* Star Busmann 1919, *supra* note 68, at 52. Thus, Star Busmann's effectively invoked the ECMH, which was to be formulated a few decades later. *See* § 2.2.5 *supra*.
78. *See* P. Scholten, 'Nieuwe Geschriften over het Wetsontwerp op de Naamlooze Vennootschappen', 56 *Weekblad voor Privaatrecht, Notariaat en Registratie* 565 (1926).
79. *See* J.M.I.A. Simons, 'Koninklijke bewilliging', 4 *De Naamlooze Vennootschap* 67 (1925) (*"Gedurende een goede vijftig jaar stond bij gelegenheid de naamloze vennootschap op de agenda's der Staatscommissies en wetgevenede lichamen in het kikkerland. Nu weer, in 1925, zag de zoveelste proefdruk van verbeterde regeling het daglicht. Er is veel gedokterd en er zijn professoren geraadpleegd, maar de patiënte slikte het voorgeschreven middel niet"*); *see also* Kist & Visser 1914, *supra* note 41, at 399: "*Dat de wetgever, aldus, zij het ook met eenige afwijkingen en aanvullingen, den Code de Commerce navolgende, heeft misgetast, wordt algemeen erkend en kan dus terstond hier worden geconstateerd*."
80. *See* P.J. Dortmond, *Van der Heijden Handboek voor de naamloze en de besloten vennootschap* § 18 (Kluwer, 2013).
81. *See Kamerstukken II* 1909/10, 217, nr. 3.
82. *See* Dortmond 2013, *supra* note 80, at § 19.

by the 2 previous AGMs (art. 43a and 44a WvKN). According to some scholars, these elements resulted in the WvKN being overly strict and focused at open, listed NVs at the expense of their closed, private counterparts.[83]

A new design, presented by Minister of Justice Heemskerk and edited by Visser, was presented in 1925 (WvKHV).[84] It was largely founded upon the same principles as the Nelissen-draft. The WvKHV reintroduced the requirement of government assent, although this was to be granted by the Minister of Justice instead of the monarch. Interestingly, this *volte face* did not give rise to considerable critique. With regard to the balance of power between minority and majority shareholders, the WvKHV adopted an entirely different approach than the WvKN. Doctrinally, it reemphasized the position of the AGM as the supreme corporate body.[85] Despite expressing its allegiance to this principle, the WvKHV did not contain a right for outside minority shareholders to challenge previous AGM decisions. Furthermore, it increased the threshold to initiate inquiry proceedings to 20 % of the equity. Conversely, the AGM was granted, in art. 48 WvKHV, the right to reject binding executive director nominations, made by holders of priority shares, by 2/3 of the AGM votes cast. However, in the end this gesture proved largely meaningless, as art. 44b WvKHV also permitted multiple voting shares, without capping the maximum number of votes per share.[86] Thus, one could have observed, and quite rightfully so, that one control-enhancing mechanism was merely being replaced by another. Nonetheless, the cancellation of the binding character of director nominations drew sharp criticism. A second contentious issue was the obligation to publish the annual accounts, which were deemed to contain competitively sensitive information.[87]

In response, the Heemskerk-Visser proposal was amended by Minister of Justice Donner (WvKD). As a compromise, the WvKD prohibited multiple voting and adopted proportional voting, whilst not going as far as returning to the

83. *See* B.Th.W. van Hasselt, *De literatuur over het wetsontwerp op de naamlooze vennootschappen, critisch samengevat* 15 (Vilders, 1919). For a modern interpretation, *see* De Jongh 2014, *supra* note 4, at 286-288, observing that contemporary scholars also faulted the WvKN for ignoring the concept of majority rule.
84. *See Kamerstukken II* 1924/25, 69, nr. 2.
85. *See Kamerstukken II* 1924/25, 69, nr. 1, p. 2. For a recent analysis, *see* De Jongh 2014, *supra* note 4, at 288-291, attributing the pushback in relation to outside minority shareholder protection in important part to Visser.
86. *See* E.J.J. van der Heijden, *Het wetsontwerp, 1925 op de naamlooze vennootschappen* 57 (Romen, 1926); *see also* Scheltema 1926, *supra* note 74, at 28 (arguing in favor of curbing multiple voting, in addition to a cancellation of the priority shares mechanism); Oppenheim 1926, *supra* note 68, at 46.
87. *See* Van der Heijden 1926, *supra* note 86, at 56; *see also* W.L.P.A. Molengraaff, *De herziening van het recht der Naamlooze Vennootschap* (Muusses, 1926); Scheltema 1926, *supra* note 74. For an overview of the extensive contemporary literature, *see* Dortmond 2013, *supra* note 80, at § 21.

mandatory degressive system (art. 39d and 44b WvKD).[88] Binding directors nominations could be rejected by 2/3 of the AGM votes cast, but only if these represented a quorum of 50 %, pursuant to art. 48a WvKD. Moreover, existing priority schemes were grandfathered in.[89] Thus, the WvKD 1928 considered the AGM the corporation's supreme organ but simultaneously limited its effective powers considerably. Financial rights of shareholders were also regulated fairly extensively. The distribution of corporate profits was mandatory, unless the Articles of Association provided otherwise. Dividend payments should be made on a proportional basis (art. 42d WvKD). Although the Articles of Association could reduce an investors' profit entitlement, he could not be excluded entirely. Losses amounting to 75 % of the share capital no longer resulted in mandatory dissolution. Paying interest to shareholders – in respect of capital contributions – was no longer principally prohibited, but such payments could only be made during the start-up period, which was limited at 4 years, and at a maximum rate of 5 %.[90] In this constellation, the WvKD was signed into law in 1928 (the WvK 1928).[91] Because of the detailed provisions it contained, the WvK 1928 was rather more elaborate than its 1838 predecessor, encompassing 122 instead of 21 provisions. Nonetheless, there was also a certain degree of continuity. The NV was still considered a contract, and executive directors continued to be viewed as officials mandated by the AGM. The requirement of government consent to incorporate, which commentators had criticized virtually from the day the WvK had been enacted – if not longer, *see* § 27.2.2 *supra* – remained, in the form of a Ministerial no-objection statement.

Interestingly, some years after the WvK 1928 had been enacted, the debate on multiple voting rights reignited once again. The attention was mainly the result of statutory changes implemented by the French legislator in relation to

88. Especially Koster, at the time member of parliament for the liberal *Vrijzinnig-Democratische Bond*, presented a remarkably broad working knowledge of corporate law, comparing the legal systems of France, Germany, the United Kingdom and Belgium in a single speech. In particular, he pointed towards a French government-sponsored analysis to ban multiple voting rights. However, after due deliberation, the matter was put to rest, as the committee responsible for the enquiry had concluded that multiple voting shares served a useful purpose in resisting control by large financial institutions and foreign corporations. *See Handelingen Eerste Kamer* 1926/27, 920.
89. For an extensive overview of contemporary oligarchic practices and minority shareholder protection, *see* Denijs 1936, *supra* note 70, at 69-89, 105-123. For a recent analysis, *see* De Jongh 2014, *supra* note 4, at 291-294.
90. For an extensive analysis, *see* Barneveld 2014, *supra* note 17, at at 364-368.
91. *See Kamerstukken II* 1926/27, 27, nr. 3; *see also Kamerstukken II* 1926/27, 27, nr. 15; *Stb*. 1928, 216. Note that despite the draft having been approved by the House of Commons, the House of Lords (*Eerste Kamer*) continued to voice serious opposition. These related solely to the disclosure obligations in respect of closed, unlisted NVs, laid down in art. 42c WvK. Minister Donner addressed these concerns by introducing a separate draft-bill, which provided certain exemptions. The revised WvK entered into force in 1929. *See* Dortmond 2013, *supra* note 80, at § 22-26.

loyalty shares.[92] However, this development ultimately failed to gain sufficient traction to result in any policy measures.[93]

27.4 The second dual class debate: 1980s and 1990s

27.4.1 Previous minor developments

Dutch scholars have traditionally observed that between 1929 and 1971, the legislator generally adopted an attitude of masterly inactivity with regard to corporate law.[94] That is true for the topic of this PhD-thesis as well. Naturally, this is not to say there were no developments in corporate legal doctrine or case law – in fact, there were many. In important part, these advancements related to the purpose and personhood of the corporation, topics that will be addressed elsewhere (*see* § 28.2.1 and § 28.2.2 *supra*, respectively).

Nonetheless, there was some debate regarding dual class equity structures as well, starting from the late 1950s. The main participants were two close colleagues, Van der Grinten and Treurniet.[95] In this particular case, the course of deliberations of these otherwise authoritative scholars was somewhat remarkable. Treurniet, opening the debate, argued there simply existed a practical need for non-voting stock.[96] However, in 1968, he renounced his original views entirely, observing instead that under Dutch corporate law, voting rights are an integral and necessary element of the relationship between the corporation and its shareholders.[97] The reasoning of Van der Grinten developed exactly amongst the same lines, although the arguments put forward differed. At first, he noted

92. For a contemporary discussion, *see* E. Gaillard, *La société anonyme de demain. La théorie institutionelle et le fonctionnement de la société anonyme* 68-70 (Librairie du Recueil Sirey, 1932).
93. *See* Denijs 1936, *supra* note 70, at 59-68; *see also* E.L. Kayenbergh, 'Aandeelen met meervoudig stemrecht', 12 *De Naamlooze Vennootschap* 65 (1933); P.M.H. Snel, 'Het vraagstuk van de meerstemmige aandeelen in Frankrijk', 9 *De Naamlooze Vennootschap* 71 (1930). For a modern analysis, *see* A.A. Bootsma, 'Over de toekomst van het vennootschapsrecht', in: H.J. de Kluiver (red.), *100 jaar Handelsrecht. Over heden, toekomst en verleden* 101 (Paris, 2018); *see also* L. Timmerman, 'Het Nederlandse vennootschapsrecht tussen 1918 en 2018, enkele schetsmatige opmerkingen', in: H.J. de Kluiver (red.), *100 jaar Handelsrecht. Over heden, toekomst en verleden* 61 (Paris, 2018).
94. *See* H.J.M.N. Honée, 'De ontwikkeling van het vennootschapsrecht', in: O. Moorman van Kappen et al., *150 jaar Wetboek van Koophandel: het verleden en de toekomst* 40 (Kluwer, 1989).
95. Treurniet, founder of the well-known Rotterdam school for civil law notaries, regularly invited Van der Grinten to hold guest lectures. *See* G.C. Kok, *Rotterdamse juristen uit vijf eeuwen* 286 (Verloren, 2009).
96. *See* W.C. Treurniet, 'Wat niet in het bijvoegsel straat (De stemovereenkomst)', 38 *De Naamlooze Vennootschap* 163 (1959).
97. *See* W.C. Treurniet, 'Titel III, Kapitaal, aandelen en rechten der aandeelhouders, obligaties', 47 *De Naamlooze Vennootschap* 204 (1968).

that the absenteeism at shareholder meetings could flaw decision-making by giving rise to accidental majorities, thus posing a genuine threat to achieving long-term objectives. In Van der Grinten's view, shareholder absenteeism was caused by the fact that most investors were not interested in actually controlling the corporation, but rather focused on achieving a return on their investment. Therefore, Van der Grinten argued that the possibility to acquire stock carrying voting rights should be the sole privilege of entrepreneurs – those veritably committed to the corporation. Conversely, investors – who refused to make such a commitment – ought to settle for non-voting stock.[98] Building on these observations, Van der Grinten designed a system in which only registered shares would carry the right to vote; this would not be the case for bearer shares. However, in 1991, Van der Grinten would abandon this position, referring to stocks without voting rights as denatured shares.[99] To this end, he essentially adopted the same argument as Treurniet had done in 1968.[100] Corporations in need of obtaining additional funding whilst leaving the existing control rights of investors intact should be issuing profit-sharing certificates (*winstbewijzen*) instead of shares.[101] Van der Grinten's 1991 paper brings us to the vigorous debate regarding non-voting shares in the Dutch literature of the late 1980s and early 1990s.

27.4.2 Numerous proposals regarding non-voting shares…

The second phase, commencing in the late 1980s, should be seen mainly as a derivative of legislative activity in the former Dutch Antilles. Although the corporate laws of the continental part of the Kingdom of the Netherlands and the former Dutch Antilles tend(ed) to resemble each other, there was and is no binding obligation for utter legal alignment (*see* § 26.2 *supra*). One of the differences between the respective legal systems is the ability for the NV to issue non-voting stock. Whereas NVs incorporated according to the laws of the continental part of the Kingdom are unable to issue such securities (*see* § 28.4.2 *infra*), their counterparts under the laws of the former Dutch Antilles have had

98. *See* W.C.L. Van der Grinten, 'De aandeelhoudersvergadering en de NV', in: *Uit het recht. Rechtsgeleerde opstellen aangeboden aan mr. P.J. Verdam* 295 (Kluwer, 1971). Recently, a similar argument has been made regarding passive investors, who buy stocks by means of index funds and ETFs. S*ee* § 11.4.1 *supra*.
99. *See* W.C.L. van der Grinten, 'Winstbewijzen als financieringsinstrument', in: *De bankier als jurist tegen wil en dank: bundel aangeboden aan Mr. Drs. H. Langman ter gelegenheid van zijn aftreden als lid van de Raad van Bestuur van de ABN AMRO-combinatie op 28 februari 1991*, 125 (Kluwer, 1991).
100. As such, the debate underscores that caution should be taken when attributing various allegedly fundamental characteristics to the corporation (*see* § 2.3 *supra*). Indeed, the corporation possesses a remarkable ability to adjust itself to changing circumstances. Had this not been the case, it would not have enjoyed such great success.
101. *See* Van der Grinten 1991, *supra* note 99.

this option since 1987.[102] The modification of art. 89a of the Code of Commerce of the Dutch Antilles (*Wetboek van Koophandel van de Nederlandse Antillen*, WvKNA) enabled corporations to issue up to 80 % of the authorized share capital in the form of non-voting shares. Accordingly, the right to vote only had to be vested in 20 % of the equity. This provision was intended to enable corporations to thwart unsolicited takeover attempts.[103]

At the time, many scholars in continental Holland voiced their sympathy to the amendment of art. 89a WvKNA. Noordraven, for instance, drew a comparison between corporate and partnership law. He concluded that the issuance of non-voting stock by NVs should be permitted, as partners could equally be excluded from strategic decision-making.[104] Van Schilfgaarde observed that principally, he could not conceive of any fundamental objections against non-voting shares. However, the unlimited use of non-voting stock would reduce the corporation to a capital-raising foundation.[105] Slagter considered non-voting stock a "logical" terminus in the decay of shareholder rights.[106] From a more functional perspective, some scholars observed that the prevention of hostile takeovers had been widely accepted as a legitimate cause.[107] Meanwhile, the most elaborate proposal to create a statutory basis in respect of non-voting shares was undoubtedly made by Schwarz.[108] In his inaugural lecture at Maastricht University, Schwarz observed that such securities enable corporations to raise equity whilst leaving the pre-existing balance of powers at the AGM intact. Furthermore, non-voting shares enable the corporation to cancel any potential adverse effects of shareholder absenteeism, including decision-making by a coincidental majority. After a careful study of various

102. *See* Landsverordening van de 3de september 1987 tot wijziging van het Wetboek van Koophandel van de Nederlandse Antillen, *P.B.* 1987, no. 111.
103. *See* D.E. Cijntje et al. (eds.), *Netherlands Antilles Business Law. Legal, Accounting and Tax Aspects of Doing Business in the Netherlands Antilles* 108 (Kluwer Law International, 1999); *see also* H. Burgers, 'Aandelen zonder stemrecht en aandelen met beperkt stemrecht', 31 *Tijdschrift voor Vennootschappen, Verenigingen en Stichtingen* 276 (1988).
104. *See* G. Noordraven, 'De zeggenschap van verschaffers van risicodragend kapitaal', in: *Van vennootschappelijk belang* 171, 176 (H. Honeé et al. eds., 1988). For an extensive overview of the arguments put forward, *see* R.A. Wolf, *De kapitaalverschaffer zonder stemrecht in de BV* 8-17 (Kluwer, 2013).
105. *See* P. van Schilfgaarde, 'Beursovername en beschermingsconstructies', in: *Aandelen* 19, 35 (J. Maeijer et al. eds, 1988).
106. *See* W. Slagter, *Macht en onmacht van de aandeelhouder* 12 (Kluwer, 1988), observing that even without the right to vote, shareholders could, in practice, still exert considerable influence.
107. *See* E. van Groeningen, 'Bescherming tegen overvallen: zakelijk nodig', 67 *De Naamlooze Vennootschap* 139, 140 (1989) (arguing that "in Europe, there is no place for squandering firms"); *see also* R.P. Voogd, *Statutaire beschermingsmiddelen bij beursvennootschappen* 99 (Kluwer, 1989); J. Galavazzi & H. van Wilsum, 'In Nederland nu ook Non-Voting Shares', 66 *De Naamlooze Vennootschap* 130 (1988); Noordraven 1988, *supra* note 104.
108. *See* C. Schwarz, *Aandelen zonder stemrecht* (W.E.J. Tjeenk Willink, 1990), referring to these stocks as "0-shares".

foreign legal systems, including those of Germany and Switzerland, Schwarz proposed an elaborate system of non-voting preference shares.[109] According to Schwarz, such securities could be issued up to 70 % of the authorized share capital. As indemnification for their foregone control, investors ought to receive preferential treatment with regard to dividend distributions. Schwarz advocated a mandatory minimum dividend preference of 3 % on an annual basis – if such a dividend preference were absent, the absence of voting rights would not be sufficiently compensated. When the dividend had not been paid in full for a single year, the right to vote would be reinstated.[110]

Although the ideas put forward by Schwarz were not received with dismissal, they did not result in any efforts by the legislator either. In particular, scholars found it difficult to understand why introducing non-voting shares was strictly necessary. Indeed, Dutch corporate law offers various substitutes in this regard (*see* § 28.4.2 *infra*).[111] Employee stock ownership plans (ESOPs) have been cited as an example of a mechanism which could just as well be created by use of other means.[112]

27.4.3 ... Failing to gain ground

In hindsight, an underlying factor to explain why Schwarz's imaginative proposal may have failed to capture the heart and mind of the legislator could be the shift in the 1990s towards outside minority shareholder empowerment.[113] Both the absence of voting rights as well as the relatively modest dividend preference (3 %) were at odds with this trend. Two developments may especially serve to illustrate the shift.[114] These were the policy discussion on

109. *See* Schwarz 1990, *supra* note 108. On the German system of non-voting preference shares, *see* § 22.5 *supra*.
110. *See* Schwarz 1990, *supra* note 108. For the drawbacks of a mandatory minimum dividend, *see* § 9.7.3 *supra*.
111. *See* S. Eisma & J. de Keijzer, *Aandelen zonder stemrecht* (NIBE, 1994) (concluding that if a statutory basis should at all be created in respect of non-voting preference shares, the framework should be much more enabling in nature, for instance without a mandatory minimum dividend or the obligation to reinstate the right to vote upon defaulting on the dividend payment); *see also* M.W. den Boogert, 'Boekbespreking', 123 *Weekblad voor Privaatrecht, Notariaat en Registratie* 12 (1992); Van der Grinten 1991, *supra* note 99 (arguing that voting rights are an inextricable aspect of the shareholder-corporation membership relation). *But see* Galavazzi & Van Wilsum, *supra* note 107, at 133, stressing the "practical need" for non-voting shares.
112. *See* A. Voute, *Aandelen voor werknemers* 101-102 (Kluwer, 1991), instead advocating the use of depository receipts (*see* § 28.4.2 *infra*) and participation certificates (*participatiebewijzen*).
113. For an example, *see* G. Rietkerk, 'Stemrechtloze aandelen', 71 *De Naamlooze Vennootschap* 101 (1992), fundamentally rejecting non-voting shares as the instrument eroded the position of shareholders. For similar developments in Germany during the 1990s, *see* § 21.4 *supra*.
114. The theoretical underpinnings of the focus on shareholder value maximization were agency theory (*see* § 2.3.5 *supra*) and the market for corporate control (*see* § 2.2.4 *supra*).

anti-takeover mechanisms and the 40 Recommendations (*Veertig Aanbevelingen*), made by the Peters Committee in 1997, as predecessor to the Dutch Corporate Governance Code (*see* § 26.5 *supra*). First, there was an active policy debate on anti-takeover mechanisms.[115] In 1989, the Amsterdam Stock Exchange (*Vereniging voor de Effectenhandel,* VvdE) and the Association of Security Issuing Corporations (*Vereniging van Effectenuitgevende Ondernemingen*, VEUO) reached a preliminary compromise regarding the procedure for cancelling these mechanisms. Accordingly, certain restrictions were imposed on the purpose of anti-takeover measures and their cumulation.[116] Moreover, the VvdE and VEUO pledged to present a final agreement before 1992.[117] Despite a number of additional concessions, a definitive understanding was not reached. Therefore, the legislator decide to extend the previously-set deadline to June 1995. In May of that year, the VvdE and VEUO managed to present a Memorandum of Understanding. Accordingly, a bidder who had held 70 % of the equity for a period of 18 months would have the right to adjudicate a panel, which would then decide on the cancellation of any anti-takeover mechanisms.[118] After some further deliberations, mainly on procedural matters, the legislator presented a draft-bill on uninvited takeovers (*Wetsvoorstel betwiste overnames*) in 1997.[119] Under the draft-bill, the authority to decide on the abolition of anti-takeover measures was transferred from the panel to the Enterprise Chamber of the Amsterdam Court of Appeals. Despite the momentum it carried at the time, the draft-bill would lay dormant for a long period of time, only to be retracted by the legislator in 2006.[120] Second, in 1997 the

115. For an elaborate description of these developments, *see* F.G.K. Overkleeft, *De positie van aandeelhouders in beursvennootschappen. Een analyse van recht, gebeurtenissen en ideeën* 100-145 (Kluwer, 2017); *see also* De Jongh 2014, *supra* note 4, at 423-466; M.J. van Ginneken, *Vijandige overnames: de rol van de vennootschapsleiding in Nederland en de Verenigde Staten* 26-27, 72-87 (Kluwer, 2010).
116. For a detailed analysis of the 1989 VvdE-VEUO agreement, *see* D.H. Cross, 'De regulering van de effectenhandel; recente ontwikkelingen', 35 *Tijdschrift voor Vennootschappen, Verenigingen en Stichtingen* 59 (1992).
117. *See* Overkleeft 2017, *supra* note 115, at 101-105, noting that the discussions between VvdE and VEUO were being closely monitored by the Ministers of Finance and Justice, whilst also being overshadowed by the preparations of the Takeover Bids Directive, of which art. 8 of the draft version contained a no-frustration rule.
118. *See* D.C. Buijs, 'Beginselakkoord Beurs-VEUO en de reactie daarop van de minister van Financiën', 38 *Tijdschrift voor Vennootschappen, Verenigingen en Stichtingen* 157 (1995).
119. *See Kamerstukken II* 1997/98, 25732, nr. 3. The procedural concerns related mainly to the position of the panel, which was initially intended to be private instead of public in nature, giving rise to issues in relation to the enforceability of its rulings and the protection of property. For a discussion of some these complications, *see* D.C. Buijs, 'Commissie Betwiste Overnames; wel een compromis, maar geen oplossing. Fopspeen of dobbelsteen?, 38 *Tijdschrift voor Vennootschappen, Verenigingen en Stichtingen* 301 (1995); *see also* M.M. Mendel, 'Wetsontwerp beschermingsmaatregelen VEUO-beurs uit oogpunt van rechtsbedeling en corporate governance', 74 *De Naamlooze Vennootschap* 271 (1995).
120. *See Kamerstukken II* 2005/06, 25732, nr. 23. Note that the draft-bill on uninvited takeovers formed the basis for the breakthrough rule of the Takeover Bids Directive. *See* Van Ginneken

Peters Committee presented its 40 Recommendations. Similar to the draft-bill on uninvited takeovers, the creation of the Peters Committee resulted from the VvdE-VEUO Memorandum of Understanding of 1995. In an abstract sense, the Peters Committee aspired to stimulate the dialogue between the corporation and its investors and to promote investor influence regarding corporate strategy.[121] More specifically, the Peters Committee stated that the executive and supervisory board should enjoy the trust of the AGM. Moreover, it introduced a shareholder AGM proposal right (Recommendation 30) for holders of 1 % of the equity, or a NLG 500,000 equivalent. Most fundamentally, however, was that it subscribed to the one share, one vote rule (Paragraph 5.1), highlighting once again to which degree the tide had turned against Schwarz' proposal (*see* § 27.4.2 *supra*).

Some, but not all, of the recommendations of the Peters Committee would subsequently be incorporated in the Dutch Corporate Governance Code – which, in recent years, has turned its back to shareholder value maximization, *see* § 28.2.1 *infra* – or the Dutch Civil Code. Dutch pro-outside minority shareholder empowerment eventually culminated in the € 70 billion takeover of ABN AMRO in 2007 by a consortium of Fortis, Royal Bank of Scotland and Santander.[122] Although the takeover was in itself successful, the transaction, amidst the Great Recession, ultimately proved the undoing of 2 of its acquirers.[123] This brings us to an analysis of current Dutch corporate law.

2010, *supra* note 115, at 26, 72.

121. For a humorous appraisal of the findings of the Peters Committee, *see* D.C. Buijs, 'Rapport Commissie Corporate Governance', 40 *Tijdschrift voor Vennootschappen, Verenigingen en Stichtingen* 299 (1997).

122. *See* De Jongh 2014, *supra* note 4, at 439-456, observing a certain "judicial enthusiasm" at the Enterprise Chamber of the Amsterdam Court of Appeals in the years prior to the ABN AMRO ruling which typically, although perhaps not intentionally, served to empower outside minority investors, referring to Gerechtshof Amsterdam 4 July 2001, ECLI:NL:GHAMS:2001:AB2476 (*HBG*) and Gerechtshof Amsterdam 17 January 2007, ECLI:NL:GHAMS:2007:AZ6440 (*Stork*).

123. *See* C. de Groot, A. van Nood & F. Lambert, 'The ABN AMRO Ruling: Some Commentaries' 4 *European Company Law* 168 (2007).

Chapter 28. Current dutch corporate law

28.1 Introduction

Subsequently, in Chapter 28, I study the current Dutch legal framework in the usual order. Therefore, I first examine the character of the Dutch corporation, focusing on its purpose, approach to legal personhood and semi-mandatory character of the governing statute, in § 28.2. Then, I discuss the position and composition of the executive and/or supervisory board, its installation and removal, fiduciary duties of directors, the standards applied by the Dutch courts for assessing their behavior, and the criteria for director independence, in § 28.3. Additionally, in § 28.4, I analyze shareholder control rights and the position of the AGM. To that end, I first discuss the scope and relevance of certain concepts, including par value and equal treatment. Subsequently, I consider shareholder voting rights, as well as various deviations from the one share, one vote default rule, including depository receipts, loyalty shares and multiple voting shares. This § 28.4 also studies the position of the AGM and convocation and agenda setting rights. Finally, in § 28.5, I examine shareholders' financial rights. This includes matters of capital formation and retention, directors' powers to declare dividends, financial constraints in this regard and the possibilities to create classes of stock carrying different financial entitlements.

28.2 The character of the NV

28.2.1 Corporate purpose

Under Dutch corporate law, corporations bear a greater responsibility than merely "to increase their profits."[1] For the NV, this follows from art. 2:129 (5) BW. Accordingly, the executive board should act in the interest of the NV and its affiliated businesses. Art. 2:140 (2) BW imposes an identical obligation on

1. For this quote, *see* M. Friedman, *Capitalism and Freedom* 133 (Chicago University Press, 1962); *see also* § 2.3.5 *supra*.

the supervisory board.[2] Therefore, Dutch law can be said to be more in line with the German stakeholder model (*see* § 22.2.1 *supra*) than the traditional US shareholder-focused approach (*see* § 16.2.1 *supra*).[3] Historically, Maeijer's Radboud University inaugural lecture of 1964 has been highly influential in this regard. In his lecture, Maeijer developed a holistic corporate purpose. He argued that the interest of the NV is to remain (financially) healthy and to grow until achieving its objective, if still worthwhile. This goal of the corporation should be distinguished from that of the shareholders.[4] Meanwhile, different views have been put forward as well.[5] Van der Grinten advocated the "derivative approach" (*resultanteleer*), according to which the interest *of* the corporation is determined (on a case-by-case basis) by weighing the specific interests of those involved *in* the corporation.[6] Honée and Winter have been notable representatives of the group of scholars which does not recognize a separate interest of the NV, besides that of the shareholders (*leer van de*

2. For an analysis, *see* G. van Solinge & M.P. Nieuwe Weme, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands burgerlijk recht. 2. Rechtspersonenrecht. Deel IIb. NV en BV. Corporate Governance* § 122-134 (Wolters Kluwer, 2019); *see also* M.J. Kroeze, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 2. Rechtspersonenrecht. Deel I. De rechtspersoon* § 189 (Kluwer, 2015).
3. Nonetheless, co-determination is less fundamental to Dutch corporate law than to its German counterpart. According to art. 2:152 et seq. BW, the Works Council (*Ondernemingsraad*) of a sufficiently large corporation (share capital in excess of € 16 million and more than 100 long-term employees) is entitled to nominating 1/3rd of the members of the supervisory board. Thus, there are fewer employee representatives than in Germany (where the figure is 50 % of the supervisory directors, *see* § 20.4.2 *supra*). Moreover, numerous exceptions to and exemptions from co-determination apply under the Dutch regime. *See* R.G.J. Nowak, *Corporate Boards in the Netherlands,* in: *Corporate Boards in Law and Practice: A Comparative Analysis in Europe* 431 (P. Davies et al. eds., 2013).
4. *See* J.M.M. Maeijer, *Het belangenconflict in de naamloze vennootschap* (Kluwer, 1964). Note that Maeijer largely disregarded employees or other stakeholders. In his view, the notion of corporate purpose served primarily to distance the legal entity from its investors. *See* F.G.K. Overkleeft, *De positie van aandeelhouders in beursvennootschappen. Een analyse van recht, gebeurtenissen en ideeën* 64-69 (Kluwer, 2017); *see also* J.M. de Jongh, *Tussen societas en universitas. De beursvennootschap en haar aandeelhouders in historisch perspectief* 339-340 (Kluwer, 2014).
5. For a thorough overview, *see* K.W.H. Broekhuizen, *Klantbelang, belangenconflict en zorgplicht* 193 (Boom, 2016); *see also* B. Kemp, *Aandeelhoudersverantwoordelijkheid: De positie en rol van de aandeelhouder en aandeelhoudersvergadering* 109-119 (Kluwer, 2015); R.A. Wolf, *De kapitaalverschaffer zonder stemrecht in de BV* 168-173 (Kluwer, 2013).
6. *See* P.J. Dortmond, *Van der Heijden Handboek voor de naamloze en besloten vennootschap* 483-484 (Kluwer, 2013). Concurring scholars have included Vletter-van Dort (H.M. Vletter-van Dort, *Gelijke behandeling van beleggers bij informatieverstrekking* 58 (Kluwer, 2001) and Van Solinge & Nieuwe Weme (G. van Solinge & M.P. Nieuwe Weme, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands burgerlijk recht. 2. Rechtspersonenrecht. Deel 2-II. De naamloze en besloten vennootschap* § 5 (Kluwer, 2009)).

leegte).[7] Indeed, in the 1990s, Dutch views on corporate purpose shifted towards the (enlightened) shareholder value-approach.[8]

This view has been abandoned. Any doubts in this regard where quelled by the landmark *Cancun*-ruling of the Dutch Supreme Court of 2014.[9] The *Cancun*-ruling essentially combines the holistic and derivative approaches and shifts the focus away from (enlightened) shareholder value.[10] The case involved a 50/50 joint venture. The participants intended to construct a hotel resort in Cancun, Mexico, using a Dutch holding corporation. After the bank conditioned the continuation of the project on the parties providing additional finance themselves as well, a temporary debt/equity swap was implemented. As a result, one of the joint venture partners was diluted to a stake of 0.13 %. Despite the debt/equity swap being executed, the bank refused to grant the loan. Subsequently, the joint venture parties failed to agree on the terms for unwinding of what should have been a temporary situation. In *Cancun*, the Dutch Supreme Court ruled that in general, the purpose of the corporation is to "promote the lasting success of the enterprise" (*bevorderen van het bestendige succes van de onderneming*).[11] The interest of the firm is *additionally* (emphasis added, TK) determined by the nature and scope of shareholder interests. As a result, directors are principally required to promote the interests of the

7. *See* H.J.M.N. Honée, 'Commissarissen, gezanten uit Niemandsland?', 75 *De Naamlooze Vennootschap* 276 (1996); *see also* J.W. Winter, 'Level playing fields forever', in: *De nieuwe macht van de kapitaalverschaffer* (H. Beckman et al. eds., 2007). In the meantime, Winter appears to have made a U-turn. *See* J.W. Winter et al., 'Naar een zorgplicht voor bestuurders en commissarissen tot verantwoorde deelname aan het maatschappelijk verkeer', 22 *Ondernemingsrecht* 471 (2020), arguing corporations should act socially responsible and state their purpose.
8. *See* J.M. de Jongh, 'Een maatschappelijke resultante. Het vennootschapsbelang op de golven van maatschappelijke verandering', in: B. Kemp, H. Koster & C.A. Schwarz, *De betekenis en functies van het vennootschappelijk belang* 5 (Kluwer, 2019); *see also* L. Timmerman, 'Grondslagen van geldend ondernemingsrecht', 11 *Ondernemingsrecht* 4 (2009).
9. *See* Hoge Raad 4 April 2014, ECLI:NL:HR:2014:797 (*Cancun*).
10. Indeed, *Cancun* confirms the existence of a separate interest of the corporation, being the sum of the interests of those involved in the corporation. For important scholarly contributions in similar vein prior to the the Dutch Supreme Court-ruling, s*ee* M.J. van Ginneken & L. Timmerman, 'De betekenis van het evenredigheidsbeginsel voor het ondernemingsrecht', 13 *Ondernemingsrecht* 601 (2011); *see also* B.F. Assink, *De Januskop van het ondernemingsrecht, over faciliëring en regulering van ondernemerschap* 39-40 (Kluwer, 2010).
11. *See* Hoge Raad 4 April 2014, ECLI:NL:HR:2014:797 (*Cancun*). In case of insolvency, the corporate purpose shifts to promoting creditors interests. *See* Gerechtshof Amsterdam 3 December 2019, ECLI:NL:GHAMS:2019:4295 (*ZED+*). Note that *Cancun* and its progeny principally apply to corporations. The purpose of a partnership is typically a derivative of the joint interests of the partners. *See* Hoge Raad 22 September 2017, ECLI:NL:HR:2017:2444 (*Bastion de Leede*). Whether this is a criterion different than that of *Cancun* has been debated. *See* B.F. Assink, 'Verbindend (vennootschaps)recht', 68 *Ars Aequi* 43 (2018).

corporation.[12] In practice, this involves weighing the interests of the various constituents. In this balancing act, shareholder interests are not necessarily preponderant.[13]

The *Cancun*-framework not only governs closed, private entities, but also applies to listed NVs.[14] This is reflected in the Dutch Corporate Governance Code (the Code, *see* § 26.5 *supra*). As part of the 2016 review, long-term *value creation* was made the Code's overarching theme.[15] Importantly, this concept should be distinguished from long-term *shareholder value*, which is principally investor focused and was the main notion to underly the 2008 Code.[16] According to Principle 1.1 – the very first substantive rule! – of the 2016 Code, management is responsible for promoting the continuity of the NV and the businesses involved. To that extent, it takes relevant stakeholder interests into account. The obligation to account for stakeholder interests is specified in more detail in Best Practice Provisions 1.1.1, 1.1.2 and 1.1.3.[17] These Best Practice Provisions stipulate that the executive board should develop a strategy focused

---

12. *See* Hoge Raad 4 April 2014, ECLI:NL:HR:2014:797 (*Cancun*). For similar, earlier rulings, *see* Hoge Raad 12 July 2013, ECLI:NL:HR:2013:BZ9145 (*VEB/KLM*) (regarding dividend policy, on which *see* § 28.5 *infra*); *see also* Hoge Raad 9 July 2010, ECLI:NL:HR:2010:BM0976 (*ASMI*) (in relation to hedge-fund activism); Hoge Raad 13 July 2007, ECLI:NL:HR:2007:BA7972 (*ABN AMRO*) (involving a Revlon-takeover scenario).
13. The literature on the *Cancun*-ruling is vast and too extensive to be cited in full. For instructive readings, *see* B. Kemp, H. Koster & C.A. Schwarz, *De betekenis en functies van het vennootschappelijk belang* (Kluwer, 2019); *see also* B.F. Assink, 'Van vennootschapsrechtelijk belang (I)', 147 *Weekblad voor Privaatrecht, Notariaat en Registratie* 465 (2016); B.F. Assink, 'Van vennootschapsrechtelijk belang (II)', 147 *Weekblad voor Privaatrecht, Notariaat en Registratie* 491 (2016) (discussing the futility of shareholder value maximization as corporate strategy instead of becoming, for instance, a high-quality market leader or a low-cost bulk supplier); B.F. Assink, 'Belang van de vennootschap, overname en algemeen belang', 146 *Weekblad voor Privaatrecht, Notariaat en Registratie* 103 (2015); M.J.G.C. Raaijmakers, 'Cancun: een joint venture klem tussen contract en instituut', 64 *Ars Aequi* 459 (2014), critically observing the ruling should only apply to the largest of businesses.
14. *See* Gerechtshof Amsterdam 29 May 2017, ECLI:NL:GHAMS:2017:1965 (*Akzo Nobel*); *see also* Gerechtshof Amsterdam 12 October 2016, ECLI:NL:GHAMS:2016:4056 (*Delta Lloyd*).
15. *See* Principle 1.1: "*Het bestuur is verantwoordelijk voor de continuïteit van de vennootschap en de met haar verbonden onderneming. Het bestuur richt zich op de lange termijn waardecreatie van de vennootschap en de met haar verbonden onderneming en weegt daartoe de in aanmerking komende belangen van de stakeholders. De raad van commissarissen houdt toezicht op het bestuur terzake.*"
16. *See* Preamble 7: "*Daarbij streeft de vennootschap naar het creëren van aandeelhouderswaarde op de lange termijn.*"
17. *See* R. Kleipool, M. van Olffen & B. Roelvink, *Corporate Governance in the Netherlands: A practical guide to the new Corporate Governance Code* (Eleven International Publishing, 2018); *see also* R.H. Kleipool & M. van Olffen, 'De Nederlandse Corporate Governance Code 2016', 19 *Ondernemingsrecht* 316 (2016); S. Rietveld & M. Cremers, 'Herziening van de Corporate Governance Code: een overzicht van de wijzigingen, 18 *Ondernemingsrecht* 318, 319 (2016).

on long-term value creation and address the role of the supervisory board in that regard. Moreover, Best Practice Provision 1.1.4 mandates the executive board to disclose its views on long-term value creation in the annual report. To summarize, sustainability is deeply imbedded in the Code.

28.2.2 Corporate Personhood

A second characteristic to define the character of the NV is its approach to legal personhood. Under Dutch law, a corporation is considered an institution in itself, instead of a contract solely negotiated by investors.[18] To a certain extent, this institution is governed by its own rules. In this sense, the corporation constitutes a separate legal order. As Timmerman has argued forcefully, institutionalism grants the NV a potentially, although not necessarily, open character.[19] Whilst not going as far as claiming that creditors and employees can become legal members of the corporation, institutionalism entails that factually, the sphere of the NV is accessible for such parties – provided they are sufficiently institutionally involved. Therefore, institutionalism can be related to the stakeholder approach (*see* § 28.2.1 *supra*). Moreover, this notion recognizes that the corporation's organs, including the AGM and the executive and/or supervisory board, each have separate powers and responsibilities. The relationship between these organs is not so much vertical in nature as agency theory posits, but rather horizontal. After its inception, the NV becomes increasingly distinct from its original directors and founding shareholders. Consequently, institutionalism is inextricably linked to managerial autonomy. The *Forumbank*-ruling of the Dutch Supreme Court is a landmark case in this regard.[20] There, it was held that even the AGM, which until then had been considered the supreme corporate organ (*see* § 27.2.3 *supra*), cannot exceed its statutory powers or those attributed to it in the Articles of Association. As a result, executive and/or supervisory directors are under no obligation to follow AGM instructions to the extent that these relate to management competences.[21] Interestingly, institutionalism is not only linked to stakeholder thinking and the separation of corporate powers, but may also be said to enjoy a solid financial-economic basis. Indeed, the institutional approach is rather similar

18. *See* Kroeze 2015, *supra* note 2, at § 30.
19. *See* L. Timmerman, 'Oude koeien met actualiteitswaarde. Over begripsvorming in het ondernemingsrecht', 16 *Ondernemingsrecht* 569 (2014), referring to P. van Schilfgaarde & A.G. van Solinge, *De vennootschap volgens het ontwerp BW* 12 (W.E.J. Tjeenk Willink, 1974).
20. *See* Hoge Raad 21 January 1955, ECLI:NL:HR:1955:AG2033 (*Forumbank*).
21. *See* Hoge Raad 21 January 1955, ECLI:NL:HR:1955:AG2033 (*Forumbank*). The case concerned a share buyback mandated by the majority shareholders, although opposed by the executive and supervisory board as well as outside minority shareholders. With the Articles of Association being silent on the matter, the default statutory regime applied, as a result of which the issue was ruled part of managerial discretion. For an extensive discussion, *see* Overkleeft 2017, *supra* note 4, at 51-57.

to the life-cycle perspective, in the sense that it assumes the corporation will grow over time (*see* § 10.6 *supra*). Initially, the NV's relevance to society is limited, and its separate legal order is small in scope. As the corporation offers more employment and builds on an increasingly large network of suppliers, the social costs of not involving third parties rise considerably, and the trade-off for doing so changes.

Despite the strong connections between institutionalism, stakeholder thinking and managerial autonomy – and perhaps contrary to one's expectations – the concept of institutionalism has not always been part of Dutch corporate dogma. In times past, Dutch law subscribed to the contractual view.[22] Art. 15 of the Dutch Code of Commerce (*Wetboek van Koophandel*) of 1838, as inspired by its French counterpart (*see* § 27.2.2 *supra*), applied to "contracts of firms". Ironically, the breach with the French-influenced contractual approach was fueled by scholars from France, notably Hauriou.[23] The French institutionalists argued that a corporation existed around a central idea (in other words, the founder's "idiosyncratic vision", *see* § 10.5.4 *supra*). Its execution required establishing an institution with different organs, working together towards a common goal but performing their tasks independently.[24] Compared to the prior contractual approach, institutionalism acknowledged that for many corporations, profound shareholder involvement was no longer the norm. From a doctrinal perspective, institutionalism also favored decision making by majority over decision making by unanimity and subordinating the interests of the individual to those of the organization as a whole. However, the legislator only recognized the influence of institutionalism, which had been gaining prominence for over 50 years, in 1976, when the Dutch Civil Code was (partially) enacted.[25] There were several

22. This view differed from the nexus-of-contracts approach in the sense that it did not consider every single obligation, for instance one between the corporation and its creditors, a contract, but only deemed investor relationships to be contractual. For a thorough discussion, *see* Kemp 2015, *supra* note 5, at 55-70; *see also* De Jongh 2014, *supra* note 4, at 315-366.
23. *See* M. Hauriou, 'La théorie de l'institution et de la fondation,' 2 *Cahiers de la Nouvelle Journée* 2 (1925). For more recent interpretations of Hauriou's works, *see* E. Millard, 'Hauriou et la théorie de l'institution', 30 *Droit et société* 381 (1995); *see also* A. Broderick (eds.), *The French Institutionalists. Maurice Hauriou, Georges Renard, Joseph T. Delos* (Harvard University Press, 1970).
24. *See* De Jongh 2014, *supra* note 4, at 311-313, noting that the French institutionalist were motivated by catholic corporatist ideas, thus aiming to bridge the gap between capital and labor.
25. Naturally, other dates have been put forward as well. *See* Kemp 2015, *supra* note 5, at 60-63, pointing to the Code of Commerce (*Wetboek van Koophandel*) of 1928 as the first development towards institutionalism, as it abolished the requirement that NVs should be incorporated by at least two persons, which is typically the case with a contract; *see also* J. Barneveld, *Financiering en vermogensonttrekking door aandeelhouders: een studie naar de grenzen aan de financieringsvrijheid van aandeelhouders in besloten verhoudingen naar Amerikaans, Duits en Nederlands recht* 374 (Kluwer, 2014), arguing that the introduction of the statutory co-determination regime in 1971 (*see* note 3 *supra* and note 26 *infra*) can be seen as the acceptance of institutionalism.

socio-economic causes for the shift towards the institutional doctrine over its contractual adversary. These included the growth in size of corporations (also due to business combinations), the emancipation of labor in the political arena as well as the increasingly active role of the government in society.[26] Three cases of the Dutch Supreme Court are especially indicative of the gradual transition towards institutionalism. The *Gulpen & Scherts/Memel*-ruling of 1938 confirmed that the AGM is not allowed, not even by a unanimous vote representing the entire issued share capital, to adopt a resolution contrary to the Articles of Association.[27] Moreover, the *Doetinchemse IJzergieterij*-decision of 1949 held that diluting the majority shareholder was lawful, as the (above par) issuance was deemed in the best interests of the corporation. The corporate interests outweighed the interests of the controlling investor.[28] Finally, the *Mante*-ruling of 1964 may be said to embody the acceptance of institutionalism by the judiciary.[29] There, the Dutch Supreme Court held that the (lower) Court of Appeals of The Hague had ruled correctly that the AGM had exceeded its powers. By justifying its judgement by referring to the law instead of a statute, the Dutch Supreme Court implied the NV has a legal sphere of its own. The works of Dutch scholars show a similar development: whilst few advocated institutionalism in the 1920s,[30] the idea became more common during the 1930s and 1940s[31] and was accepted by many at the dawn of the 1960s.[32]

26. In 1964, the very same factors also resulted in a report by the Verdam-Committee on the introduction of a statutory co-determination scheme. *See* Commissie Ondernemingsrecht, *Herziening van het Ondernemingsrecht* (Staatsuitgeverij, 1965). For elaborate analyses, *see* Overkleeft 2017, *supra* note 4, at 69-78; *see also* De Jongh 2014, *supra* note 4, at 341-354.
27. *See* Hoge Raad 8 April 1938, ECLI:NL:HR:1938:236 (*Gulpen & Scherts/Memel*).
28. *See* Hoge Raad 1 April 1949, ECLI:NL:HR:1949:126 (*Doetinchemse IJzergieterij*). For a critical contemporary discussion, *see* W.C.L. van der Grinten, 'Uitgifte van nieuwe aandelen en voorkeursrecht', 27 *Naamloooze Vennootschap* 121 (1949), arguing that the corporate interest and the interests of the shareholders are interchangeable. For a modern interpretation of Van der Grinten's thoughts, *see* Overkleeft 2017, *supra* note 4, at 45-50. In my view, diluting a controlling shareholder to support the corporate interest is still permitted as a matter of principle, even after the 2014 *Cancun*-ruling of the Dutch Supreme Court ruled against such a transaction based on the facts and circumstances of that particular case. For the arguably different US situation, *see* § 16.3.5 *supra*.
29. *See* Hoge Raad 30 October 1964 (*Mante*).
30. For a notable exception, *see* C.M.O. Van Nispen tot Sevenaer, 'Het rechtskarakter van de statuten eener Naamlooze Vennootschap', 6 *De Naamlooze Vennootschap* 260 (1927); *see also* C.M.O. Van Nispen tot Sevenaer, 'Nogmaals "Het rechtskarakter van de statuten eener Naamlooze Vennootschap."', 7 *De Naamlooze Vennootschap* 163 (1928).
31. *See* C.P.M. Romme, *De onderneming als gemeenschap in het recht* (Urbi et Orbi, 1946); *see also* J.Ph.M. van Campen, *Onderneming en rechtsvorm* (Dekker & Van de Vegt, 1945); W.F. de Gaay Fortmann, *De onderneming in het arbeidsrecht* (H.J. Paris, 1936).
32. For authoritative examples, *see* W.C.L. van der Grinten, 'Rechtspersonen', in: *Ter eerste kennismaking. Zes voordrachten over de eerste vier boeken van het ontwerp voor een nieuw Burgerlijk Wetboek* 123 (A.R. de Bruin et al. eds., 1955); *see also* F.J.W. Löwensteyn, *Wezen en bevoegdheid van het bestuur van de vereniging en de naamloze vennootschap* 14-15, 18-19 (W.E.J. Tjeenk Willink 1959); P. Sanders, 'De nieuwe druk van Van der Heijden-Van

This development culminated in the landmark inaugural lecture of Maeijer in 1964, which linked the concept of corporate personhood to that of the purpose of the corporation (*see* § 28.2.1 *supra*).[33]

In modern times the institutional approach has faced criticism as well. Especially Raaijmakers (senior) has been going to great lengths in arguing that this legal construct obstructs entrepreneurialism and complicates investor collaboration. In his view, the institutional perspective serves to legitimize shareholder disempowerment, inducing Raaijmakers to advocate a return towards contractualism.[34] Raaijmakers' critiques, thoughtful as they may be, have generally failed to gain much ground regarding open, listed corporations.[35] Meanwhile, the 2012 overhaul of the statute of the private limited company (*besloten vennootschap*, BV), a legal entity which was initially introduced as a rigid copy of the NV (*see* § 26.3.1 *supra*), has strengthened the BV's contractual element. However, even for the BV, the reorientation on contractualism has only been partial.[36]

Given the idiosyncratic Dutch approach to corporate personhood in the form of institutionalism, neither the fictional theory on legal personality, in the tradition of Von Savigny,[37] nor the real entity theory, following Von Gierke,[38] lies

der Grinten', 41 *Naamloooze Vennootschap* 58 (1963). Note that it is not always abundantly clear whether scholars discuss the open or closed variant of the NV, obfuscating the understanding of their views.

33. *See* Maeijer 1964, *supra* note 4.
34. *See* M.J.G.C. Raaijmakers, *Rechtspersonen tussen contract en instituut* (Kluwer, 1987); *see also* M.J.G.C. Raaijmakers, ''Besloten' vennootschappen: quasi-nv of quasi-vof? Enkele rechtsvergelijkende notities', 43 *Ars Aequi* 76 (1994); Raaijmakers 2014, *supra* note 13; M.J.G.C. Raaijmakers, 'De 'institutionele opvatting': grondslag en inhoud?', 45 *Ondernemingsrecht* 155 (2015).
35. For an exception, *see* J.M. Blanco Fernández, 'Wat is de vennootschap en wat behoort het vennootschapsrecht te zijn', 20 *Ondernemingsrecht* 169 (2018). *But see* M.A. Verbrugh, 'Reactie op J.M. Blanco Fernández, 'Wat is de vennootschap en wat behoort het vennootschapsrecht te zijn', Ondernemingsrecht 2018/29', 20 *Ondernemingsrecht* 722 (2018), arguing that Blanco Fernández's criticisms appear ill-founded, since these are based on smaller private corporations instead of larger listed firms.
36. *See* D.F.M.M. Zaman & S.A. Kruisinga, 'Uitleg van statuten', 11 *Tijdschrift voor vennootschapsrecht, rechtspersonenrecht en ondernemingsbestuur* 182 (2014); *see also* D.F.M.M. Zaman & I.C.P. Groenland, 'Tussen contract en instituut: waar zweeft de Flex-BV?', 6 *Tijdschrift voor vennootschapsrecht, rechtspersonenrecht en ondernemingsbestuur* 168 (2009). Note that BVs incorporated under the laws of the former Dutch Antilles may be formed without a board. *See* L. Timmerman, 'Een BV zonder bestuur en zonder aandeelhoudersvergadering', 6 *Ondernemingsrecht* 27 (2004). Then, the contractual aspect carries even more weight.
37. *See* F.C. von Savigny, *System des heutigen Römischen Rechts II* 235 (Veit, 1840). For an analysis, *see* § 21.2.2 *supra*.
38. *See* O. von Gierke, *Die Genossenschaftstheorie und die Deutsche Rechtsprechung* 603 (Weidmann, 1887). For a discussion, *see* § 21.2.2 *supra*.

at the basis of the Dutch Civil Code[39] – although the fictional approach is quite influential in the current legal debate.[40] The relationship between the corporation and its investors resulting from the concept of institutionalism has been referred to as membership relation (*lidmaatschapsverhouding*). This term is traditionally considered to indicate the distinction between shareholder and purely contractual rights.[41] It has been frequently argued that the membership relation is the actual source of shareholder rights, rather than the share itself.[42]

28.2.3 Mandatory versus enabling Law

A third characteristic to define the NV-statute is the way in which it balances mandatory and enabling aspects. If art. 2:25 BW were to be interpreted literally, one might come under the impression that Dutch corporate law has a principally paternalistic character. Accordingly, the Articles of Association may only deviate from statutory provisions provided that such variations are authorized by the statute itself. This regime applies both to the NV and the BV.[43] Decisions by corporate organs in violation of mandatory provisions are void (art. 2:14 BW). Thus, the "magic words" which are not required under Delaware corporate law (*see* § 16.2.3 *supra*) appear to be a bare necessity under Dutch corporate law.

However, as a historical analysis suggests, caution is in order. The predecessor of art. 2:25 BW can be found in art. 37d WvK 1928 and was initially introduced as art. 39a WvK in the draft-Nelissen of 1910 (WvKN, *see* § 27.3.2 *supra*). The draft-Nelissen did not seek to impose a rigid one size fits all-approach.[44] Rather, art. 39a WvKN was intended to positively identify default rules which parties were authorized to deviate from.[45] Likewise, Timmerman

39. *See* C.J. van Zeben, W.G. Belinfante & O.W. van Ewijk, *Parlementaire geschiedenis van het Nieuwe Burgerlijk Wetboek. Boek 2. Rechtspersonen.* (Kluwer, 1961), containing the *travaux préparatoires* to (Book 2 of) the Dutch Civil Code. For a thorough analysis of the fictional and the real entity theory under Dutch corporate law, *see* Kroeze 2015, *supra* note 2, at § 4-9.
40. Proponents of the fictional approach have notably included De Jongh 2014, *supra* note 4, at 416; *see also* Timmerman 2014, *supra* note 19, at 569.
41. *See* W.J. Slagter, 'De lidmaatschapsverhouding als grondslag van het rechtspersonenrecht', 6 *Ondernemingsrecht* 424 (2004).
42. On membership rights of shareholders, *see* Kroeze 2015, *supra* note 2, at § 215; *see also* Kemp 2015, *supra* note 5, at 139-148; G.J.C. Rensen, *Extra-verplichtingen van leden en aandeelhouders* (Kluwer, 2005).
43. *See* Kroeze 2015, *supra* note 2, at § 43; *see also* B.F. Assink & W.J. Slagter, *Compendium Ondernemingsrecht*, § 8 (Kluwer, 2013). The discussion in § 28.2.3 is largely based on T.A. Keijzer, 'Autonomie en paternalisme in het vennootschapsrecht van Nederland en Delaware', 67 *Ars Aequi* 610 (2017).
44. *See Kamerstukken II* 1909/10, 217, nr. 3, p. 25.
45. *See* M. Meinema, *Dwingend recht voor de besloten vennootschap* 24-27 (Kluwer, 2003). For a similar view, *see* A.G.H. Klaassen, 'Opgelegde bescherming aan de AvA: de dominee en

has concluded that art. 2:25 BW mainly serves a technical function.[46] In fact, he has argued that to better encapsulate the rationale of art. 2:25 BW, the wording of this provision should be mirrored. Whereas Timmerman acknowledged there existed convincing arguments for imposing some mandatory rules of law, the parties involved in a corporation under Dutch law should principally be permitted to adopt a tailor-made governance regime.[47] Mirroring art. 2:25 BW would enable important simplifications, mainly with respect to the flexible BV-statute, which features many non-binding default rules.[48] The fact that the legislator has not adopted Timmerman's suggestion as part of the 2012 Flex-BV review (*see* § 26.3.1 *supra*) did not stem from any substantive disagreements, but is primarily due to the fact that doing so would have caused delays and technical complications.[49]

In conclusion, the wording of art. 2:25 BW may not have promoted an enabling interpretation of statutory provisions, but its meaning has neither categorically ruled out innovations within the pre-existing legal framework. To substantiate, Dutch corporate law permitted oligarchic clauses (*see* § 27.3.1 *supra*), which involve subjecting certain powers mandatorily attributed to the AGM to initiative or control rights of others, long before an enabling statutory provision for such practices existed. Moreover, art. 2:92 BW could be construed to enable loyalty shares, despite the provision itself not stating as such (*see* § 28.4.3 *infra*). Finally, art. 2:129a BW apparently could be read in such a way as to enable a one tier board consisting of a chair, CEO and senior non-independent director, with the latter acting as formal chair.[50] With regard to the balance between mandatory and enabling law, therefore, the Dutch system more resembles its US than its German counterpart.

---

de koopman in Boek 2 BW', in: F.G.M. Smeele & M.A. Verbrugh, *'Opgelegde bescherming' in het bedrijfsrecht* 57, 61 (Boom, 2010).

46. *See* L. Timmerman, 'Waarom hebben wij dwingend vennootschapsrecht', in: L. Timmerman et al. (eds.), *Ondernemingsrechtelijke contracten* 1 (Kluwer, 1991). For a broadly similar view, *see* H.J. de Kluiver & M. Meinema, 'Dwingend vennootschapsrecht na de Wet herziening preventief toezicht en de mogelijkheden van statutaire of contractuele afwijking en aanvulling', 133 *Weekblad voor Privaatrecht, Notariaat en Registratie* 648 (2002), arguing that whether a specific provision is mandatory depends not (only) on its wording but rather on its character.
47. *See* Timmerman 1991, *supra* note 46, arguing rules of corporate law should only be mandatory i) in relation to the goal of the corporation, ii) to guarantee rights of third parties, iii) for reasons of efficiency and iv) to create corporate forms with a distinct profile.
48. *See* Timmerman 1991, *supra* note 46; *see also* H.J. de Kluiver, 'Het vennootschapsrecht dient te worden versoepeld…en verscherpt', 37 *Tijdschrift voor Vennootschappen, Verenigingen en Stichtingen* 174 (1994).
49. *See Kamerstukken II* 2006/07, 31058, nr. 3, p. 6; *see* L. Timmerman, 'Grondslagen van geldend ondernemingsrecht', 11 *Ondernemingsrecht* 4 (2009), accepting the legislator's arguements for retaining art. 2:25 BW.
50. *See* M. van Olffen, 'Inrichting van de one tier vennootschap bij of krachtens de statuten', 14 *Ondernemingsrecht* 481 (2012). For a critical reading, *see* A.A. Bootsma, 'De voorzitter van de one-tier board als dwaallicht', 18 *Ondernemingsrecht* 533 (2016).

28.3 The position of the executive and supervisory board

28.3.1 Position and composition

Pursuant to art. 2:129 (1) BW, the executive board is responsible for managing the NV.[51] In line with the German approach (*see* § 22.3.1 *supra*), Dutch corporate law has historically subscribed to the two tier board model. Meanwhile, as of January 1, 2013, Dutch corporate law (art. 2:129a BW) also provides a statutory basis in respect of one tier boards.[52]

According to Best Practice Provision 1.1.1 of the Dutch Corporate Governance Code, the executive board is responsible for formulating a vision and developing a strategy to deliver on its objectives. Since the concept of strategy is interpreted rather broadly, the Netherlands has traditionally been said to adhere to a board-centric governance model, similar to Delaware (*see* § 16.3 *supra*) and Germany (*see* § 22.3 *supra*). The position of the executive board was confirmed, for instance, in the landmark *Boskalis/Fugro*-case of 2018[53] and can also be derived from prior case law.[54] The supervisory board, for its part, must monitor the policies of the executive board and the general course of events as well as provide advice (art. 2:140 (2) BW).[55] Pursuant to art. 2:164 (1) BW, momentous executive board decisions, for instance

51. Note that the Dutch wording of art. 2:129 (1) BW is rather circular in nature, a subtlety that is most often lost in translation. A formulation which retains this peculiarity reads "the governors are responsible for governing the corporation". This perplexing phrase has given rise to many enquiries as to the exact meaning of art. 2:129 (1) BW. For insightful analyses, *see* Van Solinge & Nieuwe Weme 2019, *supra* note 2, at § 389-393; *see also* Kroeze 2015, *supra* note 2, at § 189-211.
52. *See* M. van Olffen, 'Inrichting van de one tier vennootschap bij of krachtens de statuten', 14 *Ondernemingsrecht* 481 (2012); *see also* S.H.M.A. Dumoulin, 'Het monistische bestuursmodel volgens de Wet bestuur en toezicht – observaties vanuit de praktijk', 14 *Ondernemingsrecht* 488 (2012). The Dutch Corporate Governance Code equally addresses one tier boards. *See* Principle 5.1 et seq., which reflect that, with a few exceptions, the Dutch approach to one tier boards has been to apply (statutory) provisions regarding supervisory directors to non- executive directors by means of analogy. The remainder of § 28.3.1 assumes a two tier board structure.
53. *See* Hoge Raad 20 April 2018, ECLI:NL:HR:2018:652 (*Boskalis/Fugro*), ruling that the decision whether to abolish anti-takeover measures is part of the strategy, meaning that the matter falls within the exclusive competence of the executive board. *See* B.F. Assink, 'Kanttekeningen bij Boskalis/Fugro', 4 *Maandblad voor Ondernemingsrecht* 183 (2018); *see also* R.A.F. Timmermans, 'Beschermingsperikelen bij Fugro N.V.', 17 *Ondernemingsrecht* 307 (2015); F.M. Peters & F. Eikelboom, 'De strijd over het agenderingsrecht tussen Boskalis en Fugro', 146 *Weekblad voor Privaatrecht, Notariaat en Registratie* 407 (2015). On AGM-powers and investor proposals, *see* § 28.4.5 *infra*.
54. *See* Hoge Raad 9 July 2010, ECLI:NL:HR:2010:BM0976 (*ASMI*); *see also* Hoge Raad 13 July 2007, ECLI:NL:HR:2007:BA7972 (*ABN AMRO*), both ruling that the executive board is under no obligation to consult the AGM regarding its future course of action.
55. *See* Hoge Raad 9 July 2010, ECLI:NL:HR:2010:BM0976 (*ASMI*), holding that the supervisory board is under no obligation to mediate in conflicts between the executive board and

to issue stock, modify the Articles of Association or dissolve the corporation are all subject to supervisory board veto rights.[56] In practice, the supervisory board may be heavily involved in formulating corporate strategy.[57] Although the Chair of the supervisory board enjoys no special statutory position, he or she may become rather influential, especially in times of corporate distress.[58] All executive and supervisory directors, including controlling shareholder or employee nominees, are legally required to promote the interest of the corporation (*see* § 28.2.1 *supra*). The executive and supervisory board have the right to convene (art. 2:109 BW) and make proposals to (art. 2:114 (1) BW) the AGM. Indeed, the AGM generally lacks a right of initiative of its own (*see* § 28.4.5 *infra*). The use of executive Committees is widespread and accepted by most Dutch scholars, although this phenomenon constituted a doctrinal *terra incognita* until recently.[59]

The executive board is appointed by the supervisory board (art. 2:162 BW).[60] Supervisory directors are nominated by the existing supervisory board (co-opting!) and formally appointed by the AGM (art. 2:158 (4), (5) and (6) BW).[61] Employee representatives make up one third of the supervisory board (art. 2:158 (6) BW). However, these are not necessarily union members, and

the AGM. For an extensive discussion, *see* M.J. van Ginneken, *Vijandige overnames: de rol van de vennootschapsleiding in Nederland en de Verenigde Staten* 63-72 (Kluwer, 2010).

56. Note this discussion assumes the applicability of the structure regime (art. 2:152 et seq. BW), governing the "large" NV (*see* note 3 *supra*). For smaller NVs, establishing a supervisory board is optional.

57. On the interplay between the executive and supervisory board with regard to strategy, *see* S.H.M.A Dumoulin, 'Het bestuur van de beursvennootschap. Enige beschouwingen over bestuur, toezicht en governance', 21 *Ondernemingsrecht* 411 (2019); *see also* Principle 1.5 et seq. of the Dutch Corporate Governance Code.

58. *See* G.N.H. Kemperink, 'De voorzitter van de raad van commissarissen, of: de éminence grise van het vennootschapsrecht', 5 *Maandblad voor Ondernemingsrecht* 330 (2019), stating somewhat surprised there exists no formal obligation to appoint a Chair of the supervisory board, and calling for further regulation of this role.

59. For authoritative papers on this issue, *see* H.M. Vletter-van Dort, 'Executive Committee lid', in: *De vele gezichten van Maarten Kroeze's "bange bestuurders"* 215 (Wolters Kluwer, 2017) (pointing to unexpected liability risks for members of the executive committee); *see also* S.H.M.A Dumoulin, 'Het Executive Committee over bestuur en toezicht, vennootschap en onderneming', 19 *Ondernemingsrecht* 363 (2017) (arguing that since there exists a practical need for executive committees, the mechanism must be efficient); C.E. Honée, 'Het Executive Committee, haken en ogen aan een nieuwe trend', 16 *Ondernemingsrecht* 119 (2014) (more critically on their usefulness); G.N.H. Kemperink, '"Ik hoor u wel, maar luister niet…": de raad van commissarissen en het executive committee bij de beursgenoteerde vennootschap', 20 *Ondernemingsrecht* 535 (2018), arguing the body may usurp executive board powers.

60. For smaller corporations, where a supervisory board does not exist, the executive board is appointed and dismissed directly by the AGM. *See* art. 2:132 and 2.142 BW.

61. The powers of the supervisory board under this co-optation system are not entirely unchecked: the AGM may reject candidates, by an absolute majority vote representing 1/3rd of the share capital. *See* art. 2:158 (9) BW.

generally adopt less of an activist pro-labor stance than their German counterparts (*see* § 20.4 *supra*). Absent provisions in the Articles of Association to the contrary, supervisory directors require a majority of the AGM votes to be elected, whereas executive directors require a majority of the supervisory director votes. For both organs, plurality voting is not practiced. The executive board may consist of both natural persons as well as legal entities, whereas the supervisory board can only consist of natural persons.[62] There exists no statutory term limit for executive and supervisory directors. In practice, 4-year terms are most common.[63] As is the case with appointment, the AGM is the competent body to dismiss the supervisory board en bloc, even without cause, according to art. 2:161a BW. (Pursuant to art. 2:162 (2) BW, individual supervisory directors can only be removed by adjudicating a court.) For its part, the supervisory board can terminate executive directors at all times, again without cause, after having consulted the AGM (art. 2:162 BW).

28.3.2 Director duties

Executive and supervisory directors of the NV are not bound by fiduciary duties towards shareholders in the traditional sense. First, this follows from the fact that under Dutch law, the corporate purpose is not to create shareholder value (*see* § 28.2.1 *supra*). This equally applies in case the board decides to give up the corporation's independence, meaning that no Revlon-duties (*see* § 16.3.4 *supra*) apply.[64] Second, although the concept of fiduciary duties is well-known amongst scholars,[65] Dutch legal doctrine has followed a somewhat different path to regulate director behavior.[66]

---

62. *See* K.H.M. de Roo, 'Het lichaam van de niet-uitvoerende bestuurder', 3 *Maandblad voor Ondernemingsrecht* 250 (2017), arguing a convincing rationale for restricting supervisory positions to natural persons is lacking.
63. *See* Van Solinge & Nieuwe Weme 2019, *supra* note 2, at § 182; *see also See* R. Kleipool, M. van Olffen & B. Roelvink, *Corporate Governance in the Netherlands: A practical guide to the new Corporate Governance Code* (Eleven International Publishing, 2018). Note that pursuant to Best Practice Provisions 2.2.1 and 2.2.2 of the Dutch Corporate Governance Code , proposals to reappointment supervisory directors who have already been in office for 8 years must be sufficiently motivated.
64. *See* Gerechtshof Amsterdam 21 March 2017, ECLI:NL:GHAMS:2017:930 (*TMG*); *see also* Hoge Raad 9 July 2010, ECLI:NL:HR:2010:BM0976 (*ASMI*); Hoge Raad 13 July 2007, ECLI:NL:HR:2007:BA7972 (*ABN AMRO*). Meanwhile, the use of anti-takeover mechanisms under Dutch law is regulated rather similarly as is the case in the US (*see* § 16.3.4 *supra* on Unocal), being subjected to a reasonableness and proportionality-test. *See* Hoge Raad 18 April 2003, ECLI:NL:HR:2003:AF2161 (*RNA/Westfield*).
65. For an particularly relevant contribution, *see* B.F. Assink, *Rechterlijke toetsing van bestuurlijk gedrag binnen het vennootschapsrecht van Nederland en Delaware* (Kluwer, 2007), advocating a Dutch-variant of the BJR.
66. On the behavioral aspect of director responsibilities, *see* L. Timmerman, 'Principles of Prevailing Dutch Company Law', 11 *European Business Organization Law Review* 609 (2010);

According to art. 2:9 (1) BW and art. 2:129 (5) BW, each executive director is responsible towards the corporation for the proper fulfillment of his tasks.[67] executive directors are assumed to be fit for their tasks, which should be carried out meticulously, displaying insight and diligence.[68] Even if the duties of loyalty and care do not apply formally, these formulations indicate such considerations are an inextricable part, also in the Dutch system, of the body of (case) law regulating director behavior.[69] (As such, the differences with US- and German-law fiduciary duties are indeed rather subtle.) Art. 2:149 BW extends the obligation of art. 2:9 (1) BW to supervisory directors. Individual executive and supervisory directors are responsible for all tasks not attributed to others by statute or the Articles of Association. Although art. 2:9 (1) and art. 2:149 BW do not prohibit a division of tasks, executive and supervisory directors remain individually responsible for managing and overseeing the entirety of the corporate affairs.[70]

28.3.3 Serious reproach

Director are responsible towards the corporation for the proper fulfilment of their tasks. Whether executive directors have acted in accordance with this duty is determined by comparing their actions against the (sufficiently) serious reproach (*ernstig verwijt*) standard. Indeed, Dutch corporate law has adopted a regime different from the US system of the business judgement rule (BJR, *see* § 16.3.4 *supra*) or its German variant (*see* § 22.3.2 *supra*).[71] However, similar to the BJR, the serious reproach-standard has traditionally been interpreted as setting a high threshold for personal director liability.[72] This position is based on the idea that directors should feel comfortable in assuming a responsible dose of risk.[73] Kroeze's 2004 inaugural lecture at Erasmus University in particular has been particularly influential in drawing the attention to this side of the argument.[74]

---

see also L. Timmerman, 'Grondslagen van geldend ondernemingsrecht', 11 *Ondernemingsrecht* 4 (2009).

67. *See* art. 2:9 (1) BW: "*Elke bestuurder is tegenover de rechtspersoon gehouden tot een behoorlijke vervulling van zijn taak*."
68. *See* Hoge Raad 10 January 1997, ECLI:NL:HR:1997:ZC2243 (*Staleman/Van de Ven*). For an extensive analysis, *see* Assink & Slagter 2013, *supra* note 43, at 928-933.
69. *See* Van Solinge & Nieuwe Weme 2019, *supra* note 2, at § 111.
70. *See* Kroeze 2015, *supra* note 2, at § 198.
71. *But see* Assink 2007, *supra* note 65, for an authoritative argument in favour of implementing a Dutch-variant of the BJR.
72. *See* Kroeze 2015, *supra* note 2, at § 199-208; *see also* Assink & Slagter 2013, *supra* note 43, at § 13.2, § 51-10-51.19.
73. *See* Hoge Raad 5 September 2014, ECLI:NL:HR:2014:2628 (*Hezemans Air*); *see also* Hoge Raad 5 September 2014, ECLI:NL:HR:2014:2627 (*RCI*).
74. *See* M.J. Kroeze, *Bange bestuurders* (Kluwer, 2005). For a vigorous – and ill-founded – critique of a high director liability threshold, *see* W.A. Westenbroek, *Bestuurdersaansprakeli-*

Traditionally, Dutch scholars have distinguished between internal and external liability of executive directors. Internal liability involves the relationship of executive directors vis-à-vis the corporation, whereas external liability encompasses the position of executive in relation to other parties, for instance creditors and shareholders. For internal situations, the applicability of the serious reproach standard follows directly from art. 2:9 (2) BW. Whether a serious reproach can be made depends on a holistic analysis of all relevant facts and circumstances.[75] These include the nature of the activities of the corporation, the resulting risks, the division of tasks within the board, policy guidelines (if any), data the board possessed or reasonably should have possessed and the insight and diligence that may be expected of an executive director who is fit for his duties and fulfils his tasks meticulously.[76] The burden of proof typically rests on the claimant, pursuant to art. 150 of the Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*). However, if an executive director has violated a provision of the Articles of Associations which serves to safeguard the interests of the corporation liability will, in principle, be a given.[77] When a claim based on art. 2:9 (2) BW succeeds, all directors are jointly and severally liable. Meanwhile, an executive director can escape individual liability by proving that i) his own actions did not constitute a serious reproach and ii) he has taken the measures necessary to mitigate the damage done by his colleagues.[78] It would be conceivable, in internal liability situations, for claimants to attempt to circumvent the high serious reproach threshold by launching a tort claim (art. 6:162 BW). According to case law, this idea will not work: in director liability situations, art. 6:162 BW will be interpreted and applied along similar lines as art. 2:9 (2) BW.[79]

---

jkheid in theorie (Kluwer, 2017).

75. *See* Hoge Raad 10 Januari 1997, ECLI:NL:HR:1997:ZC2243 (*Staleman/Van de Ven*). Non-executive directors of a one tier board principally face the same liability regime as executive directors of a two tier board. (Indeed, they are all board members.) The existence of a division of tasks between executive and non-executive directors may mitigate the liability of the latter to a certain extent. Had the one tier non-executive directors been two tier board supervisory directors, they only would have been liable for failing to carry out their monitoring duties, if the oversight failure merited a serious reproach of its own.
76. *See* Hoge Raad 10 Januari 1997, ECLI:NL:HR:1997:ZC2243 (*Staleman/Van de Ven*). An executive director having expert knowledge of a certain matter may be held liable sooner than non-experts. *See* Gerechtshof Amsterdam 21 September 2010, ECLI:NL:GHAMS:2010:BN6929 (*Lambers/Stichting Freule Lauta van Aysma*).
77. *See* Hoge Raad 29 November 2002, ECLI:NL:HR:2002:AE7011 (*Schwandt/Berghuizer Papierfabriek*).
78. For an argument in favour of a more individual approach to director liability, *see* D.A.M.H.W. Strik, *Grondslagen bestuurdersaansprakelijkheid, Een maatpak voor de Board Room* (Kluwer, 2010).
79. *See* Hoge Raad 2 March 2007, ECLI:NL:HR:2007:AZ3535 (*Holding Nutsbedrijf Westland/Schieke*). Note that directors can only invoke the (more permissive) serious reproach liability threshold for claims relating to managerial actions or inactions. For dealings not carried out in the capacity of corporate official, the ordinary tort standard of art. 6:162 BW applies. *See*

In external situations, which involves claims made by creditors or shareholders, an executive director liability claim can only be based on art. 6:162 BW: art. 2:9 (2) BW does not apply directly.[80] However, in this scenario as well, the tort claim of art. 6:162 BW is interpreted according to the serious reproach standard of art. 2:9 (2) BW, thus creating a homogenous system of executive director liability.[81] Dutch corporate law recognizes two types of external director liability based on creditor claims. The first category relates to executive directors entering into a contract when it should have been reasonably known to them that the corporation would not be able to meet its obligations.[82] The second category involves executive directors allowing or effectuating that the corporation does not pay its creditors.[83] An external director liability claim made by shareholders constitutes a derivative suit. The Dutch judiciary has traditionally been most conservative in awarding such claims and requires intent or the violation of a specific duty of care towards a particular investor.[84] A successful external claim, whether initiated by a creditor or a shareholder, only gives rise to individual director liability, not joint and several liability, as is the case with a internal claim.

28.3.4 Director independence & interestedness

Dutch law in relation to director independence and self-interest is multi-faceted. executive and supervisory directors are assumed to be independent and disinterested. If an executive (art. 2:129 (6) BW) or supervisory director (art. 2:140 (5) BW) faces a direct or indirect personal conflict of interest, he will not take part in discussions and abstain from participating in the

---

Hoge Raad 23 November 2012, ECLI:NL:HR:2012:BX5881 (*Spaanse Villa*). This ruling actually gave rise to considerable confusion as to whether the Dutch Supreme Court had abolished the serious reproach-standard. *See* G. van Solinge & J. van Bekkum, 'Villa Mundo', 16 *Ondernemingsrecht* 228 (2014); *see also* A. Karapetian, 'Bestuurdersaansprakelijkheid na Van de Riet/Hoffmann: over hoe het is, hoe het was en zou moeten zijn', 146 *Weekblad voor Privaatrecht, Notariaat en Registratie* 209 (2015). It was quickly confirmed the doctrine was still very much alive. *See* Hoge Raad 5 September 2014, ECLI:NL:HR:2014:2628 (*Hezemans Air*).

80. In case of insolvency, art. 2:138 BW can be invoked as well. This provision contains certain legal presumptions to render directors liable. Given the specific character of art. 2:138 BW, I will not be discussing it in more detail. For an extensive discussion, *see* Assink & Slagter 2013, *supra* note 43, at § 51.14.
81. The convergence in relation to director liability standards similarly serves to comfort directors when taking responsible risks. *See* Kroeze 2005, *supra* note 74.
82. *See* Hoge Raad 6 October 1989, ECLI:NL:HR:1989:AB9521 (*Beklamel*).
83. *See* Hoge Raad 8 December 2006, ECLI:NL:HR:2006:AZ0758 (*Ontvanger/Roelofsen*).
84. *See* M.J. Kroeze, *Afgeleide schade en afgeleide actie* (Kluwer, 2004). Note that violating a provision of the Articles of Association which serves to safeguard shareholder interests will, in principle, vest executive director liability. *See* Hoge Raad 20 June 2008, ECLI:NL:HR:2008:BC4959 (*Willemsen Beheer/NOM*).

decision-making process (i.e. voting).[85] When all executive directors are conflicted, decision-making powers shift to the supervisory board. In case all supervisory directors are conflicted as well, the decision will be made by the AGM, unless the Articles of Association provide otherwise.[86] Board decisions suffering from a conflict of interest are void or voidable, depending on the specific situation at hand, and the directors concerned will have a difficult time refuting a personal liability claim (*see* § 28.3.3 *supra*).

According to the *Bruil*-ruling of the Dutch Supreme Court, a director becomes interested in case there exists a direct, material and specific conflict of interest.[87] A direct, material and specific conflict of interest can arise in the form of a i) personal interest or ii) an ulterior interest, which is not entirely congruent with that of the corporation.[88] As such, the abstract possibility of a conflict is insufficient for a director to lose his disinterested status – for this, additional facts and circumstances are required. Moreover, an indirect conflict of interest of a qualitative nature, resulting from a director holding office at fully consolidated group entities involved in a certain transaction at opposite sides of the table, will, absent further facts and circumstances, not qualify as a conflict of interest in the sense of art. 2:129 (5) BW and art. 2:140 (5) BW.[89] Thus, *Bruil* is typically interpreted as setting a high threshold for assuming the existence of a conflict of interest.[90]

However, the *Linders*/*Hofstee*-ruling of the Amsterdam Court of Appeals and its progeny impose a certain duty of care, in addition to the *Bruil*-framework of the Dutch Supreme Court.[91] The *Linders*/*Hofstee*-ruling recognizes

85. Under Dutch law, a direct conflict of interest involves a director personally engaging in business dealings with the NV he governs; an indirect conflict relates, for instance, to a director transacting with another legal entity which he does not manage but in which he does hold an equity stake.

86. *See* Van Solinge & Nieuwe Weme 2019, *supra* note 2, at § 219-236; *see also* Kroeze 2015, *supra* note 2, at § 306; Assink & Slagter 2013, *supra* note 43, at § 51.6.

87. *See* Hoge Raad 29 June 2007, ECLI:NL:HR:2007:BA0033 (*Bruil*).

88. For an example of the latter scenario, *see* Hoge Raad 14 September 2007, ECLI:NL:HR:2007:BA4887 (*Versatel*). There, multiple supervisory directors of Versatel voluntarily resigned, only to be replaced by candidates nominated by Versatel's controlling shareholder, Tele2. Also in light of the fact that Tele2 was engaged in a freeze-out of Versatel minority shareholders, the Dutch Supreme Court ruled a conflict of interest was present.

89. *See* Hoge Raad 29 June 2007, ECLI:NL:HR:2007:BA0033 (*Bruil*). From an economic point of view, this approach generally makes sense, as either allocation of profit may serve the interests of the group as a whole. However, exceptions are conceivable as well, for instance in case of insolvency, or if (the profits and losses of) certain group entities are not being taken into consideration on a fully consolidated basis or are subject to profit distribution prohibitions. For an example, *see* Gerechtshof Amsterdam 30 April 2018, ECLI:NL:GHAMS:2018:1465 (*De Seizoenen*), involving a firm in the medical sector.

90. For an extensive analysis of older Dutch case law, which set a lower threshold for the existence of a conflict of interest, *see* J.M. de Jongh, *Twee eeuwen tegenstrijdig belang* 41-44 (Boom, 2019).

91. *See* Gerechtshof Amsterdam 26 May 1983, ECLI:NL:GHAMS:1983:AC8007 (*Linders/ Hofstee*).

that depending on the Articles of Association, there may exist certain situations in which conflicted directors participate in discussions and decision-making.[92] In that case, the director should disclose his conflicted position as early as possible in the negotiating process. Moreover, it may be desirable or even necessary to consult external (valuation) experts, to ensure the transaction is structured fully at arm's length. Finally, the AGM should be informed timely and adequately of the involvement of the conflicted director.[93] These additional obligations stem from the principle of reasonableness and fairness, as laid down in art. 2:8 BW (*see* § 26.4 *supra*). The relationship between the *Bruil*- and *Linders/Hofstee*-branches of case law has not always been manifestly evident. Indeed, the *Intergamma*-ruling clearly illustrates that underestimating *Linders/Hofstee*-obligations may give rise to unwelcome surprises.[94]

The implementation of the 2017 SRD II imposes certain additional provisions in relation to conflicts of interest. Contrary to the traditional Dutch statutory framework, SRD II is focused around related party transactions, a concept which overlaps with, but is not entirely identical to, director interest. According to art. 2:167 (3) BW and art. 2:169 (3) BW, material related party transactions include those concluded between the corporation and supervisory or executive directors, as well as dealings between the corporation and holders of at least 10 % of the equity. Such transactions must be disclosed and approved by the supervisory board or, if absent, the AGM.[95]

To further complicate matters, the Dutch Corporate Governance Code contains additional points of attention with regard to supervisory director independence and interest.[96] Best Practice Provision 2.1.8 presents a catalogue of circumstances which prevent a supervisory director from being considered independent. These circumstances relate mainly to prior (advisory or business) relationships with the firm, cross-directorships and equity holdings in excess of 10 %. After applying the criteria of Best Practice Provision 2.1.8, a majority of

92. Currently, this situation is limited to supervisory directors. Prior to January 1, 2013, art. 2:146 BW also stated that the Articles of Association could authorize the involvement of conflicted executive directors.

93. *See* Gerechtshof Amsterdam 26 May 1983, ECLI:NL:GHAMS:1983:AC8007 (*Linders/Hofstee*). For an analysis, s*ee* De Jongh 2019, *supra* note 90, at 61-66.

94. *See* Gerechtshof Amsterdam 22 December 2017, ECLI:NL:GHAMS:2017:5354 (*Intergamma*). The case involved a sizeable minority of supervisory directors deciding on the acquisition of certain business activities from the firm's controlling shareholder. For a critical analysis, *see* H.J. de Kluiver, 'Kroniek van het ondernemingsrecht. Overvloed en onbehagen; Nederlandse ondernemingen in het vizier', 94 *Nederlands Juristenblad* 745 (2018); *see also* M.C. Hoeba, 'De tegenstrijdigbelangregeling(en) in het enquêterecht. De Intergamma- en Staphorst beschikkingen nader bekeken', 4 *Maandblad voor Ondernemingsrecht* 173 (2018).

95. *See* J.M. de Jongh, 'Tegenstrijdig belang en transacties met verbonden partijen', 21 *Ondernemingsrecht* 892 (2019), for an elaborate analysis of the consequences of SRD II for the Dutch legal order.

96. These criteria apply by analogy for one tier boards. *See* Best Practice Provisions 5.1.1 and 5.1.3.

directors should be independent.[97] The Chair of the supervisory board must be independent at all times, pursuant to Best Practice Provision 2.1.9. Moreover, Principle 2.7 addresses conflicts of interest. Accordingly, all conflicts of interest between the corporation and its executive and supervisory directors must be prevented. The supervisory board is responsible for overseeing the issue and determining whether a conflict of interest exists. Under Best Practice Provision 2.7.1, executive and supervisory directors must, in any case, not compete with the NV or usurp its corporate opportunities, accept donations by the corporation or extend privileges to third parties at the corporation's expense. Furthermore, Best Practice Provision 2.7.3 states that a conflict of interest may exist when the NV deals with an entity in which the executive or supervisory director holds i) a material financial interest or ii) is involved due to family ties.[98] One possible solution for dealing with conflicts of interest or a lack of independence would be the creation of a Special Committee. However, the Code only provides a questionable basis in this regard.[99] Whereas Best Practice Provisions 2.7.4 and 2.7.5, as included in the proposal to review the 2008 Code, intended to facilitate the use of Special Committees, these proposals were viewed as overly strict and a constraint to legal practice. As a result, they were not included in the revised 2016 version of the Code. However, this is not to say that the use of a Special Committee has been prohibited.[100]

97. *See* Best Practice Provision 2.1.7, also stipulating that only one supervisory director may be interested due to prior relationships or cross-directorships and that investors holding at least 10 % of the equity may nominate one supervisory director each. Nonetheless, the Code is considerably more flexible than its German counterpart, which states that directors that no longer qualify as independent should resign (*see* § 20.6 *supra*).
98. For an extensive overview of the implications of the Code for director independence and interest, *see* R.H. Kleipool, M. van Olffen & B.W. Roelvink, *Commentaar & Context Corporate Governance Code* 127 et seq. (Boom, 2017); *see also* A.F.J.A. Leijten, 'Een tegenstrijdigbelangregeling ontwerpen', 148 *Weekblad voor Privaatrecht, Notariaat en Registratie* 953 (2017).
99. On the use of Special Committees in Dutch legal practice, *see* C. Groen & H. Koster, 'De speciale overnamecommissie in nationaal en rechtsvergelijkend perspectief', 3 *Maandblad voor Ondernemingsrecht* 259 (2017); *see also* P.L. Hezer, 'Het special committee naar Amerikaans model bij openbare biedingen', 3 *Maandblad voor Ondernemingsrecht* 266 (2017).
100. Also note that art. 2:129 (6) BW and art. 2:140 (6) BW already prevent conflicted decision-making to a certain degree, and the use of a Special Committee is not incentivized by BJR-treatment of a contested transaction, as is the case in the US legal system (*see* § 17.4 *supra*).

28.4 Shareholders right to vote & the position of the AGM

28.4.1 Par value, equal treatment and decision-making thresholds

Art. 2:79 (1) BW unimaginatively defines the concept of shares for the NV, stating that these are "the parts into which the authorized capital is divided".[101] Stocks must have a nominal value of at least € 0.01. Smaller amounts, for instance € 0.001, or non-par value stocks are not permitted. In principle, Dutch corporate law does not recognize a maximum par value. However, the creation of shares with an excessively high nominal value may violate the principle of reasonableness and fairness of art. 2:8 BW.[102] In any case, the Articles of Association should mention the applicable figure(s) under art. 2:67 (1) BW.

The shares' nominal value is closely tied to the concept of equal treatment.[103] For the NV, the principle of equal treatment is laid down in art. 2:92 BW. The purpose of this provision is twofold.[104] First, art. 2:92 (1) BW states that all shares – the securities – grant identical rights in proportion to their nominal value, unless the Articles of Association provide otherwise.[105] This is the case with respect to both financial rights (art. 2:105 BW, *see* § 28.5.3 *infra*) and voting rights (art. 2:118 BW, *see* § 28.4.1 *infra*). Second, art. 2:92 (2) BW mandates that NVs should treat all shareholders – the investors – whose circumstances are similar in an equal manner. Thus, art. 2:92 (2) BW, contrary to art. 2:92 (1) BW, imposes an obligation on the corporation, not on the shareholders. Because of its general formulation, art. 2:92 (2) BW has a wide scope and applies beyond capital increases and capital reductions, for which the provision was initially

101. Art. 2:190 BW, which was revised as part of the Flex-BV reform of 2012 (*see* § 26.3.1 *supra*), presents a more substantive (albeit negative) definition of the concept of BV-shares. Accordingly, securities which carry nor the right to vote nor an entitlement to profits or retained earnings do not qualify as shares. Consequently, the BV can issue stocks which lack either voting or profit rights, but not both.
102. *See* Gerechtshof Amsterdam 20 December 2007, ECLI:NL:GHAMS:2007:BC0800 (*Shell*), ruling against the creation of shares with a nominal value of almost € 200 million, allegedly for the purpose of freezing-out outside minority shareholders. Indeed, it has been argued that art. 2:92 BW should be considered a corollary of art. 2:8 BW. Even if that were not true, the concepts of equality and fairness are inextricably related.
103. In this sense, Dutch corporate law is rather similar to its German counterpart (*see* § 22.4.1 *supra*), although the Dutch regime is more flexible in terms of the minimum par value.
104. In addition, art. 2:92 (3) BW provides a statutory basis specifically in respect of priority shares, which typically grant director nomination rights. On the historic use of oligarchic clauses, *see* § 27.3.1 *supra*.
105. For an analysis, *see* Van Solinge & Nieuwe Weme 2019, *supra* note 2, at § 291-293; *see also* Assink & Slagter 2013, *supra* note 43, at § 31; Dortmond 2013, *supra* note 6, at § 186. For an extensive discussion of the implications of art. 2:92 BW in terms of investor access to price sensitive information, *see* Vletter-Van Dort 2001, *supra* note 6.

drafted by the European legislator[106] – at least from a Dutch point of view.[107] The wording of art. 2:92 (2) BW also entails that unequal cases are to be treated unequally, whereas equal cases may be treated unequally. In this regard, the criteria as developed in the case law of the European Court of Justice apply, if not directly, than by means of analogy. Accordingly, treating holders of shares of the same class differently is permitted solely if there exists an objective, adequate, necessary and proportional reason to do so.[108]

Investors owning stock of different classes do not find themselves in an identical position and may therefore be treated differently – i.e. regardless whether there exists an objective, adequate, necessary and proportional reason, aside from the existence of different classes of stock.[109] Determining whether multiple classes of shares exist may be complicated in case the Articles of Association do not contain an explicit clause designating certain securities, for instance, "A-class" or "B-class" shares. (The creation of different classes of stock cannot be based merely on the bylaws or a shareholder agreement.) Separate classes of shares exist only when i) voting rights in relation to the distribution of dividends or ii) entitlements to retained earnings differ.[110] If different classes of shares do exist, the Articles of Association must indicate the number of stocks and the total amount of capital contributed on a per class basis, as

106. Art. 42 of Directive 77/91/EEC (Second Council Directive of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent).

107. *See Kamerstukken II* 1979/80, 15304, nr. 51, p. 12-13; *see also* Vletter-Van Dort 2001, *supra* note 6, at 13-19. Somewhat surprisingly, the European Court of Justice has later ruled that art. 42 of Directive 77/91/EEC applies only to topics governed by the Directive, and does not apply to other parts of corporate law. *See* European Court of Justice 15 October 2009, ECLI:EU:C:2009:626 (*Audiolux*).

108. *See* J.M. de Jongh, 'Het loyaliteitsstemrecht. Een terreinverkenning', 11 *Ondernemingsrecht* 442 (2009). For an early example, *see* Hoge Raad 31 December 1993, ECLI:NL:HR:1993:ZC1212 (*Verenigde Bootlieden*). There, it was ruled that pre-emptive rights of shareholders could be ignored or restricted to enable fellow investors to meet statutory equity stake requirements necessary for obtaining preferential tax treatment, provided an objective justificaten was present.

109. This does not necessarily imply that all holders of stocks of the same class are in the same position. *See* Hoge Raad 14 December 2007, ECLI:NL:HR:2007:BB3523 (*DSM*), on which *see* § 28.4.3 *infra*.

110. *See* Hoge Raad 16 December 2011, ECLI:NL:HR:2011:BN7252. For the sake of completeness, it should be mentioned this case involved the interpretation of certain provisions of Dutch tax law. Because of its general formulation, the ruling is often applied in corporate law as well. For a note of approval, *see* R.A. Wolf, 'Het creëren en de uitgifte van stemrechtloze aandelen als soort aandelen', 144 *Weekblad voor Privaatrecht, Notariaat en Registratie* 253 (2014). The Minister of Justice has subscribed to the Dutch Supreme Court's interpretation as well. *See Kamerstukken II* 2010/11, 32426, nr. 7, p. 10-11.

well as the investors who subscribed to the shares at the corporation's inception (art. 2:67 (1) BW).[111]

As has been observed previously, the right to vote should be considered in conjunction with the majority necessary for reaching a decision. Dutch corporate law is generally rather permissive with regard to quorum and supermajority requirements. In fact, such provisions are used regularly. In principle, AGM decision-making does not require a quorum, and can take place by absolute majority (art. 2:120 BW). Some decisions, including the restriction of pre-emptive rights of shareholders (art. 2:96a BW), the reduction of capital (art. 2:99 BW) and (de)mergers (art. 2:330 BW), depend upon a statutory supermajority in combination with a quorum.[112] The most important restriction is arguably laid down in art. 2:158 (9) BW. Accordingly, the Articles of Association may not stipulate a majority larger than an absolute majority (representing 33 % of the equity) for the appointment of supervisory directors.[113] The appointment of supervisory directors aside, Dutch corporate law generally poses no obstacles to elevated supermajority and/or quorum requirements, provided that the functioning of the AGM is not fundamentally impaired.[114]

28.4.2 Voting rights, non-voting shares & depository receipts

The right to vote is governed by art. 2:118 BW. The default rule is that of one share, one vote (art. 2:118 (1) BW). However, pursuant to art. 2:118 (2) and (3) BW, the number of votes vested in each stock is principally tied to the share's nominal value (*see* § 28.4.1 *supra*). In case the NV has issued 2 classes of stock, the first with a nominal value of € 0.01 and the second with a nominal value of € 0.02, shares of the former class carry 1 vote each and stocks of the latter 2.[115] Importantly, art. 2:118 (1) BW restricts the allocation of voting

---

111. The annual report must equally disclose the capital paid-in for each class of stock (art. 2:378 (2) BW) as well as, in case of a BV, the number of non-voting and non-profit participating shares (art. 2:392 (1) (e) BW).
112. On supermajority requirements and quorums under Dutch corporate law, *see* Van Solinge & Nieuwe Weme 2019, *supra* note 2, at § 74, 78; *see also* Assink & Slagter 2013, *supra* note 43, at § 43.
113. Note that art. 2:158 (9) BW assumes the applicability of the structure regime for sufficiently large corporations (*see* note 3 *supra*). For appointing and removing (executive and supervisory) directors at non-structure regime NVs, art. 2:133 and 2:142 BW permit a supermajority of two thirds and a quorum of 50 %. Interestingly, Best Practice Provision 4.3.3 contradicts the law, stating that an absolute majority and a quorum of 33 % suffice.
114. *See* De Kluiver & Meinema 2002, *supra* note 46, at 650.
115. Art. 2:118 (5) BW enables – but does not mandate – an alternative approach, in which the number of votes is tied to the person of the investor (and limited to 6 per person) instead of the share's par value. Given that art. 2:118 (5) BW has become largely dysfunctional, it will be disregarded for the remainder of the analysis.

rights in two directions.[116] First, it provides that only shareholders can have the right to vote. Other parties, such as creditors, may not.[117] Second, it states that every shareholder must have at least 1 vote. In principle, therefore, non-voting shares cannot be validly issued by the NV.[118] In recent years, this restriction has increasingly been criticized, both for listed[119] and unlisted NVs.[120] However, the Dutch Minister of Justice does not yet appear to have taken a particularly strong view on the matter. Both in 2016 and 2018, the Minister reflected on future reforms of the NV statute (*see* § 26.3.1 *supra*), but his position on non-voting shares (and non-profit participating shares, *see* § 28.5.3 *infra*) has remained somewhat fluent.[121]

Although principally, Dutch corporate law prohibits the NV to issue non-voting stock, certain exceptions exist.[122] First, this ban does not extend to the entire Kingdom of the Netherlands. In 1987, art. 89a WvKNA was amended to enable locally incorporated firms to issue up to 80 % of the share capital in the form of non-voting stock (*see* § 27.4.2 *supra*). After a series of legislative operations, the successor to art. 89a WvKNA can currently be found in art. 2:132 (1) of the Curaçao Civil Code. Moreover, the requirement that 20 % of the shares should

116. For an discussion of art. 2:118 BW, *see* Van Solinge & Nieuwe Weme 2019, *supra* note 2, at § 602; *see also* Kroeze 2015, *supra* note 2, at § 282; Assink & Slagter 2013, *supra* note 43, at § 76; Dortmond 2013, *supra* note 6, at § 214-215.
117. Nonetheless, exceptions exist for pledgees and usufructuaries. *See* art. 2:88 and art. 2:89 BW. For extensive analyses, *see* K.I.J. Visser, *Zeggenschapsrechten van houders van een recht van pand of vruchtgebruik op aandelen op naam* (Deventer, 2004); *see also* J.J.A. Hamers, *Verpanding van aandelen en de beslotenheid van kapitaalvennootschappen* (Deventer, 1996); E.C. Bos, *Vruchtgebruik op aandelen. Over de grenzen van goederenrecht, erfrecht en vennootschapsrecht* (Deventer, 2005).
118. The BV has been permitted to issue non-voting stock as part of the 2012 reforms. *See* art. 2:228 (5) BW. For an extensive discussion, *see* R.A. Wolf, *De kapitaalverschaffer zonder stemrecht in de BV* (Deventer, 2013).
119. *See* G.T.M.J. Raaijmakers & M.J.G.C. Raaijmakers, 'De NV in 2020', 16 *Ondernemingsrecht* 53 (2014); *see also* B.J. de Jong, 'Lessen uit het vernieuwde Britse vennootschapsrecht voor de modernisering van het Nederlandse NV-recht', 16 *Ondernemingsrecht* 61 (2014); H.E. Boschma, M.L. Lennarts & J.N. Schutte-Veenstra, 'Lessen uit het Duitse AG-recht voor de modernisering van het Nederlandse NV-recht?', 16 *Ondernemingsrecht* 70 (2014); A.A. Bootsma & T.A. Keijzer, 'Snap Inc. De eerste beursgang met stemrechtloze aandelen in de V.S.', 19 *Ondernemingsrecht* 400 (2017).
120. *See* R.A. Wolf, 'Het stemrechtloze aandeel in de N.V.? Een pleidooi en verkenning', 11 *Tijdschrift voor vennootschapsrecht, rechtspersonenrecht en ondernemingsbestuur* 42 (2014).
121. *See Kamerstukken II* 2016/17, 29752, nr. 9, p. 20 ("*Tevens kan worden bezien of in hoeverre er behoefte is aan* […]").
122. As one may conclude, partitioning shareholder rights is doctrinally less controversial under Dutch corporate law than it is under German corporate law (*see* § 22.4.2 *supra*). *See* M.C. Schouten, *The Decoupling of Voting and Economic Ownership* (Kluwer, 2012), concluding that empty voting and hidden ownership are principally permitted, but that voting behaviour to the detriment of the corporation may violate art. 2:8 BW.

carry voting rights has been abolished.[123] Second, Dutch corporate law does permit the use of non-voting preference shares. However, contrary to Germany (*see* § 22.5 *supra*), this instrument plays no major role to finance corporations.[124] Third, the private ordering mechanism involving depository receipts creates a instrument largely similar to non-voting shares.[125] The mechanism has existed for an extensive period of time and is used regularly.[126] Although a statutory definition of depository receipts has remained absent, the art of the mechanism is that of securitization: instead of issuing non-voting shares directly – which is prohibited – the common stocks are transferred to a trust office, usually a foundation (*stichting*). Subsequently, the trust office issues depository receipts – not the shares – to the investing public.[127] The trust office is a separate legal entity, owns the shares and is the sole member of the NV. The trust office is bound by contract with the NV to forward any and all dividends and repayments of capital. Therefore, the financial rights vested in the depository receipts are considered functionally equal to those of the underlying stocks.[128] By contrast, depository

---

123. *See* K. Frielink, *Kort begrip van het Nederlands Caribisch Rechtspersonenrecht* 124-125 (Kluwer, 2017).
124. Meanwhile, preference shares that do carry voting rights act as a vital component of the Dutch poison pill. Since no pre-emptive rights exist specifically with respect to preference shares (art. 2:96a BW), these securities can be issued in great numbers to dilute an unwelcome acquirer. Note that in the Dutch system, preference shares are not distributed to incumbent investors (similar to a US rights plan) but rather to an independent foundation or trust office (*stichting*) which prevents the bidder from obtaining control. *See* R.A.F. Timmermans, *Bescherming van beursvennootschappen door uitgifte van preferente aandelen* (Wolters Kluwer, 2017); *see also* S.J. Van der Graaf, 'Understanding the Dutch Poison Pill' (2018), available at http://corgov.law.harvard.edu/.
125. An empirical study showed that in 2014, 14 % of the 97 Dutch NVs listed at the Amsterdam Stock Exchange had issued depository receipts. *See* A.A. Bootsma et al., *Bescherming bij Nederlandse beursvennootschappen* 34 (2015), available at http://www.mccg.nl/download/?id=2775, observing that prior to the 1990s, the figure was considerably higher (32 %). In the meantime, other schemes have become more popular. *See* L. Timmerman, 'De carrousel van beschermingsmaatregelen (ofwel: on and on and on)', 20 *Ondernemingsrecht* 456 (2018). Nonetheless, depository receipts continue to be used regularly. For a discussion of the role of depository receipts in ABN ARMO's 2015 IPO – following its nationalization in the wake of the 2008 financial crisis – *see* H.M. Vletter-van Dort & T.A. Keijzer, 'Bescherming van beursvennootschappen: dubbel gestikt houdt beter', 65 *Ars Aequi* 329 (2016); *see also* J.M. de Jongh, 'Privatisering, bescherming en algemeen belang, De voorgenomen beursgang van ABN AMRO', 146 *Weekblad voor Privaatrecht, Notariaat en Registratie* 118 (2015); R. Abma, 'Enige kanttekeningen bij de voorgenomen beschermingsconstructie bij ABN AMRO', 17 *Ondernemingsrecht* 387 (2015).
126. For the classic analysis of depository receipts in the Dutch legal order, *see* F.J.P van den Ingh, *Certificering en certificaat van aandeel bij de besloten vennootschap* (Kluwer, 1991).
127. The mechanism is usually put in place prior to the IPO, as there will be typically fewer shareholders from whom consent should be obtained compared to a post-IPO scenario. The trust office is generally called *Stichting Administratiekantoor (X)*, with (*X*) representing the name of the NV.
128. For modern discussions, *see* Van Solinge & Nieuwe Weme 2019, *supra* note 2, at § 656-697; *see also* C.A. Schwarz & S.B. Garcia Nelen, *Certificering van aandelen bij NV en BV*

receipts generally do not carry voting rights. Instead, the right to vote remains with the trust office. Absent any extraordinary circumstances, holders of depository receipts may request an exclusive power of attorney to exercise the right to vote. However, this request can be denied or revoked when an unsolicited takeover attempt is imminent or an offer has been made, and even when an investor has acquired 25 % of the issued share capital (art. 2:118a (2) BW).[129] The board of the trust office must form an opinion of its own – independent from, notably, the board of the NV of which it holds the shares – as to whether it should hold or retake the right to vote.[130] If it decides to assume control, the trust office will dominate the AGM, also because exchanging depository receipts for shares is generally not possible (or heavily restricted).

Despite the fact that depository receipts are a private ordering mechanism, some safeguards for outside minority investors do exist. First, the Dutch Civil Code, whilst not going as far as creating a statutory framework in respect of depository receipts, has extended some of the shareholder powers to holders of depository receipts. This includes the right to reasonable and fair (art. 2:8 BW)[131] and equal treatment (art. 2:92 (2) BW). Furthermore, holders of depository receipts have the right convene (art. 2:110 (2) BW) and attend an AGM (art. 2:117 (2) BW),[132] put items on its agenda (art. 2:114 (1) BW) and request information during the event (art. 2:107 (2) BW).[133] Second, the Dutch Corporate Governance Code contains certain safeguards, in Principle 4.4 et seq., although it can be doubted whether these will all be adhered to in practice.

(SDU, 2016); Assink & Slagter 2013, *supra* note 43, at § 30; Dortmond 2013, *supra* note 6, at § 197-197.1.

129. On the turbulent history of this provision, *see Kamerstukken II* 2002/03, 28179, nr. 31; *see also Kamerstukken II* 2002/03, 28179, nr. 47-I. Note that the terms of the agreement between the NV and the trust office governing the depository receipts may also stipulate that a power of attorney is provided under all circumstances. A well-known example is Unilever.

130. Especially so since the depository receipts mechanism requires an exception to the mandatory bid rule. This exception is granted only when the trust office is formally independent from the corporation. Therefore, personal unions at the board level are not permitted. *See* art. 5:70 and 5:71 (1) (d) of the Dutch Financial Supervision Act (*Wet op het financieel toezicht*); *see also* art. 2:118a (3) BW.

131. Admittedly, some scholars have argued that only holders of depository receipts issued in cooperation with the NV are authorized to invoke art. 2:8 BW, denying holders of depository receipts created as a private initiative the right to invoke this provision. For an overview of the different arguments put forward, *see* Van Solinge & Nieuwe Weme 2019, *supra* note 2, at § 666. In the remainder of the analysis, I assume the depository receipts have been issued in dialogue with the NV – especially for listed entities, this will be virtually always the case.

132. Paradoxically, the BV-statute grants non-voting shareholders the (inalienable) right to attend the AGM, whereas holders of depository receipts can only do so if authorized by the Articles of Association. *See* S.B. Garcia Nelen, 'Managementparticipatie in private equity transacties: certificaten of stemrechtloze aandelen?', 15 *Ondernemingsrecht* 511 (2013).

133. For an extensive analysis of the rights of holders of depository receipts, *see* Van Solinge & Nieuwe Weme 2019, *supra* note 2, at § 674-678; *see also* Schwarz & Garcia Nelen 2016, *supra* note 128; Assink & Slagter 2013, *supra* note 43, at § 76. On convocation and agenda rights, *see* § 28.4.5 *infra*.

For instance, the Code stipulates that the trust office's Board should enjoy the confidence of investors (Principle 4.4 and Best Practice Provision 4.4.1). Additionally, Best Practice Provision 4.4.2 provides that the holders of depository receipts may recommend candidates for trust office director positions, and that former executive or Supervisory directors of the NV are ineligible for appointment. Furthermore, trust office directors should promote the interests of the holders of depository receipts (Best Practice Provision 4.4.5).[134] Finally, the existence of any (potential) anti-takeover mechanisms should also be disclosed in the annual report (Best Practice Provision 4.2.6). Interestingly, the Corporate Governance Code formally prohibits the use of depository receipts as an anti-takeover mechanism – which, for all intents and purposes, often seems to be their main function. By contrast, the Code permits using depository receipts as an instrument to counter the harmful effects of shareholder absenteeism.[135] Additionally, the Corporate Governance Code provides that shareholders shall receive a full and unrestricted power of attorney under all circumstances – even after an unsolicited takeover attempt has been announced. This is exactly what can be refused according to the Civil Code. In conclusion, the Dutch Civil Code and the Dutch Corporate Governance Code are not particularly well-aligned.[136]

28.4.3 Loyalty shares: the DSM-case and later developments

The art of a loyalty (or tenure) scheme is that shareholders obtain additional entitlements based on the duration of their stock-ownership. Loyalty schemes are permitted under Dutch corporate law, despite the absence of an explicit statutory basis.[137] This follows from the landmark *DSM*-ruling of the Dutch Supreme Court of 2007.[138] In DSM, the main question was whether the principle of equality (art. 2:92 BW, on which *see* § 28.4.1 *supra*) permitted owners of

134. This statement appears to violate Principle 1.1. For an authoritative discussion of the implications of Corporate Governance Code for holders of depository receipts, *see* Kleipool, Van Olffen & Roelvink 2017, *supra* note 98.
135. *See* Principle 4.4 Code. As part of the 2016 review of the Dutch Corporate Governance Code, the Monitoring Committee proposed to allow depository receipts to be used as anti-takeover mechanism if this would promote long term value creation. *See* Principle 4.4 Draft Code 2016. However, the idea failed to gather sufficient support.
136. *See* Best Practice 4.4.8 Code; *see also* art. 2:118a (2) BW. Non-compliance with the Corporate Governance Code can be explained by referring to the Civil Code in conjunction with more substantive arguments.
137. *See* Van Solinge & Nieuwe Weme 2019, *supra* note 2, at § 616; *see also* Dortmond 2013, *supra* note 6, at § 186; Assink & Slagter 2013, *supra* note 43, at § 30. The Dutch legislator has similarly stated that an explicit statutory basis in respect of loyalty shares is not strictly necessary (again illustrating the limited scope of art. 2:25 BW, *see* § 28.2.3 *supra*). *See Kamerstukken II* 2018/19, 29752, nr. 12, p. 9-14 (also noting the Netherlands will not introduce a Florange-like default rule); *see also Kamerstukken II* 2010/11, 31980, nr. 48, p. 1.
138. *See* Hoge Raad 14 December 2007, ECLI:NL:HR:2007:BB3523 (*DSM*).

stocks of the same class to be treated differently.[139] In DSM's recapitalization proposal, investors were given the choice between registering their common shares – with the effect that these became non-transferable – to obtain a loyalty dividend bonus or preserving the liquidity of their holdings and foregoing the loyalty bonus.[140] The registration period to qualify for the dividend bonus was three years. In practice, this term had an exclusionary effect on most institutional investors.[141] The recapitalization occurred midstream, as DSM was already listed at the Amsterdam Stock Exchange. The dividend bonus was to be borne by the non-participating shareholders. DSM itself stated the aim of the scheme was to improve communications with investors and to reward shareholder commitment.[142] Nonetheless, in a lawsuit initiated by US hedge funds, the Amsterdam Court of Appeals ruled against DSM's proposal. It held that, pursuant to art. 2:92 (1) BW, shares from the same class should, by definition, carry identical shareholder rights, and that the position and personal circumstances of shareholders were irrelevant.[143] Subsequently, DSM laid the proposal to rest, in an attempt to calm its investor base.

The matter went to the Dutch Supreme Court regardless, in a rare example of "cassation in the public interest" (*cassatie in het belang der wet*) initiated by Attorney-General to the Dutch Supreme Court Timmerman.[144] Following his opinion,[145] the Dutch Supreme Court ruled exactly to the contrary of the Amsterdam Court of Appeals, holding that loyalty schemes are permitted.[146] This judgement, formally against the background of a loyalty dividend mechanism, has been widely invoked by scholars to argue that loyalty vot-

139. For a groundbreaking paper regarding loyalty shares under Dutch corporate law, *see* M. van Olffen, 'Loyaliteitsaandelen', 137 *Weekblad voor Privaatrecht, Notariaat en Registratie* 779 (2006).
140. On loyalty dividends, *see* Z. Tali & F.J. de Graaf, 'Loyaliteitsdividend, registratiedividend en institutionele beleggers: vaste relatie of betaalde liefde?', 9 *Ondernemingsrecht* 139 (2007). For an extensive discussion of the interaction between loyalty dividend and loyalty voting schemes, *see* A.A. Bootsma, 'An Eclectic Approach to Loyalty-Promoting Instruments in Corporate Law: Revisiting Hirschman's Model of Exit, Voice, and Loyalty', 6 *Erasmus Law Review* 111 (2013).
141. *See* De Jongh 2009, *supra* note 108.
142. For the similar argument put forward by Cincinnati Milacron, *see* § 17.2.2 *supra*. Note that DSM's share ownership was dispersed. As such, the loyalty scheme did not serve to strengthen the grip of a controlling shareholder.
143. *See* Gerechtshof Amsterdam (Ondernemingskamer) 28 March 2007, ECLI:NL:GHAMS:2007:BA1717 (*DSM*).
144. On cassation in the public interest, *see* art. 78 (1) of the Act on the Judiciary (*Wet op de Rechterlijke Organisatie*). The outcome of a procedure in the public interest does not affect the rights of the parties, as they have ceased litigating and continued to be bound by (in this case) the ruling of the Amsterdam Court of Appeals.
145. *See* Parket bij de Hoge Raad 17 September 2007, ECLI:NL:PHR:2007:BB3523 (*DSM*).
146. *See* Hoge Raad 14 December 2007, ECLI:NL:HR:2007:BB3523 (*DSM*). For a thorough analysis following the DSM-case, *see* De Jongh 2009, *supra* note 108.

ing rights are permitted as well.[147] The sole requirement when introducing a loyalty scheme under Dutch corporate law is that all holders of shares of the same class should be eligible to qualify for the loyalty bonus (art. 2:92 (2) BW).[148] Shareholders may decide to forego the loyalty bonus – presumably to ensure the liquidity of their investment – but doing so is a voluntary choice of their own, rather than the result of coercion by the corporation.[149] Therefore, the fact that certain investors were granted a loyalty bonus at the expense of others was or is not considered an obligation for the non-participating shareholders.[150] If the loyalty scheme had been deemed to constitute an obligation, introducing it would have been subjected to an individual veto right, pursuant to art. 2:81 BW, since investors are not required to accept any other obligation than to contribute capital. This provision, as well as art. 2:96 (2) BW and art. 2:99 (5) BW, which mandate a class vote in case rights of investors of a certain class are impaired because of the introduction or cancellation of a dual class equity structure, are all interpreted narrowly – but their exact meaning is unclear.[151] (Note that a loyalty scheme typically does not create multiple classes of stock, meaning that art. 2:96 (2) BW and art. 2:99 (5) BW could not have been applicable in the DSM-case.[152]) From the DSM-ruling, it also follows that

147. *See* A.A. Bootsma, 'Over de toekomst van het vennootschapsrecht', in: H.J. de Kluiver (red.), *100 Jaar Handelsrecht. Over heden, toekomst en verleden* 101-130 (Paris, 2018); *see also* A.A. Bootsma, 'Loyaliteitsdividend, bijzondere stemrechtaandelen en de positie van minderheidsaandeelhouders. Midstream or IPO introduction, that's the question', 7 *Maandblad voor Ondernemingsrecht* 151 (2016).

148. *See* Hoge Raad 14 December 2007, ECLI:NL:HR:2007:BB3523 (*DSM*). For relevant analyses, *see* Bootsma 2016, *supra* note 50; *see also* De Jongh 2009, *supra* note 108.

149. For the remarkably similar 19th century ruling in relation to NHM's recapitalization, *see* § 27.2.2 *supra*.

150. For a note of approval, *see* De Jongh 2009, *supra* note 108, stating that voluntariy decisions cannot give rise to an obligation for corporate law purposes.

151. The relevant criterion for art. 2:96 (2) BW and art. 2:99 (5) BW is whether the introduction or cancellation of a dual class equity structure harms the rights of investors involved, not whether the recapitalization is merely disadvantageous. However, there are no clear criteria to distinguish between these two concepts. The scope of art. 2:96 (2) BW and art. 2:99 (5) BW is mostly limited to specific, well-defined shareholder rights, such as dividend preferences (note that the Dutch legal framework pales in comparison to its advanced German counterpart, *see* Chapter 23) being eroded by subsequent issuing of superior preference shares. In any case, these provisions do not target changes in voting rights. Meanwhile, a recapitalization diluting an investor's control power may violate art. 2:8 BW, which thus compensates for the limited scope of art. 2:96 (2) BW and art. 2:99 (5) BW. *See* M. van Olffen & G.J.C. Rensen, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands burgerlijk recht. 2. Rechtspersonenrecht. Deel IIa. NV en BV. Oprichting, vermogen en aandelen* § 249 (Kluwer, 2019); *see also* P.H.N. Quist, *Conversie en aandelen* 52 (Wolters Kluwer, 2018), stating art. 2:96 (2) BW and art. 2:99 (5) BW will "practically never" apply.

152. For the avoidance of doubt, it should be noted that a Dutch loyalty mechanism typically operates by doubling the number of shares of the long term investor, instead of doubling the number of votes vested in each share. This approach is preferred, given that art. 2:118 BW

the introduction of a loyalty scheme does not give rise to a (non-personal) conflict of interest for directors (*see* § 28.3.4 *supra*). Whilst it might be argued that theoretically, directors have a personal interest in retaining their position and therefore may prefer to reduce the relevance of investor voice, the DSM-ruling contains no legal arguments to support such a view. Furthermore, the fact that a statutory framework in respect of loyalty shares has remained absent entails that Dutch corporate law does not present any explicit restrictions with regard to the minimum length of the vesting period, the maximum percentage of the outstanding share capital which can participate in the scheme,[153] or grandfathering of incumbent long term shareholders.[154]

Following the enabling judgement of the Dutch Supreme Court, several corporations have implemented loyalty voting schemes. Arguably, the most well-known representative of Dutch loyalty voting is the so-called "Fiat-Triplett", consisting of the Italian firms CNH Industrial, Fiat Chrysler Automobiles and Ferrari.[155] In 2013, CNH Industrial was the first of three Fiat corporations to relocate to the Netherlands, becoming an NV established under Dutch law.[156]

---

strictly adheres to the nominal value for calculating the number of votes to be cast on each stock (*see* § 28.4.2 *supra*). Although other approaches – for instance creating a separate class of loyalty shares by converting common stock – would be conceivable, they may pose larger risks from a legal point of view. *See* K.J. Bakker, 'Loyaliteitsregelingen; lessen uit Frankrijk en Delaware', 10 *Maandblad voor Ondernemingsrecht* 5 (2019).

153. *See* De Jongh 2009, *supra* note 108 (observing that for NVs with dispersed share ownership, capping the part of the share capital which may qualify for the loyalty scheme prevents an investor from seizing control); *see also* Bootsma 2013, *supra* note 140, arguing that corporations should be granted latitude in these and other matters.

154. For a critical commentary of grandfathering, *see* A.A. Bootsma, 'Loyaliteitsstemrecht naar Italiaans recht en bij Fiat Chrysler Automobiles NV', 17 *Ondernemingsrecht* 32 (2015), arguing that such preferential treatment of controlling shareholders likely violates art. 2:92 BW. By means of exception, I have to politely disagree with Bart. If grandfathering were categorically prohibited, incumbent long term investors would be treated similar to newly arrived short term speculators. Similarly, high/low-voting schemes directly impair institutional investors and undercut the argument they will fail to meet the loyalty bonus vestng period. For a more nuanced analysis, *see* J.S Kalisvaart, 'Meervoudig stemrecht', 27 *Onderneming & Financiering* 22 (2019).

155. As the cases of the "Fiat-Triplett" are rather similar, this analysis focuses on first mover CNH Industrial. For the terms of the 2014 Fiat Chrysler Automobiles recapitalization, *see* https://www.fcagroup.com/en-US/investors/stock_info_and_shareholder_corner/Documents/Special_Voting_Shares_Terms_and_Conditions_ENG.pdf. Specifically regarding the Fiat Chrysler Automobiles case, *see* F. Pernazza, 'Fiat Chrysler Automobiles and the New Face of the Corporate Mobility in Europe', 14 *European Company and Financial Law Review* 37 (2017); *see also* M. Ventoruzzo, 'The Disappearing Taboo of Multiple Voting Shares: Regulatory Responses to the Migration of Chrysler-Fiat' (2015), available at http://www.ssrn.com/. On the 2014 Ferrari recapitalization, executed in the form of a cross-border demerger, *see* http://corporate.ferrari.com/sites/ferrari15ipo/files/dms-20012424-v1-index_13_-_ferrari_terms_and_conditions_special_voting_.pdf.

156. The shares of CNH Industrial and the other members of the "Fiat-Triplett", which are all Dutch legal entities, continue to trade exclusively on stock exchanges abroad. In the literature, such a firm is referred to as a *beurs-nv in den vreemde*. On the growing importance of

The cross-border merger coincided with the introduction of a loyalty voting scheme.[157] The additional loyalty share could be obtained in two ways. First, all existing shareholders of both Fiat Industrial and CNH Global who i) were present at the AGM which authorized the cross-border merger and ii) held onto their investments until the completion of the transaction were granted the loyalty bonus (grandfathering).[158] Second, investors who acquire CNH Industrial stock after the implementation of the cross-border merger are eligible to receive the loyalty bonus after a 3-year registration period. During this period, the securities cannot be traded. Prior to the merger, approximately 30% of Fiat Industrial's stock was (beneficially) held by Exor, the investment vehicle of the Agnelli family, with 87 % of CNH Global's stock being owned by Fiat Industrial. Following the introduction of the loyalty mechanism, Exor's voting power increased from 30 % to 43 %. As the loyalty shares in the newly created CNH Industrial legal entity were distributed before the common shares became listed at the Milan stock exchange, the mandatory bid rule did not apply.[159] Since the recapitalization was implemented in the form of a cross-border merger, the transaction had the side-effect of granting outside investors a cash exit right (art. 2:333h BW).

However, in the Mediaset-ruling of September 2020, the Amsterdam Court of Appeals pushed back consideably on the use of loyalty shares.[160] Whereas the principal requirement to introduce a loyalty scheme has been that all holders of shares of the same class should be eligible to qualify for the loyalty bonus, this has not been the sole criterion. Indeed, the mechanism still must be objectively justified, adequate, necessary and proportional. According to the Mediaset cross-border merger proposal, investors would receive 3 votes upon the transaction completing. After 2 years, qualifying shareholders would gain 2 additional votes, and after 3 more years 5 additonal votes. In principle, the Court acknowledged the permissibility of loyalty voting shares – a legal primer – and acknowledged the discretion of corporations to set their own governance

---

this phenomenon, *see* A.A. Bootsma & J.B.S. Hijink, 'De beurs-NV in den vreemde. Een perspectief op modernisering van het NV-recht', 16 *Ondernemingsrecht* 85 (2014). For an analysis of the implications of cross-border recapitalizations for agency costs in light of the bonding hypothesis, *see* § 11.2.3 *supra*.

157. On CNH Industrial's recapitalization, *see* http://www.cnhindustrial.com/en-us/investor_relations/stock_information/stock_information_documents/Special_Voting_Shares_Terms_and_Conditions_incl_annexes.pdf (stating the goal of the loyalty mechanism was to reward long-term commitment and to facilitate future acquisitions, as the scheme would mitigate the dilution of Exor's equity stake). For a detailed commentary, *see* M. van Olffen, 'Nederlandse loyaliteitsaandelen met een Frans sausje', 15 *Ondernemingsrecht* 333 (2013).
158. *See* Kalisvaart 2019, *supra* note 154; *see also* Bootsma 2015, *supra* note 154.
159. *See* Van Olffen 2013, *supra* note 157; *see also* P. Cronheim, 'Loyal Lawyers and Loyalty Shares', in: C. Cascante, A. Spahlinger & S. Wilske, *Global Wisdom on Business Transactions, International Law and Dispute Resolution (Festschrift Wegen)* 197 (C.H. Beck, 2010).
160. *See* Amsterdam Court of Appeals 1 September 2020, ECLI:NL:GHAMS:2020:2379 (*Mediaset*).

structure. Moreover, creating a core base of long-term investors and reinforcing corporate stability were viewed as legitimate goals by the Court.[161] However, the criteria of adequacy and necessity were not met, given that the loyalty shares and director nomination schemes, in combination, enable the Berlusconi family to exercise total and perpetual control.[162] Furthermore, the Amsterdam Court of Appeals was highly critical of the high/low-character of the loyalty scheme. Due to absenteeism of outside minority shareholders, this approach was foreseeably advantageous to the blockholder, whose control power rose instantly, instead of subjecting the grant of additional voting rights to a minimum holding period. This reallocation of control could, according to the Amsterdam Court of Appeals, not be justified as a reward to incumbent Mediaset investors, given that apart from the blockholder, only 10 % of Mediaset shareholders had voted in favor of the cross-border merger.[163] Whilst the Amsterdam Court of Appeals recognized that the loyalty scheme enabled Mediaset to raise additional capital whilst preventing incumbent investors from being diluted, this was found not to serve the interests of the company itself, but rather those of its controlling investor.[164]

28.4.4 Multiple voting shares: altice and beyond

In addition to loyalty schemes, Dutch corporate law permits the use of multiple voting shares – where investors obtain additional votes directly, rather than based on the duration of their stock ownership. The archetypical example of a multiple voting structure under Dutch corporate law is Altice NV.[165] Altice is a telecommunications firm, founded by Patrick Drahi. Its multiple voting scheme was implemented as part of a cross border merger from Luxembourg to the Netherlands between Altice SA and New Athena BV, executed

161. *See* Amsterdam Court of Appeals 1 September 2020, ECLI:NL:GHAMS:2020:2379 (*Mediaset*).
162. *See* Amsterdam Court of Appeals 1 September 2020, ECLI:NL:GHAMS:2020:2379 (*Mediaset*). The board nomination scheme entails that if a nominee for a director positon is not confirmed by the AGM, the controlling shareholder may perpetually nominate another candidate.
163. *See* Amsterdam Court of Appeals 1 September 2020, ECLI:NL:GHAMS:2020:2379 (*Mediaset*).
164. *See* Amsterdam Court of Appeals 1 September 2020, ECLI:NL:GHAMS:2020:2379 (*Mediaset*).
165. Some earlier cases included KPNQwest and Benckiser. *See* H.M. Parson, 'High/Low Voting Stock bij beursvennootschappen', 10 *Vennootschap & Onderneming* 29 (2000). Another contemporary example involves Yandex NV, a Russian e-commerce business. In May 2011, Yandex executed an IPO at NASDAQ worth $ 1.3 billion. The firm's equity consisted of approximately 10 % A-class shares (1 vote per share) and 90 % B-class shares (10 votes). Initially, all investors owned B Class-shares. When sold on the stock exchange, these securities automatically convert – without any compensation being due – into Class-A shares. For Yandex's prospectus, *see* http://www.sec.gov/Archives/edgar/data/1513845/000104746911004187/a2203514zf- 1.htm#cm46101_capitalization.

in August 2015 (*see* § 1.1.1 *supra*). The transaction required approval by the AGM, which was granted with 90 % of the votes cast. All existing shareholders received equal compensation, consisting of 3 A-class stocks, carrying one vote each, and 1 B-class stock, carrying 25 votes. (As opposed to loyalty shares, multiple voting mechanisms can only be created by issuing separate classes of stock under Dutch corporate law.) The goal of the recapitalization was to create a powerful equity currency with a view to funding future acquisitions.[166] Altice's B-class shares can be converted into A-class shares on a 1:1-basis (again without any compensation being due); conversion the other way around is not possible. Both the A- and the B-class shares are traded at the Amsterdam Stock Exchange. It was assumed that Altice's B-class shares would be less liquid, so that many outside investors would convert their B-class shares into A-class shares, increasing Drahi's voting power.[167] The case of Altice is highly illustrative for implementing a dual class equity structure under Dutch corporate law. Since the number of votes vested in a certain stock is tied to its nominal value (*see* § 28.4.1 *supra*), a multiple voting scheme can be created by stipulating, in the Articles of Association, that stocks of a certain class have a higher par value than others. Indeed, the nominal value of Altice's A-class shares is € 0.01, whereas the B-class shares' par value is € 0.25. In view of the DSM-ruling, the introduction of a multiple voting structure is typically not considered a conflicted transaction. Similarly, there exist no explicit statutory restrictions with regard to grandfathering of existing shareholders or the maximum percentage of the share capital which can participate in the multiple voting scheme. A few scholars have argued the Dutch corporate law maximizes the number of votes per share – although a statutory provision to that extent is absent – since an excessive imbalance between the amount of capital contributed and the number of votes granted may violate art. 2:8 BW.[168] This debate is not entirely a theoretical affair, as is illustrated by the example of Prosus (*see* § 1.1.1 *supra*). In 2019, digital technology firm Prosus was spun-off by South-African media-conglomerate Naspers, and executed an

166. *See* http://altice.net/sites/default/files/pdf/Altice-cross-border-merger-proposal-presentation.pdf. Thus, Altice essentially adopted a pecking-order theory argument to support its recapitalization. Pecking-order theory suggests that corporations resort to issuing equity when other means of finance are exhausted. *See* § 8.4 *supra*.
167. For a detailed technical analysis of the Altice case, *see* Kalisvaart 2019, *supra* note 154; *see also* B.P. Buirma, 'High/Low Voting Stock. Een nieuwe trend?', 11 *Tijdschrift voor de Ondernemingsrechtpraktijk* 43 (2016). For a critical discussion from an institutional investor perspective, *see* R. Abma, 'De uitwassen van ons flexibele vennootschapsrecht', 45 *Ondernemingsrecht* 439 (2015) and, in response to Abma, M.W. den Boogert, 'Eumedion ziet spoken rond Nederlandse NV-norm', *Het Financieele Dagblad* 13 July 2015. Note that in 2017, Altice USA was listed spun off from Altice Europe, with the latter retaining a 70 % equity interest. In 2018, Altice Europe distributed the shares it held in Altice USA to its investors.
168. *See* Buirma 2016, *supra* note 167. For a more nuanced approach, *see* Bootsma 2016, *supra* note 147.

IPO at the Amsterdam Stock Exchange. Prosus pursued the IPO to decrease the discount that its parent corporation Naspers' stock price incurred for trading at the Johannesburg Stock Exchange in South Africa, which was viewed with suspicion by international institution investors. However, Prosus also adopted a conditional dual class equity structure. Accordingly, the A1 common shares held by Naspers, with a nominal value of € 0.05, will convert into A2 class shares upon Naspers' equity stake decreasing below 50 %. The A2 class shares have a nominal value of € 50.00, granting their owner 1,000 votes per share.[169] Although such governance arrangements may appear undesirable – especially to institutional investors – Dutch corporate law does not, it itself, limit the number of votes a single share may carry.[170] From an economic point of view, information costs (*see* § 10.6 *supra*) may theoretically be indefinitely high, meaning that super-powered multiple voting stock may be required to cancel these effects out. From a legal point of view, the corporation is principally entitled to adopt a governance regime of its own, absent a statutory provision to the contrary. In Prosus' case, the use of multiple voting stock was moreover foreseeable to outside minority investors from the outset, as the conditional dual class equity structure was disclosed in the prospectus distributed prior to the IPO. Naturally, the fact that Dutch corporate law does not restrict the maximum number of votes per share does not entail that a holder of super-powered voting shares should not take the concept of reasonableness and fairness into account when exercising his right to vote – to the contrary.[171] The presence of a wedge between the capital contributed and the shareholder's voting power may be a relevant factor, depending on the facts and circumstances perhaps even a highly relevant one, for applying art. 2:8 BW and assuming the existence of a special duty of care.

28.4.5 The position of the AGM

If one were to take art. 2:107 BW at face value, the powers of the AGM may appear to be wide-ranging. According to this provision, any competence not explicitly attributed to the executive board or others resides with the AGM.[172] However, caution is in order. The executive board is the sole competent organ with regard to matters of corporate strategy, a concept that is interpreted rather broadly (*see* § 28.3.1 *supra*). Moreover, numerous statutory and Dutch Corporate Governance Code provisions attribute powers explicitly to the

169. *See* http://www.naspers.com/getattachment/58dd5d97-e8ff-4942-9f87-b2d6713b0ca3/AMCO-11006822-v1-Prosus_N_V__Prospectus.PDF.aspx?lang=en-US for the Prosus IPO prospectus.
170. Note that Prosus' dual class equity structure arrangement is somewhat at odds with the life-cycle perspective, since it is activated instead of abolished over time. *See* § 10.6 *supra*.
171. *See* Hoge Raad 14 September 2007, ECLI:NL:HR:2007:BA4887 (*Versatel*); *see also* Hoge Raad 1 March 2002, ECLI:NL:HR:2002:AD9857 (*Zwagerman Beheer*).
172. *See* Van Solinge & Nieuwe Weme 2019, *supra* note 2, at § 3-5; *see also* Assink & Slagter 2013, *supra* note 43, at § 13; Dortmond 2013, *supra* note 6, at § 203.

executive and/or supervisory board, or enable the Articles of Association to do so. The AGM cannot, without a legal basis or basis in the Articles of Association, present itself as the "supreme corporate organ" and usurp the powers of others (*see* § 28.2.2 *supra*). In reality, therefore, the residual competence laid down in art. 2:107 BW has a more technical-legislative nature, similar to art. 2:25 BW, which states that Dutch corporate law has a principally mandatory character (*see* § 28.2.3 *supra*).[173] The most notable competences of the AGM are to modify the Articles of Association (art. 2:121 BW), to appoint supervisory directors (art. 2:158 (4), (5) and (6) BW) and to liquidate (art. 2:19 (1) (a) BW) or merge the NV (art. 2:317 BW). Moreover, pursuant to art. 2:107a BW, the AGM holds an approval right in respect of transactions which fundamentally affect the identity of the corporation. This includes acquisitions and disposals in excess of one third of the corporate assets. However, art. 2:107a BW is to be interpreted narrowly.[174]

The AGM is typically convened by the executive and/or supervisory board. The Articles of Association may also authorize others, for instance the holders of priority shares (*see* § 27.3.1 *supra*), to convene the AGM (art. 2:109 BW). Investor should be notified of the meeting at least 42 days in advance (art. 2:115 (2) BW).[175] Pursuant to art. 2:110 BW, shareholders representing at least 10 % of the equity can request a court to organize an AGM themselves as well.[176] The Articles of Association may provide a threshold lower than 10 %. A request can only be filed if investors are able to demonstrate a failed attempt to have the AGM convened by the executive and supervisory board within 8 weeks. According to art. 2:111 BW, the court will grant the request, and set a date for the AGM, if investors have a reasonable interest for the AGM to be convened.[177]

173. Occasionally, there have been scholars to subtly advocate a more normative interpretation of art. 2:107 BW, with a view to strengthening the position of the AGM. *See* B. Kemp & A.S. Renshof, 'Het gebruik van oligarchische clausules bij benoeming en ontslag door Nederlandse beursvennootschappen', 6 *Maandblad voor Ondernemingsrecht* 51 (2020).

174. *See* Hoge Raad 13 July 2007, ECLI:NL:HR:2007:BA7972 (*ABN AMRO*), ruling that art. 2:107a BW cannot be invoked for transactions which, despite involving large sums of money, fail to meet the 33 % asset threshold. For an extensive analysis of the origins and implications of art. 2:107a BW, *see* A.G.H. Klaassen, *Bevoegdheden van de algemene vergadering van aandeelhouders* 175-238 (Kluwer, 2007).

175. *See* Van Solinge & Nieuwe Weme 2019, *supra* note 2, at § 31-40; *see also* Assink & Slagter 2013, *supra* note 43, at § 44; Dortmond 2013, *supra* note 6, at § 205-206.

176. Under art. 2:110 (2) BW, holders of depository receipts (*see* § 28.4.2 *supra*) are equally counted towards the 10 % equity threshold.

177. Importantly, a convocation request may be rejected if it violates the requirement of reasonableness and fairness of art. 2:8 BW, although this does not follow explicitly from art. 2:110 BW. *See* Rechtbank Amsterdam 10 Augustus 2017, ECLI:NL:RBAMS:2017:5845 (*Akzo Nobel*), ruling that an extraordinary AGM of a listed NV to dismiss directors can only be convened following a regular AGM during which the executive and/or supervisory board have reported on their activities (i.e. both matters cannot be dealt with at the same meeting).

In principle, the agenda of the AGM is set by the executive and/or supervisory Board. However, art. 2:114a BW presents a shareholder proposal right.[178] Accordingly, resolutions made by investors representing at least 3 % of the issued share capital are included in the agenda of the AGM, as distributed by the executive and/or supervisory board, provided the proposal has been received at least 60 days in advance.[179] The Articles of Association may provide a lower equity stake threshold or a shorter notification period.[180] There exists no maximum as to the number of resolutions an individual shareholder can table or a word limit regarding the length of each proposal. Meanwhile, an important limitation of (insurgent) investor powers is that the proposal right of art. 2:114a BW only relates to matters not in the domain of the board. The corporate strategy, for instance, is a matter under the board's exclusive competence (*see* § 28.3.1 *supra*). Notably, this does not prevent the AGM from using art. 2:114a BW to hold non-binding discussions regarding the corporate strategy. However, it cannot invoke the provision to force a binding vote on strategic matters, as was confirmed in the landmark *Boskalis/Fugro* ruling of 2018.[181] Accordingly, the AGM is neither entitled to command a non-binding motion on issues of corporate strategy. Permitting a non-binding vote would likely have the same effect as enabling a binding vote.[182] In conclusion, Dutch shareholder convocation and proposal rights are less powerful in practice than they may appear based on a literal interpretation of the law.[183]

---

178. *See* Van Solinge & Nieuwe Weme 2019, *supra* note 2, at § 51-59; *see also* Assink & Slagter 2013, *supra* note 43, at § 44; Dortmond 2013, *supra* note 6, at § 209.
179. Pursuant to art. 2:114a (3) BW, holders of depository receipts (*see* § 28.4.2 *supra*) enjoy the same proposal rights as shareholders do. Investors only have to meet the 3 % equity threshold at the time of filing the proposal; retaining the investment until the date of the AGM is not strictly necessary.
180. Note that the AGM convocation period is only 42 days (art. 2:115 (2) BW). Planning an AGM more than 42 but less than 60 days in advance may enable an NV to convene an AGM without allowing its shareholders to table any resolutions. This is not an entirely theoretical affair, but remains unorthodox nonetheless. For a rare example, *see* Gerechtshof Amsterdam 29 May 2017, ECLI:NL:GHAMS:2017:1965 (*Akzo Nobel*).
181. *See* Hoge Raad 20 April 2018, ECLI:NL:HR:2018:652 (*Boskalis*/*Fugro*).
182. *See* Hoge Raad 20 April 2018, ECLI:NL:HR:2018:652 (*Boskalis*/*Fugro*). For relevant analyses, *see* Assink 2018, *supra* note 53 (stressing that a provision in the Articles of Association granting investors a proposal right on a certain topic should be respected, even if it relates to a matter of corporate strategy); *see also* Timmermans 2015, *supra* note 53; Peters & Eikelboom 2015, *supra* note 53.
183. The Dutch framework regarding shareholder convocation and proposal rights has been criticized by some for (allegedly) frustrating the right to vote, thus violating the Shareholder Rights Directive. *See* F. Eikelboom, 'Wat onder de oppervlakte bleef in de rechtspraak rond AkzoNobel', 3 *Maandblad voor Ondernemingsrecht* 231 (2017); *see also* Peters & Eikelboom 2015, *supra* note 53. For a convincing rebuttal, *see* L. Timmerman, 'De rol van vennootschappelijk belang en strategie bij het beschermen van beursvennootschappen', 15 *Tijdschrift voor vennootschapsrecht, rechtspersonenrecht en ondernemingsbestuur* 14 (2018).

This state of affairs is arguably exacerbated by the response period (*responstijd*), a mechanism idiosyncratic to the Netherlands. According to Best Practice Provisions 4.1.6 and 4.1.7 of the Dutch Corporate Governance Code, the executive board may unilaterally call for a time-out of 180 days at most.[184] During this time-out, the board must seek a constructive dialogue with dissident investors, whereas the AGM cannot make any proposals to modify the corporation's strategy or to fire any executive and/or supervisory directors. At the end of the response period, the executive board must report on the discussions held. Although the response time is not, as such, directly legally binding, shareholders may be obliged to comply in order not to violate the requirement of reasonableness and fairness of art. 2:8 BW.[185] In 2018, the Dutch legislator presented a proposal to create a statutory variant of the response time, referred to as the reflection period (*bedenktijd*). Although important technical differences exist between the current response period and the proposed reflection period, both schemes are functionally somewhat similar. The maximum length of the reflection period will be 250 days, compared to 180 days for the response period. The reflection period still permits proposals to be discussed in a non-binding manner, which is not the case under the response period.[186] The reflection period has been controversial to some commentators,[187] but the Dutch legislator appears adamant to bring the proposal forward.[188]

184. For an extensive discussion of the response period in the Dutch legal order, *see* Kleipool, Van Olffen & Roelvink 2017, *supra* note 98.
185. *See* Gerechtshof Amsterdam (OK) 6 September 2013, ECLI:NL:GHAMS:2013:2836 (*Cryo-Save*). For an insightful appraisal, *see* K.H.M. de Roo, 'De Corporate Governance Code en het drijfzand van de open norm', 65 *Ars Aequi* 257 (2015). For the conflicting statements by the Dutch legislator on the character of the response time, *see Kamerstukken II* 2010/11, 32014, nr. 12, p. 10 (observing an investor is not bound by Best Practice Provisions 4.1.6 and 4.17); *see also Kamerstukken II* 2008/09, 31746, nr. 3, p. 24, on the effects of art. 2:8 BW.
186. For an extensive comparison of the response and the reflection time, *see* M. van Olffen, 'Voorontwerp wettelijke bedenktijd beursvennootschappen', 21 *Ondernemingsrecht* 77 (2019).
187. For notable discussions, *see* R.H. Kleipool & R.L. Pouwer, 'Tijd en rust wettelijk toegevoegd aan de gereedschapskist van het bestuur', 5 *Maandblad voor Ondernemingsrecht* 141 (2019); *see also* M.W. Josephus Jitta, 'Het voorontwerp over de bedenktijd; bedenktijd voor de wetgever?', 21 *Ondernemingsrecht* 155 (2019); H.M. Vletter-van Dort, 'De bedenktijd: naïef of noodzaak?', 21 *Ondernemingsrecht* 899 (2019).
188. For the version of the bill sent to Parliament, *see Kamerstukken II* 2019/20, 35367, nr. 3. For a commentary, *see* M. van Olffen, 'Wetsvoorstel wettelijke bedenktijd beursvennootschappen', 22 *Ondernemingsrecht* 261 (2020).

28.5 Shareholder dividend entitlements

28.5.1 General framework

The basic characteristics of the capital structure of the Dutch NV are somewhat similar as – albeit more facilitative than – those of the German AG (*see* § 22.5 *supra*). The Articles of Association of the NV must state the corporation's authorized share capital; the minimum issued share capital is € 45,000 (art. 2:67 (2) BW).[189] The issued share capital may only consist of par value shares, with a minimum nominal value of € 0.01 each. Issuing non-par value stock or shares with a lower par value is not permitted (art. 2:79 (1) BW, *see* § 28.4.1 *supra*).

Absent any provisions in the Articles of Association to the contrary, realized profits should be distributed to investors directly and in full (art. 2:105 (1) BW). However, such a division of powers with regard to corporate funding would unduly constrain operational flexibility. Therefore, the Articles of Association typically provide that the executive and/or supervisory board may decide to reserve a certain part of the profits, with the AGM being allowed to decide on the allocation of the remainder (art. 2:101 (6) BW).[190] There exist comparatively few constraints for management in this regard: unlike its German counterpart, Dutch corporate law does not mandate an elaborate web of statutory (loss) reserves (*see* § 22.5.1 *supra*). Any dividends must, in principle be paid in cash. Stock dividends or payments in kind are permitted, assuming the Articles of Association enable such distributions or the shareholder accepts them.[191] According to the Dutch legislator, any advantage granted to a shareholder – in that capacity – which represents an identifiable value may qualify as a dividend.[192] Pursuant to art. 2:105 (4) BW), interim dividends are equally allowed, again provided these enjoy a basis in the Articles of Association.[193]

---

189. *See* Van Olffen & Rensen 2019, *supra* note 151; *see also* Assink & Slagter 2013, *supra* note 43, at § 32.1; Dortmond 2013, *supra* note 6, at § 161-162.
190. An alternative arrangement is that the executive and/or supervisory board make a proposal to the AGM regarding the size of the dividend and the amount of earnings to be retained. Most often, this resolution will be adopted. *See* Van Olffen & Rensen 2019, *supra* note 151, at § 188; *see also* Kroeze 2015, *supra* note 2, at § 597; Assink & Slagter 2013, *supra* note 43, at § 33.1; Dortmond 2013, *supra* note 6, at § 331-332.
191. On the forms of dividends, *see* Van Olffen & Rensen 2019, *supra* note 151, at § 180-185; *see also* Kroeze 2015, *supra* note 2, at § 602; Assink & Slagter 2013, *supra* note 43, at § 33.1; Dortmond 2013, *supra* note 6, at § 331-332.
192. *See Kamerstukken II* 1978/79, 15304, nr. 3, p. 48. Note that paying a dividend by distributing a highly illiquid asset may violate art. 2:8 BW. *See* M. van Olffen, 'Uitkeringen in natura', 127 *Weekblad voor Privaatrecht, Notariaat en Registratie* 534 (1996).
193. In relation to interim dividends, Dutch corporate law is again more flexible than its German counterpart. Although art. 2:105 (4) BW similarly mandates that the preliminary accounts must indicate a profit, these accounts do not necessarily have to cover a yearly period.

Although the executive and/or supervisory board may, as a rule, retain earnings without limit, case law limits the latitude of directors somewhat. Accordingly, investors are entitled to a reasonable dividend, even if the Articles of Association provide a sufficient basis for earnings to be retained.[194] This position follows from the notion of reasonableness and fairness, as laid down in art. 2:8 BW (*see* § 26.4 *supra*), and safeguards the interests of outside minority shareholders to a certain extent, at least theoretically.[195] However, what actually constitutes a reasonable return on investment is highly context-specific, and whether a distribution of earnings can be forced depends on a number of factors. In an abstract sense, these include the economic situation of the NV at hand, its strategy and liquidity position, as well as the broader industry which the NV is part of and general industry projections.[196] In *Uniwest*, the Dutch Supreme Court ruled that retaining earnings for 3 years in a row without the interest of corporation requiring such a dividend policy violated the obligation to declare a reasonable dividend.[197] Meanwhile, the view that shareholders are, in principle, entitled to a reasonable return on investment does not entail that their interests will necessarily prevail over those of the NV. It may be argued that the reasonable dividend case law primarily addresses closed corporations and carries less weight regarding open, listed firms.[198] For instance, in the *KLM*-ruling,[199] it was held that, depending on the facts and circumstances, a well-funded NV may, in light of art. 2:8 BW, decide to retain earnings in the face of adversity, provided the executive and/or supervisory board properly motivates its decision.[200]

Moreover, no restrictions apply regarding the maximum amount of the interim dividend compared to ordinary distributions (*see* § 22.5.1 *supra*).

194. *See* Hoge Raad 9 July 1990, ECLI:NL:HR:1990:AC0960 (*Sluis*). For an overview of relevant later case law, *see* Van Olffen & Rensen 2019, *supra* note 151, at § 195; *see also* Wolf 2013, *supra* note 118, at 340-350.
195. For the view that investors are entitled to a reasonable dividend, *see* B. Bier, 'Betekent winstrecht ook recht op winst?', in: P.J. van der Korst, R. Abma & G.T.M.J. Raaijmakers (eds.), *Handboek onderneming en aandeelhouder* 163 (Kluwer, 2012); *see also* B. Bier, *Uitkeringen aan aandeelhouders* 79 (Kluwer, 2003).
196. *See* Bier 2003, *supra* note 195, at 72; *see also* M. Koelemeijer, *Redelijkheid en billijkheid in kapitaalvennootschappen* 171, 179-184 (Kluwer, 1999). The fact that an investor effectively controls the corporation does not warrant additional scrutiny of the corporate dividend policy, beyond the obligations imposed by art. 2:8 BW on controllers. This may be different in case the controller has payed himself a dividend, to the exclusion of outside minority investors.
197. *See* Hoge Raad 17 January 1990, ECLI:NL:HR:1990:AD1001 (*Uniwest*).
198. Most, if not all corporations which were forced by the courts to make a dividend distribution were BVs or private NVs. In this sense, the practical effects of the reasonable dividend doctrine are limited, and the Dutch legal state of affairs is rather similar to that in the US (*see* § 16.5.1 *supra*).
199. KLM is a somewhat hybrid case, as it involved a previously listed NV which had been taken private as part of the merger with Air France in 2004. The suit was initiated by investors who had not tendered their stock.
200. *See* Hoge Raad 12 July 2013, ECLI:NL:HR:2013:BZ9145; *see also* Gerechtshof Amsterdam 15 November 2011, ECLI:NL:GHAMS:2011:BV1255 (*KLM*). In the case of

Moreover, even if legal proceedings are successful, the economic outlook may have deteriorated in the meantime, entailing that earnings should be retained regardless of the judgement based on the historic situation.

28.5.2 Financial requirements & director liability

Whether a dividend may be declared depends on the financial position of the NV. Dutch corporate law mandates both a balance sheet test and a solvency test.[201] The balance sheet test is laid down in art. 2:105 lid 2 BW. Accordingly, the NV can only make distributions to investors provided that the corporate equity exceeds the sum of the paid-up share capital, statutory reserves and the reserves mandated by the Articles of Association.[202] Moreover, the distribution must meet a solvency test. Accordingly, the dividend may not severely jeopardize the continued existence of the corporation.[203] As part of the 2012 review of the BV-statute (*see* § 27.3.1 *supra*), the Dutch Minister of Justice observed that in principle, the solvency test spanned a future period of one year.[204] During that period, the BV must be able to meet its obligations as they arise, as well the obligations that existed at the time of the distribution. The same may very well apply for the NV. Any distributions which fail to meet the balance or solvency tests may render the responsible executive and/or supervisory directors personally liable under the serious reproach standard of art. 2:9 BW (*see* § 28.3.3 *supra*).[205] A relevant factor in this regard will be whether management itself took the initiative to make a distribution or whether this decision was more or less forced by the AGM.[206]

KLM, the (increasingly) Dutch national flag carrier, earnings had been retained to combat elevated fuel costs, fierce competition and to renew a fleet of aging aircraft. For a critical commentary, *see* M. Koelemeijer, 'Minderheidsaandeelhouders revisited: les uit Air France-KLM', 9 *Tijdschrift voor vennootschapsrecht, rechtspersonenrecht en ondernemingsbestuur* 41 (2012), arguing the judgement violates prior case law, notably the *Sluis*-ruling.

201. For an extensive discussion of these tests, *see* Barneveld 2014, *supra* note 25, at 393-407, admittedly applying them in the rather different context of the BV.

202. *See* Van Olffen & Rensen 2019, *supra* note 151, at § 197, 199 (stating that the relevant figures should be obtained from the most recent annual accounts, but also that corrections may made in relation to subsequent material events, for instance stock repurchases); *see also* Assink & Slagter 2013, *supra* note 43, at § 33.

203. For relevant examples of distributions which failed to meet the solvency test, *see* Hoge Raad 6 February 2004, ECLI:NL:HR:2004:AO3045 (*Reinders/Didam*); *see also* Hoge Raad 28 April 2000, ECLI:NL:HR:2000:AA5658 (*Montedison*); HR 8 November 1991, ECLI:NL:HR:1991:ZC0401 (*Nimox*).

204. *See Kamerstukken II* 2006/07, 31058, nr. 3, p. 6. Naturally, exceptions to this rule are conceivable, for instance if it is foreseeable that a large debt will have to be repaid two years in the future.

205. *See* Van Olffen & Rensen 2019, *supra* note 151, at § 200; Assink & Slagter 2013, *supra* note 43, at § 33.

206. *See* Hoge Raad 6 February 2004, ECLI:NL:HR:2004:AO3045 (*Reinders/*Didam); *see also* HR 8 November 1991, ECLI:NL:HR:1991:ZC0401 (*Nimox*).

28.5.3 Inferior & superior profit rights

In principle, shareholders are entitled to an equal amount of dividends and retained earnings in proportion to the amount of capital contributed. This follows not only from the general provision of art. 2:92 (1) BW (*see* § 28.4.1 *supra*), but also specifically from art. 2:105 (6) BW.[207] As is the case with the number of votes per share (*see* § 28.4.4 *supra*), the size of the profit entitlement vested in a stock is principally tied to the security's nominal value, unless the Articles of Association state otherwise. In case the NV has issued 2 classes of stock, being A-class shares with a nominal value of € 0.01 and B-class stocks with a nominal value of € 0.02, the profit entitlement of the B-class shares is double that of the A-class stock. This mechanism enables the creation of securities with super-powered financial rights. By contrast, art. 2:105 (9) BW stipulates that the NV cannot issue non-profit participating stock.[208] This position is attributed to the fact that the archetypical enterprise is a joint undertaking. Then, each investor should receive at least some part of the profits, as a reward for his involvement.[209] Meanwhile, art 2:105 (9) BW does not prohibit shareholder agreements.[210] These may be drafted to exclude individual investors from corporate profits for a pre-determined period of time or with regard to a certain portion of their holdings.[211] Moreover, art. 2:105 (9) BW is typically not interpreted as prohibiting stocks which only carry minor or even negligible profit entitlements.[212] Finally, pursuant to art. 2:105 (10) BW, the Articles of Association may provide that dividends are not paid oud, but

---

207. For a commentary, *see* Van Olffen & Rensen 2019, *supra* note 151, at § 192; *see also* Kroeze 2015, *supra* note 2, at § 602; Assink & Slagter 2013, *supra* note 43, at § 30.
208. As of 2012, the BV has been permitted to issue non-profit participating stock. *See* art. 2:216 (7) BW. This policy change was justified on the grounds that enabling non-profit participating shares could facilitate succession planning in family businesses, where the senior family member was willing to part with the income the firm generated, but not with his grip on corporate strategy. *See Kamerstukken II* 2006/07, 31 058, 3, p. 75.
209. For a more holistic approach, *see* T.A. Keijzer, 'De societas leonina en het winstrechtloze BV-aandeel vergeleken', 16 *Ondernemingsrecht* 273 (2014), arguing that a reward can also be made in non-monterary terms.
210. In similar vein, shareholder agreements may be used to waive voting rights. However, the practical use of a shareholder agreement may be rather limited in an open, listed corporation with dispersed share ownership. Presumably, such an arrangement will be workable only for private firms or between the largest shareholders of a listed corporation.
211. For an analysis of the degree to which shareholder agreements can be used to circumvent the prohibition on non-profit participating (and non-voting) stock, *see* T.A. Keijzer, 'De betekenis van art. 2:190 BW: over BV-aandelen en aandeelhouderschap', 148 *Weekblad voor Privaatrecht, Notariaat en Registratie* 137 (2017); *see also* T.A. Keijzer, 'De aandeelhoudersovereenkomst in het licht van art. 2:190 BW', 147 *Weekblad voor Privaatrecht, Notariaat en Registratie* 312 (2016). Both papers focus primarily on the BV, but the observations may also be applied on the NV by means of analogy.
212. *See* R.A.F. Timmermans, 'Financiering van preferente beschermingsaandelen bij New Sources Energy N.V.', 14 *Ondernemingsrecht* 462 (2012); *see also* G.J.W. Kinnegim, 'De flex-bv opnieuw fiscaal getoetst', 57 *Weekblad Fiscaal Recht* 116 (2011).

instead will be added to a specific capital reserve. In conclusion, the ban for the NV to create non-profit participating stock, although doctrinally restrictive, is not absolute.

Private ordering mechanisms to circumvent the ban on non-profit participating stock have been uncommon. In some instances, these are simply a mere complement to a control-oriented dual class equity structure. In case of the Fiat-Triplett, for instance, where "loyal" investors are awarded additional stocks after a number of years of uninterrupted share-ownership (*see* § 28.4.3 *supra*), the dividends on the additional securities are limited to 1 % of their nominal value. Moreover, the dividends are not paid out to investors, but added to the corporate capital reserve instead, in accordance with art. 2:105 (10) BW. Cnova presents another example. Its controlling shareholder waived all financial interests in relation to the additional loyalty shares by contract.[213] In the case of Altice, which implemented a multiple voting dual class equity structure (*see* § 28.4.4 *supra*), things work slightly differently. Altice has issued two classes of stock, the A-class shares having a nominal value of € 0.01 and the B-class stock carrying a nominal value € 0.25. Absent any provisions in the Articles of Association, the profit entitlements of holders of B-class shares would have been 25 times as large as those of holders of A-class stocks (art. 2:105 (6) BW). That, however, was not what the mechanism was intended to achieve. Therefore, the Articles of Association of a dual class equity structure NV will typically also contain a provision stating that the dividend of all classes of stock is calculated based on the combined amount of the nominal value and the non-stipulated share premium (*agio*). The share premium deposited on each Altice A-class share amounted to € 0.24. As a result, the capital contribution in respect of both the A- and B-classes of stock was € 0.25, harmonizing the financial rights of investors. Moreover, depending on the dual class equity structure, it may be necessary to create separate capital reserves, to prevent the holder of the multiple voting stock from becoming entitled to the share premium contributed in respect of the common shares.[214]

In line with the NV's apparent limited practical need for non-profit participating stock, the calls for abolishing art. 2:105 (9) BW have been modest. Nonetheless, some scholars have advocated the introduction of non-profit participating shares, including De Jong,[215] Raaijmakers and Raaijmakers,[216] and Boschma, Lennarts and Schutte-Veenstra.[217] Essentially, their comparative argument comes down to the fact that, since foreign legal systems are familiar with non-profit participating shares and convincing reasons against the mechanism do not exist, the instrument would – for these reasons alone – constitute a

213. *See* http://www.cnova.com/en/wp-content/uploads/sites/2/2016/01/CNV-CG-Articles-of-association-2014-10-30.pdf for Cnova's Articles of Association (both the Dutch original version and an English working translation).
214. *See* Kalisvaart 2019, *supra* note 154; *see also* Buirma 2016, *supra* note 167.
215. *See* De Jong 2014, *supra* note 119.
216. *See* Raaijmakers and Raaijmakers 2014, *supra* note 119.
217. *See* Boschma, Lennarts & Schutte-Veenstra 2014, *supra* note 119.

useful addition to Dutch corporate law. This is a somewhat shaky basis for legal reform. Additional arguments may be required to fully support the conclusion that non-profit participating stock is a useful means of corporate funding. One argument could be that non-profit participating stock may play a useful role in the earlier corporate life-cycle stages (*see* § 9.7.3 *supra*). Another reason may be that, since non-profit participating stock would likely be valued rather low (due to the absence of cash-flow rights) but still carry the right to vote, the mechanism could be an effective anti-takeover mechanism.

Chapter 29. Summary

29.1 The Dutch corporate legal landscape

Per tradition, Part V commenced with an outline of the Dutch corporate legal landscape, in Chapter 26. As was discussed in § 26.2, there exists a centralized legislative system in Holland. However, from a constitutional perspective, Holland may also be considered as a constituent state of the Kingdom of the Netherlands, which equally includes Aruba, Curaçao and Sint Maarten. According to the Charter for the Kingdom of the Netherlands, matters of civil and commercial law should be harmonized as far as possible. Meanwhile, there was and is no obligation for utter alignment. The Dutch Supreme Court may, depending on the circumstances, adopt or reject a harmonized interpretation of legal provisions. Since various corporate law concepts, originally developed in Aruba, Curaçao or Sint Maarten, have made their way to Holland, the laws of Curaçao – which, from the three jurisdictions of the former Dutch Antilles, has the most modern statute – were studied as well.

Another issue involved selecting the relevant legal entity to take into consideration for comparative purposes. This issue was addressed in § 26.3. Dutch corporate law has typically provided two legal forms for engaging in entrepreneurial activity. Whereas the NV is open in nature, the BV has a closed character. The BV was initially introduced, in 1971, as a virtual copy of the NV statute, but developed a distinct, more enabling profile following the Flex-BV reforms of 2012. This, in turn, induced various actors to share their views on the future of the NV, including the Corporate Law Committee (*Commissie Vennootschapsrecht*) and Eumedion, an association of institutional investors, whereas the scholarly debate focused on the issue whether a separate statute should be drafted to govern listed NVs, as opposed to unlisted NVs. Somewhat curiously, the 2012 reforms enabled BVs to have their securities traded on the stock exchange. If listed firms were to use the flexible legal framework of the BV widely to go public, the position of outside minority investors could be severely affected. Since the Dutch legislator has responded by stipulating that certain parts of the NV-statute will apply to listed BVs by analogy, and given that Dutch listed firms continue to use the NV by overwhelming majority, the comparative Dutch analysis was focused on this particular legal form. As a side note, I observed that life-cycle theory makes several additions to the debate concerning the function of the BV vis-à-vis that of the NV. What matters is not necessarily whether a corporate legal systems consists of one generic corporate form or two or more distinct legal entities. However, if the latter approach is adopted, well-designed, clear and effective procedures must be in place to facilitate the conversion of closed corporations into open corporations (and vice versa).

One of the defining features of Dutch corporate governance is the concept of reasonableness and fairness (*redelijkheid en billijkheid*). This principle, laid down in art. 2:8 BW, was discussed in § 26.4. According to art. 2:8 (1) BW, parties must act reasonable and fair towards each other. Art. 2:8 (2) BW contains the derogatory aspect of reasonableness and fairness. Any rule of law, either in the form of an act, custom, or as laid down in the Articles of Association, bylaws or corporate resolution, shall be inapplicable to the extent that it delivers an inconceivable outcome. Reasonableness and fairness not only governs the relationship between the corporation and its shareholders, but also actions of one stakeholder to another. Relevant factors for applying art. 2:8 BW include, for instance, whether the corporation at hand is a large, listed NV or a small, recently incorporated BV. Another aspect is whether the investor is a controlling shareholder or simply a retail party. Because of art. 2:8 BW, Dutch corporate law has a different basis than the conflict-oriented model of agency theory.

As final part of Chapter 26, I analyzed the role and function of the Dutch Corporate Governance Code, in § 26.5. Like many of its foreign counterparts, the Dutch Code originates from the 1990s. Building on the report of the Peters Committee of 1997, the first Code was presented in 2003. The current version was adopted 2016. The legal status of the Code is somewhat similar to its German counterpart, in the sense that the Code enjoys a statutory basis but is not part of any stock exchange listing rules. The Code consists of fundamental Principles and more detailed Best Practices. The Code is not directly legally binding to corporations and/or their investors. However, the Code is deemed to reflect generally accepted Dutch governance views, and failure to comply may violate art. 2:8 BW.

29.2 Dutch dual class stock from a historical perspective

The Dutch comparative analysis continued in Chapter 27 with a discussion of the historical use of dual class equity structures. Adhering to the chronological order of events, I first discussed developments in the 19th century, in § 27.2. The origins of Dutch corporate law have traditionally been traced back to the VOC), which was established by Charter (*Octrooi*) on March 20, 1602. The VOC's strategic decisions were made by a governing body of 17 "directors" and carried out by its 78 (later: 60) representatives. Theoretically, the economic interests of VOC participants were protected somewhat, but in practice, safeguards were minimal. Especially in its infancy, the VOC was required to invest large amounts of funds, and profits were small. With regard to control rights, participants were even worse off. Voting rights were completely absent, and disclosure obligations were grossly violated. In 1622, this gave rise to severe discontent amongst investors, and a supervisory body was created. At the start of the 19^{th} century, the VOC still found itself at the center of attention. Excessive distributions meant that the VOC's financial position had progressively deteriorated. Following the Anglo-Dutch War of 1780-1784, the VOC lost many of its colonial possessions. In 1798, the VOC was nationalized, with the government assuming the organization's mounting debt.

The collapse of the VOC was symptomatic for the position of the Netherlands on the political-economic theatre. The Netherlands came under French rule and in 1811, the Code Napoleon and CdC entered into force. When the Kingdom of the Netherlands regained its independence in 1813, the French legislation was not immediately abolished. The CdC proved to be rather useful due to its flexibility. For instance, it contained no (mandatory) provisions on the allocation of voting rights or distribution of dividends – neither was the existence of the AGM mandatory. Meanwhile, William I, the new Dutch monarch, initiated several programs to improve the welfare of his (European) subjects. As the intended successor to the VOC, the purpose of the NHM was to revitalize trade and navigation. Financial interests of investors were safeguarded relatively well; William I actually guaranteed an annual dividend of 4.5 %. The 60 largest shareholders in terms of capital contributions even had voting rights – on a one man, one vote basis – concerning a limited number of topics, including corporate dissolution and modifications of the Articles of Association.

In 1833, a revised Code of Commerce was presented. Controversially, the draft proposed not only a concession system, but also outlined a scheme of continuous governmental supervision. In 1835, a compromise was reached: the government concession to incorporate would be granted by default, provided that certain predefined requirements had been met. To counter widespread oligarchic practices, the AGM was granted the statutory right to appoint directors. Most interestingly, degressive voting became mandatory. Investors would seek to curb the effects of degressive voting well into the 20^{th} century, and the use of stooges was commonplace. After the enactment of the Code of Commerce in 1838, government funding of innovative industries, including railroads, was initially rather limited due to budget constraints – as was the number of newly-established NVs. In the 1860s, the narrative changed. Several proposals were made to modernize the Code of Commerce of 1838. The plans of Jolles and Kist outlined various measures, such as the abolition of the concession system and mandatory degressive voting. However, none of these proposals was enacted. As a result, the Netherlands the Code of Commerce of 1838 remained in force.

In § 27.3, I discussed developments in relation to dual class equity structures in the 1920s and 1930s. These were largely rooted in the late 1890s and early 1900s. During this period, it became increasingly obvious that mandatory degressive voting constrains fundraising in times of rapid economic expansion.

Moreover, the degressive scheme put Dutch corporations at a relative disadvantage compared to firms incorporated in jurisdictions that had subscribed to more liberal voting rights regimes. In response to an unsolicited takeover attempt by Standard Oil, Royal Dutch Shell resorted to an innovative instrument, being the issuance of priority shares. The holders of these securities had the right to make binding nominations for executive and supervisory director positions. Additionally, they could veto future modifications of the Articles of Association. In the absence of proportional voting, the priority shares mechanism quickly became widely-used. Another important development during this period was the modernization of the Code of Commerce of 1838. Several proposals were presented, including by Nelissen (1910), Heenskerk and Visser (1925) and Donner. Eventually, Donner's draft was signed into law, becoming the Code of Commerce of 1928. The Code of Commerce of 1928 adopted proportional voting as the default rule and permitted the priority shares mechanism, provided that any nominations could be rejected by 2/3 of the votes cast at the AGM, representing 50 % of the equity. Doctrinally, the NV was still considered a contract, and the much-criticized requirement of government consent to incorporate remained in place, in the form of a Ministerial no-objection statement.

The final paragraph of Chapter 27, § 27.4, focused on developments in the late 1980s and the 1990s. The second wave of the debate on dual class equity structures was primarily a derivative of legislative activity in the former Dutch Antilles. (Prior to that, Treurniet and Van der Grinten, two icons of Dutch corporate law, had advocated the use of non-voting stock, but without any tangible effects, likely because both later reversed their views.) In 1987, the corporate law statute of the former Dutch Antilles was amended, enabling locally incorporated firms to issue non-voting shares. At the time, many scholars in continental Holland voiced their sympathy to the amendment. The most elaborate proposal to create a statutory basis in respect of non-voting shares was undoubtedly made by Schwarz in his inaugural lecture at Maastricht University. Although Schwarz' ideas were not received with dismissal, they did not result in any policy measures either. In particular, scholars found it difficult to understand why introducing non-voting shares was strictly necessary, as Dutch corporate law offers a widely used alternative to non-voting shares: depository receipts. This was corroborated by the fact that in the 1990s, scholars and policy-makers sympathized increasingly with outside minority shareholder interests. A draft-bill, presented in 1997, proposed to create a legal procedure at the Amsterdam Court of Appeals to abolish anti-takeover measures following an unsolicited takeover bid. In the same year, the Peters Committee presented its 40 Recommendations – the precursor to the current Dutch Corporate Governance Code – which outlined many investor-friendly measures, including a shareholder proposal right.

29.3 The division of powers in Dutch corporations

In Chapter 28, I studied the relationship between the board and the NV's shareholders. To that end, I first analyzed fundamental character traits of the corporation, in § 28.2. With regard to corporate purpose, the Dutch system is more in line with German than US corporate law. The executive and/or supervisory board should act in the interests of the NV and its affiliated businesses. Maeijer's 1964 inaugural lecture has been highly influential in this regard. In 2014, the Cancun-ruling of the Dutch Supreme Court confirmed that corporations bear a greater responsibility than merely to increase their profits. There, the Dutch Supreme Court ruled that the purpose of the corporation is to "promote the lasting success of the enterprise". The nature and scope of shareholder interests are only of secondary importance. The second characteristic to define the NV is its approach to legal personhood. Currently, a corporation under Dutch law is considered an institution in itself, instead of a contract solely negotiated by investors. Institutionalism entails that the sphere of the NV is accessible to parties such as creditors and employees, provided they are sufficiently institutionally involved. Thus, institutionalism can be related to the stakeholder approach. Moreover, institutionalism recognizes that the corporation's organs, including the AGM and the executive and/or supervisory board, each have separate powers and responsibilities. Consequently, executive and/or supervisory directors are under no obligation to follow AGM instructions, not even unanimous ones, to the extent that these relate to management competences. A third characteristic to describe the NV is its balance between mandatory and enabling provisions of law. According to art. 2:25 BW, the Articles of Association may only deviate from statutory provisions provided that these variations are authorized by the statute itself. If art. 2:25 BW were to be interpreted literally, one might come under the impression that Dutch corporate law has a principally paternalistic character. However, art. 2:25 BW mainly has a technical function, and has not prevented important legal innovations within the pre-existing framework.

Following the analysis of the character of the NV, I discussed the role and position of executive and supervisory directors, in § 28.3. In line with the German approach, Dutch corporate law has historically subscribed to the two tier board model, although a statutory basis in respect of one tier boards has existed since 2013. The executive board is responsible for developing a strategy to deliver on its objectives. Since the concept of strategy has been interpreted rather broadly, the Netherlands has traditionally been said to adhere to a board-centric governance model. The executive board is appointed and dismissed by the supervisory board. In turn, supervisory directors are nominated by the incumbent supervisory board and appointed and dismissed by the AGM. Employee representatives make up one third of the supervisory board, but generally adopt less of a pro-labor stance than is the case in Germany.

Executive and supervisory directors are responsible towards the corporation for the proper fulfillment of their tasks. Whether directors have acted in accordance with this duty is determined by comparing their actions against the (sufficiently) serious reproach (*ernstig verwijt*) standard. This is a different regime than the US business judgement rule or its German variant. However, similar to the BJR, the serious reproach-standard has traditionally been interpreted as setting a high threshold for personal director liability. For internal situations – involving claims launched by the corporation itself – the applicability of the serious reproach standard follows from art. 2:9 (2) BW. In external situations – regarding suits initiated by creditors or shareholders – a claim can only be based on tort (art. 6:162 BW). However, in this scenario, art. 6:162 BW is interpreted according to the serious reproach standard of art. 2:9 (2) BW, creating a harmonized director liability system.

Director self-interest or a lack of independence can be quite a relevant factor in light of the serious reproach-doctrine. Indeed, if an executive or supervisory director faces a direct or indirect personal conflict of interest, he may not take part in the decision-making process. When all executive directors are conflicted, decision-making power shifts to the supervisory board. In case all supervisory directors are conflicted as well, the decision will be made by the AGM. According to the *Bruil*-ruling of the Dutch Supreme Court, a director becomes self-interested in the presence of a direct, material and specific conflict of interest; the abstract possibility of a conflict is insufficient. However, the *Linders/Hofstee*-ruling of the Amsterdam Court of Appeals imposes a certain duty of care in conflicted situations, in addition to the *Bruil*-framework. Thus, a director may violate his duty of care even if no conflict of interest exists according to *Bruil*, meaning that directors must watch their position carefully. The 2017 SRD II and the Dutch Corporate Governance Code also impose certain obligations when dealing with conflicted situations.

Having analysed the position of executive and supervisory directors, I turned my attention to shareholder voting rights and the position of the AGM, in § 28.4. According to art. 2:92 BW, all shares grant identical rights in proportion to their nominal value; moreover, NVs must treat shareholders whose circumstances are similar in an equal manner. Investors holding different classes of stock may be treated differently. Separate classes of stock exist when voting rights or entitlements to retained earnings differ. The right to vote proper is governed by art. 2:118 BW. The default rule is that of one share, one vote (art. 2:118 (1) BW). However, pursuant to art. 2:118 (2) and (3) BW, the number of vested in each share is principally tied to the share's par value. In case the NV has issued 2 classes of stock, the first with a nominal value of € 0.01 and the other with a par value of € 0.02, shares of the former class carry 1 vote and stocks of the latter 2.

Non-voting shares cannot be validly issued by an NV incorporated in Holland – art. 2:132 (1) of the Curaçao Civil Code provides a more enabling regime. Meanwhile, the private ordering mechanism of depository receipts creates a instrument largely similar to non-voting shares. Instead of issuing non-voting stock directly, the common shares are transferred to a trust office (*stichting*). In turn, the trust office issues depository receipts to the investing public. The trust office is bound by contract with the NV to forward dividends and repayments of capital. Consequently, the financial rights vested in depository receipts are deemed equal to those of the underlying stocks. By contrast, depository receipts do not carry voting rights. Although the holder of a depository receipt may request a power of attorney to vote, this request can be denied in the face of an unsolicited takeover attempt. Whereas depository receipts are a private ordering mechanism, certain protections for outside minority investors do exist. Some of the powers attributed to shareholders have been extended to holders of depository receipts, including the right to reasonable and fair (art. 2:8 BW) and equal treatment (art. 2:92 (2) BW), the right convene (art. 2:110 (2) BW) and attend an AGM (art. 2:117 (2) BW), and put items on its agenda (art. 2:114 (1) BW). The Dutch Corporate Governance Code equally outlines certain safeguards. Their practical relevance may, however, be more limited.

Dutch corporate law also permits loyalty voting or dividend schemes, despite the absence of an explicit statutory basis. This follows from the landmark 2007 *DSM*-ruling of the Dutch Supreme Court. The loyalty scheme typically operates by granting qualifying long term investors additional stocks, which in turn give rise to additional control or financial entitlements. The principal requirement when introducing a loyalty scheme is that all holders of shares of the same class should be eligible to qualify for the loyalty bonus. In addition, the scheme most meet the objectivity, adequate, necessary and proportionality requirements. According to the DSM-ruling, the introduction of a loyalty scheme does not give rise to a (non-personal) conflict of interest for directors. The fact that a statutory framework in respect of loyalty shares has remained absent entails Dutch corporate law presents no explicit restrictions with regard to the minimum length of the vesting period, the maximum percentage of the share capital which can participate, or grandfathering of existing long term shareholders. However, the recent Mediaset-ruling has undercut the potential of loyalty shares mechisms to a considerable degree, casting doubt on the adequacy and necessity of the instrument. Dutch corporate law equally permits multiple voting shares. The state of affairs in relation to multiple voting shares is rather similar to that of loyalty shares, in the sense that very few if any statutory restrictions apply. Since the number of votes vested in a stock is tied to its nominal value, a multiple voting scheme can be created, not by granting additional securities to qualifying investors (as is the case with a loyalty mechanism) but instead by stipulating, in the Articles of Association, that stocks of a certain class have a higher nominal value than others. Dutch corporate law does not maximize the number of votes which can be vested in a single stock.

I also discussed the position of the AGM. According to art. 2:107 BW, any competences not explicitly attributed to the executive board or others reside with the AGM. If one were to take art. 2:107 BW at face value, the powers of the AGM may appear to be wide-ranging. In reality, however, the residual competence of art. 2:107 BW has a more technical-legislative nature. The most notable powers of the AGM are to modify the Articles of Association (art. 2:121 BW), to appoint supervisory Directors (art. 2:158 (4), (5) and (6) BW) and to liquidate (art. 2:19 (1) (a) BW) or merge the NV (art. 2:317 BW). Moreover, pursuant to art. 2:107a BW, the AGM holds an approval right in respect of certain fundamental transactions. The AGM is typically convened by the executive and/or supervisory board, at least 42 days in advance, which also set the AGM's agenda. However, pursuant to art. 2:110 BW, shareholders representing at least 10 % of the equity may request a court to organize an AGM themselves. Alternatively, art. 2:114a BW outlines a shareholder proposal right. Accordingly, resolutions made 60 days in advance by investors representing at least 3 % of the equity are included in the agenda of the AGM. Meanwhile, the recent landmark *Boskalis/Fugro*-holding entails that the AGM cannot invoke art. 2:114a BW to force a binding (or non-binding) vote on matters of corporate strategy. Finally, management may invoke the response period (*responstijd*) to quell shareholder voice. The response period, laid down in Best Practice Provisions 4.1.6 and 4.1.7 of the Corporate Governance Code, is a uniquely Dutch mechanism. During this 180 day time-out, the AGM cannot table any resolutions to modify the corporation's strategy or to dismiss any executive and/or supervisory directors.

Finally, in § 28.5, I discussed the financial rights of NV-shareholders. Absent any provisions in the Articles of Association to the contrary, profits should be distributed to investors directly and in full (art. 2:105 (1) BW). Since such an obligation would unduly constrain operational flexibility, the Articles of Association typically provide that the executive and/or supervisory board may decide to reserve a certain part of the profits, with the AGM being allowed to decide on the distribution of the remainder (art. 2:101 (6) BW). There exist few constraints for management in this regard: unlike its German counterpart, the executive and/or supervisory board of an NV may retain earnings without limit. Meanwhile, case law limits director discretion somewhat. In light of art. 2:8 BW, investors are entitled to a reasonable dividend. However, what actually constitutes a reasonable return and whether a distribution of earnings can be forced is highly context-specific.

Whether a dividend may be declared depends on the financial position of the NV. Similar to especially its US counterpart, Dutch corporate law mandates both a balance sheet test and a solvency test. Accordingly to the balance sheet test (art. 2:105 (2) BW), the NV can only make distributions provided that the equity exceeds the sum of the paid-up share capital, statutory reserves and the reserves mandated by the Articles of Association. Following the solvency test, the dividend may not severely jeopardize the continued existence of the corporation. Any distributions which fail to meet the solvency or solvency tests may render the responsible executive and/or supervisory directors personally liable under the serious reproach standard of art. 2:9 BW.

In principle, shareholders are entitled to an equal amount of dividends and retained earnings in proportion to the share's nominal value. This mechanism theoretically enables the creation of securities with super-powered financial rights. By contrast, art. 2:105 (9) BW stipulates that the NV cannot issue non-profit participating stock. Meanwhile, art 2:105 (9) does not prevent shareholder agreements which exclude investors from corporate profits. Moreover, art. 2:105 (9) BW is typically not interpreted as prohibiting stocks which only carry minor or even negligible profit entitlements. Private ordering mechanisms to circumvent the prohibition on non-profit participating stock have been uncommon – in a number of instances, these are simply a mere complement to the control-focused dual class equity structure. Prior scholarly calls for statutory reform of art. 2:105 (9) BW have been modest and, one may argue, not exactly compelling.

Chapter 30. Where do we stand?

30.1 Legal uncertainty

Until very recently, the 2007 DSM-ruling of the Dutch Supreme Court offered listed companies great discretion in implementing a tailor-made loyalty scheme, enabling blockholders to retain control.[1] This was principially a positive development, as it enabled corporations to take idiosyncrasies into consideration. For instance, there existed no explicit requirements with regards to the length of the loyalty bonus registration period, the number of the loyalty votes per share or the maximum total size of the loyalty bonus.[2] Moreover, the use of high/low voting schemes, as to grandfather in incumbent long-term shareholders, appeared permissible.[3]

However, issuers have been pursuing increasingly aggressive loyalty shares and dual class equity structures, as the examples of Mediaset and Prosus (*see* § 1.1.1 *supra*) illustrate. The inevitable result has been the Mediaset-ruling. Whilst formally acknowledging the legality of loyalty voting shares and corporate discretion to set the governance framework, it has cast quite some doubt over the permitted scope of these instruments, particularly the more aggressive variants. (By contrast, dual class equity structures are implicated to a lesser degree.) In fact, the discretion to use loyalty shares may be diminished to such an extent that it in fact no longer exists. Indeed, it will be an uphill challenge for companies to convince investors or justices that the choices made satisfy the criteria of adequacy, necessity and (especially) proportionality. Is a 3-year registration period more adequate than a 2-year period, and is grandfathering

1. *See* Dutch Supreme Court 14 December 2007, ECLI:NL:HR:2007:BB3523 (*DSM*). For a seasoned analysis of the state of affairs post-DSM, *see* A.A. Bootsma, 'Loyaliteitsdividend, bijzondere stemrechtaandelen en de positie van minderheidsaandeelhouders. Midstream or IPO introduction, that's the question', 7 *Maandblad voor Ondernemingsrecht* 151 (2016).
2. For an argument in favor of capping the loyalty bonus, *see* J.M. de Jongh, 'Het loyaliteitsstemrecht. Een terreinverkenning', 11 *Ondernemingsrecht* 442 (2009) (observing that for NVs with dispersed share ownership, this approach prevents individual investors from seizing control); for the view that corporations should be granted discretion, *see* A.A. Bootsma, 'An Eclectic Approach to Loyalty-Promoting Instruments in Corporate Law: Revisiting Hirschman's Model of Exit, Voice, and Loyalty', 6 *Erasmus Law Review* 111 (2013).
3. *See* J.S Kalisvaart, 'Meervoudig stemrecht', 27 *Onderneming & Financiering* 22 (2019); *but see* A.A. Bootsma, 'Loyaliteitsstemrecht naar Italiaans recht en bij Fiat Chrysler Automobiles NV', 17 *Ondernemingsrecht* 32 (2015).

permitted at all? Are 5 loyalty votes per share necessary, or is this superfluous but 4 acceptable? Does the criterion of proportionality require the voting rights of the long-term shareholder pursuant to the loyalty voting bonus to be capped, to prevent him from obtaining absolute control? These and similar questions will prove very difficult to answer for individual corporations.

The Mediaset-ruling has given rise to questions on other aspects than the adequacy and necessity of loyalty shares (and, by perhaps extension, dual class equity structures) as well. For instance, it may be interpreted by some – although I do not share this view, since the wording of the Mediaset-ruling is insufficiently explicit – as necessitating a majority-of-the-minority vote when implementing or cancelling such a mechanism. Indeed, the ruling condemns Mediaset's loyalty scheme for only having obtained 10 % of the votes of the investors unaffiliated with the controller.[4] Similarly, it could be argued that, since dual class equity structures tend to (partially) freeze-out minority shareholders, recapitalizations should be subjected to the business purpose test.[5] However, a corporation will typically be able to mention (or, if necessary, fabricate) a business purpose, as dual class mechanisms are intimately intertwined with long term value creation.[6] As such, this test adds little, and should not apply. Another criterion for introducing and abolishing dual class equity structures, in addition to the scheme meeting the proportionality requirements of art. 2:92 (2) BW, may be said to apply as well, being that the mechanism must promote the interest in the corporation.[7] Indeed, in the Mediaset-ruling, the Court observed that the applicable loyalty shares mechanism served the interests of the controlling shareholder, not those of the corporation.[8] In that case as well, the implication of the Mediaset-ruling would be that certain dual class equity structures may now be prohibited.

30.2 Regulation: the role of the legislator

The only actor which can convincingly address the uncertainty in respect of loyalty shares and, by extension, dual class equity structures, as outlined in § 30.1, is the national (Dutch) legislator. Drafting a statutory framework

4. *See* Amsterdam Court of Appeals 1 September 2020, ECLI:NL:GHAMS:2020:2379 (*Mediaset*). Majority-of-the-minority voting is not practiced by Dutch listed companies at all. This mechanism is used primarily by Delaware corporations to obtain favorable judicial treatment of certain conflicted transactions. *See* Chapter 17.
5. *See* Hoge Raad 14 September 2007, ECLI:NL:HR:2007:BA4887 (*Versatel*).
6. Zie J. Barneveld, 'De achterkant van het openbaar bod. Over de opkomst, ontwikkeling en normering van de pre-wired back-end', 5 *Maandblad voor Ondernemingsrecht* 155, 163 (2019).
7. *See* Hoge Raad 4 April 2014, ECLI:NL:HR:2014:797 (*Cancun*).
8. *See* Amsterdam Court of Appeals 1 September 2020, ECLI:NL:GHAMS:2020:2379 (*Mediaset*).

should be preferred over adopting a supranational (EU) legal design. There exists a wide variety of control-enhancing mechanisms across the Member States. Moreover, the concepts involved may differ; loyalty shares are a separate class of stock under Belgian corporate law, but not necessarily according to Dutch corporate law. Consequently, coming up with a useful framework at the EU-level whilst doing justice to all subtleties involved may pose a challenge. Drafting a statutory framework is also the preferable option compared to regulating the matter in the Dutch Corporate Governance Code. Although highly useful, the Code is primarily suitable for softer organizational matters and may not be a sufficiently robust instrument to address such a fundamental topic of corporate law.[9] I express these preferenes for a national statutory solution knowing that the Dutch House of Commons (*Tweede Kamer*) had already adopted a motion to introduce a statutory framework in respect of loyalty shares in 2009. Admittedly, little actual progress has been made since (*see* § 26.3.1). However, the calls for regulating loyalty shares have recently been renewed by Dutch politicians, meaning that the legislator may start revising the statute of the NV after all.[10] Hopefully, that day is not too far aff.

As the Mediaset-case highlights, investors of Dutch listed corporations are far from defenseless when faced with a proposed recapitalization. Indeed, I am not aware of dual class equity structures at Dutch listed corporations that have given rise to exploitation of outside minority investors. In that sense, the existing legal framework, consisting of approval by the supervisory vote and an AGM vote by absolute majority (art. 2:121 BW), is sufficient. At the same time, the Mediaset-ruling may indicate a shift towards greater scrutiny of dual class equity structure recapitalizations. If that is indeed what the legislator desires, granting dissenting outside minority investors an exit right is the most appropriate response from a doctrinal point of view. A dual class equity structure recapitalization typically serves to adopt a long-term focus – which is in itself a legitimate goal. Exit rights are an adequate instrument to contribute to this goal, as they enable the corporation to shedd its myopic shareholders and build a more aligned investor base, reducing hold ups to a larger extent than ordinary majority voting.[11] Exit rights are also necessary. Compared to ordinary majority voting, they offer substantive (instead of procedural) protection to dissatisfied investors and compared to majority-of-the-minority voting, they retain the insiders' contribution to decreasing information costs. Moreover, an exit right provides for a proportional outcome, since not all dissatisfied investors

9. Moreover, the last review of the Dutch Corporate Governance Code (in 2016) failed to bring any substantive progress as far as shareholder rights were concerned.
10. *See Kamerstukken II* 2019/20, 35367, nr. 3.
11. Also note that under Dutch corporate law, outside minority shareholders have no vested right to continued share-ownership. *See* Hoge Raad 14 September 2007, ECLI:NL:HR:2007:BA4887 (*Versatel*).

are frozen out, but only those who voluntarily decide to make use of the opt-out option.

At the same time, the exit right should not be considered in and by itself as a justification for the implementation or cancellation of a dual class equity structure. Instead, it should be viewed as compensation. The exit right itself should, in light of art. 2:8 and 2:92 BW, also be structured as a way of, in principle, offering equal treatment. For instance, all dissatisfied investors must be able to invoke an exit right – not a small subsection of holders of the same class of stock – and at the same terms. Offering a monetarily limited exit right, or offering cash to some shareholders and below investment grade bonds to others should be prohibited. But at the same time, investors should be permitted to vote on different compensation regimes, for instance permitting the controlling shareholder to receive a higher price per share, since this may entail that the equity value of outside minority investors will appreciate as well.

30.3 Regulation: the role of the courts

The Courts should primarily be deferential to corporations implementing a dual class equity structure recapitalization. This involves applying solely the proportionality test of art. 2:92 (2) BW in combination with, if desired, a shareholder exit right, instead of other criteria, whilst remaining vigilant for cases in which shareholder interests are under threat. Here as well, the Mediaset-case offers an intriguing example. Since the Berlusconi family holds already in excess of 30 % of the Mediaset voting rights, it is exempted from the obligation to launch a mandatory offer. This would not change if the loyalty shares recapitalization were to materialize. However, for claimant Vivendi, things are different. Vivendi's 28.8 % equity stake in Mediaset would result in voting rights in excess of 30 %.[12] Thus, Vivendi would be under an obligation to launch a mandatory offer. The only possibility for Vivendi to evade this obligation would be not to apply for the loyalty scheme.[13] In other words, the goal of the loyalty scheme was not to create a stable base of long-term shareholders, but rather to force Vivendi's hand, making it choose between an offer not on it's own terms or seeing it control power diluted.

At the same time, the Courts should hold broad discretion for determining the fair value of the share price of investors who invoke their exit right and be permitted to differentiatie between investors in this regard. In particular, judges should not be required to focus solely on the price of the listed corporation on the stock market. Given that dual class equity structure recapitalizations only

12. *See* Amsterdam Court of Appeals 1 September 2020, ECLI:NL:GHAMS:2020:2379 (*Mediaset*).
13. *See* Amsterdam Court of Appeals 1 September 2020, ECLI:NL:GHAMS:2020:2379 (*Mediaset*).

occur at firms that are fundamentally undervalued from a long-term perspective, the Courts should take a broader look. Meanwhile, the exit price does not necessarily have to be higher than the stock market price at the time of transaction's announcement. If the stock market price would act as a floor, all investors could vote against the recapitalization and tender their shares without risk or cost.

Part VI

– Conclusion –

Chapter 31. Summary & recommendations

31.1 Central research question & sub-questions

The central research question of this PhD-thesis was as follows:

> Should open, listed corporations be permitted to create a dual class equity structure, involving inferior and/or superior voting and/or profit-participating stock?

I partitioned this research question in three specific elements. The three sub-questions were the following:

> The Economic Perspective
> - How do permanent, going concern dual class equity structures relate to the function of financial markets, in which ways do they affect shareholder value, in general as well as on a per class basis, and what are the effects of midstream introductions and cancellations?
>
> The Historical Perspective
> - What types of permanent, going concern dual class equity structures have US, German and Dutch open, listed corporations been able to create, starting from the 1800s, and which internal and external factors have contributed to changes in legal doctrine and legal practice?
>
> The Legal Perspective
> - What types of permanent, going concern dual class equity structures can open, listed US, German and Dutch corporations currently create, how does this relate to the broader system of corporate governance in the respective jurisdiction, and under which circumstances are midstream introductions and cancellations permitted?

31.2 Conclusion

31.2.1 The economic perspective

1. Stock markets no longer serve to raise funding. Dual class equity structures may help to counter this trend in part.

Most investments are financed by either retained earnings or debt issuances. Starting from the 1970s and 1980s, the amount of dividend distributions and stock repurchases has consistently and vastly outnumbered the amount of funds raised by IPOs and secondary equity offerings. Simultaneously, obtaining a stock market listing has become less and less popular amongst issuers. Currently, there are at least 5,000 fewer corporations listed than one would expect based on the size of the global economy, effectively constituting a massive freeze-out of public investors. This development may be attributed to a variety of factors, including high regulatory costs, the abundant presence of alternative funding opportunities (including PE) and the fact that intangible assets are difficult to finance in public markets. Whereas the decision to go public hinges on many factors, including price, dual class equity structures may induce a founder to execute an IPO, given that he can retain control.

2. The corporate capital structure, dividend policy and allocation of voting rights all reflect the maturity of the corporation. Thus, there exists a single unified theory in respect of corporate funding. Life-cycle theory should replace agency theory as the central paradigm of corporate law.

According to life-cycle theory, the corporate capital structure, dividend policy and voting rights distribution are the result of a number of factors. These include taxes (both at firm and investor-level), bankruptcy costs, information costs and agency costs. The relative weight of these factors shifts as the corporation develops. For younger corporations, the presence of high information and bankruptcy costs may imply that granting control to insiders and retaining funds within the firm will be the most sensible options. As the corporation grows, the relevance of information and bankruptcy costs decreases. By contrast, agency costs generally become more important. As a result, sharing control rights with and distributing retained earnings to outside minority investors may become a logical course of action. However, this does not necessarily have to be the case: life-cycle theory does not state the corporation's trajectory to maturity is without detours. Sudden shocks in agency or information costs may appear from time to time, for instance when the firm spins-off a mature line of business. Although life-cycle theory suggests that dual class equity structures will typically be abolished over time, they may also remain in place for perpetuity.

31.2.2 The historical perspective

3. Whereas the allocation of profit entitlements has remained fairly constant over time, the allocation of voting rights has shifted considerably. If anything, the tendency towards dual class equity structrues is set to contune.

Profit entitlements of investors were and are calculated in proportion to the amount of capital contributed. Meanwhile, the default voting scheme has shifted. In the early years of the corporation, the one-man (!), one vote rule, a legacy of the partnership form, was virtually omnipresent. As the typical body of investors expanded and information asymmetries between insiders and outsiders grew, the right to vote was decoupled from the person of the investor and, via the intermediate step of degressive voting, tied to the amount of the shareholders' investments instead. All corporate law systems studied have witnessed this development. Although the historical analysis does not necessarily suggest that the use of dual class equity structures will continue to rise in the coming years, it does indicate that, if anything, these mechanisms will not fade away. Indeed, granting ever larger control rights to insiders at the expense of outsiders has been the trend for the last 200 years.

4. Dual class equity structures have been and can be used for a variety of purposes, depending on the socio-economic circumstances of that particular era.

Textbook examples include countering outsized foreign influence (Germany in the 1920s), financing corporate expansion (the US and the Netherlands in the early 1900s) and preventing unsolicited takeover attempts or, phrased differently, entrenching management (the US in the 1980s). Control-enhancing mechanisms also serve as substitutes for each other. The Dutch Code of Commerce of 1838 offers an intriguing example. With degressive voting being mandatory, insiders resorted to a variety of measures, most notably the use of priority shares. These securities typically granted their holders the right to appoint members of senior management, enabling insiders to shape corporate strategy regardless of statutory voting rules. Although mandatory degressive voting has long been abolished by the Dutch legislator, priority shares continued to be used regularly, illustrating a certain path-dependency in legal practice. At the same time, the law also possesses considerable power to shape behavior, as the US and German historical analyses indicate. Following changes in the listing rules of the NSYE in 1926 and the enactment of the Aktiengesetz of 1937 the use of non-voting and multiple voting shares declined rapidly.

31.2.3 The legal perspective

5. Although the corporate governance systems studied showed important doctrinal differences, this has not prevented them from converging to a board-centric model.

Conceptually, there exist important differences between US, German and Dutch, for instance in respect of the purpose of the corporation, the approach to legal personhood and the balance between mandatory and enabling law. Meanwhile, the US, Germany and the Netherlands have all subscribed to a rather board-centric system of corporate governance. The (executive) board is in charge of determining corporate strategy and holds the initiative when convening an AGM and setting its agenda. Moreover, (executive) directors typically benefits from a benevolent personal liability regime. Additionally, investors hold little power to make proposals to the AGM, convene the meeting themselves or to force the distribution of retained earnings.

6. <u>German corporate governance is more strict with regard to allocating control and financial rights than US corporate governance, with the Netherlands finding itself in the middle, leaning towards the US.</u>

The US and German corporate governance systems differ in terms of permitted deviations from the one share, one vote default rule. The US legal system allows all sorts of securities to be issued. By contrast, German corporate law prohibits multiple and loyalty voting shares, and only permits non-voting shares to the extent that shares carry a dividend preference. The Dutch system finds itself somewhat in between those two extremes, leaning clearly to the US. The main restriction is that non-voting shares are prohibited, although the substitute of depository receipts is widely used. Most other deviations from the one share, one vote default rule are permitted as well.

Meanwhile, there is considerable convergence on the amount of funds corporations may validly distribute to investors. This matter is typically governed by a combination of a balance sheet and a solvency test. German corporate law is again the strictest, creating an elaborate web of statutory loss reserves, and US law the most flexible, as it also allows non-profit participating stock.

31.3 Recommendations

31.3.1 Shareholder rights in general

1. <u>Corporate law should be facilitative, enabling the firm to issue the widest possible variety of securities. Notably, this includes non-voting shares and multiple voting shares, as well as non-profit participating and super-profit participating stock.</u>

Broadening the continuum of available funding mechanisms may create shareholder value in the earlier phases of the corporate life-cycle, stimulate entrepreneurialism, promote an innovation-based economy, and induce founders to conduct an IPO. From a legal point of view, the *ex ante* use of a dual class equity structure is foreseeable and a voluntary choice of investors, who should be principally permitted to adopt a tailor-made governance regime. Moreover, inferior voting and proifit and superior voting shares are merely a different side of the same coin. Indeed, all serve to concentrate power in the hands of insiders, and should be treated equally by the law. It would be inconsistent to permit, for instance, non-voting shares but to ban multiple voting stock. Accordingly, the law should not mandate a minimum or maximum of control or profit rights which can be vested in a single share.

2. Dual class equity structures will not be useful for every single corporation.

Presumably, such mechanisms will be most effective for a subset of firms, those which are fundamentally misunderstood by the markets, because of a long-term vision and/or due to assets consisting largely of intangible properties. In short, dual class equity structures may be primarily relevant for technology-heavy businesses – as most firms of the future probably will be.

3. Sunset provisions should not be made mandatory.

The law should not subject inferior or superior control or profit rights to a mandatory (time- or equity-based) sunset provision. Life-cycle theory only provides a general direction for the corporation's development rather than a path set in stone. Thus, the situation which the sunset provision was intended to cover may not materialize at all. Although sunset mechanisms are befitting to the life-cycle perspective in some regards, they may be difficult to draft appropriately in practice. If implemented incorrectly, sunset provisions can do the corporation involved grave harm. The policy arguments to prevent corporations from voluntarily adopting a sunset provision are perhaps less convincing, but nonetheless present.

4. Adequate protection of outside minority shareholders through effective legal procedures is a necessary condition for the effectiveness of dual class equity structures.

Economic growth requires well-developed financial markets, for which safeguarding the interests of outside minority investors is a precondition. Whilst the interests of outside minority investors merit the undivided attention of scholars and policy-makers, the mere use of a dual class equity structure does not, in and by itself, necessarily entail that rights of outsiders are in jeopardy – this requires rather more disturbing actions. To the extent that these materialize, there exist several instruments to retaliate, based on the fiduciary duties of directors and controlling shareholders as well as by deploying various country-specific legal procedures. Such *ex post* control is a more proportionate strategy than outright banning certain means of funding *ex ante* – yet presupposes that legal protection, if sought by outsiders, will be effective. When such protection is absent, dual class equity structures may pose a significant cost on outside minority investors.

31.3.2 Introducing a dual class equity structure in the midstream phase

Both the US and the German legal system provide ideas for a comprehensive regulatory framework governing the midstream introduction of a dual class equity structure. This is the situation in which a corporation that is already listed on the stock exchange issues shares carrying control or financial rights superior or inferior to the stocks created previously. From the life-cycle perspective, it follows that the corporation has a property right to reorganize its capital structure. Any statutory framework should therefore not only facilitate the introduction but also the cancellation of dual class equity structures.

5. <u>When considering US corporate law, the majority-of-the-minority vote requirement acts as a drag. By contrast, the Special Committee requirement appears rather sensible.</u>

The US approach, based on MFW-case law, consists of subjecting a midstream recapitalization sponsored by a controlling shareholder to approval by a Special Committee and a majority-of-the-minority vote. Provided that these measures are taken, the BJR applies, instead of the EFS. The mandatory use of a well-informed yet independent negotiating agent – the Special Committee – is both rational and necessary to ensure that the transaction is concluded at appropriate terms, given the potentially conflicted circumstances in which it may take place. By contrast, I am not convinced of the usefulness of majority-of-the-minority voting. Although the mechanism may be interpreted as a signal by the transaction's sponsor that recapitalization will create value, this signal can be susceptible to misinterpretation and suffers from severe flaws. Indeed, majority-of-the-minority voting places control in the hands of the very investors that, precisely because of their uninformedness, are deemed best to remain powerless. Moreover, majority-of-the-minority voting has been taken out of its original context and is hardly-used by institutional investors. Finally, both elements of the MFW-framework are procedural in nature, which thus lacks a truly material component.

6. <u>When considering German corporate law, the decision-making process gives rise to legal uncertainty, frustrates majority rule and may deliver an outfair outcome. Meanwhile, the exit-right, even if not applied specifically in relation to dual class equity structures, holds more promise.</u>

The German approach consists primarily of a statutory regime in respect of non-voting preference shares. There exists abundant scholarship and case law on the question whether a midstream introduction of non-voting preference shares impairs the rights of incumbent investors, either directly or indirectly. It appears there are no clear-cut solutions in this regard. Moreover, German corporate governance provides an overly cumbersome system of class votes and AGM-votes to which the introduction and cancellation of non-voting preference shares are subjected. German law is based on capital- instead of voting-based majorities, which are set rather high. Due to the nature of non-voting preference shares, voting rights and dividend entitlements are intertwined. As a result, the number of shareholder classes that hold approval rights may increase exponentially, especially in case more than two classes of stock exist. Finally, despite its rigid nature, German corporate law fails to cover all cases in which rights of incumbent investors are impaired. By contrast, the German system is quite familiar with granting compensation or an exit right in a number of situations involving a change of control – although these situations do not necessarily include the creation or cancellation of non-voting shares.

7. A midstream introduction of a dual class equity structure effectively constitutes a partial (control or cash-flow wise) freeze-out of outside minority investors and should be treated as such. The doctrinally most correct response is to grant outside minority investors an exit right.

A governance framework to adequately address a midstream recapitalization would involve the following. First, this requires that the recapitalization is subjected to approval by a Special Committee. Second, the recapitalization must be mandatorily subjected to an AGM vote, rather than a majority-of-the-minority vote. All shareholders, both interested and disinterested, must be able to participate in the voting process, and be permitted to exercise their voting rights as outlined in the articles of association, either proportionate or disproportionate. Allowing every investor to engage in the vote, including the recapitalization's sponsor, recognizes that his funds are on the line as well, just as those of outsiders. Moreover, doing so incorporates the views of the party who likely possesses superior information into the decision-making process.[1] To facilitate reorganizations of the corporate capital structure, which life-cycle theory suggests may be necessary from time to time, the required AGM majority should not be excessively high – in fact, there are no valid arguments why an absolute majority would not suffice.

Third, dual class equity structures are not known to have given rise to large-scale exploitation of outside minority investors. At the same time, there may be a need for enhanced scrutiny of dual class equity structure recapitalizations. If that would indeed be desired, granting dissenting outside minority investors who voted against the transaction an exit right is the most appropriate alternative from a doctrinal point of view. Accordingly, such investors would have the right but not be under an obligation to tender their stock at a fair value basis. A mandatory exit right is befitting to a freeze-out transaction. After all, an exit is what happens in case of a regular freeze-out, and the fact that the corporation is in need of reorganizing its capital structure does not necessarily imply that dissenting investors should have to suffer from a lock-in of their holdings. Moreover, an exit right matches the concept of the corporation, which is based on majority rather than minority rule, delivers a proportional

1. In my view, majority-of-the-minority voting is neither permitted as a complement to the AGM vote. Then, the more cumbersome majority-of-the-minority vote will effectively still pose the main requirement.

outcome and aligns long-term insider and outsider investors by excluding myopic participants. The fair value metric should include a control premium and the value of future synergies, calculated just prior to the announcement of the recapitalization.[2] Granting a fair value exit right would not only provide procedural, but also substantive protection to outside minority shareholder. In fact, an exit right provides outside minority investors a latent but potentially strong tool to force the sponsors' hand. Indeed, he may not be able to pursue the recapitalization if too many stocks are tendered, because obtaining sufficient funds to finance the transaction will not be possible. In this sense, the exit right effectively serves as a vote of outside shareholders (by their feet), albeit that they cannot prevent a recapitalization beyond what a regular AGM vote is capable of.

8. Not all midstream introductions and cancellations of a dual class equity structure necessarily have to result in an change of control. However, even when this is not the case, dissenting outside minority shareholders should ideally be granted an exit right.

Up until this point, the analysis has focused on a somewhat theoretical – Weberian Idealtype – midstream introduction of a dual class equity structure, in which a controlling shareholder is not present prior to the transaction, and where that party only assumes control because of the fact that the recapitalization materializes. This would presumably require the investor subscribing to a large number of superior voting or inferior profit participating stock. In such circumstances, the conflict of interest between the sponsor of the recapitalization and the other investors is manifestly evident, as is the need for scrutiny of the transaction. Alternative scenarios of introducing a dual class equity structure in the midstream phase may include the creation of non-voting shares or loyalty shares. Such recapitalizations do not necessarily have to result in a shareholder obtaining control nor will they always be sponsored by an investor who has already assumed control. Nonetheless, caution is in order. Although the creation of non-voting shares or loyalty shares could serve to align the corporate capital structure with the corporate life-cycle – by reducing the effects of information asymmetries – such issuances may also be intended to entrench directors or to safeguard controllers from pressure exerted by financial markets.[3] In short, it will often be unclear – *ex ante* – what the corporation's life-cycle stage or the

2. This may be different in case the midstream recapitalization were to be combined with a sunset provision. Then, there has not necessarily been a permanent transfer of control. Naturally, this argument is more convincing for shorter rather than longer time-based sunset periods, and may not apply at all for equity-based sunset provisions. I will disregard this option for the remainder of the analysis.
3. An alternative would be to apply the jurisdiction's generic statutory regime in respect of conflict of interests on dual class equity structure recapitalizations. However, such regimes may fail to cover all relevant forms of recapitalizations, as the conflict of interest may not be sufficiently critical for directors to lose their disinterested states. Moreover, the generic

motive to issue non-voting shares or loyalty shares are. Moreover, control is a fluid concept. In certain cases, it may be virtually impossible to determine whether an investor should qualify as a controlling shareholder or not, following a successful recapitalization. In those circumstances, on may wish to err on the side of caution to the benefit of outside minority shareholders. Therefore, all such midstream recapitalizations should be subjected to the aforementioned three-pronged framework, consisting of a Special Committee vote, approval by the AGM and an exit right of dissenting outside minority shareholders. This approach has the advantage of simplicity and consistency whilst simultaneously eliminating the risk of a reallocation of shareholder rights taking place under false pretenses.

31.3.3 Abolishing a dual class equity structure in the midstream phase

9. <u>When abolishing a dual class equity structure, holders of the disappearing class of stock should be entitled to a class vote, in addition to other measures.</u>

The cancellation of a dual class equity structure can take place in a going concern situation, but effectively also by means of a takeover. If a dual class equity structure is abolished in a going concern situation, the three-pronged framework, consisting of Special Committee approval, an AGM vote and an exit right, should apply by means of analogy, supplemented by a vote of holders of the class of shares which is to disappear. Similarly to the AGM vote, this class vote should take place on an absolute majority-basis. The exit right should exist for both holders of common shares and holders of the disappearing class of stock. This is to ensure that owners of shares of one class are not favored unfairly relative to holders of stock of another.

A dual class equity structure can also be cancelled following a successful takeover attempt. In that case, the same (four-pronged) scheme should apply (note this may already be required to close the transaction). Again, this approach serves to ensure that the transaction is fair for holders of all classes of stock.

10. <u>The controlling shareholder should be permitted to obtain a higher price per share to reflect the value of control, but outside minority shareholders should similarly be permitted to obtain a similar price per share as the controller.</u>

If a controller is present, the question arises whether he should be permitted to exchange his securities into common shares, or to tender them to the third party bidder, on such conditions that he effectively receives more consideration than is warranted by the size of his equity stake. Granting disparate consideration to controlling shareholders should indeed be allowed (subject to the four-pronged

statutory regime in respect of conflict of interests may be mostly procedural in nature, thus offering insufficient (substantive) safeguards to outside minority investors.

framework). Being able to placate a controller is essential to remove a dual class equity structure which no longer serves its purpose. Under such circumstances, refusing disparate consideration may very well have the (psychological) effect of preventing a switch towards a more efficient governance structure. This is particularly regrettable, given that in many situations in which the controller is willing to consider exiting his position, his equity stake may be relatively small. Then, the costs of a generous premium for a minor part of the equity may be modest on an overall basis.

If a controller is absent, the issue in a going concern situation is rather whether holders of inferior shares should compensate their fellow investors to obtain additional investor rights. Granting compensation to holders of superior shares should be possible for the purpose of switching towards a more effective unified equity structure – and be subjected to the four-prong approach – but not be made mandatory, as it involves a highly-firm specific matter. In a take-over situation, the question can arise whether owners of inferior shares should be able to receive the same amount of compensation as holders of superior shares when tendering their securities. Although I am not in favor of mandatory coattail provisions, I am sympathetic towards allowing individual corporations to adopt such schemes on a voluntary basis. Doing so could comfort outside minority investors, meaning that coattail provisions may enable a firm to raise funds more easily in the first place.

31.3.4 Some final thoughts

11. <u>To prevent opportunistic behavior, only dissenting shareholders should be given an exit right.</u>

Only shareholders who actively voted against the introduction or cancellation of the dual class equity structure should be entitled to invoke the exit right. Thus, absentee investors and those who have abstained from voting should be excluded. Otherwise, investors would be granted a "heads I win, tail you lose" set of options: they could vote in favour of the transaction, yet still claim compensation by tendering. The mere possibility of such opportunistic behaviour should be ruled out.

12. <u>The nature of the buyer is a largely academic matter.</u>

Another question is whether the stocks tendered should be purchased by the corporation, the transaction's sponsor or both. I do not have any strong views on this matter, and the practical differences – assuming that parties act as guarantees to each other – may be limited.[4] One relevant argument could be that

4. Assume a sponsor with a 10 % equity stake in a corporation with a share capital consisting of 100 stocks, proposing a recapitalization involving A- and B-class shares carrying 1 and 10 votes each, respectively, which succeeds at the cost of 10 % of the shares being tendered. From that moment on, the sponsor holds 55 % of the voting power (100 out of 180 votes), even if the corporation and not the sponsor purchases the tendered stock.

by granting the corporation and the sponsor latitude in deciding the relative amount of outsider stock they will each purchase, balance sheet test and other solvency restrictions may be avoided. The same applies for the applicability of the mandatory bid rule.[5]

13. True-up arrangements should be permitted, but will likely enjoy only modest success.

The sponsor of and the corporation involved in the recapitalization could propose a true-up arrangement. This involves granting a dividend payment to holders of securities with inferior (financial or) control rights, based on the average stock market discount of these securities compared to the common shares. A true-up arrangement may only serve as an additional gesture to outside minority investors, and not as a full replacement of the exit right, given the fundamental nature of that power. If an investor would opt for the true-up, the recapitalization does not so much constitute a pure freeze-out, but rather a thorough renegotiation of the terms of corporate membership. A true-up arrangement actually prevents prices of the different classes of stock from diverging widely, and in doing so incentivizes a controller to minimize agency costs. Admittedly, it can be doubted whether investors will have a large appetite for true-up arrangements. From a life-cycle perspective, that instrument could be particularly useful for firms which find themselves somewhere in an intermediate phase at the path towards maturity. For them, free cash flows may already be more considerable (and predictable) whilst information asymmetries have likely fallen to a certain extent, meaning that curbing the associated agency costs by declaring dividends can actually be a sound strategy. In this sense, true-up arrangements may be compared to non-voting preference shares, the key difference being that the dividend is not being paid in advance nor is its amount fixed.

31.4 Recommendations specifically in relation to Dutch corporate law[6]

31.4.1 Shareholder rights in general

14. It is pivotal for loyalty shares and dual class equity structures to obtain a statutory basis.

The recent Mediaset-ruling has cast considerable doubt over the legality of loyalty shares (and, to a certain extent, dual class equity structures). It will be an uphill challenge for companies to convince investors or justices that the choices

5. *See* art. 5 of the Directive 2004/25/EC of the European Parliament and of the Council. Note that matters of financial law are beyond the scope of this PhD-thesis. Therefore, I will not discuss the implications of the mandatory bid rule for dual class equity structure recapitalizations in greater detail.
6. The general recommendations, made in § 30.3, apply to the Dutch situation as well.

made satisfy the criteria of adequacy, necessity and proportionality. In its more radical interpretations, the Mediaset-ruling may be red as mandating majority-of-the-minority voting or requiring that the dual class equity structure must demonstrably promote the interest in the corporation, meaning that certain dual class equity structures may now be prohibited.

15. Non-voting shares differ in form and effect from depository receipts, and are a valuable addition to Dutch corporate law.

Although non-voting shares are currently prohibited, Dutch corporate law has long been familiar with a substitute to such securities, in the form of depository receipts. Both depository receipts and non-voting shares may permanently restrict the right to vote.[7] Meanwhile, depository receipts are a more nuanced mechanism than non-voting shares. Indeed, the trust office may decide to enable the investing public to exercise the right to vote, and has considerable discretion in making this decision. In other words, the absence of the right to vote is conditional when using depository receipts but permanent when issuing non-voting shares. Accordingly, depository receipts are primarily aimed at eliminating short-term capital market inefficiencies. By contrast, non-voting shares are geared towards preventing the harmful effects of long-term information asymmetries. Moreover, non-voting shares negate the issue of dilution of control rights. Typically all investors, including holders of depository receipts, see their voting power reduced when additional shares are issued. (Indeed, holders of depository receipts can be diluted as well, since they have conditional voting rights.) By contrast, non-voting shares, by their very nature, respect pre-existing positions of control. To summarize, depository receipts and non-voting shares differ in function and effect. Moreover, non-voting shares may be better understood by international investors and can be a cheaper instrument, since they do not give rise to administrative and maintenance costs of a trust office. Therefore, non-voting shares are a valuable addition to Dutch corporate law, besides depository receipts.

16. Holders of non-voting shares must be kept at a distance of decision-making on corporate strategy, but should not be left on their own entirely.

I would propose not to leave the holders of non-voting shares totally defenseless. Otherwise, outside minority investors will not be interested in subscribing to such shares. (When the statute of the BV was reviewed in 2012, the Dutch legislator adopted a similar approach.) In my view, a share must at least carry voting rights or create entitlements in respect of dividends, retained earnings or the liquidity surplus, to prevent the membership relation from becoming hollow

7. The trust office which administrates the shares may deny or revoke a power of attorney, as requested by holders of depository receipts, for multiple AGMs in succession, perhaps even indefinitely, provided that doing so complies with the ground rule of reasonableness and fairness, as laid down in art. 2:8 BW.

and meaningless. A similar provision can be found in art. 2:190 BW, which addresses shareholder rights at the BV. The absence of the right to vote should be total, i.e. not limited to certain topics, as a different approach could give rise to considerable confusion. Holders of non-voting NV-shares must be able to void corporate decisions which violate the concept of reasonableness and fairness (art. 2:8 and art. 2:15 (1) BW) and are entitled to equal treatment compared to fellow non-voting investors (art. 2:92 BW). Similarly, owners of non-voting shares must have the right to attend the AGM (art. 2:117 BW) and to initiate inquiry proceedings (art. 2:346 BW). Although the competence to launch inquiry proceedings may grant non-voting shareholders a powerful weapon, the articles of association can, under current law, grant this competence to a wide range of actors, including employees. Then, a compelling justification to withhold the power to initiate enquiry proceedings from non-voting shareholders does not exist. Furthermore, I would suggest granting pre-emptive rights to holders of non-voting shares, but restrict the pre-emptive powers specifically to non-voting shares, and not to expand them to common stocks. (The same would apply to non-profit participating shares by means of analogy.) Art. 2:206a BW, which addresses (and denies) pre-emptive rights for non-voting and non-profit participating shareholders at the BV, is rather counter-intuitive. Additionally, the BV-statute allows certain powers to be attributed to the meeting of holders of inferior voting or profit participating stock. The same possibility should exist for the NV. The main issue for which I would suggest to restrict holders of non-voting shares at the NV as compared to holders of non-voting shares at the BV involves convocation (art. 2:110 BW) and shareholder proposal rights (art. 2:114a BW). These matters are intimately related to corporate control. Admittedly, the BV-statute includes holders of non-voting shares for convocation and shareholder proposal purposes. Such an approach could perhaps make sense for the closed corporate form of the BV but appears principally unjustified in open, listed corporations. Meanwhile, the restriction in respect of convocation and shareholder proposal rights should not apply for holders of non-profit participating shares. Indeed, these investors have merely dividends or retained earnings but not renounced their interest in the controlling the corporation.

31.4.2 Dual class equity structure recapitalizations

17. The *DSM*-framework already goes a long way, and if any change were to be contemplated, expanding it with an exit right would suffice.

The Dutch legal framework in respect of midstream introductions of dual class equity structures, as set forth in the *DSM*-ruling of the Dutch Supreme Court,[8] already appears to be in line with the three-or four-pronged framework outlined in § 31.3.2 and § 31.3.3 to a considerable degree.

8. *See* Hoge Raad 14 December 2007, ECLI:NL:HR:2007:BB3523 (*DSM*).

Accordingly, creating a new class of stock will typically be subject to approval of the supervisory board (art. 2:164 BW). The role of this body is functionally comparable to that of a Special Committee. Indeed, Dutch corporate law forcibly eliminates self-interested directors from the decision-making process, meaning that the supervisory board will be necessarily independent. Moreover, modifications of the Articles of Association are subject to AGM-approval, in principle by an absolute majority (art. 2:121 BW).

In the Netherlands, loyalty share and dual class equity structures have neither given rise to large-scale exploitation of outside minority investors, meaning that modifying the existing legal framework is not strictly necessary. Meanwhile, the Mediaset-ruling may indicate a shift towards greating scrutiny of such recapitalizations. If that would indeed be the desire of the legislator, granting dissenting outside minority investors who voted against the transaction an exit right is the most appropriate response from a doctrinal point of view. Exit rights are an adequate instrument, as they enable the corporation to shedd its myopic shareholders. Exit rights are also necessary. Compared to ordinary majority voting, they offer substantive (instead of procedural) protection to dissatisfied investors and compared to majority-of-the-minority voting, they retain the insiders' contribution to decreasing information costs. Moreover, an exit right provides for a proportional outcome, since not all dissatisfied investors are frozen out, but only those that voluntarily decide to make use of the opt-out option.

Currently, exit rights exist already in response to cross-border mergers (art. 2:333h BW). Moreover, exit rights are on the rise beyond their US cradle. This is due to the fact that the European Directive on cross-border corporate mobility has made an exit right for dissenting investors mandatory.[9] Previously, it was up to the Member States whether to provide an exit right or not. This is no longer the case. When cross-border dual class equity structure recapitalizations into the Netherlands – which take place regularly, especially from Italy – trigger an exit right, it would be undesirable not to treat dissenting investors in internal transactions in the same manner. (Admittedly, investors do not witness a change of applicable law in case of an intra-Netherlands recapitalization, but they do experience a partial freeze-out, which should, in itself, be sufficient to trigger an exit right.) The exit right of dissenting investors may not be restricted, for instance by limiting the value of the shares which may be tendered to a certain amount of money. Doing so would undermine the *effet utile* of European law, as it would entail that not all investors who intend to invoke their exit right can do so.

9. Directive (EU) 2019/2121 of the European Parliament and of the Council of 27 November 2019 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions.

18. Investors should be quicker entitled to a class vote, but the required majority should be low.

I close this PhD-thesis with some final thoughts on the erosion of shareholder rights of existing investors in relation the introduction or aboltion of a dual class equity structure. Art. 2:81 BW states that besides providing capital, investors can only incur additional obligations by individual consent. Art. 2:96 (2) BW and art. 2:99 (5) BW, which mandate a class vote in case rights of investors of a certain class are impaired because of the introduction or cancellation of a dual class equity structure, are both interpreted narrowly. Meanwhile, a similar provision for the BV, art: 2:231 (4) BW, may very well be interpreted extensively, whereas proposals intending to impair profit (art. 2:216 (7) BW) or voting rights (art. 2:228 (5) BW) of shares of a certain class are subject to the consent of individual investors.

When interpreting art. 2:81, art. 2:96 (2) and art. 2:99 (5) BW, we should adopt a compromise. Stringently requiring individual investor consent obstructs the corporation on its path to maturity, yet virtually disregarding these provisions means that voting rights of investors will be at risk perpetually. Although art. 2:8 BW may offer some safeguards, these are rather indirect in nature. It may be easier and more acceptable for foreign investors to address the issue directly. In this view, class vote decision-making should take place on an absolute majority basis. This means that most if not all indirect interventions, as was discussed in relation to German corporate law, do not give rise to a class vote, but most direct interventions, for instance with regards to the right to vote, do. Indeed, the introduction and abolition of dual class equity structures do not necessarily have to be at odds with minority shareholder rights, at least not to an worrying extent.

Nederlandse samenvatting (Dutch Summary)

1. Centrale onderzoeksvraag en deelvragen

De centrale onderzoeksvraag die aan dit proefschrift ten grondslag ligt is als volgt:

Moet de open, beursgenoteerde NV in staat zijn een *dual class*-aandelenstructuur op te tuigen, bestaande uit aandelen met inferieure stemrechten, aandelen met superieure stemrechten, aandelen met inferieure winstrechten of aandelen met superieure winstrechten?

Deze kernvraag is opgesplitst in 3 deelvragen. Deze luidden als volgt:

Het economisch perspectief:

- Hoe verhouden permanente, *going concern dual class*-aandelenstructuren zich tot de functie van financiële markten, welke effecten hebben zij op de positie van aandeelhouders, zowel in het algemeen als voor de verschillende klassen aandelen, en wat zijn de gevolgen van het introduceren of afschaffen van een *dual class*-aandelenstructuur in een *midstream* situatie?

Het historisch perspectief:

- Welke soorten permanente, *going concern dual class*-aandelenstructuren hebben Amerikaanse, Duitse en Nederlandse open, beursgenoteerde vennootschappen vanaf de 19e eeuw kunnen hanteren, en welke interne en externe factoren hebben bijgedragen aan de opkomst en ondergang van deze mechanismen in de doctrine en de rechtspraktijk?

Het juridisch perspectief:

- Welke typen permanente, *going concern dual class*-aandelenstructuren kunnen Amerikaanse, Duitse en Nederlandse open, beursgenoteerde vennootschappen momenteel creëren, hoe verhouden deze zich tot het bredere corporate governance systeem in de desbetreffende jurisdictie, en onder welke voorwaarden is het toegestaan een *dual class*-aandelenstructuur te introduceren of af te schaffen in een *midstream* situatie?

2. Conclusies

2.1 Het economisch perspectief

Het economisch onderzoek levert twee inzichten op, één in relatie tot de financiële markten en in relatie tot de vennootschap. Wat betreft de financiële markten valt op dat aandelenbeurzen als geheel beschouwd niet langer dienen om investeringen te financieren. De meeste investeringen worden betaald vanuit ingehouden winsten of met vreemd vermogen. Vanaf de jaren '70 en '80 is de waarde van dividenduitkeringen en aandelen-inkoopprogramma's veel hoger dan die van aandelenuitgiftes. Dit wordt onder meer gedreven door het feit dat een beursnotering een steeds minder populaire financieringsoptie is onder vennootschappen. Op dit moment zijn er 5000 ondernemingen minder aan de beurs genoteerd dan men op basis van de omvang van wereldwijde economie zou verwachten. Dit is het gevolg van een combinatie van factoren, waaronder hoge regelgevingskosten, de beschikbaarheid van alternatieve vormen van financiering (waaronder *private equity*) en het feit dat immateriële activa zich lastiger laten financieren op publieke markten.

Bovenal echter zijn de onderzoeksresultaten in relatie tot de vennootschap relevant. Op basis van de theorieën van Modigliani en Miller en het daarop voortbordurende onderzoek kan wat mij betreft geconcludeerd worden dat de kapitaalstructuur, het dividendbeleid en de verdeling van stemrechten allen een afgeleide zijn van de levensfase waarin de onderneming verkeert. Daarmee bestaat er een uniforme theorie wat betreft de financiering van de onderneming. Op basis van *life-cycle theory* vloeien de kapitaalstructuur, het dividendbeleid en de verdeling van de stemrechten voort uit een aantal factoren. Daaronder dienen begrepen te worden belastingen (zowel op het niveau van de vennootschap als op het niveau van de investeerder), faillissementskosten, informatie-kosten en *agency*-kosten. Het relatieve gewicht van deze factoren verandert naarmate de vennootschap groeit. Voor jongere ondernemingen betekent de aanwezigheid van hoge informatie- en *agency*-kosten dat het verstandig kan zijn controle toe te kennen aan *insiders* en gerealiseerde winsten in te houden in plaats van uit te keren. Naarmate de onderneming groeit vermindert de relevantie van informatie- en faillissementskosten. Het belang van *agency*-kosten neemt daarentegen toe. Het kan daarom nuttig zijn controlerechten op meer proportionele wijze te verdelen tussen *insiders* en *outsiders* en gerealiseerde winsten in grotere mate uit te gaan keren. Dit is echter niet noodzakelijkerwijs het geval: *life-cycle theory* houdt niet in dat het pad naar volwassenheid een rechte lijn is. Plotselinge toe- en afnames in informatie- en *agency*-kosten kunnen zich van tijd tot tijd voordoen, bijvoorbeeld wanneer een volwassen bedrijfsonderdeel wordt afgestoten. Hoewel *life-cycle theory* suggereert dat *dual class*-aandelenstructuren naar verloop van tijd afgeschaft zullen worden, kunnen zij op basis van dit model ook permanent in stand blijven.

2.2 Het historisch perspectief

Het historisch perspectief toont twee verschillende beelden. De winstrechten van aandeelhouders zijn in de loop tijd grotendeels onveranderd gebleven; zij werden en worden in de regel op proportionele wijze gerelateerd aan het ingelegde kapitaal. Daarnaast valt op het systeem inzake de verdeling van stemrechten gedurende de tijd veranderingen heeft ondergaan. In de eerste jaren van de kapitaalvennootschap was het *one man, one vote*-systeem nog ~~dominant~~, veelal als uitvloeisel van de regeling voor personenvennootschappen. Met het uitdijen van het aantal investeerders per vennootschap en de groei van informatie-asymmetriën tussen *insiders* en *outsiders* werd het stemrecht langzamerhand losgekoppeld van de persoon van de investeerder en, via de tussenstap van degressief stemrecht, gerelateerd aan het bedrag dat aandeelhouders aan kapitaal hadden ingelegd. Zowel het Amerikaanse, het Duitse als het Nederlandse vennootschapsrecht hebben deze ontwikkeling doorgemaakt. Hoewel de historische analyse niet noodzakelijkerwijs suggereert dat het gebruik van *dual class*-aandelenstructuren de komende jaren exponentieel zal groeien impliceert deze wel dat dergelijke mechanismen aanwezig zullen blijven. Het toekennen van steeds grotere zeggenschapsrechten aan *insiders* is de afgelopen 200 jaar immers de trend geweest.

De historische analyse laat ook zien dat *dual class*-aandelenstructuren voor verschillende doelen zijn gebruikt, afhankelijk van de sociaal ~~economische~~ omstandigheden. Voorbeelden zijn het weren van buitenlandse invloeden (het Duitsland van de jaren 1920), het financieren van expansie (de VS en Nederland in de vroege 19e eeuw) en het voorkomen van vijandige overnames (de VS in de jaren 1980). Beschermingsmaatregelen fungeren in zekere zin als substituut voor elkaar. Het Nederlands Wetboek van Koophandel van 1838 biedt een intrigerend voorbeeld. Aangezien degressief stemrecht verplicht was gingen *insiders* over tot het uitgeven van prioriteitsaandelen. Deze aandelen geven de houder daarvan het recht leden van de ondernemingsleiding te benoemen. Daardoor kunnen zij de strategie van de vennootschap beheersen, ongeacht de wettelijke regeling van het stemrecht. Hoewel degressief stemrecht reeds lange tijd geleden is afgeschaft door de Nederlandse wetgever bleven prioriteitsaandelen in gebruik. In die zin is het ondernemingsrecht enigszins padafhankelijk. Tegelijkertijd vormt wet- en regelgeving een sterk instrument om gedrag te reguleren. De Amerikaanse en Duitse historische analyses geven daar treffende voorbeelden. Het gebruik van *dual* class-aandelen structuren piekte in de jaren 1920. Als gevolg van wijzigingen in de listing rules van de NYSE en de introductie van de Aktiengesetz 1937 nam het gebruik van deze mechanismen snel af.

2.3 *Het juridisch perspectief*

De juridische analyse laat zien dat de kapitaalvennootschap tegelijkertijd divergeert en convergeert. Vanuit doctrinair oogpunt bestaan er belangrijke verschillen tussen de Amerikaanse, Duitse en Nederlandse systemen van corporate governance, bijvoorbeeld wat betreft het doel van de vennootschap, de benadering van rechtspersoonlijkheid en de balans tussen regulerend en faciliterend vennootschapsrecht. In de VS staat het creëren van ~~aandeelhouderswaarde~~ traditioneel op de eerste plaats. Nederland en Duitsland daarentegen hanteren een meer op stakeholders georiënteerde benadering. Vooral in Duitsland is medezeggenschap van werknemers stevig verankerd in het sociale systeem. Een ander voorbeeld van doctrinaire divergentie is dat het Amerikaanse ondernemingsrecht traditioneel een *laissez-faire* benadering heeft aangehangen, terwijl het Duitse vennootschapsrecht sterk ~~voorschrijvend~~ van aard is. Tegelijkertijd staan deze theoretische divergenties niet in de weg aan convergentie op een meer functioneel niveau. De VS, Duitsland en Nederland hangen alle een bestuurscentristisch corporate governance model aan. Het bestuur bepaalt de strategie, roept de Algemene Vergadering (AV) bijeen en stelt haar agenda vast. Bovendien genieten bestuurders een mild persoonlijk aansprakelijkheidsregime. Aandeelhouders hebben daarentegen weinig bevoegdheden (in Europa wellicht nog iets meer dan in de VS) om voorstellen voor de agenda van de AV in te dienen, de AV bijeen te roepen of de uitkering van ingehouden winsten af te dwingen.

De Amerikaanse en Duitse corporate governance systemen verschillen in de mate waarin zij afwijkingen van het beginsel van *one share*, *one vote* toestaan. De Amerikaanse benadering is erg flexibel. Het Duitse vennootschapsrecht daarentegen verbiedt meervoudig stemrecht en loyaliteitsaandelen, en staat stemrechtloze aandelen enkel toe voor zover daar een preferent dividend tegenover staat. Het Nederlandse systeem bevindt zich enigszins tussen deze twee extremen in. De meeste afwijkingen van het beginsel van *one share*, *one vote* zijn toegestaan; de voornaamste beperking is dat de NV geen stemrechtloze aandelen kan uitgeven. Er bestaat echter een veelgebruikt substituut in de vorm van certificaten van aandelen. Het Nederlandse vennootschapsrecht leunt in die zin meer naar het Amerikaanse dan naar het Duitse systeem.

Tot slot bestaat er aanzienlijke convergentie wat betreft de ruimte die een vennootschap heeft om uitkeringen te doen aan de aandeelhouders. Deze aangelegenheid wordt veelal beheerst door een combinatie van een balanstest en een uitkeringstest. Het Duitse ondernemingsrecht is op dit punt wederom het strengst, onder meer door de vele verplichte wettelijke reserves, en het Amerikaanse vennootschapsrecht het meest flexibel, ook door het feit dat naar Amerikaans recht winstrechtloze aandelen zijn toegestaan.

3. Aanbevelingen

3.1 Aandeelhoudersrechten in het algemeen

De voornaamste aanbeveling van dit proefschrift is dat de NV in de *ex ante* ~~situatie~~ ruime mogelijkheden zou moeten hebben om te differentiëren in de rechten van aandeelhouders. Dit betekent ook dat het mogelijk zou moeten zijn om stemrechtloze aandelen, aandelen met meervoudig stemrecht, winstrechtloze aandelen en aandelen met "meervoudig" winstrecht uit te geven. Vanuit ~~economisch~~ oogpunt kan het vergroten van het spectrum aan beschikbare financieringsmogelijkheden ondernemerschap en daarmee aandeelhouderswaarde stimuleren en, belangrijker nog, het innovatievermogen van de economie vergroten. Bovendien kan het toestaan van *dual class*-aandelenstructuren ondernemers mogelijk verleiden tot een beursgang, afhankelijk van de invloed van de *dual class*-aandelenstructuur op de prijs waartegen aandelen kunnen worden uitgegeven. Vanuit historisch oogpunt zijn er ongetwijfeld voorbeelden denkbaar van *dual class*-aandelenstructuren die hebben bijgedragen aan fraude of de uitbuiting van minderheidsaandeelhouders. *Dual class*-aandelenstructuren zijn echter niet onverbrekelijk verbonden met zulke gebeurtenissen. Vanuit juridisch oogpunt is het *ex ante* gebruik *dual class*-aandelenstructuren bovendien voorzienbaar en een vrijwillige keuze van investeerders, die ook in staat gesteld zouden moeten worden om een op maat gesneden governance-structuur vorm te geven.

Gelet op het voorgaande, en omdat *life-cycle theory* slechts een algemene route voor de ontwikkeling van de vennootschap biedt en geen vastomlijnd toekomstperspectief, moeten het aantal stemmen en het winstrecht per aandeel niet wettelijk geminimaliseerd of gemaximeerd worden. Op gelijke wijze dient de wet aandelen met inferieur of superieur winst of stemrecht niet bij voorbaat te onderwerpen aan verplichte toekomstige afschaffing. Zo'n mechanisme, vaak een *sunset provision* of horizonbepaling genoemd, kan gebaseerd zijn op enkel tijdsverloop of op het kapitaalbelang van de oprichter. Hoewel een horizonbepaling in beginsel aansluit bij het *life cycle* perspectief, zal het in de praktijk veelal lastig zijn een horizonbepaling op adequate wijze vorm te geven. Een incorrect opgestelde horizonbepaling kan de vennootschap echter ernstige schade berokkenen. Tegelijkertijd bestaan er wat mij betreft geen overtuigende argumenten om individuele vennootschappen te verbieden op vrijwillige basis een horizonbepaling op te nemen. Immers, het corporate governance-regime dient zoveel mogelijk toegesneden te worden op de individuele onderneming. Een *dual class*-aandelenstructuur zal dan ook niet zinvol zijn voor iedere vennootschap. Het mechanisme is het meest effectief bij vennootschappen die fundamenteel niet begrepen worden door de kapitaalmarkten of waarvan de bezittingen grotendeels bestaan uit immateriële activa. *Dual class*-aandelenstructuren zijn dus met name nuttig voor op technologie georiënteerde ondernemingen – waarbij ik aanteken dat in de toekomst de meeste ondernemingen op technologie gefocust zullen zijn.

Als meer fundamenteel argument tegen *dual class*-aandelenstructuren kan genoemd worden dat economische groei de aanwezigheid van goed ontwikkelde kapitaalmarkten vereist. Betoogd kan worden dat het beschermen van de positie van minderheidsaandeelhouders daarvoor een noodzakelijke voorwaarde is. Hoewel de belangen van minderheidsaandeelhouders de onverdeelde aandacht van onderzoekers een beleidsmakers verdienen, betekent het gebruik van een *dual class*-aandelenstructuur op zichzelf niet dat die belangen in gevaar zijn. Wanneer de positie van minderheidsaandeelhouders wel in de knel dreigt te komen bestaan er verschillende manieren om dit te voorkomen, bijvoorbeeld aan de hand van de fiduciaire verplichtingen die op bestuurders en grootaandeelhouders rusten, in combinatie met verschillende landspecifieke juridische procedures. Deze vorm van controle achteraf is echter meer proportioneel en efficiënter dan het vooraf verbieden van bepaalde financieringsinstrumenten, maar vereist wel dat wanneer rechtsbescherming wordt gezocht deze ook daadwerkelijk effectief moet zijn.

3.2 Midstream introductie van een dual class-aandelenstructuur

Een lastiger vraag is op welke wijze omgegaan moet worden met de invoering van een *dual class*-aandelenstructuur wanneer de vennootschap reeds aan de beurs is genoteerd. Dergelijke transacties worden ook wel *midstream* herkapitalisaties genoemd. Uit het *life-cycle* perspectief volgt dat de vennootschap ten principale gerechtigd is haar kapitaalstructuur te reorganiseren. Een ~~wettelijke~~ regeling zou daarom niet alleen het introduceren maar ook het afschaffen van een *dual class*-aandelenstructuur moeten adresseren. Hoewel het *life-cycle* perspectief in beginsel suggereert dat *dual class*-aandelenstructuren na verloop van tijd zullen worden afgeschaft, kunnen er ook gegronde redenen bestaan om een *dual class*-aandelenstructuur in de *midstream* fase in te willen voeren. Zowel het Amerikaanse als het Duitse corporate governance systeem biedt aanknopingspunten om tot een regeling van *midstream* herkapitalisaties te komen.

De Amerikaanse aanpak is gebaseerd op de MFW-jurisprudentie. Op basis daarvan is in beginsel de EFS van toepassing op transacties die door de controlerend aandeelhouder zijn geïnitieerd. Voor *midstream* herkapitalisaties die onderworpen zijn aan een recht van goedkeuring van het *Special Committee* en een *majority-of-the-minority vote* geldt echter de business judgement rule. De business judgement rule vormt dus niet langer het uitgangspunt. Het MFW-systeem geldt zowel bij de invoering als bij de afschaffing van een *dual class*-aandelenstructuur. De verplichting de herkapitalisatie te onderwerpen aan de goedkeuring van een geïnformeerde maar onafhankelijke actor – het *Special Committee* – is rationeel en noodzakelijk om te verzekeren dat de transactie wordt aangegaan op zakelijke voorwaarden, gegeven de mogelijk geconflicteerde omstandigheden waarin deze tot stand komt. Ik ben daarentegen minder gecharmeerd van *majority-of-the-minority voting*. Hoewel dit mechanisme geïnterpreteerd kan worden als een signaal vanuit de initiator van de herkapitalisatie dat deze waarde zal scheppen, kan het signaal ook anders opgevat worden en kleven er verschillende gebreken aan. *Majority-of-the-minority voting* verschaft immers zeggenschap aan investeerders die wegens hun beperkte kennis juist buiten het besluitvormingsproces zouden moeten blijven. Bovendien wordt *majority-of-the-minority voting* in geval van een ~~herkapitalisatie~~ toegepast buiten de situatie waar dit mechanisme oorspronkelijk voor bedoeld was en valt het gebruik door institutionele beleggers tegen. Tot slot zijn beide elementen van het MFW-kader procedureel van aard, zodat materiële bescherming afwezig is.

De Duitse aanpak bestaat met name uit een wettelijke regeling inzake stemrechtloze preferente aandelen. (Meervoudig stemrecht is een minder relevante erfenis uit het verleden.) Onderzoekers zijn uitgebreid ingegaan op de vraag of een *midstream* introductie van stemrechtloze preferente aandelen de rechten van zittende investeerders beperkt, hetzij direct, hetzij indirect. Deze vraag is ook in de jurisprudentie meermaals aan de orde gekomen. Het onderscheid blijkt in de praktijk niet eenvoudig te maken. Het Duitse vennootschapsrecht is vrij bekend met het bieden van compensatie of een recht van uittreding aan minderheidsaandeelhouers, hoewel primair in het kader van een *change of control* en niet direct als gevolg van de introductie of afschaffing van stemrechtloze preferente aandelen. De procedurele vereisten die naar Duits vennootschapsrecht gesteld worden aan de introductie en afschaffing van stemrechtloze ~~preferente~~ aandelen zijn mijns inziens onnodig bezwarend. Naar Duits recht dient een herkapitalisatie goedgekeurd te worden door de AV alsmede door houders van aandelen van een bepaalde klasse waarvan de rechten worden aangetast. Dit zijn in de praktijk vrijwel altijd alle klassen aandelen, omdat stemrechtloze preferente aandelen financiële- en zeggenschapsrechten met elkaar verweven. De vereiste meerderheden zijn niet alleen erg hoog, maar veelal ook gebaseerd op het kapitaalbelang in plaats van het stemrecht. Tot slot biedt het Duitse ondernemingsrecht, ondanks het rigide karakter daarvan, in een aantal gevallen geen bescherming waar men dat wil zou verwachten.

Wat mij betreft vormt een *midstream* introductie van een *dual class*-aandelenstructuur een gedeeltelijke uitstoting van (de stem- of winstrechten van) minderheidsaandeelhouders. De meest ideale reactie daarop vereist daarom het volgende. Allereerst dient de herkapitalisatie verplicht onderworpen te worden aan een recht van goedkeuring van het Special Committee. Daarnaast moet de transactie verplicht onderworpen worden aan een stemming ter AV, in plaats van een *majority-of-the-minority-vote*. Aandeelhouders dienen in staat gesteld te worden om aan het besluitvormingsproces deel te nemen, ongeacht of zij belang hebben bij het doorgaan van de herkapitalisatie of niet. Zij moeten ~~bovendien~~ in staat worden gesteld hun stemrecht uit te oefenen zoals dat volgt uit de statuten, dat wil zeggen al dan niet in afwijking van het beginsel van *one* *share, one vote*. Door de initiator van de herkapitalisatie in het besluitvormingsproces te betrekken worden zijn eigendomsrechten gerespecteerd. Bovendien zal deze partij waarschijnlijk beschikken over superieure informatie wat ~~betreft~~ de gevolgen van de herkapitalisatie. On de reorganisatie van de kapitaalstructuur van de vennootschap niet overmatig te belemmeren dient de vereiste meerderheid ter AV onnodig hoog gesteld te worden. Een absolute meerderheid volstaat wat mij betreft.

Het gebruik van dual class-aandelenstructuren heeft niet tot grootscheeps misbruik geleid. In die zin vorm het treffen van aanvullende maatregelen geen noozaak. Zou verdere bescherming van aandeelhouders echter door de wetgever gewenst zijn, dan dienen aandeelhouders die tegen de *midstream* invoering van een *dual class*-aandelenstructuur hebben gestemd een recht van uittreding krijgen. Een uittredingsrecht is een adequate reactie, aangezien uittreding ook plaatsvindt na een reguliere *freeze out*. Het feit dat de vennootschap haar kapitaalstructuur wil reorganiseren betekent immers niet dat aandeelhouders die het daarmee oneens zijn een beknelling van hun positie zouden moeten accepteren. Een uittredingsrecht past ook bij het karakter van de (beurs)vennootschap, dat immers gebaseerd is op besluitvorming bij meerderheid in plaats van bij minderheid. Bovendien levert een uittredingsrecht een meer proportionele uitkomst op dan een *majority-of-the-minority vote* en worden de belangen van *insiders* en *outsiders* met een langetermijnvisie ondersteund doordat kortetermijnbeleggers naar verhouding meer van het uittredingsrecht gebruik zullen maken. De uittredingsvergoeding zou een controlepremie moeten omvatten alsmede een vergoeding voor toekomstige synergievoordelen. Het toekennen van een uittredingsrecht zorgt ervoor dat de belangen van minderheidsaandeelhouders niet alleen op een procedurele maar ook op een materiële manier worden ~~beschermd~~. Het uittredingsrecht vormt bovendien een potentieel krachtig beschermingsmiddel. De initiator van de herkapitalisatie zal immers niet in staat zijn deze door te voeren wanneer hij teveel aandelen van ontevreden *outsiders* over zal moeten nemen. In die zin vormt het uittredingsrecht nog steeds een stemming van minderheidsaandeelhouders (met de voeten), zij het dat zij het doorgaan van de transactie niet kunnen tegenhouden met meer middelen dan die de AV ter beschikking staan.

Tot dit punt richtte de analyse zich op een meer theoretisch scenario, zijnde een *midstream* introductie van een *dual class*-aandelenstructuur waarbij voorafgaand aan de herkapitalisatie geen controlerend aandeelhouder aanwezig was en na de herkapitalisatie wel, zuiver als gevolg van die transactie. Dit vereist dat de investeerder een groot aan de aantal aandelen met meervoudig stemrecht of inferieur winstrecht neemt. In zulke omstandigheden is het belangenconflict tussen de initiator van de herkapitalisatie en de andere investeerders evident. Andere mogelijkheden om in de *midstream* fase een *dual class*-aandelenstructuur in te voeren zijn bijvoorbeeld de uitgifte van stemrechtloze aandelen of (de facto) loyaliteitsaandelen. Zulke herkapitalisaties hoeven er niet ~~noodzakelijkerwijs~~ toe te leiden dat een investeerder controle over de vennootschap verwerft, noch zullen zij altijd voorgesteld worden door de controlerend aandeelhouder. Desondanks dienen uitgiftes van stemrechtloze aandelen en loyaliteitsaandelen met de nodige zorgvuldigheid benaderd te worden. Hoewel dergelijke emissies er toe zou kunnen leiden dat de kapitaalstructuur van de vennootschap meer in lijn wordt gebracht met haar levensfase, kunnen zij ook tot doel hebben om de positie van bestuurders onaantastbaar te maken of om controlerend aandeelhouders te vrijwaren van de druk van zoals die wordt uitgeoefend door de financiële markten. Het zal kortom *ex ante* veelal onduidelijk zijn wat het werkelijke motief voor een aandelenuitgifte is. Daarom dienen alle *midstream* herkapitalisaties, waaronder ook uitgiftes van stemrechtloze aandelen en ~~loyaliteitsaandelen~~ onderworpen te worden aan het eerder geschetste kader, bestaande uit goedkeuring van de Special Committee, goedkeuring van de AV en een uittredingsrecht voor tegenstemmende minderheidsaandeelhouders. Deze benadering heeft het voordeel van eenvoud en consistentie, terwijl voorkomen wordt dat een herstructurering van aandeelhoudersrechten plaatsvindt op basis van onjuiste informatie.

3.3 Midstream afschaffing van een dual class-aandelenstructuur

Het afschaffen van een *dual class*-aandelenstructuur kan zowel plaatsvinden in een *going concern* situatie als door een overname. In een *going concern* situatie dient het drieledig kader, zoals dat in § 3.2 is geschetst, eveneens toegepast te worden, aangevuld met een stemming door de houders van de aandelen waarvan de inferieure of superieure rechten opgeheven zullen worden. Net als de stemming ter AV vereist deze stemming besluitvorming bij absolute meerderheid. Het uittredingsrecht dient zowel te bestaan voor houders van gewone aandelen als houders van aandelen met inferieure of superieure rechten. Deze aanpak strekt er toe te verzekeren dat houders van aandelen van de ene soort niet bevoordeeld worden ten opzichte van houders van aandelen van een andere soort. Een *dual class*-aandelenstructuur kan ook opgeheven worden als gevolg van een succesvolle overname. In dat geval dient dezelfde vierledige benadering toegepast te worden. Deze benadering strekt er wederom toe te bewaken tot de transactie fair is voor houders van alle verschillende soorten aandelen.

Wanneer een controlerend aandeelhouder aanwezig is kan de vraag opkomen of het hem toegestaan zou moeten worden zijn superieure aandelen voor ~~reguliere~~ aandelen in te wisselen danwel zijn aandelen aan te bieden aan de bieder tegen zodanige voorwaarden dat hij een hogere prijs per aandeel ontvangst dan zuiver op basis van zijn kapitaalbelang gerechtvaardigd zou zijn. Naar mijn mening zou het inderdaad toegestaan moeten worden de controlerend aandeelhouder een hogere prijs per aandeel toe te kennen, mits zulks geschiedt in overeenstemming met het vierdelig kader zoals eerder uiteen gezet. Door een controlerend aandeelhouder te paaien kan een *dual* class-aandelenstructuur die niet langer efficiënt is worden opgeheven. De weigering om een hogere prijs per aandeel te betalen zou er toe kunnen leiden dat de overgang naar een efficiëntere governance structuur wordt voorkomen. Dit zou des te meer spijtig zijn omdat wanneer een controlerend aandeelhouder bereid is afstand te doen van zijn positie, zijn kapitaalbelang vaak relatief gering zal zijn. De kosten van een afkoopregeling kunnen dan over het geheel bezien relatief bescheiden blijven.

Wanneer een controlerend aandeelhouder afwezig is speelt veeleer de vraag, uitgaande van een *going concern* situatie, of houders van aandelen met inferieure rechten hun mede-investeerders zouden moeten compenseren voor het ~~verkrijgen~~ van aanvullende aandeelhoudersrechten. Het toekennen van compensatie zou mijns inziens mogelijk moeten zijn, maar niet verplicht gesteld moeten worden. In een overname-situatie kan dan juist de vraag opkomen of houders van aandelen met inferieure rechten dezelfde prijs per aandeel zouden moeten ontvangen als houders van aandelen met superieure rechten. Hoewel ik geen voorstander ben van verplichte *coattail*-bepalingen zou het voor individuele vennootschappen mogelijk moeten zijn zo'n regeling toe te passen op vrijwillige basis. Dit kan ertoe bijdragen dat outsiders eerder bereid zijn om aandelen met inferieure rechten te kopen, zodat een *coattail*-bepaling de vennootschap in staat stelt meer kapitaal aan te trekken en sneller te groeien.

4. Aanbevelingen voor het Nederlandse ondernemingsrecht

4.1 Aandeelhoudersrechten in het algemeen

In aanvulling op de reeds in § 3 gedane algemene aanbevelingen doe ik nog enkele aanbevelingen specifiek voor de Nederlandse situatie. Er dient allereerst binnen afzienbare tijd een wettelijke regeling te komen om de onzekerheid rondom de voorwaarden aan loyaliteitsaandelen (en in zekere zin ook dual class-aandelenstructuren) te verhelpen. De open, beursgenoteerde vennootschap dient stemrechtloze aandelen en aandelen met meervoudig stemrecht uit te kunnen geven, evenals winstrechtloze aandelen en aandelen met "meervoudig" winstrecht. Deze observatie geldt ook voor de Nederlandse NV. Desondanks kan de vraag opkomen of het pleidooi om de NV toe te staan stemrechtloze aandelen uit te geven wel zo overtuigend is. Hoewel het momenteel niet mogelijk is voor de NV om stemrechtloze aandelen te emitteren, biedt het Nederlandse vennootschapsrecht met certificaten van aandelen een betrouwbaar substituut.

Zowel bij het gebruik van certificaten van aandelen als bij het gebruik van stemrechtloze aandelen kan het stemrecht permanent worden uitgesloten. Certificaten van aandelen zijn echter een subtieler mechanisme, ~~aangezien~~ het administratiekantoor naar eigen inzicht kan besluiten de houders van certificaten van aandelen een volmacht toe te kennen om het stemrecht uit te oefenen. De afwezigheid van het stemrecht is daarmee voorwaardelijk wanneer certificaten van aandelen worden uitgegeven maar onvoorwaardelijk wanneer stemrechtloze aandelen worden gebruikt. In die zin dienen certificaten van aandelen er met name toe om korte termijn inefficiënties op de kapitaalmarkten te elimineren. Stemrechtloze aandelen strekken er in die benadering vooral toe om de langetermijneffecten van informatie- assymmetriën uit te bannen. ~~Bovendien~~ kan opgemerkt worden dat stemrechtloze aandelen voorkomen dat de zeggenschap van zittende aandeelhouders verwatert. Certificaten van aandelen en stemrechtloze aandelen verschillen dus in functie en effect. Bovendien zijn stemrechtloze aandelen bekender bij buitenlandse investeerders en goedkoper, aangezien het niet noodzakelijk is een administratiekantoor in stand te houden. Daarom vormen stemrechtloze aandelen wat mij betreft een waardevolle ~~toevoeging~~ aan het Nederlandse vennootschapsrecht, in aanvulling op en niet ter vervanging van certificaten van aandelen.

Hoewel dit proefschrift niet tot doelstelling heeft om een gedetailleerde wettelijke regeling voor de positie van aandeelhouders bij de NV te ontwerpen heb ik op dat vlak enige inleidende voorstellen gedaan. Wat mij betreft dient een aandeel ten minste recht te geven op hetzij stemrecht, hetzij dividend, reserves of het liquidatie-overschot. De houder van stemrechtloze aandelen dient voorts niet volledig afhankelijk te zijn van de genade van zijn mede-investeerders. Hij moet in staat zijn besluiten aan te vechten wanneer deze in strijd zijn met de redelijkheid en billijkheid en heeft recht om gelijk als andere houders van stemrechtloze aandelen behandeld te worden. Houders van stemrechtloze aandelen moeten bovendien te bevoegdheid hebben de av bij te wonen en een enquêteprocedure in te stellen. Hoewel de bevoegdheid een enquêteprocedure te entameren een krachtig instrument is kan deze bevoegdheid naar huidig recht aan een breed spectrum van actoren worden toegekend. Een overtuigend argument om houders van stemrechtloze aandelen de mogelijkheid van een enquêteprocedure te ontzeggen bestaat wat mij betreft dan ook niet. Verder zou ik voor willen stellen houders van stemrechtloze aandelen een voorkeursrecht toe te kennen, maar enkel wat betreft de stemrechtloze aandelen en niet met betrekking tot gewone aandelen. Het voornaamste punt waarop ik voor het NV-recht zou willen afwijken van de regeling voor de BV betreft het convocatie- en agenderingsrecht. Deze bevoegdheden zijn wezenlijk voor de controle over de vennootschap. Hoewel het BV-recht het convocatie- en agenderingsrecht ~~toekent~~ aan houders van stemrechtloze aandelen past een dergelijke regeling niet bij open, beursgenoteerde vennootschappen. De beperking wat betreft het convocatie- en agenderingsrecht zou wat mij betreft trouwens niet moeten gelden voor houders van winstrechtloze aandelen. Deze investeerder hebben immers geen afstand gedaan van hun belang bij controle over de vennootschap.

4.2 Midstream introductie en afschaffing van een dual class-structuur

Het Nederlands ondernemingsrechtelijk kader wat betreft *midstream* introducties van *dual class*-aandelenstructuren, zoals dat volgt uit de *DSM* uitspraak van de Hoge Raad, lijkt al grotendeels in overeenstemming te zijn met het driedelig of vierdelig raamwerk, zoals uiteengezet in § 3.2 en § 3.3.

Het creëren van een nieuwe soort aandelen is onderworpen zijn aan toestemming van de Raad van Commissarissen. De rol van dit orgaan is goeddeels vergelijkbaar met die van een *Special Committee*. Het Nederlandse vennootschapsrecht elimineert immers bestuurders met een tegenstrijdig belang uit het besluitvormingsproces, zodat de Raad van Commissarissen enkel zal bestaan uit onafhankelijke leden. Wijzigingen van de statuten zijn bovendien onderworpen aan goedkeuring van de AV en vereisen een absolute meerderheid van de stemmen. In principe volstaan deze vereisten om de belangen van beleggers op passende wijze te beschermen. In die zin zijn aanvullende waarborgen niet noodzakelijk.

Op basis van mijn bevindingen zouden Nederlandse beleidsmakers kunnen overwegen het *DSM*-raamwerk uit te bouwen door tegenstemmende aandeelhouders een uitreedrecht toe te kennen. De Mediaset-uitspraak van het ~~Gerechtshof~~ Amsterdam zou inderdaad kunnen betekenen dat dual class-aandelenstructuren meer onder het vergrootglas komen te liggen. Uitreedrechten zijn een adequaat, noodzakelijk en proprtioneel en voldoen in die zin aan het EU-raamwerk. Zij worden al toegekend in het kader van grensoverschrijdende omzettingen. Uittredingsrechten zitten bovendien in de lift. Dit is het gevolg van het feit dat de Europese Mobiliteitsrichtlijn het uittredingsrecht verplicht heeft gesteld; voorheen was het aan de lidstaten om te bepalen of zij tegenstemmende aandeelhouders een recht van uittreding wilden toekennen of niet. Wanneer grensoverschrijdende fusies naar Nederland waarmee een *dual class*-aandelenstructuur wordt ingevoerd een recht van uittreding toekennen zou het mijns inziens onwenselijk zijn om soortgelijke transacties binnen Nederland niet op dezelfde manier te behandelen. Het uittredingsrecht mag wat mij betreft niet worden gemaximeerd op bijvoorbeeld een bepaald bedrag. In dat geval wordt immers het effect van het Europees recht mogelijk beperkt, omdat niet alle aandeelhouders die van het uittredingsrecht gebruik willen maken dat ook daadwerkelijk kunnen doen.

Ik besluit dit proefschrift met enige opmerkingen over het introduceren en afschaffen van een *dual class*-aandelenstructuur naar Nederlands vennootschapsrecht. In dit verband zou de vierdelige benadering, zoals uiteengezet in § 3.3, wat mij betreft ook moeten gelden. De NV kent met art. 2:81 BW een wetsartikel dat bepaalt dat aanvullende verplichtingen bovenop de ~~stortingsplicht~~ individuele toestemming van aandeelhouders behoeven, terwrijl art. 2:96 lid 2 en art. 2:99 lid 5 BW, die een stem per soort aandelen voorschrijven, veelal niet van toepassing zijn en daarmee nauwelijks bescherming bieden. De BV kent wel bepalingen inzake *dual class*-reorganisaties, maar ook deze verlangen individuele toestemming van aandeelhouders. Hier lijkt het mij raadzaam een compromis te sluiten, inhoudende dat aandelen met superieure winst- of ~~stemrechten~~ uitgegeven of ingetrokken kunnen worden door een besluit van de desbetreffende klasse met absolute meerderheid. Op die manier worden de belangen van beleggers beschermd (op een directere en internationaal meer begrijpelijke manier dan via art. 2:8 BW) en behoud de vennootschap de mogelijkheid zich te ontwikkelen naar gelang haar *life-cycle* dat vordert. *Dual class*-reorganisaties hoeven immers niet in strijd te zijn met de belangen van minderheidsaandeelhouders, althans niet in zodanige mate dat zij reden tot zorg zouden moeten geven.

Bibliography

R. Abma, 'De positie en rol van institutionele beleggers', 21 *Ondernemingsrecht* 873 (2019).

R. Abma, 'De uitwassen van ons flexibele vennootschapsrecht', 17 *Ondernemingsrecht* 439 (2015).

R. Abma, 'Enige kanttekeningen bij de voorgenomen beschermingsconstructie bij ABN AMRO', 17 *Ondernemingsrecht* 387 (2015).

M. Adams & J. Bomhoff, 'Comparing law: practice and theory', in: *Practice and Theory in Comparative Law* (M. Adams & J. Bomhoff eds.).

R. Adams & D. Ferreira, 'One Share-One Vote: The Empirical Evidence', 12 *Review of Finance* 51 (2008).

I. Adizes, 'Organizational Passages – Diagnosing and Treating Lifecycle Problems of Organisations', 8 *Organizational Dynamics* 3 (1979).

A.R. Admati, 'A Skeptical View of Financialized Corporate Governance', 31 *Journal of Economic Perspectives* 131 (2017).

A.R. Admati, P. Pfleiderer & J. Zechner, 'Large Shareholder Activism, Risk Sharing and Financial Market Equilibrium', 102 *Journal of Political Economy* 1097 (1994).

A.R. Admati & P. Pfleiderer, 'The "Wall Street Walk" and Shareholder Activism: Exit as a Form of Voice', 22 *Review of Financial Studies* 7 (2009).

A. Agapova, 'Conventional Mutual Index Funds Versus Exchange Traded Funds', 14 *Journal of Financial Markets* 323 (2011).

J. Aharony & I. Swary, 'Quarterly Dividend and Earnings Announcements and Stockholders' Returns: an Empirical Analysis', 35 *Journal of Finance* 1 (1980).

H. Albach et al., *Deregulierung des Aktienrechts: das Drei-Stufen-Modell* (Bertelsmann Stiftung, 1988).

A.A. Alchian & H. Demsetz, 'Production, Information Costs, and Economic Organization', 62 *The American Economic Review* 777 (1972).

F.H. Alexander et al., 'M&A under Delaware's Public Benefit Corporation Statute: A Hypothetical Tour', 4 *Harvard Business Law Review* 255 (2014).

F. Allen, 'Stock markets and resource allocation', in: *Capital Markets and Financial Intermediation* 84 (C. Mayer & X. Vives eds., 1993).

F. Allen, A.E. Bernardo & I. Welch, 'A Theory of Dividends Based on Tax Clienteles', 55 *Journal of Finance* 2499 (2000).

F. Allen & R. Michaely, 'Payout Policy', in: *Handbook of the Economics of Finance* 339 (G.M. Constantinides, M. Harris & R. M. Stulz eds.).

W.T. Allen, 'Ambiguity in Corporation Law', 22 *Delaware Journal of Corporate Law* 894 (1997).

W.T. Allen, 'Corporate Takeovers and Our Schizophrenic Conception of the Business Corporation', 14 *Cardozo Law Review* 261 (1992).

W.T. Allen, J.B. Jacobs & L.E. Strine, 'Function over Form: A Reassessment of Standards of Review in Delaware Corporation Law', 26 *Delaware Journal of Corporate Law* 859 (2001).

W.T. Allen, J.B. Jacobs & L.E. Strine, 'Realigning the Standard of Review of Director Due Care with Delaware Public Policy: A Critique of Van Gorkom and its Progeny as a Standard of Review Problem', 96 *Northwestern University Law Review* 449 (2002).

E.I. Altman, 'A Further Empirical Investigation of the Bankruptcy Cost Question', 39 *Journal of Finance* 1067 (1984).

H. Altmeppen, 'Das neue Recht der Gesellschafterdarlehen in der Praxis', 61 *Neue Juristische Wochenschrift* 3601 (2008).

H. Altmeppen, 'Die historischen Grundlagen des Konzernrechts', in: *Aktienrecht im Wandel* 1027 (Mohr Siebeck, 2007).

Y. Amihud & M. Murgia, 'Dividends, Taxes and Signaling: Evidence from Germany', 52 *Journal of Finance* 397 (1997).

Y. Amihud, M. Schmid & S. Davidoff Solomon, 'Settling the Staggered Board Debate', 166 *University of Pennsylvania Law Review* 1475 (2018).

B. Amoako-Adu & B.F. Smith, 'Dual Class Firms: Capitalization, Ownership Structure and Recapitalization Back Into Single Class', 25 *Journal of Banking & Finance* 1083 (2001).

I. Anabtawi & L. Stout, 'Fiduciary Duties for Activist Shareholders', 60 *Stanford Law Review* 1256 (2008).

R. Anderson & J. Manns, 'The Delaware Delusion', 93 *North Carolina Law Review* 1049 (2015).

R.C. Anderson & D.M. Reeb, 'Founding-Family Ownership and Firm Performance: Evidence from the S&P 500', 58 *Journal of Finance* 1301 (2003).

R.C. Anderson, A. Duru & D.M. Reeb, 'Founders, Heirs, and Corporate Opacity in the United States', 92 *Journal of Financial Economics* 205 (2009).

R.C. Anderson, E. Ottolenghi & D.M. Reeb, 'The Dual Class Premium: A Family Affair' (2017), available at http://www.ssrn.com/.

A. Ando & F. Modigliani, 'The Life Cycle Hypothesis of Saving: Aggregate Implications and Tests', 53 *The American Economic Review* 55 (1963).

G. Andrade & S.N. Kaplan, 'How Costly is Financial (Not Economic) Distress? Evidence from Highly Levered Transactions That Became Distressed', 53 *Journal of Finance* 1443 (1998).

C. Andrés, 'Large Shareholders and Firm Performance—An Empirical Examination of Founding-family Ownership', 14 *Journal of Corporate Finance* 431 (2008).

J.S. Ang & S.J. Ciccone, 'Dividend Irrelevance Theory', in: *Dividends and Dividend Policy* 95 (H. Kent Baker ed.).

J.B. Ang, 'A Survey of Recent Developments in the Literature of Finance and Growth', 22 *Journal of Economic Surveys* 536 (2008).

D. Anschütz, 'Unternehmensfinanzierung durch Vorzugsaktien', 9 *Bucerius Law Journal* 9 (2015).

I.R. Appel, T.A. Gormley & D.B. Keim, 'Passive Investors, Not Passive Owners', 121 *Journal of Financial Economics* 111 (2016).

I.R. Appel, T.A. Gormley & D.B. Keim, 'Standing on the Shoulders of Giants: The Effect of Passive Investors on Activism' (2016), available at http://www.ssrn.com/.

Y.A. Arbel, 'Shielding of Assets and Lending Contracts', 48 *International Review of Law and Economics* 26 (2016).

P. Arestis & P. Demetriades, 'Financial Development and Economic Growth: Assessing the Evidence', 107 *The Economic Journal* 783 (1997).

J. Armour & M.J. Whincop, 'The Proprietary Foundations of Corporate Law', 27 *Oxford Journal of Legal Studies* 429 (2007).

J. Armour et al., 'The Basic Governance Structure: The Interests of Shareholders as a Class', in: *The Anatomy of Corporate Law. A Comparative and Functional Approach* 49 (R. Kraakman et al., 2017).

J. Armour et al., 'What is Corporate Law', in: *The Anatomy of Corporate Law. A Comparative and Functional Approach* 4 (R. Kraakman et al., 2017).

J. Armour et al., 'Beyond the Anatomy', in: *The Anatomy of Corporate Law: A Comparative and Functional Approach* 271 (J. Armour et al. eds).

J. Armour, 'Share Capital and Creditor Protection: Efficient Rules for a Modern Company Law', 63 *The Modern Law Review* 355 (2000).

J. Armour, B. Black & B. Cheffins, 'Delaware's Balancing Act', 87 *Indiana Law Journal* 1345 (2012).

A. Arnold, 'Das Unsicherheitsproblem bei der Entschädigung von Mehrstimmrechten – eine Replik', 41 *Deutsches Steuerrecht* 1671 (2003).

A. Arnold, 'Entschädigung von Mehrstimmrechten nach § 5 EGAktG', 41 *Deutsches Steuerrecht* 784 (2003).

A. Arora, F. Fosfuri & T. Roende, 'Waiting for the Payday? The Market for Startups and the Timing of Entrepreneurial Exit' (2018), available at http://www.nber.org/.

S.S. Arsht, 'A History of Delaware Corporation Law', 1 *Delaware Journal of Corporate Law* 1 (1976).

E.R. Arzac, 'On the Capital Structure of Leveraged Buyouts', 21 *Financial Management* 16 (1992).

P. Asquith & D.W. Mullins, 'Equity Issues and Offering Dilution', 15 *Journal of Financial Economics* 61 (1986).

P. Asquith & D.W. Mullins, 'The Impact of Initiating Dividend Payments on Shareholders' Wealth', 56 *Journal of Business* 77 (1983).

B.F. Assink & L. Timmerman, 'Langetermijnbetrokkenheid van aandeelhouders', 21 *Ondernemingsrecht* 865 (2019).

B.F. Assink & W.J. Slagter, *Compendium Ondernemingsrecht* (Kluwer, 2013).

B.F. Assink, 'Belang van de vennootschap, overname en algemeen belang', 146 *Weekblad voor Privaatrecht, Notariaat en Registratie* 103 (2015).

B.F. Assink, 'Enige beschouwingen over Duitse ontwerpwetgeving, de Amerikaanse 'business judgment rule' en ontwikkelingen in het Nederlandse vennootschapsrecht', 7 *Ondernemingsrecht* 372 (2005).

B.F. Assink, 'Kanttekeningen bij Boskalis/Fugro', 4 *Maandblad voor Ondernemingsrecht* 183 (2018).

B.F. Assink, 'Over de 'business judgment rule' - Enige recente ontwikkelingen in het vennootschapsrecht van met name Duitsland en Delaware', 8 *Ondernemingsrecht* 75 (2006).

B.F. Assink, 'Van vennootschapsrechtelijk belang (II)', 147 *Weekblad voor Privaatrecht, Notariaat en Registratie* 491 (2016).

B.F. Assink, 'Verbindend (vennootschaps)recht', 68 *Ars Aequi* 43 (2018).

B.F. Assink, *Rechterlijke toetsing van bestuurlijk gedrag binnen het vennootschapsrecht van Nederland en Delaware* (Kluwer, 2007).

B.F. Assink, 'Van vennootschapsrechtelijk belang (I)', 147 *Weekblad voor Privaatrecht, Notariaat en Registratie* 465 (2016).

B.F. Assink, *De Januskop van het ondernemingsrecht, over faciliëring en regulering van ondernemerschap* (Kluwer, 2010).

H-D. Assmann, 'Überlagerung und Komplementierung des Aktienrechts nach dem Aktiengesetz 1965 durch Kapitalmarktrecht', 56 *Die Aktiengesellschaft* 597 (2015).

C. At, M. Burkart & S. Lee, ‘Security-voting Structure and Bidder Screening’, 20 *Journal of Financial Intermediation* 458 (2011).

V.A. Atanasov, B.S. Black & C.S. Ciccotello, ‘Law and Tunneling’, 37 *Journal of Corporation Law* 1 (2011).

J. Atanassov, ‘Do Hostile Takeovers Stifle Innovation? Evidence from Antitakeover Legislation and Corporate Patenting’, 68 *Journal of Finance* 1097 (2013).

R.S. Avi-Yonah, ‘Citizens United and the Corporate Form’, 2010 *Wisconsin Law Review* 999 (2010).

J. Azar, M.C. Schmalz & I. Tecu, ‘Anticompetitive Effects of Common Ownership’, 73 *Journal of Finance* 1513 (2018).

G. Bachmann et al., ‘Entwurf einer Regelung zur Mitbestimmungsvereinbarung sowie zur Größe des mitbestimmten Aufsichtsrats’, 30 *Zeitschrift für Wirtschaftsrecht* 885 (2009).

G. Bachmann, ‘Rechtsfragen der Wertpapierleihe’, 173 *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* 596 (2009).

J. Bähr, ‘Unternehmens- und Kapitalmarktrecht im “Dritten Reich”: Die Aktienrechtsreform und das Anleihestockgesetz’, in: *Wirtschaftssteuerung durch Recht im Nationalsozaliusmus* 35 (J. Bähr & R. Banken, eds.).

S.M. Bainbridge & M.T. Henderson, *Limited Liability: A Legal and Economic Analysis* (Edward Elgar, 2017).

S.M. Bainbridge, ‘Director Primacy and Shareholder Disempowerment’, 119 *Harvard Law Review* 1735 (2006).

S.M. Bainbridge, ‘Director Primacy: The Means and Ends of Corporate Governance’, 97 *Northwestern University Law Review* 547 (2002).

S.M. Bainbridge, ‘Revitalizing SEC Rule 14a-8’s Ordinary Business Exclusion: Preventing Shareholder Micromanagement by Proposal’, 85 *Fordham Law Review* 705 (2016).

S.M. Bainbridge, ‘State Takeover and Tender Offer Regulations Post-MITE: The Maryland, Ohio and Pennsylvania Attempts’, 90 *Dickinson Law Review* 731 (1986).

S.M. Bainbridge, 'The Case for Limited Shareholder Voting Rights', 53 *UCLA Law Review* 601 (2006).

S.M. Bainbridge, 'The Geography of Revlon-Land', 81 *Fordham Law Review* 3277 (2012).

S.M. Bainbridge, 'The Short Life and Resurrection of SEC Rule 19c-4', 69 *Washington University Law Quarterly* 565 (1991).

S.M. Bainbridge, 'Unocal at 20: Director Primacy in Corporate Takeovers', 31 *Delaware Journal of Corporate Law* 769 (2006).

S.M. Bainbridge, 'Why a Board? Group Decisionmaking in Corporate Governance', 55 *Vanderbilt Law Review* 1 (2002).

S.M. Bainbridge, 'Dodd-Frank: Quack Federal Corporate Governance Round II', 95 *Minnesota Law Review* 1779 (2011).

M. Baker & J. Wurgler, 'A Catering Theory of Dividends', 59 *Journal of Finance* 1125 (2004).

M. Baker & J. Wurgler, 'Market Timing and Capital Structure', 57 *Journal of Finance* 1 (2002).

M. Baker & J. Wurgler, Behavioral Corporate Finance: An Updated Survey, in: *Handbook of the Economics of Finance* 357 (G.M. Constantinides, M. Harris & R. M. Stulz eds.).

K.J. Bakker, 'Loyaliteitsregelingen; lessen uit Frankrijk en Delaware', 10 *Maandblad voor Ondernemingsrecht* 5 (2019).

R.F. Balotti & J.A. Finkelstein, *Balotti and Finkelstein's Delaware Law of Corporations and Business Organizations* (Wolters Kluwer, 2018).

S. Banerjee & R.W. Masulis, 'Ownership, Investment and Governance: The Costs and Benefits of Dual Class Shares' (2017), available at http://www.ssrn.com/.

S. Banner, 'What Causes New Securities Regulation? 300 Years of Evidence', 75 Washington *University Law Quarterly* 849 (1997).

N. Barberis & R. Thaler, 'A Survey of Behavioral Finance', in: *Handbook of the Economics of Finance* 1053 (G.M. Constantinides, M. Harris & R. M. Stulz eds.).

M.J. Barclay & C.G. Holderness, ‘Private Benefits from Control of Public Corporations’, 25 *Journal of Financial Economics* 371 (1989).

R.M. Barker & I.H.-Y. Chiu, ‘From Value Protection to Value Creation: Rethinking Corporate Governance Standards for Firm Innovation’, 23 *Fordham Journal of Corporate & Financial Law* 437 (2018).

J.W. Barnard, ‘Historical Quirks, Political Opportunism, and the Anti-Loan Provision of the Sarbanes-Oxley Act’, 31 *Ohio Northern University Law Review* 325 (2005).

J. Barneveld, ‘De achterkant van het openbaar bod. Over de opkomst, ontwikkeling en normering van de pre-wired back-end’, 5 *Maandblad voor Ondernemingsrecht* 155, 163 (2019).

J. Barneveld, ‘PCM & private equity – Over de rol van het vennootschappelijk belang bij vermogensonttrekkingen’, 140 *Weekblad voor Privaatrecht, ~~Notariaat~~ en Registratie* 230 (2009).

J. Barneveld, *Financiering en vermogensonttrekking door aandeelhouders: een studie naar de grenzen aan de financieringsvrijheid van aandeelhouders in besloten verhoudingen naar Amerikaans, Duits en Nederlands recht* (Kluwer, 2014).

S.A. Barshay, ‘Elon Musk and the Control of Tesla’ (2018), available at http://www.corpgov.law.harvard.edu/.

S. Bartie, ‘The Lingering Core of Legal Scholarship’, 30 *Journal of Legal Studies* 345 (2010).

S.M. Bartman, ‘De Code-Tabaksblat; een juridisch lichtgewicht’, 6 *Ondernemingsrecht* 123 (2004).

M. Barzuza, ‘Market Segmentation: The Rise of Nevada as a Liability-Free Jurisdiction’, 98 *Virginia Law Review* 935 (2012).

A. Baumbach, K.J. Hopt et al. (eds.), *Handelsgesetzbuch* (Beck, 2018).

T. Baums & K.E. Scott, ‘Taking Shareholder Protection Seriously? Corporate Governance in the United States and Germany’, 53 *American Journal on Comparative Law* 31 (2005).

T. Baums (eds.), *Bericht der Regierungskommission Corporate Governance* (Otto Schmidt, 2001).

T. Baums, 'Das Zinsverbot im Aktienrecht', in: K.P. Berger et al. (eds.), *Zivil- und Wirtschaftsrecht im europäischen und globalen Kontext: Festschrift für Norbert Horn zum 70. Geburtstag* (De Gruyter, 2006).

T. Baums, *Gesetz über die Aktiengesellschaften für die königlich preussischen Staaten vom 9. November 1843: Text und Materialien* (Scientia, 1981).

W. Bayer & S. Engelke, 'Die Revision des Aktienrechts durch das Aktiengesetz von 1937', in: *Aktienrecht im Wandel* 619 (W. Bayer & M. Habersack eds., 2007).

W. Bayer, 'Grundkapital, Kapitalaufbringung, Kapitalerhaltung', in: *Aktienrecht im Wandel* 708 (Mohr Siebeck, 2007).

W. Bayer, 'Stärkere Differenzierungen zwischen börsennotierten und nicht-börsennotierten Aktiengesellschaften? – 67. DJT (2008)', in: W. Bayer (ed.), *Gesellschafts- und Kapitalmarktrecht in den Beratungen des Deutschen Juristentages* 693 (Jenaer Wissenschaftliche Verlagsgesellschaft, 2010).

F. de Beaupuy, 'France Hits Out at Dutch in Feud Over Air France-KLM Holdings' (2019), available at http://www.bloomberg.com/.

L.A. Bebchuk & A. Ferrell, 'A New Approach to Takeover Law and Regulatory Competition', 87 *Virginia Law Review* 111 (2001).

L.A. Bebchuk & A. Ferrell, 'Federalism and Corporate Law: The Race To Protect Managers from Takeovers', 99 *Columbia Law Review* 1168 (1999).

L.A. Bebchuk & A. Hamdani, 'Federal Corporate Law: Lessons from History', 106 *Columbia Law Review* 1793 (2006).

L.A. Bebchuk & A. Hamdani, 'Independent Directors and Controlling Shareholders', 165 *University of Pennsylvania Law Review* 1271 (2017).

L.A. Bebchuk & A. Hamdani, 'Optimal Defaults for Corporate Law Evolution', 96 *Northwestern University Law Review* 489 (2002).

L.A. Bebchuk & A. Hamdani, 'Vigorous Race or Leisurely Walk: Reconsidering the Competition over Corporate Charters', 112 *The Yale Law Journal* 553 (2002).

L.A. Bebchuk & K. Kastiel, 'The Perils of Dell's Low-Voting Stock' (2018), available at http://www.ssrn.com/.

L.A. Bebchuk & K. Kastiel, ‘The Perils of Small-Minority Controllers’, 107 *Georgetown Law Journal* 1453 (2019).

L.A. Bebchuk & K. Kastiel, ‘The Untenable Case for Perpetual Dual-Class Stock’, 103 *Virginia Law Review* 585 (2017).

L.A. Bebchuk & M.J. Roe, ‘A Theory of Path Dependence in Corporate Ownership and Governance’, 52 *Stanford Law Review* 127 (2000).

L.A. Bebchuk & S. Hirst, ‘Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy’ (2018), available at http://www.ssrn.com/.

L.A. Bebchuk, ‘The Case for Increasing Shareholder Power’, 118 *Harvard Law Review* 833 (2005).

L.A. Bebchuk, A. Brav & W. Jiang, ‘Don’t Run Away from the Evidence: A Reply to Wachtell Lipton’ (2013), available at http://www.corpgov.law.harvard.edu/.

L.A. Bebchuk, ‘Federalism and the Corporation. The Desirable Limits on State Competition in Corporate Law’, 105 *Harvard Law Review* 1435 (1992).

L.A. Bebchuk, ‘Foreword: The Debate on Contractual Freedom in Corporate Law’, 89 *Columbia Law Review* 1395 (1989).

L.A. Bebchuk, ‘The Case for Shareholder Access to the Ballot’, 59 *The Business Lawyer* 43 (2003).

L.A. Bebchuk, ‘Why Firms Adopt Anti-Takeover Provisions’, 152 *Pennsylvania Law Review* 713 (2003).

L.A. Bebchuk, A. Brav & W. Jiang, ‘The Long-Term Effects of Hedge Fund Activism’, 115 *Columbia Law Review* 1085 (2015).

L.A. Bebchuk, A. Cohen & A. Ferrell, ‘Does the Evidence Favor State Competition in Corporate Law?’, 90 *California Law Review* 1777 (2002).

L.A. Bebchuk, A. Cohen & A. Ferrell, ‘What Matters in Corporate Governance?’, 22 *Review of Financial Studies* 783 (2009).

L.A. Bebchuk, R. Kraakman & G. Triantis, ‘Stock Pyramids, Cross-Ownership and Dual Class Equity: The Mechanisms and Agency Costs of Separating Control From Cash-Flow Rights 445 (R. Morck ed., 2000).

L. Bebchuk, A. Brav & W. Jiang, 'Still Running Away from the Evidence: A Reply to Wachtell Lipton's Review of Empirical Work' (2014), available at http://www.corpgov.law.harvard.edu/.

L.A. Bebchuk, 'Efficient and Inefficient Sales of Corporate Control', 109 *Quarterly Journal of Economics* 957 (1994).

M. Becht & E. Boehmer, 'Voting Control in German Corporations', 23 *International Review of Law & Economics* 1 (2003).

M. Becht, 'Loyalty Shares with Tenure Voting - Does the Default Rule Matter? Evidence from the Loi Florange Experiment' (2018), available at http://www.ssrn.com/.

I. Ben-David, 'Dividend Policy Decisions', in: *Behavioral Finance: Investors, Corporations and Markets* 435 (H. Kent Baker & J.R. Nofsinger eds.).

S. Benartzi, R. Michaely & R.H. Thaler, 'Do Changes in Dividends Signal the Furture or The Past?', 52 *Journal of Finance* 1007 (1997).

M. Bennedsen & K.M. Nielsen, 'Incentive and Entrenchment Effects in European Ownership', 34 *Journal of Banking & Finance* 2212 (2010).

K. Bentel & G. Walter, 'Dual Class Shares ' (2016), available at http://scholarship.law.upenn.edu/.

C. Berdejo, 'Going Public after the JOBS Act', 76 *Ohio State Law Journal* 1 (2015).

P. van den Berg, 'Codificatie en staatsvorming in de tijd van Lodewijk Napoleon', 30 *De Negentiende Eeuw* 159 (2006).

J-L. Bergel, *Théorie générale du droit* (Dalloz, 2003).

A. Berger & K. Schaeck, 'Small and Medium-Sized Enterprises, Bank Relationship Strength, and the Use of Venture Capital', 43 *Journal of Money, Credit & Banking* 461 (2011).

A.N. Berger & U.F. Udell, 'The Economics of Small Business Finance: The Roles of Private Equity and Debt Markets in the Financial Growth Cycle', 22 *Journal of Banking & Finance* 613 (1998).

D.J. Berger, S. Davidoff Solomon & A.J. Benjamin, 'Tenure Voting and the U.S. Public Company', 72 *The Business Lawyer* 295 (2017).

A.A. Berle & G.C. Means, *The Modern Corporation and Private Property* (Macmillan, 1932).

A.A. Berle, *The 20th Century Capitalist Revolution* (Harcourt, Brace & Co. 1954).

A.A. Berle, 'Corporate Powers as Powers in Trust', 44 *Harvard Law Review* 1049 (1931).

A.A. Berle, 'For Whom Corporate Managers are Trustees: A Note', 45 *Harvard Law Review* 1365 (1932).

A.A. Berle, 'Non-Voting Stock and Bankers' Control', 39 *Harvard Law Review* 673 (1926).

C. Berrar, 'Zur Reform des AR nach den Vorschlägen der Regierungskommission "Corporate Governance"', 4 *Neue Zeitschrift für Gesellschaftsrecht* 1113 (2001).

A. Betzer, I. van den Bongard & M. Goergen, 'Index membership vs. loss of voting power: The unification of dual-class shares', 49 *Journal of International Financial Markets, Institutions and Money* 140 (2017).

T. Bezzenberger, *Vorzugsaktien ohne Stimmrecht* (Heymanns, 1991).

S. Bhattacharya, 'Corporate Finance and the Legacy of Miller and Modigliani', 2 *Journal of Economic Perspectives* 135 (1988).

S. Bhattacharya, 'Imperfect Information, Dividend Policy, and "The Bird in the Hand" Fallacy', 10 *Bell Journal of Economics* 259 (1979).

B. Bier, 'Betekent winstrecht ook recht op winst?', in: P.J. van der Korst, R. Abma & G.T.M.J. Raaijmakers (eds.), *Handboek onderneming en aandeelhouder* 163 (Kluwer, 2012).

B. Bier, *Uitkeringen aan aandeelhouders* (Kluwer, 2003).

M. Bigelli, V. Mehrotra & P. Raghavendra Rau, 'Why are Shareholders not Paid to Give up Their Voting Privileges? Unique Evidence From Italy', 17 *Journal of Corporate Finance* 1619 (2011).

C.S. Bigler & S.B. Tillman, 'Void or Voidable?-Curing Defects in Stock Issuances Under Delaware Law', 63 *The Business Lawyer* 1109 (2008).

B.S. Black et al., 'Corporate Governance Indices and Construct Validity', 25 *Corporate Governance: an International Review* 397 (2017).

B.S. Black, 'Agents Watching Agents: The Promise of Institutional Investor Voice', 39 *UCLA Law Review* 811 (1991).

B.S. Black, 'Shareholder Passivity Reexamined', 89 *Michigan Law Review* 520 (1990).

B.S. Black, 'The Legal and Institutional Preconditions for Strong Securities Markets', 48 *UCLA Law Review* 781 (2001).

E.L. Black, 'Life-Cycle Impacts on the Incremental Value Relevance of Earnings and Cash Flow Measures', 4 *Journal of Financial Statement Analysis* 40 (1998).

F. Black & M. Scholes, 'The Effects of Dividend Yield and Dividend Policy on Common Stock Prices and Returns', 1 *Journal of Financial Economics* 1 (1974).

F. Black, 'Noise', 41 *Journal of Finance* 529 (1985).

F. Black, 'The Dividend Puzzle', 2 *The Journal of Portfolio Management* 5 (1976).

M.M. Blair & L.A. Stout, 'A Team Production Theory of Corporate Law', 85 *Virginia Law Review* 248 (1999).

M.M. Blair, 'Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century,' 51 *UCLA Law Review* 387 (2003).

J.M. Blanco Fernández, 'Timmerman's grondslagen: reactie op de oratie', 11 *Ondernemingsrecht* 24 (2009).

J.M. Blanco Fernández, 'Wat is de vennootschap en wat behoort het vennootschapsrecht te zijn', 20 *Ondernemingsrecht* 169 (2018).

J.E. Blouin, J.E. Core & W. Guay, 'Have the Tax Benefits of Debt Been Overestimated?', 98 *Journal of Financial Economics* 195 (2010).

M. Bock, 'Nachzahlbare Vorzugsdividende und Sonderbeschluss bei Aktienzusammenlegungen', 18 *Neuze Zeitschrift für Gesellschaftsrecht* 824 (2015).

M. Bodig, 'Legal Doctrinal Scholarship and Interdisciplinary Engagement', 8 *Erasmus Law Review* 43 (2015).

G.J. Boelens, *Oligarchische Clausules in statuten van naamlooze vennootschappen* (Kok, 1946).

B. Boersma & H. Sprenger, 'Ingrijpende herziening van het Curaçaose rechtspersonenrecht een feit', 14 *Ondernemingsrecht* 685 (2012).

E. Boesebeck, 'Eine Lanze für die nennwertlose Aktie', 12 *Der Betrieb* 309 (1959).

M.W. den Boogert, 'Boekbespreking', 123 *Weekblad voor Privaatrecht, ~~Notariaat~~ en Registratie* 12 (1992).

M.W. den Boogert, 'Corporate governance in een stroomversnelling', 5 *Ondernemingsrecht* 406 (2003).

M.W. den Boogert, 'Eumedion ziet spoken rond Nederlandse NV-norm', Het Financieele Dagblad 13 July 2015.

P. Bolton & E-L. von Thadden, 'Blocks, Liquidity, and Corporate Control', 53 *Journal of Finance* 1 (1998).

P. Bolton & F. Samama, 'Loyalty-Shares: Rewarding Long-term Investors', 25 *Journal of Applied Corporate Finance* (2013).

P. Bolton, 'Investor Ideology' (2018), available at http://www.ssrn.com/.

A.A. Bootsma & J.B.S. Hijink, 'De beurs-NV in den vreemde. Een perspectief op modernisering van het NV-recht', 16 *Ondernemingsrecht* 85 (2014).

A.A. Bootsma & T.A. Keijzer, 'Snap Inc. De eerste beursgang met stemrechtloze aandelen in de V.S.', 19 *Ondernemingsrecht* 400 (2017).

A.A. Bootsma et al., 'Bescherming bij Nederlandse beursvennootschappen' (2015), available at http://mccg.nl/.

A.A. Bootsma, 'An Eclectic Approach to Loyalty-Promoting Instruments in Corporate Law: Revisiting Hirschman's Model of Ext, Voice and Loyalty', 7 *Erasmus Law Review* 111 (2013).

A.A. Bootsma, 'De voorzitter van de one-tier board als dwaallicht', 18 *Ondernemingsrecht* 533 (2016).

A.A. Bootsma, 'Loyaliteitsdividend, bijzondere stemrechtaandelen en de positie van minderheidsaandeelhouders. Midstream or IPO introduction, that's the question', 2 *Maandblad voor Ondernemingsrecht* 151 (2016).

A.A. Bootsma, 'Loyaliteitsstemrecht in het Franse wetsvoorstel-Florange', 16 *Ondernemingsrecht* 218 (2014).

A.A. Bootsma, 'Loyaliteitsstemrecht naar Italiaans recht en bij Fiat Chrysler Automobiles NV', 17 *Ondernemingsrecht* 32 (2015).

A.A. Bootsma, 'Nederland, het Delaware van Europa?', 18 *Ondernemingsrecht* 419 (2016).

A.A. Bootsma, 'Over de toekomst van het vennootschapsrecht', in: H.J. de Kluiver (red.), *100 Jaar Handelsrecht. Over heden, toekomst en verleden* 101 (Paris, 2018).

A.A. Bootsma, J.B.S. Hijink & L. in 't Veld, 'De eerste beurs-BV. Certificaten van aandelen in Fastned BV toegelaten tot de handel op de nieuwe gereglementeerde markt van Nx'change', 18 *Ondernemingsrecht* 555 (2016).

G. Borges, 'Selbregulierung im Gesellschaftsrecht – zur Bindung an Corporate Governance-Kodizes', 32 *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 508 (2003).

C. Borman, *Het statuut voor het Koninkrijk* (Deventer, 2012).

E.C. Bos, *Vruchtgebruik op aandelen. Over de grenzen van goederenrecht, erfrecht en vennootschapsrecht* (Deventer, 2005).

W. Bosch, *Die Epochen der Kreditrestriktionspolitik der Deutschen Reichsbank 1924/1926* (Stuttgart, 1927).

H.E. Boschma, M.L. Lennarts & J.N. Schutte-Veenstra, 'Lessen uit het Duitse AG-recht voor de modernisering van het Nederlandse NV-recht?', 16 *Ondernemingsrecht* 70 (2014).

K. Bösselmann, *Die Entwicklung des deutschen Aktienwesens im 19. Jahrhundert* (Berlin, 1939).

K. Bösselmann, *Zur Finanzierung der A.-G. vor 1850* (De Gruyter, 1938).

F. Braggion & M. Giannetti, 'Changing Corporate Governance Norms: Evidence from Dual Class Shares in the UK', 37 *Journal of Financial Intermediation* 15 (2019).

S. van Brakel, *De Hollandsche handelscompagnieën der zeventiende eeuw* (Martinus Nijhoff, 1908).

D. Brakman Reiser & S.A. Dean, 'Financing the Benefit Corporation', 40 *Seattle University Law Review* 793 (2017).

L.D. Brandeis, *Other People's Money and How the Bankers Use It* (Strokes, 1914).

O.C. Brändel, 'Mehrstimmrechtsaktien – ein in Vergessenheit geratenes Instrument der Beherrschung und des Minderheitenschutzes?', in: *Festschrift für Karlheinz Quack zum 65. Geburtstag am 3. Januar 1991* 175 (H.P. Westermann & W. Rosener eds.).

W.W. Bratton & J.A. McCahery, 'Incomplete Contracts Theories of the Firm and Comparative Corporate Governance', 2 *Theoretical Inquiries in Law* 745 (2001).

W.W. Bratton & M.L. Wachter, 'Shareholder Primacy's Corporatist Origins: Adolf Berle and the Modern Corporation'. 34 *Journal of Corporation Law* 99 (2008).

W.W. Bratton & M.L. Wachter, 'Tracking Berle's Footsteps: The Trail of the Modern Corporation's Law Chapter', 33 *Seattle University Law Review* 849 (2010).

W.W. Bratton, 'The Nexus of Contracts Corporation: A Critical Appraisal', 74 *Cornell Law Review* 407 (1989).

W.W. Bratton, 'The New Economic Theory of the Firm: Critical Perspectives from History', 41 *Stanford Law Review* 1471 (1989).

W.W. Bratton, 'The Separation of Corporate Law and Social Welfare', 74 *Washington & Lee Law Review* 767 (2017).

A. Brav & P.A. Gompers, 'Myth or Reality? The Long-Run Underperformance of Initial Public Offerings: Evidence from Venture and Nonventure Capital – Backed Companies', 52 *Journal of Finance* 1791 (1997).

A. Brav et al., ‘Hedge Fund Activism, Corporate Governance, and Firm Performance’, 63 *Journal of Finance* 1729 (2008).

A. Brav et al., ‘Payout Policy in the 21st Century’, 77 *Journal of Financial Economics* 483 (2005).

R.A. Brealey, S.C. Myers & F. Allen, *Principles of Corporate Finance* (McGraw-Hill, 2014).

A. Broderick (eds.), *The French Institutionalists. Maurice Hauriou, Georges Renard, Joseph T. Delos,* (Harvard University Press 1970).

K.W.H. Broekhuizen, *Klantbelang, belangenconflict en zorgplicht* (Boom, 2016).

P.P.T. Bovend’Eert et al. (eds.), *Tekst & Commentaar Grondwet en Statuut* (Wolters Kluwer, 2018).

J. Brogaard, T. Hendershott & R. Riordan, ‘High-Frequency Trading and Price Discovery’, 27 *Review of Financial Studies* 2267 (2014).

R. Bronzini, G. Caramellino & S. Magri, ‘Venture Capitalists at Work: What are the Effects on the Firms They Finance?’ (2017), available at http://www.ssrn.com/.

A.R. Brownstein, B.M. Roth & E. Tetelbaum, ‘Use of Special Committees in Conflict Transactions’ (2019), available at http://www.corpgov.law.harvard.edu/.

V.A. Brudney, ‘Dividends, Discretion and Disclosure’, 66 *Virginia Law Review* 85 (1980).

U. Brüggeman et al., ‘The Twilight Zone: OTC Regulatory Regimes and Market Quality’, 31 *Review of Financial Studies* 898 (2018).

A. Brumbaugh, ‘The Business Judgement Rule and the Diversified Investor: Encouraging Risk in Financial Institutions’, 17 *UC Davis Business Law Journal* 171 (2017).

C. Brummer, ‘Disruptive Technology and Securities’, 84 *Fordham Law Review* 977 (2015).

C.M. Bruner, ‘What is the Domain of Corporate Law?’ (2019), available at http://www.ssrn.com/.

J.M. Buchanan & G. Tullock, The Calculus of Consent: Logical Foundations of Constitutional Democracy (Ann Arbor, 1962).

D.C. Buijs, 'Beginselakkoord Beurs-VEUO en de reactie daarop van de ~~minister~~ van Financiën', 38 *Tijdschrift voor Vennootschappen, Verenigingen en Stichtingen* 157 (1995).

D.C. Buijs, 'Commissie Betwiste Overnames; wel een compromis, maar geen oplossing. Fopspeen of dobbelsteen?, 38 *Tijdschrift voor Vennootschappen, Verenigingen en Stichtingen* 301 (1995).

D.C. Buijs, 'Rapport Commissie Corporate Governance', 40 *Tijdschrift voor Vennootschappen, Verenigingen en Stichtingen* 299 (1997).

B.P. Buirma, 'High/Low Voting Stock. Een nieuwe trend?', 11 *Tijdschrift voor de Ondernemingsrechtpraktijk* 43 (2016).

L.T. Bulan & N. Subramanian, 'The Firm Life Cycle Theory of Dividends', in: *Dividends and Dividend Policy* 201 (H. Kent Baker ed.).

L. Bulan, N. Subramanian & L. Tanlu, 'On the Timing of Dividend Initiations', 36 *Financial Management* 31 (2007).

H. Burgers, 'Aandelen zonder stemrecht en aandelen met beperkt stemrecht', 31 *Tijdschrift voor Vennootschappen, Verenigingen en Stichtingen* 276 (1988).

H-P. Burghof & A. Hunger, 'The Neuer Markt: An (Overly) Risky Asset Of Germany's Financial System', in: G. Giudici & P. Roosenboom (eds.), *The Rise and Fall of Europe's New Stock Markets* 295 (Emerald, 2004).

C. Burhop, D. Chambers & B.R. Cheffins, 'Law, Politics and the Rise and Fall of German Stock Market Development, 1870-1938' (2015), available at http://www.ssrn.com/.

M. Burkart & S. Lee, 'Activism and Takeovers' (2019), available at http://www.ssrn.com/.

M. Burkart & S. Lee, 'One Share-One Vote: The Theory', 12 *Review of Finance* 1 (2008).

M. Burkart, D. Gromb & F. Panunzi, 'Large Shareholders, Monitoring, and the Value of the Firm', 112 *Quarterly Journal of Economics* 693 (1997).

M. Burkart, F. Panunzi & A. Shleifer, 'Family Firms', 58 *Journal of Finance* 2167 (2003).

B. Burrough & J. Helyar, *Barbarians at the Gate: The Fall of RJR Nabisco* (Harper & Row, 1989).

B.J. Bushee, 'The Influence of Institutional Investors on Myopic Investment Behavior', 73 *The Accounting Review* 305 (1998).

A.W. Butler, M.O. Keefe & R. Kieschnick, 'Robust Determinants of IPO underpricing and Their Implications for IPO Research', 27 *Journal of Corporate Finance* 367 (2014).

R.M. Buxbaum, 'The Threatened Constitutionalization of the Internal Affairs Doctrine in Corporation Law', 75 *California Law Review* 29 (1987).

A. Cahn, 'The Shareholders' Fiduciary Duty in German Company Law', in: H.S. Birkmose, *Shareholders' Duties* 347 (2017).

M.D. Caine et al., 'The Shifting Tides of Merger Litigation', 71 *Vanderbilt Law Review* 603 (2018).

W.J.L. Calkoen, *The One-Tier Board in the Changing and Converging World of Corporate Governance: A comparative study of boards in the UK, the US and the Netherlands* (Kluwer, 2012).

R.B. Campbell, 'Blue Sky Laws and the Recent Congressional Preemption Failure', 22 *Journal of Corporation Law* 176 (1997).

R.B. Campbell, 'The Rule of Blue Sky Laws After NSMIA and the JOBS Act', 66 *Duke Law Journal* 605 (2016).

J.Ph.M. van Campen, *Onderneming en rechtsvorm* (Dekker & Van de Vegt, 1945).

W.J. Carney & G.B. Shepherd, 'The Mystery of Delaware Law's Continuing Success', 2009 *University of Illinois Law Review* 1 (2009).

W.J. Carney, 'The Costs of Being Public After Sarbanes-Oxley: the Irony of "Going Private"', 55 *Emory Law Journal* 141 (2006).

J. Carroll, 'Edgar v. MITE Corp.: The Death Knell for the Indiana Takeover Offers Act' 16 *Indiana Law Review* 517 (1983).

W.L. Cary, 'A Proposed Federal Corporate Minimum Standards Act', 29 *The Business Lawyer* 1101 (1974).

W.L. Cary, 'Federalism and Corporate Law: Reflections upon Delaware', 83 *Yale Law Journal* 663 (1974).

S. Çelik, G. Demirtaş & M. Isaksson, 'Corporate Bonds, Bondholders and Corporate Governance', OECD Corporate Governance Working Papers No. 16 (2015), available at http://www.ssrn.com/.

E.C. Chaffee, 'The Origins of Corporate Social Responsibility', 85 *University of Cincinnati Law Review* 353 (2017).

E. Chancellor, *Devil Take the Hindmost, A History of Financial Speculation* (Farrar, Straus, Giroux, 1999).

W.B. Chandler & A.A. Rickey, 'Manufacturing Mystery: A Response to Professors Carney and Shepherd's "The Mystery of Delaware Law's Continuing Success"', 2009 *University of Illinois Law Review* 95 (2009).

W.B. Chandler & A.A. Rickey, 'The Trouble with Trulia', in: *Can Delaware Be Dethroned? Evaluating Delaware's Dominance of Corporate Law* 145 (S.M. Bainbridge et al. eds, 2018).

W.B. Chandler & L.E. Strine, 'The New Federalism of the American Corporate Governance System: Preliminary Reflections of Two Residents of One Small State', 152 *University of Pennsylvania Law Review* 997 (2003).

A.D. Chandler, *The Visible Hand: The Managerial Revolution in American Business* (Belknap Press, 1977).

Y-C. Chang, H. Hong & I. Liskovich, 'Regression Discontinuity and the Price Effects of Stock Market Indexing', 28 *The Review of Financial Studies* 212 (2015).

S. Chaplinsky & G. Niehaus, 'The Role of ESOPs in Takeover Contests', 49 *Journal of Finance* 1451 (1994).

B.R. Cheffins & J. Armour, 'The Past, Present, and Future of Shareholder Activism by Hedge Funds', 37 *Journal of Corporation Law* 51 (2011).

B.R. Cheffins, 'Dividends as a Substitute for Corporate Law: The Separation of Ownership and Control in the United Kingdom', 63 *Washington & Lee Law Review* 1273 (2006).

B.R. Cheffins, 'Law as Bedrock: The Foundations of an Economy Dominated by Widely Held Public Companies, 23 *Oxford Journal of Legal Studies* 1 (2003).

B.R. Cheffins, 'Rumours of the Death of the American Public Company are Greatly Exaggerated' (2018), available at http://www.ssrn.com/.

T.J. Chemmanur & X. Tian, 'Do Anti-Takeover Provisions Spur Corporate Innovation? A Regression Discontinuity Analysis' (2017), available at http://www.ssrn.com/.

T.J. Chemmanur & Y. Jiao, 'Dual Class IPOs: a Theoretical Analysis', 36 *Journal of Banking & Finance* 305 (2012).

I.H.-Y. Chiu & D. Katelouzou, 'From Shareholder Stewardship to Shareholder Duties: Is the Time Ripe?', in: H. Birkmose (ed.), *Shareholder's Duties* 131 (Kluwer Law Interntional, 2016).

I.H.-Y. Chiu & D. Katelouzou, 'Making a Case for Regulating Institutional Shareholders' Corporate Governance Roles', 62 *Journal of Business Law* 67 (2018).

I.H.-Y. Chiu, 'Turning Institutional Investors into 'Stewards': Exploring the Meaning and Objectives of 'Stewardship'', 66 *Current Legal Problems* 443 (2013).

I.H.-Y. Chiu, *The Foundations and Anatomy of Shareholder Activism* (Hart, 2010).

S.J. Choi et al., 'Does Majority Voting Improve Board Accountability', 83 *University of Chicago Law Review* 1119 (2016).

A.H. Choi, 'Fee-Shifting and Shareholder Litigation', 104 *Virginia Law Review* 59 (2018).

S. Choi, J. Fisch & M. Kahan, 'Who Calls the Shots? How Mutual Funds Vote on Director Elections', 3 *Harvard Business Law Review* 35 (2013).

R.D. Chrisman, 'LLCs are the New King of the Hill: An Empirical Study of the Number of New LLCs, Corporations, and LPS Formed in the United States between 2004-2007 and How LLCs Were Taxed for Tax Years 2002-2006' 15 *Fordham Journal of Corporate & Financial Law* 459 (2010).

D.E. Cijntje et al. (eds.), *Netherlands Antilles Business Law. Legal, Accounting and Tax Aspects of Doing Business in the Netherlands Antilles* (Kluwer Law International, 1999).

S. Claessens et al., 'Disentangling the Incentive and Entrenchment Effects of Large Shareholdings', 57 *Journal of Finance* 2741 (2002).

S. Claessens, S. Djankov & L.H.P. Lang, 'The Separation of Ownership and Control in East Asian Corporations', 58 *Journal of Financial Economics* 81 (2000).

C.P. Claussen, 'Die Aktie ohne Nennbetrag ist die richtigere', 8 *Die Aktiengesellschaft* 237 (1963).

R.H. Coase, 'The Nature of the Firm', 4 *Economica* 386 (1937).

R.H. Coase, 'The Problem of Social Cost', 3 *Journal of Law & Economics* 1 (1960).

J.C. Coffee, 'Loser Pays: The Latest Installment in the Battle-Scarred, Cliff-Hanging Survival of the Rule 10b-5 Class Action', 68 *Southern Methodist University Law Review* 689 (2015).

J.C. Coffee, 'Racing towards the Top? The Impact of Cross-Listings and Stock Market Competition on International Corporate Governance', 102 *Columbia Law Review* 1757 (2002).

J.C. Coffee, 'Regulating the Market for Corporate Control: A Critical Assessment of the Tender Offer's Role in Corporate Governance', 84 *Columbia Law Review* 1145 (1984).

J.C. Coffee, 'The Future as History: The Prospects for Global Convergence in Corporate Governance and its Implications', 93 *Northwestern University Law Review* 641 (1999).

J.C. Coffee, 'The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role', 89 *Columbia Law Review* 1618 (1989).

J.C. Coffee, 'The Political Economy of Dodd-Frank: Why Financial Reform Tends to be Frustrated and Systemic Risk Perpetuated', 97 *Cornell Law Review* 1019 (2012).

J.C. Coffee, 'The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control', 111 *The Yale Law Journal* 1 (2001).

S. Coleman & A. Robb, 'Capital Structure Theory and New Technology Firms: is There a Match?', 35 *Management Research Review* 106 (2012).

J.L. Coleman, 'Efficiency, Utility, And Wealth Maximization', 8 *Hofstra Law Review* 509 (1980).

H.T. Colenbrander & N. Beets, *Vestiging van het Koninkrijk (1813-1815)* (Meulenhoff, 1927).

M.G. Colombo & L. Grilli, 'Funding Gaps? Access to Bank Loans by High-Tech Start-Ups', 29 *Small Business Economics* 25 (2007).

W.W. Cook, 'Legal Possibilities of Federal Railroad Incorporation', 26 *Yale Law Journal* 207 (1917).

S. Cools & T.A. Keijzer, 'Dubbel stemrecht in combinatie met een horizon-bepaling: een alternatief voor het loyauteitsstemrecht?', 4 *Tijdschrift voor Rechtspersoon en Vennootschap – Revue pratique des sociétés* 239 (2019).

S. Cools & T.A. Keijzer, 'Over meervoudig stemrecht, loyaliteitsstemrecht, levenscycli en horizonbepalingen. Rechtseconomischce en rechtsvergelijkende beschouwingen', 21 *Ondernemingsrecht* 371 (2019).

S. Cools, 'The Dividing Line Between Shareholder Democracy and Board Autonomy: Inherent Conflicts of Interest as Normative Criterion', 11 *European Company & Financial Law Review* 258 (2004).

S. Cools, 'The Real Difference in Corporate Law Between the United States and Continental Europe: Distribution of Powers', 30 *Delaware Journal of Corporate Law* 697 (2005).

R. Cooper, R. Zutshi & V. Richardson, 'Clarifying MFW's ab initio Condition' (2018), available at http://corpgov.law.harvard.edu/.

A. Cordes & K. Jahntz, 'Aktiengesellschaften vor 1807?', in: *Aktienrecht im Wandel* (Mohr Siebeck, 2007).

L.A. Coser, *Masters of Sociological Thought: Ideas in Historical and Social Context* (Harcourt Brace Jovanovich, 1977).

C.A. Cosman & M. Mees, *Welke beginselen moet ene wettelijke regeling der Naamlooze Vennootschappen huldigen ten aanzien van het kapitaal der vennootschap* (Belinfante, 1872).

R. Cotterrell, 'Comparative Law and Legal Culture', in: *The Oxford Handbook of Comparative Law* (M. Reimann & R. Zimmermann eds.).

J. Cotterill, 'Naspers: 'Africa's SoftBank' looks beyond its Tencent stake' (2019), available at http://www.ft.com/.

J.D. Cox & R.S. Thomas, 'Delaware's Retreat: Exploring Developing Fissures and Tectonic Shifts in Delaware Corporate Law', 42 *Delaware Journal of Corporate Law* 323 (2018).

P.N. Cox, 'The Constitutional Dynamics of the Internal Affairs Rule-A Comment on CTS Corporation', 13 *Journal of Corporation Law* 317 (1988).

A.D. Crane, S. Michenaud & J.P. Weston, 'The Effect of Institutional Ownership on Payout Policy: Evidence from Index Thresholds', 29 *Review of Financial Studies* 1377 (2016).

M. Cremers & A. Ferrell, 'Thirty Years of Shareholder Rights and Firm Value', 69 *Journal of Finance* 1167 (2014).

M. Cremers et al., 'Indexing and Active Fund Management: International Evidence', 120 *Journal of Financial Economics* 539 (2016).

J.H.F.J. Cremers, *Prioriteitsaandelen* (Kluwer, 1971).

K.J.M. Cremers, L.P. Litov & S.M. Sepe, 'Staggered Boards and Long-Term Firm Value, Revisited', 126 *Journal of Financial Economics* 422 (2017).

K.J.M. Cremers, S. Masconale & S.M. Sepe, 'Commitment and Entrenchment in Corporate Governance', 110 *Northwestern University Law Review* 727 (2016).

M. Cremers, 'Hoe flexibiliseer je een BV?', 14 *Ondernemingsrecht* 603 (2012).

M. Cremers, B. Lauterbach & A. Pajuste, 'The Life-Cycle of Dual Class Firms' (2017), available at http://www.ssrn.com/.

P. Cronheim, 'Loyal Lawyers and Loyalty Shares', in: C. Cascante, A. Spahlinger & S. Wilske, *Global Wisdom on Business Transactions, International Law and Dispute Resolution (Festschrift Wegen)* 197 (C.H. Beck, 2010).

H. Cronqvist & M. Nilsson, 'Agency Costs of Controlling Minority Shareholders', 38 *Journal of Financial and Quantitative Analysis* 695 (2003).

D.H. Cross, ‘De regulering van de effectenhandel; recente ontwikkelingen’, 35 *Tijdschrift voor Vennootschappen, Verenigingen en Stichtingen* 59 (1992).

D.P. Currie, ‘Republication – the Separation of Powers in the Federal Republic of Germany’, 9 *German Law Journal* 2113 (2008).

Fletcher Cyclopedia of the Law of Corporations (Thomson Reuters, 2018).

M. Dahlquist, G. Robertsson & K. Rydqvist, ‘Direct Evidence of Dividend Tax Clienteles’, 28 *Journal of Empirical Finance* 1 (2014).

R.M. Daines & M. Klausner, ‘Do IPO Charters Maximize Firm Value? Antitakeover Protection in IPOs’, 17 *Journal of Law, Economics & Organization* 83 (2001).

R. Daines, S. Xin Li & C.C.Y. Wang, ‘Can Staggered Boards Improve Value? Evidence from the Massachusetts Natural Experiment’ (2018), available at http://www.ssrn.com/.

L.L. Dallas & J.M. Barry, ‘Long-Term Shareholders and Time-Phased Voting’, 40 *Delaware Journal of Corporate Law* 541 (2015).

L.R. Dallas, ‘Comment on Brian R. Cheffins, Dividends as a Substitute for Corporate Law: The Separation of Ownership and Control in the United Kingdom’, 63 *Washington & Lee Law Review* 1339 (2006).

A. Damadoran, *Investment Valuation: Tools and Techniques for Determining the Value of Any Asset* (Wiley, 2013).

J. Dammann, ‘The Controlling Shareholder’s General Duty of Care: A Dogma that should be Abandoned’ 2 *University of Illinois Review* 479 (2015).

S. Daske & O. Ehrhardt, ‘Kursunterschiede und Renditen deutscher Stamm- und Vorzugsaktien’, 16 *Financial Markets and Portfolio Management* 179 (2002).

S. Daske, *Vorzugsaktien in Deutschland. Historische und rechtliche Grundlagen, ökonomische Analyse, empirische Befunde* (Springer, 2019).

P. Davies & K. J. Hopt, ‘Corporate Boards in Europe – Accountability and Convergence’, 61 *The American Journal of Comparative Law* 301 (2013).

P. Davies, 'Struktur der Unternehmensführung in Großbritannien und Deutschland: Konvergenz oder fortbestehende Divergenz?', 30 *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 268 (2001).

P. Davies, K. Hopt & W-G. Ringe, 'Control Transactions', in: *The Anatomy of Corporate Law. A Comparative and Functional Approach* 205 (R. Kraakman et al., 2017).

S.J. Davis et al, 'Private Equity, Jobs, and Productivity', 104 *American Economic Review* 3596 (2013).

J.H. Davis, F.D. Schoorman & L. Donaldson, 'Toward a Stewardship Theory of Management', 22 *Academy of Management Review* 20 (1997).

S. Davis, 'So Long, Stockholder' (2018), available at http://corpgov.law.harvard.edu/.

S. Deakin, P. Sarkar & M. Siems, 'Is there a relationship between shareholder protection and stock market development?', (2017), available at http://www.ssrn.com/.

H. DeAngelo & L. DeAngelo, 'Controlling Stockholders and the Disciplinary Role of Corporate Payout Policy: A Study of the Times Mirror Company', 56 *Journal of Financial Economics* 153 (2000).

H. DeAngelo & L. DeAngelo, 'Dividend Policy and Financial Distress: An Empirical Investigation of Troubled NYSE Firms', 45 *Journal of Finance* 1415 (1990).

H. DeAngelo & L. DeAngelo, 'Managerial Ownership Of Voting Rights: A Study of Public Corporations with Dual Classes of Common Stock', 14 *Journal of Financial Economics* 33 (1985).

H. DeAngelo & L. DeAngelo, 'The Irrelevance of the MM Dividend Irrelevance Theorem', 79 *Journal of Financial Economics* 293 (2006).

H. DeAngelo & L. DeAngelo, Capital Structure, Payout Policy and Financial Flexibility (2006), available at http://www.ssrn.com/.

H. DeAngelo & R.W. Masulis, 'Optimal Capital Structure Under Corporate and Personal Taxation', 8 *Journal of Financial Economics* 3 (1980).

H. DeAngelo, L. DeAngelo & D.J. Skinner, 'Dividends and Losses', 47 *Journal of Finance* 1837 (1992).

H. DeAngelo, L. DeAngelo & R. Stulz, 'Seasoned Equity Offerings, Market Timing, and the Corporate Lifecycle', 95 *Journal of Financial Economics* 275 (2010).

H. DeAngelo, L. DeAngelo & T.M. Whited, 'Capital Structure Dynamics and Transitory Debt', 99 *Journal of Financial Economics* 235 (2011).

E. deHaan, D.F. Larcker & C. McClure, 'Long-Term Economic Consequences of Hedge Fund Activist Interventions', 24 *Review of Accounting Studies* 536 (2019).

J. Delvoie & C. Clottens, 'Accountability and Short-Termism: Some Notes on Loyalty Shares', 9 *Law and Financial Markets Review* 19 (2015).

J. Delvoie & S. Declercq, 'De invoering van meervoudig stemrecht en ~~loyauteitsstemrecht~~ in bestaande vennootschappen', 4 *Tijdschrift voor Rechtspersoon en Vennootschap – Revue pratique des sociétés* 129 (2019).

A. Demirgüç-Kunt, E. Feyen & R. Levine, 'The Evolving Importance of Banks and Securities Markets', 27 *The World Bank Economic Review* 476 (2013).

D.A. DeMott, 'Corporate Officers as Agents', 74 *Washington & Lee Law Review* 847 (2017).

D.A. DeMott, 'Perspectives on Choice of Law for Corporate Internal Affairs', 48 *Law and Contemporary Problems* 161 (1985).

H. Demsetz & K. Lehn, 'The Structure of Corporate Ownership: Causes and Consequences', 93 *Journal of Political Economy* 1155 (1985).

M.J. Denijs, *Het stemrecht in de Naamlooze Vennootschap naar Nederlands Recht* (H.J. Paris, 1936).

D.J. Denis & I. Osobov, 'Why do Firms Pay Dividends? International Evidence on the Determinants of Dividend Policy', 89 *Journal of Financial Economics* 62 (2008).

D.J. Denis, D.K. Denis & A. Sarin, 'The Information Content of Dividend Changes: Cash Flow Signaling, Overinvestment, and Dividend Clienteles', 29 *The Journal of Financial and Qualitative Analysis* 567 (1994).

B.P. Denning, 'Reconstructing the Dormant Commerce Clause Doctrine', 50 *William and Mary Law Review* 417 (2008).

G. Dent, Dual Class Capitalization: A Reply to Professor Seligman, 54 *George Washington Law Review* 725 (1986).

J. Dewey, ‘The Historic Background of Corporate Legal Personality’, 35 *Yale Law Journal* 655 (1926).

A. Dewing, *The Financial Policy of Corporations* (Ronald Press, 1953).

J. Dill, ‘National Incorporation Laws for Trusts’, 11 *Yale Law Journal* 273 (1902).

V. Dimitrov & P.C. Jain, ‘Recapitalization of One Class of Common Stock into Dual-Class: Growth and Long-Run Stock Returns’, 12 *Journal of Corporate Finance* 342 (2006).

I. Dittmann & N. Ulbricht, ‘Timing and Wealth Effects of German Dual Class Stock Unifications‘, 14 *European Financial Management* 163 (2008).

S. Djankov et al., ‘The Law and Economics of Self-Dealing’, 88 *Journal of Financial Economics* 430 (2008).

E.M. Dodd, ‘For Whom are Corporate Managers Trustees?’, 45 *Harvard Law Review* 1145 (1932).

E.M. Dodd, ‘Is Effective Enforcement of the Fiduciary Duties of Corporate Managers Practicable?’, 2 *University of Chicago Law Review* 194 (1935).

E.M. Dodd, ‘The Modem Corporation, Private Property, and Recent Federal Legislation’, 54 *Harvard Law Review* 917 (1941).

C. Doidge et al., ‘Eclipse of the Public Corporation or Eclipse of the Public Markets?’, 30 *Journal of Applied Corporate Finance* 8 (2018).

C. Doidge, ‘U.S. Cross-Listings and the Private Benefits of Control: Evidence from Dual-Class Firms’, 72 *Journal of Financial Economics* 519 (2004).

C. Doidge, A. Karolyi & R.M. Stulz, ‘The U.S. Listing Gap’, 123 *Journal of Financial Economics* 464 (2017).

D.L. Domian & D.A. Louton, ‘Diversification in Portfolios of Individual Stocks: 100 Stocks Are Not Enough’, 42 *Financial Review* 557 (2007).

L.H. Donaldson & J.H. Davis, 'Stewardship Theory or Agency Theory: CEO Governance and Shareholder Returns', 16 *Australian Journal of Management* 49 (1991).

G. Donaldson, *Corporate Debt Capacity: A Study of Corporate Debt Policy and the Determination of Corporate Debt Capacity* (Harvard University, 1961).

P.J. Dortmond, *Handboek voor de naamloze en de besloten vennootschap* (Kluwer, 2013).

W.O. Douglas & G.E. Bates, 'The Federal Securities Act of 1933', 43 *Yale Law Journal* 171 (1933).

W.O. Douglas, 'Directors Who do not Direct', 47 *Harvard Law Review* 1305 (1934).

J. Drost, *Rechten van aandeelhouders in naamlooze vennootschappen* (Daamen, 1903).

T. Drygala, 'Die neue Deutsche Übernahmeskepsis und ihre Auswirkungen auf die Vorstandspflichten nach § 33 WpÜG', 4 *Neue Zeitschrift für Gesellschaftsrecht* 1861 (2001).

J.J. du Plessis et al., *German Corporate Governance in International and European Context* (Springer, 2017).

S.H.M.A Dumoulin, 'Het bestuur van de beursvennootschap. Enige beschouwingen over bestuur, toezicht en governance', 21 *Ondernemingsrecht* 411 (2019).

S.H.M.A Dumoulin, 'Het Executive Committee over bestuur en toezicht, vennootschap en onderneming', 19 *Ondernemingsrecht* 363 (2017).

S.H.M.A. Dumoulin, 'Het monistische bestuursmodel volgens de Wet bestuur en toezicht – observaties vanuit de praktijk', 14 *Ondernemingsrecht* 488 (2012).

C.A. Dunlavy, 'Social Conceptions of the Corporation: Insights from the History of Shareholder Voting Rights', 63 *Washington & Lee Law Review* 1347 (2006).

D. Durand, 'The Cost of Capital, Corporation Finance, and the Theory of Investment: Comment', 49 *The American Economic Review* 639 (1959).

G. Dworkin, ‘Paternalism: Some Second Thoughts’, in: *Paternalism* (R. Sartorius ed., 1983).

A. Dyck & L. Zingales, ‘Private Benefits of Control: An International Comparison’, 59 *Journal of Finance* 537 (2004).

F.H. Easterbrook & D.R. Fischel, ‘Close Corporations and Agency Costs’, 38 *Stanford Law Review* 271 (1986).

F.H. Easterbrook & D.R. Fischel, ‘Limited Liability and the Corporation’, 52 *University of Chicago Law Review* 89 (1985).

F.H. Easterbrook & D.R. Fischel, ‘Voting in Corporate Law’, 26 *The Journal of Law & Economics* 395 (1983).

F.H. Easterbrook & D.R. Fischel, *The Economic Structure of Corporate Law* (Harvard University Press, 1991).

F.H. Easterbrook, ‘Two Agency-Cost Explanations of Dividends’, 74 *The American Economic Review* 650 (1984).

B.E. Eckbo, R. Giammarino & R. Heinkel, ‘Asymmetric Information and the Medium of Exchange in Takeovers: Theory and Tests’, 3 *Review of Financial Studies* 651 (1990).

U. Eckhardt, ‘Satzungsänderungen auf Grund des neuen Aktiengesetzes’, 20 *Neue Juristische Wochenschrift* 369 (1967).

P. Edelman, ‘On Legal Interpretations of the Condorcet Jury Theorem’, 31 *Journal of Legal Studies* 327 (2002).

P.H. Edelman, W. Jiang & R.S. Thomas, ‘Will Tenure Voting Give Corporate Managers Lifetime Tenure?’ (2018), available at http://www.ssrn.com/.

A. Edmans, ‘Blockholders and Corporate Governance’, 6 *Annual Review of Financial Economics* 23 (2014).

R.D. Edwards, J. Magee, W.H.C. Bassetti, *Technical Analysis of Stock Trends* (CRC Press 2007).

V. Edwards, ‘The Directive on Takeover Bids – Not Worth the Paper It’s Written On?’, 1 *European Company and Financial Law Review* 416 (2004).

H. Eidenmüller & A. Engert, 'Die angemessene Höhe des Grundkapitals der Aktiengesellschaft', 50 *Die Aktiengesellschaft* 97 (2005).

H. Eidenmüller, A. Engert & L. Hornuf, 'How Does the Market React to the Societas Europaea?', 11 *European Business Organization Law Review* 35 (2010).

H. Eidenmüller, A. Engert & L. Hornuf, 'Incorporating Under European Law: The Societas Europaea as a Vehicle for Legal Arbitrage', 10 *European Business Organization Law Review* 1 (2009).

C. von Eiff & D. Otte, 'Die Kapitalgesellschaft & Co. KGaA – eine attraktive Gestaltungsmöglichkeit', 7 *Gesellschafts- und Wirtschaftsrecht* 246 (2015).

H. von Eije & W.L. Megginson, 'Dividends and Share Repurchases in the European Union', 89 *Journal of Financial Economics* 347 (2008).

F. Eikelboom, 'Wat onder de oppervlakte bleef in de rechtspraak rond AkzoNobel', 3 *Maandblad voor Ondernemingsrecht* 231 (2017).

M.A. Eisenberg, 'Corporate Law and Social Norms', 99 *Columbia Law Review* 1253 (1999).

M.A. Eisenberg, 'The Divergence of Standards of Conduct and Standards of Review in Corporate Law', 62 *Fordham Law Review* 437 (1993).

M.A. Eisenberg, 'The Structure of Corporation Law', 89 *Columbia Law Review* 1461 (1989).

S. Eisma & J. de Keijzer, *Aandelen zonder stemrecht* (NIBE, 1994).

J. Ekkenga, 'Vorzüge und Nachteile der nennwertlosen Aktie', 49 *Wertpapier Mitteilungen* 1645 (1997).

E. Elhauge, 'Horizontal Shareholding', 109 *Harvard Law Review* 1267 (2016).

E.J. Elton & M.J. Gruber, 'Marginal Stockholder Tax Rates and the Clientele Effect', 52 *The Review of Economics and Statistics* 68 (1970).

E. Engel, Die erwerbsthätigen juristischen Personen im preusisschen Staate, insbesondere die Actiengesellschaften 15 *Zeitschrift des Königlich Preußischen Statistischen Bureaus* 449 (1875).

S. Engelke & R. Maltschew, 'Weltwirtschaftskrise, Aktienskandale und Reaktionen des Gesetzgebers durch Notverordnungen im Jahre 1931', in: *Aktienrecht im Wandel* 570 (W. Bayer & M. Habersack eds., 2007).

L. Enriques & T.H. Tröger, *The Law and Finance of Related Party Transactions* (Cambridge University Press, 2019).

L. Enriques et al., 'Related Party Transactions', in: *The Anatomy of Corporate Law. A Comparative and Functional Approach* 145 (R. Kraakman et al., 2017).

L. Enriques et al., 'The Basic Governance Structure: Minority Shareholders and Non-Shareholder Constituencies', in: *The Anatomy of Corporate Law. A Comparative and Functional Approach* 79 (R. Kraakman et al., 2017).

L. Enriques, 'A Harmonized European Company Law: Are We There Already?', 66 *International & Comparative Law Quarterly* 763 (2017).

J.L. Evans & S.H. Archer, 'Diversification and the Reduction of Dispersion: an Empirical Analysis', 23 *Journal of Finance* 761 (1968).

M. Faccio & L.H.P. Lang, 'The Ultimate Ownership of Western European Corporations', 65 *Journal of Financial Economics* 365 (2002).

C. Faden, *Das Pflichtangebot nach dem Wertpapiererwerbs- und Übernahmegesetz (WpÜG)* (Cuvillier, 2008).

E.F. Fama & H. Babiak, 'Dividend Policy: An Empirical Analysis', 63 *Journal of the American Statistical Association* 1132 (1968).

E.F. Fama & K.R. French, 'Disappearing Dividends: Changing Firm Characteristics or Lower Propensity to Pay?', 60 *Journal of Financial Economics* 3 (2001).

E.F. Fama & K.R. French, 'Financing Decisions: Who Issues Stock?', 76 *Journal of Financial Economics* 549 (2005).

E.F. Fama & K.R. French, 'Taxes, Financing Decisions, and Firm Value', 53 *Journal of Finance* 819 (1998).

E.F. Fama & K.R. French, 'Testing Trade-Off and Pecking-Order Predictions About Dividends and Debt', 15 *Review of Financial Studies* 1 (2002).

E.F. Fama & M.C. Jensen, 'Agency Problems and Residual Claims', 26 *Journal of Law & Economics* 327 (1983).

E.F. Fama & M.C. Jensen, 'Separation of Ownership and Control', 26 *Journal of Law & Economics* 301 (1983).

E.F. Fama, 'Efficient Capital Markets: A Review of Theory and Empirical Work', 25 *Journal of Finance* 383 (1970).

E.F. Fama, 'The Effects of a Firm's Investment and Financing Decisions on the Welfare of its Security Holders', 68 *The American Economic Review* 272 (1978).

A.P. Fassas, 'Tracking Ability of ETFs: Physical versus Synthetic Replication', 5 *The Journal of Index Investing* 9 (2015).

D. Feddersen, 'Die Vorzugsaktie ohne Stimmrecht: Viel geschmähtes Relikt aus vergangenen Zeiten oder nützliches Finanzierungsinstrument?', in: M. Habersack et al. (eds.), *Festschrift für Peter Ulmer zum 70. Geburtstag am 2. Januar 2003* 105 (De Gruyter, 2003).

N. Ferguson, 'The Balance of Payments Question: Versailles and After', in: M.F. Boemeke, G.D. Feldman & E. Glaser (eds.), *The Treaty of Versailles. A Reassessment After 75 Years* (Cambridge University Press, 1998).

R. Ferris & P. LeBeau, 'Elon Musk could make more than $50 billion from pay plan shareholders approved…but he has a lot to deliver' (2018), available at http://www.cnbc.com/.

T. Fett & D. Stütz, '20 Jahre Kapitalgesellschaft & Co. KGaA', 20 *Neue Zeitschrift für Gesellschaftsrecht* 1121 (2017).

G. Fey, 'Corporate Governance: Unternehmensüberwachung bei deutsche Aktiengesellschaften', 33 *Deutsches Steuerrecht* 1320 (1995).

J. Fichtner, E.M. Heemskerk & J. Garcia-Bernardo, 'Hidden Power of the Big Three? Passive Index Funds, Re-Concentration of Corporate Ownership, and New Financial Risk', 19 *Business and Politics* 298 (2017).

I. Fiegenbaum, 'The Controlling Shareholder Enforcement Gap' (2019), available at http://www.ssrn.com/.

I. Fiegenbaum, 'The Geography of MFW-Land', 41 *Delaware Journal of Corporate Law* 763 (2017).

L.C. Field & J.M. Karpoff, 'Takeover Defenses of IPO Firms', 57 *Journal of Finance* 2002 (1857).

G. Filbeck, ‘Asymmetric Information and Signaling Theory’, in: *Dividends and Dividend Policy* 163 (H. Kent Baker ed.).

L. Fink, ‘Purpose & Profit’ (2019), available at http://www.corpgov.law.harvard.edu/.

J. Fisch & S. Davidoff Solomon, ‘The Problem of Sunsets’, 99 *Boston University Law Review* 1057 (2019).

J.E. Fisch & S. Davidoff Solomon, ‘Centros, California’s ‘Women on Boards’ Statute and the Scope of Regulatory Competition’ (2019), available at http://www.ssrn.com/.

J.E. Fisch, ‘From Legitimacy to Logic: Reconstructing Proxy Regulation’, 46 *Vanderbilt Law Review* 1129 (1993).

J.E. Fisch, ‘Leave it to Delaware: Why Congress Should Stay out of Corporate Governance’, 37 *Delaware Journal of Corporate Law* 731 (2013).

J.E. Fish, ‘Measuring Efficiency In Corporate Law: The Role Of Shareholder Primacy’, 31 *The Journal Of Corporation Law* 637 (2006).

J.E. Fisch, ‘The Destructive Ambiguity of Federal Proxy Access’, 61 *Emory Law Journal* 435 (2012).

J.E. Fisch, ‘The New Titans of Wall Street: A Theoretical Framework for Passive Investors’ Shareholders’ (2018), available at http://www.ssrn.com/.

J.E. Fisch, ‘The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters’, 68 *University of Cincinnati Law Review* 1061 (2000).

D.R. Fischel ‘The Law and Economics of Dividend Policy’, 67 *Virginia Law Review* 699 (1981).

D.R. Fischel, ‘From MITE To CTS: State Anti-Takeover Statutes, the Williams Act, the Commerce Clause, and Insider Trading’, 1987 *Supreme Court Review* 47 (1987).

D.R. Fischel, ‘Organized Exchanges and the Regulation of Dual Class Common Stock’, 54 *University of Chicago Law Review* 119 (1987).

D.R. Fischel, ‘The Business Judgment Rule and the Trans Union Case’, 40 *The Business Lawyer* 1437 (1985).

C. Fischer, *The Ruhr Crisis 1923-1924* (Oxford University Press, 2003).

E.O. Fischer, R. Heinkel & J. Zechner, 'Dynamic Capital Structure Choice: Theory and Tests', 44 *Journal of Finance* 19 (1989).

H. Fleischer & K. Horn, 'Berühmte Gesellschaftsverträge unter dem Brennglas: Das Standard Oil Trust Agreement von 1882', 83 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 507 (2019).

H. Fleischer, 'Das Aktienrecht und das neue Kapitalmarktrecht', 22 *Zeitschrift für Wirtschaftsrecht* 451 (2006).

H. Fleischer, 'Konzernuntreue zwischen Straf- und Gesellschaftsrecht', 57 *Neue Juristische Wochenschrift* 2867 (2004).

H. Fleischer, 'Legal Transplants in European Company Law – The Case of Fiduciary Duties', 2 *European Company & Financial Law Review* 378 (2005).

H. Fleischer, 'Related Party Transactions bei börsennotierten Gesellschaften: Deutsches Aktien(konzern)recht und Europäische Reformvorschläge', 69 *Betriebs-Berater* 2691 (2014).

H. Fleischer, 'Ungeschriebene Hauptversammlungszuständigkeiten im Aktienrecht: Von "Holzmüller" zu "Gelatine"', 57 *Neue Juristische Wochtenschrift* 2335 (2004).

H. Fleischer, 'Unternehmensspenden und Leitungsermessen des Vorstands im Aktienrecht', 46 *Die Aktiengesellschaft* 171 (2001).

H. Fleischer, 'Zweifelsfragen der verdeckten Gewinnausschüttung im Aktienrecht', 59 *Wertpapier Mitteilungen* 909 914 (2007).

H. Fleischer, *Handbuch des Vorstandsrechts* (C.H. Beck, 2006).

S. Flow & M. Alcock, 'Analysis of SEC Shareholder Proposal Guidance' (2017), available at http://www.corpgov.law.harvard.edu/.

Z. Fluck, 'Capital Structure Decisions in Small and Large Firms: A Life-cycle Theory of Financing' (2001), available at http://www.ssrn.com/.

M. Foerster, 'Beweislastverteilung und Einsichtsrecht bei Inanspruchnahme ausgeschiedener Organmitglieder', 176 *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht* 211 (2011).

C. Fohlin, ‘The History of Corporate Ownership and Control in Germany’, in: *A History of Corporate Governance Around the World* 223 (R.K. Mock ed., 2005).

C. Fohlin, *Finance Capitalism and Germany’s Rise to Industrial Power* (Cambridge University Press, 2007).

T. Foucault & L. Frésard, ‘Cross-Listing, Investment Sensitivity to Stock Price, and the Learning Hypothesis’, 25 *Review of Financial Studies* 3305 (2012).

J. Francis, K. Schipper & L. Vincent, ‘Earnings and Dividend Informativeness When Cash Flow Rights are Separated from Voting Rights’, 39 *Journal of Accounting and Economics* 329 (2005).

M.Z. Frank & V.K. Goyal, ‘Capital Structure Decisions: Which Factors are Reliably Important?’, 38 *Financial Management* 1 (2009).

M.Z. Frank & V.K. Goyal, ‘Trade-off and Pecking Order Theories of Debt’ in: *Handbook of Corporate Finance. Empirical Corporate Finance* 136 (B. Espen Eckbo ed.).

Z. Frank & V.K. Goyal, ‘Testing the Pecking Order Theory of Capital Structure’, 67 *Journal of Financial Economics* 217 (2003).

G.M. Frankfurter & W.R. Lane, ‘The Rationality of Dividends‘, 1 *International Review of Financial Analysis* 115 (1992).

J. Franks et al., ‘The Life Cycle of Family Ownership: International Evidence’, 25 *Review of Financial Studies* 1675 (2012).

J.R. Franks & C.P. Mayer, ‘Ownership and Control of German corporations’, 14 *Review of Financial Studies* 943 (2001).

K. Frei & H. Hirte, ‘Vorzugsaktionäre und Kapitalerhöhung’, 42 *Der Betrieb* 2465 (1989).

K.R. French, ‘Presidential Address: The Cost of Active Investing’, 63 *Journal of Finance* 1537 (2008).

P. Frentrop, *Corporate Governance (1602 – 2002)* (Prometheus, 2002).

J. Fried & L.A. Bebchuk, *Pay without Performance: The Unfulfilled Promise of Executive Compensation* (Harvard University Press, 2004).

J.M. Fried & C.C.Y. Wang, 'Are Buybacks Really Shortchanging Investment?', 96 *Harvard Business Review* 88 (2018).

J.M. Fried & H. Spamann, 'Cheap-Stock Tunneling Around Preemptive Rights' (2018), available at http://www.ssrn.com/.

J.M. Fried, 'The Uneasy Case for Favoring Long-Term Shareholders', 124 *Yale Law Journal* 1554 (2015).

A. Friedman, K. Berrini & A. Rutherford, 'SEC Proposed Rule Amendments on Shareholder Proposals and Proxy Advisors: Implications for Issuers, Investors and Proxy Advisors' (2019), available at http://www.corpgov.law.harvard.edu/.

M. Friedman, *Capitalism and Freedom* (Chicago University Press 1962).

K. Frielink, *Kort begrip van het Nederlands Caribisch Rechtspersonenrecht* (Kluwer, 2017).

P.H. Friesen & D. Miller, 'A Longitudinal Study of the Corporate Life Cycle', 30 *Management Science* 1161 (1984).

R. Frydman & M.D. Goldberg, *Beyond Mechanical Markets: Asset Price, Swings, Risk, and the Role of the State* (Princeton University Press, 2011).

W.F. de Gaay Fortmann, *De onderneming in het arbeidsrecht* (H.J. Paris, 1936).

E. Gaillard, *La société anonyme de demain. La théorie institutionelle et le fonctionnement de la société anonyme* (Librairie du Recueil Sirey, 1932).

J. Galavazzi & H. van Wilsum, 'In Nederland nu ook Non-Voting Shares', 66 *De Naamlooze Vennootschap* 130 (1988).

J.G.C.M. Galle, *Consensus on the Comply or Explain Principle Within the EU Corporate Governance Framework: Legal And Empirical Research* (Kluwer, 2012).

N. Gantchev, 'The Costs of Shareholder Activism: Evidence from a Sequential Decision Model', 107 *Journal of Financial Economics* 610 (2013).

X. Gao, J.R. Ritter & Z. Zhu, 'Where Have All the IPOs Gone?', 48 *Journal of Financial and Quantitative Analysis* 1663 (2013).

M.J. Garcia et al. (eds.), *The Constitution of the United States of America. Analysis and Interpretation* (US Government Publishing Office, 2016).

S.B. Garcia Nelen, 'Managementparticipatie in private equity transacties: certificaten of stemrechtloze aandelen?', 15 *Ondernemingsrecht* 511 (2013).

K. Geens & C. Clottens, 'One Share-One Vote: Fairness, Efficiency and (the Case for) EU Harmonisation Revisited' (2010), available at http://www.ssrn.com/.

O. Gelderblom, A. de Jong & J. Jonker, 'The Formative Years of the Modern Corporation: The Dutch East India Company VOC, 1602–1623', 73 *The Journal of Economic History* 1050 (2013).

M. Gelter, 'Taming or Protecting the Modern Corporation – Shareholder-Stakeholder Debates in a Comparative Light', 7 *New York University Journal of Law & Business* 641 (2011).

E. Gepken-Jager, 'Verenigde Oost-Indische Compagnie (VOC)', in: *VOC 1602-2002. 400 Years of Company Law* 41 (E. Gepken-Jager, G. van Solinge & L. Timmerman eds., 2005).

E. Gepken-Jager, G. van Solinge & L. Timmerman, *VOC 1602-2002. 400 Years of Company Law* (Kluwer Law International, 2005).

J-F. Gerkens, *Droit privé comparé* (Larcier, 2007).

R. van Gestel, H-W. Micklitz & H. Poiares Maduro, 'Methodology in the New Legal World' (2012), available at http://cadmus.eui.eu/.

O. von Gierke, *Die Genossenschaftstheorie und die Deutsche Rechtsprechung* (Weidmann, 1887).

T. Giersch, 'Marktführer. Deutschlands geheime Champions' (2012), available at http://handelsblatt.com/.

R.J. Gilson & A. Schwartz, 'Constraints on Private Benefits of Control: Ex Ante Control Mechanisms versus Ex Post Transaction Review', 169 *Journal of Institutional and Theoretical Economics* 160 (2013).

R.J. Gilson & A. Schwartz, 'Corporate Control and Credible Commitment', 43 *International Review of Law and Economics* 119 (2015).

R.J. Gilson & B.S. Black, 'Venture Capital and the Structure of Capital Markets: Banks versus Stock Markets', 47 *Journal of Financial Economics* 243 (1998).

R.J. Gilson & C.K. Whitehead, 'Deconstructing Equity: Public Ownership, Agency Costs, And Complete Capital Markets', 108 *Columbia Law Review* (2008).

R.J. Gilson & J.N. Gordon, 'Controlling Controlling Shareholders', 152 *University of Pennsylvania Law Review* 785 (2003).

R.J. GIlson & J.N. Gordon, 'The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights', 113 *Columbia Law Review* 863, 874 (2013)

R.J. Gilson & R.H. Kraakman, 'Market Efficiency after the Financial Crisis: It's Still a Matter of Information Costs', 100 *Virginia Law Review* 313 (2012).

R.J. Gilson & R.H. Kraakman, 'The Mechanisms of Market Efficiency', 70 *Virginia Law Review* 549 (1984).

R.J. Gilson, 'Controlling Shareholders and Corporate Governance: Complicating the Comparative Taxonomy', 119 *Harvard Law Review* 1641 (2006).

R.J. Gilson, 'Evaluating Dual Class Common Stock: The Relevance of Substitutes', 73 *Virginia Law Review* 807 (1987).

R.J. Gilson, 'From Corporate Law to Corporate Governance' (2017), available at http://www.ssrn.com/.

R.J. Gilson, 'The Nordic Model of Corporate Governance: the Role of Ownership', in: *The Nordic Corporate Governance Model* 94 (P. Lekvall ed., 2014).

M.J. van Ginneken & L. Timmerman, 'De betekenis van het evenredigheidsbeginsel voor het ondernemingsrecht', 13 *Ondernemingsrecht* 601 (2011).

M.J. van Ginneken, 'De 'Sarbanes-Oxley Act of 2002': Het Amerikaanse antwoord op Enron (I)', 5 *Ondernemingsrecht* 63 (2003).

M.J. van Ginneken, 'De 'Sarbanes-Oxley Act of 2002': Het Amerikaanse antwoord op Enron (II)', 6 *Ondernemingsrecht* 150 (2004).

M.J. van Ginneken, *Vijandige overnames: de rol van de vennootschapsleiding in Nederland en de Verenigde Staten* (Kluwer, 2010).

B. Glover, 'The Expected Cost of Default', 119 *Journal of Financial Economics* 284 (2016).

T.P. Glynn, ‘Delaware’s VantagePoint: The Empire Strikes Back in the Post-Post-Enron Era’, 102 *Northwestern University Law Review* 91 (2008).

R. von Godin, ‘Das Nachbezugsrecht stimmrechtsloser Vorzugsaktien’, 5 *Der Betrieb* 1077 (1952).

M. Goergen, L. Renneboog & L. Correia da Silva, ‘When do German Firms Change Their Dividends?’, 11 *Journal of Corporate Finance* 375 (2005).

W. Goette, ‘Organisationspflichten in Kapitalgesellschaften zwischen Rechtspflicht und Opportunität’, 175 *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht* 388 (2011).

W. Goette & M. Habersack (eds.), *Münchener Kommentar zum Aktiengesetz* (Beck, 2016).

M.D. Goldhaber, ‘Marty Lipton’s War’, 35 *The American Lawyer* 44 (2015).

P.A. Gompers, J. Ishii & A. Metrick, ‘Corporate Governance and Equity Prices’, 118 *Quarterly Journal of Economics* 107 (2003).

P.A. Gompers, J. Ishii & A. Metrick, ‘Extreme Governance: An Analysis of Dual-Class Firms in the United States’, 23 *Review of Financial Studies* 1051 (2010).

K.E. Goodpaster, ‘Business Ethics And Stakeholder Analysis’, 1 *Business Ethics Quarterly* 53 (1991).

M.J. Gordon & E. Shapiro, ‘Capital Equipment Analysis: The Required Rate of Profit’, 3 *Management Science* 102 (1956).

J.N. Gordon, ‘Institutions as Relational Investors: A New Look at Cumulative Voting’, 94 *Columbia Law Review* 124 (1994).

J.N. Gordon, ‘Mandatory Structure of Corporate Law’, 89 *Columbia Law Review* 1549 (1989).

J.N. Gordon, ‘Proxy Contests in an Era of Increasing Shareholder Power: Forget Issuer Proxy Access and Focus on E-Proxy’, 61 *Vanderbilt Law Review* 475 (2008).

J.N. Gordon, ‘The Rise of Independent Directors in the United States, 1950-2005: of Shareholder Value and Stock Market Prices’, 59 *Stanford Law Review* 1465 (2007).

J.N. Gordon, ‘Ties that Bond: Duel Class Common Stock and the Problem of Shareholder Choice’, 76 *California Law Review* 3 (1988).

M.J. Gordon, ‘Corporate Finance under the MM Theorems’, 18 *Financial Management* 19 (1989).

M.J. Gordon, ‘Dividends, Earnings and Stock Prices’, 41 *Review of Economics and Statistics* 99 (1959).

M.J. Gordon, ‘Optimal Investment and Financing Policy’, 18 *Journal of Finance* 264 (1963).

M.J. Gordon, ‘The Savings, Investment and Valuation of the Corporation’, 44 *Review of Economics and Statistics* 37 (1962).

J.M. Gorris, L.A. Hamermesh & L.E. Strine, ‘Delaware Corporate Law and The Model Business Corporation Act: a Study in Symbiosis’, 74 *Law and Contemporary Problems* 107 (2011).

Z. Goshen & A. Hamdani, ‘Corporate Control and Idiosyncratic Vision’, 125 *Yale Law Journal* 560 (2016).

Z. Goshen & A. Hamdani, ‘Corporate Control and the Limits of Judicial Review’ (2019), available at http://www.ssrn.com/.

Z. Goshen & A. Hamdani, ‘Corporate Control and the Regulation of Controlling Shareholders’, in: L. Enriques & T.H. Tröger (eds.), *The Law and Finance of Related Party Transactions* (Cambrige University Press, 2019).

Z. Goshen & G. Parchomovsky, ‘The Essential Role of Securities Regulation’, 55 *Duke Law Journal* 711 (2006).

Z. Goshen & R. Squire, ‘Principal Costs: A New Theory for Corporate Law and Governance’, 117 *Columbia Law Review* 767 (2017).

Z. Goshen & S. Hannes, ‘The Death of Corporate Law’, 94 *New York University Law Review* 263 (2019).

Z. Goshen, ‘Shareholder Dividend Options’, 104 *Yale Law Journal* 881 (1995).

J. Götz, ‘Corporate Governance multinationaler Konzerne und deutsches Unternehmensrecht’, 32 *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 1 (2003).

C. Götze, 'Aktienrechtsnovelle – und ein (vorläufiges) Ende!', 19 *Neue Zeitschrift für Gesellschaftsrecht* 48 (2016).

M.Th. Goudsmit, 'De aandeelenmaatschappij en haar bestuur', 30 *Nieuwe bijdragen voor rechtsgeleerdheid en wetgeving* 190 (1880).

T. de Graaf, *Voor Handel en Maatschappij. Geschiedenis van de Nederlandsche Handel-Maatschappij, 1824-1964* (Universiteit Utrecht, 2012).

S.J. Van der Graaf, 'Understanding the Dutch Poison Pill' (2018), available at http://corgov.law.harvard.edu/.

B. Graham & D. Dodd, *Security analysis* (McGraw-Hill, 1934).

J. Graham & A. Kumar, 'Do Dividend Clienteles Exist? Evidence on Dividend Preferences of Retail Investors', 61 *Journal of Finance* 1305 (2006).

B. Graham, *The Intelligent Investor* (Harper, 1949).

J.R. Graham, 'How Big are the Tax Benefits of Debt?', 55 *Journal of Finance* 1901 (2000).

J.R. Graham, 'Taxes and Corporate Finance: A Review', 16 *Review of Financial Studies* 1075 (2003).

J.R. Graham, M.T. Leary & M.R. Roberts, 'A Century of Capital Structure: The Leveraging of Corporate America', 118 *Journal of Financial Economics* 658 (2015).

J.R. Graham, R. Michaely & M.R. Roberts, 'Do Price Discreteness and Transactions Costs Affect Stock Returns? Comparing Ex-Dividend Pricing Before and After Decimalization', 58 *Journal of Finance* 2611 (2003).

J.R. Graham, 'Taxes and Corporate Finance', in: *Handbook of Corporate Finance. Empirical Corporate Finance* 62 (B. Espen Eckbo ed.).

C. Grandy, 'New Jersey Corporate Chartermongering, 1875-1929', 49 *The Journal of Economic History* 677 (1989).

S.J. Griffith & D.S. Lund, 'Conflicted Mutual Fund Voting in Corporate Law', 99 *Boston University Law* Review 1151 (2019).

S.J. Griffith, ‘Product Differentiation in the Market for Corporate Law’, in: *Can Delaware Be Dethroned? Evaluating Delaware’s Dominance of Corporate Law* 17 (S.M. Bainbridge et al. eds, 2018).

Y. Grinstein & R. Michaely, ‘Institutional Holdings and Payout Policy’, 60 *Journal of Finance* 1389 (2005).

W.C.L. Van der Grinten, ‘De aandeelhoudersvergadering en de NV’, in: *Uit het recht. Rechtsgeleerde opstellen aangeboden aan mr. P.J. Verdam* (Kluwer, 1971).

W.C.L. van der Grinten, ‘Rechtspersonen’, in: *Ter eerste kennismaking. Zes voordrachten over de eerste vier boeken van het ontwerp voor een nieuw Burgerlijk Wetboek* (A.R. de Bruin et al. eds., 1955).

W.C.L. van der Grinten, ‘Uitgifte van nieuwe aandelen en voorkeursrecht’, 27 *De Naamlooze Vennootschap* 121 (1949).

W.C.L. van der Grinten, ‘Winstbewijzen als financieringsinstrument’, in: *De bankier als jurist tegen wil en dank: bundel aangeboden aan Mr. Drs. H. Langman ter gelegenheid van zijn aftreden als lid van de Raad van Bestuur van de ABN AMRO-combinatie op 28 februari 1991* 125 (Kluwer, 1991).

C. Groen & H. Koster, ‘De speciale overnamecommissie in nationaal en rechtsvergelijkend perspectief’, 3 *Maandblad voor Ondernemingsrecht* 259 (2017).

E. van Groeningen, ‘Bescherming tegen overvallen: zakelijk nodig’, 67 *De Naamlooze Vennootschap* 139 (1989).

C. de Groot, A. van Nood & F. Lambert, ‘The ABN AMRO Ruling: Some Commentaries’ 4 *European Company Law* 168 (2007).

S.J. Grossman & J.E. Stiglitz, ‘On the Impossibility of Informationally Efficient Markets’, 70 *The American Economic Review* 393 (1980).

S.J. Grossman & O.D. Hart, ‘One Share-One Vote and the Market for Corporate Control’, 20 *Journal of Financial Economics* 175 (1988).

G. Grullon et al., ‘Dividend Changes do not Signal Changes in Future Profitability’, 78 *Journal of Business* 1659 (2005).

G. Grullon, R. Michaely & B. Swaminathan, ‘Are Dividend Changes a Sign of Firm Maturity?’, 75 *Journal of Business* 387 (2002).

G. Grullon, Y. Larkin & R. Michaely, ‘Are U.S. Industries Becoming More Concentrated?’ (2018), available at http://www.ssrn.com/.

J.A. Grundfest, ‘Just Vote No: A Minimalist Strategy for Dealing with Barbarians inside the Gates’, 45 *Stanford Law Review* 857 (1993).

J.A. Grundfest, ‘The SEC’s Proposed Proxy Access Rules: Politics, Economics, and the Law’, 65 *The Business Lawyer* 361 (2010).

B. Grunewald, ‘Rückverlagerung von Entscheidungskompetenzen der Hauptversammlung auf den Vorstand’, 35 *Die Aktiengesellschaft* 133 (1990).

T.W. Guinnane, ‘German company law 1794-1897’, in: *Research Handbook on the History of Corporate and Company Law* (Harwell Wells, ed.).

M.D. Guttentag, ‘Protection from What: Investor Protection and the JOBS Act’, 13 *University of California Davis Business Law Journal* 207 (2013).

S.C. Haan, ‘Federalizing the Foreign Corporate Form’, 85 *St. John’s Law Review* 925 (2011).

S.C. Haan, ‘Shareholder Proposal Settlement and the Private Ordering of Public Elections’, 126 *Yale Law Journal* 262 (2016).

M. Habersack, ‘Mitwirkungsrechte der Aktionäre nach Macroton und Gelatine’, 50 *Die Aktiengesellschaft* 137 (2005).

M. Habersack, ‘The Non-Frustration Rule and the Mandatory Bid Rule – Cornerstones of European Takeover Law?’, 15 *European Company and Financial Law Review* 1 (2018).

M. Habersack, ‘Zur Corporate Governance der Kapitalgesellschaft & Co. KGaA’, 35 *Zeitschrift für Wirtschaftsrecht* 1453 (2019).

S. Haffner, *The Rise and Fall of Prussia* (Weidenfeld & Nicolson, 1980).

F.A. van Hall, *Verdediging van de Onafhankelijkheid des Handels, bij het oprigten van naamlooze maatschappijen* (Erven H. Gartman, 1834).

A. Hamdani & Y. Yafeh, ‘Instiutional Investors as Minority Shareholders’ 17 *Review of Finance* 691 (2013).

B. Hamel, ‘An Examination of the Jumpstart Our Business Startups Act: How JOBS Act Exemptions May Help Startups and Hurt Investors’, 17 *Houston Business and Tax Law Journal* 79 (2016).

L.A. Hamermesh, 'The Policy Foundations of Delaware Corporate Law', 106 *Columbia Law Review* 1749 (2006).

J.J.A. Hamers, *Verpanding van aandelen en de beslotenheid van kapitaalvennootschappen* (Deventer, 1996).

R.W. Hamilton, 'The Revised Model Business Corporation Act: Comment and Observation: Reflections of a Reporter', 63 *Texas Law Review* 1455 (1985).

J.C. Handley, 'Dividend Policy: Reconciling DD with MM', 87 *Journal of Financial Economics* 528 (2008).

D. Hansemann, *Die Eisenbahnen und deren Aktionäre in ihrem Verhältniß zum Staat* (Renger'sche Verlagsbuchhandlung, 1837).

H. Hansmann & M. Pargendler, 'The Evolution of Shareholder Voting Rights: Separation of Ownership and Consumption', 123 *The Yale Law Journal* 948 (2014).

H. Hansmann & R. Kraakman, 'The End of History for Corporate Law' 89 *Georgetown Law Journal* 439 (2001).

H. Hansmann, 'How Close is The End of History?', 32 *The Journal of Corporation Law* 745 (2006).

H. Hansmann, R. Kraakman & R. Squire, 'Law and the Rise of the Firm', 119 *Harvard Law Review* 1333 (2006).

S. Harbarth & H. Freiherr von Plettenberg, 'Aktienrechtsnovelle 84 Punktuelle Fortentwicklung des Aktienrechts', 5 *Die Aktiengesellschaft* 145 (2016).

M. Harris & A. Raviv, 'The Theory of Capital Structure', 46 *Journal of Finance* 297 (1991).

R. Harris, 'The History of Team Production Theory', 38 *Seattle University Law Review* 537 (2015).

R. Harris, 'The Transplantation of the Legal Discourse on Corporate Personality Theories: From German Codification to British Political Pluralism and American Big Business', 63 *Washington & Lee Law Review* 1421 (2006).

R.D.F. Harris, 'Stock Markets and Development: a Re-assessment', 41 *European Economic Review* 139 (1997).

A.S. Hartkamp & C.H. Sieburgh, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 6. Verbintenissenrecht. Deel III. Algemeen overeenkomstenrecht* (Kluwer, 2014).

J. Haskell Murray, 'Social Enterprise Innovation: Delaware's Public Benefit Corporation Law', 4 *Harvard Business Law Review* 345 (2014).

J. Haskell Murray, 'The Social Enterprise Law Market', 75 *Maryland Law Review* 541 (2016).

P.T. Hasler, 'RWE wandelt endlich die Vorzüge in Stämme um' (2018), available at http://www.gevestor.de/.

B.Th.W. van Hasselt, *De literatuur over het wetsontwerp op de naamlooze vennootschappen, critisch samengevat* (Vilders, 1919).

R.A. Haugen & L.W. Senbet, 'The Insignificance of Bankruptcy Costs to the Theory of Optimal Capital Structure', 33 *Journal of Finance* 383 (1978).

M. Hauriou, 'La théorie de l'institution et de la fondation,' 2 *Cahiers de la Nouvelle Journée* 2 (1925).

S. Hauser & B. Lauterbach, 'The Value of Voting Rights to Majority Shareholders: Evidence from Dual-Class Stock Unifications', 17 *The Review of Financial Studies* 1167 (2004).

F. Haussmann, *Vom Aktienwesen und vom Aktienrecht* (Bensheimer, 1928).

D. Heath, 'Do Index Funds Monitor?' (2018), available at http://www.ssrn.com/.

D. Heckelmann, 'Die uneinheitliche Abstimmung bei Kapitalgesellschaften', 170 *Archiv für die civilistische Praxis* 306 (1970).

G.J.J. Heerma van Voss, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 7. Bijzondere overeenkomsten. Deel V. Arbeidsovereenkomst* (Wolters Kluwer, 2015).

K. Heider, 'Einführung der nennwertlosen Aktie in Deutschland anläßlich der Umstellung des Gesellschaftsrecht auf den Euro', 43 *Die Aktiengesellschaft* 1 (1998).

E.J.J. van der Heijden, 'Kunst-stroo', 7 *De Naamlooze Vennootschap* 321 (1928).

E.J.J. van der Heijden, *De ontwikkeling van de Naamlooze Vennootschap in Nederland voor de codificatie* (Van der Vecht, 1908).

E.J.J. van der Heijden, *Het wetsontwerp, 1925 op de naamlooze vennootschappen* (Romen, 1926).

H.J. den Heijer, *De geoctrooieerde Compagnie* (Kluwer, 2005).

H.-J. Hellwig & C. Behme, 'Gemeinschaftsrechtliche Probleme der deutschen Mitbestimmung', 54 *Die Aktiengesellschaft* 261 (2009).

H.-J. Hellwig, 'German Corporate Co-Determination of Employees and EU Law – The Opinion of the Advocate-General of the CJEU of 4 May 2017' (2017), available at http://www.law.ox.ac.uk/.

W.O. Henderson, *The Zollverein* (Cambridge University Press, 1939).

J. Hendry, 'Legal comparison and the (im)possibility of legal translation', in: *Comparative Law - Engaging Translation* 87 (S. Glanert ed.).

G. Henn, *Handbuch des Aktienrechts* (C.F. Müller, 2007).

B. Hennerkes & P. May, 'Überlegungen zur Rechtsformwahl im Familienunternehmen', 42 *Der Betrieb* 537 (1988).

M. Henssler & H. Wiedemann, 'Die Aktiengesellschaft im System des deutschen Gesellschaftsrechts', in: *Aktienrecht im Wandel* 1 (Mohr Siebeck, 2007).

T. Hering & M. Olbrich, 'Bewertung von Mehrstimmrechten: Zum Unsicherheitsproblem bei der Entschädigung nach § 5 EGAktG. Anmerkungen zum Beitrag von Arnold, DStR 2003 784-788', 41 *Deutsches Steuerrecht* 1579 (2003).

T. Hering & M. Olbrich, 'Zur Bewertung von Mehrstimmrechten', 53 *Zeitschrift für betriebswirtschaftliche Forschung* 20 (2001).

H. Hershkoff & M. Kahan, 'Forum Selection Provisions in Corporate Contracts', 93 *Washington Law Review* 265 (2018).

J. Heuschmid & D. Ulber, 'Unternehmensmitbestimmung auf dem Prüfstand des EUgH', 19 *Neue Zeitschrift für Gesellschaftsrecht* 102 (2016).

P.L. Hezer, 'Het special committee naar Amerikaans model bij openbare biedingen', 3 *Maandblad voor Ondernemingsrecht* 266 (2017).

J.P. Hicks, 'Continental, Still Digesting General Tire, Battles Pirelli' (1991), available http://www.wsj.com/.

J.R. Hicks, 'The Foundations of Welfare Economics', 49 *The Economic Journal* 696 (1939).

J.B.S. Hijink, 'Regulering van de beursvennootschap: over Deel 5 Wft als rommelkamer en ontwikkelingen buiten Boek 2 BW', 21 *Ondernemingsrecht* 834 (2019).

J.B.S. Hijink, *Publicatieverplichtingen voor beursvennootschappen* (Kluwer, 2010).

C.A. Hill & A.M. Pacces, 'The Neglected Role of Justification Under Uncertainty in Corporate Governance and Finance', 3 *Annals of Corporate Governance* 276 (2018).

A.O. Hirschman, 'Exit, Voice and the Fate of the German Democratic Republic: An Essay in Conceptual History', 45 *World Politics* 2 (1993).

A.O. Hirschman, *Exit, Voice, and Loyalty, Responses to Decline in Firms, Organizations, and States* (Harvard University Press, 1970).

S. Hirst & K. Kastiel, 'Corporate Governance by Index Exclusion', 99 *Boston University Law Review* 1229 (2019).

H. Hirte, 'Der Nennwert der Aktie – EG-Vorgaben und Situation in anderen Ländern', 43 *Wertpapier Mitteilungen* 753 (1991).

H. Hirte, P.O. Mülbert & M. Roth (eds.), *Großkommentar Aktiengesetz* (De Gruyter, 2017).

G. Hoberg & N.R. Prabhala, 'Disappearing Dividends, Catering and Risk', 22 *The Review of Financial Studies* 79 (2009).

M.C. Hoeba, 'De tegenstrijdigbelangregeling(en) in het enquêterecht. De Intergamma- en Staphorst beschikkingen nader bekeken', 4 *Maandblad voor Ondernemingsrecht* 173 (2018).

M. van Hoecke & M. Warrington, 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law', 47 *International and Comparative Law Quarterly* 495 (1998).

M. van Hoecke, 'Methodology of Comparative Legal Research', 5 *Law & Method* 1 (2015).

M.A. Hofbauer, *Die GmbH & Co. KG in der Praxis: Recht und Besteuerung* (Gabler, 1970).

S. Hofer, 'Das Aktiengesetz von 1884 – ein Lehrstück für prinzipielle Schutzkonzeptionen', in: *Aktienrecht im Wandel* 388 (Mohr Siebeck, 2007).

M. Hoffmann-Becking, 'Das Recht des Aufsichtsrats zur Prüfung durch Sachverständige nach § 111 Abs. 2 Satz 2 AktG', 40 *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 136 (2011).

M. Hoffmann-Becking, 'Gesetz zur „kleinen AG" – unwesentliche Randkorrekturen oder grundlegende Reform?', 11 *Zeitschrift für Wirtschaftsrecht* 1 (1995).

M. Hoffmann-Becking, 'Vorstandsvergütungen nach Mannesmann', 9 *Neue Zeitschrift für Gesellschaftsrecht* 127 (2006).

M. Hoffmann-Becking, 'Zur rechtlichen Organisation der Zusammenarbeit im Vorstand der AG', 27 *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 497 (1998).

R.J. Holland, 'Delaware's Business Courts: Litigation Leadership', 34 *The Journal of Corporation Law* 771 (2009).

M. Holmén & J.D. Knopf, 'Minority Shareholder Protections and the Private Benefits of Control for Swedish Mergers', 39 *Journal of Financial and Qualitative Analysis* 167 (2004).

M. Holmen, J.D. Knopf & S. Peterson, 'Inside Shareholders' Effective Tax Rates and Dividends', 32 *Journal of Banking and Finance* 1860 (2008).

D.R. Honabach, 'Smith v. Van Gorkom: Managerial Liability and Exculpatory Clauses – A Proposal to Fill the Gap of the Missing Officer Protection', 45 *Washburn Law Journal* 307 (2006).

C. Honée, 'Moet Boek 2 worden ingevoerd?', 130 *Weekblad voor Privaatrecht, Notariaat en Registratie* 373 (1999).

C.E. Honée, 'Het Executive Committee, haken en ogen aan een nieuwe trend', 16 *Ondernemingsrecht* 119 (2014).

H.J.M.N. Honée, 'Commissarissen, gezanten uit Niemandsland?', 75 *De Naamlooze Vennootschap* 276 (1996).

H.J.M.N. Honée, 'De ontwikkeling van het vennootschapsrecht', in: O. Moorman van Kappen et al., *150 jaar Wetboek van Koophandel: het verleden en de toekomst* 40 (Kluwer, 1989).

C. Höpfner, 'Der fehlerhafte Aufsichtsrat. Zur Anwendbarkeit der Lehre vom fehlerhaft bestellten Organ auf die Beschlussfassung im Aufsichtsrat', 45 *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 505 (2016).

K.J. Hopt & P.C. Leyens, 'Board Models in Europe - Recent Developments of Internal Corporate Governance Structures in Germany, the United Kingdom, France, and Italy', 1 *European Company and Financial Law Review* 135 (2004).

K. Hopt, 'Comparative Company Law', in: *The Oxford Handbook of Comparative Law* 1161 (M. Reimann & R. Zimmermann eds.).

K.J Hopt, 'Vergleichende Corporate Governance – Forschung und internationale Regulierung', 175 *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* 444 (2011).

K.J. Hopt, 'Aktionärskreis und Vorstandsneutralität', 22 *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 534 (1993).

K.J. Hopt, 'Labor Representation on Corporate Boards: Impacts and Problems for Corporate Governance and Economic Integration in Europe', 14 *International Review of Law & Economics* 203 (1994).

K.J. Hopt, 'The German Law of and Experience with the Supervisory Board' (2016), available at http://papers.ssrn.com/.

K.J. Hopt, 'The German Two-Tier Board: Experience, Theories, Reforms' in: *Comparative Corporate Governance – The State of the Art and Emerging Research* 228 (K.J. Hopt et al., eds.).

E.S. Hotchkiss et al., 'Bankruptcy and the Resolution of Financial Distress', in: *Handbook of Corporate Finance. Empirical Corporate Finance* 260 (B. Espen Eckbo ed.).

D. van Houten, *Het stemrecht in de naamlooze vennootschap* (Mouton, 1889).

H.T.C. Hu & B.S. Black, 'Hedge Funds, Insiders, And The Decoupling Of Economic And Voting Ownership: Empty Voting And Hidden (Morphable) Ownership', 13 *Journal of Corporate Finance* 343 (2007).

H.T.C. Hu & B.S. Black, 'The New Vote Buying: Empty Voting and Hidden (Morphable) Ownership', 79 *Southern California Law Review* 811 (2006).

T. Hua, 'Growing Pains at Altice Prompt New Share Structure' (2015), available at http://blogs.wsj.com/.

B.M. Huber, J.A. Hall & L. Goldberg, 'Legal Implications of The Business Roundtable Statement on Corporate Purpose' (2019), available at http://www.corpgov.law.harvard.edu/.

F. Hubik, '15 Jahre Mannesmann-Übernahme. Wie der "Haifisch" das "Hirn" besiegte' (2015), available http://www.handelsblatt.com/.

S.S. Huebner, 'Scope and Functions of the Stock Market', 35 *The Annals of the American Academy of Political Science* 1 (1910).

A. Hueck, *Der Treuegedanke im modernen Privatrecht* (Bayerischen Akademie der Wissenschaften, 1947).

U. Hüffer, 'Das Leitungsermessen des Vorstands in der Aktiengesellschaft', in: *Festschrift für Thomas Raiser zum 70. Geburtstag* 163 (R. Damm, P. Heermann & R. Veil eds., 2005).

U. Hüffer, 'Die Unabhängigkeit von Aufsichtsratsmitgliedern nach Ziffer 5.4.2 DCGK', 27 *Zeitschrift für Wirtschaftsrecht* 637 (2006).

U. Hüffer & J. Koch (eds.), *Aktiengesetz* (Beck, 2018).

C. Hurt, 'The Private Ordering of Publicly Traded Partnerships', in: *Can Delaware Be Dethroned? Evaluating Delaware's Dominance of Corporate Law* 201 (S.M. Bainbridge et al. eds, 2018).

E. Husserl, *Die Krisis der europäischen Wissenschaften und die transzendentale Phänomenologie: eine Einleitung in die phänomenologische Philosophie* (Martinus Nijhoff, 1954).

F.M. Huussen-de Groot, *Rechtspersonen in de negentiende eeuw. Een studie van privaatrechtelijke rechtspersonen in de negentiende-eeuwse wetgeving van Frankrijk, Nederland en Duitsland* (W.E.J. Tjeenk Willink, 1976).

D. Ibbetson, 'Comparative legal history', in: *Making Legal History: Approaches and Methodologies* 131 (A. Musson & C. Stebbings eds.).

P. Illiev & M. Lowry, 'Are Mutual Funds Active Voters?' 28 *Review of Financial Studies* 446 (2015).

F.J.P van den Ingh, *Certificering en certificaat van aandeel bij de besloten vennootschap* (Kluwer, 1991).

F.J.P. van den Ingh & R.G.J. Nowak, *Vereenvoudiging en flexibilisering BV-recht deel I. De pre-parlementaire geschiedenis* (Kluwer, 2006).

R.J. Jackson, 'Perpetual Dual-Class Stock: The Case Against Corporate Royalty' (2018), available at http://www.corpgov.law.harvard.edu/.

M.D. Jaffe, G. Rodgers & H. Gutierrez, 'Spotify Case Study: Structuring and Executing a Direct Listing' (2018), available at http://www.corpgov.law.harvard.edu/.

G. Jahr & W. Stützel, *Aktien ohne Nennbetrag: ein Beitrag zur Uberwindung von Missverständnissen im Aktienwesen* (Knapp, 1963).

G.A. Jarrell & A.B. Poulsen, 'Dual-Class Recapitalizations as Antitakeover Mechanisms – The Recent Evidence' 20 *Journal of Financial Economics* 129 (1988).

M.M. Jennings, B.K. Childers & R.J. Kudla, 'Federalism to an Advantage: the Demise of State Blue Sky Laws Under the Uniform Securities Act', 19 *Akron Law Review* 395 (1986).

M.C. Jensen & W.H. Meckling, 'Theory of the Firm. Managerial Behaviour, Agency Costs and Ownership Structure', 3 *Journal of Financial Economics* 305 (1976).

M. Jensen, 'Eclipse of the Public Corporation', 67 *Harvard Business Review* 61 (1989).

M.C. Jensen, 'Value Maximization, Stakeholder Theory, and the Corporate Objective Function', 22 *Journal of Applied Corporate Finance* 16 (2001).

R. von Jhering, *Der Zweck im Recht* (Breitkopf & Härtel, 1877).

B. Johann & J. Masuhr, 'Lukrative Wette' (2001), available at http://www.focus.de/.

S. Johnson et al., 'Tunneling', 90 *The American Economic Review* 22 (2000).

L. Johnson, 'Sovereignty over Corporate Stock', 16 *Delaware Journal of Corporate Law* 485 (1991).

L.P.Q. Johnson, & D.K. Millon, 'Corporate Law after Hobby Lobby', 70 *The Business Lawyer* 1 (2015).

L.P.Q. Johnson, 'Unsettledness in Delaware Corporate Law: Business Judgment Rule, Corporate Purpose', 38 *Delaware Journal of Corporate Law* 405 (2013).

W.C. Johnson, J.M. Karpoff & S. Yi, 'The Lifecycle Effects of Firm Takeover Defenses' (2017), available at http://www.ssrn.com/.

R.M. Jones, 'Does Federalism Matter? Its Perplexing Role in the Corporate Governance Debate', 41 *Wake Forest Law Review* 879 (2006).

A. de Jong & A. Roëll, 'Financing and Control in The Netherlands: A Historical Perspective', in: *A History of Corporate Governance around the World: Family Business Groups to Professional Managers* 467 (R.K. Morck, ed., 2005).

B.J. de Jong, 'Lessen uit het vernieuwde Britse vennootschapsrecht voor de modernisering van het Nederlandse NV-recht', 16 *Ondernemingsrecht* 61 (2014).

J.M. de Jongh, 'Aandeelhouders gebonden aan eisen redelijkheid en billijkheid', 88 *Nederlands Juristenblad* 2622 (2012).

J.M. de Jongh, 'Een maatschappelijke resultante. Het vennootschapsbelang op de golven van maatschappelijke verandering', in: B. Kemp, H. Koster & C.A. Schwarz, *De betekenis en functies van het vennootschappelijk belang* (Kluwer, 2019).

J.M. de Jongh, 'Het loyaliteitsstemrecht. Een terreinverkenning', 11 *Ondernemingsrecht* 442 (2009).

J.M. de Jongh, 'Privatisering, bescherming en algemeen belang, De voorgenomen beursgang van ABN AMRO', 146 *Weekblad voor Privaatrecht, Notariaat en Registratie* 118 (2015).

J.M. de Jongh, 'Shareholder Activists Avant la Lettre: The "Complaining Participants" in the Dutch East India Company, 1622–1625', in: J.G.S. Koppell (eds.), *Origins of Shareholder Advocacy* 61 (Palgrave Macmillan, 2011).

J.M. de Jongh, ‘Tegenstrijdig belang en transacties met verbonden partijen’, 21 *Ondernemingsrecht* 892 (2019).

J.M. de Jongh, *Tussen societas en universitas. De beursvennootschap en haar aandeelhouders in historisch perspectief* (Kluwer, 2014).

J.M. de Jongh, *Twee eeuwen tegenstrijdig belang* (Boom, 2019).

J. Jonker & J.L. van Zanden, *Van Nieuwkomer tot marktleider, 1890-1939. Geschiedenis van Koninklijke Shell, deel 1* (Boom, 2007).

J. Jonker, *Merchants, Bankers, Middlemen. The Amsterdam money market during the First half of the 19th century* (Neha, 1996).

B.D. Jordan, S. Kim & M.H. Liu, ‘Growth Opportunities, Short-Term Market Pressure, and Dual-class Share Structure’, 41 *Journal of Corporate Finance* 304 (2016).

M.W. Josephus Jitta, ‘Het voorontwerp over de bedenktijd; bedenktijd voor de wetgever?’, 21 *Ondernemingsrecht* 155 (2019).

B. Julio & D.L. Ikenberry, ‘Reappearing Dividends’, 16 *Journal of Applied Corporate Finance* 89 (2004).

A. Jung & F. Wachtler, ‘Die Kursdifferenz zwischen Stamm- und Vorzugsaktien’, 46 *Die Aktiengesellschaft* 513 (2001).

W. Junge, ‘Das Unternehmensinteresse’, in: *Festschrift für E. von Caemmerer* 547 (H.C. Ficker et al., eds., 1978).

M. Kahan & E. Kamar, ‘Price Discrimination in the Market for Corporate Law’, 86 *Cornell Law Review* 1205 (2001).

M. Kahan & E. Kamer, ‘The Myth of State Competition in Corporate Law’, 55 *Stanford Law Review* 679 (2002).

M. Kahan & E. Rock, ‘Symbiotic Federalism and the Structure of Corporate Law’, 58 *Vanderbilt Law Review* 1573 (2005).

M. Kahan & E.B. Rock, ‘Embattled CEOs’, 88 *Texas Law Review* 989 (2010).

M. Kahan & E.B. Rock, ‘The Insignificance of Proxy Access’, 97 *Virginia Law Review* 1347 (2011).

M. Kahan & E.B. Rock, 'Hedge Funds In Corporate Governance and Corporate Control', 155 *University of Pennsylvania Law Review* 1021 (2007).

M. Kahan, 'Sales of Corporate Control', 9 *Journal of Law, Economics, and Organization* 368 (1993).

K.M. Kahle & R.M. Schulz, 'Are Corporate Payouts Abnormally High in the 2000s?' (2020), available at http://www.ssrn.com/.

D. Kahneman & A. Tversky, 'Prospect Theory: An Analysis of Decision Under Risk', 47 *Econometrica* 263 (1979).

D. Kahneman, *Thinking, Fast And Slow* (Farrar, Straus & Giroux 2015).

A. Kalay & M. Lemmon, 'Payout Policy', in: *Handbook of Corporate Finance. Empirical Corporate Finance* (B. Espen Eckbo ed.).

A. Kalay & R. Michaely, 'Dividends and Taxes: A Re-Examination', 29 *Financial Management* 55 (2000).

A. Kalay, 'Signaling, Information Content and the Reluctance to Cut Dividends', 15 *The Journal of Finance and Qualitative Analysis* 855 (1980).

A. Kalay, 'Stockholder-Bondholder Conflict and Dividend Constraint,' 14 *Journal of Financial Economics* 423 (1982).

A. Kalay, O. Karakaş & S. Pant, 'The Market Value of Corporate Votes: Theory and Evidence from Option Prices', 69 *Journal of Finance* 1235 (2014).

N. Kaldor, 'Welfare Propositions of Economics and Interpersonal Comparisons of Utility', 49 *The Economic Journal* 549 (1939).

J.S Kalisvaart, 'Meervoudig stemrecht', 27 *Onderneming & Financiering* 22 (2019).

S.A. Kallen (eds.), *The Roaring Twenties* (Greenhaven, 2001).

S.N. Kaplan & P. Strömberg, 'Leveraged Buyouts and Private Equity', 23 *Journal of Economic Perspectives* 121 (2009).

L. Kaplow & S. Shavell, *Fairness versus Welfare* (Harvard University Press, 2002).

A. Karapetian, 'Bestuurdersaansprakelijkheid na Van de Riet/Hoffmann: over hoe het is, hoe het was en zou moeten zijn', 146 *Weekblad voor Privaatrecht, Notariaat en Registratie* 209 (2015).

R.S. Karmel, 'Blue-Sky Merit Regulation: Benefit to Investors or Burden on Commerce?', 53 *Brooklyn Law Review* 105 (1987).

R.S. Karmel, 'Disclosure Reform - The SEC is Riding off in Two Directions at Once', 71 *The Business Lawyer* 781 (2016).

R.S. Karmel, 'Is It Time for a Federal Corporation Law', 57 *Brooklyn Law Review* 55 (1991).

R.S. Karmel, 'The Future of Corporate Governance Listing Requirements', 54 *SMU Law Review* 325 (2001).

K. Kastiel, 'Against All Odds: Hedge Fund Activism in Controlled Companies', 2016 *Columbia Business Law Review* 60 (2016).

D.A. Katz & L.A. McIntosh, 'Common-Sense Capitalism' (2017), available at http://www.corpgov.law.harvard.edu/.

J. Kay, 'The Kay Review of UK Equity Markets and Long-term Decision Making – Interim Report' (2012), available at http://www.gov.uk/.

E.L. Kayenbergh, 'Aandeelen met meervoudig stemrecht', 12 *De Naamlooze Vennootschap* 65 (1933).

E. van Keeken, 'De toekomst van het concordantiebeginsel', 8 *Caribisch Juristenblad* 189 (2019).

E.Q. Keasbey, 'New Jersey and the Great Corporations II', 13 *Harvard Law Review* 264 266 (1899).

T.A. Keijzer & L. in 't Veld, ''Slechts' aanspraak op het liquidatie-overschot: onvoldoende om van een BV-aandeel te kunnen spreken?', 18 *Ondernemingsrecht* 168 (2016).

T.A. Keijzer & M.J. van Ginneken, 'Het Mitbestimmungsrecht op de schop?' 67 *Ars Aequi* 26 (2017).

T.A. Keijzer, 'De betekenis van art. 2:190 BW: over BV-aandelen en aandeelhouderschap', 148 *Weekblad voor Privaatrecht, Notariaat en Registratie* 137 (2017).

T.A. Keijzer, 'De societas leonina en het winstrechtloze BV-aandeel vergeleken', 16 *Ondernemingsrecht* 273 (2014).

T.A. Keijzer, 'Having your cake and eating it, too. Over het weren van dual class-structuren uit aandelenindices', 4 *Maandblad voor Ondernemingsrecht* 223 (2018).

T.A. Keijzer, 'Waarvan worden bestuurders bang?', in: *De vele gezichten van Maarten Kroeze's 'bange bestuurders'* 137 (L. Timmerman & B.F. Assink eds., 2017).

T.A. Keijzer, O. Oost & M.J. van Ginneken, 'The ECJ Erzberger Case, An Analysis of German Co-determination and EU Law', 14 *European Company Law* 217 (2017).

T.A. Keijzer, 'Autonomie en paternalisme in het vennootschapsrecht van Nederland en Delaware', 67 *Ars Aequi* 610 (2017).

T.A. Keijzer, 'De aandeelhoudersovereenkomst in het licht van art. 2:190 BW', 147 *Weekblad voor Privaatrecht, Notariaat en Registratie* 312 (2016).

B. Keller, 'Änderungen der Überwachung in Kapitalgesellschaften – Der Entwurf eines Gesetzes zur Kontrolle und Transparenz im Unternehmensbereich', 35 *Deutsches Steuerrecht* 1986 (1997).

B. Kemp & A.S. Renshof, 'Het gebruik van oligarchische clausules bij benoeming en ontslag door Nederlandse beursvennootschappen', 6 *Maandblad voor Ondernemingsrecht* 51 (2020).

B. Kemp, 'Normering van aandeelhouders. Redelijkheid en billijkheid of misbruik van bevoegdheid?', 89 *Nederlands Juristenblad* 818 (2013).

B. Kemp, *Aandeelhoudersverantwoordelijkheid: De positie en rol van de aandeelhouder en aandeelhoudersvergadering* (Kluwer, 2015).

B. Kemp, H. Koster & C.A. Schwarz, *De betekenis en functies van het vennootschappelijk belang* (Kluwer, 2019).

G.N.H. Kemperink, '"Ik hoor u wel, maar luister niet…": de raad van commissarissen en het executive committee bij de beursgenoteerde vennootschap', 20 *Ondernemingsrecht* 535 (2018).

G.N.H. Kemperink, 'De voorzitter van de raad van commissarissen, of: de éminence grise van het vennootschapsrecht', 5 *Maandblad voor Ondernemingsrecht* 330 (2019).

D. Kemsley & D. Nissim, 'Valuation of the Debt Tax Shield', 57 *Journal of Finance* 2045 (2002).

H. Kent Baker & D.M. Smith, 'In Search of a Residual Dividend Policy', 15 *Review of Financical Economics* 1 (2006).

H. Kent Baker, G. Farrelly & R. Edelman, 'A Survey of Management Views on Dividend Policy', 14 *Financial Management* 78 (1985).

H. Kent Baker, G.E. Powell & E.T. Veit, 'Revisiting the Dividend Puzzle: Do All of the Pieces Now Fit?', 11 *Review of Financial Economics* 241 (2002).

O. Kersting, 'Der Neuer Markt der Deutsche Börse AG', 42 *Die Aktiengesellschaft* 222 (1997).

W. Kessler, 'The German Corporation Law of 1937', 4 *American Economic Review* 653 (1938).

J. Kesten, 'The Law and Economics of the Going-Public Decision' (2018), available at http://www.ssrn.com/.

J.M. Keynes, *The Economic Consequences of the Peace* (Macmillan, 1920).

E. Kießling, 'Das preußische Aktiengesetz von 1843', in: *Aktienrecht im Wandel* 193 (Mohr Siebeck, 2007).

E. Kießling, 'Das Preußische Eisenbahngesetz von 1838', in: *Aktienrecht im Wandel* 126 (Mohr Siebeck, 2007).

E.H. Kim & P. Ouimet, 'Broad-Based Employee Stock Ownership: Motives and Outcomes', 69 *Journal of Finance* 1273 (2014).

H. Kim & R. Michaely, 'Sticking around Too Long? Dynamics of the Benefits of Dual-Class Voting' (2019), available at http://www.ssrn.com/.

R.G. King & R. Levine, 'Finance and Growth: Schumpeter Might be Right', 108 *The Quarterly Journal of Economics* 717 (1993).

G.J.W. Kinnegim, 'De flex-bv opnieuw fiscaal getoetst', 57 *Weekblad Fiscaal Recht* 116 (2011).

W.E. Kirk, ' A Case Study in Legislative Opportunism: How Delaware Used the Federal-State System to Attain Corporate Pre-Eminence', 10 *Journal of Corporation Law* 233 (1984).

J.G. Kist & L.E. Visser, *Beginselen van Handelsrecht volgens de Nederlandsche wet. Handsverbintenissen uit overeenkomst. Deel 3* (Belinfante, 1914).

J.G. Kist et al., *Ontwerpen van wetten op de vennootschappen en andere, met toelichtingen, den Koning aangeboden door de Staatscommissie, ingesteld bij Zijner Majesteits besluit van 22 november 1879 no. 26* (Belinfante, 1890).

A.G.H. Klaassen, *Bevoegdheden van de algemene vergadering van aandeelhouders. Historische, concernrechtelijke en rechtsvergelijkende beschouwingen, in het bijzonder over structuurwijzigingen* (Kluwer, 2007).

A.G.H. Klaassen, 'Opgelegde bescherming aan de AvA: de dominee en de koopman in Boek 2 BW', in: F.G.M. Smeele & M.A. Verbrugh, *Opgelegde bescherming' in het bedrijfsrecht* 57 (Boom, 2010).

M. Klausner, 'Empirical Studies of Corporate Law and Governance: Some Steps Forward and Some Steps Not', in: *The Oxford Handbook of Corporate Law and Governance* (J.N. Gordon & W-G. Ringe eds).

A. Klein & E. Zur, 'Entrepreneurial Shareholder Activism: Hedge Funds and Other Private Investors', 64 *Journal of Finance* 187 188 226 (2009).

R.H. Kleipool & M. van Olffen, 'De Nederlandse Corporate Governance Code 2016', 19 *Ondernemingsrecht* 317 (2017).

R.H. Kleipool & R.L. Pouwer, 'Tijd en rust wettelijk toegevoegd aan de gereedschapskist van het bestuur', 5 *Maandblad voor Ondernemingsrecht* 141 (2019).

R. Kleipool, M. van Olffen & B. Roelvink, *Corporate Governance in the Netherlands: A practical guide to the new Corporate Governance Code* (Eleven International Publishing, 2018).

R.H. Kleipool, M. van Olffen & B.W. Roelvink, *Commentaar & Context Corporate Governance Code* (Boom, 2017).

E.A. Klingsberg, 'Index Eligibility as Governance Battlefield: Why the System is Not Broken and We Can Live With Dual Class Issuers' (2018), available at http://www.corpgov.law.harvard.edu/.

B.M.J. van Klink & H.S. Taekema, 'On the Border. Limits and Possibilities of Interdisciplinary Research', in: *Law and Method. Interdisciplinary Research Into Law* 7 (B.M.J. van Klink & H.S. Taekema eds., 2011).

N. Kluge, 'Corporate governance with co-determination – a key element of the European social model', 11 *Transfer: European Review of Labour and Research* 163 (2005).

H.J. de Kluiver & M. Meinema, 'Dwingend vennootschapsrecht na de Wet herziening preventief toezicht en de mogelijkheden van statutaire of contractuele afwijking en aanvulling', 133 *Weekblad voor Privaatrecht, Notariaat en Registratie* 648 (2002).

H.J. de Kluiver & M. Wyckaert, 'Regulering van de beurs-NV en de beurs-BV in België en Nederland', in: J. Barneveld et al., *Ondernemingsrecht in de Lage Landen. Wat kunnen wij van de Belgen leren?* 163 (Wolters Kluwer, 2020).

H.J. de Kluiver, 'Het vennootschapsrecht dient te worden versoepeld…en verscherpt', 37 *Tijdschrift voor Vennootschappen, Verenigingen en Stichtingen* 174 (1994).

H.J. de Kluiver, 'Kroniek van het ondernemingsrecht. Overvloed en onbehagen; Nederlandse ondernemingen in het vizier', 94 *Nederlands Juristenblad* 745 (2018).

H.J. de Kluiver, 'Vennootschappelijke repliek op Timmerman's grondslagen', 11 *Ondernemingsrecht* 17 (2009).

W. Kluth, 'Abschaffung von Mehrstimmrechtsaktien verfassungswidrig?', 14 *Zeitschrift für Wirtschaftsrecht* 1217 (1997).

B.H. Kobayashi & L.E. Ribstein, 'Nevada and the Market for Corporate Law', 35 *Seattle University Law Review* 1165 (2012).

J. Koch, 'Das Gesetz zur Unternehmensintegrität und Modernisierung des Anfechtungsrechts (UMAG) – ein Überblick', 35 *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 769 (2006).

M. Koelemeijer, 'Minderheidsaandeelhouders revisited: les uit Air France-KLM', 9 *Tijdschrift voor vennootschapsrecht, rechtspersonenrecht en ondernemingsbestuur* 41 (2012).

M. Koelemeijer, *Redelijkheid en billijkheid in kapitaalvennootschappen: beschouwingen rond aandeelhouders en bestuurders in rechtsvergelijkend perspectief* (Kluwer, 1999).

G.C. Kok, *Rotterdamse juristen uit vijf eeuwen* (Verloren, 2009).

J. Kolb & T. Tykvova, 'Going Public via Special Purpose Acquisition Companies: Frogs do not Turn into Princes', 40 *Journal of Corporate Finance* 80 (2016).

J. König, 'Der Dividendenverzicht des Mehrheitsaktionärs – Dogmatische Einordnung und praktische Durchführung', 46 *Die Aktiengesellschaft* 399 (2001).

H. Konschewski, *Vorzugsaktie und Pluralstimmrecht* (Breslau, 1921).

U. Kornblum, 'Bundesweite Rechtstatsachen zum Unternehmens- und Gesellschaftsrecht (Stand 1.1.2017)', 115 *GmbH Rundschau* 739 (2017).

L. Körner, *Die angemessene Gegenleistung für Vorzugs- und Stammaktien nach dem WpÜG* (Lang, 2006).

L.A. Kornhauser, 'The Nexus of Contracts Approach to Corporations: A Comment on Easterbrook and Fischel', 89 *Columbia Law Review* 1449 (1989).

M. Kort, 'Vorstandshandeln im Spannungsverhältnis zwischen Unternehmensinteresse und Aktionärsinteressen', 57 *Die Aktiengesellschaft* 605 (2012).

A. Korteweg, 'The Net Benefits to Leverage', 65 *Journal of Finance* 2137 (2010).

H. Koster, *De Flex BV* (Kluwer, 2013).

R. Köstler, 'Die Mitbestimmung in der SE', 32 *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 800 (2003).

L. Kostovetsky, 'Index Mutual Funds and Exchange-Traded Funds', 29 *The Journal of Portfolio Management* 80 (2003).

M.E. Kotler & M.E. McDonald, 'Lessons from the CBS-NAI Dispute, Part IV: A Temporary Restraining Order Against the Controlling Stockholder?' (2018), available at http://www.corpgov.law.harvard.edu/.

H. Koziol, 'Glanz und Elend der deutschen Zivilrechtsdogmatik Das deutsche Zivilrecht als Vorbild für Europa?', 212 *Archiv für die civilistische Praxis* 1 (2012).

B.I. Kraaipoel, 'De maatstaf voor bestuurdersaansprakelijkheid tegenover een individuele aandeelhouder: overeenkomstig art. 2:9 BW', 21 *Bedrijfsjuridische Berichten* 339 (2008).

W. Krauel & B. Weng, 'Das Erfordernis von Sonderbeschlüssen stimmrechtsloser Vorzugsaktionäre bei Kapitalerhöhungen und Kapitalherabsetzungen', 48 *Die Aktiengesellschaft* 561 (2003).

A. Kraus & R.H. Litzenberger, 'A State Preference Model of Optimal Financial Leverage', 28 *Journal of Finance* 911 (1973).

M.J. Kroeze & H.M. Vletter-van Dort, 'History and Future of Uniform Company Law in Europe' 5 *European Company Law* 114 (2008).

M.J. Kroeze, 'Het Delaware van Europa?', 6 *Ondernemingsrecht* 565 (2004).

M.J. Kroeze, 'Ontklonen', 11 *Ondernemingsrecht* 495 (2009).

M.J. Kroeze, 'Rechtspersoon en vennootschap', in: *Met recht* 283 (P. Essers et al. eds., 2009).

M.J. Kroeze, 'The Dutch Companies and Business Court as a Specialized Court' (2006), available at http://www.ssrn.com/.

M.J. Kroeze, *Afgeleide schade en afgeleide actie* (Kluwer, 2004).

M.J. Kroeze, *Bange bestuurders* (Kluwer, 2005).

M.J. Kroeze, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 2. Rechtspersonenrecht. Deel I. De rechtspersoon* (Wolters Kluwer, 2015).

B. Kropff, 'Reformbestrebungen im Nachkriegsdeutschland und die Aktienrechtsreform von 1965', in: *Aktienrecht im Wandel* 670 (Mohr Siebeck, 2007).

C. Kuhner, 'Unternehmensinteresse vs. Shareholder Value als Leitmaxime kapitalmarktorientierter Aktiengesellschaften', 33 *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 244 (2004).

T. Kuntz, 'German Corporate Law in the 20th Century', in: *Research Handbook on the History of Corporate and Company Law* (H. Wells ed., 2017).

D. Kunze, *Positive Stimmpflichten im Kapitalgesellschaftsrecht* (Lang, 2004).

R. La Porta et al., 'Agency Problems and Dividend Policies Around the World', 55 *Journal of Finance* 1 (2000).

R. La Porta et al., 'Investor Protection and Corporate Governance', 58 *Journal of Financial Economics* 3 (2000).

R. La Porta et al., 'Law and Finance', 106 *Journal of Political Economy* 1113 (1998).

R. La Porta et al., 'Legal Determinants of External Finance', 52 *Journal of Finance* 1131 (1997).

R. La Porta, F. Lopez-de-Silanes & A. Shleifer, 'Corporate Ownership Around the World', 54 *Journal of Finance* 471 (1999).

R. La Porta, F. Lopez-de-Silanes & A. Shleifer, 'The Economic Consequences of Legal Origins', 46 *Journal of Economic Literature* 285 (2008).

R. La Porta, F. Lopez-de-Silanes & A. Shleifer, 'What Works In Securities Laws', 61 *Journal of Finance* 1 (2006).

J. Lakonishok, A. Shleifer & R.W. Vishny, 'Contrarian Investment, Extrapolation and Risk, in: R.H. Thaler, *Advances in Behavioral Finance* (Princeton University Press, 2005).

B.M. Lambrecht & S.C. Myers, 'A Lintner Model of Payout and Managerial Rents', 67 *Journal of Finance* 1761 (2012).

N.R. Lamoreaux, *The Great Merger Movement in American Business*, 1895-1904 (Cambridge University Press, 1988).

L.H.P. Lang & R.H. Litzenberger, 'Dividend Announcements: Cash Flow Signalling vs. Free Cash Flow Hypothesis?', 24 *Journal of Financial Economics* 181 (1989).

M. Lang, *Die Entwicklung des Unternehmensrechts der Niederländischen Antillen* (Münster, 2001).

G.E. Langemeijer, *Juridische Dogmatiek* (Noord-Hollandsche Uitgevers Maatschappij, 1962).

D.C. Langevoort & R.B. Thompson, 'Publicness in Contemporary Securities Regulation after the JOBS Act', 101 *Georgetown Law Journal* 337 (2013).

D.C. Langevoort, 'Internal Controls after Sarbanes-Oxley: Revisiting Corporate Law's Duty of Care as Responsibility for Systems', 31 *Journal of Corporation Law* 949 (2006).

D.C. Langevoort, 'The Supreme Court and the Politics of Corporate Takeovers: A Comment on CTS Corp. v. Dynamics Corp. of America', 101 *Harvard Law Review* 96 (1987).

B. Lauterbach & Y. Yafeh, 'Long Term Changes in Voting Power and Control Structure Following the Unification of Ddual Class Shares', 17 *Journal of Corporate Finance* 215 (2011).

W. Lazonick, 'The Functions of the Stock Market and the Fallacies of Shareholder Value' (2017), available at http://www.ineteconomics.org/.

M.T. Leary & M.R. Roberts, 'The Pecking Order, Debt Capacity, and Information Asymmetry', 95 *Journal of Financial Economics* 332 (2010).

M.T. Leary & R. Michaely, 'Determinants of Dividend Smoothing: Empirical Evidence', 24 *Review of Financial Studies* 3197 (2011).

R.C. Lease, J.J. McConnell & W.H. Mikkelson, 'The Market Value of Control in Publicly-traded Corporations', 11 *Journal of Financial Economics* 43 (1983).

G. Lee & R.W. Masulis, 'Seasoned Equity Offerings: Quality of Accounting Information and Expected Flotation Costs', 92 *Journal of Financial Economics* 443 (2009).

P. Lee, 'Protecting Public Shareholders: The Case of Google's Recapitalization', 5 *Harvard Business Law Review* 281 (2015).

A.A. Leff, 'Economic Analysis of Law: Some Realism About Nominalism', 60 *Virginia Law Review* 451 (1974).

P. Legrand, 'The Impossibility of 'Legal Transplants', 4 *Maastricht Journal of European and Comparative Law* 111 (1997).

K. Lehn, J. Netter & A. Poulsen, 'Consolidating Corporate Control: Dual-Class Recapitalizations Versus Leveraged Buyouts', 27 *Journal of Financial Economics* 557 (1990).

A.F.J.A. Leijten, 'Een tegenstrijdigbelangregeling ontwerpen', 148 *Weekblad voor Privaatrecht, Notariaat en Registratie* 953 (2017).

J. Leitzel, *Concepts in Law and Economics. A Guide for the Curious* (Oxford University Press, 2015).

U. Lel & D.P. Miller, 'International Cross-Listing, Firm Performance, and Top Management Turnover: A Test of the Bonding Hypothesis', 63 *Journal of Finance* 1897 (2008).

N. Lemann, *Transaction Man: The Rise of the Deal and the Decline of the American Dream* (Farrar, Straus and Giroux, 2019).

M.L. Lemmon & J.F. Zender, 'Debt Capacity and Tests of Capital Structure Theories', 45 *Journal of Financial and Quantitative Analysis* 1161 (2010).

J. Lerner, M. Sorensen & P. Strömberg, 'Private Equity and Long-Run Investment: The Case of Innovation', 66 *Journal of Finance* 445 (2011).

R. Levine & S. Zervos, 'Stock Markets, Banks, and Economic Growth', 88 *The American Economic Review* 537 (1998).

R. Levine, 'Finance and Growth: Theory and Evidence', in: *Handbook of Economic Growth* 865 (P. Aghion & S.N. Durlauf, 2005).

R. Levine, 'Financial Development and Economic Growth: Views and Agenda', 35 *Journal of Economic Literature* 688 (1997).

I.A. Levy, Actiënrecht; *Bijdrage tot de herziening onzer handelswet* (Belinfante, 1884).

W.G. Lewellen et al., 'Some Direct Evidence on the Dividend Clientele Phenomenon', 33 *Journal of Finance* 1385 (1978).

P.C. Leyens, 'Deutscher Aufsichtsrat und U.S.-Board: ein- oder zweistufiges Verwaltungssystem? Zum Stand der rechtsvergleichenden Corporate Governance-Debatte', 67 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 57 (2001).

W. Li & E. Lie, 'Dividend Changes and Catering Incentives', 80 *Journal of Financial Economics* 293 (2006).

K. Li, H. Ortiz-Molina & X. Zhao, 'Do Voting Rights Affect Institutional Investment Decisions? Evidence from Dual-Class Firms', 37 *Financial Management* 713 (2008).

S. Li, E.G. Maug & M. Schwartz-Ziv, 'When Shareholders Disagree: Trading After Shareholder Meetings' (2019), available at http://www.ssrn.com/.

A. Licht, 'Farewell to Fairness: Towards Retiring Delaware's Entire Fairness Review' (2019), available at http://www.ssrn.com/.

S.W. Liebeler, 'A Proposal to Rescind the Shareholder Proposal Rule', 18 *Georgia Law Review* 425 (1984).

T. Liebscher, 'Ungeschriebene Hauptversammlungszuständigkeiten im Lichte von Holzmüller, Macrotron und Gelatine', 34 *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 1 (2005).

J. Lieder, 'Die 1. Aktienrechtsnovelle vom 11. Juni 1870', in: *Aktienrecht im Wandel* 318 (Mohr Siebeck, 2007).

J. Lieder, 'Die Treuepflicht Der Vorstandsmitglieder', 2016 *Journal of Commercial and Intellectual Property Law* 41 (2016).

J. Lieder, 'The German Supervisory Board on Its Way to Professionalism', 11 *German Law Journal* 115 (2010).

Th.H. van Limburg Stirum, *Iets over de naamlooze maatschappijen* (Van Cleeff, 1829).

D. Lin, 'Beyond Beholden', 44 *Journal of Corporation Law* 515 (2019).

Y-H. Lin, 'Controlling Controlling-Minority Shareholders: Corporate Governance and Leveraged Corporate Control', 2016 *Columbia Business Law Review* 453 (2016).

W. Link, *Die amerikanische Stabilisierungspolitik in Deutschland 1921–32* (Droste, 1970).

J. Lintner, 'Distribution of Income of Corporations Among Dividends, Retained Earnings, and Taxes', 46 *American Economic Review* 97 (1956).

J. Lintner, 'Dividends, Earnings, Leverage, Stock Prices and the Supply of Capital to Corporations', 44 *The Review of Economics and Statistics* 243 (1962).

M. Lipton & S.A. Rosenblum, 'Election Contests In the Company's Proxy: An Idea Whose Time Has Not Come', 59 *The Business Lawyer* 67 (2003).

A.M. Lipton, 'After Corwin: Down the Controlling Shareholder Rabbit Hole', 72 *Vanderbilt Law Review* 1977 (2019).

A.M. Lipton, 'Shareholder Divorce Court', 44 *Journal of Corporation Law* 297 341 (2018).

M. Lipton, 'Corporate Governance Stakeholder Primacy Federal Incorporation' (2018), available at http://www.corpgov.law.harvard.edu/.

M. Lipton, 'Current Thoughts About Activism' (2013), available at http://www.corpgov.law.harvard.edu/.

M. Lipton, 'Empiricism and Experience Activism and Short-Termism the Real World of Business' (2013), available at http://www.corpgov.law.harvard.edu/.

M. Lipton, 'It's Time to Adopt the New Paradigm' (2019), available at http://www.corpgov.law.harvard.edu/.

M. Lipton, 'Takeover Bids in the Target's Boardroom', 35 *The Business Lawyer* 101 (1979).

M. Lipton, 'The Bebchuk Syllogism' (2013), available at http://www.corpgov.law.harvard.edu/.

R. Litzenberger & K. Ramaswamy, 'Dividends, Short Selling Restrictions, Tax Induced Investor Clientele and Market Equilibrium', 35 *Journal of Finance* 469 (1980).

R. Litzenberger & K. Ramaswamy, 'The Effect of Personal Taxes and Dividends on Capital Asset Prices: Theory and Empirical Evidence', 7 *Journal of Financial Economics* 163 (1979).

R.H. Litzenberger & K. Ramaswamy, 'The Effects of Dividends on Common Stock Prices Tax Effects or Information Effects?', 37 *Journal of Finance* 429 (1982).

M. Livingstone, 'The "Unordinary Business" Exclusion and Changes to Board Structure', 93 *Denver Law Review* 263 (2016).

A.W. Lo, 'The Adaptive Markets Hypothesis: Market Efficiency from an Evolutionary Perspective', 30 *The Journal of Portfolio Management* 15 (2004).

M. Löbbe, 'Corporate Groups: Competences of the Shareholders' Meeting and Minority Protection – the German Federal Court of Justice's recent Gelatine and Macrotron Cases Redefine the Holzmüller Doctrine', 5 *German Law Journal* 1057 (2004).

R. Loges & W. Distler, 'Gestaltungsmöglichkeiten durch Aktiengattungen', 22 *Zeitschrift für Wirtschaftsrecht* 467 (2002).

E.C.H.J. Lokin, 'Implementatie van de herziene Aandeelhoudersrechtenrichtlijn: het bezoldigingsbeleid', 21 *Ondernemingsrecht* 881 (2019).

E.C.H.J. Lokin, *De bezoldiging van bestuurders van beursgenoteerde vennootschappen* (Wolters Kluwer, 2018).

J.H.A. Lokin, 'De receptie van de Code civil in de Noordelijke Nederlanden', 21 *Groninger Opmerkingen en Mededelingen* 1 (2004).

J.B. Long, 'The Market Valuation of Cash Dividends: A Case to Consider', 6 *Journal of Financial Economics* 235 (1978).

P.A. Loomis & B.K. Rubman, 'Corporate Governance in Historical Perspective', 8 *Hofstra Law Review* 141 (1979).

D. Looschelders, 'Zum Nutzen der Rechtsgeschichte für die Dogmatik', 30 *Zeitschrift für Neuere Rechtsgeschichte* 282 (2008).

L. Lowenstein, 'Shareholder Voting Rights: A Response to SEC Rule 19c-4 and to Professor Gilson', 89 *Columbia Law Review* 979 (1989).

F.J.W. Löwensteyn, *Wezen en bevoegdheid van het bestuur van de vereniging en de naamloze vennootschap* (W.E.J. Tjeenk Willink 1959).

S.J. Lubben, 'The Direct Costs of Corporate Reorganization: An Empirical Examination of Professional Fees in Large Chapter 11 Cases,' 74 *American Bankruptcy Law Journal* 508 (2000).

D. Lund, 'Nonvoting Shares and Efficient Corporate Governance', 71 *Stanford Law Review* 687 (2019).

D. Lund, 'The Case Against Passive Shareholder Voting' (2017), 43 *Journal of Corporation Law* 493 (2018).

M. Lutter, 'Comparative Corporate Governance: A German Perspective', 2 *International and Comparative Corporate Law Journal* 423 (2001).

M. Lutter, 'Das neue 'Gesetz fur kleine Aktiengesellschaften und zur Deregulierung des Aktienrechts', 35 *Die Aktiengesellschaft* 429 (1994).

M. Lutter, 'Die Erklärung zum Corporate Governance Kodex gemäß § 161 AktG', 164 *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* 523 (2002).

M. Lutter, 'Professionalisierung der Aufsichtsräte', 48 *Neue Juristische Wochenschrift* 1133 (1995).

M.L. Mace, *Directors: Myth and Reality* (Harvard University Press, 1971).

J.R. Macey & G.P. Miller, 'Origin of the Blue Sky Laws', 70 *Texas Law Review* 347 (1991).

J.R. Macey & G.P. Miller, 'Toward an Interest Group Theory of Delaware Corporate Law', 65 *Texas Law Review* 469 (1987).

J.R. Macey, 'A Close Read of an Excellent Commentary on Dodge v. Ford', 3 *Virginia Law & Business Review* 177 (2008).

A.N. Madhavan, *Exchange-Traded Funds and the New Dynamics of Investing* (Oxford University Press, 2016).

J.M.M. Maeijer, 'De corrigerende werking van de redelijkheid en billijkheid', in: *Goed en trouw: opstellen aangeboden aan W.C.L. van der Grinten ter gelegenheid van zijn afscheid als hoogleraar aan de Katholieke Universiteit Nijmegen* 31 (E.A.A. Luijten & W.C.L. van der Grinten, eds.).

J.M.M. Maeijer, *Het belangenconflict in de naamloze vennootschap* (Kluwer, 1964).

P.G. Mahoney, 'Mandatory Disclosure as a Solution to Agency Problems', 62 *University of Chicago Law Review* 1047 (1995).

P.G. Mahoney, 'The Origins of Blue Sky Laws: A Test of Competing Hypotheses', 46 *Journal of Law & Economics* 229 (2003).

M.J. Mallow & J. Sethi, 'Engagement: The Missing Middle Approach in the Bebchuk-Strine Debates', 12 *New York University Journal of Law & Business* 386 (2016).

H.G. Manne, 'Mergers and the Market for Corporate Control', 73 *Journal of Political Economy* 110 (1965).

H.G. Manne, 'Our Two Corporation Systems: Law and Economics', 53 *Virginia Law Review* 259 (1967).

B. Manning, 'The Shareholder 's Appraisal Remedy: An Essay for Frank Coker', 72 *Yale Law Journal* 223 (1962).

H. Markowitz, 'Portfolio Selection', 7 *Journal of Finance* 77 (1952).

P.C. Martin, 'Die Entstehung des preußischen Aktiengesetzes von 1843', 56 *Vierteljahrschrift für Sozial- und Wirtschaftsgeschichte* 499 (1969).

W. Martin, 'Corporate Governance – Der Import angelsächsischer "Self-Regulation" im Widerstreit zum deutschen Parlamentsvorbehalt', 35 *Zeitschrift für Rechtspolitik* 59 (2002).

E. Martino, 'Bail-inable Securities and Financial Contracting: can Contracts Discipline Bankers?', 10 *European Journal of Risk Regulation* 164 (2019).

T.C. Martins & W. Novaes, 'Mandatory Dividend Rules: Do They Make it Harder for Firms to Invest?', 18 *Journal of Corporate Finance* 953 (2012).

R.W. Masulis, C. Wang & F. Xie, 'Agency Problems at Dual-Class Companies', 64 *Journal of Finance* 1697 (2009).

R.W. Masulis, P.K. Pham & J. Zein, 'Family Business Groups around the World: Financing Advantages, Control Motivations, and Organizational Choices', 24 *Review of Financial Studies* 3556 (2011).

Multatuli, *Max Havelaar, of De koffij-veilingen der Nederlandsche Handel-Maatschappij* (De Ruyter, 1860).

C. Mayer, 'New Issues in Corporate Finance', 32 *European Economic Review* 1167 (1988)

C. Mayer, *Firm Commitment. Why the Corporation is Failing to us and how to Restore Trust in it* (Oxford University Press, 2013).

J.A. McCahery & E.P.M. Vermeulen, *Corporate Governance of Non-Listed Companies* (Oxford University Press, 2008).

J. McCahery, Z. Sautner, & L.T. Starks, 'Behind the Scenes: The Corporate Governance Preference of Institutional Investors, 71 *Journal of Finance* 2905 (2016).

B. McDonnell, 'The Liberal Case for Hobby Lobby', 57 *Arizona Law Review* 777 (2015).

B.H. McDonnell, ‘Sticky Defaults and Altering Rules in Corporate Law’, 60 *Southern Methodist University Law Review* 383 (2007).

E. McGaughey, ‘Good for Governance: Erzberger v TUI AG and the Codetermination Bargains’ (2017), available at http://www.law.ox.ac.uk/.

E. McGaughey, ‘The Codetermination Bargains: The History of German Corporate and Labour Law’, 23 *Columbia Journal of European Law* 135 (2016).

J.A. McMullen, ‘Committees of the Board of Directors’, 29 *The Business Lawyer* 755 (1974).

W. Megginson, ‘Restricted Voting Stock, Acquisition Premiums, and the Market Value of Corporate Control’, 25 *Financial Review* 175 (1990).

G. Meijer & S.Y.Th. Meijer, ‘Influence of the Code Civil in the Netherlands’, 14 *European Journal of Law & Economics* 227 (2002).

M. Meinema, *Dwingend recht voor de besloten vennootschap* (Kluwer, 2003).

D.A.M. Melis, *The Institutional Investor Stewardship Myth: A Theoretical, Legal And Empirical Analysis Of Prescribed Institutional Investor Stewardship In A Dutch Context* (Nyenrode, 2014).

M.M. Mendel, ‘Wetsontwerp beschermingsmaatregelen VEUO-beurs uit oogpunt van rechtsbedeling en corporate governance’, 74 *De Naamlooze Vennootschap* 271 (1995).

B. Mertens, ‘Das Aktiengesetz von 1937 – unpolitischer Schlussstein oder ideologischer Neuanfang?’, 29 *Zeitschrift für Neue Rechtsgeschichte* 88 (2007).

R.C. Merton & Z. Bodie, ‘A Conceptual Framework for Analyzing the Financial Environment’, in: *The Global Financial System: A Functional Perspective* 12 (D.B. Crane et al. eds., 1995).

R. Michaels, ‘The Functional Method of Comparative Law’, in: *The Oxford Handbook of Comparative Law* 339 (M. Reimann & R. Zimmermann eds.).

R. Michaely, J-L. Vila & J. Wang, ‘A Model of Trading Volume with Tax-Induced Heterogeneous Valuation and Transaction Costs’, 5 *Journal of Financial Intermediation* 471 (1996).

R. Michaely, R.H. Thaler & K.L. Womack, 'Price Reactions to Dividend Initiations and Omissions: Overreaction or Drift?', 50 *Journal of Finance* 573 (1995).

R. Michaely, S. Rossi & M. Weber, 'Signaling Safety' (2019), available at http://www.ssrn.com/.

W. Mikkelson & M. Partch, 'Stock Price Effects and Costs of Secondary Distributions', 14 *Journal of Financial Economics* 165 (1985).

W.H. Mikkelson & M.M. Partch, Valuation Effects of Security Offerings and the Issuance Process', 15 *Journal of Financial Economics* 31 (1986).

W.H. Mikkelson, M.M. Partch & K. Shah, 'Ownership and Operating Performance of Companies that go Public', 44 *Journal of Financial Economics* 281 (1997).

M. Milde-Büttcher, 'Mehrstimmrechte bei Kapitalerhöhungen aus AG-Gesellschaftsmitteln – Opfer der heißen Nadel des Gesetzgebers?', 54 *Betriebs-Berater* 1073 (1999).

E. Millard, 'Hauriou et la théorie de l'institution', 30 *Droit et société* 381 (1995).

D. Miller et al., 'Are Family Firms Really Superior Performers?', 13 *Journal of Corporate Finance* 829 (2007).

M.H. Miller & F. Modigliani, ´Dividend Policy, Growth, and the Valuation of Shares´, 34 *Journal of Business* 411 (1961).

M.H. Miller & K. Rock, 'Dividend Signaling under Asymmetric Information', 40 *Journal of Finance* 1031 (1985).

M.H. Miller & M.S. Scholes, 'Dividends and Taxes: Some Empirical Evidence', 90 *The Journal of Political Economy* 1118 (1982).

M.H. Miller, 'Debt and Taxes', 32 *Journal of Finance* 261 (1977).

M.H. Miller, 'The Modigliani-Miller Propositions After Thirty Years', 2 *Journal of Economic Perspectives* 99 (1988).

D.K. Millon, 'Theories of the Corporation', 1990 *Duke Law Journal* 201 (1990).

F. Modigliani & M.H. Miller, 'Corporate Income Taxes and the Cost of Capital: A Correction', 53 *The American Economic Review* 433 (1963).

F. Modigliani & M.H. Miller, 'The Cost of Capital, Corporation Finance and the Theory of Investment', 48 *American Economic Review* 261 (1958).

F. Modigliani & M.H. Miller, 'The Cost of Capital, Corporation Finance, and the Theory of Investment: Reply', 49 *The American Economic Review* 655 (1959).

F. Modigliani & R.H. Brumberg, *Utility Analysis and the Consumption Function: An Interpretation of Cross-Section Data* 339 (K.K. Kurihara, ed.).

F. Modigliani, 'MM--Past, Present, Future', 2 *Journal of Economic Perspectives* 149 (1988).

F. Modigliani, 'The Life Cycle Hypothesis of Saving, the Demand for Wealth and the Supply of Capital', 33 *Social Research* 160 (1966).

W.L.P.A. Molengraaff, *De herziening van het recht der Naamlooze Vennootschap* (Muusses, 1926).

W.L.P.A. Molengraaff, *Leidraad bij de beoefening van het Nederlandsche Handelsrecht. Eerste Deel* (De Erven F. Bohm, 1919).

D.K. Moll, 'Shareholder Oppression & Dividend Policy in the Close Corporation', 60 *Washington & Lee Law Review* 841 (2003).

A.G.T Moore, 'The Birth of Unocal – A Brief History', 31 *Delaware Journal of Corporate Law* 865 (2006).

R.K. Morck & L. Steier, 'The Global History of Corporate Governance – An Introduction' (2005), available at http://www.nber.org/.

R. Morck, A. Shleifer & R.W. Vishny, 'Management Ownership and Market Valuation. An Empirical Analysis', 20 *Journal of Financial Economics* 293 (1988).

R.K. Morck, 'The Global History of Corporate Governance: an Introduction', in: *A History of Corporate Governance Around the World* (R.K. Morck ed., 2005).

E. Morellec, B. Nikolov & N. Schürhoff, 'Corporate Governance and Capital Structure Dynamics', 67 *Journal of Finance* 803 (2012).

J. Morley, 'The Common Law Corporation: the Power of the Trust in Anglo-American Business History', 116 *Columbia Law Review* 2145 (2016).

J. Morley, 'The Separation of Funds and Managers: A Theory of Investment Fund Structure and Regulation', 123 *Yale Law Journal* 1228 (2014).

P. Muchlinski, 'The Development of German Corporate Law until 1990: An Historical Reappraisal', 14 *German Law Journal* 339 (2013).

T. Mukherjee, 'Agency Costs and the Free Cash Flow Hypothesis' in: *Handbook of Corporate Finance. Empirical Corporate Finance* 26 (B. Espen Eckbo ed.).

P.O. Mülbert, 'Shareholder Value aus rechtlicher Sicht', 26 *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 129 (1997).

P.O. Mülbert, 'Soziale Verantwortung von Unternehmen im Gesellschaftsrecht', 54 *Die Aktiengesellschaft* 766 (2009).

R. Müller-Glöge, U. Preis & I. Schmidt (eds.), *Erfurter Kommentar zum Arbeitsrecht* (Beck, 2017).

C. Münch, 'Der gekreuzte Bezugsrechtsausschluß im Recht der Aktiengesellschaft', 46 *Der Betrieb* 769 (1993).

S.C. Myers & N.S. Majluf, 'Corporate Financing and Investment Decisions When Firms Have Information That Investors do not Have', 13 *Journal of Financial Economics* 187 (1984).

S.C. Myers, 'The Capital Structure Puzzle', 39 *Journal of Finance* 575 (1984).

S.C. Myers,' Financing of Corporations', in: *Handbook of the Economics of Finance* 216 (G.M. Constantinides, M. Harris & R. M. Stulz eds.).

G. Naik & A. Raghavan, 'Vodafone, Mannesmann Set Takeover At $180.95 Billion After Long Struggle' (2000), available at http://www.wsj.com/.

R.G. Natelson, 'The Original Understanding of the Indian Commerce Clause', 85 *Denver University Law Review* 201 (2007).

T.R. Navin & M.V. Sears, 'The Rise of a Market for Industrial Securities, 1887-1902', 29 *The Business History Review* 105 (1955).

O. von Nell-Breuning, 'Wie kam es zur Montan-Mitbestimmung', 32 *Gewerkschaftliche Monatshefte* 386 (1981).

T. Nenova, 'The Value of Corporate Voting Rights and Control: A Cross-Country Analysis', 68 *Journal of Financial Economics* 325 (2003).

A. Nevins, *John D. Rockefeller: The Heroic Age of American Enterprise* (Charles Scribner's Sons, 1940).

F.S. van Nierop, *De vennootschap met beperkte aansprakelijkheid, volgens het Engelsche recht* (Gebr. Binger, 1866).

Y. Nili & K. Kastiel, 'In Search of Absent Shareholders: A New Solution To Retail Investors' Apathy', 41 *Delaware Journal of Corporate Law* 55 (2016).

C.M.O. Van Nispen tot Sevenaer, 'Het rechtskarakter van de statuten eener Naamlooze Vennootschap', 6 *De Naamlooze Vennootschap* 260 (1927).

C.M.O. Van Nispen tot Sevenaer, 'Nogmaals "Het rechtskarakter van de statuten eener Naamlooze Vennootschap."', 7 *De Naamlooze Vennootschap* 163 (1928).

D. Nissim & A. Ziv, 'Dividend Changes and Future Profitability', 56 *Journal of Finance* 2111 (2001).

G. Noordraven, 'De zeggenschap van verschaffers van risicodragend kapitaal', in: *Van vennootschappelijk belang* 171 (H. Honeé et al. eds., 1988).

B. Novick, 'Diversified Portfolios Do Not Reduce Competition' (2019), available at http://www.corpgov.law.harvard.edu/.

R.G.J. Nowak & A.M. Memmens, *Vereenvoudiging en flexibilisering deel II. De parlementaire geschiedenis* (Kluwer, 2012).

E. Nowak, R. Rott & T.G. Mahr, 'Wer den Kodex Nicht Einhält, den Bestraft der Kapitalmarkt?: Eine Empirische Analyse der Selbstregulierung und Kapitalmarktrelevanz des Deutschen Corporate Governance Kodex', 34 *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 252 (2005).

R.G.J. Nowak, 'Corporate Boards in the Netherlands', in: *Corporate Boards in Law and Practice: A Comparative Analysis in Europe* 431 (P. Davies et al. eds., 2013).

M. Oderkerk, 'The Need for a Methodological Framework for Comparative Legal Research - Sense and Nonsense of Methodological Pluralism in Comparative Law', 79 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 589 (2015).

M. van Olffen & G.J.C. Rensen, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands burgerlijk recht. 2. Rechtspersonenrecht. Deel IIa. NV en BV. Oprichting, vermogen en aandelen* (Wolters Kluwer, 2019).

M. van Olffen, 'Inrichting van de one tier vennootschap bij of krachtens de statuten', 14 *Ondernemingsrecht* 481 (2012).

M. van Olffen, 'Loyaliteitsaandelen', 137 *Weekblad voor Privaatrecht, Notariaat en Registratie* 779 (2006).

M. van Olffen, 'Nederlandse loyaliteitsaandelen met een Frans sausje', 15 *Ondernemingsrecht* 333 (2013).

M. van Olffen, 'Uitkeringen in natura', 127 *Weekblad voor Privaatrecht, Notariaat en Registratie* 534 (1996).

M. van Olffen, 'Voorontwerp wettelijke bedenktijd beursvennootschappen', 21 *Ondernemingsrecht* 77 (2019).

M. van Olffen, 'Wetsvoorstel wettelijke bedenktijd beursvennootschappen', 22 *Ondernemingsrecht* 261 (2020).

G. Oostindie & I. Klinkers, *Decolonising the Caribbean: Dutch Policies in a Comparative Perspective* (Amsterdam University Press, 2003).

A.S. Oppenheim, 'De oligarchische clausule' 56 *Weekblad voor Privaatrecht, Notariaat en Registratie* 44 (1926).

F.G.K. Overkleeft, *De positie van aandeelhouders in beursvennootschappen. Een analyse van recht, gebeurtenissen en ideeën* (Kluwer, 2017).

A.M. Pacces, 'Exit, Voice and Loyalty from the Perspective of Hedge Funds Activism in Corporate Governance', 10 *Erasmus Law Review* 199 (2016).

A.M. Pacces, 'Procedural and Substantive Review of Related Party Transactions (RPTs): The Case for Non-Controlling Shareholder Dependent (NCS-Dependent) Directors' (2018), available at http://www.ssrn.com/.

A.M. Pacces, *Featuring Control Power* (RILE, 2007).

S.J. Padfield, 'Rehabilitating Concession Theory', 66 *Oklahoma Law Review* 327 (2014).

L. Page & S. Brin, '2004 Founders' IPO Letter' (2004), available at http://www.abc.xyz/.

L. Pahlow, 'Aktienrecht und Aktiengesellschaf zwischen Revolution und Reichsgründung. Das Allgemeine Deutsche Handelsgesetzbuch von 1861', in: *Aktienrecht im Wandel* 237 (Mohr Siebeck, 2007).

L. Pahlow, 'Das Aktienrecht im Handelsgesetzbuch von 1897', in: *Aktienrecht im Wandel* 415 (Mohr Siebeck, 2007).

A. Pajuste, 'Determinants and Consequences of the Unification of Dual-Class Shares' (2005), available at http://www.ssrn.com/.

M. Pargendler, 'The Grip of Nationalism on Corporate Law' (2019), available at http://www.ssrn.com/.

J.J. Park, 'Delaware and Santa Fe Industries v. Green', in: *Can Delaware be Dethroned? Evaluating Delaware's Dominance of Corporate Law* 101 (S.M. Bainbridge et al. eds, 2018).

H.M. Parson, 'High/Low Voting Stock bij beursvennootschappen', 10 *Vennootschap & Onderneming* 29 (2000).

M.M. Partch, 'The Creation of a Class of Limited Voting Common Stock and Shareholder Wealth', 18 *Journal of Financial Economics* 313 (1987).

N. Paschos & K. von der Linden, 'Vorzeitige Wiederbestellung von Vorstand-smitgliedern', 57 *Die Aktiengesellschaft* 736 (2012).

N. Paschos & S. Goslar, 'Die Aktienrechtsnovelle 2016 – Ein Überblick', 69 *Neue Juristische Wochenschrift* 359 (2016).

R. Passow, *Die Aktiengesellschaft: Eine wirtschaftswissenschaftliche Studie* (Verlag Gustav Fischer, 1922).

H. Patrick Glenn, 'Comparative Legal Families and Comparative Legal Traditions', in: *The Oxford Handbook of Comparative Law* 422 (M. Reimann & R. Zimmermann eds.).

H. Patrick Glenn, *Legal Traditions of The World* (Oxford University Press, 2014).

B. Pellens & F. Hildebrandt, 'Vorzugsaktien vor dem Hintergrund der Corporate Governance-Diskussion', 46 *Die Aktiengesellschaft* 57 (2001).

G. Pencinone, 'Welfare, Autonomy and Contractual Freedom', in: *Theoretical Foundations of Law and Economics* 214 (M.D. White ed., 2009).

S.H. Penman, 'The Predictive Content of Earnings Forecasts and Dividends', 38 *Journal of Finance* 1181 (1983).

F. Pernazza, 'Fiat Chrysler Automobiles and the New Face of the Corporate Mobility in Europe', 14 *European Company and Financial Law Review* 37 (2017).

F.M. Peters & F. Eikelboom, 'De strijd over het agenderingsrecht tussen Boskalis en Fugro', 146 *Weekblad voor Privaatrecht, Notariaat en Registratie* 407 (2015).

R.R. Petit, 'Dividend Announcements, Security Performance and Capital Market Efficiency', 27 *Journal of Finance* 993 (1972).

R.R. Petit, 'Taxes, Transactions Costs and the Clientele Effect of Dividends', 5 *Journal of Financial Economics* 419 (1977).

L.O. Petram, *The world's first stock exchange: how the Amsterdam market for Dutch East India Company shares became a modern securities market, 1602-1700* (Universiteit van Amsterdam, 2011).

B. Pfterner, *Unternehmerische Entscheidungen des Vorstands* (Mohr Siebeck, 2017).

M.J. Phillips, 'Reappraising the Real Entity Theory of the Corporation', 21 *Florida State University Law Review* 1061 (1994).

A. de Pinto, *Handleiding tot het Wetboek van Koophandel* (Belinfante, 1841).

A.R. Pinto, 'Takeover Statutes: The Dormant Commerce Clause and State Corporate Law', 41 *University of Miami Law Review* 473 (1987).

A.R. Pinto, 'The Constitution and the Market for Corporate Control: State Takeover Statutes After CTS Corp.', 29 *William & Mary Law Review* 699 (1988).

K. Pistor et al., 'The Evolution of Corporate Law: A Cross-Country Comparison', 23 *Journal of International Economic Law* 791 (2003).

K. Pistor, 'Co-Determination in Germany: A Socio-Political Model with Governance Externalities', in: *Employees and Corporate Governance* (M. M. Blair & M. Roe eds., 1999).

M. Pöhls, *Das Recht der Actiengesellschaften mit besonderer Rücksicht auf Eisenbahngesellschaften* (Hoffmann & Campe, 1842).

R. Polak, *Wering van vreemden invloed uit nationale ondernemingen* (J.H. de Bussy, 1918).

G. Pollner, E. Ising, & T. Hamlette, 'JOBS Act 3.0' (2018), available at http://www.corpgov.law.harvard.edu/.

M. Polte, *Aktiengattungen Eine rechtsvergleichende Untersuchung zum deutschen, US-amerikanischen und englischen Recht* (Peter Lang, 2005).

H.J. Portengen, 'Interne verhoudingen – flex bv', 138 *Weekblad voor Privaatrecht, Notariaat en Registratie* 940 (2007).

M.E. Porter, *Capital Choices: Changing the Way America Invests in Industry* (Harvard Business School Press, 1994).

C. Posner, 'So Long to Shareholder Primacy' (2019), available at http://www.corpgov.law.harvard.edu/.

E.A. Posner, F.M. Scott Morton & E. Glen Weyl, 'A Proposal to Limit the Anti-Competitive Power of Institutional Investors', 81 *Antitrust Law Journal* 669 (2017).

R.A. Posner, 'The Decline of Law as an Autonomous Discipline: 1962-1987', 100 *Harvard Law Review* 761 (1987).

R.A. Posner, 'The Rights of Creditors of Affiliated Corporations', 43 *University of Chicago Law Review* 499 (1976).

R.A. Posner, 'Utilitarianism, Economics, and Legal Theory', 8 *Journal of Legal Studies* 103 (1979).

R.A. Posner, *Economics Analysis of Law* (Wolters Kluwer Law & Business, 2014).

R.A. Posner, *How Judges Think* (Harvard University Press, 2008).

R. Pound, 'The Scope and Purpose of Sociological Jurisprudence I', 24 *Harvard Law Review* 591 (1911).

R. Pound, 'The Scope and Purpose of Sociological Jurisprudence II', 25 *Harvard Law Review* 140 (1912).

R. Pound, 'The Scope and Purpose of Sociological Jurisprudence III', 25 *Harvard Law Review* 489 (1912).

R.C. Pozen, 'Institutional Investors: The Reluctant Activists', 72 *Harvard Business Review* 140 (1994).

W. Prest, 'Lay legal history', in: *Making Legal History: Approaches and Methodologies* 196 (A. Musson & C. Stebbings eds.).

H.J. Priester, 'Die Kommanditgesellschaft auf Aktien ohne natürlichen Komplementär', 160 *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* 250 (1996).

A.C. Pritchard & R.B. Thompson, 'Securities Law and the New Deal Justices', 95 *Virginia Law Review* 841 (2009).

T.C. Pulvino, 'Do Asset Fire Sales Exist? An Empirical Investigation of Commercial Aircraft Transactions', 53 *Journal of Finance* 939 (1998).

H.M. Punt, *Het vennootschapsrecht van Holland* (Kluwer, 2010).

M. Puri & R. Zatuskie, 'On the Life Cycle Dynamics of Venture-Capital- and Non-Venture-Capital-Financed Firms', 67 *Journal of Finance* 2247 (2012).

Y. Qiu, 'Debt Structure as a Strategic Bargaining Tool' (2017), available at http://www.ssrn.com/.

W.T. Quillen & M. Hanrahan, 'A Short History of the Delaware Court of Chancery 1792-1992', 18 *Delaware Journal of Corporate Law* 819 (1993).

D. Quinn, 'Dutch Treat: Netherlands Judiciary only Goes Halfway towards Adopting Delaware Trilogy in Takeover Context', 41 *Vanderbilt Journal of Transnational Law* 1211 (2008).

P.H.N. Quist, *Conversie en aandelen* (Wolters Kluwer, 2018).

G.T.M.J. Raaijmakers & M.J.G.C. Raaijmakers, 'De NV in 2020', 16 *Ondernemingsrecht* 53 (2014).

G.T.M.J. Raaijmakers & M.R.S.S. Soliman, 'De implementatie van de herziene Aandeelhoudersrechtenrichtlijn', 21 *Ondernemingsrecht* 908 (2019).

M.J.G.C. Raaijmakers, ''Besloten' vennootschappen: quasi-nv of quasi-vof? Enkele rechtsvergelijkende notities', 44 *Ars Aequi* 76 (1994).

M.J.G.C. Raaijmakers, 'Cancun: een joint venture klem tussen contract en instituut', 64 *Ars Aequi* 459 (2014).

M.J.G.C. Raaijmakers, 'De 'institutionele opvatting': grondslag en inhoud?', 45 *Ondernemingsrecht* 155 (2015).

M.J.G.C. Raaijmakers, 'Zelfregulering van corporate governance van beursondernemingen', 135 *Weekblad voor Privaatrecht, Notariaat en Registratie* 67 (2004).

M.J.G.C. Raaijmakers, *Rechtspersonen tussen contract en instituut* (Kluwer, 1987).

D.M. Rabban, 'Methodology in legal history', in: *Making Legal History: Approaches and Methodologies* 88 (A. Musson & C. Stebbings eds.).

A. Rackham, *Aesop's fables* (Dover, 2010).

W. Raemisch, *Die Vorzugsaktie* (Universität Würzburg, 1923).

T. Raiser, 'Klagebefugnisse einzelner Aufsichtsratsmitglieder', 18 *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 52 (1989).

R.G. Rajan & L. Zingales, 'Financial Dependence and Growth', 88 *The American Economic Review* 559 (1998).

R.G. Rajan & L. Zingales, 'What do we Know About Capital Structure? Some Evidence from International Data', 50 *Journal of Finance* 1421 (1995).

W. Rathenau, *Vom Aktienwesen – Eine Geschäftliche Betrachtung* (Berlin, 1917).

D. Ratner, 'The Government of Business Corporations: Critical Reflections on the Rule of "One Share, One Vote"' 56 *Cornell Law Review* 1 (1970).

J. Rawls, *Justice as Fairness: A Restatement* (Harvard University Press, 2001).

W.H. Rehnquist, *The Supreme Court: How It Was, How It Is* (William Morrow & Co., 1987).

G.J.C. Rensen, *Extra-verplichtingen van leden en aandeelhouders* (Kluwer, 2005).

F. Restrepo & G. Subramanian, 'The Effect of Delaware Doctrine on Freezeout Structure & Outcomes: Evidence on the Unified Approach', 5 *Harvard Business Law Review* 205 (2015).

L.E. Ribstein, *The Rise of the Uncorporation* (Oxford University Press, 2009).

R. Richardi et al. (eds.), *Betriebsverfassungsgesetz* (Beck, 2018).

V. Rieble & C. Latzel, 'Inlandsmitbestimmung als Ausländerdiskriminierung bei Standortkonflikten', 4 *Europäische Zeitschrift für Arbeitsrecht* 145 (2011).

V. Rieble, 'Der Fall Holzmann und seine Lehren', 17 *Neue Zeitschrift für Arbeitsrecht* 225 (2000).

A. Riechers, *Das 'Unternehmen an sich'* (Mohr Siebeck, 1996).

G. Rietkerk, 'Stemrechtloze aandelen', 71 *De Naamlooze Vennootschap* 101 (1992).

S. Rietveld & M. Cremers, 'Herziening van de Corporate Governance Code: een overzicht van de wijzigingen, 18 *Ondernemingsrecht* 318 (2016).

S. Rietveld, 'Slotdocument Monitoring Commissie: terugblik, maar vooral ook vooruitkijken', 4 *Maandblad voor Ondernemingsrecht* 157 (2018).

W-G. Ringe, 'Changing Law and Ownership Patterns in Germany: Corporate Governance and the Erosion of Deutschland AG', 63 *The American Journal of Comparative Law* 493 (2015).

W-G. Ringe, 'Deviations from Ownership-Control Proportionality—Economic Protectionism Revisited', in: *Company Law and Economic Protectionism* 209 (U. Bernitz & W-G. Ringe eds., 2010).

W-G. Ringe, *The Deconstruction of Equity: Activist Shareholders, Decoupled Risk, and Corporate Governance* (Oxford University Press 2016).

W.Z. Ripley, *Main Street and Wall Street* (Little & Brown Company, 1927).

J.R. Ritter, 'The Costs of Going Public', 19 *Journal of Financial Economics* 269 (1987).

F. Rittner, 'Zur Verantwortung des Vorstands nach § 76 Abs. 1 AktG 1965', 16 *Die Aktiengesellschaft* 113 (1973).

J. Robinson, *The Generalization of the General Theory* (Macmillan, 1952).

E.B. Rock & D.L. Rubinfield, 'Defusing the Antitrust Threat to Institutional Investor Involvement in Corporate Governance' (2017), available at http://www.ssrn.com/.

E.B. Rock & M. Kahan, 'Index Funds and Corporate Governance: Let Shareholders be Shareholders' (2018), available at http://www.ssrn.com/.

E.B. Rock, 'Greenhorns, Yankees, and Cosmopolitans: Venture Capital, IPOs, Foreign Firms, and U.S. Markets', 2 *Theoretical Inquiries in Law* 711 (2001).

E.B. Rock, 'MOM Approval in a World of Active Shareholders' (2018), available at http://www.ssrn.com/.

E.B. Rock, 'Shareholder Eugenics in the Public Corporation', 97 *Cornell Law Review* 849 (2012).

F. Rödl, 'Diskriminierende Mitbestimmung?', 71 *Juristen Zeitung* 980 (2016).

U. Rodrigues, 'Corporate Governance in an Age of Separation of Ownership from Ownership', 95 *Minnesota Law Review* 1822 (2011).

U. Rodrigues, 'The Fetishization of Independence', 33 *Journal of Corporation Law* 447 (2008).

M.J. Roe, 'A Spatial Representation of Delaware-Washington Interaction in Corporate Lawmaking', 2012 *Columbia Business Law Review* 553 (2012).

M.J. Roe, 'Chaos and Evolution in Law and Economics', 109 *Harvard Law Review* 641 (1996).

M.J. Roe, 'Corporate Short-Termism – In the Boardroom and in the Courtroom', 68 *The Business Lawyer* 977 (2013).

M.J. Roe, 'Delaware's Competition', 117 *Harvard Law Review* 588 (2003).

M.J. Roe, 'Stock Market Short-Termism's Impact', 167 *University of Pennsylvania Law Review* 871 (2018).

L.J.J. Rogier, 'Het einde van het concordantiebeginsel?', 177 *Rechtsgeleerd Magazijn Themis* 124 (2016).

C. Rohrlich, 'Corporate Voting: Majority Control' 7 *St. John's Law Review* 218 (1933).

E.L. Roisman, 'The Proxy Process Roundtable' (2018), available at http://www.corpgov.law.harvard.edu/.

R. Romano, 'Corporate Governance in the Aftermath of the Insurance Crisis', 39 *Emory Law Journal* 1155 (1990).

R. Romano, 'Empowering Investors: A Market Approach to Securities Regulation', 107 *Yale Law Journal* 2359 (1998).

R. Romano, 'Law as a Product: Some Pieces of the Incorporation Puzzle', *International Journal of Law, Economics & Organization* 225 (1985).

R. Romano, 'The Need for Competition in International Securities Regulation', 2 *Theoretical Inquiries in Law* 387 (2001).

R. Romano, 'The Sarbanes-Oxley Act and the Making of Quack Corporate Governance', 114 *Yale Law Journal* 1521 (2005).

R. Romano, 'The State Competition Debate in Corporate Law', 8 *Cardozo Law Review* 709 (1987).

R. Romano, *The Genius of American Corporate Law* (AEI Press, 1993).

C.P.M. Romme, *De onderneming als gemeenschap in het recht* (Urbi et Orbi, 1946).

U. Ronge, *Die langfristige Rendite deutscher Standardaktien: Konstruktion eines historischen Aktienindex ab Ultimo 1870 bis Ultimo 1959* (Lang, 2002).

K.H.M. de Roo, 'Directors' Fiduciary Duties Beyond the Nation State', 66 *Ars Aequi* 263 (2016).

K.H.M. de Roo, 'Het lichaam van de niet-uitvoerende bestuurder', 3 *Maandblad voor Ondernemingsrecht* 250 (2017).

K.H.M. de Roo, 'De Corporate Governance Code en het drijfzand van de open norm', 65 *Ars Aequi* 257 (2015).

F. de Roon & A. Slager, *The Duration and Turnover of Dutch Equity Ownership, A Case Study of Dutch Institutional Investors* (2012).

H. Rosenberg, 'Political and Social Consequences of the Great Depression of 1873-1896 in Central Europe', 13 *The Economic History Review* 58 (1943).

R. Rosendorff, 'The New German Company Law and the English Companies Act, 1929', 14 *Journal of Comparative Legislation and International Law* 94 (1932).

R. Rosendorff, 'The New German Company Law and the English Companies Act, 1929-II', 15 *Journal of Comparative Legislation and International Law* 112 (1933).

S.A. Ross, 'Comment on the Modigliani-Miller Propositions', 2 *Journal of Economic Perspectives* 127 (1988).

S.A. Ross, 'The Determination of Financial Structure: The Incentive-Signaling Approach', 8 *Bell Journal of Economics* 23 (1977).

J. Rossman, 'Lazard's 1Q 2019 Activism Review' (2019), available at http://corpgov.law.harvard.edu/.

M. Roth, 'Corporate Boards in Germany', in: *Corporate Boards in Law and Practice: A Comparative Analysis in Europe* (P. Davies et al., eds.).

M. Roth, 'Outside Director Liability: German Stock Corporation Law in Transatlantic Perspective', 8 *Journal of Corporate Law Studies* 337 (2008).

M. Roth, 'Wirtschaftsrecht auf dem Deutschen Juristentag 2012', 15 *Neue Zeitschrift für Gesellschaftsrecht* 881 (2012).

P.L. Rousseau & P. Wachtel, 'What is Happening to the Impact of Financial Deepening on Economic Growth?', 49 *Economic Inquiry* 276 (2011).

P.K. Rowe, T.N. Mirvis & W. Savitt, 'Bebchuk's "Case for Increasing Shareholder Power": An Opposition' (2007), available at http://www.ssrn.com/.

K. Rydqvist, 'Dual-Class Shares: a Review', 8 *Oxford Review of Economic Policy* 45 (1992).

K. Rydqvist, 'Takeover Bids and the Relative Prices of Shares That Differ in Their Voting Rights', 20 *Journal of Banking & Finance* 1407 (1996).

S. Saaidi & S. Dutta, *Taxes and Clientele Effects*, in: *Dividends and Dividend Policy* 127 (H. Kent Baker ed.).

J. Säcker et al. (eds.), *Münchener Kommentar zum Bürgerliches Gesetzbuch* (Beck, 2019).

M. Sachs (ed.), *Grundgesetz* (Beck, 2014).

J.M. Saleh, *50 Jaar Statuut van het Koninkrijk: in vrijheid en verscheidenheid verbonden of tot elkaar veroordeeld* (Universiteit Utrecht, 2006).

P. Sanders, 'De nieuwe druk van Van der Heijden-Van der Grinten', 41 *Naamlooze Vennootschap* 58 (1963).

O. Sandrock, 'German and International Perspectives of the German Model of Codetermination' 26 *European Business Law Review* 129 (2015).

F.C. von Savigny, *System des heutigen Römischen Rechts II* (Veit, 1840).

F.C. von Savigny, *Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft* (Mohr und Zimmer, 1814).

C. Schäfer, 'Besondere Regelungen für börsennotierte und für nicht börsennotierte Gesellschaften', 61 *Neue Juristische Wochenschrift* 2536 (2008).

S. Schama, *Patriots and Liberators. Revolution in the Netherlands, 1780-1813* (Harper Collins, 1992).

F.G. Scheltema, *Het gewijzigd ontwerp van wet op de naamlooze vennootschappen* (Belinfante, 1926).

P. van Schilfgaarde, 'Beursovername en beschermingsconstructies', in: *Aandelen* 19 (J. Maeijer et al. eds, 1988).

P. van Schilfgaarde, 'Concordantie in het privaatrecht', 130 *Weekblad voor Privaatrecht, Notariaat en Registratie* 318 (1999).

P. van Schilfgaarde, *De redelijkheid en billijkheid in het ondernemingsrecht* (Wolters Kluwer, 2016).

P. van Schilfgaarde & A.G. van Solinge, *De vennootschap volgens het ontwerp BW* 12 (W.E.J. Tjeenk Willink, 1974).

W. Schilling, 'Wandlungen des modernen Gesellschaftsrechts', 8 *Juristen-Zeitung* 489 (1953).

F. Schlegelberger, *Die Erneuerung des deutschen Aktienrechts, Vortrag gehalten am 15. August 1935 vor der Industrie- und Handelskammer in Hamburg* (Vahlen, 1935).

E. Schmalenbach, 'Die Vorzugsaktie', 2 *Zeitschrift für handelswissenschaftliche Forschung* 241 (1908).

E. Schmalenbach, *Finanzierungen* (Gloeckner, 1928).

C. Schmidt & R. Fahlenbrach, 'Do Exogenous Changes in Passive Institutional Ownership Affect Corporate Governance and Firm Value', 124 *Journal of Financial Economics* 285 (2017).

J. Schmidt, 'Reforms in German Stock Corporation Law – The 67th German Jurists Forum', 9 *European Business Organization Law Review* 637 (2008).

J. Schmidt, 'Related Party Transactions nach dem RegE zum ARUG II', 30 *Europäische Zeitschrift für Wirtschaftsrecht* 261 (2019).

I. Schnabel, 'The German Twin Crisis of 1931', 64 Journal of Economic *History* 822 (2004).

U.H. Schneider, 'Europarechtlicher Schutz vor nachteiligen Transaktionenmit nahe stehenden Unternehmen und Personen,' 25 *Europäische Zeitschrift für Wirtschaftsrecht* 641 (2014).

P. Scholten, 'Nieuwe Geschriften over het Wetsontwerp op de Naamlooze Vennootschappen', 56 *Weekblad voor Privaatrecht, Notariaat en Registratie* 565 (1926).

P. Scholten, 'Wijziging van Statuten', 37 *Weekblad voor Privaatrecht, Notariaat en Registratie* 1940 (1907).

M.C. Schouten, 'The Mechanisms of Voting Efficiency', 2010 *Columbia Business Law Review* 763 (2010).

M.C. Schouten, *The Decoupling of Voting and Economic Ownership* (Kluwer, 2012).

H. Schröer, 'Zur Einführung der unechten nennwertlosen Aktie aus Anlaß der Europäischen Währungsunion', 14 *Zeitschrift für Wirtschaftsrecht* 221 (1997).

C. Schubel, *Verbandssouveränität und Binnenorganisation der Handelsgesellschaften* (Mohr Siebeck, 2003).

W. Schubert & P. Hommelhoff (eds.), *Hundert Jahre modernes Aktienrecht. Eine Sammlung von Texten und Quellen zur Aktienrechtsreform 1884 mit zwei Einführungen* (De Gruyter, 1985).

W. Schubert, 'Vom Konzessions- zum Normativsystem. Materialien zur Aktienrechtsnovelle 1870', 46 *Zeitschrift für Unternehmens- und Gesellschaftsrecht* (Sonderheft 21) (2017).

S. Schulz, 'Die Ausgleichsanspruch für erloschene und beseitigte Mehrstimmrechte gem. § 5 III EGAktG', 5 *Neue Zeitschrift für Gesellschaftsrecht* 996 (2002).

J.A. Schumpeter, *Theorie der Wirtschaftlichen Entwicklung* (Dunker & Humblot, 1912).

J. Schwartz, 'Should Mutual Funds Invest in Startups? A Case Study of Fidelity Magellan Fund's Investments in Unicorns (and other Startups) and the Regulatory Implications', 95 *North Carolina Law Review* 1341 (2017).

J. Schwartz, 'The Law and Economics of Scaled Equity Market Regulation', 39 *Journal of Corporation Law* 37 (2014).

C.A. Schwarz, *Aandelen zonder stemrecht* (W.E.J. Tjeenk Willink, 1990).

C.A. Schwarz, *De impact van het vennootschappelijk belang: machtsverhoudingen, verantwoordelijkheid en aansprakelijkheid* (Boom, 2018).

C.A. Schwarz & S.B. Garcia Nelen, *Certificering van aandelen bij NV en BV* (SDU, 2016).

G. Segall, *John D. Rockefeller: Anointed with Oil* (Oxford University Press, 2001).

U. Seibert, 'Control and Transparency in Business (KonTraG): Corporate Governance Reform in Germany', 10 *European Business Law Review* 70 (1999).

U. Seibert, 'Das "TransPuG" – Gesetz zur weiteren Reform des Aktien- und Bilanzrechts, zu Transparenz und Publizität (Transparenz- und Publizitätsgesetz) – Diskussion im Gesetzgebungsverfahren und endgültige Fassung', 5 *Neue Zeitschrift für Gesellschaftsrecht* 608 (2002).

U. Seibert, 'Gesetzentwurf zur Herabsetzung des Nennbetrags der Aktien', 38 *Die Aktiengesellschaft* 315 (1993).

C.H. Seibt, 'Verbandssouveränität und Abspaltungsverbot im Aktien- und Kapitalmarktrecht – Revisited: Hidden Ownership, Empty Voting und andere Kleinigkeiten', 39 *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 795 (2010).

W. Seidel, 'Der Deutsche Corporate Governance Kodex – eine private oder doch eine staatliche Regelung', 25 *Zeitschrift für Wirtschaftsrecht* 285 (2004).

J. Seligman, 'A Brief History of Delaware's General Corporation Law of 1899', 1 *Delaware Journal of Corporate Law* 249 (1976).

J. Seligman, 'Equal Protection in Shareholder Voting Rights: The One Common Share, One Vote Controversy', 54 *George Washington Law Review* 695 (1986).

M. Senger & A. Vogelmann, 'Die Umwandlung von Vorzugsaktien in Stammaktien', 47 *Die Aktiengesellschaft* 193 (2002).

B.S. Sharfman, 'A Private Ordering Defense of a Company's Right to Use Dual Class Share Structures in IPOs', 63 *Vilanova Law Review* 1 (2018).

B.S. Sharfman, 'Kahn v. M&F Worldwide Corporation: A Small but Significant Step Forward in the War Against Frivolous Shareholder Lawsuits', 40 *Journal of Corporation Law* 197 (2014).

H.M. Shefrin & M. Statman, 'Explaining Investor Preference for Cash Dividends', 13 *Journal of Financial Economics* 253 (1984).

H.M. Shefrin & R.H. Thaler, 'The Behavioral Life-Cycle Hypothesis', 26 *Economic Enquiry* 609 (1988).

H. Shefrin, 'Behavioral Explanations of Dividends', in: *Dividends and Dividend Policy* 179 (H. Kent Baker ed.).

R.J. Shiller, 'Do Stock Prices Move Too Much to be Justified by Subsequent Changes in Dividends?', 71 *The American Economic Review* 421 (1981).

R.J. Shiller, *Irrational Exuberance* (Princeton University Press, 2016).

A. Shleifer & R.W. Vishny, 'Large Shareholders and Corporate Control', 94 *Journal of Political Economy* 461 (1986).

A. Shleifer & R.W. Vishny, 'Liquidation Values and Debt Capacity: A Market Equilibrium Approach', 47 *Journal of Finance* 1343 (1992).

A. Shleifer, 'Do Demand Curves for Stocks Slope Down?', 41 *Journal of Finance* 579 (1986).

C. Shu, 'Alibaba's Shares Climb Almost 8% in Their First Morning of Trading on the Hong Kong Stock Exchange' (2019), available at http://www.techcrunch.com/.

L. Shyam-Sunder & S.C. Myers, 'Testing Static Tradeoff Against Pecking Order Models of Capital Structure', 51 *Journal of Financial Economics* 219 (1999).

U.R. Siebel & S. Gebauer, 'Interimsdividende', 44 *Die Aktiengesellschaft* 385 (1999).

U.R. Siebel, 'Für und wider die Quotenaktie', 7 *Zeitschrift für das gesamte Kreditwesen* 92 (1954).

U.R. Siebel, 'Vorzugsaktien als „Hybride" Finanzierungsform und ihre Grenzen', 161 *Zeitschrift für das Gesamte Handels- und Wirtschaftsrecht* 628 (1997).

C.H. Sieburgh, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 6. Verbintenissenrecht. Deel I. De verbintenis in het algemeen, eerste gedeelte* (Wolters Kluwer, 2016).

J.J. Sieger & K. Hasselbach, '„Tracking Stock" im deutschen Aktien- und Kapitalmarktrecht', 46 *Die Aktiengesellschaft* 391 (2001).

M. Simkovic, 'Limited Liability and the Known Unknown', 68 *Duke Law Journal* 275 (2018).

J.M.I.A. Simons, 'Koninklijke bewilliging', 4 *De Naamlooze Vennootschap* 67 (1925).

W.K. Sjostrom & Y.S. Kim, 'Majority Voting for the Election of Directors', 40 *Connecticut Law Review* 459 (2007).

D. Skeel, 'The Bylaw Puzzle in Delaware Corporate Law', 72 *The Business Lawyer* 1 (2017).

T.B. Skelton, '2013 Jobs Act Review & Analysis of Emerging Growth Company IPOs', 15 *Transactions: The Tennessee Journal of Business Law* 455 (2014).

W. Slagter, *Macht en onmacht van de aandeelhouder* 12 (Kluwer, 1988).

W.J. Slagter, 'De lidmaatschapsverhouding als grondslag van het rechtspersonenrecht', 6 *Ondernemingsrecht* 424 (2004).

W.J. Slagter, 'De metamorfose van de aandeelhouder', 88 *Nederlands Juristenblad* 2036 (2012).

J.R. Slights & M. Diller, 'Corwin v. KKR Financial Holdings LLC–An After-Action Report', 24 *Fordham Journal of Corporate & Financial Law* 1 (2018).

K.E. Sluyterman, Kerende kansen. *Het Nederlandse bedrijfsleven in de twintigste eeuw* (Boom, 2003).

S.B. Smart & C.J. Zutter, 'Dual Class IPOs are Underpriced Less Severely', 43 *The Financial Review* 85 (2008).

S.B. Smart & C.J. Zutter, 'Control as a Motivation for Underpricing: a Comparison of Dual and Single-class IPOs', 69 *Journal of Financial Economics* 85 (2003).

D.M. Smith, 'Residual Dividend Policy' in: *Dividends and Dividend Policy* 115 (H. Kent Baker ed.).

K. Smith, 'The Agency Costs of Equal Treatment Clauses', 127 *The Yale Law Journal Forum* 543 (2017).

A.H. Smyth, *The Writings of Benjamin Franklin, Vol. X* (1789-1790) (MacMillian, 1907).

D.J. Smythe,'Shareholder Democracy and the Economic Purpose of the Corporation', 63 *Washington & Lee Law Review* 1407 (2006).

P.M.H. Snel, 'Het vraagstuk van de meerstemmige aandeelen in Frankrijk', 9 *De Naamlooze Vennootschap* 71 (1930).

G. van Solinge & J. van Bekkum, 'Villa Mundo', 16 *Ondernemingsrecht* 228 (2014).

G. van Solinge & M.P. Nieuwe Weme, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands burgerlijk recht. 2. Rechtspersonenrecht. Deel IIb. NV en BV. Corporate Governance* (Wolters Kluwer, 2019).

H. Spamann, 'The "Antidirector Rights Index" Revisited', 23 *Review of Financial Studies* 467 (2010).

G. Spindler, 'Corporate Social Responsibility in der AG – Mythos oder Real-ität?', in: *Festschrift für Peter Hommelhoff zum 70. Geburtstag* 1133 (B. Erle et al., eds., 2012).

G. Spindler, 'Haftung und Aktionärsklage nach dem neuen UMAG', 8 *Neue Zeitschrift für Gesellschaftsrecht* 865 (2005).

G. Spindler & E. Stilz (eds.), *Kommentar zum Aktiengesetz* (Beck, 2019).

G. Spindler, 'Kriegsfolgen, Konzernbildung und Machtfrage als zentrale Aspekte der aktienrechtlichen Diskussion in der Weimarer Republik', in: *Aktienrecht im Wandel* 440 (Mohr Siebeck, 2007).

C.W. Star Busmann, 'De autocratische of oligarchische clausule in de statuten van de naamlooze vennootschappen', 45 *Vragen des Tijds* 31 (1919).

L. Steffens, 'New Jersey: A Traitor State', 25 *McClure's Magazine* 41 (1905).

J. Steinberg, *Bismarck: A Life* (New York, 2011).

E. Steinitzer, *Ökonomische Theorie der Aktiengesellschaft* (Duncker & Humblot, 1908).

F. Stevelman, 'Regulatory Competition, Choice of Forum, and Delaware's Stake in Corporate Law', 34 *Delaware Journal of Corporate Law* 57 (2009).

M. Stevens, 'Internal Affairs Doctrine: California Versus Delaware in a Fight for the Right to Regulate Foreign Corporations,' 48 *Boston College Law Review* 1047 (2007).

W.H.S. Stevens, 'Stockholders' Voting Rights and the Centralization of Voting Control', 40 *Quarterly Journal of Economics* 353 (1926).

W.H.S. Stevens, 'Voting Rights of Capital Stock and Shareholders', 11 *The Journal of Business of the University of Chicago* 311 (1938).

J.E. Stiglitz, 'A Re-Examination of the Modigliani-Miller Theorem', 59 *The American Economic Review* 784 (1969).

J.E. Stiglitz, 'Why Financial Structure Matters', 2 *Journal of Economic Perspectives* 121 (1988).

J.E. Stiglitz, *Freefall: America, Free Markets, and the Sinking of the World Economy* (Norton, 2010).

H.W. Stoke, 'Economic Influences Upon the Corporation Laws of New Jersey', 38 *Journal of Political Economy* 551 (1930).

C.J.J.M. Stolker: ''Ja, geléérd zijn jullie wel!' Over de status van de rechtswetenschap', 77 *Nederlands Juristenblad* 766 (2003).

L. Stout, *The Shareholder Value Myth. How Putting Shareholders First Harms Investors, Corporations, and the Public* (Berret-Koehler, 2012).

L.A. Stout, 'The Mechanisms of Market Inefficiency: An Introduction to the New Finance', 28 *Journal of Corporation Law* 635 (2003).

L.A. Stout, 'Why We Should Stop Teaching Dodge v. Ford', 3 *Virginia Law & Business Review* 163 (2008).

M. Straska & H.G. Waller, 'Antitakeover Provisions and Shareholder Wealth: A Survey of the Literature', 49 *Journal of Financial & Quantitative Analysis* 933 (2014).

D.A.M.H.W. Strik, ' Ernstige verwijtbaarheid: tussen onrechtmatigheid en toerekenbaarheid. Over de 'inkleuring' van art. 6:162 BW door art. 2:9 BW', 11 *Ondernemingsrecht* 660 (2009).

D.A.M.H.W. Strik, *Grondslagen bestuurdersaansprakelijkheid, Een maatpak voor de Board Room* (Kluwer, 2010).

L.E. Strine & J.R. Macey, 'Citizens United as Bad Corporate Law' (2018), available at http://www.ssrn.com/.

L.E. Strine et al., 'Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law', 98 *The Georgetown Law Journal* 629 (2010).

L.E. Strine, 'A Job is Not a Hobby: The Judicial Revival of Corporate Paternalism and its Problematic Implications', 41 *Journal of Corporation Law* 71 (2015).

L.E. Strine, 'Can We Do Better by Ordinary Investors? A Pragmatic Reaction to the Dueling Ideological Mythologists of Corporate Law', 114 *Columbia Law Review* 449 (2014).

L.E. Strine, 'Corporate Power is Corporate Purpose I: Evidence From my Hometown', 33 *Oxford Review of Economic Policy* 176 (2017).

L.E. Strine, ‘Making It Easier for Directors to Do the Right Thing’, 4 *Harvard Business Law Review* 235 (2014).

L.E. Strine, ‘One Fundamental Corporate Governance Question We Face: Can Corporations Be Managed for the Long Term Unless Their Powerful Electorates also Act and Think Long Term?’, 66 *The Business Lawyer* 1 (2010).

L.E. Strine, ‘Our Continuing Struggle with the Idea that For-Profit Corporations seek Profit’, 47 *Wake Forest Law Review* 135 (2012).

L.E. Strine, ‘The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law’, 50 *Wake Forest Law Review* 761 (2015).

L.E. Strine, ‘The Delaware Way: How We Do Corporate Law and Some of the New Challenges we (And Europe) Face’, 30 *Delaware Journal of Corporate Law* 673 (2005).

L.E. Strine, ‘The Soviet Constitution Problem in Comparative Corporate Law: Testing the Proposition that European Corporate Law is More Stockholder Focused than U.S. Corporate Law’, 89 *Southern California Law Review* 1239 (2016).

L.E. Strine, ‘Toward a True Corporate Republic: A Traditionalist Response to Bebchuk’s Solution for Improving Corporate America’, 119 *Harvard Law Review* 1759 (2006).

L.E. Strine, ‘Toward Fair and Sustainable Capitalism’ (2019), available at http://www.ssrn.com/.

L.E. Strine, ‘Who Bleeds When the Wolves Bite? A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Strange Corporate Governance System’, 126 *Yale Law Journal* 1870 (2017).

C. Strothotte, *Die Gewinnverwendung in Aktiengesellschaften* (Carl Heymans, 2014).

R.M. Stulz, ‘Globalization, Corporate Finance, and the Cost of Capital’, 12 *Journal of Corporate Finance* 8 (1999).

G. Subramanian, ‘Post-Siliconix Freeze-Outs: Theory and Evidence, 36 *Journal of Legal Studies* 1 (2007).

G. Subramanian, 'The Disappearing Delaware Effect', 20 *Journal of Law, Economics & Organization* 32 (2004).

N. Summers, 'Why Google Is Issuing a New Kind of Toothless Stock' (2014), available at http://www.bloomberg.com/.

E. Sünner, 'Die Wahl von ausscheidenden Vorstandsmitgliedern in den Aufsichtsrat' 55 *Die Aktiengesellschaft* 111 (2010).

I.M. Tabell, *The History of the Standard Oil Company* (McClure, Philips & Co., 1904).

H.S. Taekema, 'Relative Autonomy: A Characterization of the Discipline of Law', in: *Law and Method. Interdisciplinary Research into Law* 33 (B.M.J. van Klink & H.S. Taekema eds., 2011).

Z. Tali & F.J. de Graaf, 'Loyaliteitsdividend, registratiedividend en institutionele beleggers: vaste relatie of betaalde liefde?', 9 *Ondernemingsrecht* 139 (2007).

B.Z. Tamanaha, 'How History Bears On Jurisprudence', in: *Law in Theory and History: New Essays on a Neglected Dialogue* 329 (M. del Mar & M. Lobban eds.).

A. Tan, 'SGX Enters New Era as it Starts Dual-class Shares for Qualifying IPOs' (2018), available at http://www.businesstimes.com.sg/.

S. Taylor & G. Whittred, 'Security Design and the Allocation of Voting Rights: Evidence from the Australian IPO Market', 4 *Journal of Corporate Finance* 107 (1998).

C. Teichmann, 'Die Auslandsgesellschaft & Co.', 43 *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 221 (2014).

E. Tekenbroek, De *verhouding tusschen de aandeelhouders en de bestuurders bij de publieke naamlooze vennootschap in Nederland: een onderzoek naar de ontwikkeling der publieke naamlooze vennootschap in Nederland* (Universiteits-Boekencentrale, 1923).

R. Thaler & E. Johnson, 'Gambling With the House Money and Trying to Break Even: the Effects of Prior Outcomes on Risky Choice', 36 *Management Science* 643 (1990).

R.H. Thaler & C.R. Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (Yale University Press, 2008).

R.H. Thaler, 'Mental Accounting and Consumer Choice', 4 *Marketing Science* 199 (1985).

S. Thel, 'The Original Conception of Section 10(b) of the Securities Exchange Act', 42 *Stanford Law Review* 385 (1990).

M. Thelen, 'Federal Incorporation of Railroads', 5 *California Law Review* 273 (1917).

H. Thieme, 'Statistische Materialien zur Konzessionierung von Aktiengesellschaften in Preussen bis 1867', 1 *Jahrbuch für Wirtschaftsgeschichte* 286 (1960).

R.B. Thompson & P.H. Edelman, 'Corporate Voting', 62 *Vanderbilt Law Review* 129 (2009).

R.B. Thompson, 'Preemption and Federalism in Corporate Governance: Protecting Shareholder Rights to Vote, Sell and Sue, 62 *Law & Contemporary Problems* 215 (1999).

R.B. Thompson, 'Delaware's Dominance: a Peculiar Illustration of American Federalism', in: *Can Delaware Be Dethroned? Evaluating Delaware's Dominance of Corporate Law* 65 (S.M. Bainbridge et al. eds, 2018).

T. Thompson, *Stewardship In Contemporary Theology* (Association Press, 1960).

W. Timm, 'Die Mitwirkung des Aufsichtsrates bei unternehmensstrukturellen Entscheidungen', 33 *Der Betrieb* 1201 (1980).

L. Timmerman, 'De carrousel van beschermingsmaatregelen (ofwel: on and on and on)', 20 *Ondernemingsrecht* 456 (2018).

L. Timmerman, 'De rol van vennootschappelijk belang en strategie bij het beschermen van beursvennootschappen', 15 *Tijdschrift voor vennootschapsrecht, rechtspersonenrecht en ondernemingsbestuur* 14 (2018).

L. Timmerman, 'Een BV zonder bestuur en zonder aandeelhoudersvergadering', 6 *Ondernemingsrecht* 27 (2004).

L. Timmerman, 'Grondslagen van geldend ondernemingsrecht', 11 *Ondernemingsrecht* 4 (2009).

L. Timmerman, 'Het Nederlandse vennootschapsrecht tussen 1918 en 2018 enkele schetsmatige opmerkingen', in: H.J. de Kluiver (red.), *100 jaar Handelsrecht. Over heden, toekomst en verleden* 61 (Paris, 2018).

L. Timmerman, 'Oude koeien met actualiteitswaarde. Over begripsvorming in het ondernemingsrecht', 16 *Ondernemingsrecht* 569 (2014).

L. Timmerman, 'Principles of Prevailing Dutch Company Law', 11 *European Business Organization Law* Review 609 (2010).

L. Timmerman, 'Samenwerking, rechtspersoon en het staart schudt hond-verschijnsel', in: *Samenwerken in het Ondernemingsrecht* 1 (L. Timmerman et al. eds., 2011).

L. Timmerman, 'Waarom hebben wij dwingend vennootschapsrecht', in: L. Timmerman et al. (eds.), *Ondernemingsrechtelijke contracten* 1 (Kluwer, 1991).

R.A.F. Timmermans, 'Beschermingsperikelen bij Fugro N.V.', 17 *Ondernemingsrecht* 307 (2015).

R.A.F. Timmermans, 'Financiering van preferente beschermingsaandelen bij New Sources Energy N.V.', 14 *Ondernemingsrecht* 462 (2012).

R.A.F. Timmermans, *Bescherming van beursvennootschappen door uitgifte van preferente aandelen* (Wolters Kluwer, 2017).

J. Tobin & W. Brainard, 'Pitfalls in Financial Model Building', 58 *American Economic Review* 99 (1968).

S. Toms, 'The Life-Cycle of Corporate Governance', in: *The Oxford Handbook of Corporate Governance* 349 (D.M. Wright et al., eds.).

J.F. Tornau, 'Ungeheurer Eingriff', 61 *Magazin Mitbestimmung* 40 (2015).

C. Torres-Spelliscy, K. Fogel & R. El-Khatib, 'Running the D.C. Circuit Gauntlet on Cost-Benefit Analysis after Citizens United: Empirical Evidence from Sarbanes-Oxley and the Jobs Act', 9 *Duke Journal of Constitutional Law & Public Policy* 135 (2014).

J. Travis Laster, 'Revlon is a Standard of Review: Why it's True and What it Means', 19 *Fordham Journal of Corporate & Financial Law* 5 (2013).

J. Travis Laster, 'The Effect of Stockholder Approval on Enhanced Scrutiny', 40 *William Mitchell Law Review* 1443 (2014).

W.C. Treurniet, 'Titel III, Kapitaal, aandelen en rechten der aandeelhouders, obligaties', 47 *De Naamlooze Vennootschap* 204 (1968).

W.C. Treurniet, 'Wat niet in het bijvoegsel straat (De stemovereenkomst)', 38 *De Naamlooze Vennootschap* 163 (1959).

T. Tröger & L. Pfaffinger, 'Partnerschaftsgesellschaft mit beschränkter Berufshaftung: Eine kritische Bewertung deutscher Verteidigungsbemühungen im europäischen Wettbewerb der Verbandsrechtsordnungen', 68 *JuristenZeitung* 812 (2013).

T. Tröger, 'Unternehmensübernahmen im deutschen Recht (II) – Übernahmeangebote, Pflichtangebote, Squeeze Out', 12 *Deutsche Zeitschrift für Wirtschafts- und Insolvenzrecht* 397 (2002).

T.H. Tröger, 'Germany's Reluctance to Regulate Related Party Transactions', in: L. Enriques & T.H. Tröger (eds.), *The Law and Finance of Related Party Transactions* 426 (Oxford University Press, 2019).

A.F. Tuch, 'The Remaking of Wall Street', 7 *Harvard Business Law Review* 315 (2017).

A.M. Tucker, 'The Long and The Short: Portfolio Turnover Ratios & Mutual Fund Investment Time Horizons', 43 *Journal of Corporation Law* 581 (2018).

F. Tung, 'Before Competition: Origins of the Internal Affairs Doctrine', 32 *The Journal of Corporation* Law 33 (2006).

W. Twining, *Law In Context: Enlarging A Discipline* (Oxford University Press, 1997).

P. Ulmer, 'Aktienrecht im Wandel – Entwicklungslinien und Diskussionsschwerpunkte', 202 *Archiv für die civilistische Praxis* 129 (2002).

P. Ulmer, 'Der Deutsche Corporate Governance Kodex – ein neues Regulierungsinstrument für börsennotierte Aktiengesellschaften', 166 *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* 150 (2002).

D.F. Vagts, 'Reforming the Modern Corporation: Perspectives from the German', 80 *Harvard Law Review* 23 (1966).

J. Velasco, 'How Many Fiduciary Duties are There in Corporate Law', 83 *Southern California Law Review* 1231 (2009).

M. Ventoruzzo, 'Empowering Shareholders in Directors' Elections: A Revolution in the Making', 8 *European Financial & Company Law Review* 105 (2011).

M. Ventoruzzo, 'The Disappearing Taboo of Multiple Voting Shares: Regulatory Responses to the Migration of Chrysler-Fiat' (2015), available at http://www.ssrn.com/.

M.A. Verbrugh & C.A. Schwarz, 'Leidt de herziene Aandeelhoudersrichtlijn tot meer langetermijnbetrokkenheid van aandeelhouders?', 21 *Ondernemingsrecht* 863 (2019).

M.A. Verbrugh, 'Concurrentie van vennootschapssystemen in Europa', 57 *Sociaal-economische wetgeving: tijdschrift voor Europees en economisch recht* 122 (2008).

M.A. Verbrugh, 'Reactie op J.M. Blanco Fernández, 'Wat is de vennootschap en wat behoort het vennootschapsrecht te zijn', Ondernemingsrecht 2018/29', 20 *Ondernemingsrecht* 722 (2018).

M.A. Verbrugh, 'Van de NV naar de BV naar de NV?', 64 *Ars Aequi* 263 (2014).

J.W. Verret, 'Pandora's Ballot Box, or a Proxy with Moxie? Majority Voting, Corporate Ballot Access, and the Legend of Martin Lipton Re-Examined', 62 *The Business Lawyer* 1007 (2007).

A. Verse, 'Die Entwicklung des europäischen Gesellschaftsrechts', 27 *Europäische Zeitschrift für Wirtschaftsrecht* 330 (2016).

D.A. Verse, *Der Gleichbehandlungsgrundsatz Im Recht Der Kapitalgesellschaften* (Mohr Siebeck, 2006).

J. Vetter, 'Verpflichting zur Schaffung von 1 Euro-Aktien', 45 *Die Aktiengesellschaft* 193 (2000).

B. Villalonga & R. Amit, 'How do Family Ownership, Control and Management Affect Firm Value?', 80 *Journal of Financial Economics* 385 (2006).

B. Vins, *Die Ausgabe konkurrierender Vorzugsaktien bei der SE (*Nomos, 2014).

K.I.J. Visser, *Zeggenschapsrechten van houders van een recht van pand of vruchtgebruik op aandelen op naam* (Deventer, 2004).

L.E. Visser, *Op welke wijze behooren de voorschriften van het Wetboek van Koophandel betreffende samenstelling en behoud van het kapitaal der Naamlooze Vennootschap te worden herzien?* (Belinfante, 1902).

H.M. Vletter van-Dort, 'De aandeelhouder als hoeksteen van de beursvennootschap?', 20 *Ondernemingsrecht* 280 (2018).

H.M. Vletter-van Dort & T.A. Keijzer, 'Bescherming van beursvennootschappen: dubbel gestikt houdt beter', 66 *Ars Aequi* 329 (2016).

H.M. Vletter-van Dort & T.A. Keijzer, 'Herziening Britse Corporate Governance Code: stof tot nadenken', 20 *Ondernemingsrecht* 321 (2018).

H.M. Vletter-van Dort, 'De bedenktijd: naïef of noodzaak?', 21 *Ondernemingsrecht* 899 (2019).

H.M. Vletter-van Dort, 'Executive Committee lid', in: *De vele gezichten van Maarten Kroeze's "bange bestuurders"* 215 (Wolters Kluwer, 2017).

H.M. Vletter-van Dort, *Gelijke behandeling van beleggers bij informatieverstrekking* (Kluwer, 2001).

M. Vollertsen, *Corporate Governance der börsennotierten KGaA* 48-49 (Nomos, 2019).

R.P. Voogd, *Statutaire beschermingsmiddelen bij beursvennootschappen* (Kluwer, 1989).

T. Vos, 'Baby, It's Cold Outside…' – A Comparative and Economic Analysis of Freeze-Outs of Minority Shareholders', 15 *European Company and Financial Law Review* 148 (2018).

A. Voute, *Aandelen voor werknemers* (Kluwer, 1991).

J.B.M. Vranken, *Mr. C. Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. Algemeen deel****. Een synthese* (Kluwer, 2014).

J. de Vries & A. van der Woude, *The First Modern Economy. Success, Failure and Perseverance of the Dutch Economy, 1500-1815* (Cambridge University Press, 1997).

K.A.M. van Vught, *Het besluit van de rechtspersoon* (Wolters Kluwer, 2020).

J.E. Walter, 'Dividend Policy: Its Influence on the Value of the Enterprise', 18 *Journal of Finance* 280 (1963).

E. Wälzholz, 'Besonderheiten der Satzungsgestaltung bei der Familien-AG (Teil II)', 42 *Deutsches Steuerrecht* 819 (2004).

T. Ward, *England's Reformation: a Poem, in Four Cantos* (D.&J. Sadlier & Co., 1853).

J.B. Warner, 'Bankruptcy Costs: Some Evidence', 32 *Journal of Finance* 337 (1977).

M.G. Warren, 'Developments in State Takeover Regulation: MITE and Its Aftermath', 40 *The Business Lawyer* 671 (1985).

A. Watson, *Legal Transplants: An Approach to Comparative Law* (Scottish Academic Press, 1974).

R. Watts, 'The Information Content of Dividends', 46 *Journal of Business* 191 (1973).

A. Weber, 'An Empirical Analysis of the 2000 Corporate Tax Reform in Germany: Effects on Ownership and Control in Listed Companies', 29 *International Review of Law & Economics* 57 (2009).

I.J. Weber, *Die gemeinnützige Aktiengesellschaft* (Bucerius Law School Press, 2014).

M.C.E. Weber, *Gesammelte Aufsätze Zur Wissenschaftslehre* (Mohr Siebeck, 1922).

E.J. Weiss, 'Balancing Interests in Cash-Out Mergers: The Promise of Weinberger v. UOP, Inc.', 8 *Delaware Journal of Corporate Law* 1 (1983).

L.A. Weiss, 'Bankruptcy Resolution: Direct Costs and Violation of Priority of Claims', 27 *Journal of Financial Economics* 285 (1990).

E.P. Welch & R.S. Saunders, 'Freedom and its Limits in the Delaware General Corporation Law', 33 *Delaware Journal of Corporate Law* 845 (2008).

E.P. Welch et al., *Folk on the Delaware General Corporate Law* (Wolters Kluwer, 2019).

T. Wen, 'You Can't Sell Your Firm and Own it Too: Disallowing Dual-Class Stock Companies From Listing on the Securities Exchanges', 162 *University of Pennsylvania Law Review* 1495 (2014).

A. von Werder & T. Talaulicar, 'Kodex Report 2010. Die Akzeptanz der Empfehlungen und Anregungen des Deutschen Corporate Governance Kodex', 63 *Der Betrieb* 853 (2010).

A. von Werder 'Der Deutsche Corporate Governance Kodex – Grundlagen und Einzelbestimmungen' 55 *Der Betrieb* 801 (2002).

A. von Werder, 'Überwachungseffizienz und Unternehmensmitbestimmung', 49 *Die Aktiengesellschaft* 166 (2004).

W.A. Westenbroek, *Bestuurdersaansprakelijkheid in theorie* (Kluwer, 2017).

J. Wiarda et al. (eds.), *Molengraaff Bundel* (W.E.J. Tjeenk Willink, 1978).

H.J. Wiarda, *Corporatism and Comparative Politics: The Other Great "Ism"* (Routledge, 1997).

J. Wiegand, 'Destabilizing the Global Monetary System: Germany's Adoption of the Gold Standard in the Early 1870s' (2019), available at http://www.ssrn.com/.

J.B. Williams, *The Theory of Investment Value* (Harvard University Press, 1938).

O.E. Williamson, *Markets and Hierarchies, Analysis and Antitrust Implications: A Study in the Economics of Internal Organization* (Free Press, 1985).

S. Williston, 'History of the Law of Business Corporations before 1800', 2 *Harvard Law Review* 149 (1888).

H-U. Wilsing & L. Winkler, 'Deutscher Corporate Governance Kodex 2019 – ein Überblick', 74 *Betriebs-Berater* 1603 (2019).

D. Wilson, 'Desirable Resistance: Kahn V. M&F Worldwide and the Fight for the Business Judgment Rule in Going-Private Mergers', 17 *University of Pennsylvania Journal of Business Law* 643 (2015).

A. Winden & A.C. Baker, 'Dual-Class Index Exclusion' (2018), available at http://www.ssrn.com/.

A.W. Winden, 'Sunrise, Sunset: An Empirical and Theoretical Assessment of Dual-Class Stock Structures', 2018 *Columbia Business Law Review* 852 (2019).

J.W. Winter et al., 'Naar een zorgplicht voor bestuurders en commissarissen tot verantwoorde deelname aan het maatschappelijk verkeer', 22 *Ondernemingsrecht* 471 (2020).

J.W. Winter, 'BV, NV en beursvennootschap', in: P. van Schilfgaarde et al. (eds.), *Vereenvoudiging en flexibilisering van het Nederlandse BV-recht* 107 (Kluwer, 2005).

J.W. Winter, 'Shareholder engagement and stewardship: the realities and illusions of institutional share ownership', (2011) available at http://www.ssrn.com/.

J.W. Winter, Aandeelhouder engagement en stewardship, in: *Samenwerken in het Ondernemingsrecht* 39 (L. Timmerman et al. eds., 2011).

M. Winter, E. Marx & N. De Decker, 'Zählen und wählen Arbeitnehmer nach deutschem Mitbestimmungsrecht?', 32 *Neue Zeitschrift für Arbeitsrecht* 1111 (2015).

R.K. Winter, 'State Law, Shareholder Protection, and the Theory of the Corporation', 6 *The Journal of Legal Studies* 251 (1977).

J.W. Winter, 'Level playing fields forever', in: *De nieuwe macht van de kapitaalverschaffer* (H. Beckman et al. eds., 2007).

J. Winzen, *Vorzugsaktie und KGaA − Instrumente zur Kontrollerhaltung bei der Eigenkapitalfinanzierung* (Peter Lang, 2014).

G. Wirth & M. Arnold, 'Umwandlung von Vorzugsaktien in Stammaktien', 31 *Zeitschrift für Unternehmens- und Gesellschaftsrecht* 859 (2002).

D.A. Wishnick, 'Corporate Purposes in a Free Enterprise System: A Comment on eBay v. Newmark', 121 *Yale Law Journal* 2405 (2012).

D.E. Wolf & G. Zohari, 'Controlling Stockholder M&A Does Not Automatically Trigger Entire Fairness Review' (2018), available http://www.corpgov.law.harvard.edu/.

R.A. Wolf, 'Het stemrechtloze aandeel in de N.V.? Een pleidooi en verkenning', 11 *Tijdschrift voor vennootschapsrecht, rechtspersonenrecht en ondernemingsbestuur* 42 (2014).

R.A. Wolf, *De kapitaalverschaffer zonder stemrecht in de BV* (Wolters Kluwer, 2013).

R.A. Wolf, 'Het creëren en de uitgifte van stemrechtloze aandelen als soort aandelen', 144 *Weekblad voor Privaatrecht, Notariaat en Registratie* 253 (2014).

C. Wolmar, *The Great Railroad Revolution: The History of Trains in America* (Public Affairs, 2013).

P.T.J. Wolters, *Alle omstandigheden van het geval. Een onderzoek naar de omstandigheden die de werking van de redelijkheid en billijkheid beïnvloeden* (Kluwer, 2013).

The Works of Alexander Hamilton (Henry Cabot Lodge ed., 1904).

J. Wouters, 'European Company Law: Quo Vadis?', 37 *Common Market Law Review* 257 (2000).

C.M. Yablon, 'The Historical Race. Competition for Corporate Charters and the Rise and Decline of New Jersey: 1880-1910', 32 *The Journal of Corporation Law* 323 (2007).

P.S. Yoon & L.T. Starks, 'Signaling, Investment Opportunities, and Dividend Announcements', 8 *Review of Financial Studies* 995 (1995).

D.F.M.M. Zaman & S.A. Kruisinga, 'Uitleg van statuten', 11 *Tijdschrift voor vennootschapsrecht, rechtspersonenrecht en ondernemingsbestuur* 182 (2014).

D.F.M.M. Zaman & I.C.P. Groenland, 'Tussen contract en instituut: waar zweeft de Flex-BV'?, 6 *Tijdschrift voor vennootschapsrecht, rechtspersonenrecht en ondernemingsbestuur* 168 (2009).

J.L. van Zanden & A. van Riel, *The Strictures of Inheritance. The Dutch economy in the nineteenth century* (Princeton University Press, 2004).

C.J. van Zeben, W.G. Belinfante & O.W. van Ewijk, *Parlementaire geschiedenis van het Nieuwe Burgerlijk Wetboek. Boek 2. Rechtspersonen.* (Kluwer, 1961).

G. Zielinski, *Grundtypvermischungen und Handelsgesellschaftsrecht, Der Eintritt von Kapitalgenossenschaften in Personenhandelsgesellschaften, seine wirtschaftliche Bedeutung und rechtliche Zulässigkeit* (Elwert'sche Verlagsbuchhandlung, 1925).

D. Zimmer, 'Das Gesetz zur Kontrolle und Transparenz im Unternehmensbereich', 51 *Neue Juristische Wochenschrift* 3521 (1998).

L. Zingales, 'The Value of the Voting Right: A Study of the Milan Stock Exchange Experience', 7 *The Review of Financial Studies* 125 (1994).

L. Zingales, 'Towards a Political Theory of the Firm', 31 *The Journal of Economic Perspectives* 113 (2017).

L. Zingales, 'What Determines the Value of Corporate Votes', 110 *The Quarterly Journal of Economics* 1047 (1995).

W. Zöllner & P. Hanau, 'Die verfassungsrechtlichen Grenzen der Beseitigung von Mehrstimmrechten bei Aktiengesellschaften', 42 *Die Aktiengesellschaft* 206 (1997).

W. Zöllner & U. Noack, 'One Share – One Vote?', 36 *Die Aktiengesellschaft* 117 (1991).

W. Zöllner, 'Unternehmensinnenrecht: Gibt es das?', 48 *Die Aktiengesellschaft* 2 (2003).

H. Zschäpitz, 'Fünf Jahre danach. Wie der Neue Markt die Deutschen traumatisierte' (2008), available at http://www.morgenpost.de/.

K. Zweigert & H. Kötz, *An Introduction to Comparative Law* (Oxford University Press, 1998).

Case Law Register

United States

United States Supreme Court

Burwell v. Hobby Lobby Stores, 134 U.S. 2751 (2014).
Halliburton v. Erica P. John Fund, 573 U.S. 258 (2014).
Citizens United v. Federal Election Commission, 558 U.S. 310 (2010).
Atherton v. FDIC, 519 U.S. 213 (1997).
CTS v. Dynamics Corp. of America, 481 U.S. 69 (1987).
Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984).
Edgar v. MITE, 457 U.S. 624 (1982).
Fidelity Federal Savings & Loan Association v. De La Cuesta, 458 U.S. 141 (1982).
Santa Fe Industries v. Green, 430 U.S. 462 (1977).
TSC Industries v. Northway, 426 U.S. 438 (U.S. 1976).
United States v. Byrum, 408 U.S. 125 (1972).
Pike v. Bruce Church, 397 U.S. 137 (1970).
Florida Lime & Avocado Growers v. Paul, 373 U.S. 132 (1963).
Rice v. Santa Fe Elevator, 331 U.S. 218 (1947).
Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945).
Railway Express Agency v. Virginia, 282 U.S. 440 (1931).
Federal Baseball League v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922).
Minnesota v. Barber, 136 U.S. 313 (1890).
Kidd v. Pearson, 128 U.S. 1 (1888).
Santa Clara County v. Southern Pacific Railroad, 118 U.S. 394 (1886).
Munn v. Illinois, 94 U.S. 113 (1877).
Welton v. Missouri, 91 U.S. 275 (1876).
Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 36 U.S. 420 (1837).
Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824).

Federal and Miscellaneous Courts

Business Roundtable and Chamber of Commerce v. SEC, 647 F.3d 1144 (2011).
AFSCME v. AIG, 462 F.3d 121 (2d Cir. 2006).
Business Roundtable v. SEC, 905 F.2d 406 (D.C. Cir. 1990).
Amanda Acquisition v. Universal Foods, 877 F.2d 496 (7th Cir. 1989).

New York Shipping Association v. Federal Maritime Commission, 854 F.2d 1338 (D.C. Cir. 1988).
Dynamics Corp. of America v. CTS, 794 F.2d 250 (7th Cir. 1986).
Burton v. Exxon, 583 F. Supp. 405 (S.D.N.Y. 1984).
Joy v. North, 692 F.2d 880 (2d. Cir. 1982).
Medical Committee for Human Rights v. SEC, 432 F.2d 659 (D.C. Cir. 1970).
Rosenfeld v. Fairchild Engine & Airplane Corporation, 128 N.E.2d 291 (N.Y. Appeals 1955).
Dodge v. Ford Motor, 170 N.W. 668 (Mich. 1919).
Clark v. Mut. Reserve Fund Life Association, 14 App. D.C. 154 (1899).
State ex rel. Attorney v. Standard Oil, 49 Ohio St. 137, 30 N.E. 279 (1892).
Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1869).
Taylor v. Griswold, 14 New Jersey Law 222 (1834).
Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).
Middlesex Turnpike v. Locke, 8 Mass. 267 (1811).

Delaware Supreme Court

Marchand v. Barnhill, 212 A.3d 805 (Del. 2019).
Olenik v. Lozinski (Del. 2019).
Verition Partners Master Fund v. Aruba Networks, C.A. No. 11-448-VCL (Del. 2019).
Flood v. Synutra, 195 A.3d 754 (Del. 2018).
Dell v. Magnetar Global Event Driven Master Fund, 177 A.3d 1 (Del. 2017).
DFC Global v. Muirfield Value Partners, 172 A.3d 346 (Del. 2017).
In re Books-A-Million, 164 A.3d 56 (Del. 2017).
Singh v. Attenborough, 137 A.3d 151 (Del. 2016).
Sandys v. Pincus, 152 A.3d 124 (Del. 2016).
In re Sanchez, C.A. No. 9132-VCG (Del. 2016).
Corwin v. KKR Financial Holdings, 125 A.3d 304 (Del. 2015).
Kahn v. M&F Worldwide, 88 A.3d 635 (Del. 2014).
ATP Tours v. Deutscher Tennis Bund, 91 A.3d 554 (Del. 2014).
Americas Mining v. Theriault, 51 A.3d 1213 (Del. 2012).
Airgas v. Air Products & Chemicals, 8 A.3d 1182 (Del. 2010).
Versata Enterprises v. Selectica, 5 A.3d 586 (Del. 2010).
Lyondell Chemicals v. Ryan, 970 A.2d 235 (Del. 2009).
Pfeffer v. Redstone, 965 A.2d 676 (Del. 2009).
Gantler v. Stephens, 965 A.2d 695 (Del. 2009).
CA v. AFSCME Employees Pension Plan, 953 A.2d 227 (Del. 2008).
Matulich v. Aegis Communications Group, 942 A.2d 596 (Del. 2008).
ATR-Kim Eng Financial v. Araneta, 930 A.2d 928 (Del. 2007).
Stone v. Ritter, 911 A.2d 362 (Del. 2006).
In re Walt Disney, 906 A.2d 27 (Del. 2006).
Black v. Hollinger International, 872 A.2d 559 (Del. 2005).

Vantage Point Venture Partners 1996 v. Examen, 871 A.2d 1108 (Del. 2005).
Weinstein Enterprises v. Orloff, 870 A.2d 499 (Del. 2005).
Beam v. Stewart, 845 A.2d 1040 (Del. 2004).
MM Cosmetics v. Liquid Audio, 813 A.2d 1118 (Del. 2003).
Levco Alternative Fund v. Reader's Digest, 803 A2.d 428 (Del. 2002).
Telxon v. Meyerson, 802 A.2d 257 (Del. 2002).
Emerald Partners v. Berlin, 787 A.2d 85 (Del. 2001).
Malpiede v. Townson, 780 A.2d 1075 (Del. 2001).
McMullin v. Beran, 765 A.2d 910 (Del. 2000).
Brehm v. Eisner, 746 A.2d 244 (Del. 2000).
Eliason v. Englehart, 733 A.2d 944 (Del. 1999).
Malone v. Brincat, 722 A.2d 5 (Del. 1998).
Elliott Associates v. Avatex, 715 A.2d 843 (Del. 1998).
Klang v. Smith's Food and Drug Centers, 702 A.2d 150 (Del. 1997).
Kahn v. Tremont, 694 A.2d 422 (Del. 1997).
Thorpe v. CERBCO, 676 A.2d 436 (Del. 1996).
Grimes v. Donald, 673 A.2d 1207 (Del. 1996).
Solomon v. Pathe Communications, 672 A.2d 35 (Del. 1996).
Williams v. Geier, 671 A.2d 1368 (Del. 1996).
Cinerama v. Technicolor, 663 A.2d 1156 (Del. 1995).
Unitrin v. American General, 651 A.2d 1361 (Del. 1995).
Preston v. Allison, 650 A.2d 646 (Del. 1994).
Kahn v. Lynch Communication Systems, 638 A.2d 1110 (Del. 1994).
Paramount Communications v. QVC Network, 637 A.2d 34 (Del. 1994).
Rales v. Blasband, 634 A.2d 927 (Del. 1993).
Cede & Co. v. Technicolor, 634 A.2d 345 (Del. 1993).
Sullivan Money Management v. FLS Holdings, 628 A.2d 84 (Del. 1993).
Nixon v. Blackwell, 626 A.2d 1366 (Del. 1993).
Draper v. Paul N. Gardner Defined Plan Trust, 625 A.2d 859 (Del. 1993).
Oberly v. Kirby, 592 A.2d 445 (Del. 1991).
Waggoner v. Laster, 581 A.2d 1127 (Del. 1990).
Paramount Communications v. Time, 571 A.2d 1140 (Del. 1989).
Citron v. Fairchild Camera & Instrument, 569 A.2d 53 (Del. 1989).
Mills Acquisition Co. v. MacMillan, 559 A.2d 1261 (Del. 1989).
Berlin v. Emerald Partners, 552 A.2d 482 (Del. 1989).
Grobow v. Perot, 539 A.2d 180 (Del. 1988).
Andarko Petroleum v. Panhandle E, 545 A.2d 1171 (Del. 1988).
Summa v. Trans World Airline, 540 A.2d 403 (Del. 1988).
McDermott v. Lewis, 531 A.2d 206 (Del. 1987).
Bershad v. Curtis-Wright, 535 A.2d 840 (Del. 1987).
Lynam v. Gallagher, 526 A.2d 878 (Del. 1987).
Ivanhoe Partners v. Newmont Mining, 535 A.2d 1334 (Del. 1987).
Revlon v. MacAndrews & Forbes Holdings, 506 A.2d 173 (Del. 1986).
Frantz Manufacturing v. EAC Industries, 501 A.2d 401 (Del. 1985).

Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985).
Rosenblatt v. Getty Oil, 493 A.2d 929 (Del. 1985).
Unocal v. Mesa Petroleum, 493 A.2d 946 (Del. 1985).
Gabelli & Co. v. Liggett Group, 479 A.2d 276 (Del. 1984).
Aronson v. Lewis, 473 A.2d 805 (Del. 1984).
Weinberger v. UOP, 457 A.2d 701 (Del. 1983).
Roland International v. Najjar, 407 A.2d 1032 (Del. 1979).
Lynch v. Vickers Energy, 383 A.2d 278 (Del. 1978).
Singer v. Magnavox, 380 A.2d 969 (Del. 1977).
Tanzer v. International Gen. Industries, 379 A.2d 1121 (Del. 1977).
Providence & Worcester v. Baker, 378 A.2d 121 (Del. 1977).
Sinclair Oil v. Levien, 280 A.2d 717 (Del. 1971).
Lehrman v. Cohen, 222 A.2d 800 (Del. 1966).
Fulweiler v. Spruance, 222 A.2d 555 (Del. 1966).
Warshaw v. Calhoun, 221 A.2d 487 (Del. 1966).
Graham v. Allis-Chalmers Manufacturing Company, 188 A.2d 125 (Del. 1963).
Moskowitz v. Bantrell, 190 A.2d 749 (Del. 1963).
Saxe v. Brady, 184 A.2d 602 (Del. 1962).
Coyne v. Park & Tilford Distillers, 154 A.2d 893 (Del. 1959).
Hall v. John S. Isaacs & Sons Farms, 163 A.2d 288 (Del. 1958).
Sterling v. Mayflower Hotel, 93 A.2d 107 (Del. 1952).
Hannigan v. Italo Petroleum Corporation of America, 77 A.2d 209 (Del. 1949).
Ringling Brothers-Barnum & Bailey Combined Shows v. Ringling, 53 A.2d 441 (Del. 1947).
Ellingwood v. Wolf's Head Oil Refining, 38 A.2d 743 (Del. 1944).
Federal United Corporation v. Havender, 11 A.2d 331 (Del. 1940).
Guth v. Loft, 5 A.2d 503 (Del. 1939).
Italo Petroleum Corporation of America v. Producers' Oil Corporation of America, 174 A. 276 (Del. 1934).
Penington v. Commonwealth Hotel Construction Corporation, 155 A. 514 (Del. 1931).
Lofland v. Cahall, 118 A. 1 (Del. 1922).
Brooks v. State, 79 A. 790 (Del. 1911).
Delaware Railroad v. Tharp, 6 Del. 149 (Del. 1855).

Delaware Court of Chancery

Tornetta v. Elon Musk, C.A. No. 0408-JRS (Del. Ch. 2019).
CBS v. National Amusements, C.A. No. 0342-AGB (Del. Ch. 2018).
In re Oracle, WL 1381331 (Del. Ch. 2018).
In re Xura, C.A. No. 12698-VCS (Del. Ch. 2018).
Sciabacucchi v. Salzberg, WL 6719718 (Del. Ch. 2018).
In re Tesla Motors, WL 1560293 (Del. Ch. 2018).
Sciabacucchi v. Charter Communications, C.A. No. 11418-VCG (Del. Ch. 2018).

In re Rouse Properties, C.A. No. 12194-VCS (Del. Ch. 2018).
Ford v. VMware, WL 1684089 (Del. Ch. 2017).
In re Martha Stewart Living Omnimedia, WL 3568089 (Del. Ch. 2017).
Frederick Hsu Living Trust v. ODN Holding, C.A. No. 12108-VCL (Del. Ch. 2017).
IRA Trust FBO Bobbie Ahmed v. Crane, C.A. No. 12742-CB (Del. Ch. 2017).
In re EZCORP, 130 A.3d 934 (Del. Ch. 2016).
In re Volcano Stockholder Litigation, 143 A.3d 727 (Del. Ch. 2016).
Pell v. Kill, 135 A.3d 764 (Del. Ch. 2016).
Amalgamated Bank v. Yahoo!, 132 A.3d 752 (Del. Ch. 2016).
In re Trulia Stockholder Litigation, 129 A.3d 884 (Del. Ch. 2016).
In re Books-A-Million, C.A. No. 11343-VCL (Del. Ch. 2016).
Sandys v. Pincus, WL 769999 (Del. Ch. 2016).
In re Dole Food, C.A. 8703-VCL (Del. Ch. 2015).
In re KKR Financial Holdings, 101 A.3d 980 (Del. Ch. 2014).
In re Rural Metro, 88 A.3d 54 (Del. Ch. 2014).
In re Orchard Enterprises, 88 A.3d 1 (Del. Ch. 2014).
Chen v. Howard-Anderson, 87 A.3d 648 (Del. Ch. 2014).
In re Crimson Exploration, WL 5449419 (Del. Ch. 2014).
In re Novell, C.A. No. 6032-VCN (Del. Ch. 2014).
In re Morton's Restaurant Group, 74 A.3d 656 (Del. Ch. 2013).
In re Trados, 73 A.3d 17 (Del. Ch. 2013).
Boilermakers Local 154 Retirement Fund v. Chevron, 73 A.3d 934 (Del. Ch. 2013).
Carsanaro v. Bloodhound Technologies, 65 A.3d 618 (Del. Ch. 2013).
In re MFW, 67 A.3d 496 (Del. Ch. 2013).
In re Google Class C, C.A. No. 7469-CS (Del. Ch. 2013).
Klaassen v. Allegro Development, WL 5967028 (Del. Ch. 2013).
Pfeiffer v. Leedle, C.A. No. 7831-VCP (Del. Ch. 2013).
In re Delphi, C.A. No. 7144-VCG (Del. Ch. 2012).
Dweck v. Nasser, WL 161590 (Del. Ch. 2012).
Keyser v. Curtis, C.A. No. 7109-VCN (Del. Ch. 2012).
Johnston v. Pedersen, 28 A.3d 1079 (Del. Ch. 2011).
Reis v. Hazelett Strip-Casting, 28 A.3d 442 (Del. Ch. 2011).
In re Del Monte Foods, 25 A.3d 813 (Del. Ch. 2011).
Air Products & Chemicals. v. Airgas, 16 A.3d 48 (Del. Ch. 2011).
In re Alloy, C.A. No. 5626-VCP (Del. Ch. 2011).
In re Goldman Sachs, C.A. No. 5215-VCG (Del. Ch. 2011).
SV Investment Partners v. ThoughtWorks, 7 A.3d 973 (Del. Ch. 2010).
eBay v. Newmark, 16 A.3d 1 (Del. Ch. 2010).
In re Dollar Thrifty, 14 A.3d 573 (Del. Ch. 2010).
In re CNX Gas, 4 A.3d 397 (Del. Ch. 2010).
Yucaipa American Alliance Fund II. v. Riggio, 1 A.3d 310 (Del. Ch. 2010).
Blades v. Wisehart, C.A. No. 5317-VCS (Del. Ch. 2010).
In re Citigroup, 964 A.2d 106 (Del. Ch. 2009).

In re John Q. Hammons Hotels, WL 3165613 (Del. Ch. 2009).
In re Lear, 967 A.2d 640 (Del. Ch. 2008).
In re IAC/InterActive, 948 A.2d 471 (Del. Ch. 2008).
In re Loral Space & Communications, C.A. No. 2808-VCS (Del. Ch. 2008).
Pfeffer v. Redstone, C.A. No. 2317-VCL (Del. Ch. 2008).
Matulich v. Aegis Communications Group, 942 A.2d 596 (Del. Ch. 2007).
In Mercier v. Inter-Tel (Delaware), 929 A.2d 786 (Del. Ch. 2007).
In re Netsmart Technologies, 924 A.2d 171 (Del. Ch. 2007).
Valeant Pharmaceuticals v. Jerney, 921 A.2d 732 (Del. Ch. 2007).
In re Tyson Foods, 919 A.2d 563 (Del. Ch. 2007).
Perlegos v. Atmel, WL 475453 (Del. Ch. 2007).
Trenwick America Litigation Trust v. Ernst & Young, 906 A.2d 168 (Del. Ch. 2006).
Abraham v. Emerson Radio, 901 A.2d 751 (Del. Ch. 2006).
Teachers' Retirement System of Louisiana v. Aidinoff, 900 A.2d 654 (Del. Ch. 2006).
ATR-Kim Eng Financial v. Araneta, WL 3783520 (Del. Ch. 2006).
Canadian Commercial Workers Industry Pension Plan v. Alden, WL 456786 (Del. Ch. 2006).
North American Catholic Educational Programming Foundation v. Gheewalla, WL 2588971 (Del. Ch. 2006).
In re PNB Holding, WL 2403999 (Del. Ch. 2006).
Benihana of Tokyo v. Benihana, 891 A.2d 150 (Del. Ch. 2005).
In re Cox Communications, 879 A.2d 604 (Del. Ch. 2005).
In re Toys 'R' Us, 877 A.2d 975 (Del. Ch. 2005).
Blackmore Partners v. Link Energy, WL 2709639 (Del. Ch. 2005).
In re Tele-Communications Incorporated, C.A. No. 16470 (Del. Ch. 2005).
In re General Motors (Hughes), C.A. No. 20269 (Del. Ch. 2005).
Jones Apparel Group v. Maxwell Shoe, 883 A2.d 837 (Del. Ch. 2004).
Production Resources Group v. NCT Group, 863 A.2d. 772 (Del. Ch. 2004).
Teachers' Retirement System of Louisiana v. Anschutz, C.A. No. 444-N (Del. Ch. 2004).
Integrated Health Services v. Elkins, C.A. No. 20228-NC (Del. Ch. 2004).
Seidman & Associates v. G.A. Financial, 837 A.2d 21 (Del. Ch. 2003).
In re Oracle, 824 A.2d 917 (Del. Ch. 2003).
Guttman v. Huang, 823 A.2d 492 (Del. Ch. 2003).
In re Pure Resources, 808 A.2d 421 (Del. Ch. 2002).
Harrah's Entertainment v. JCC Holding, 802 A.2d 294 (Del. Ch. 2002).
Orman v. Cullman, 794 A.2d 5 (Del. Ch. 2002).
Adlerstein v. Wertheimer, WL 205684 (Del. Ch. 2002).
In re Siliconix, WL 716787 (Del. Ch. 2001).
Chesapeake v. Shore, 771 A.2d 293 (Del. Ch. 2000).
State of Wisconsin Investment Board v. Peerless Systems, WL 1805376 (Del. Ch. 2000).
Harbor Finance Partners v. Huizenga, 751 A.2d 879 (Del. Ch. 1999).
Solomon v. Armstrong, 747 A.2d 1098 (Del. Ch. 1999).

In re General Motors Class H, 734 A.2d 611 (Del. Ch. 1999).
Chaffin v. GNI Group, C.A. No. 16211-NC (Del. Ch. 1999).
Winston v. Mandor, 710 A.2d 835 (Del. Ch. 1997).
Equity-Linked Investors v. Adams, 705 A.2d 1040 (Del. Ch. 1997).
Zupnick v. Goizueta, 698 A.2d 384 (Del. Ch. 1997).
In re Caremark International, 698 A.2d 959 (Del. Ch. 1996).
Gagliardi v. TriFoods International, 683 A.2d 1049 (Del. Ch. 1996).
In re MAXXAM, 659 A.2d 760 (Del. Ch. 1995).
Mendel v. Carrol, 651 A.2d 297 (Del. Ch. 1994).
Orban v. Field, C.A. No. 12820 (Del. Ch. 1993).
Litle v. Waters, C.A. No. 12155 (Del. Ch. 1992).
Rosenmiller v. Bordes, 607 A.2d 465 (Del. Ch. 1991).
Lobato v. Health Concepts IV, 606 A.2d 1343 (Del. Ch. 1991).
Credit Lyonnais Bank Nederland v. Pathe Communications, WL 277613 (Del. Ch. 1991).
Harris v. Carter, 582 A.2d 222 (Del. Ch. 1990).
Warner Communications v. Chris-Craft Industries, 583 A.2d 962 (Del. Ch. 1989).
In re RJR Nabisco, 576 A.2d 654 (Del. Ch. 1989).
Blasius Industries v. Atlas, 564 A.2d 651 (Del. Ch. 1988).
Roven v. Cotter, 547 A.2d 603 (Del. Ch. 1988).
In re J.P. Stevens & Co, 542 A.2d 770 (Del. Ch. 1988).
Solash v. The Telex Corporation, WL 3587 (Del. Ch. 1988).
Citron v. Fairchild Camera & Instruments, C.A. No. 6085 (Del. Ch. 1988).
Hahn v. Carter-Wallace, C.A. No. 9097 (Del. Ch. 1987).
Weiss v. Rockwell International, C.A. No. 8811 (Del. Ch. 1987).
In re Sea-Land, C.A. No. 8453 (Del. Ch. 1987).
AC Acquisitions v. Anderson, Clayton & Co., 519 A.2d 103 (Del. Ch. 1986).
Lacos Land v. Arden, 517 A.2d 271 (Del. Ch. 1986).
Jedwab v. MGM Grand Hotels, 509 A.2d 584 (Del. Ch. 1986).
Katz v. Oak Industries, 508 A.2d 873 (Del. Ch. 1986).
Moran v. Household, 490 A.2d 1054 (Del. Ch. 1985).
Lewis v. Fuqua, 502 A.2d 962 (Del. Ch. 1985).
Sachs v. R.P. Scherer, C.A. No. 7537 (Del. Ch. 1984).
Societe Holding Ray D'Albion v. Saunders Leasing System, C.A. No. 6648 (Del. Ch. 1981).
Gimbel v. The Signal Companies, 316 A.2d 599 (Del. Ch. 1974).
Shanghai Power v. Delaware Trust, 316 A.2d 589 (Del. Ch. 1974).
Levin v. Metro-Goldwyn-Mayer, 221 A.2d 499 (Del. Ch. 1966).
Hartford Accident & Indemnity v. W.S. Dickey Clay Manufacturing, 24 A.2d 315 (Del. Ch. 1942).
Topkis v. Delaware Hardware, 2 A.2d 114 (Del. Ch. 1938).
Keller v. Wilson & Co., 180 A. 584 (Del. Ch. 1935).
Maddock v. Vorclone, 147 A. 255 (Del. Ch. 1929).
Gaskill v. Gladys Belle Oil, 145 A. 337 (Del. Ch. 1929).

Davis v. Louisville Gas & Electric, 142 A. 654 (Del. Ch. 1928).
Morris v. American Public Utilities, 122 A. 696 (Del. Ch. 1923).
Allied Chemical & Dye Corporation v. Steel & Tube Corporation of America, 120 A. 486 (Del. Ch. 1923).
Butler v. Newstone Copper, 93 A. 380 (Del. Ch. 1915).
Wilmington City Railway v. People's Railway, 47 A. 245 (Del. Ch. 1900).

Germany

Bundesverfassungsgericht (German Constitutional Court)

Bundesverfassungsgericht 27 April 1999 – 1 BvR 1613/94 (*DAT/Altana*).

Bundesgerichtshof (German Supreme Court 1950 – present)

Bundesgerichtshof 29 September 2015 – II ZB 23/14.
Bundesgerichtshof 15 January 2013 – II ZR 90/11.
Bundesgerichtshof 19 May 2011 – II ZR 141/09.
Bundesgerichtshof 15 April 2010 – IX ZR 188/09.
Bundesgerichtshof 16 February 2009 – II ZR 185/07 (*Kirch/Deutsche Bank*).
Bundesgerichtshof 12 December 2008 – II ZR 102/07.
Bundesgerichtshof 2 April 2007 – II ZR 325/05.
Bundesgerichtshof 21 December 2005 – 3 StR 470/04 (*Mannesmann*).
Bundesgerichtshof 24 November 2004 – XII ZR 113/01.
Bundesgerichtshof 26 April 2004 – II ZR 155/02 (*Gelatine*).
Bundesgerichtshof 21 July 2003 – II ZR 109/02.
Bundesgerichtshof 4 November 2002 – II ZR 224/00.
Bundesgerichtshof 6 December 2001 – 1 StR 215/01.
Bundesgerichtshof 27 September 1999 – II ZR 371/98.
Bundesgerichtshof 5 July 1999 – II ZR 126/98.
Bundesgerichtshof 14 September 1998 – II ZR 172/97.
Bundesgerichtshof 21 April 1997 – II ZR 175/95 (*ARAG/Garmenbeck*).
Bundesgerichtshof 24 February 1997 – II ZB 11/96.
Bundesgerichtshof 20 March 1995 – II ZR 205/94 (*Girmes*).
Bundesgerichtshof 20 February 1995 – II ZR 143/93.
Bundesgerichtshof 4 July 1994 – II ZR 197/93.
Bundesgerichtshof 28 October 1993 – IX ZR 21/93.
Bundesgerichtshof 29 March 1993 – II ZR 265/91.
Bundesgerichtshof 5 October 1992 – II ZR 172/91.
Bundesgerichtshof 25 March 1991 – II ZR 188/89.
Bundesgerichtshof 29 June 1987 – II ZR 242/86.
Bundesgerichtshof 17 November 1986 – II ZR 96/86.
Bundesgerichtshof 8 July 1986 – VI ZR 47/85.

Bundesgerichtshof 21 February 1983 – II ZR 183/82.
Bundesgerichtshof 28 June 1982 – II ZR 69/81.
Bundesgerichtshof 25 February 1982 – II ZR 174/80 (*Holzmüller*).
Bundesgerichtshof 21 December 1979 – II ZR 244/78.
Bundesgerichtshof 8 May 1979 – KVR 1/78.
Bundesgerichtshof 19 December 1977 – II ZR 136/76 (*Mannesmann*).
Bundesgerichtshof 13 October 1977 – II ZR 123/76.
Bundesgerichtshof 10 February 1977 – II ZR 79/75.
Bundesgerichtshof 1 March 1971 – II ZR 53/69.
Bundesgerichtshof 8 May 1967 – II ZR 126/65.
Bundesgerichtshof 24 January 1957 – II ZR 208/55.
Bundesgerichtshof 14 July 1954 – II ZR 342/53.
Bundesgerichtshof 7 July 1954 – II ZR 342/53.
Bundesgerichtshof 8 October 1952 – II ZR 313/51.

Reichsgericht (German Supreme Court 1879 – 1950)

Reichsgericht 22 October 1937 – II 58/37.
Reichsgericht 31 March 1931 – II 222/30.
Reichsgericht 9 December 1929 – 142/29 VI.
Reichsgericht 24 September 1929 – II 26/29.
Reichsgericht 13 December 1927 – II 401/27 (*Hamburg Süd*).
Reichsgericht 20 February 1923 – II 36/22.
Reichsgericht 4 July 1922 – II B 2/22 (*Hanseatische Motorengesellschaft mbH & Co.*).

Oberlandesgerichte & Kammergerichte (Courts of Appeal)

Oberlandesgericht Frankfurt am Main 25 May 2018 – 21 W 32/18.
Oberlandesgericht München 6 March 2018 – 31 Wx 321/15.
Oberlandesgericht Düsseldorf 22 June 2017 – I-6 AktG 1/17 (*METRO/Ceconomy*).
Oberlandesgericht Frankfurt am Main 17 June 2016 – 21 W 91/15 (*Deutsche Börse*).
Kammergericht Berlin 16 October 2015 – 14 W 89/15.
Oberlandesgericht Celle 4 February 2015 – 9 W 14/15.
Oberlandesgericht Frankfurt am Main 28 March 2014 – 21 W 15/11 (*Wella*).
Oberlandesgericht Zweibrücken 20 February 2014 – 3 W 150/13 (*Hornbach*).
Oberlandesgericht Frankfurt am Main 17 August 2011 – 13 U 100/10.
Oberlandesgericht Düsseldorf 10 June 2009 – I-26 W 1/07.
Oberlandesgericht Celle 7 May 2008 – 9 U 165/07.
Oberlandesgericht Schleswig 15 October 2007 – 5 W 50/07.
Oberlandesgericht München 19 October 2006 – 31 Wx 92/05 (*Fränkisches Überlandwerk*).
Oberlandesgericht Hamm 17 March 2005 – 27 W 3/05.

Oberlandesgericht Schleswig 27 May 2004 – 5 U 2/04.
Bayerische Oberste Landesgericht 31 July 2002 – 3Z BR 362/01.
Oberlandesgericht Köln 20 September 2001 – 18 U 125/01 (*METRO*).
Oberlandesgericht Stuttgart 20 September 2000 – 20 U 87/99.
Oberlandesgericht Hamm 10 May 1995 – 8 U 59/94 (*Harpener/Omni I*).
Oberlandesgericht Düsseldorf 22 July 1993 – 6 U 84/92.
Oberlandesgericht Frankfurt am Main 23 December 1992 – 21 U 143/91.
Oberlandesgericht Stuttgart 11 February 1992 – 10 U 313/90 (*Hugo Boss*).

Landgericht (Court of First Instance)

Landgericht Dortmund 22 February 2018 – 18 O 71/17.
Landgericht Hamburg 6 February 2018 – 403 HKO 130/17.
Landgericht München 27 August 2015 – 5 HKO 20 285/14 (*BayWa*).
Landgericht München I 31 July 2015 – 5 HKO 16371/13 (*MAN*).
Landgericht Berlin 1 June 2015 – 102 O 65/14 (*TUI*).
Landgericht Frankfurt am Main 16 February 2015 – 3-16 O 1/14 (*Deutsche Börse*).
Landgericht München I 6 November 2014 – 5 HKO 679/14.
Landgericht Landau 18 September 2013 – HKO 27/13 (*Hornbach*).
Landgericht Hannover 29 August 2007 – 23 O 139/06.
Landgericht Krefeld 20 December 2006 – 11 O 70/06.
Landgericht München I 14 September 2001 – 5 HKO 16369/99.
Landgericht Köln 7 March 2001 – 91 O 131/00 (*METRO*).
Landgericht Memmingen 12 February 2001 – 2 H O 1748/00 (*Gruschwitz Textilwerke*).

The Netherlands

Hoge Raad (Dutch Supreme Court)

Hoge Raad 8 March 2019, ECLI:NL:HR:2019:316.
Hoge Raad 20 April 2018, ECLI:NL:HR:2018:652 (*Boskalis/Fugro*).
Hoge Raad 22 September 2017, ECLI:NL:HR:2017:2444 (*Bastion de Leede*).
Hoge Raad 9 January 2015, ECLI:NL:HR:2015:38.
Hoge Raad 5 September 2014, ECLI:NL:HR:2014:2628 (*Hezemans Air*).
Hoge Raad 5 September 2014, ECLI:NL:HR:2014:2627 (*RCI*).
Hoge Raad 4 April 2014, ECLI:NL:HR:2014:797 (*Cancun*).
Hoge Raad 12 July 2013, ECLI:NL:HR:2013:BZ9145 (*VEB/KLM*).
Hoge Raad 23 November 2012, ECLI:NL:HR:2012:BX5881 (*Spaanse Villa*).
Conclusie A-G 26 October 2012, ECLI:NL:PHR:2013:BY1880 (*Austria/APA*).
Hoge Raad 16 December 2011, ECLI:NL:HR:2011:BN7252.
Hoge Raad 9 July 2010, ECLI:NL:HR:2010:BM0976 (*ASMI*).

Hoge Raad 20 June 2008, ECLI:NL:HR:2008:BC4959 (*Willemsen Beheer/NOM*).
Hoge Raad 14 December 2007, ECLI:NL:HR:2007:BB3523 (*DSM*).
Conclusie A-G 17 September 2007, ECLI:NL:PHR:2007:BB3523 (*DSM*).
Hoge Raad 14 September 2007, ECLI:NL:HR:2007:BA4887 (*Versatel*).
Hoge Raad 13 July 2007, ECLI:NL:HR:2007:BA7972 (*ABN AMRO*).
Hoge Raad 29 June 2007, ECLI:NL:HR:2007:BA0033 (*Bruil*).
Hoge Raad 13 April 2007, ECLI:NL:HR:2007:AZ6095.
Hoge Raad 2 March 2007, ECLI:NL:HR:2007:AZ3535 (*Holding Nutsbedrijf Westland/Schieke*).
Hoge Raad 8 December 2006, ECLI:NL:HR:2006:AZ0758 (*Ontvanger/Roelofsen*).
Hoge Raad 6 February 2004, ECLI:NL:HR:2004:AO3045 (*Reinders/Didam*).
Hoge Raad 18 April 2003, ECLI:NL:HR:2003:AF2161 (*RNA/Westfield*).
Hoge Raad 29 November 2002, ECLI:NL:HR:2002:AE7011 (*Schwandt/Berghuizer Papierfabriek*).
Hoge Raad 1 March 2002, ECLI:NL:HR:2002:AD9857 (*Zwagerman Beheer*).
Hoge Raad 28 April 2000, ECLI:NL:HR:2000:AA5658 (*Montedison*).
Hoge Raad 14 February 1997, ECLI:NL:HR:1997:ZC2280.
Hoge Raad 10 Januari 1997, ECLI:NL:HR:1997:ZC2243 (*Staleman/Van de Ven*).
Hoge Raad 31 December 1993, ECLI:NL:HR:1993:ZC1212 (*Verenigde Bootlieden*).
Hoge Raad 8 November 1991, ECLI:NL:HR:1991:ZC0401 (*Nimox*).
Hoge Raad 9 July 1990, ECLI:NL:HR:1990:AC0960 (*Sluis*).
Hoge Raad 17 January 1990, ECLI:NL:HR:1990:AD1001 (*Uniwest*).
Hoge Raad 6 October 1989, ECLI:NL:HR:1989:AB9521 (*Beklamel*).
Hoge Raad 30 October 1964, ECLI:NL:HR:1964:AB6473 (*Weduwe Mante*).
Hoge Raad 19 February 1960, ECLI:NL:HR:1960:AG2044 (*Aurora*).
Hoge Raad 13 November 1959, ECLI:NL:HR:1959:AG2043 (*Distilleerderij Melchers*).
Hoge Raad 21 January 1955, ECLI:NL:HR:1955:AG2033 (*Forumbank*).
Hoge Raad 1 April 1949, ECLI:NL:HR:1949:126 (*Doetinchemse IJzergieterij*).
Hoge Raad 30 June 1944, ECLI:NL:HR:1944:BG9449 (*Wennex*).
Hoge Raad 8 April 1938, ECLI:NL:HR:1938:236 (*Gulpen & Scherts/Memel*).
Hoge Raad 30 June 1846, Weekblad van het Regt 723.

Gerechtshof (Court of Appeal)

Gerechtshof Amsterdam 1 September 2020, ECLI:NL:GHAMS:2020:2379 (*Mediaset*).
Gerechtshof Amsterdam 3 December 2019, ECLI:NL:GHAMS:2019:4295 (*ZED+*).

Gerechtshof Amsterdam 30 April 2018, ECLI:NL:GHAMS:2018:1465 (*De Seizoenen*).
Gerechtshof Amsterdam 22 December 2017, ECLI:NL:GHAMS:2017:5354 (*Intergamma*).
Gerechtshof Amsterdam 21 March 2017, ECLI:NL:GHAMS:2017:930 (*TMG*).
Gerechtshof Amsterdam 29 May 2017, ECLI:NL:GHAMS:2017:1965 (*Akzo Nobel*).
Gerechtshof Amsterdam 12 October 2016, ECLI:NL:GHAMS:2016:4056 (*Delta Lloyd*).
Gerechtshof Amsterdam 6 September 2013, ECLI:NL:GHAMS:2013:2836 (*Cryo-Save*).
Gerechtshof Amsterdam 15 November 2011, ECLI:NL:GHAMS:2011:BV1255 (*KLM*).
Gerechtshof Amsterdam 21 September 2010, ECLI:NL:GHAMS:2010:BN6929 (*Lambers/Stichting Freule Lauta van Aysma*).
Gerechtshof Amsterdam 27 May 2010, ECLI:NL:GHAMS:2010:BM5928 (*PCM*).
Gerechtshof Amsterdam 20 December 2007, ECLI:NL:GHAMS:2007:BC0800 (*Shell*).
Gerechtshof Amsterdam 3 May 2007, ECLI:NL:GHAMS:2007:BA4395 (*ABN AMRO*).
Gerechtshof Amsterdam 28 March 2007, ECLI:NL:GHAMS:2007:BA1717 (*DSM*).
Gerechtshof Amsterdam 17 January 2007, ECLI:NL:GHAMS:2007:AZ6440 (*Stork*).
Gerechtshof Amsterdam 4 July 2001, ECLI:NL:GHAMS:2001:AB2476 (*HBG*).
Gerechtshof Amsterdam 26 May 1983, ECLI:NL:GHAMS:1983:AC8007 (*Linders/Hofstee*).

Rechtbank (Court of First Instance)

Rechtbank Amsterdam 10 Augustus 2017, ECLI:NL:RBAMS:2017:5845 (*Akzo Nobel*).
Rechtbank Amsterdam 18 May 2011, ECLI:NL:RBAMS:2011:BQ4815 (*FortisEffect c.s./Staat*).
Rechtbank Amsterdam 26 March 2008, ECLI:NL:RBAMS:2008:BD1330 (*Delta Lloyd*).

European Court of Justice

European Court of Justice 25 October 2017, ECLI:EU:C:2017:804 (*Polbud*).
European Court of Justice 18 July 2017, ECLI:EU:C:2017:562 (*Erzberger*).
Conclusion of the A-G to the European Court of Justice of 4 May 2017, ECLI:EU:C:2017:347 (*Erzberger*).

European Court of Justice 12 July 2012, ECLI:EU:C:2012:440 (*Vale*).
European Court of Justice 15 October 2009, ECLI:EU:C:2009:626 (*Audiolux*).
European Court of Justice 16 December 2008, ECLI:EU:C:2008:723 (*Cartesio*).
European Court of Justice 23 May 1996, ECLI:EU:C:1996:206 (*O'Flynn*).
European Court of Justice 30 November 1995, ECLI:EU:C:1995:411 (*Gebhard*).
European Court of Justice 11 July 1974, ECLI:EU:C:1974:82 (*Dassonville*).

Parliamentary Documents

Germany

BT-Drucksache 13/10038, 28.
BT-Drucksache 13/9712, 11.
BT-Drucksache 7/4845, 4.
BT-Drucksache IV/3295.
BT-Drucksache IV/171, 98.

The Netherlands

Kamerstukken II 2019/20, 35367, nr. 17.
Kamerstukken II 2019/20, 35367, nr. 3.
Kamerstukken II 2018/19, 35058, nr. 3.
Kamerstukken II 2018/19, 29752, nr. 12, p. 14.
Kamerstukken II 2016/17, 29752, nr. 9, p. 5, 19-21.
Kamerstukken II 2010/11, 32426, nr. 7, p. 10-11.
Kamerstukken II 2010/11, 32014, nr. 12, p. 10.
Kamerstukken II 2010/11, 31980, nr. 48, p. 1.
Kamerstukken II 2008/09, 31746, nr. 3, p. 24.
Kamerstukken II 2006/07, 31058, nr. 3, p. 6, 71.
Kamerstukken II 2005/06, 25732, nr. 23.
Kamerstukken II 2003/04, 29752, nr. 2.
Kamerstukken II 2002/03, 28179, nr. 47-I.
Kamerstukken II 2002/03, 28179, nr. 31.
Kamerstukken II 1997/98, 25732, nr. 3.
Kamerstukken II 1979/80, 15304, nr. 51, p. 12-13.
Kamerstukken II 1978/79, 15304, nr. 3, p. 48.
Kamerstukken II 1926/27, 27, nr. 15.
Kamerstukken II 1926/27, 27, nr. 3.
Kamerstukken II 1924/25, 69, nr. 2.
Kamerstukken II 1924/25, 69, nr. 1, p. 2.
Handelingen Eerste Kamer 1926/27, 920.
Handelingen Tweede Kamer 1917/18, 2508.
Kamerstukken II 1909/10, 217, nr. 3.
Kamerstukken II 1871/72, 65, nr. 3.
Kamerstukken II 1871/72, 65, nr. 2.

Portfolio

Academic Publications

T.A. Keijzer & K.J. Bakker, 'Corporate governance en de rol van het vennootschappelijk belang. Verslag Van der Heijden Congres 2019', 22 *Ondernemingsrecht* 568 (2020).

S. Cools & T.A. Keijzer, 'Over meervoudig stemrecht, loyaliteitsstemrecht, levenscycli en horizonbepalingen. Rechtseconomischce en rechtsvergelijkende beschouwingen', 21 *Ondernemingsrecht* 371 (2019).

S. Cools & T.A. Keijzer, 'Dubbel stemrecht in combinatie met een horizonbepaling: een alternatief voor het loyauteitsstemrecht?', 4 *Tijdschrift voor Rechtspersoon en Vennootschap – Revue pratique des sociétés* 239 (2019).

T.A. Keijzer, 'Having your cake and eating it, too. Over het weren van dual class-structuren uit aandelenindices', 4 *Maandblad voor Ondernemingsrecht* 223 (2018).

H.M. Vletter-van Dort & T.A. Keijzer, 'Herziening van de UK Corporate Governance Code: stof tot nadenken', 20 *Ondernemingsrecht* 321 (2018).

T.A. Keijzer, 'Extra bescherming van Nederlandse beursondernemingen: noodzaak of hypocrisie? Verslag van het Eumedion-symposium 2017', 4 *Maandblad voor Ondernemingsrecht* 1 (2018).

O. Oost, T.A. Keijzer & P.J. Suurd, 'Polbud: een paradigmawisseling voor grensoverschrijdende omzettingen?', 67 *Ars Aequi* 979 (2017).

A.A. Bootsma & T.A. Keijzer, 'Snap Inc. De eerste beursgang met stemrechtloze aandelen in de V.S.', 19 *Ondernemingsrecht* 400 (2017).

T.A. Keijzer, O. Oost & M.J. van Ginneken, 'The ECJ Erzberger Case, An Analysis of German Co-determination and EU Law', 14 *European Company Law* 217 (2017).

T.A. Keijzer, 'Autonomie en paternalisme in het ondernemingsrecht van Nederland en Delaware', 67 *Ars Aequi* 610 (2017).

T.A. Keijzer & O. Oost, 'De invloed van Europese FTA's op het Nederlandse ondernemingsrecht', 19 *Ondernemingsrecht* 337 (2017).

T.A. Keijzer & M.J. van Ginneken, 'Het Mitbestimmungsrecht op de schop?', 67 *Ars Aequi* 26 (2017).

T.A. Keijzer, 'De aandeelhoudersovereenkomst in het licht van art. 2:190 BW', 147 *Weekblad voor Privaatrecht, Notariaat en Registratie* 312 (2016).

H.M. Vletter-van Dort & T.A. Keijzer, 'Bescherming van beursvennootschappen: dubbel gestikt houdt beter', 66 *Ars Aequi* 329 (2016).

T.A. Keijzer & L. in 't Veld, ''Slechts' aanspraak op het liquidatie-overschot: onvoldoende om van een BV-aandeel te kunnen spreken?', 18 *Ondernemingsrecht* 168 (2016).

T.A. Keijzer, 'De betekenis van art. 2:190 BW: over BV-aandelen en aandeelhouderschap', 147 *Weekblad voor Privaatrecht, Notariaat en Registratie* 137 (2016).

T.A. Keijzer & C.C. de Kluiver, 'Gefaalde scheiding', 2 *Maandblad voor Ondernemingsrecht* 16 (2016).

T.A. Keijzer, 'De societas leonina en het winstrechtloze BV-aandeel vergeleken', 16 *Ondernemingsrecht* 273 (2014).

Professional Publications

T.A. Keijzer, 'Se vogliamo che tutto rimanga com'è… over de ontwikkeling van het ondernemingsrecht', 69 *Ars Aequi* 934 (2019).

H.M. Vletter-van Dort & T.A. Keijzer, 'De veilige toekomst van de Nederlandse beursvennootschap', 19 *Ondernemingsrecht* 433 (2017).

T.A. Keijzer, 'Afstand doen en afstand nemen', 147 *Weekblad voor Privaatrecht, Notariaat en Registratie* 584 (2016).

T.A. Keijzer, R. de Graaff, M. Samadi & C.C. de Kluiver, 'Hernieuwde aandacht voor het tuchtrecht', 66 *Ars Aequi* 490 (2016).

T.A. Keijzer & L. in 't Veld, 'Het BV-aandeel met 'slechts' aanspraak op het liquidatie-overschot: een naschrift', 18 *Ondernemingsrecht* 248 (2016).

T.A. Keijzer & M. Samadi, 'Post-Post Salduz', 66 *Ars Aequi* 155 (2016).

M.T. Beumers, P. Broere, R. de Graaff, T.A. Keijzer, C.C. de Kluiver, T. Kok, L. Noyon, O. Oost, A.M. Overheul, F.Q. van de Pol, M. Samadi, L.S.A.

Trapman, K. van Vught & P.G.J. Wissink, 'Kwaliteit van juridische publicaties', 66 *Ars Aequi* 71 (2016).

T.A. Keijzer, C.C. de Kluiver, L. van Langen, T. Kok & L.S.A. Trapman, 'Een platonisch voorspel', 66 *Ars Aequi* 53 (2016).

T.A. Keijzer & M. Samadi, 'Te koop: fraudebestrijding (T.E.A.B.)', 65 *Ars Aequi* 643 (2015).

R. de Graaff, T.A. Keijzer, M. Samadi, E.F. Verheul & S.A.M. Vermeulen, 'Woord vooraf', 65 *Ars Aequi* 60 (2015).

F.S. Bakker & T.A. Keijzer, 'Het zijn ook maar mensen', 64 *Ars Aequi* 695 (2014).

T.A. Keijzer & R. Kindt, 'Het boeken van een boek', 64 *Ars Aequi* 3 (2014).

T.A. Keijzer, 'Art. 13L Wet VPB 1969: nieuwe troef overheid in strijd tegen excessieve renteaftrek?' 26 *Forfaitair* 26 (2013).

Annotations

M.J. van Ginneken & T.A. Keijzer, 'Case note on ECJ 18 July 2017, C-566/15 ((Erzberger)', 22 *Jurisprudentie Onderneming & Recht* 3220 (2017).

Edited Volumes

R. de Graaff, T.A. Keijzer, C.C. de Kluiver & M. Samadi (eds.), *Rechtsvorming door de Hoge Raad* (Ars Aequi Libri, 2016).

T.A. Keijzer (ed.), *Lokaal formeel belastingrecht in Nederland, België en Duitsland* (Erasmus Studiecentrum voor Belastingen van Lokale overheden, 2014).

Book Contributions

T.A. Keijzer, 'Introductie en afschaffing van onevenredig stemrecht in de Verenigde Staten en Nederland', in: J.M. de Jongh, E.C.H.J. Lokin, J. van Bekkum, A.R.J. Croiset van Uchelen, Y. Borrius & B. Bier (eds.), Geschriften vanwege de Vereniging Corporate Litigation 2019-2020 (Wolters Kluwer, in press).

T.A. Keijzer, 'Waarvan worden bestuurders bang?', in: B.F. Assink, M.J. van Ginneken, L. Timmerman & H.M. Vletter-van Dort (eds.), *De vele gezichten van Maarten Kroeze's 'bange bestuurders'* 137 (Kluwer, 2017).

T.A. Keijzer, 'Het verbod met het oog op financial assistance voor de NV', in: M.T. Beumers, C.C. de Kluiver, A.M. Overheul, F.Q. van de Pol & L.S.A. Trapman (eds.), *Vijftig weeffouten in het BW* 53 (Ars Aequi Libri, 2017).

R. de Graaff, T.A. Keijzer, C.C. de Kluiver & M. Samadi, 'Schrijven over cassatierechtspraak', in: R. de Graaff, T.A. Keijzer, C.C. de Kluiver & M. Samadi (eds.), *Rechtsvorming door de Hoge Raad* 11 (Ars Aequi Libri, 2016).

Blogposts

H.M. Vletter-van Dort & T.A. Keijzer, 'Can the First Dutch Stewardship Code Indeed Encourage Investors to Act as Stewards?', *Harvard Law School Forum on Corporate Governance & Financial Regulation* (27 September 2018).

H.M. Vletter-van Dort & T.A. Keijzer 'Revision of the UK Corporate Governance Code: Some Observations from Continental Europe', *Oxford Business Law Blog* (5 June 2018).

Lectures & Presentations

T.A. Keijzer, 'Dual Class Shares: A Comparative Analysis', Symposium Maandblad voor Ondernemingsrecht, Amsterdam, the Netherlands (11 December 2019).

T.A. Keijzer, 'Dual Class Shares: A Comparative Analysis', Ius Commune Conference 2019 Company Law Workshop, Leuven, Belgium (28 November 2019).

T.A. Keijzer, 'Beyond Agency Theory: Life-Cycle Implications for Voting Rights, Dual Class Structures and Index Composition', McGill Annual Graduate Law Conference, Montréal, Canada (Digital Presentation, 8 May 2019).

T.A. Keijzer, 'Naar een wettelijk kader van dual class structuren bij de beurs-NV', Symposium Stichting Wetenschappelijk Onderzoek (Notarieel) Ondernemingsrecht, Amsterdam, the Netherlands (25 January 2019).

T.A. Keijzer, 'Dual Class Columbia', Columbia Law School Visting Scholar Forum, New York, United States (19 July 2018).

A.M. Pacces & T.A. Keijzer, 'Loyalty Shares in the Netherlands', ECGI Roundtable on Loyalty Shares, Brussels, Belgium (18 June 2018).

T.A. Keijzer, A. Quintavalla & E.M. Martino, 'Making Free Trade Agreements Future Proof', 3rd Radboud Economic Law Conference on Upgrading Trade and Services in EU and International Economic Law, Nijmegen, the Netherlands (15 June 2018).

T.A. Keijzer, 'Why The Corporation Cannot Exist Without Deferential Liability Standards for Directors', Leyden University Centre for Business & Liability International Opening Conference on Business Resilience, Leyden, the Netherlands (25 January 2018).

T.A. Keijzer, A. Quintavalla & E.M. Martino, 'Normative Observations of Free Trade Agreements', University of Edinburgh Postgraduate Law Conference 2018, Edinburgh, United Kingdom (18 January 2018).

T.A. Keijzer & A. Quintavalla, 'Free Trade Agreements have bitten off more than they can chew?', University of Luxembourg/Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law Conference on Current Issues of EU External Relations, Luxembourg, Luxembourg (19 May 2017).

T.A. Keijzer, 'Shares without voting rights or profit entitlements: an idea for the Dutch Public Limited Company?', Erasmus Graduate School of Law Annual Meeting, Rotterdam, the Netherlands (14 January 2016).

Curriculum Vitae

Titiaan Adam Keijzer was born on July 14, 1992, in Hengelo (Overijssel), the Netherlands. In 2009, he obtained his high school diploma (*Gymnasium*) at SG De Grundel. From 2009 to 2016, Titiaan studied law at Erasmus University, obtaining Master's degrees in corporate law and tax law. During his studies, Titiaan served as a volunteer and subsequently (2011 to 2012) board member to Stichting Belastingwinkel Rotterdam, which supports the less-fortunate with filing their tax returns, participated in the Erasmus Honours Program (2011 to 2012), and acted as an editor to Ars Aequi, the Dutch national law review (2013 to 2016). Titiaan won a fully-funded research position by participating in the Research Lab of Erasmus Graduate School of Law. From September 2015 to January 2020, Titiaan was employed as a PhD-candidate (*promovendus*) at Erasmus University's Department of Trade, Corporate & Financial Law. As part of his research, Titiaan was seconded to the Monitoring Committee Corporate Governance on a full time basis (June to October 2016), to provide technical assistance for the pending review of the Dutch Corporate Governance Code. He also served as a Visiting Scholar to the Max Planck Institute for Comparative and International Private Law (Hamburg, Germany, April and May 2018) and Columbia Law School (New York, United States, July, August and September 2018). Since February 2020, Titiaan has been employed as an attorney at De Brauw Blackstone Westbroek.

Titiaan is an editor of the *Maandblad voor Ondernemingsrecht* legal journal and a member of the Vereeniging Handelsrecht and the Vereniging Corporate Litigation as well as an Academic Member of the European Corporate Governance Institute. In his spare time, he likes to read about history and politics and to ride his racing bike.

Propositions

1. Life-cycle theory should replace excessively narrow agency theory as the dominant corporate governance paradigm for the allocation of voting rights and the payment of dividends and, in fact, the corporate capital structure in general.
2. The global decrease in the number of listed corporations is a serious although underappreciated problem, as this development constitutes a freeze-out of public investors on an unprecedented scale. The responsible use of dual class equity structures may help to alleviate this problem.
3. The proper response to the introduction or cancellation of a dual class equity structure is a fair value exit right for dissatisfied investors, rather than a sunset provision or a majority-of-the-minority vote.
4. Allocating corporate control by means of (differentiated) voting rights is more efficient than doing so through (differentiated) dividend rights.
5. Cross-border mergers into the Netherlands which involve introducing a dual class equity structure do not necessarily undercut the global investing climate, and may in fact improve it.
6. "An investment in knowledge always pays the best interest." (*Benjamin Franklin*)
7. Although history suggests that corporate governance is a highly circular field of study, the shift in corporate purpose towards circularity is here to stay.
8. Corporate governance is like physics: both disciplines build on the law of mass conservation. Policy measures which claim to unilaterally enhance welfare across the entire spectrum of corporations may be failing to capture all costs and benefits involved in the trade-off.
9. Real comparative corporate governance requires an understanding of the culture and mentality engrained in a legal system.
10. To remedy the asymmetry in responsibilities that currently exists between shareholders and directors, substantive obligations should be imposed on professional investors and their advisors, in addition to existing disclosure-based Stewardship Codes.
11. "Shut up, legs." (*Jens Voigt*)

Acknowledgements

Writing this PhD-thesis has been an entertaining journey, allowing me to reflect for an extended period of time on a small set of wide-ranging questions. I thoroughly enjoyed this project. First and foremost, that is to the credit of my supervisors, Maarten Kroeze and Hélène Vletter-van Dort. Thank you, for the freedom you gave me in pursuing my ambitions as well as for the many apt suggestions and insightful comments you provided over the years, in addition to being so terribly kind. I could not have wished for any more pleasant *promotores*.

I thank Alessio Pacces, Gerard van Solinge, Matthijs de Jongh, Kid Schwarz, Richard Squire and Vino Timmerman for their willingness to take part in my doctoral committees and their thoughtful suggestions. Without them, the manuscript would not have been what it currently is. I hope we will be discussing many more ideas and developments in years to come.

Patrick Leyens and Zohar Goshen were both incredibly friendly in helping me visit the Max Planck Institute and Columbia Law School, respectively. The Hamburg and New York visits provided not only a welcome stimulus to the comparative parts of the PhD-research, but also fostered lasting memories.

My gratitude equally applies towards my colleagues at the department of Trade, Corporate & Financial Law of Erasmus University. Maarten Verbrugh, Marnix van Ginneken and Bastiaan Assink each supported me continuously in my many (side) projects. Bart, Olivier, Eva, Randolf, Arnoud, Karel and Erik, thank you for the occasional chats, both more and less substantive, and Anja, Linda and Shelly, for making all seemingly impossible things possible. I am highly looking forward to continue combining legal academia and legal practice at De Brauw Blackstone Westbroek. I thank my fellow Brewery-members for the fun we already had during and the collaborations that are yet to come. Paul, many thanks for those 2 glasses of wine at Oliver's and all the things that followed, as well as for suggesting this title of my PhD-thesis. Martin, Sven, Harm-Jan, Reinier, Klaas, Michael, Jeroen, Lennard, Jaap, Casper, Omar, Claudia, Josse, Maurits, Hylke, Ralph and Pieter, and so many others, thank you for the warmth with which you have welcomed me (again) at the firm.

Whilst studying at Erasmus University aroused my interest in the law, serving as an editor at Ars Aequi was perhaps even more instrumental for my development, as it challenged me to explore a wide variety of legal territories I had not yet chartered. The tireless Nancy Wolter, as a managing editor, was the but for cause of many Ars Aequi volumes being published. Similarly, I am most grateful to my fellow editors, especially Emil, Marishka, Ruben, Mojan, Charlotte, Friso, Marlou, Koen, Pjotr and Johan, for the great discussions and the numerous times we reflected on these discussions over drinks or dinner.

I want to thank my friends for putting up with me, despite all the get togethers that I missed, in particular Lukas, Mark, Jan, Jaap, Kasper and Bas. It has been a joy spending time with you ever since we met in college. Vincent and Hsinya, although we did not meet in college, the fun is very much the same. I am grateful towards my family for their genuine interest in my scholarship and the discussions we had over non-work related matters. My sincere thanks to my mother and father for the immense devotion and energy with which they raised me as a kid. Dad, I hope you will continue your path towards a full recovery. Claudia and Onno, what an amusing coincidence you embark on your own academic journey as I finish mine. I wish you best of luck. Marien, Helga, Marloes and José, you have welcomed me in your midst with a warmth I could not have imagined. Thank you for your support, especially in the end-phase of the project. Rogier, I consider it a stroke of luck that we have met again in an entirely different capacity. It never ceases being fun hanging out with you.

Last but definitely not least, I wholeheartedly want to thank Marloes. Thank you for your patience with my PhD-thesis – you defended yours at just 26 years of age – and with me as person in general. I admire your smile and your ability to analyze matters so distant to your own field of study in such a shockingly well-informed manner. Of all the favors that fate has bestowed upon me, getting to know you was undoubtedly the biggest. *Até o fim do mundo*.

UITGAVEN VANWEGE HET INSTITUUT VOOR ONDERNEMINGSRECHT, RIJKSUNIVERSITEIT GRONINGEN EN ERASMUS UNIVERSITEIT ROTTERDAM

1. Prof. mr. P. van Schilfgaarde, prof. mr. W.J. Slagter, mr. R.A.A. Duk, prof. mr. C.W.A. Timmermans, prof. mr. W.C.L. van der Grinten, Geschillen in de onderneming, 1984.
2. Prof. mr. P. van Schilfgaarde, mr. P.J. Dortmond, mr. P.C. van den Hoek, mr. H.L.J. Roelvink, prof. mr. H.J.M.N. Honée. De nieuwe misbruikwetgeving, 1986.
3. Prof. mr. P. van Schilfgaarde, Misbruik van rechtspersonen, 1986.
4. Mr. L. Timmerman, Over multinationale ondernemingen en medezeggenschap van werknemers, 1988.
5. Prof. mr. J.M.M. Maeijer, prof. mr. P. van Schilfgaarde, mr. M.W. den Boogert, prof. mr. M.R. Mok, prof. mr. E. Aardema, Aandelen, 1988.
6. Mr. S.M. Bartman, Concernbeleid en aansprakelijkheid, 1989.
7. Mr. J.B. Huizink, Bestuurders van rechtspersonen, 1989.
8. Mr. A.F.M. Dorresteijn, Tegenstrijdig belang van bestuurders en commissarissen, 1989.
9. Prof. mr. L. Timmerman, prof. mr. P.J. Dortmond, prof. mr. C.A. Boukema, mr. H.J.M.N. Honée, mr. H.L.J. Roelvink, mr. A.L. Mohr, prof. mr. P. van Schilfgaarde, Piercing Van Schilfgaarde, 1990.
10. Mr. B.H.A. van Leeuwen, Beginselen van behoorlijk ondernemingsbestuur, 1990.
11. Prof. mr. W.J. Slagter, mr. Karin C. Th. Schouwenberg, mr. A.G. van Solinge, mr. A.L. Mohr, prof. dr. L.G.M. Stevens, mr. A.J.S.M. Tervoort, mr. M.E. Koppenol-Laforce, Aspecten van het EESV, 1990.
12. Mr. J.N. Schutte-Veenstra, Harmonisatie van het kapitaalbeschermingsrecht in de EEG, 1991.
13. Mr. B.T.M. Steins Bisschop, De beperkte houdbaarheid van beschermingsmaatregelen bij beursvennootschappen, 1991.
14. Prof. mr. L. Timmerman, prof. mr. P. van Schilfgaarde, mr. H.J.M.N. Honée, mr. S.E. Eisma, prof. dr. H.P. Westermann, mr. M.W. den Boogert, mr. P.C. van den Hoek, prof. mr. P.F. van der Heijden, prof. mr. W.C.L. van der Grinten, Ondernemingsrechtelijke contracten, 1991.
15. Mr. J.W. Winter, Concernfinanciering, 1992.
16. Prof. mr. L. Timmerman, prof. mr. J.M.M. Maeijer, prof. mr. P. van Schilfgaarde, mr. S.E. Eisma, prof. G.K. Morse, mr. L.H. Slijkhuis, prof. mr. A.L. Mohr en mr. T. Drion, De dubbelrol in het vennootschapsrecht, 1993.
17. Dr. R.H. van het Kaar, Medezeggenschap bij fusie en ontvlechting, 1993.
18. Mr. J.W. Winter, mr. drs. H. Langman, prof. mr. M.J.G.C. Raaijmakers, mr. H.J.M.N. Honée, Beschouwingen over concernfinanciering, 1993.
19. Mr. J.M. Blanco Fernández, De raad van commissarissen bij nv en bv, 1993.

20. Mr. G.M. ter Huurne, Nieuwe regels voor de levering van aandelen op naam, 1994.
21. Mr. H.M. Vletter-van Dort, Meldingsplicht voor beursvennootschappen, 1994.
22. Mr. R.C. van Dongen, Identificatie in het rechtspersonenrecht, 1995.
23. Mr. M.Y. Nethe, De ontbinding van lege besloten en naamloze vennootschappen, 1995.
24. Prof. mr. P. van Schilfgaarde, prof. mr. P.J. Dortmond, prof. mr. L. Timmerman, prof. mr. P.C. van den Hoek, mr. D.C. Buijs, prof. mr. drs. H.P.J. Ophof, prof. mr. drs. H. Beckman en mr. J.W. Winter, Knelpunten in de vennootschapswetgeving, 1995.
25. Prof. mr. H. Beckman, De jaarrekeningvrijstelling voor afhankelijke groepsmaatschappijen, 1995.
26. Prof. mr. P. van Schilfgaarde, prof. mr. S.C.J.J. Kortmann, prof. mr. H.J.M.N. Honée, prof. mr. L. Timmerman, prof. mr. W.D.H. Asser, mr. J.B. Huizink, mr. O.L.O. deWitt Wijnen, mr. M.W. den Boogert, prof. mr. drs. H. Beckman, Rechtspleging in het ondernemingsrecht, 1997.
27. Mr. W.J. Oostwouder, Management Buy-out, 1996.
28. Mr. H.E. Boschma, De eenpersoons-bv, 1997.
29. Mr. J.B. Wezeman, Aansprakelijkheid van bestuurders, 1998.
30. Prof. mr. P.C. van den Hoek, prof. mr. P. van Schilfgaarde, prof. mr. H.J.M.N. Honée, prof. mr. M.W. den Boogert, prof. dr. E. Wymeersch, mr. J.W. Winter, prof. mr. L. Timmerman, mr. J.B. Huizink, Corporate Governance voor juristen, 1998.
31. Mr. S.H.M.A. Dumoulin, Besluitvorming in rechtspersonen, 1999.
32. Mr. M.L. Lennarts, Concernaansprakelijkheid, 1999.
33. Mr. M. Koelemeijer, Redelijkheid en billijkheid in kapitaalvennootschappen, 1999.
34. Mr. E.E.G. Gepken-Jager, Vertegenwoordiging bij NV en BV, 2000.
35. Peter van Schilfgaarde Select, 2000.
36. Prof. mr. J.W. Winter, mr. J.W.G. Vink, mr. A.W.H. Docters van Leeuwen, prof. mr. H.J.M.N. Honée, prof. mr. M.W. den Boogert, prof. mr. S.E. Eisma, prof. mr. S. Perrick, prof. mr. G. van Solinge, prof. mr. J.B. Huizink, prof. mr. L. Timmerman, De beursvennootschap, 2001.
37. Mr. H.M. Vletter-van Dort, Gelijke behandeling van beleggers bij informatieverstrekking, 2001.
38. Mr. Th. Groenewald, Doeloverschrijding bij NV en BV, 2001.
39. Mr. G.N.H. Kemperink, Fusies, overnames en medezeggenschapsrechten, 2002.
40. Mr. L.J. Hijmans van den Bergh, prof. mr. Gerard van Solinge, mr. T. de Waard, prof. mr. J.W. Winter, prof. mr. L. Timmerman, prof. mr. H.J. de Kluiver, prof. mr. P.J. Dortmond, mr. J.N. Schutte-Veenstra, mr. E.D.G. Kiersch, prof. Jonathan Rickford, Nederlands ondernemingsrecht in grensoverschrijdend perspectief, 2003.
41. Marius Josephus Jitta, Vino Timmerman, Guus Kemperink, Richard Norbruis, Anthony Driessen, Peter van der Zanden en HuubWillems, The Companies and Business Court from a comparative law perspective, 2003.
42. Mr. B. Bier, Uitkeringen aan aandeelhouders, 2003.
43. Mr. M. Meinema, Dwingend recht voor de besloten vennootschap, 2003.
44. LT, Verzamelde 'Groninger' opstellen aangeboden aan Vino Timmerman, 2003.
45. Mr. M.J. Kroeze, Afgeleide schade en afgeleide actie, 2004.
46. Mr. P.G.F.A. Geerts, Enkele formele aspecten van het enquêterecht, 2004.

47. Mr. M.L. Lennarts en mr. J.N. Schutte-Veenstra, Versoepeling van het BV-kapitaalbeschermingsrecht, 2004.
48. Mr. K.I.J. Visser, Zeggenschapsrechten van houders van een recht van pand of vruchtgebruik op aandelen op naam, 2004.
49. Mr. J.G. Groeneveld-Louwerse, Publieke wenselijkheid of private beleidsvrijheid, 2004.
50. Mr. Hanny Schutte-Veenstra, mr. Hylda Boschma, prof. mr. Marie-Louise Lennarts, Alternative systems for capital protection 2005.
51. Prof. mr. Peter van Schilfgaarde, mr. Hanny Schutte-Veenstra, prof. mr. P.J. Dortmond, prof. mr. L. Timmerman, mr. Brian Mezas, prof. mr. Jan Berend Wezeman, mr. Ellen Kiersch, prof. mr. Jaap Winter, prof. mr. Harm-Jan de Kluiver, Vereenvoudiging en flexibilisering van het Nederlandse BV-recht, 2005.
52. Mr. S. Parijs, Fairness opinions and liability, 2005.
53. Mr. J.B.W.M. Kemperink, Vraagstukken rond (terug)storting op nv/bv-aandelen en van coöperatierecht, 2006.
54. Mr. A. Haan-Kamminga, Supervision on takeover bids, 2006.
55. Mr. dr. H.H. Voogsgeerd, Corporate Governance Codes, Markt- of rechtsarrangement?, 2006.
56. Xiaoning Li, A comparative study of shareholders' derivative actions, 2007.
57. Prof. mr. Hans Beckman, mr. Herman L. Kaemingk, mr. drs. Charles Honée, prof. mr. L. Timmerman, prof. mr. A.F. Verdam, prof. mr. Maarten Kroeze, prof. mr. Jan Berend Wezeman, mr. Barbara Bier, prof. mr. Jaap Winter, prof. mr. M.W. den Boogert, De nieuwe macht van de kapitaalverschaffer, 2007.
58. Mr. M.A. Verbrugh, Structuurwijzigingen bij kapitaalvennootschappen en de positie van schuldeisers, 2007.
59. Mr. drs. B.F. Assink, Rechterlijke toetsing van bestuurlijk gedrag, 2007.
60. Mr. A.G.H. Klaassen, Bevoegdheden van de algemene vergadering van aandeelhouders, 2007.
61. Mr. M.L.H. Reumers, Samengevoegde afwikkeling van faillissementen, 2007.
62. Ondernemingsrecht door en voor Mick den Boogert, 2008.
63. Mr. S.N. de Valk, Aansprakelijkheid van leidinggevenden. Naar privaatrechtelijke, strafrechtelijke en bestuursrechtelijke maatstaven, 2009.
64. Mr. A. van der Krans LLM, De virtuele aandeelhoudersvergadering, 2009.
65. Prof. dr. K. Cools RA, mr. P.G.F.A. Geerts, prof. mr. M.J. Kroeze, mr. drs. A.C.W. Pijls, Het recht van enquête, een empirisch onderzoek, 2009.
66. Prof. dr. Thomas Blanke, dr. Edgar Rose, dr. Herman Voogsgeerd, prof. dr. Wijnand Zondag, Recasting Worker Involvement?, 2009.
67. Prof. mr. M.J. Kroeze, dr. E.M.H. Hirsch Ballin, dr. A.H.G Rinnooy Kan, prof. mr. L. Timmerman, prof. mr. M. van Olffen, mr. M. Holtzer, prof. dr. M. Wyckaert, prof. dr. K. Geens, prof. mr. J.B. Wezeman, prof. mr. M.L. Lennarts, mr. P.D. Olden, prof. mr. H.M. Vletter-van Dort, Bestuur en toezicht, 2009.
68. Mr. H. Koster, De Nederlandse juridische splitsing in Europees en rechtsvergelijkend perspectief, 2009.
69. Mr. F. Veenstra, Impassezaken en verantwoordelijkheden binnen het enquêterecht, 2010.
70. Mr. B. Snijder-Kuipers, Omzetting als rechtsvormwijziging, 2010.

71. Europees ondernemingsrecht: 50 jaar na Sanders' Europese NV, 2010.
72. Mr. P.P. de Vries, Exit rights of minority shareholders in a private limited company, 2010.
73. Mr. D.A.M.H.W. Strik, Grondslagen bestuurdersaansprakelijkheid, 2010.
74. Mr. J.B.S. Hijink, Publicatieverplichtingen voor beursvennootschappen, 2010.
75. Mr. J.B.S. Hijink en mr. M.A. Verbrugh e.a., Grensoverschrijdend ondernemen na Cartesio, 2010.
76. Prof. mr. B.F. Assink e.a., Evolutie van het bestuurdersaansprakelijkheidsrecht, 2011.
77. Mr. T.E. Lambooy, Corporate Social Responsibility, 2010.
78. Mr. H.M. Punt, Het vennootschapsrecht van Holland, 2010.
79. Mr. M.J. van Ginneken, Vijandige overnames, 2010.
80. Prof. mr. M.J. Kroeze, prof. mr. J.B. Wezeman, prof. mr. L. Timmerman, prof. mr. B.F. Assink, prof. mr. J.W. Winter, prof. mr. L.G. Verburg, prof. mr. H.M. Vletter-van Dort, mr. drs. H.H. Kersten, prof. mr. W.J.M. van Veen, mr. P. Glazener, prof. mr. H. Beckman, SamenWerken in het ondernemingsrecht, 2011.
81. Mr. drs. I.S. Wuisman, Een Nederlandse personenvennootschap met beperkte aansprakelijkheid: wenselijk?, 2011.
82. Qiuju Wang, Exit remedies for minority shareholders in close companies, 2011.
83. Mr. M. Mussche, Vertrouwen op informatie bij bestuurlijke taakvervulling, 2011.
84. Prof. mr. L. Timmerman, Harry Honée-bundel, 2011.
85. Mr. W.J.L. Calkoen, The One-Tier Board in the changing and converging world of corporate governance, 2012.
86. Mr. J.G.C.M. Galle, Consensus on the comply or explain principle within the EU corporate governance framework: legal and empirical research, 2012.
87. Mr. drs. T.M.C. Arons, Cross-border enforcement of listed companies' duties to inform, 2012.
88. Mr. M.C. Schouten, The Decoupling of Voting and Economic Ownership, 2012.
89. Mr. A.J.M. Klein Wassink, Toetsing van besluiten in het rechtspersonenrecht, 2012.
90. Mr. drs. N.J.M. van Zijl, The Importance of Board Independence – A Multidisciplinary Approach, 2012.
91. Mr. A.J.P. Schild, De invloed van het EVRM op het ondernemingsrecht, 2012.
92. Mr. G.N.H. Kemperink, Vennootschappelijk toezicht op de doelvennootschap bij openbare biedingen, 2013.
93. Mr. A.J.S.M. Tervoort, Het bestuursverbod bij de commanditaire vennootschap, 2013.
94. Mr. J.M. de Jongh, Tussen *societas* en *universitas*, De beursvennootschap en haar aandeelhouders in historisch perspectief, 2014.
95. Mr. M. Holtzer, De invloed van werknemers op de strategie van de vennootschap, 2014.
96. Prof. mr. P. van Schilfgaarde, prof. mr. H.E. Boschma, prof. mr. J.B.S. Hijink, prof. mr. J.W. Winter, prof. mr. J.H.M. Willems, prof. dr. J.A. van Manen RA, mr. A.R.J. Croiset van Uchelen, mr. C.W.M. Lieverse, prof. mr. L. Timmerman, Ondernemingsrecht in tijden van crisis, 2014.
97. Mr. P.P.D. Mathey-Bal, De positie van de vennootschap onder firma. In civielrechtelijk, vennootschapsrechtelijk, publiekrechtelijk en Europeesrechtelijk perspectief, 2016.
98. Prof. mr. L. Timmerman, mr. dr. J.N. Schutte-Veenstra, mr. dr. J.M. de Jongh, mr. dr. C.H.C. Overes, mr. dr. A.J.S.M. Tervoort, prof. mr. J.B. Wezeman, prof. mr. B.F. Assink, prof. mr.

J.B.S. Hijink, prof. mr. J.H.M. Willems, Eenheid en verscheidenheid in het ondernemingsrecht, 2016.

99. De toekomst van het ondernemingsrecht – het ondernemingsrecht van de toekomst, Opstellen voor Prof. mr. L. (Vino) Timmerman, ter gelegenheid van zijn 65[ste] verjaardag en 25+ jaar hoogleraarschap, 2015.
100. Prof. mr. P. van Schilfgaarde, De redelijkheid en billijkheid in het ondernemingsrecht, 2016.

100a Bacchus Rietveld, Glimlachjes en andere weemoedigheden, 2019.

101. Mr. drs. N.T. Pham, Directors' liability. A legal and empirical study, 2017.
102. Mr. Chr.M. Stokkermans, Sleutels voor personenvennootschapsrecht, 2017.
103. Mr. F.G.K. Overkleeft, De positie van aandeelhouders in beursvennootschappen, 2017.
104. Prof. mr. B.F. Assink, mr. M.J. van Ginneken, prof. mr. L. Timmerman, prof. mr. H.M. Vletter-van Dort (Red.), De vele gezichten van Maarten Kroeze's 'bange bestuurders', 2017.
105. Mr. F. Eikelboom, De (onmiddellijke) voorzieningen van de enquêteprocedure, 2017.
106. Mr. C.E.J.M. Hanegraaf, Art. 2:11 BW, doorgeefluik van bestuurdersaansprakelijkheid. Hoe diep kan een bestuurder vallen?, 2017.
107. Mr. dr. A.J.S.M. Tervoort, prof. mr. Bastiaan F. Assink, mr. dr. P.P. de Vries, prof. mr. M.L. Lennarts, mr. P. Schütte, prof. mr. C.A. Schwarz, mr. M.H.C. Sinninghe Damsté, prof. mr. W.J.M. van Veen, mr. dr. B. Snijder-Kuipers, Familievennootschappen, 2017.
108. Mr. W.A. Westenbroek, Bestuurdersaansprakelijkheid en ernstig verwijt in theorie, 2017.
109. Mr. drs. R.E. van Lambalgen, State aid to banks, 2018.
110. Prof. mr. H.E. Boschma, prof. mr. M.L. Lennarts, prof. mr. J.N. Schutte-Veenstra, dr. K. van Veen, Evaluatie Wet bestuur en toezicht, 2018.
111. Mr. A. Argyrou, Social enterprises in the EU: Law in promoting stakeholder participation in social enterprises, 2018.
112. Mr. M.J. van Uchelen-Schipper, De rol en positie van de raad van toezicht van de stichting, 2018.
113. Mr. E.C.H.J. Lokin, De bezoldiging van bestuurders van beursgenoteerde vennootschappen, 2018.
114. Mr. E.V.A. Eijkelenboom, Vertrouwen voorop. Een onderzoek naar kwaliteitsbevorderende wetgeving voor Nederlandse accountantsorganisaties, 2019.
115. Mr. B. Kemp, mr. dr. H. Koster & prof. mr. C.A. Schwarz (red.), De betekenis en functies van het vennootschappelijk belang, 2019.
116. Mr. drs. E.C.A. Nass, Groepsregime, jaarrekening en 403-aansprakelijkheid, 2019.
117. Mr. dr. M.Y. Nethe (Red.), prof. dr. H. de Wulf, mr. dr. J. Barneveld, mr. dr. D.A.M.W.H. Strik, prof. mr. J.N. Schutte-Veenstra, prof. mr. C.D.J. Bulten, prof. dr. M. Wyckaert, prof. mr. H.J. de Kluiver, mr. dr. F.G.K. Overkleeft, mr. A.F.J.A. Leijten, Ondernemingsrecht in de lage landen, 2020.
118. Mr. A.C. Faber, Onmiddellijke voorzieningen en hun externe werking, 2020.
119. Prof. mr. L. Timmerman & mr. Chr.M. Stokkermans, Oprichten zonder omwegen. Digitalisering en fraudebestrijding als *game changers* voor de oprichtingsprocedures van vennootschappen, 2020.
120. Mr. S.B. Garcia Nelen, De beursvennootschap, corporate governance en strategie, 2020.
121. Mr. T.A. Keijzer, Vote and Value, 2020.