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Spaces and Places: A Systems Theory Approach to Regulatory Competition in European Company Law

Peer Zumbansen

Osgoode Hall Law School of York University, pzumbansen@osgoode.yorku.ca

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‘New Governance’ in European Corporate Law Regulation as Transnational Legal Pluralism

*Peer Zumbansen**

Abstract: *The present transformation of European corporate governance regulation mirrors the challenges that have been facing the EU’s continuously evolving polity, marked by tensions between centralised integration programmes, on the one hand, and Member State’s embedded capitalisms, path-dependencies and rent-seeking, on the other. As longstanding concerns with remaining obstacles to more mobility for workers, services, business entities and capital in recent years are aligned with post-Lisbon commitments to creating the world’s leading competitive market, European corporate governance regulation (ECGR) has become exposed to and implicated in a set of highly dynamic regulatory experiments. In this context, ‘New Governance’ offers itself as both a tentative label and immodest proposal for a more responsive and innovative approach to European law making. The following article assesses the recently emerging regulatory forms in ECGR as illustrations of far-reaching transformations in market governance. The arguable parallels between the EU’s regulatory transformation in response to growing legitimacy concerns and the recurring question about whose interests a business corporation is intended to serve, provide the framework for an exploration of current regulatory trajectories in European corporate law that can most adequately be understood as a telling example of transnational legal pluralism.*

I European Corporate Governance Regulation:

Embeddedness and Co-Evolution

The European Commission’s corporate governance agenda occupies a unique place within the European imagination. Since the beginning, the ‘European company law scene’ occupied regulators and policy makers inside and outside of

* Canada Research Chair in the Transnational and Comparative Law of Corporate Governance at Osgoode Hall Law School, York University, Toronto. Founder/Director of the Critical Research Laboratory (Program on Comparative Research in Law and Political Economy) at Osgoode and Regular Visiting Professor at the Collaborative Research Centre ‘Transformations of the State’ in Bremen (<http://www.sfb597.uni-bremen.de/>). Thanks to Simon Archer, Farzana Nawaz, Fenner Kennedy-Stewart and Phillip Bevans for their helpful comments. Paul Hancock, Stephen Wolpert, Zohar Levy and Hermie Abraham at Osgoode Hall provided excellent research assistance. Financial support from the Social Sciences and Humanities Research Council of Canada (SSHRC, Grant # 410-2005-2421) is gratefully acknowledged. Errors remain mine.

Europe, and recent innovations and changes in the approaches to regulatory governance, have given this area a set of noteworthy turns. The arrival of ‘new governance’ in the area of European corporate governance regulation (ECGR) brings the already charged interests and dynamics that are at stake in this area into much sharper contours. New Governance (NG) is itself a label for a tremendously challenging and provoking trajectory for the EU’s transnational governance. Ever since ‘governance’ entered the scene through the Commission’s ‘White Paper on European Governance’ in 2001,¹ the spectre of a fundamental transition from government to governance has been haunting Europe,² as well as transnational regulatory spheres.³ The Commission’s definition of governance as ‘a very versatile one . . . being used in connection with several contemporary social sciences, especially economics and political science’, and as one originating ‘from the need of economics (as regards corporate governance) and political science (as regards State governance) for an all-embracing concept capable of conveying diverse meanings not covered by the traditional term “government”’⁴ is very open-ended and leaves one wondering whether the definition is meant to conclude or open an inquiry into the changing nature of market regulation.⁵

Without intending to overly strain the Commission’s reference to corporate governance in the cited definition, the following observations will nevertheless point to particular complementarities between the EU’s ongoing construction process and the unfolding European corporate governance matrix. The varied history of European corporate law regulation is marked by the diversity of interests and concerns invested in this area of regulation. While the legislative record was, until recently, not altogether comprehensive,⁶ ECGR has in the last years become one of the most vibrant sectors of norm-creation and regulatory interaction. As such, ECGR has become a regulatory universe of its own, with a large portfolio within the Commission’s internal market division and a seemingly tireless expert

community feeding into the policy and norm-making process at every turn. With ECGR long having left the confines of the European Court of Justice, the Council and Parliament, it has expanded into an extremely versatile, comparative and transnational legal field. ECGR constitutes a *semi-autonomous* field, comprised both of hard law and social norms, which are in a constant relation of complementarity, fusion and irritation.⁷ As such, ECGR presents formidable challenges for legal, economic, sociological or political analysis. From the point of view of legal pluralism, the particularity and intricacy of ECGR lies in its mixed constitution of law and ‘social norms’.⁸ Seen through the legal pluralist lens, ECGR develops as a co-evolutionary process, where the imposition of law—which encompasses regulations, directives, recommendations and judgments—is both shaping and being shaped by the norms evolving outside of its imposition. Similar to the unpredictability of consequences and effects of rights/principles transplants,⁹ ECGR faces enormous challenges in terms of legal certainty and strategy, given its many sources of potential disturbance, irritation, and complementing points due to its complex regulatory agenda. With a view to the challenges facing the EU from the substantive enlargement in 2004, Silvana Sciarra observed: ‘As the tradition of comparative legal scholarship in Europe has taught us, the attempt to pursue a “transplant” of legal institutions uncritically is both a sign of disregard for traditions different from the one to be transplanted, and, very often, is an inefficient solution’.¹⁰

Adding to the difficulties arising from the multilevel and multi-stakeholder dimension in company law regulation in Europe, ECGR has been amplifying the tensions that underlie the conceptual and architectural distinction between ‘company’ and ‘capital market’ law, which are deeply embedded in a country’s market regulation histories.¹¹ Struggling with competing policy goals regarding the enhancement of market freedoms as they relate to capital market rules, on

the one hand, and to corporate governance law, on the other, ECGR is driven to actualise ‘the best of both worlds’. Yet, while corporate law itself appears to continue to withstand all attempts at deconstruction and demystification by other conceptual frameworks as to what corporations do,¹² ECGR finds itself deeply involved in a large, ever-so amorphous marketbuilding project. The ‘function’ of the firm, as necessarily implicated within ECGR, must now extend far beyond the financial-organisational dimensions that have recently again been depicted as the ‘what’, ‘how’ and ‘why’ of corporate law. Within the European project, in particular after the Lisbon Summit 2000¹³ and its most recent reinvigoration in the form of a ‘social makeover’,¹⁴ corporate law has become a strategic token in a complex multilevel governance game that brings a much wider range of players to the policy-making table than any single market regulation unit would reasonably want to assume responsibility for.

While the to-do list for ECGR only seems to keep growing in view of pressing competitive, social, environmental and monitoring demands,¹⁵ it has in fact always been evolving in a particularly accentuated and contested field of contrasting and competing Member State agendas in pursuit of national prosperity, of which corporate and capital market law had always been a central building block.¹⁶ As such, ECGR has never sat comfortably within the wider market integration agenda. The real challenges of company law harmonisation, however, became impressively obvious during the exhausting struggle over the adoption of a regulation concerning the creation of the European company statute, originally initiated in the 1970s, and eventually passed after many more compromises, in 2001.¹⁷ Another illustration of how ECGR has been inextricably caught up in the European ‘Varieties of Capitalism’¹⁸ was, without doubt, the long contest over a European Takeover Directive,¹⁹ which resulted in 2004 in a directive full of loop-holes and opt-out clauses.²⁰ Eddy Wymeersch recently called

the moment of adopting the directive a ‘provisional semifinal point in a process that has taken more than 17 years, and according to some even more than 30 years on the way to opening up the European markets for corporate control’.²¹ At the time, André Nilsen observed that ‘[T]he Takeover Directive sees light after a long and acrimonious journey through the institutional labyrinth in Brussels’.²²

As the regulatory trajectory of ECGR continues to unfold, we must be even more sensitive to the degree to which this enterprise remains deeply embedded in the particular dynamics of multilevel governance of European integration, on the one hand,²³ and the globalisation of markets and regulatory processes, on the other.²⁴ Under such conditions, an assessment of the concrete forms of norm-creation presents great challenges due to ECGR’s complex appearances ranging from ‘hard’ to ‘soft’ law to norms that are developed, promulgated and disseminated by a panoply of public and private actors.²⁵ Therefore, instead of trying to free ECGR from its embeddedness in this complex regulatory environment, the emphasis must be on the exact opposite. Precisely by embracing the embeddedness of ECGR as a *transnational legal field* can we begin to see better the concrete as well as the amorphous forms of change. Embeddedness is here understood in the following four dimensions:

- a) ECGR is informed by the policy and legislative dynamics between corporate law and capital-market law (securities regulation) as well as between corporate law and labour law, categorisations of functionally separable legal areas that can be found in all advanced industrialised societies and that are increasingly challenged through global forces of rule making.
- b) ECGR is entangled in the European ‘Varieties of Capitalism’ with regard to corporate and labour regulation, as evidenced, for example, in the struggle

over the Takeover Directive and the statute of the *Societas Europaea*.

- c) ECGR as part of the larger project towards the completion of the European internal market,²⁶ in particular in the post-Lisbon environment of knowledge society politics within the EU.²⁷
- d) ECGR as a semi-autonomous field, marked by a vibrant and yet precarious, always threatened balance between official law making, transnational consultations, expert committee preparatory work, recommendations, communications and standardisation, that we see unfolding on the domestic, EU supra-national and transnational level.

The following section (II) will further draw out the correlations between the ECGR and the unfolding forms of ‘new’ and ‘experimental’ governance forms in the EU. Section III will work out the connections between the transnational pluralism of ECGR and emerging, parallel forms of transnational norm-creation by focusing on the disclosure of executive compensation. The emergence of de-territorialised, hybrid regulatory regimes, consisting of both hard and soft norms governing particular elements of corporate governance, accentuates the degree to which ECGR has come under pressure to facilitate quasi-neutral, ‘best’ practices in ‘good’ corporate governance. This functionalist ‘normalisation’ of corporate governance standards illustrates, in turn, how the European company law scene²⁸ sees itself increasingly transnationalised. As a result, corporate governance regulation presents formidable challenges with a view to developing adequate enabling rules for corporate actors in highly competitive global markets, while not frustrating critics’ attempts at preventing the insulation of emerging regulatory processes from outside assessment. The article will suggest that a combination of ‘reflexive corporate governance’ and ‘transnational legal pluralism’ can best capture this new regulatory challenge. With this body of law constituting an intricate combination of

both substantive and procedural aspects, evolving intertwined processes of law/norms negotiation, dissemination and alternative ‘enforcement’ modes, ECGR goes beyond and reaches across categories through which comparative company law scholars have been assessing the function of the corporation²⁹ and the rules governing its behaviour.³⁰ Part IV concludes.

II ‘New’ and ‘Experimentalist Governance’ in European Corporate Law Regulation: Towards Transnational Legal Pluralism

A ECGR between Harmonisation and Regulatory Competition

Any assessment of emerging forms of corporate governance regulation in Europe has to build on the fast-growing body of scholarship by legal sociology and conflicts of laws scholars,³¹ on the one hand, and comparative company law experts, on the other.³² The present challenge is facilitating a mutually enriching dialogue and exchange between this scholarship and the ongoing exploration of EU governance, which remains—due to its complexity of levels and contexts of regulation—for the most part a domain almost exclusively gardened by EU-focused regulatory theorists. One important area of ‘overlap’ between EU regulatory work and corporate governance scholarship is marked by the tension between harmonisation and regulatory competition. This perspective has for years been informing a fruitful comparative inquiry into the different conditions in particular between the US federal organisation of corporate law making (states) and securities regulation (federal).³³ Recent years have seen significant progress in reaching beyond the obvious obstacles to comparisons by focusing, on the one hand, more clearly on the evolving flexible and hybrid forms of regulation in Europe³⁴ and, on the other, by sophisticating the underlying comparative methodologies.³⁵ Again, the emphasis on the paradoxical nature of the emerging regulatory forms as being both *embedded*

in learned regulatory practices from within the Member States and *disembedded* in terms of evolving within a dramatically globalising market points to the difficulties of disentangling any assessment of ECGR from the larger project of European integration,³⁶ which is itself inescapably and always tied to processes of globalisation of capital, labour and rights.

It is against this background that the particular challenges facing ECGR can best be illustrated, by studying them through the lens of transnational law and, more specifically, through the emerging prism of transnational legal pluralism. The connection of observations of the transformation of public and private international law towards ‘transnational law’³⁷ and the legal-sociological and anthropological work on legal pluralism offers important insights into a better understanding of current trajectories of functionally determined regulatory areas. ECGR is a powerful illustration of such a functional field, determined both by its semi-autonomous nature with regard to its tension between law/norms and politics/market. The latter are powerfully evident in ECGR, which emerges through the co-evolution of the different functional dynamics, which drive corporate organisation. At the same time, the fast-emerging forms of new corporate organisation such as private equity vehicles and hedge funds seem to defy an organisation-oriented assessment of the firm in favour of a differently positioned analysis of contemporary corporate forms. As the ‘end-of-history’ thesis in comparative corporate governance scholarship and the Berle-Means paradigm of corporate organisation and its related governance issues are revisited and recontextualised,³⁸ the dramatic threat of a mortgage-loan meltdown in the spring of 2008 points to the need for a comprehensive reassessment of the corporate governance approach for an understanding of the financial structures of the corporate form and the contested aspiration of financial markets regulation.³⁹

B The Polarities of EU Governance: Global Competitiveness, Indirect Regulation and 'Reflexive Corporate Governance'

Recent ECGR developments must be seen in the context of a highly diversified series of norm-setting processes resulting in a veritable explosion of corporate governance codes in Europe and elsewhere.⁴⁰ With the proliferation of corporate governance codes, influenced and pushed by international⁴¹ and transnational activities of norm setting, discussion and thought exchange,⁴² it has become increasingly difficult to identify a single institution or author of a set of norms. Instead, the production and dissemination of corporate governance rules has, for some time now, taken on the nature of migrating standards,⁴³ and a cross-fertilisation of norms is now regarded as eminent and necessary in shaping future corporate activity. A distinct feature of this de-territorialised production of norms is the radical challenge these processes pose for our understanding of what we call law proper. With the dissemination of corporate governance codes, disclosure standards and rules, best practices and codes of conduct, not only corporate and securities law, but also other fields of law—such as labour and employment law—change. The decentralisation of norm producers is repeated, mirrored and reflected in the hybridisation of the norms themselves. It is in this sense that the study of the proliferation of corporate governance codes and company law production in general, and of the rules of remuneration disclosure in particular, feeds into a broader research into the changing face of legal regulation in globally integrated marketplaces. What shines through particular developments in individual jurisdictions in this regard is a most poignant exhibition of particular legal and political cultures and political economies of law making and economic regulation.⁴⁴

'New' or alternative modes of governance have been emerging in response and reaction to the regulatory challenges that inevitably arise from these distinct

variances in 'Member States' regulatory design. The most remarkable regulatory innovation in recent years is without doubt the so-called *open method of coordination* (OMC), which, after emerging during the 1990s in the realm of politically contested national, economic and employment policies, was formally adopted at the 2000 Lisbon Summit. Its defining feature has been the proceduralisation of regulatory governance by benchmarking and disseminating non-binding objectives and standards across a growing body of regulatory areas:⁴⁵

In the years following the Lisbon Summit, the OMC . . . appeared to have become the governance instrument of choice for EU policymaking in complex, domestically sensitive areas, where diversity among the Member States precludes harmonisation but inaction is politically unacceptable, and where widespread strategic uncertainty recommends mutual learning at the national as well as the European level.⁴⁶

The departure of the OMC from the more rigid norm-generation and enforcement programme of the 'Community method' has been both welcomed and criticised.⁴⁷ What Francis Snyder identified as 'the challenge of sites' facing the European Constitutionalist project,⁴⁸ indeed constitutes the framework for the proliferating norm-generation processes of ECGR. As we will see in the example of regulating the disclosure requirements for executive compensation, this area of ECGR is marked by a deep, underlying tension between increasingly decentralised, indirect regulatory forms, on the one hand, and vaguely defined and yet broadly conceived policy goals against which the adequacy and the success of lower-level norm-setting processes will be measured, on the other. At the same time, EU internal corporate governance negotiations are increasingly becoming disembedded from the exclusionary European context as they are complemented, irritated and shaped by those norms and principles ('best practices' and 'guidelines' that are disseminated on the transnational level, promulgated, for example, by actors such as the Organisation for Economic Cooperation and

Development (OECD)).⁴⁹

Seen, thus, under the magnifying glass, ECGR can be described as unfolding as a particular open-ended and contestable practice.⁵⁰ Even a cursory overview of the emerging features of ECGR suggests strong corollaries between ECGR and emerging general forms of ‘new’⁵¹ or ‘experimental’ EU governance,⁵² on the one hand, and between ECGR and transnational governance forms in corporate and labour law, on the other.⁵³

On the ‘inside’ of the European integration process, recent years have seen a tremendous drive towards the creation of ever-more flexible forms of indirect regulation, benchmarking and rule/standards production through expert groups and advisory committees. As Simon Deakin argues in this issue,⁵⁴ expert groups such as the *European Corporate Governance Forum*,⁵⁵ while importantly building on recent experiences with the Winter I and II groups and their vital contribution to break the deadlock over the Takeover Directive, nevertheless reinforce and further accentuate the drive towards a ‘right’ standard in corporate governance regulation despite the declarations that many years of debating the convergence and divergence of corporate governance standards⁵⁶ should support the view that ‘no one size fits all’.⁵⁷

Paradoxically, the operational method of the OMC, originally designed to promote greater flexibility and pressure to foster a race to the top in social standards, transforms itself in the context of the ECGR into an engine towards ‘best practice in corporate governance’. The utilitarian, soft-law approach as here employed, leads to considerably different results than would have been hoped for in other areas of the OMC. With a view to the earlier described tensions between different regulatory trajectories of corporate governance—consisting of an amalgamation of company law, securities regulation, taxation and insolvency law—the pursuit of ‘best practices’ is determined by a considerably narrower scope of functional concerns. At this point, the goals of this pursuit are fused too fast and probably

too uncritically with the functional orientation of the post-Lisbon Innovation and Competitiveness Agenda. By emphasising the need to ensure the economic performance and, connected herewith, the integrity and stability of financial institutions,⁵⁸ corporate governance as a regulatory field is taken out of the more complex regulatory context we have seen unfold over the course of the twentieth century.⁵⁹

As the globalisation of corporate activity and finance undermines any attempt at effectively re-domesticating corporate governance into the previously contained political economies of nation states, the more appropriate conceptual approach would be to argue for the need for a transnationalisation of corporate governance regulation. In the case of ECGR, this would mean, first, to recognise the need for a differentiated assessment of different nation state regulatory experiences and their presently continuing variations and innovations.⁶⁰ The next step would then not consist in ‘translating’ specific regulatory instruments onto the transnational sphere, but, instead, in fostering a radically functionalist understanding of corporate governance. Such an approach would go beyond the now abundant references to ‘best practices’, which owe their content more to the ideological battles out of which they are emerging than to a truly functionalist governance model. Such a model would have to be developed with the complete corporation, its markets, governance structures, dynamics and contextual performance practices in mind. Building on work regarding ‘reflexive law’ in the area of corporate governance and corporate environmental responsibilities,⁶¹ a more adequate governance approach would have to start with the corporation itself, complementing simultaneously continuing assessments of the organisational functionalities of the corporation.⁶² While such functionalist approaches to corporate governance are only now emerging,⁶³ their promise lies in their pursuit of governance models that are evolving directly out of the practice, management and operation of complex business entities on uncertain

markets. While this approach would place great emphasis on self-regulation, which would in turn create additional pressure on the regulatory systems with a mandatory-law approach to corporate law,⁶⁴ *reflexive corporate governance* would eventually emerge as a more adequate and flexible approach to corporate law regulation while—at the same time—not necessarily being insulated from ongoing assessments of this hybrid regulatory enterprise. Instead of reacting to the long, tiresome and frustrating harmonisation attempts in European company law with a turn to expert rule and market governance, reflexive corporate governance would allow for a clearer view of how political governance and corporate self-regulation can be mutually reinforcing and optimising by constantly exposing regulatory choices and practices to scrutiny. The prime advantage of this approach would be that the regulatory challenges facing today's transnational corporations could be assessed in correlation with the ongoing transformation of the political economies in which companies are legally constituted.⁶⁵ A reflexive approach to corporate governance is even more pressing as the dramatically unfolding debate over a present transition from a 'real economy' to a 'financial economy'⁶⁶ suggests that neither a return to embedded capitalism corporate governance regulation nor an undeterred belief in the 'end of history of corporate law'⁶⁷ with its dubious promises of triumphant shareholder value maximisation are a viable option. This means that what would previously have been an interest-pluralist assessment of choices in corporate governance regulation with a view to allegedly opposed and eventually irreconcilable stakeholder interests can now be transposed into a more comprehensive and contextual analysis of the corporation's functions, in particular of its embeddedness in operational and regulatory practices.

Against this background, it is important to contextualise ECGR again within the otherwise unfolding dynamics of hybrid governance modes within the EU. Echoing earlier legitimacy concerns with the OMC, recent explorations of 'new',

‘experimentalist’ or ‘informal’⁶⁸ governance critically address the instrumentalisation of decentralised self-governance in service of a larger ‘whole’, the problem being that both the accessibility of the implied, overall political goal along with the now available regulatory modes are becoming ever more precarious.⁶⁹ As Charles Sabel and Jonathan Zeitlin have recently argued, the persistent legitimacy critique *vis-à-vis* soft and hybrid governance forms ‘crucially overlooks the underlying architecture of public rule making in the EU: the fundamental design for law making, and the way this design transforms the distinct elements of EU governance by connecting them into a novel whole’.⁷⁰ The particular challenge arising from these forms of governance is, however, the growing pressure on actors participating in multi-level norm-creation processes to identify effectively the desired output and the coordination elements necessary for its realisation: ‘The difficulty . . . and the open secret of administrative law in both the EU and the USA, is that it is very often—regularly?—the case that no actor among those seeking to coordinate their efforts has a precise enough idea of the goal either to give precise instructions to the others or reliably recognise when their actions do or don’t serve the specified end’.⁷¹ In defence of what they call ‘experimentalist governance’, Sabel and Zeitlin extrapolate the legitimacy potentials of the ‘recursive redefinition of means and ends’ at its heart by pointing out that under conditions of complex regulatory challenges an accountability model designed for a hierarchical principal–agent relation is no longer adequate.⁷² Instead of assessing whether the agent did comply with a rule set by the principle, the agent is expected to provide ‘a good explanation for choosing, in the light of fresh knowledge, one way of advancing a common, albeit somewhat indeterminate project (as all projects are)’. Correspondingly, ‘[p]eer review becomes in turn dynamic accountability—accountability that anticipates the transformation of rules in use—and dynamic accountability becomes the key to “anomalous” administrative law’.⁷³ The authors

certainly recognise the limitations of the proposed endorsement of experimental governance, when they address the tension between the described participatory processes and democracy. But, their response is radical: while acknowledging the unavailability of a large-scale democratic justification of the new system of governance, Sabel and Zeitlin emphasise how accountability through peer review can help destabilise ‘entrenched forms of authority—starting with, but not limited to technical authority’.⁷⁴ Importantly, they argue, the ‘diffusion of procedural commitments to transparency and participation in EU networked governance has had a democratising destabilisation effect in terms of stimulating demands to widen the circle of actors and alternatives involved in policy making at the national as well as the European level’.⁷⁵

This short discussion of EU ‘experimentalist’ governance modes points to the deeper complexity of tying an exploration of ECGR into the context of European governance. As the following case study will illustrate, the particular challenge arises from the intersection of national and transnational law making in an overall hotly contested regulatory area. There has been and continues to be considerable pressure on European corporations to become more attractive to foreign investors, first, by both changing core corporate governance rules and, second, by substantively expanding its disclosure portfolio. The peculiar trajectory of the European attempt at introducing standards regarding the disclosure of executive compensation can be used to highlight the persistent tension between ‘old’ and ‘new’ EU governance.

III The Case of Executive Compensation

A Breaking the Deadlock: Governance by Expertise

While it has oft been repeated that there is no universally optimal system of corporate governance and that, despite upheld claims of an ‘end of history in corporate law’, there is much likelihood for continued divergences and persistence of distinct regimes, the case of management compensation illustrates the changing dynamics within the ECGR process. As hard-law harmonisation in the area of company law seems to be out of reach,⁷⁶ soft-law harmonisation might prove to be a far more efficient approach to regulatory change in that respect. While company law experts in the 1970s harboured highest hopes for a flourishing harmonisation programme of company laws in Europe,⁷⁷ the ensuing decades have received a much more reserved assessment. Over time it became apparent that harmonisation could not be achieved in many central areas of company law given the substantial, political, socio-economic and legal differences of company law organisation in the European Member States.⁷⁸ Instead, the European Commission as the principal initiator of European-wide company law legislation pursued various projects in the area of capital market and securities law, which would remain, until very recently, the only areas where Brussels could function as a law-making motor.⁷⁹ Recently, much of this well-known status quo has come into greater movement. Among the events and developments that have contributed to a notable increase in legislative activity in this area are the already mentioned *Societas Europaea* and the Takeover Directive, the ECJ’s judgment in *Centros* and follow-up decisions in 2002, 2003 and 2004, and a fourth and in many ways very promising development, which had been initiated by the Commission amidst the turmoil surrounding the deliberations around the Takeover Directive. In 2002, the Commission mandated the so-called High Level Group of Company Law Experts under the chairmanship of Dutch law professor, Jaap Winter, to prepare a comprehensive report to facilitate the directive’s adoption.⁸⁰ Shortly after the Group had submitted its report, the Commission asked for another study. This

mandate constituted the starting point for an entirely new wave of European company law making. When the Winter Group submitted its *Report of the High Level Group of Company Law Experts on A Modern Regulatory Framework for Company Law in Europe* in November 2002 (the Winter 2 report), it did no less than present an outline, blueprint and wish-list for future legislative projects for the European company law legislator.⁸¹ Based on the Winter 2 report, the Commission drafted a concise outline of future legislative projects, the ‘Modernising Company Law and Enhancing Corporate Governance in the European Union—A Plan to Move Forward’, the so-called Action Plan.⁸² Given the wide range of issues addressed in its Action Plan, including, *inter alia*, corporate governance disclosure, strengthening of shareholder rights, modernising corporate boards and coordinating the corporate governance efforts of Member States,⁸³ the Commission invited public comments designed to assist it in the realisation and implementation of the Action Plan’s agenda.⁸⁴ When, in November 2003, the Directorate General Internal Market, the Commission’s subdivision responsible for company law, issued a synthesis of the responses received on the Action Plan,⁸⁵ it highlighted the overwhelming public support for the attempt embodied in the Action Plan to work towards a higher capital market efficiency and enhanced confidence in the market.⁸⁶ It further reiterated that many participants in the consultation had stressed the necessity of a ‘fully integrated approach combining self-regulatory market solutions, adequate co-ordination of corporate governance codes and legislation where necessary’, while recognising that there cannot be a one-size-fits-all solution⁸⁷ for corporate governance in Europe. In light of the continuing differing company law structures in Europe and the differences in the political economies among Member States, it has been the consensus for some years now not to pursue a uniform corporate governance model but to enhance better transparency, communication and learning across Member State borders.⁸⁸

B Governance by Transparency

Among the more recently pursued issues, however, by the law makers in Brussels, was a European-wide regime for executive compensation. Already highlighted in the Winter 2 report,⁸⁹ the Action Plan of May 2003 re-emphasised the need for an initiative in this regard, which would basically be oriented around the central principles of shareholder approval and full, ie individualised, disclosure of the compensation schemes.⁹⁰ The Commission acted in this regard by issuing, on 14 December 2004, a Recommendation:⁹¹ ‘fostering an appropriate regime for the remuneration of directors of listed companies’.⁹² Under (3), the Commission highlighted the central role of the compensation scheme’s disclosure for good corporate governance: ‘The disclosure of accurate and timely information by the issuers of securities builds sustained investor confidence and constitutes an important tool for promoting sound corporate governance throughout the Community’.⁹³ One of the remarkable features of this Recommendation was that it addressed questions of disclosure over any substantive issues related to directors’ remuneration. While the Recommendation subsequently addressed ‘remuneration policy’, ‘remuneration of individual directors’, ‘share-based remuneration’ and ‘information’, its central focus was on issues of transparency, disclosure and effective communication of the compensation details to shareholders and investors. The Commission addressed this Recommendation to the Member States⁹⁴ and underlined the necessity of Member States taking ‘all appropriate measures’ to ensure that companies registered in their jurisdictions have regard to this Recommendation.⁹⁵

To understand the particular dynamics of European law making, mention should be made of the discernible tension between Brussels’ political will to install a Europeanwide regime, on the one hand, and its awareness of the numerous

obstacles, on the other. The Recommendation did in very explicit terms highlight the political embeddedness of the remuneration regime within the greater system of corporate governance. Section (2) of the Recommendation reads:

. . . remuneration is one of the key areas where executive directors may have a conflict of interest and where due account should be taken of the interests of shareholders. Remuneration systems should therefore be subjected to appropriate governance controls, based on adequate information rights. In this respect, it is important to respect fully the diversity of corporate governance systems within the Community, which reflect different Member States' views about the roles of corporations and of bodies responsible for the determination of policy on the remuneration of directors, and the remuneration of individual actors.⁹⁶

This section expresses—in very simple terms—one of the most compelling features of European company law development, ie the great divergence between different company law traditions and histories.⁹⁷ While the history of ECGR has long been marked by struggles over nationally distinct corporate governance regimes,⁹⁸ more recent accounts document the origins, causes and prospects for change.⁹⁹ As already alluded to, the regulatory changes taking place in Brussels and in various Member States strongly reflect trends of parallel law-making initiatives that, on the one hand, involve official norm-setting bodies such as the Commission and the Member States' parliaments, and, on the other, non-state actors, expert commissions and private enterprises, complementing or accompanying the official law-making processes through an amalgam of private, informal law-making regimes.¹⁰⁰ The particular challenge lies in the proliferation of sites, levels and forms of law making. As is shown next through a brief account of the German response to the European Recommendation, norms are sometimes the result of a highly intricate and unpredictable political process, during which the legislative initiative moves back and forth between domestic and supranational (Berlin—Brussels) and between unofficial and official law makers (Expert Commission—Federal Legislator).

The Commission's Recommendation of December 2004 soon began to trigger reactions in Member States that—according to paragraph 8.1. of the Recommendation— were 'invited to take the necessary measures to promote the application . . . by 30 June 2006'. According to the legal, non-binding nature of this regulatory instrument, Member States were invited 'to notify the Commission of measures taken in accordance with the Recommendation in order to allow the Commission to monitor closely the situation and, on this basis, to assess the need for further measures'. Not only did the Recommendation appear to be just about one of the most elegant, non-coercive and perhaps most permeating legal instruments in a highly politically contested regulatory environment, but it also might have offered just the right amount of pressure and substance to allow Member States to pursue domestically certain policies that otherwise might have proven too politically sensitive.

At the core of this small case-study is the 'law' governing the disclosure of executive compensation in large, publicly traded business corporations. In recent years, there has been much development in this area, mostly initiated by public resistance against high pay packages for corporate leaders all too often now associated with excessive rentseeking and fraudulent behaviour.¹⁰¹ Academic work alone on the issue of executive compensation—while having grown with the rise in real-world compensation during the 1990s bull market—has eventually outgrown this development.¹⁰² Even a superficial survey of the media and the scholarly literature suggests that the topic has not ceased to attract immense attention—from the academy and policy advisory circles to the media and the general public. The mood regarding the subject, however, might have—or so we hope—matured over time. With allegedly or potentially everyone driving a BMW in parts of California a few years ago, the perception of success in the market was that it was generally accompanied and documented by steep increases in management pay. With

Bernard Ebbers convicted by a jury that remained utterly unimpressed by his pleas of ignorance *vis-à-vis* the fraudulent events in Enron,¹⁰³ today's discussion about executive compensation seems again to be moving in another direction. Generally, the attitudes rank from scepticism to outright hostility with regard to the increasingly mediatised compensation programmes.¹⁰⁴ In the shadow of the dramatic and existential destruction of real capital and lifelong earnings with the collapse of the dot.com market in 2002,¹⁰⁵ it may come as little surprise that the discussion about management pay has again risen to the fore of public attention.¹⁰⁶

Academic debate has played a large role in giving voice to the various positions defended in this regard.¹⁰⁷ William Bratton, in an insightful discussion and critique of Bebchuk and Fried's important book,¹⁰⁸ recognises in this discussion not merely an opposition between anti and pro-management arguments, but a 'contest for shareholder capitalism's high ground'.¹⁰⁹ This observation is particularly poignant as it highlights that within the quarrel, notably not so much over the amount of compensation paid, but over whether this amount is adequately tied to the management's success in creating shareholder value, there ought still be some room to question the starting premise, namely whether one can continue reasonably to define the firm's objective by no more and no less than shareholder value (SHV) maximisation.¹¹⁰

A recurring argument at present deliberations over excessive chief executive officer (CEO) pay and the promises of controlling management behaviour through the addition of stock-driven components into their salary, is the contention that the issue of incentivising management behaviour is really more complicated than that. Closely tied to this contention is the suggestion that the corporation is really more complicated than SHV theory might sometimes be taken to suggest.¹¹¹ As a result, the connection made between CEO compensation packages and these CEOs' success in creating SHV underscores the theoretical paradigm which sees the corporation, in

rough terms, less as an entity channelling and collectivising various interests, ranging from investors over employees and creditors to society at large, but as a nexus of contractual relations, entered into solely with the creation of shareholder profit in mind.¹¹² In their description of how the model of the firm, emerging from the substitution of smaller, closely held and founder-governed enterprises by large, publicly traded corporations between 1880 and 1930,¹¹³ placed the investors at the mercy of their managers, Adolf Berle and Gardiner Means¹¹⁴ pointed out that the real challenge of reconciling the separation of ownership and control lay in a realistic and context-sensitive appreciation of the evolving political economy of corporate practice and corporate regulation. Here lies the key to undoing much of the more recent apprehension of Berle and Means as forerunners of the SHV paradigm.¹¹⁵ The disembedding of Berle and Means' work occurred at a time of increasingly vibrant securities markets in the 1980s by reducing their argument to a mere call to arms in favour of stronger management control in the interest of shareholders. This move paid—and continues to pay—little to no attention to the contemporary political economy, management and ownership structure at the time of Berle and Means' writing.¹¹⁶ Berle and Means did not contend themselves with critiquing the challenge of the threatening 'separation of ownership and control'. Instead, they made clear, and Berle would go to emphasise this point much more strongly some decades later,¹¹⁷ that the corporation also ought to be understood as an eminently important social and political institution.¹¹⁸ While Berle and Means' critique of an unaccountable management caste continued to dominate corporate law thinking for decades to come, since the 1960s, economists and corporate law authors asked why, if the separation of ownership and control thesis was correct, investors had not been deterred from buying corporate shares. Their response, which would prove to remain influential to our present day, was, in short, that besides internal governance and control mechanisms such as shareholder

suits or the firing of executives, there were also alternative, outside control mechanisms. As advanced by Henry Manne,¹¹⁹ but also by others writing on regulatory competition,¹²⁰ the market for corporate control would exercise a strong enough control mechanism to keep management within range.¹²¹ The management's concern with how the market assesses the value of the firm under their guidance allegedly made it responsive to market opinion, most powerfully addressed by the selling of shares, reduction in value and acquisition/take-over by another corporation, which would regularly replace the incumbent management. This emerging understanding of the separation of ownership and control/problem prepared the ground for the rise of the nexus-of-contracts model of the corporation, which spread, aided by the rise of the law and economics movement, like a prairie fire through the 1970s corporate law arena.¹²² The nexus model shifted the focus significantly, but much of this shift had already been announcing itself with a growing disillusionment with government regulation all throughout the 1980s and 1990s,¹²³ culminating eventually in the rise to power by Margaret Thatcher in the UK and Ronald Reagan in the USA. The contractarian model, thus, fits smoothly into a larger political climate where emphasis was placed on individual responsibility, private ordering and the greater burden on the state to justify any intervention. Certainly, a considerable amount of critique was and continues to be mounted against the contractarian premises of corporate governance.¹²⁴ What matters for our discussion, however, is not the final resolution of the debate over the nexus model of the corporation, but the recognition of this model as an important theoretical background for any concept of non-state regulation of the corporation. This section on the development of corporate law theory already indicates that there can be no adequate understanding of the regulatory framework for the corporation without an exposure to the various lines of contestation of the firm itself.¹²⁵ In fact, what makes the discussion of executive compensation so

interesting, and Bratton's observation even more insightful, is that we can recognise a set of much more fundamental questions that underlie the different contentions about competences to determine compensation packages. These questions concern our understanding and concept of the corporation as a regulatory object, subject and space.

One particular element of the current discussion and our reason to draw from the example of executive compensation for our argument is the particular dynamics of regulatory politics in this area. As already indicated, we can note an interesting shift away from the material issues of how much CEOs are being paid, who sets the compensation packages and how justified these payments are,¹²⁶ to questions regarding the regulatory framework of executive compensation. While the extreme amounts being distributed to top management surely remain on academics',¹²⁷ policy makers' and the public's mind, an intriguing discussion has emerged which addresses this problem from another perspective. It is this perspective on the regulatory structure of executive compensation, the related competences¹²⁸ and now, more importantly, its disclosure that ought to be moved into the centre of attention.¹²⁹ While the regulation and disclosure of CEO pay figures as a means of controlling management, be that on a running, day-to-day basis or in the context of corporate acquisitions,¹³⁰ remains an interesting aspect of the present discussion, an even more fruitful approach to understanding the regulatory dynamics of executive compensation would be to focus on how the various forms of corporate disclosure can be read as new means of regulating the company as such.¹³¹

The latter feeds into a parallel, contemporary debate about mandatory versus voluntary disclosure, a discussion, which emerged in the aftermath of government regulation after the financial scandals of firms such as Enron, WorldCom and Tyco. Here we find ourselves again in the midst of long-standing and dramatically urgent

deliberations over state versus market-based approaches to securities regulation.¹³² Central to this discussion over the merits or drawbacks of voluntary versus mandatory disclosure is the fundamental recognition of disclosure and transparency as regulatory means. As recently reiterated by Cynthia Williams, the recognition of disclosure as a regulatory instrument, certainly, goes back a long time, at least to the work done by Brandeis, Berle and Means.¹³³ The present discussion focuses predominantly on the positive effects (or, the lack thereof) of the US government's regulatory initiatives after Enron, most notably the Sarbanes-Oxley Act of 2002,¹³⁴ which has subsequently come under heavy fire.¹³⁵

What is to be taken from this discussion for our present inquiry into the conditions of ECGR as transnational legal pluralism is the focus on the idea of *regulation through disclosure*, which constitutes an alternative to substantial regulatory approaches. The example of disclosure of corporate earnings allows us to explore the intertwining of substantive standards and formal procedures, as it plays out in this area in a most intriguing way. Whereas the substantial issue at hand would primarily be what would be considered an adequate compensation scheme, the secondary issue would be who—investors, directors, managers—should be authorised to establish the amount of compensation to be allocated to a company's top management.¹³⁶ The first issue would be the substantive question regarding the adequacy of the compensation package, while the second issue would go to the heart of the corporate governance problem, namely, who inside of the firm gets to determine CEO pay packages and how can investors (and the firm) be protected against management's self-dealing. Apart from these substantive issues, however, lies a formal one. The formal issue is concerned with how executive compensation is regulated, in other words, whether the regulation of executive compensation ought to be assumed by the government or whether it could be left to private ordering.

A case in point for this development is the legislation introducing disclosure obligations for German stock corporations adopted in 2005.¹³⁷ This legislation is particularly interesting when seen in light of the ongoing corporate governance reforms in Germany, on the one hand, and the initiatives in this regard from the Commission. While Germany is currently undergoing what is, without doubt, the most comprehensive overhaul of company and securities law reform in decades,¹³⁸ the dynamics of this process can only adequately be assessed in light of the greater discussions about the pressure on ‘Germany Inc’ in a globally integrated market environment where investor confidence is key to gaining access to capital from large institutional investors.¹³⁹ It is necessary to understand the particular quality of contemporary law reform in corporate governance in order to fully grasp the regulatory options available to the participants. As we shall see, this regulatory field is neither purely public nor private in nature. The intricate interaction between the government, a semi-public, semi-private expert commission, and industry representatives in a far-reaching public debate over mandatory versus voluntary disclosure of CEO earnings, which we will describe in the following, leads us to the thesis that, rather than having the possibility to decide clearly in favour or against mandatory (or voluntary) disclosure, the outcome of the struggle depends in reality on a complex and even unpredictable set of developments taking place in a volatile and hybrid regulatory environment. This means that rather than being a straightforward example of either a radically decentralised and de-hierarchised law-making enterprise or a top-down, government-made legal regime, the particular development of law making in Germany in this area illustrates the absence of clear-cut solutions. As has already become clear from the preceding section concerning the contested legal nature of corporate governance codes, the regulation of CEO compensation disclosure in Germany turns out to be a further illustration of an intricate

intertwining of public and private ordering.

Executive compensation came onto the German corporate law reform agenda mainly under the pressure of an international, globe-spanning discussion over excessive CEO pay packages, management self-dealing, underscoring the investor's ultimate powerlessness to constrain effectively fraudulent and otherwise illicit behaviour among managers. As such, executive compensation is yet another example of an issue that emerges in a particular regulatory, political and cultural context, but attains allegedly universal contours when entering a common debate among academics and policy makers around the world. As has become clear in the ongoing discussion over the convergence and divergence of different corporate governance models, many issues (such as outside directors and auditors, takeovers or regulatory competition), which had once been remembered in the concrete context in which they originated,¹⁴⁰ have come to occupy our minds as unavoidable challenges for law makers and regulatory theory worldwide.¹⁴¹ In order, however, to understand how a corporate governance idea, principle or theory enters into an existing regulatory framework and paradigm, we need to shed light on this paradigm in its greater embeddedness, rather than treating it simply as an autonomous, isolated *tabula rasa*, just waiting to be filled with strange words.¹⁴²

The notion of embeddedness, however, is certainly anything but easy to concretise. Against the background of contemporary revivals and reassessments of Karl Polanyi's seminal work on the 'evolution of the "market pattern"',¹⁴³ what has been triggering the recently reawakened interest in Polanyi is the still unsatisfactory analysis and realisation of the concept of embeddedness. It is thus no surprise that economic sociologists¹⁴⁴ and corporate law scholars with a distinct interest in the embedding factor of 'culture'¹⁴⁵ emphasise the need of taking a closer look at the way in which the notion of embeddedness can help assess the contemporary dynamics between formal and informal rule making. Above all, this research, itself

developing against the background of a longstanding interest in ‘social norms’,¹⁴⁶ points to the distinct challenges arising in the area of comparative legal research where the analytical lens is not wide enough to capture the complex structure of such ‘semi-autonomous’ fields, as they are emerging along functionally differentiated, organisational and regulatory areas.

The ‘shocks’ that have been hitting German¹⁴⁷ and European¹⁴⁸ corporate governance and that by many accounts demand a no less than radical reform of existing laws,¹⁴⁹ appear in a different light when perceived from a regulatory perspective. In this regard, executive compensation becomes an example of how top-down law-making approaches alternate, interact and intertwine with attempts to promote corporate self-regulation, non-official norm setting and alternative law-enforcement mechanisms. These choices between alternative regulatory instruments and the concrete evolution of public, private and hybrid public–private ordering are deeply embedded in a nation’s political economy and regulatory environment.¹⁵⁰ No assessment of their legal nature, their compatibility with an existing institutional and normative regulatory environment, up to questions of compliance and enforceability can be carried out without reference to a specific context. It should already have become clear that in emerging areas of transnational law making, these contexts can increasingly be deterritorialised.¹⁵¹ But, in many cases, our interest remains fixated on the emergence of new legal regimes out of existing normative infrastructures. Just as much specific consumer protection instruments might be influenced by acquired views on how a specific consumer protection philosophy should be developed and promoted within a specific political economy,¹⁵² other emerging normative regimes show the same degree of embeddedness. Corporate governance codes, given their complex and in many ways still not entirely resolved legal nature, will have to be interpreted with at least a view to the particular legal and regulatory environment in which they were conceptualised

and developed: ‘Corporate governance codes function within a given legal environment. The interaction with the legal system is a complex matter that differs considerably from state to state, both due to differences in the legal status of the codes, but also due to differences in the envioning legal system’.¹⁵³

Research by sociologists, lawyers, cultural psychologists and economic historians on evolution, path dependency and embeddedness suggests that the relationships between regulatory instruments and causal outcomes cannot adequately be captured by the use of dichotomies. Often-employed dichotomies include the state and the market,¹⁵⁴ markets and hierarchies,¹⁵⁵ public and private¹⁵⁶ or the firm and its environment: ‘Such dichotomies construct divisions between two opposing, mutually exclusive categories. Dichotomy formulations always involve a binary choice, which limits the ability to measure complexity’.¹⁵⁷ These findings not only coincide with the critique put forward by legal sociologists and legal theorists against the use of dichotomies such as market versus state, or public versus private when assessing new regulatory structures in a transforming welfare state,¹⁵⁸ but also contribute to and greatly enrich the work done by *Varieties of Capitalism* scholars referred to above.¹⁵⁹ The lessons learned so far from work done in employment,¹⁶⁰ corporate¹⁶¹ and social welfare law¹⁶² teach us about the embeddedness of regulatory regimes in historically grown cultural, political and economic institutions. As we expand the traditional Varieties of Capitalism lens to study the evolving nature of the identified liberal and coordinated market regimes,¹⁶³ in particular the shifting weights between political sides¹⁶⁴ and the intricate and unpredictable interaction between public and private actors,¹⁶⁵ we can begin to grasp the challenge put before us through the cited examples of regulatory change. We are thus slowly beginning to reach beyond the historical origins of particular institutions, their alleged starting points and ensuing trajectories, lock-ins and aberrations¹⁶⁶ to look more closely at the particular dynamics of

regulatory change occurring both with regard to the institutions and the normative content that can be found to govern a particular field.

C The Political Economy of Corporate Governance Reform in Germany

a) Governing 'Germany Inc'

For the longest time, the governing norm for executive compensation in German stock corporations has been section 8(1) of the *Aktiengesetz* (Stock Corporation Act). It reads:

In setting up the total earnings for each member of the Management Board (Salary, Profit participation, Compensation, Insurances, Provisions and auxiliary remunerations of any type), the Supervisory Board must ensure that the total earnings remain appropriate in relation to the tasks of the Manager and the state of the company. This correspondingly is true also of retirement pay, payments to heirs and related payments.¹⁶⁷

The norm's most prominent and governing features are both its explicitness and implicitness. The law demands that the remuneration of members of a stock corporation's executive or managing board must be appropriate (*angemessen*) to the tasks of the board member and to the situation of the company (*Lage der Gesellschaft*). That is its explicitness. The implicitness of the norm can be seen in its silence as regards further specification and substantiation of this appropriateness. While much discussion has taken place with regard to the level of appropriateness in executive pay, this has comparatively been less than elsewhere. Largely responsible for the comparative acquiescence of the wider public in what German managers earn might be attributed to a simultaneous awareness that the German *Vorstandssprecher* and *Vorstandsmitglieder* (CEOs and managers) generally earn strikingly less than their peers in New York or Los Angeles.¹⁶⁸

While in Germany, as in elsewhere, financial scandals in recent years have led

to public concern about excessive management pay,¹⁶⁹ law-making activity in the last two years has remarkably focused less on substance than on procedure, in particular on the rules governing disclosure of management earnings. German stock corporations are obliged under section 285(9) of the *Handelsgesetzbuch* (Commercial Code) to identify in their annual report the collective sum of compensation earned by the collectivity, be it the board of managers or the supervisory council. While this obligation extends to different categories of remuneration—salary, bonuses and options—it used to stop short of demanding disclosure of individual earnings of board members.

In the meantime, following the installation of the Corporate Governance Code Commission under the chairmanship of Gerhard Cromme in 2001,¹⁷⁰ which had presented a Code in February 2002, some advance was made towards pushing German industry to disclose individualised corporate earnings. In the aftermath, however, policy makers, industry leaders and lobbyists disagreed about the need to comply with the Code's recommendations.¹⁷¹ A legislative proposal introduced by the Ministry of Justice in March 2005 changed this state of ambivalence.¹⁷² According to the new provisions, which came into force on 1 January 2006, companies are obliged to disclose detailed management earnings.¹⁷³ This constituted a dramatic change to the prior regime under section 285(9) of the *Handelsgesetzbuch*. Yet, the real degree to which the new legislation departs from the old state of the law can only be discerned when appreciated against the background of the political and regulatory climate that prevailed before and after the introduction of the new law. For this, we must again look to the proliferation of corporate governance codes generally and to the German example as a telling illustration: What became strikingly clear was that the introduction of self-introductory instruments in the area of company law did and continues to constitute a challenge to traditional understandings of legislative authority among German

scholars. While there seems to be a wide-ranging consensus on the need to improve investor confidence, at the centre of which we find calls for greater corporate transparency, better accountability and a more effective corporate governance, much of which is endorsed in the recommendations and suggestions of the German Corporate Governance Code, the concerns about its still not fully resolved constitutional status, on the one hand, and questions of voluntary compliance, on the other, continue to be problematic. The story of the Corporate Earnings Disclosure Law of 2005 is a most telling illustration of this ambiguity. To cite again the Justice Minister in her speech of November 2004 relating to the draft legislation: ‘The Principle of societal selfregulation lies at the roots of the success of corporate governance. Rightfully this principle has received international support and many followers’.¹⁷⁴ She went on to highlight the reasons why her government should at this time not pursue the adoption of a public act instead of continuing to find further voluntary support for the Corporate Governance Code’s recommendation to disclose individual earnings, declaring that she thinks that:

also in this area *norms* included in the Code are better than rigid statutory laws. Because especially in this sensible field voluntary changes of heart and self-regulation are more advantageous than state coercion. That is why we prefer—against many other voices—the economy’s self-regulation through a flexible recommendation of the Code. From our point of view, therefore there is no need to pass a statutory law regulating the disclosure of corporate earnings.¹⁷⁵

The mood, however, changed within a matter of months. In fact, already in summer 2004, the Minister had underscored her commitment to industry self-regulation, emphasising simultaneously, however, that she would pursue a legislative solution by mid-2005, if industry bosses proved resilient towards the Code’s recommendations.¹⁷⁶ Much of this drive for this change of mind, however, turned out to come from a place where only few would have expected

it. None other than the chairman of the first Corporate Governance Commission of 2001, which had prepared not only the most comprehensive task list for the company law legislator in the post-War era, but also had called in its final report for the installation of a second commission mandated to draft the Corporate Governance Code.¹⁷⁷ Professor Theodor Baums had become the leading voice for a statutory regulation of corporate earnings disclosure. In many weeks of lobbying in early 2005, Professor Baums scathed German industry leaders to comply with the recommendations of the Code to disclose their earnings in an individualised form:

Concerning an obligation to disclose corporate earnings, the Code postulates this already today. Unfortunately, however, there is a consensus among approximately two-thirds of all DAX corporations not to follow these recommendations of the Code. In our view, this constitutes a veritable abuse of that instrument. And it is for this reason that the Federal Justice Minister is rightfully threatening with a statutory obligation. The EU Commission holds a similar view.¹⁷⁸

b) The Hybridisation of Law Making: The Return of the State?

Read in light of the euphoric declarations regarding the value of a newly discovered ability of the German economy to modernise itself through the means of selfregulation,¹⁷⁹ and the fragility of the embeddedness of corporate and industry selfregulation in the larger regulatory culture. To speak, like Professor Baums did in the cited interview, of an ‘abuse’ of the Code by companies mutually agreeing not to provide an individualised disclosure of their management compensation schemes, surely turns the idea of self-regulation on its head. This is even more remarkable as Professor Baums himself highlighted the innovative and reform potential of selfregulation, which he studied with his commission between 2000 and 2001, before submitting his final report to the German Government in July 2001.¹⁸⁰ Likewise, the Justice Minister highlighted the success of corporate self-regulation through Corporate Governance Codes, referring specifically to the recently revised Corporate Governance Principles drafted by the OECD.¹⁸¹

The regulatory origin and scope of the recent German legislation is of particular interest in that it underlines the above-suggested hybridisation of the norms governing this field. While the Ministry makes it very clear that it deems earnings disclosure of management to be of vital importance for rebuilding and strengthening international investor confidence in German firms, the draft foresees the possibility for the shareholder assembly to vote against disclosure with a three-quarters majority.¹⁸² Certainly, while this has met with criticism, this option powerfully underscores the political dilemma the legislator is facing in this area. Given the stern and outspoken resistance of influential industry leaders in the past months against an obligation to disclose management earnings, the option clause seems a well-reasoned compromise. But, with regard to the perspective taken here on the changing shape of reforming a fast-evolving and highly sensitive area such as company law, the larger questions lie elsewhere. The remuneration dispute is but the tip of the iceberg of the long-standing struggle over adequate ways of valuing the firm and, with it, a richer assessment of what is at stake in the current SHV debate. Clearly, Ferrarini, Moloney and Vespro are right in their assertion that ‘It is easier to find problems than solutions in this field’.¹⁸³

IV Conclusion

A very important element in the making of border-crossing corporate governance regimes is their specific emergence through soft law, often issued and disseminated by non-state actors such as international organisations, associations or private corporations. While this article highlighted the particular dynamics through which the ‘juridical touchdown’ will sometimes occur with domestic governments initiating legislative projects to enhance, further ground or to enforce the soft norms of corporate selfregulation, the lesson to be learned consists in sensibilising us to the intricate interwoven character of private and public

regulation in this context. On the one hand, many of the law-making developments in this area could not be imagined without the push coming from non-state actors, issuing and disseminating codes of conduct, recommendations and norms for the global market place. On the other hand, however, the German case study illustrated the particular, deeply embedded regulatory dynamics of norm-creation in a much-contested area. As corporate governance scholarship continues to sharpen its lens for deeper structures of formal/informal norm creation and the particular socio-economic cultures¹⁸⁴ in which different hybrid regulatory approaches emerge, it becomes evident to what degree ‘comparative corporate governance’¹⁸⁵ is being transformed into a multi-disciplinary area of regulatory analysis. Our focus on the way in which corporate governance principles are received by and simultaneously are shaping different national political economies sharpens our perceptions for the existing differences in countries’ corporate laws, but even more so for the specific ways in which soft law becomes intertwined, changed, adapted and interwoven within a regulatory environment which itself is no longer stable. To cite, once again, the German example: the major corporate reform of 1998, the so-called Transparency and Control Legislation,¹⁸⁶ did begin a lengthy process of national soul-searching into the governing principles of a set of company law rules, the scope and content of which had for some time already ceased to be a merely domestic concern, but had instead become part of a transnational debate over ‘good corporate governance’. While domestic politicians, scholars and lobbyists would engage in deliberating over every detail of German corporate governance,¹⁸⁷ the issues being discussed, the proposals on the table and the problem awareness among the law reformers were of a veritable transnational nature, emerging from parallel reform efforts in other countries, among private and non-state actors around the world and the public at large. In that sense,¹⁸⁸ domestic company law reform can clearly be seen as part of an emerging transnational legal pluralism. Its defining feature is

the continuing contestation of the very distinction on which legal pluralism would be conceived to rest upon: the distinction between law and non-law. As has become clear, corporate governance norms offer themselves as a telling example of the transformation of traditional state-originating, official norm-setting in favour of increasingly de-centralised, multi-level processes of norm production. At the same time, not only are norms produced on more levels; the nature of these norms themselves changes dramatically. What our assessment of the present trajectories of ECGR and the case study of Germany so far have illuminated is the changing nature of regulating business in globally interdependent markets, suggesting nothing less than a far-reaching erosion of boundaries between state and non-state actors, official and unofficial law, public and private ordering.¹⁸⁹

Notes

- ¹ *European Governance. A White Paper*, COM(2001) 428 final, dated 25 July 2001, available at: http://eur-lex.europa.eu/LexyUriServ/site/en/com/2001/2001/com2001_0428en01.pdf.
- ² See F. W. Scharpf, *Governing Europe. Effective and Democratic?* (Oxford University Press, 1999); the contributions in C. Joerges, Y. Mény and J. H. H. Weiler (eds), *Mountain or Molehill? A Critical Appraisal on the Commission White Paper on Governance*, Harvard Law School Jean Monnet Working Paper (No 6/01, 2001), and the analysis by D. Trubek and L. G. Trubek, 'Hard and Soft Law in the Construction of Social Europe: The Role of the Open Method of Coordination', (2005) 11 *European Law Journal* 343.
- ³ See, eg, A.-M. Slaughter, 'Disaggregated Sovereignty: Towards the Public Accountability of Global Government Networks', (2004) 39 *Government and Opposition* 159.
- ⁴ European Commission, *Governance*, available at http://ec.europa.eu/governance/index_en.htm.
- ⁵ Hereto, see C. Möllers, 'European Governance: Meaning and Value of a Concept', (2006) 43 *Common Market Law Review* 313 (for a scathing critique of the omnipresent resorting to a still poorly defined and demarcated concept).
- ⁶ For an overview of the legislative acts in the area of company law up to 2000, see J. Wouters, 'European Company Law: Quo Vadis?', (2000) 37 *Common Market Law Review* 257 and V. Edwards, *EC Company Law* (Oxford University Press, 1999); for a more recent discussion of state and prospects of EC company law making, see K. J. Hopt, 'European Company Law and Corporate Governance: Where does the Action Plan of the European Commission Lead?', in K. J. Hopt *et al* (eds), *Corporate Governance in Context* (Oxford University Press, 2005); for a continuously updated listing of directives, regulations and recommendations, see the website of the European Commission available at http://ec.europa.eu/internal_market/company/index_en.htm.
- ⁷ S. F. Moore, 'Law and Social Change: The Semi-Autonomous Field as an Appropriate Subject of Study', (1973) 7 *Law & Society Review* 719; G. Teubner, 'Eigensinnige Produktionsregimes: Zur Ko-evolution von Wirtschaft und Recht in den varieties of capitalism', (1999) 5 *Soziale Systeme* 7.
- ⁸ P. Zumbansen, 'Spaces and Places: A Systems Theory Approach to Regulatory Competition in European Company Law', (2006) 12 *European Law Journal* 534; see generally S. E. Merry, 'Legal Pluralism', (1988) 22 *Law & Society Review* 869; H. W. Arthurs and C. Mummé, 'From Governance To Political Economy: Workers As Citizens, Stakeholders and Productive Social Actors. Paper for the First International CLPE Conference: The Corporate Governance Matrix: Unfolding the New Agenda, Osgoode Hall Law School, Toronto, 20–21 October 2005', CLPE Research Paper Series (2005), (<http://www.comparativeresearch.net>), published in (2007) 45 *Osgoode Hall Law Journal* 439.
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- A. A. Berle Jr, 'Corporate Powers as Power in Trust', (1931) 44 *Harvard Law Review* 1049; and A. A. Berle Jr, 'For Whom Corporate Managers are Trustees: A Note', (1932) 45 *Harvard Law Review* 1365.
- ¹¹⁶ For a comprehensive assessment of the origins and trajectories of Berle and Means' work, see F. Kennedy-Stewart, *A Critical History of the Early American Shareholder Primacy Discourse: A Fresh Examination of the Writings of Adolf A. Berle, E. Merrick Dodd and Henry G. Mann*, PhD Thesis Osgoode Hall Law School, draft manuscript on file with author; see also Bratton, *op cit* n 107 *supra*, Tsuk, *op cit* n 38 *supra*.
- ¹¹⁷ A. A. Berle, *The 20th Century Capitalist Revolution* (Harcourt, Brace & World, 1954) (highlighting the political power held and used by large corporations in the contemporary political economy).
- ¹¹⁸ Cheffins, *op cit* n 113 *supra*, at 487.
- ¹¹⁹ H. Manne, 'Mergers and the Market for Corporate Control', (1965) 73 *Journal of Political Economy* 110.
- ¹²⁰ See, fundamentally, C. M. Tiebout, 'A Pure Theory of Local Expenditures', (1956) 64 *Journal of Political Economy* 416.
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- ¹²² D. M. Branson, 'A Corporate Paleontologist's Look at Law and Economics in the Seventh Circuit', (1989) 65 *Chicago Kent Law Review* 745, at 745.
- ¹²³ Cheffins, *op cit* n 113 *supra*, at 494.
- ¹²⁴ See, eg, W. W. Bratton and J. A. McCahery, 'Incomplete Contracts Theories of the Firm and Comparative Corporate Governance', (2001) 2 *Theoretical Inquiries in Law* Article 7 [p 1–38].
- ¹²⁵ See hereto P. Ireland, 'Shareholder Primacy and the Distribution of Wealth', (2005) 68 *Modern Law Review* 49.
- ¹²⁶ See, eg, S. J. Stabile, 'One for A, Two for B, and Four Hundred for C: The Widening Gap in Pay Between Executives and Rank and File Employees', (2002) 36 *University of Michigan Journal of Law Reform* 115.
- ¹²⁷ Bratton, *op cit* n 107 *supra*, at 1561: 'CEO compensation has ballooned (9–10), with total remuneration increasing by more than eleven times in the past thirty years'.
- ¹²⁸ See S. M. Bainbridge, 'Executive Compensation: Who Decides?', (2005) 83 *Texas Law Review* 1615.
- ¹²⁹ Bebchuk and Fried, *op cit* n 102 *supra*, at 212–213; Bainbridge, *ibid*, at 1655 (noting the impediments in particular for small shareholders to make effective use of the wealth of disclosed information, leaving mostly professional, institutional investors to make informed choices on the basis of corporate disclosure).
- ¹³⁰ Bainbridge, *ibid*.
- ¹³¹ For a comparative overview, see L. Enriques and P. Volpin, 'Corporate Governance Reforms in Continental Europe', (2007) 21 *Journal of Economic Perspectives* 117, at 132–135.
- ¹³² R. Romano, 'Empowering Investors: A Market Approach to Securities Regulation', (1998) 107 *Yale Law Journal* 2359; R. Romano, 'Less is More: Making Institutional Investor Activism a Valuable Mechanism of Corporate Governance', in McCahery *et al*, *op cit* n 56 *supra*; S. Choi, 'Regulating Investors Not Issuers: A Market-Based Proposal', (2000) 88 *California Law Review* 279; see hereto R. A. Prentice, 'The Inevitability of a Strong SEC', (2006) *Cornell Law Review* 775, at 781: 'A company can benefit when it develops a reputation for disclosing accurate information to investors. In theory, then, we should not need an SEC to enforce voluntary, accurate disclosure. Corporate practices of the last decade or so, however, stand in marked contrast to economic theory'. Prentice, therefore, argues against models of voluntary disclosure and even regulatory competition. See, *ibid*, at 816: 'In the end, voluntary full disclosure seldom occurs in the real world'.
- ¹³³ C. A. Williams, 'The Securities and Exchange Commission and Corporate Social Transparency', (1999) 112 *Harvard Law Review* 1197, at 1211 with references to L. D. Brandeis, *Other People's Money and How the Bankers Use It* (Harper's Torch Books, 1914), and to Berle and Means, *op cit* n 114 *supra*. But see also

- J. W. Landis, *The Administrative Process* (Yale University Press, 1938) (highlighting the necessity of a strong SEC to regulate corporate disclosure practices).
- ¹³⁴ Public Company Accounting Reform and Investor Protection (Sarbanes-Oxley) Act, Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified as amended in scattered sections of 15, 18 USC).
- ¹³⁵ J. Strasburg, 'Corporate Backlash over Sarbanes-Oxley', *San Francisco Chronicle*, 23 March 2005, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2005/03/23/BUGVCBR78D43.DTL>;
- T. L. Coenen, 'Reflections on Sarbanes-Oxley Act of 2002', *Wisconsin Law Journal*, published 13 August 2007, available at http://www.sequence-inc.com/index.php?option=com_content&task=view&id=43&Itemid=22; R. Romano, 'The Sarbanes-Oxley Act and the Making of Quack Corporate Governance', (2005) 114 *Yale Law Journal* 1521 (noting that the Federal Government's legislative initiative leading up to the 2002 Sarbanes-Oxley Act encroached upon the States' competence in corporate law making, calling the Act 'not just a considerable change in law, but also a departure in the mode of regulation. The federal regime had until then consisted primarily of disclosure requirements rather than substantive corporate governance mandates, which were traditionally left to state corporate law' (*ibid*, at 1523); see also
- H. T. Hollister, "'Shock Therapy" for Aktiengesellschaften: Can the Sarbanes-Oxley Certification Requirements Transform German Corporate Culture, Practice and Prospects?', (2005) 25 *Northwestern Journal of International Law and Business* 453, at 463: '... corporate-governance regulation in the 1930s was a matter of state, not national law, so the SEC's task for both U.S. and foreign corporations was one of requiring financial reports, rather than mandating governance structures'.
- ¹³⁶ In most US corporate law jurisdictions, the directors of a corporation have the competence to determine the amount of compensation for managers.
- ¹³⁷ See the *Gesetz über die Offenlegung der Vorstandsvergütungen* [VorstOG] (Federal CEO Earnings Disclosure Act) of 3 August 2005, published in (2005) I *Bundesgesetzblatt* (Federal Gazette) 2267, available at <http://www.bmj.bund.de/files/-/1382/VorstOG.pdf>; for the draft and the ensuing discussion, see *Bundesministerium der Justiz* (Federal Ministry of Justice), Press release, 11 March 2005, *Eckpunkte eines Gesetzentwurfs 'Individualisierte Offenlegung der Gehälter von Vorstandsmitgliedern von Aktiengesellschaften' vorgestellt*, available at http://www.bmj.de/enid/0,0/Presse/Pressemitteilungen_58.html?druck=1&presseartikel_id=1906; see also 'Grüne bemängeln Gesetzentwurf...', *Netzeitung*, 11 March 2005 (citing the critique voiced by members of the Green Party (*Die Grünen*) targeting the option for the general shareholder assembly adopting a non-disclosure possibility for management earnings with a three-quarters majority).
- ¹³⁸ For recent overviews, see U. Noack and D. Zetzsche, *Corporate Governance in Germany: The Second Decade*, Center for Business & Corporate Law (CBC) Research Paper Series, (CBC WP No. 0010, 2005), available at <http://ssrn.com/abstract=646761>; P. C. Leyens, 'German Company Law: Recent Developments and Future Challenges', (2005) 6 *German Law Journal* 1407; U. Noack and D. A. Zetzsche, *Germany's Corporate and Financial Law 2007: (Getting) Ready for Competition* (CBC-RPS No. 0028, 2007), available at <http://ssrn.com/abstract=986357> (highlighting the current dynamism of 'service-oriented law making and innovative reforms').
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- ¹⁴⁰ R. J. Gilson, 'The Political Ecology of Takeovers: Thoughts on Harmonising the European Corporate Governance Environment', in K. J. Hopt and E. Wymeersch (eds), *European Takeovers. Law and Practice* (Butterworths, 1992); J. C. Coffee Jr, 'The Future as History: The Prospects of Global Convergence in Corporate Governance and Its Implications', (1999) 93 *Northwestern University Law Review* 641;
- D. Charny, 'Competition among Jurisdictions in Formulating Corporate Rules: An American Perspective on the "Race to the Bottom" in the European Communities', (1991) 32 *Harvard International Law Journal* 423.
- ¹⁴¹ See the critique hereto by D. M. Branson, 'The Very Uncertain Prospect of "Global" Convergence in Corporate Governance', (2001) 34 *Cornell International Law Journal* 321.
- ¹⁴² Hereto, see, eg, H. T. Hollister, "'Shock Therapy" for Aktiengesellschaften: Can the Sarbanes-Oxley Certification Requirements Transform German Corporate Culture, Practice and Prospects?', (2005) 25 *Northwestern Journal of International Law and Business* 453, with regard to the certification requirements for foreign private issuers created by the Sarbanes-Oxley Act. See *ibid*, at 463: 'An examination of basic German corporate structure, practices and values provides crucial context for

- the German objections to the certification requirements’.
- ¹⁴³ K. Polanyi, *The Great Transformation. The Political and Economic Origins of our Time* (Beacon Press, 1944), at 56–67 and 57: ‘The market pattern . . . is capable of creating a specific institution, namely the market. Ultimately, that is why the control of the economic system by the market is of overwhelming consequence to the whole organisation of society: it means no less than the running of society as an adjunct to the market’.
- ¹⁴⁴ J. Beckert, *The Great Transformation of Embeddedness. Karl Polanyi and the New Economic Sociology*, Max-Planck-Institut für Gesellschaftsforschung/Max-Planck-Institute for the Study of Societies, MPIfG Discussion Paper 07/1 (2007); see already M. Granovetter, ‘Economic Action and Social Structure: The Problem of Embeddedness’, (1985) 91 *American Journal of Sociology* 481; M. Granovetter, ‘The Impact of Social Structure on Economic Outcomes’, (2005) 19 *Journal of Economic Perspectives* 33.
- ¹⁴⁵ A. N. Licht, C. Goldschmidt and S. H. Schwartz, ‘Culture, Law, and Corporate Governance’, (2005) 25 *International Review of Law and Economics* 229 (taking issue with LLSV’s reliance on ‘legal families’ to explain corporate governance divergences); A. N. Licht, *Social Norms and the Law: A Social Institutional Approach*, Working Paper (2005), at 52, available at <http://ssrn.com/abstract=710621>: ‘It should be clear that dynamic processes are always at work. Cultural value dimensions constitute the backbone of a constantly developing body of social norms’.
- ¹⁴⁶ R. Ellickson, ‘Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County’, (1986) 38 *Stanford Law Review* 623; L. Bernstein, ‘Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry’, (1992) 21 *Journal of Legal Studies* 115.
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- ¹⁴⁸ G. Hertig, ‘Western Europe’s Corporate Governance Dilemma’, in T. Baums, K. J. Hopt and N. Horn (eds), *Corporations, Capital Markets and Business in the Law. Liber Amicorum Richard M. Buxbaum* (Kluwer Law International, 2000), at 266.
- ¹⁴⁹ T. Baums, ‘Company Law Reform in Germany’, (2003) 3 *Journal of Corporation Legal Studies* 181.
- ¹⁵⁰ See most recently K. Ibata-Arens, J. Dierkes and D. Zorn, ‘Guest Editors’ Introduction: Theoretical Introduction to the Special Issue on the Embedded Enterprise’, (2006) 7 *Enterprise & Society* 1, at 2: ‘Embeddedness connotes the complex interrelatedness of actors within their social, political, and cultural environments’. Hereto, see also M. Granovetter, ‘Economic Action and Social Structure: The Problem of Embeddedness’, (1985) 91 *American Journal of Sociology* 481; P. Zumbansen, *Varieties of Capitalism and the Learning Firm. Corporate Governance and Labor in the Context of Contemporary Developments in European and German Company Law*, CLPE Research Paper No 3/2007 and University of Cambridge, Centre for Business Research Working Paper 347, available at <http://ssrn.com/abstract=993910>, published in (2007) 8 *European Business Organisation Law Review* 467.
- ¹⁵¹ See, *supra*, section II.
- ¹⁵² See, eg, G. Howells and T. Wilhelmsson, ‘EC Consumer Law: Has it Come of Age?’, (2003) 28 *European Law Review* 370.
- ¹⁵³ E. Wymeersch, *Enforcement of Corporate Governance Codes*, ECGI Law Working Paper No 46/2005 (2005), at 2.
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- ¹⁵⁵ O. Williamson, *Markets and Hierarchies. Analysis and Antitrust Implications* (Free Press, 1975); see hereto the critique by M. Granovetter, ‘Economic Action and Social Structure: The Problem of Embeddedness’, (1985) 91 *American Journal of Sociology* 481, at 489–490 (critiquing Williamson for underestimating the role played by personal relations and obligations as well as institutional arrangements in encouraging trust and discouraging malfeasance); see the elaboration and expansion by Beckert, *op cit* n 144 *supra*.
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- ¹⁵⁷ Ibata-Arens, Dierkes and Zorn, *op cit* n 150 *supra*, at 7.
- ¹⁵⁸ See, eg, G. Frankenberg, ‘Shifting Boundaries: The Private, the Public, and the Welfare State’, in M. B. Katz and C. Sachße (eds), *The Mixed Economy of Social Welfare* (Nomos, 1996); N. Fraser and L. Gordon, ‘Dekodierung von “Abhängigkeit”. Zur Genealogie eines Schlüsselbegriffs des amerikanischen Wohlfahrtsstaats’, (1993) 26 *Kritische Justiz* 306; P. Zumbansen, ‘Quod Omnes Tangit: Globalisation, Welfare Regimes and Entitlements’, in E. Benvenisti and G. Nolte (eds), *The Welfare State, Globalisation, and International Law* (Springer, 2003), 147–149.

- ¹⁵⁹ See *supra*.
- ¹⁶⁰ K. Thelen, 'Varieties of Labor Politics in the Developed Democracies', in P. A. Hall and D. Soskice (eds), *Varieties of Capitalism* (Oxford University Press, 2001).
- ¹⁶¹ J. W. Cioffi and S. S. Cohen, 'The State, Law and Corporate Governance: The Advantage of Forwardness', in S. S. Cohen and G. Boyd (eds), *Corporate Governance and Globalisation. Long Range Planning Issues* (Edward Elgar, 2000).
- ¹⁶² P. Manow, 'Welfare State Building and Coordinated Capitalism in Japan and Germany', in W. Streeck and K. Yamamura (eds), *The Origins of Nonliberal Capitalism* (Cornell University Press, 2001).
- ¹⁶³ On this distinction, see foremost P. A. Hall and D. Soskice, 'An Introduction to Varieties of Capitalism', in P. A. Hall and D. Soskice (eds), *Varieties of Capitalism. The Institutional Foundations of Comparative Advantage* (Oxford University Press, 2001).
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- ¹⁶⁵ P. Zumbansen, 'The Parallel Worlds of Corporate Governance and Labor Law', (2006) 13 *Indiana Journal of Global Studies* 261.
- ¹⁶⁶ M. J. Roe, 'Chaos and Evolution in Law and Economics', (1996) 109 *Harvard Law Review* 641.
- ¹⁶⁷ German original: *Der Aufsichtsrat hat bei der Festsetzung der Gesamtbezüge des einzelnen Vorstandsmitglieds (Gehalt, Gewinnbeteiligungen, Aufwandsentschädigungen, Versicherungsentgelte, Provisionen und Nebenleistungen jeder Art) dafür zu sorgen, daß die Gesamtbezüge in einem angemessenen Verhältnis zu den Aufgaben des Vorstandsmitglieds und zur Lage der Gesellschaft stehen. Dies gilt sinngemäß für Ruhegehalt, Hinterbliebenenbezüge und Leistungen verwandter Art.* [My translation, PZ]
- ¹⁶⁸ *Global Executive Pay 2006; Senior Executives in the US Earn the Highest Salaries* (Finfacts Ireland, 30 March 2006), available at http://www.finfacts.com/irelandbusinessnews/publish/article_10005367.shtml.
J. W. Lorsch, *Rising CEO Pay: What Directors Should Do*, Harvard Business School Working Knowledge (13 August 2006), available at <http://hbswk.hbs.edu/item/5490.html>: 'Ask any thoughtful corporate board member what they are most concerned about these days, and it is not Sarbanes-Oxley. It is CEO pay'.
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- ¹⁷⁰ Effective 30 June 2008, the chairmanship will be transferred, see Press Release of 5 June 2008, available at http://www.corporate-governance-code.de/eng/download/Presseinfo-BMJ-Wechse-Kodex-Kommission_en.pdf.
- ¹⁷¹ Last amended version (14 June 2007), see the website available at http://www.corporate-governance-code.de/eng/download/E_Kodex_2007_markiert.pdf. But see the Press Release of the Commission of 18 April 2008, stating that level of compliance has been increasing steadily, available at http://www.corporate-governance-code.de/eng/download/080418_Pressemitteilung_2008_en.pdf.
- ¹⁷² Federal Minister of Justice, Brigitte Zypries, justified the regulatory advance with the failure of companies to disclose voluntarily their management earnings. See 'Corporate Governance: Zypries fordert gläserne Vorstandsgewalt', *Manager-Magazin*, 14 May 2005, available at <http://www.manager-magazin.de/unternehmen/vorstandsgehaelter/0,2828,299768,00.html>.
- ¹⁷³ See VorstOG, n 137 *supra*.
- ¹⁷⁴ 'Das Prinzip der gesellschaftlichen Selbstregulierung begründet den Erfolg von Corporate Governance. Dieses Prinzip hat zu Recht auch international Anerkennung erhalten und zahlreiche Anhänger gefunden.' [My translation from the German, PZ]
- ¹⁷⁵ See *ibid.* 'Allerdings halte ich auch in diesem Bereich Regelungen im Rahmen des Kodex für besser als rigide gesetzliche Vorschriften. Denn gerade auch auf diesem sensiblen Feld sind freiwilliges Umdenken und Selbstregulierung vorteilhafter als staatlicher Zwang. Daher bevorzuge ich—trotz vieler anderer Stimmen—weiterhin die Selbstregulierung der Wirtschaft über eine flexible Kodexvorgabe. Es besteht deshalb aus meiner Sicht kein Anlass, die Offenlegungspflicht bereits jetzt nach so kurzer Zeit gesetzlich zu normieren.' [My translation from the German, PZ]
- ¹⁷⁶ 'Politik erhöht Druck auf Unternehmen zur Offenlegung der Manager-Bezüge', *Netzeitung.de*, 2 August 2004, available at <http://www.netzeitung.de/wirtschaft/wirtschaftspolitik/298430.html>; see also W. Wiedeking (CEO, Porsche), 'Wie man das Thema auch wendet, es kommt immer Unsinn

heraus' [Regardless from which perspective you look at the issue, it always turns out to be nonsense; my translation, PZ], in *Frankfurter Allgemeine Zeitung*, No 64, 17 March 2005.

¹⁷⁷ Baums, *op cit* n 100 *supra*.

¹⁷⁸ A. Nölting, 'Von gierigen Vorständen und albernen Vergleichen' (Interview with Theodor Baums), *Manager Magazin*, 26 April 2004, available at <http://www.manager-magazin.de/unternehmen/vorstandsgehaelter/0,2828,305446-3,00.html>. See *ibid*: 'Was die Offenlegungspflicht angeht, so besteht sie nach dem Kodex schon heute. Es gibt aber leider eine Übereinstimmung von etwa zwei Drittel der Dax- Unternehmen darüber, dass man sich an diese Empfehlungen des Corporate-Governance-Kodex nicht hält. Das ist meines Erachtens ein klarer Missbrauch dieses Instruments. Und das bedeutet, dass die Bundes-justizministerin Recht hat mit ihrer Drohung, dass wir eine gesetzliche Vorgabe haben müssen. Die EU-Kommission sieht das ähnlich.' [My translation, PZ]

¹⁷⁹ See, *supra*, section III.B.

¹⁸⁰ Baums, *op cit* n 100 *supra*.

¹⁸¹ Federal Minister of Justice, Brigitte Zypries, Speech before the Annual *Handelsblatt* Conference, 18 November 2004.

¹⁸² See VorstOG, n 137 *supra*, Art 1(2), inserting a new para 5 to section 286 *Aktiengesetz* [Stock Corporation Law].

¹⁸³ G. Ferrarini, N. Moloney and C. Vespro, *Executive Compensation in the EU: Comparative Law and Practice*, ECGI Working Paper Series in Law, WP No 09/2003 (2003), at 66.

¹⁸⁴ See only A. N. Licht, 'The Mother of all Path-Dependencies: Towards a Cross-Cultural Theory of Corporate Governance Systems', (2001) 26 *Delaware Journal of Corporate Law* 147.

¹⁸⁵ M. J. Roe, 'Comparative Corporate Governance', in P. Newman (ed), *The New Palgrave Dictionary of Economics and the Law* (Palgrave Macmillan, 1998).

¹⁸⁶ Hereto, see, eg, J. W. Cioffi, 'Restructuring "Germany Inc.": The Politics of Corporate Governance Reform in Germany and the European Union', (2002) 24 *Law and Policy* 355.

¹⁸⁷ See the brilliant illustration provided by M. Höpner, 'European Corporate Governance Reform and the German Party Paradox', in *Max-Planck-Institut für Gesellschaftsforschung*, available at http://www.mpi-fg-koeln.mpg.de/pu/mpifg_dp/dp03-4.pdf.

¹⁸⁸ Referring to examples of transnational human rights litigation, see hereto R. Wai, 'Transnational Private Law and Private Ordering in Contested Global Society', (2005) 46 *Harvard International Law Journal* 471, at 475–476.

¹⁸⁹ See, eg, V. Gessner, R. P. Appelbaum and W. F. Felstiner, 'Introduction: The Legal Culture of Global Business Transactions', in V. Gessner, R. P. Appelbaum and W. F. Felstiner (eds), *Rules and Networks: The Legal Culture of Global Business Transactions* (Hart Publishing, 2001); F. Snyder, *Economic Globalization and the Law in the 21st Century*, The Blackwell Companion to Law and Society (Blackwells, 2003);

K. Pistor, 'Of Legal Transplants, Legal Irritants, and Economic Development', in P. Cornelius and B. Kogut (eds), *Corporate Governance and Capital Flows in a Global Economy* (Oxford University Press, 2003).