CODETERMINATION: A VIABLE STRATEGY FOR THE UNITED STATES?

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I. INTRODUCTION

In recent years, there has been considerable concern over the treatment and pay of workers in large corporations within the United States ("U.S."). This has generated enough concern that bills have been introduced to the Senate to fundamentally change the way corporations interact with their employees, evidenced most recently by Senator Elizabeth Warren's Accountable Capitalism Act and Senator Bernie Sanders' STOP BEZOS Act. These acts sought to force large corporations within the U.S. to make unprecedented concessions to employees, respectively giving employees two-fifths of the seats on corporate boards and requiring that large corporations pay for the cost of any social-welfare

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programs their employees use due to insufficient wages.[1] Even members of executive suites have begun questioning the orthodox view that shareholder-maximization is the central tenant of corporate governance, with over 181 leaders of some of the world's largest companies, many of them American companies, signing onto a vague statement on August 19, 2019, that sought to place the interests of stakeholders, such as employees and customers, above the traditional shareholder-only model of corporate goal-setting.[2] While these acts are unlikely to pass in the U.S.'s current political climate, and the recent statement certainly seems more aspirational than a binding commitment to change, it is clear that concerns about corporate treatment of employees (especially vis-à-vis shareholders and management) are serious enough that Congress and business executives are interested in alternative systems of corporate governance to benefit American workers.

In this article, I will be looking to the German codetermination system, where employees have considerable control of companies, as an alternative to the American system of shareholder-primacy, with an eye towards determining if American corporate governance law should apply some of the aspects of the German model in America to benefit stakeholders. This paper will ignore the political feasibility of enacting such a system in the U.S., instead focusing on the European (and specifically German experience) to determine the impacts this system has had since its enactment and to determine its feasibility as a means of corporate governance and labor reform given the peculiarities of the American systems of corporate governance and labor protections. This paper will also look towards the cultural feasibility of a codetermination system in a country like the U.S.

It would initially appear that putting significant control of a corporation into the hands of those who do not see a financial benefit from the company's profits would lead to poor performance by these corporations and that this system would generate costs for both shareholders and the corporation itself. Despite this, Germany remains the world's fourth-largest economy and is

1. *See* Accountable Capitalism Act, S. 3348, 115th Cong. § 6(b)(1) (2018); The Stop Bad Employers by Zeroing Out Subsidies Act, S. 3410, 115th Cong. (2018).

2. *See* Anders Melin & Jeff Green, *CEO's Spurn Investor-First Model. Now Critics Ask 'What's Next?'*, BLOOMBERG ECON., (Aug. 20, 2019, 2:45 PM), https://www.bloomberg.com/news/articles/2019-08-20/ceos-spurn-investor-first-model-now-critics-ask-what-s-next.

relatively healthy economically.[3] This implies that, at least in Germany, stakeholder-primacy is not catastrophically damaging to the prosperity of corporations.

While shareholder financial outcomes are generally the gold standard for corporate performance in America, they do not represent the entire story in the shareholder versus stakeholder debate in corporate law. This is because shareholder wealth (while very easy to quantify) does not take into account stakeholder benefits, which are difficult to quantify and represent the entire justification for the codetermination system.[4] Because the balancing of these two sets of benefits is a subjective exercise based on policy preferences, I will attempt to avoid this aspect of the debate on the viability of codetermination in America. Instead, I will focus on whether or not codetermination is even a good fix for problems with American corporate governance, given its success in Germany at solving the sorts of problems experienced in that nation and the underlying reasons for the development of such a system. I will show that stakeholder-focused systems such as German codetermination do not damage shareholder-concerns to an unacceptable degree, while still managing to improve outcomes for stakeholders (namely, workers). Having shown this, the focus of this paper will be on whether such a system can even be made to work in America given the development of its corporate governance regime. Based on my research, the answer to this second inquiry would appear to be in the negative. This is not to say that individual states could not pursue a stakeholder system in their corporate law as an experiment in workers' rights or that the results of implementing such a system would be disastrous to the American understanding of capitalism and corporate governance, but merely that the practical developments in corporate ownership that created the shareholder-primacy and codetermination models are tailored to a specific set of local conditions. Because of this custom-tailoring to local governance conditions, it seems unlikely a codetermination model could be successful in America as it was not designed with the peculiarities of the American corporate environment in mind.

In Section I, I will examine the history of the German co-determination system to determine the underlying policy goals of

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3. Charles Riley & Ivory Sherman, *World's Largest Economies*, CNN MONEY, https://money.cnn.com/news/economy/world_economies_gdp/index.html (last updated Jan. 18, 2018).

4. *See* Martin Gelter, *Tilting the Balance Between Capital & Labor?: The Effects of Regulatory Arbitrage in European Corporate Law on Employees*, 33 FORDHAM INT'L L.J. 792 (2009).

such a system and its implementation over the years. I will trace the performance of co-determination to the modern-day, examining its impact on the development of corporate governance in Germany and the European Union (EU). Section II will look to the performance of the codetermination system in Germany, examining its impact on stakeholder outcomes as well as other metrics of corporate governance. In Section III, I will briefly examine proposals from within the U.S. for more stakeholder control to demonstrate that there is sufficient concern about the rights of labor to warrant an examination of alternative models of ensuring labor rights. Senator Warren's Act will be of special interest, given its similarity to a codetermination style system. Section IV will attempt to determine how well the codetermination system can be applied to the U.S., and whether it should be at a federal level. Section V will conclude, summarizing the findings of this paper.

II. CORPORATE GOVERNANCE IN GERMANY

To understand the rise of codetermination, it is helpful to understand the conditions found in German corporate governance. This section will first briefly explain the types of German business entities and the differences between them, then cover the two-tiered board system found in Germany. Next, the history of the German codetermination system will be traced to the modern-day to see the expansion of the codetermination rules in Germany. After looking to German codetermination, the development of a European Union ("E.U.") corporate jurisprudence will be examined, focusing on the Centros decision and the development of the European Corporation, or Societas Europaea, which both present an alternative to codetermination in Germany. This examination will attempt to show the robustness of codetermination as a system by looking at how well it has withstood competition with these other European systems.

A. Introduction to the German Corporate Governance System

Germany "has developed four main forms of business enterprises: offene Handelsgesellschaft (unlimited liability company), Kommanditgesellschaft (limited partnership), Gesellschaft mit beschränkter Haftung (limited liability company)

[GmbH], and Aktiengesellschaft (stock corporation) [AG]."[5] The GmbH is similar to the American Limited Liability Company in that it has a small number of shareholders, while the AG has more in common with the American stock corporation as it is the only type of German business entity whose stock is freely tradeable on exchanges.[6] Despite these similarities, the distinction between the AG and GmbH does not lie in the size of the company, as the vast majority of German corporations (including some of the largest) are GmbHs, while a far smaller number are registered as AGs.[7]

> A specific feature of German corporate law is the separation between a management board ("Vorstand") and a supervisory board ("Aufsichtsrat"). This two-tier board system dates back to the 1870's. . . . The management board consists of inside directors only and manages and represents the company . . . . The supervisory board has the task of appointing and supervising the management of the company. It is exclusively made up of outside directors; members of the management board cannot serve as members of the supervisory board and vice versa.[8]

Under this two-tier board system, those business entities having between 500 and 2000 employees must have one-third of those serving on their supervisory boards be representatives elected by workers, and those businesses with over 2000 employees must have parity representation (50/50) of labor on the supervisory board,[9] with a split vote decided by the shareholder appointed chairman (which leads to this form being referred to as "quasi-parity codetermination" in much of the literature).[10] Many companies come under this requirement as German limited liability companies employ a large number of people compared to

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5. Li-Jiuan Chen, *The Defensive Measures in Case of Takeover Under German Takeover Act and Delaware Corporate Law*, 2 NAT'L TAIWAN U.L. REV. 93, 96 (2007).

6. *Id.*

7. Theodor Baums, Corporate Governance in Germany: System and Current Developments 3 (Oct. 1998) (unpublished manuscript) (on file at https://ssrn.com/abstract=158038).

8. *Id.* at 4.

9. Chen, *supra* note 5, at 98–99.

10. Katharine V. Jackson, *Towards a Stakeholder-Shareholder Theory of Corporate Governance: A Comparative Analysis*, 7 HASTINGS BUS. L.J. 309, 368 (2011).

those of other European countries.[11] The German system of corporate governance also requires a commensurately high number of directors, requiring companies with more than 2000 employees to have at least twenty directors.[12]

Germany also has historically had a high level of block-shareholding.[13] That is, in many German companies, shareholding is not widely dispersed amongst individuals like it has been in the U.S. and United Kingdom ("U.K."). Because of this, there tends to be a majority of shares held by single shareholders (often banks), with only small numbers of shares held by a limited class of minority shareholders, even in the case of AGs.[14]

B. The Development of German Codetermination

As expressed by the German Federal Court of Justice (Bundesgerichtshof), the goal of German corporate governance is not one of improving the financial interests of the shareholders.[15] Rather, the goal of German corporate governance is to protect the interest of the corporation as a whole.[16] This viewpoint is indicative of the German corporate governance system's emphasis on stakeholder governance.

German codetermination is based on a theory of stakeholder governance. "Stakeholder governance is the notion that the concerns of all the firm's investors should be brought into the governance of the firm."[17] This view includes the idea that employees are investors in the firm, contributing human capital, and learning firm-specific skills to better the long-term interests of

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11. *Business Demography by Legal Form (From 2004 Onwards, NACE Rev. 2) (bd_9ac_I_form_r2)*, EUROSTAT https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=bd_9ac_l_form_r2&lang=en, (last updated Oct. 4, 2019).

12. Klaus J. Hopt, *Comparative Corporate Governance: The State of the Art and International Regulation*, 59 AM. J. COMP. L. 1, 52 (2011).

13. Wolf-Georg Ringe, *Changing Law and Ownership Patterns in Germany and the Erosion of Deutschland AG*, 63 AM. J. COMP. L. 493, 495–96 (2015), Marc Goergen, et al., *Recent Developments in German Corporate Governance*, 28 INT'L REV. L. ECON. 175, 176 (2008).

14. Eric Engle & Tetiana Danyliuk, *Emulating the German Two-Tier Board and Worker Participation in U.S. Law: A Stakeholder Theory of the Firm*, 45 GOLDEN GATE U.L. REV. 69, 101 (2015).

15. Bundesgerichtshof [BGH] [Federal Court of Justice] 4 NEUE WOCHENSCHRIFT [NJW] (Ger.), Dec. 21, 2005, at 524.

16. *Id.*

17. Kent Greenfield, *Defending Stakeholder Governance*, 58 CASE W. RES. L. REV. 1043, 1044 (2008).

the firm in the same way shareholders invest financial capital.[18] Under such a system, it is imperative that the employees feel sufficiently secure in his position with a firm to invest in firm-specific skills and human capital. Because of this imperative, American-style at-will employment cannot exist as freely terminable laborers would not have sufficient investment in the company to warrant being treated as stakeholders.[19]

Codetermination, or "Mitbestimmung" in German, "refers to . . . a concept for employee consultation and participation . . . in company decisions at both establishment and company/group level (sic) within private sector companies in Germany."[20] In the case of establishment-level codetermination, this is handled by workers' councils, which are required under the Works Constitution Act for any company with more than five employees, and represent employees in matters involving labor.[21] In the case of company-level codetermination, this is generally done by the supervisory board, which is responsible for approving the appointment of management board members, monitoring the management board's management of the company's business, working with the management board in business operations requiring the supervisory boards approval, and scrutinizing annual accounts, as well as owing duties of care and confidentiality.[22]

The beginnings of codetermination can be found in the 1919 Weimar Constitution, Article 165, which is considered the impetus for the laws developing codetermination during the 1920s, and led to the development of the Betriebsrätegesetz ("Works Council Act"), which created the establishment-level codetermination system.[23] By 1922, the "Act on the Representation of Works Council Members in the Supervisory Boards" introduced worker representation to supervisory boards, but only one or two workers' representatives were required per board.[24] These acts would be repealed under the Nazi regime in 1934.[25]

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18. Tom. C. Hodge, *The Treatment of Employees as Stakeholders in the European Union: Current & Future Trends*, 38 SYRACUSE J. INT'L L. & COM. 91, 114 (2010).

19. *Id.* at 123.

20. Rebecca Page, *Co-Determination in Germany - A Beginner's Guide 5* (Hans Böckler Stiftung, Working Paper No. 33, 2011).

21. Tequila J. Brooks, Participation in Germany and France: A Comparison of French and German Works-Councils in a Global Compliance Context 16 (Jan. 20, 2012) (unpublished manuscript) (on file at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3050095).

22. Page, *supra* note 20, at 21.

23. *Id.* at 7.

24. *Id.*

25. *Id.*

After World War II, codetermination laws began being reinstated in West Germany. In 1951, the Gesetz über die Mitbestimmung der Arbeitnehmer in den Aufsichtsräten & Vorständen der Unternehmen des Bergbaus und der Eisen und Stahl erzeugenden Industrie (Montan-Mitbestimmungsgesetz) ("Act on the Co-determination of Employees in the Supervisory & Management Boards of Companies in the Coal, Iron & Steel Industry")[26] reintroduced codetermination in the coal and steel industry at full parity on the supervisory board, relying on well-established labor representation in these industries, which have the strongest codetermination protections.[27] The next year, the Betriebsverfassungsgesetz[28] ("Works Constitution Act") reestablished works councils in Germany and required the supervisory boards of all companies with over 500 employees be composed of at least one-third worker representatives.[29] The final major push in the German codetermination acts was the Mitbestimmungsgesetz ("Co-determination Act") of 1976,[30] which established "quasi-parity" on the boards of all companies with more than 2000 workers. Under this "quasi-parity" system, an equal number of the representatives on each board would be chosen by shareholders and workers, with the president of the board being chosen by shareholders, and having a double vote in the event of a tie.[31]

With the reunification of Germany in the 1990s and the changes in global politics that came about as a result of the end of the Cold War, there was considerable concern about the end of the codetermination system that had developed in the preceding seventy years as Germany reoriented towards a more shareholder-oriented view.[32] In the previous twenty-five years, Germany has seen the development of capital markets and the beginnings of

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26. *Gesetz über die Mitbestimmung der Arbeitnehmer in den Aufsichtsräten & Vorständen der Unternehmen des Bergbaus und der Eisen und Stahl erzeugenden Industrie vom 21 Mai 1951 (Montan-Mitbestimmungsgesetz)* ("Act on the Co-determination of Employees in the Supervisory & Mangement Boards of Companies in the Coal, Iron & Steel Industry"), 3 FED. L. GAZETTE 801 (2015) (Ger.).

27. Page, *supra* note 20, at 8; Felix R. FitzRoy & Kornelius Kraft, *Co-Determination, Efficiency, and Productivity* 8, (Institute for the Study of Labor (IZA), Working Paper No. 1442, 2004).

28. Betriebsverfassungsgesetzb [BetrVG] [Works Constitution Act], Jan. 15, 1972, BUNDESGESETZBLATT [BGBL I] (Ger.).

29. Page, *supra* note 20, at 8.

30. Mitbestimmungsgesetz [MitbestG] [Co-determination Act], May 4, 1976, BUNDESGESETZBLATT [BGBL I] (Ger.).

31. Page, *supra* note 20, at 25.

32. *See generally* Martin Höpner, *Corporate Governance in Transition: Ten Empirical Findings on Shareholder Value and Industrial Relations in Germany*, (Max-Planck-Institute for the Study of Societies, Working Paper No. 05, 2001); Jackson, *supra* note 10, at 370–71.

corporate takeovers and diversified ownership.[33] There is a general consensus that Germany has moved closer to a shareholder-oriented approach as privatization and foreign investment led Germany to have a true capital market for the first time.[34]

Despite these changes, the codetermination laws continued to be updated and amended through the 2000s, and other nations continued to make use of and adopt codetermination and two-tier boards in this period, especially in Scandinavia.[35] There was evidence of an increasing shareholder emphasis in Germany throughout the 1990s, with at least one study showing a considerable growth in shareholder orientation throughout the later 1990s.[36] This same study found that codetermination actually remained strong in this period despite a shift to shareholder orientation as workers' councils sought to become an ally of the increasingly powerful shareholders.[37]

Even with corporate law in the E.U. opening German companies to alternative governance regimes for the last twenty years, German codetermination has not been fast to change.[38] Since the 1990s, there is a general consensus that Germany has moved closer to a shareholder-oriented approach as privatization and foreign investment led Germany to have a true capital market for the first time.[39] There are still strong protections for stakeholders, and the German codetermination system remains the strongest worker-participation system of the E.U. nations.[40]

C. European Union Corporate Law

The European Community Treaty, in Articles 15 and 54, lays out a freedom of establishment for European companies and persons.[41] This freedom of establishment was largely laid out by

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33. Wolf-Georg Ringe, *Changing Law and Ownership Patterns in Germany: Corporate Governance and the Erosion of Deutschland AG*, 63 AM. J. COMP. L. 493, 537 (2015).

34. Jackson, *supra* note 32, at 370–71.

35. Page, *supra* note 20, at 9; Martin Gelter, *Tilting the Balance Between Capital & Labor? The Effects of Regulatory Arbitrage in European Corporate Law on Employees*, 33 FORDHAM INT'L L.J. 792, 803–04 (2010).

36. Höpner, *supra* note 32, at 32–37.

37. *Id.* at 30, 32, 35.

38. Li-Jiuan Chen, *The Defensive Measures in Case of Takeover Under German Takeover Act and Delaware Corporate Law*, 2 NAT'L TAIWAN U.L. REV. 93, 111 (2007); Jens C. Dammann, *The Future of Codetermination After Centros: Will German Corporate Law Move Closer to the U.S. Model?*, 8 FORDHAM J. CORP. & FIN. L. 607, 685–86 (2003).

39. Jackson, *supra* note 32, at 370–71.

40. Tom C. Hodge, *The Treatment of Employees as Stakeholders in the European Union: Current and Future Trends*, 38 SYRACUSE J. INT'L L. & COM. 91, 116 (2010).

41. Charter of Fundamental Rights of the European Union arts. 15, 54, Dec. 7, 2000, O.J. (C 83) [hereinafter Charter of Fundamental Rights].

the European Court in the 1999 *Centros* decision. This case found that a company could incorporate in any of the E.U. member states regardless of which state it did business in.[42] There was considerable concern in the following years that this would quickly lead to the end of both the German codetermination and stakeholder systems in Europe due to an ensuing "race to the bottom," where countries would remove worker protections and stakeholder-centric regimes in favor of shareholder-centric corporate regimes to make themselves more attractive for companies seeking a country to incorporate in.[43] The freedom of establishment has yet to cause this race to the bottom, at least in the context of the German codetermination system.[44]

While the ability for new companies to incorporate elsewhere under more lenient laws was not immediately disastrous for the codetermination system, the later creation of the European Corporation (Societas Europaea) ("SE") and the ability to change to this corporate form have been somewhat more problematic.[45] The SE allows a new corporation (or an existing corporation by way of a merger) to reform in any other national jurisdiction in the E.U. (without winding up its business) and allows the company to follow the new national seat's laws within two years of its reincorporation as an SE.[46]

Of the SEs created throughout the E.U. before 2007, almost half were created by German corporations as a means of reincorporation and forum shopping.[47] Indeed, it seems that all states with codetermination have seen considerable use of the SE, while those states that have a more shareholder-centric system of corporate governance have made less use of the new corporate form.[48] This makes sense, as the SE corporate structure is more flexible and allows corporations in countries with some of the stricter forms of codetermination, such as the two-tier board or high levels of worker representation to avoid these requirements.[49]

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42. Case C-212/97, Centros Ltd. v. Erhvervs-og Selskabsstyrelsen, 1999 E.C.R. I-1484, ¶¶ 21–22, [hereinafter Centros].

43. Dammann, *supra* note 38, at 610–12.

44. Markus Roth, *Employee Participation, Corporate Governance and the Firm: A Transatlantic View Focused on Occupational Pensions and Co-Determination*, 11 EUR. BUS. ORG. L. R. 51, 72 (2010) [hereinafter Roth, Employee Participation].

45. Roland Köstler, *Current Problems with Company Level Co-Determination, in Rebecca Page, Co-Determination in Germany – A Beginner's Guide 5*, 32–33 (Hans Böckler Stiftung, Working Paper No. 33, 2011).

46. Gelter, *supra* note 35, at 806.

47. Jochem Reichert, *Experience with the SE in Germany*, 4 UTRECHT L. REV. 22, 22 (2008).

48. Gelter, *supra* note 35, at 839.

49. Reichert, *supra* note 47, at 27–31.

This serves as an advantage to incorporating as an SE because some scholars find that a single-tier board is better for all but the largest of companies due to its relative simplicity and smaller size, and find that companies that choose to use the SE corporate structure tend to elect for a single-tier board about 80% of the time, with those electing the dual-tier board system being only large international corporations.[50] Those companies that elect the dual-tier boards tend to do so both to benefit from the supervisory boards monitoring, which helps avoid scandals (especially helpful in countries like Germany, which tend to lack independent directors)[51] and to benefit from a larger board-to-employee ratio, both of which are features smaller companies tend to find burdensome.[52] However, despite these apparent protections in the codetermination system against scandals, it appears that the evidence does not show codetermination as having done much to prevent corporate scandals, but this issue will be discussed in the next section.[53]

While the SE appears to function as a work-around for many of the unfavorable laws in Germany, there are two major protections for the codetermination system embedded in the E.U.'s law governing the SEs. The first is "the well-settled principle of European Community law that the citizens of a particular Member State cannot invoke the fundamental freedoms against their own country unless the case involves some form of cross-border activity. For example, a German manufacturer selling her products in Germany cannot claim that German rules on product labeling restrict her freedom of establishment . . . . In a series of decisions, the [European] Court has established the principle that a Member State is entitled to take measures designed to prevent its nationals from attempting to circumvent their national legislation [']under cover of the rights created by the Treaty [Establishing the European Community].['] (citations omitted).[54]

The other protection is the European Council Directive on Cross-Border Mergers of Limited Liability Companies, which requires that any corporation with worker representation on its

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50. Klaus J. Hopt, *Comparative Corporate Governance: The State of the Art and International Regulation*, 59 AM. J. COMP. L. 1, 22, 52 (2011).

51. Martin Gelter, *The Dark Side of Shareholder Influence: Managerial Autonomy and Stakeholder Orientation in Comparative Corporate Governance*, 50 HARV. INT'L L.J. 129, 158 (2012).

52. Hopt, *supra* note 12, at 22, 54.

53. *Id.* at 54.

54. Jens C. Dammann, *The Future of Codetermination After Centros: Will German Corporate Law Move Closer to the U.S. Model?*, 8 FORDHAM J. CORP. & FIN. L. 633–634 (2003).

supervisory board must retain at least one-third representation upon reincorporating as an SE.[55] This is meant to keep codetermination and workers' rights from falling to the wayside with the end of the real-seat theory for determining the state of incorporation (which required companies to incorporate in the country where they did their business) brought about by Centros and the allowance for changing applicable laws after merging into an SE.[56]

These two protections, in combination, effectively remove the possibility of corporations in Europe reincorporating as an SE solely for the purpose of avoiding codetermination laws (amongst others). While it is true that these protections would at the very least allow those German corporations to which the Mitbestimmungsgesetz applies to take on lighter, one-third worker representation codetermination regimes rather than full quasi-parity codetermination, the largely advisory role of the workers' representatives means that the workers' representatives will still maintain an effective voice at the board-level. Because of this, it cannot be said that protections are not in place to prevent the German codetermination system from dying out in a "race to the bottom." Because of these protections, it can be claimed that German codetermination is only allowed to continue because it is protected by law, and would not be chosen by a company upon incorporation if an alternative were available that would allow complete avoidance of the German codetermination regime.

III. PERFORMANCE OF THE GERMAN CODETERMINATION SYSTEM

In this section, I will attempt to determine whether or not codetermination is meeting its claimed policy goals, and whether it is so restrictive as to lead companies to work to avoid it as a general rule. First, I will attempt to address the success of the codetermination system (specifically the two-tier board) in properly supervising the actions of the management board and ensuring compliance and preventing scandals and other corporate governance failings. Then I will attempt to determine the success of the codetermination system in Germany as viewed in its context

55. Directive 2005/56, of the European Parliament and of the Council of 26 October 2005 on Cross-Border Mergers of Limited Liability Companies, 2005 O.J. (L 310) 1, 8.

56. Tom. C. Hodge, *The Treatment of Employees as Stakeholders in the European Union: Current & Future Trends*, 38 SYRACUSE J. INT'L L. & COM. 91, 138 (2010).

in post-Centros and SE modern Europe, paying attention to attempts to avoid codetermination regimes to see if it is so restrictive as to lead to forum shopping.

A. Does the German Codetermination System Meet its Policy Goals?

Codetermination appears to have two distinct goals as a system. First and foremost, it seeks to protect the interests of labor. But as a secondary goal, it also serves as an internal check on the discretion of the board. It may be presumed that a system such as codetermination will meet its goals of giving workers a voice in governance given the existence of the supervisory board and its requirement of having workers' representatives on the board (though, as discussed below, there are issues in ensuring that the workers' representatives are properly motivated and not corrupt). The achievement of the secondary objective is much more dubious.

Despite the supervisory board being meant to assist in monitoring when there are no or few independent directors, as is common in Germany and much of Europe, there appears to be little hard evidence that codetermination has actually acted to stop scandals and compliance issues.[57] In fact, there seems to be evidence that the German codetermination structure has actually invited scandal. The most prominent instance of this is Volkswagen's emissions reporting scandal. Several scholars have made the argument that the Volkswagen scandal was in fact caused by a major failing in the codetermination system: that it weakens the ability of the directors to act in coordination and leads to less stringent monitoring, as it is easier for directors on the managing board to handle business informally so as not to deal with the supervisory board in decision-making. This leads to almost no checks on-board discretion, despite the fact the supervisory board is supposed to give assent to major business decisions.[58]

Furthermore, the supervisory board itself cannot be said to be independent in many cases. At least one scholar has found that "the most severe problem of quasi-parity co-determination is the

57. Hopt, *supra* note 12, at 54.

58. *See* Nicola Faith Sharpe, *Volkswagen's Bad Decisions & Harmful Emissions: How Poor Process Corrupted Codetermination in Germany's Dual Board Structure*, 7 MICH. BUS. & ENTREPRENEURIAL L. REV. 49, 71 (2017); Charles M. Elson et al., *The Bug at Volkswagen: Lessons in Co-Determination, Ownership and Board Structure*, 27 J. APPLIED CORP. FIN. 36, 40–41 (2015).

lack of independence of employee representatives."[59] As the continued operation of the company benefits workers, it is not difficult to see how the workers' representatives could decide to turn a blind eye towards any questionable decisions by management in the interest of continued favorable treatment for their constituency. Indeed, it seems that supervisory board members also can be given to bribery, as came up in the Volkswagen case, which can contribute to problems with this compliance role.[60] This perverse incentive for the supervisory board to ignore certain actions of the management board in exchange for better treatment of workers on a quid-pro-quo basis does significant damage to the theory that the supervisory board is effective as a check on the board in terms of compliance monitoring and as a way to create some independence in corporate governance.

Because the German codetermination acts layout representation so that the shareholders generally have an advantage in any vote, the workers' representatives tend to merely have an advisory role on the supervisory board, especially in medium-sized companies.[61] In the case of larger companies subject to the 1976 Act, this is less true, especially given the rarity with which the tie-breaking vote is used, given the threat of souring relations with labor.[62] It has been suggested that this lesser employee representation, as well as the increased flexibility in the corporate structure of the GmbH are what has led to its dominance over the AG in Germany.[63]

Overall, while codetermination likely does benefit workers, and does succeed in giving workers a considerable voice in the boardroom (though, largely only in an advisory role), it does not serve as a perfect fix for the purpose of monitoring the board and ensuring proper compliance, opening German companies to scandals and poor governance as the workers' representatives are not independent enough, and can easily be convinced to go along

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59. Markus Roth, *Employee Participation, Corporate Governance and the Firm: A Transatlantic View Focused on Occupational Pensions and Co-Determination*, 11 EUR. BUS. ORG. L. REV. 51, 75 (2010).

60. Tequila J. Brooks, Participation in Germany and France: A Comparison of French and German Works-Councils in a Global Compliance Context 16 (Jan. 20, 2012) (unpublished manuscript) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3050095.

61. Theodor Baums, Corporate Governance in Germany: System and Current Developments 10–11 (Oct. 1998) (unpublished manuscript) https://ssrn.com/abstract=158038.

62. *Id.* at 11.

63. Uhrlich Noack & Michael Beurskens, *Modernising the German GmbH: Mere Window Dressing or Fundamental Redesign*, 9 EUR. BUS. ORG. L. REV. 97, 98, 103 (2008).

with the board.[64] While no study has been published examining the rate of scandals in the German system versus more shareholder-centric systems (likely due to the incredible breadth of research required and the difficulty in determining what counts as a corporate scandal), the Volkswagen emissions scandal stands as proof that the codetermination system is no "silver bullet" to fix the issue of non-independent boards.

B. Do Companies Willingly Choose Codetermination?

Perhaps one of the best ways to examine the relative "business-friendliness" of various corporate governance systems in the E.U. is to determine which states are chosen most often for the purposes of incorporation. While this approach is clearly problematic due to varying populations, business and economic regulations and conditions, and any other number of variables, it seems the easiest indicator of which countries have the most favorable governance regimes is to look at which countries corporations choose to incorporate in. The following charts and graphs are based on statistics acquired from the E.U.'s 2011 census data (for populations)[65] and the E.U.'s database for business demographics.[66] Specifically, I have used the sections dealing with the creation of limited liability enterprises ("LLEs") for the years 2012-2016 in a selection of countries meant to offer a good cross-section of Europe in terms of governance models (codetermination with single-tier boards, codetermination with two-tier boards, no codetermination), as well as Geography (East, West, and Central Europe and Scandinavia). In an attempt to help balance against some of the variables inherent in this cross-country data set, I have given the number of LLE incorporations per 100,000 as a check against the much higher raw numbers of incorporations in more populous countries, as well as using a five-year span to avoid relying solely on years with unusually high or low rates of incorporation in a single country. In an attempt to help even out the difference between richer and poorer countries, as well as different types of economies, I have included ex-Eastern

64. *See generally* Elson et al., *supra* note 58, at 41–42; Sharpe, *supra* note 58, at 71; *see also* Jackson, *supra* note 10, at 368.

65. *Census Data*, EUROPEAN STATISTICAL SYSTEM , https://ec.europa.eu/CensusHub2/query.do?step=selectHyperCube&qhc=false; *Luxembourg Population 2020*, WORLD POPULATION REVIEW, http://worldpopulationreview.com/countries/luxembourg-population/.

66. *Business Demography by Legal Form (From 2004 Onwards, NACE Rev. 2)*, EUROSTAT, https://ec.europa.eu/eurostat/web/products-datasets/-/bd_9ac_l_form_r2.

Bloc countries that were under communist governance in the 20th century (Slovenia, Slovakia, Czechia (formerly the Czech Republic), Poland), independent states with strong manufacturing sectors (Germany, Austria, Italy, France, and Spain), smaller wealthy central European nations (Belgium, the Netherlands, and Luxembourg), the Scandinavian states, and countries that rely heavily on the service sector (the UK and Ireland). Ideally, this wide-ranging mix of companies with vastly different economic circumstances will help to balance out any aberrant results. All population numbers are rounded to the nearest million, excepting Luxembourg, and the results are rounded to the nearest whole number for Table 2, merely for the sake of being easier to work with at a glance. Any cells left blank were lacking data for that particular value.

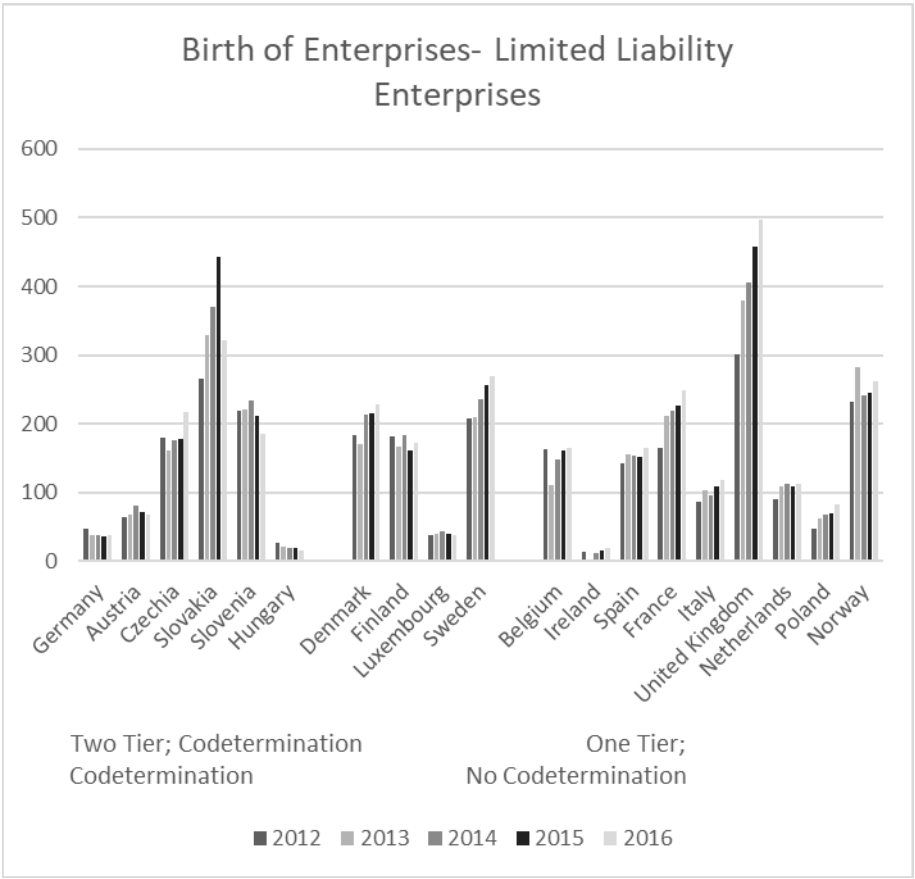
Table 1
Births of Enterprises Ltd. - Liability Enterprises[67]

	Births of Enterprises Ltd. - Liability Enterprises					Population (Millions) (2011 Census)
Country[68]	**2012**	**2013**	**2014**	**2015**	**2016**	
Germany+	37,230	30,530	30,101	29,632	30,511	37,230
Austria+	5,413	5,715	6,772	6,007	5,659	5,413
Czech Republic+	18,797	16,853	18,236	18,601	22,626	18,797
Slovakia+	14,342	17,816	19,989	23,916	17,413	14,342
Slovenia+	4,390	4,423	4,674	4,228	3,692	4,390
Hungary+	25,980	21,446	19,055	19,917	16,453	25,980
Denmark†	10,320	9,505	11,991	12,076	12,834	10,320
Finland†	9,813	9,056	9,959	8,666	9,271	9,813
Luxembourg†	2,224	2,314	2,542	2,345	2,265	2,224
Sweden†	19,691	19,979	22,422	24,439	25,550	19,691
Belgium*	17,871	12,200	16,232	17,739	18,074	17,871
Ireland*	6,435		5,826	7,532	8,648	6,435
Spain*	66,431	72,431	72,406	71,362	77,606	66,431
France*	107,325	136,985	141,970	147,305	161,762	107,325
Italy*	51,559	61,967	57,442	65,079	70,405	51,559
United Kingdom*	190,005	240,100	256,910	289,595	314,080	190,005
Netherlands*	14,989	18,131	18,798	18,052	18,851	14,989
Poland*	17,794	23,709	26,052	26,294	31,156	17,794
Norway*	11,608	14,132	12,034	12,271	13,132	11,608

67. *Id.*
68. +- Codetermination with two-tier board; †- Codetermination with single-tier board; *- No codetermination.

Table 2
Birth of LLEs
(per 100,000 population)

	Birth of LLEs (per 100,000 population)				
Country	**2012**	**2013**	**2014**	**2015**	**2016**
Germany	47	38	38	37	38
Austria	64	68	81	72	67
Czech Republic	181	162	175	179	218
Slovakia	266	330	370	443	322
Slovenia	220	221	234	211	185
Hungary	26	22	19	20	17
Denmark	184	170	214	216	229
Finland	182	168	184	160	172
Luxembourg	38	39	43	40	38
Sweden	207	210	236	257	269
Belgium	162	111	148	161	164
Ireland	13.99		12.67	16.37	18.80
Spain	142	155	155	152	166
France	165	211	218	227	249
Italy	87	104	97	110	119
United Kingdom	301	380	407	458	497
Netherlands	90	109	113	108	113
Poland	47	62	69	69	82
Norway	232	283	241	245	263



Upon looking at the data, several trends become immediately apparent. One of the most noticeable trends is that, with the exception of the German-speaking industrial countries (Germany and Austria), countries that have some form of codetermination have similar rates of incorporation to those without codetermination, other the UK, which has a rate of incorporation in excess of twice that per hundred thousand people than countries with codetermination, excepting Slovakia. This would seem to imply that the existence of a codetermination system does not actually affect the rate of incorporation in a negative way. At the very least, it can be said that moderate forms of codetermination do not appear to negatively impact the choice of the corporate seat within the E.U. This conclusion matches those of other writers on this subject.[69]

69. Joachim Wagner, *One-Third Codetermination at Company Supervisory Boards and Firm Performance in German Manufacturing Industries: First Direct Evidence from a New Type of Enterprise Data* 17 (Inst. for the Study of Labor, Working Paper No. 4352, 2009).

It is, however, possible that Germany's stronger codetermination system does disincentivize choosing it as a corporate seat, as it has an unusually low rate of incorporation compared to countries that have a form of codetermination, and even those which have no codetermination. This seems unlikely, as Austria sees a comparable rate of incorporation while having a rather standard two-tier board structure with one-third codetermination of the supervisory board and a similar Works Council structure.[70] Because of this, it is likely that some other common factor is responsible for this lower rate of incorporation, as a focus on heavy manufacturing industries (which are more capital intensive) or some other corporate law or regulation. Given this likelihood of another factor impacting the German and Austrian systems' rates of incorporation, it may be said with some degree of confidence that codetermination laws are not so unfriendly to business as to prevent corporations from choosing states with codetermination laws to incorporate in.

Another striking trend is the UK's significantly higher rate of incorporation when compared to nearly every other E.U. nation. It is possible that the UK's shareholder-primacy model, coupled with a lack of codetermination, makes it highly desirable as a state of incorporation for E.U. citizens, and this leads to such abnormally high rates of incorporation. However, it is also possible another factor leads to this, such as the UK tending towards service industries (much as the U.S. does), which are less capital and employee intensive and therefore tend to be formed more often.[71] It has been claimed that countries favoring service industries over manufacturing tend to favor shareholder-primacy, and therefore, there is a strong incentive to form service-industry corporations in the UK due to this improved environment for service industries, while capital intensive manufacturing industries tend to prefer incorporating in the stakeholder system countries.[72] If this is the case, because the UK is one of the only countries in Europe with a favorable governance system for service-industry corporations, it may be that the unusually high rate of incorporation is due to the UK being the state of incorporation for a large number of Europe's service-companies. While not necessarily indicative of a broader

70. Manfred Grunager, *Current Corporation Governance Developments in Austria*, 21 EUR. BUS. L. REV. 345, 353, 356 (2010).

71. *Business Demography, UK: 2018*, OFFICE FOR NATIONAL STATISTICS, https://www.ons.gov.uk/businessindustryandtrade/business/activitysizeandlocation/bulletins/businessdemography/2018.

72. *See* Franklin Allen et al., *Stakeholder Capitalism, Corporate Governance and Firm Value* 29 (Eur. Corp. Governance Inst., Working Paper No. 190/2007, 2009).

trend, it seems pertinent to note that the Centros decision itself involved a Dutch couple attempting to incorporate in the UK to make use of its favorable corporate and employment laws.[73] This being said, there could be any number of reasons a company would choose the UK as a state of incorporation, such as the more developed financial markets or the differing legal systems (common versus civil law). The only real way to determine the reason for this pattern would be to fully poll the companies incorporating in Europe about why they chose their respective states of incorporation, a study which is beyond the scope of this paper.

Ultimately, the results that can be drawn from this analysis point to codetermination itself not being a negative factor in where corporations choose to incorporate (at least outside the service industry). However, given the UK's extreme popularity as a country of incorporation, it can be argued that the UK's shareholder-primacy model makes it far more attractive to incorporate in for all corporations compared to continental Europe, with its emphasis on stakeholders. If this is the case, codetermination itself is not necessarily disfavored by businesses, but rather the entire stakeholder-primacy system is disfavored by business owners.

Combined with the general unwillingness of SEs to elect the two-tier board model, it seems that given a choice, many companies do not favor a shareholder or codetermination based model of corporate governance and would prefer to incorporate in the UK with its shareholder-primacy system at an unusually high rate. Whether this is tied specifically to the particular industry will require further study. It will also be very interesting to see how the upcoming Brexit will influence the rates of incorporations, as the UK may no longer be an available choice for other E.U. countries to incorporate in if no deal is reached allowing continued freedom of movement and cross-border incorporation for corporations between the E.U. and UK.

73. *Centros*, WORKER-PARTICIPATION.EU, http://www.worker-participation.eu/Company-Law-and-CG/ECJ-Case-Law/Centros (last visited Nov. 18, 2018).

IV. DOMESTIC CALLS FOR STAKEHOLDER RIGHTS

As stated above, there have been calls for more stakeholder rights and benefits in the United States.[74] This is by no means a new phenomenon. Since the 1970s, the declining power of unions has led to declining representation for labor.[75] The American at-will labor system has generally produced few rights for workers, and labor is generally seen as replaceable and underpaid, with a rather large income-gap.[76] As discussed above, concerns about the American treatment of labor has brought up calls for reform of corporate governance at the national level.

This concern for the treatment of labor has led some people to look to codetermination systems as a possible way of solving the current issues in worker compensation and representation, both in and out of government.[77] Given the findings of Joachim Wagner that codetermination does not negatively impact shareholder value in any major negative fashion[78] and the fact that codetermination is meant to improve stakeholder and worker benefits, it does not seem unreasonable to view this system as presenting a valid way to maintain shareholder value while benefiting labor and other stakeholders. Furthermore, an increasing emphasis on shareholder value has not proven fatal to codetermination in Germany, and therefore it seems that codetermination and the maximization of shareholder value do not have to be mutually exclusive policy goals.[79] Therefore, codetermination does seem a natural choice for

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74. *See* Accountable Capitalism Act, S. 3348, 115th Cong. § 6(b)(1) (2018); The Stop Bad Employers by Zeroing Out Subsidies Act, S. 3410, 115th Cong. (2018); *see also* Anders Melin & Jeff Green, *CEO's Spurn Investor-First Model. Now Critics Ask 'What's Next?'*, BLOOMBERG ECON., (Aug. 20, 2019, 2:45 PM), https://www.bloomberg.com/news/articles/2019-08-20/ceos-spurn-investor-first-model-now-critics-ask-what-s-next.

75. Stephen J. K. Walter, *Unions and the Decline of U.S. Cities*, 30 CATO J. 117, 129 (2010).

76. *See* Roger L. Martin, *In America, Labor is Friendless*, HARV. BUS. REV. (Aug. 28, 2014), https://hbr.org/2014/08/in-america-labor-is-friendless); Timothy Noah, *The Great Divergence: What's causing America's Growing Income Inequality?*, SLATE (Sept. 3, 2010), http://www.slate.com/articles/news_and_politics/the_great_divergence/features/2010/the_united_states_of_inequality/introducing_the_great_divergence.html.

77. *See* Lane Kenworthy, *Can Codetermination Fix America's Wage Problem?*, LANE KENWORTHY BLOG (Sept. 15, 2019), https://lanekenworthy.net/2018/09/15/can-codetermination-help-fix-americas-wage-problem/; Jackson, *supra* note 10, at 368–69.

78. Joachim Wagner, *One-Third Codetermination at Company Supervisory Boards and Firm Performance in German Manufacturing Industries: First Direct Evidence from a New Type of Enterprise Data* 17 (Inst. for the Study of Labor, Discussion Paper No. 4352, 2009).

79. Martin Höpner, *Corporate Governance in Transition: Ten Empirical Findings on Shareholder Value & Industrial Relations in Germany* 32 (Max-Planck-Institute for the Study of Societies, Working Paper No. 05, 2001).

improving stakeholder outcomes in America, assuming the shareholder value maximization norm can be overcome to allow for a view of the purpose of corporate governance in line with the Bundesgerichtshof's idea on what the purpose of corporate action should be (the benefit of the corporation as a whole as opposed to shareholder maximization at the cost of all other constituencies).

While corporate governance is generally set by state law (with notable exceptions like the Sarbanes-Oxley Act), Senator Warren's Accountable Capitalism Act seeks to establish a system, not unlike the single-tier board codetermination system found in Scandinavia (excepting Norway) and Luxembourg.[80] Given my findings above, this model has performed relatively well in Europe and seems to be a viable option on paper. However, as I will explain in section V, there are reasons why codetermination is unlikely to succeed in the U.S. in practice, even if it could be instituted.

Given these calls for improved worker representation systems and corporate governance in the U.S., and the working examples of codetermination in Europe, it seems necessary to consider the practical feasibility of codetermination in the U.S., even if it is not politically feasible.

V. APPLYING CODETERMINATION IN THE U.S.

Having determined that codetermination as a system works reasonably well and does not directly threaten shareholder rights or corporate governance to an unacceptable degree, the only remaining question is not can codetermination work here in America, but rather whether or not it is the right choice for America. While there is no apparent, definitive way to answer this question without trying the system, there is considerable cause to think it is not the proper choice (at least at the national level) for the simple reason that codetermination was developed in continental Europe.

To understand why the codetermination system exists, one has to look to the way corporate ownership developed in Continental Europe, and especially Germany. In America and the UK, corporate ownership is widely dispersed, with individual ownership common and pension funds holding vast amounts of

80. Martin Gelter, *Tilting the Balance Between Capital & Labor?: The Effects of Regulatory Arbitrage in European Corporate Law on Employees*, 33 FORDHAM INT'L L.J. 792, 803–04 (2010).

stock.[81] Meanwhile, in continental Europe, corporate shares are held almost entirely in large blocks by controlling shareholders and banks, with minority shareholders possessing only a small part of the total shares.[82] This is especially true of Germany, where the banking system, founding families, and the state generally hold almost all of the shares.[83]

Because firms in continental Europe tend to be held by large block-holders, their boards tend to have almost no independence or insulation from shareholders.[84] As in the U.S., there are serious concerns about the dangers of a lack of independent directors on the board, which are amplified in Europe by this form of majority block-holding. Because of this block-holding system, activist shareholders are unable to gain sufficient shares to threaten the presiding board to force changes.[85] Beyond this, German boards are heavily entrenched, adding to the difficulty in ensuring proper governance.[86] Because minority investors and shareholder activism are so rare, and the management board so entrenched and beholden to the majority shareholders, there needed to be another way to monitor these boards that could not be insulated or independent of shareholders.[87]

In Germany, and all the other countries that developed codetermination, the answer for how to supervise these non-independent boards coincided with their need to develop a means of worker representation, and codetermination naturally evolved, handling both issues neatly: giving employee representatives a seat on the supervisory board (in two-tier board systems) or management board (in one-tier systems) to give labor concerns a voice in corporate governance, while also having a more independent constituency on the board who were not beholden to the majority block-shareholders. As discussed above, there are issues with the independence of these representatives as well as

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81. Markus Roth, *Employee Participation, Corporate Governance and the Firm: A Transatlantic View Focused on Occupational Pensions and Co-Determination*, 11 EUR. BUS. ORGANIZATION L. REV. 51, 53, 57 (2010).

82. Marc Goergen, et al., *Recent Developments in German Corporate Governance*, 28 INT'L REV. L. ECON. 175, 175–76 (2008); Eric Engle & Tetiana Danyliuk, *Emulating the German Two-Tier Board and Worker Participation in U.S. Law: A Stakeholder Theory of the Firm*, 45 GOLDEN GATE U.L. REV. 69, 101 (2015).

83. *Id.* at 101; Goergen, et al., *supra* note 82, at 175–76; Wolf-Georg Ringe, *Changing Law and Ownership Patterns in Germany and the Erosion of Deutschland AG*, 63 AM. J. COMP. L. 493, 495–96 (2015).

84. Martin Gelter, *The Dark Side of Shareholder Influence: Managerial Autonomy and Stakeholder Orientation in Comparative Corporate Governance*, 50 HARV. INT'L L.J. 129, 134 (2009).

85. Goergen, et al., *supra* note 82, at 183.

86. *Id.* at 176–77.

87. *Id.* at 183.

with their ability to effectively monitor the actions of the management board.[88] But compared to leaving the block-holder dominated board to act without any monitoring, this system provides at least some level of protection.

The U.S. and the UK took a very different approach to the issue of independence on boards because of the nature of shareholding in those countries. Markus Roth found that block-shareholding is inversely related to the existence of occupational pensions, which help in establishing widely dispersed ownership of stock and corporations.[89] This dispersed ownership creates agency problems, as the shareholders tend not to own sufficient stakes in the company to monitor it effectively, and the directors tend to be rather insulated.[90] This is clearly the opposite of the block-holding countries, and the attendant problems are opposite as well: rather than concerns about the board being too controlled by the shareholders, the Anglo-American countries' main concern is that the directors have few checks on their power, and too little independence. The Anglo-American system developed to handle these governance problems by requiring more independent directors and allowing shareholder activism to act as a check against the board's discretion. It is still debatable whether independence of a corporate board is, in fact, a real problem, but for the sake of this paper (with its focus being on codetermination and the attendant problems it was created to deal with, especially non-independent directors), it can be assumed that since both American and German legislatures have attempted to ensure the independence of board members, this is a concern which must be addressed, regardless of whether it is a good policy choice. Meanwhile, the concerns of labor have historically been addressed by unions or legislation and regulation (such as the Occupational Safety and Health Act and the Fair Labor Standards Act).

These systems were developed independently for the purpose of solving completely different sets of issues. Because of the issues that codetermination was designed to address (namely a board that is fully dominated by shareholders and workers' rights), using it to remedy labor rights issues could well solve that particular issue, but at the cost of worsening agency problems in corporate governance in the American system. Because board insulation and entrenchment have been such causes for concern in the

88. *See infra* pp. 12–13.

89. Markus Roth, *Employee Participation, Corporate Governance and the Firm: A Transatlantic View Focused on Occupational Pensions and Co-Determination*, 11 EUR. BUS. ORGANIZATION L. REV. 51, 55 (2010).

90. Goergen, et al., *supra* note 82, at 176.

shareholder-primacy system, it would seem such a system would only open internal governance and compliance goals of the board to a situation where horse-trading and backroom deals would occur in the board more often, resulting in less overall independence on the part of the board and a greater potential for scandal as well as the potential for shareholder concerns to be ignored. Some commentators even believe that the codetermination system invites the management board to take less formal actions that are not subject to scrutiny to avoid having to seek the approval of the supervisory board.[91]For examples of how this can result in very negative outcomes, one need only look to the German experience with compliance problems under a codetermination system found in the Volkswagen emissions scandals.[92] Given the decade of international high-profile coverage of this scandal and several rounds of fines and penalties running into the hundreds of millions of Euros, it seems evident that severe compliance issues exist in such a system.[93] This being said, there are still issues with self-dealing and scandals in the American system, and as said above, it is unclear whether the German or American system is better designed to prevent scandal, and research has yet to prove either way whether any particular governance structure is better suited to the prevention of major scandals in corporate governance. I am using the evidence of the Volkswagen scandal as evidence that there is no perfect system, and only a deep empirical study beyond the scope of this paper (which is perhaps impossible to perform due to difficulties in determining what constitutes a corporate scandal) could show a real benefit to either system over the other in the area of preventing corporate scandal.

Another potential concern is the fact that codetermination makes corporate takeovers more difficult in countries that use it (which has not been a concern in those countries since block-holding makes takeovers and shareholder activism near impossible

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91. *See* Nicola Faith Sharpe, *Volkswagen's Bad Decisions & Harmful Emissions: How Poor Process Corrupted Codetermination in Germany's Dual Board Structure*, 7 MICH. BUS. & ENTREPRENEURIAL L. REV. 49, 72, 74 (2017); Charles M. Elson, et al., *The Bug at Volkswagen: Lessons in Co-Determination, Ownership and Board Structure*, 27 J. APPLIED CORP. FIN. 36, 36, 41 (2015).

92. Sharpe, *supra* note 91, at 53; *see also* Jackson, supra note 10, at 368. *See generally* Elson, et al., *supra* note 91, at 36.

93. Elisabeth Berhmann & Karin Matussek, *VW's Audi Unit Settles Munich Diesel Probe for $926 Million*, BLOOMBERG LAW (Oct. 16, 2018), https://www.bloomberglaw.com/document/X3K6GF4O000000?bwid=00000166-7d0f-de4e-a3fe-ff6f24530000&email=00000166-7e6b-ddd1-a7f6-ffef29250001&emc=bctnw_hlt%3A3&et=CURATED_HIGHLIGHTS&qid=5543453.

anyway).[94] There have been claims that this harms capital markets, and lessens the potential benefits of the threat of shareholder activism for these highly entrenched boards.[95] This being said, the counter-argument has been made that a lack of shareholder activism prevents the potential short-termism that is believed to accompany shareholder activism.[96] Both of these arguments represent valid concerns, on the one-hand proposing to avoid the ills of entrenched and complacent boards that are believed to occur when a board is not threatened with being replaced, and on the other seeking to avoid the ills of activist investors seeking gains in the short-term to the detriment of the long-term interests of the firm. This second point of view is supported, at least in part, by evidence that in economic downturns, some level of board entrenchment is beneficial as it prevents short-termism and the attendant costs.[97] These conflicting viewpoints on the importance of having a market for corporate governance require a policy determination on whether it is more important to protect against short-termism or against board complacency and insulation, which is still unsettled and outside of the scope of this paper. Because it is unclear and highly debatable which of these policies should win out, the impact of codetermination on the market for corporate governance can be used to argue either way on the viability and utility of codetermination in the American corporate governance system.

VI. CONCLUSION

It would appear, based on the findings in this paper, that codetermination itself has succeeded to a considerable extent in Germany and Europe, where companies still use it (though the results are mixed on whether companies would ever elect for codetermination willingly). However, in countries with diversified ownership, or where diversified ownership begins to take root (as is increasingly the case in Europe and Germany), there appears to be a concomitant weakening of codetermination to allow for more flexible governance regimes. This points to the fact that

94. Li-Jiuan Chen, *The Defensive Measures in Case of Takeover Under German Takeover Act and Delaware Corporate Law*, 2 NAT'L TAIWAN U.L. REV. 93, 111 (2007).

95. *Id.*; Marc Goergen, et al., *Recent Developments in German Corporate Governance*, 28 INT'L REV. L. ECON. 175, 183 (2008).

96. Jackson, *supra* note 10, at 339.

97. *See* Jay B. Kesten, *Managerial Entrenchment and Shareholder Wealth Revisited: Theory and Evidence from a Recessionary Financial Market*, 2010 B.Y.U. L. REV. 1609, 1616, 1651 (2010).

codetermination systems make sense where boards are not independent due to block-ownership, though they are less useful as a means of ensuring worker rights and independence of directors where there is dispersed ownership.

Given the fact that the impact of codetermination on the market for corporate governance is subjective depending on policy preferences and normative assumptions about the importance of the market for corporate governance, the only clear deciding factor as to whether the codetermination system should be applied in the U.S. which can be determined at the current time, without further research, is whether it is a good match for the issues in American corporate governance. As stated above, it appears that codetermination is not a good fit for American corporate governance because it developed under radically different conditions of corporate governance, and because it is not tailored to the particular problems that arise under the Anglo-American shareholder-primacy model with widely distributed ownership, it is more likely than not that the codetermination system would only serve to exacerbate the agency issues inherent in the Anglo-American model. Therefore, this paper opposes the suggestion that a codetermination-style system should be implemented in America as a way of improving workers' rights and representation because of the concerns of its impact on corporate governance, and finds that another solution to these labor issues should be sought that is more tailored to dealing specifically with labor rights without interfering negatively with the American corporate governance system. This opposition to the enactment of a codetermination system necessarily assumes (for lack of clear and objective evidence to the contrary) that the importance of an independent board is very high, and that it is generally not a good idea to fully disrupt a body of law by shoe-horning a completely different system developed in response to different problems into a country which has developed its own systems of law to address its own local conditions in response to centuries of experience. This paper also assumes the evidence of the UK as a popular site of incorporation as another service-industry heavy country with similar laws to those found in the U.S. means that it is generally better for service-industry heavy countries like America to avoid a codetermination-style system. Clearly, further research is necessary to determine whether certain policy choices should win out, and there are subjective policy choices that must be taken into account to properly make a determination of whether a codetermination system should be adopted. But given the determining factor discussed above (to the exclusion of unsettled

policy debates), this paper finds that codetermination should not be enacted in America on a national level. However, if an American state or the UK were to adopt such a system, it would present a case-study that could very well settle the debates on the usefulness of codetermination for countries that have a corporate law jurisprudence like America's and a similar emphasis on service industries, without forcing a new system with questionable end results. But, on the national level, this paper finds that the forced enactment of codetermination would be problematic because it would likely cause changes in corporate governance that are wholly unintended and potentially could exacerbate the currently perceived problems in American corporate law. A corporate governance system with more limited codeterminational elements than that existent in Germany, or adoption by only one or two states of a codetermination system similar to those found in Europe would present a far better way of attempting to gain the benefits of the codetermination system without risking the potential upsides of the Anglo-American system.