

**CBR Shareholder Protection Index  
for the UK, the US, Germany, France, and India**

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See also Shareholder Protection – A Leximetric Approach  
(2007) 7 *Journal of Corporate Law Studies* 17-50  
also available at <http://ssrn.com/abstract=897479>

February 2007

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| Variables   | Description <sup>1</sup>   |
|---|--|
| <b>I. Protection against board and management</b> |  |
| 1. Powers of the general meeting <sup>2</sup>     | <p>The following variables equal 0 if there is no power of the general meeting and 1 if there is a power of the general meeting..</p> <ul style="list-style-type: none"> <li>(1) Amendments of articles of association</li> <li>(2) Mergers and divisions</li> <li>(3) Capital measures<sup>3</sup></li> <li>(4) De facto changes: The decisive thresholds are the sale of substantial assets of the company (e.g., if the sale of more than 50 % requires approval of the general meeting it equals 1; if more than 80 %, it equals 0.5; otherwise 0).</li> <li>(5) Dividend distributions: Equals 1 if the general meeting can effectively influence the amount of dividend (i.e., if it decides about the annual accounts and the annual dividend, and if the board has no significant possibility of ‘manipulating’ the accounts); equals 0.5 if there is some participation of the general meeting; equals 0 if it is only the board that decides about the dividend.</li> <li>(6) General election of board of directors</li> <li>(7) Directors’ self-dealing of substantial transactions</li> </ul> |
| 2. Agenda setting power <sup>4</sup>              | <ul style="list-style-type: none"> <li>(1) General topics: Equals 1 if shareholders who hold 1 % or less of the capital can put an item on the agenda; equals 0.5 if there is a hurdle of more than 1 % but less than 10 %; equals 0 otherwise.</li> <li>(2) Election of directors: <i>ditto</i></li> <li>(3) Costs: Equals 1 if shareholders do not have to pay for their proposals; equals 0 otherwise.</li> </ul>   |
| 3. Extraordinary shareholder meeting <sup>5</sup> | <ul style="list-style-type: none"> <li>(1) Right: Equals 1 if the minimum percentage of share capital to demand an extraordinary meeting is less than or equal to 5 %; equals 0.5 if it is more than 5 % but less or equal than 10 %; equals 0 otherwise.</li> <li>(2) Enforcement: Equals 1 if shareholders can call the meeting themselves or have a right that the court will enforce it; equals 0 if the court has discretion.</li> </ul>  |
| 4. Anticipation of shareholder decision           | <ul style="list-style-type: none"> <li>(1) Restrictions on proxy voting: Equals 0 if there are restrictions on who can be appointed or which rights the proxy has so that it is likely that proxy voting does usually not take place; equals 0.5 if there are some restrictions which reduce the relevance of proxy voting; equals 1 if there are no restrictions.</li> </ul>  |

<sup>1</sup> Even where the description of the variables does not mention it specifically, we have given intermediate scores wherever necessary.

<sup>2</sup> For the power of the general meeting for remuneration see variable I 10.1.

<sup>3</sup> The possibility of authorised capital does not lead to a reduction from 1 to 0.5 because the default rule does not change.

<sup>4</sup> Variables I 2 and 3 could also be used as mechanisms for protecting minority from majority shareholders. However, in this study we have considered them as part of protection against directors because the directors are responsible for and decide the agenda and the calling of the shareholders meetings and therefore the legal rules of these variables primarily protect shareholders against directors.

<sup>5</sup> See previous note.

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|  | <p>(2) Anticipation facilitated: Equals 1 if postal voting or proxy solicitation with two-way voting proxy form has to be provided by the company; equals 0.5 if two-way proxy form has to be provided but not proxy solicitation; equals 0 otherwise.</p> <p>(3) Costs of proxy contest: Equals 1 if the costs of proxy solicitations are paid by the company or if proxies have the right to have their proposals included in the company's proxy form; equals 0 otherwise.</p>   |
| <b>Variables</b>   | <b>Description<sup>6</sup></b>  |
| 5. Information in the run-up of the general meeting                    | <p>(1) Amendments of the articles of association: Equals 1 if the exact wording has to be sent in advance ('push-system'); equals 0.5 if the shareholders have to request it ('pull-system'); equals 0 otherwise.</p> <p>(2) Mergers: Equals 1 if a special report has to be sent in advance ('push-system'); equals 0.5 if the shareholders have to request it ('pull-system'); equals 0 otherwise.</p>  |
| 6. Shares not blocked before general meeting                           | Equals 0 if shareholders have to deposit their shares prior to the general meeting and if this has the consequence that shareholders are prevented from selling their shares for a number of days; equals 1 otherwise.  |
| 7. Individual information rights                                       | <p>(1) Right to demand information (1): equals 1 if an individual shareholder or shareholders with 5 % or less capital can demand information which will be answered at the general meeting; equals 0.5 if shareholders with 10% or less capital have this right; equals 0 otherwise.</p> <p>(2) Right to demand information (2): equals 1 if an individual shareholder or shareholders with 5 % or less capital can demand information independent of the general meeting; equals 0.5 if shareholders with 10% or less capital have this right; equals 0 otherwise.</p>  |
| 8. Communication with other shareholders                               | <p>(1) Right to access the register of shareholders and (if necessary) beneficial owners: Equals 1 if the right of inspection can be used by a single shareholder; equals 0 if there is no such right.</p> <p>(2) Equals 1 if communication is not affected by proxy rules; equals 0 otherwise.</p>   |
| 9. Board composition   | <p>(1) Division between management and control: Equals 1 if there is a two-tier system or at least half of the board members are non-executive; equals 0.5 if at least 25% of the board members are non-executive; equals 0 otherwise.</p> <p>(2) Independent board members:<sup>7</sup> Equals 1 if at least half of the board members must be independent; equals 0.5 if at least 25 % of them must be independent or if the independence requirement is very low; equals 0 otherwise.</p> <p>(3) Committees: Equals 1 if companies have to install an audit and a remuneration committee with a majority of independent members; intermediate scores are possible if the requirement is partial, (for instance requires setting up of one of the committees or the independent members of the committees constitute less than a majority); equals 0 if committees are not necessary or if they are not required to have independent members.</p> |
| 10.No excessive remuneration for non-executive and executive directors | <p>(1) General meeting power:<sup>8</sup> Equals 1 if the general meeting has to approve all compensation schemes; equals 0.5 if this is limited (e.g., applies to stock option plans only, or if some directors are excluded); equals 0 otherwise.</p> <p>(2) Annual disclosure: Equals 1 if there is full and specific disclosure about the individual remuneration of each director; equals 0.75 if there is information about the individual remuneration of some directors; equals 0.5 if there is disclosure about the top 2 directors (executives); equals 0.25 if there is only disclosure about the overall remuneration; equals 0 otherwise.</p>  |

<sup>6</sup> Even where the description of the variables does not mention it specifically, we have given intermediate scores wherever necessary.

<sup>7</sup> To be sure, independent board members may also be a method to protect minority shareholders against majority shareholders. This depends, however, on the definition of "independence", which is not coded in this variable.

<sup>8</sup> For the involvement of boards and committees see generally variable I 9.

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|  | (3) Substantive requirements placing limit for remuneration in order to protect shareholders: Equals 1 if there is a direct regulation; equals 0 otherwise   |
| <b>Variables</b>                       | <b>Description<sup>9</sup></b>   |
| 11. Performance based remuneration     | Equals 1 if performance based remuneration of directors and managers is fostered (e.g. facilitation of stock options to reward performance); equals 0 otherwise.   |
| 12. Duration of director's appointment | (1) Normal duration: Equals 1 if this is one year or less; 0 if this is five years or more; equals 0.5 if this is more than 1 but less than 5 years.<br>(2) Dismissal feasible: Equals 1 if there are no special requirements; equals 0 if an important or good reason is required; intermediate scores are possible if there are no special requirements but there may be financial burden for the company (e.g. in the form of compensation under a statute or contract or damages for breach of contract or salary under a fixed term contract).  |
| 13. Directors duties <sup>10</sup>     | (1) Directors' liability - duty of care: Equals 0 if there are narrow criteria which virtually exclude liability; equals 0.5 if there are some restrictions (e.g., business judgement rule; gross negligence); equals 1 if there are no or little restrictions (regarding business judgement and standard of care).<br>(2) Directors' liability - duty of loyalty: Equals 1 if there is a duty not to put personal interests ahead of the company; equals 0 otherwise.<br>(3) Private enforcement: Equals 0 if this is typically excluded (e.g., because of strict subsidiarity requirement, hurdle which is at least 10 %; cost rules); equals 0.5 if there are some restrictions [e.g., certain percentage of share capital (unless the hurdle is at least 10 %); cost rules; demand requirement]; equals 1 otherwise. |
| 14. Shareholder supremacy              | (1) General principle: Equals 1 if the board always has to give priority to shareholders interests; equals 0 if the board have to give priority to the interests of other stakeholders; equals 0.5 in other cases.<br>(2) Takeover law: Equals 1 if there is the principle of strict neutrality in case of takeovers; equals 0.5 if the principle of neutrality is subject to exceptions; equals 0 otherwise. <sup>11</sup>  |
| 15. Pre-emptive rights <sup>12</sup>   | Equals 1 when the law grants shareholders the first opportunity to buy new issues of shares, and this right can be waived only by the general meeting; <sup>13</sup> equals 0 otherwise.   |
| 16. Director's disqualification        | Equals 1 if negligent conduct can lead to disqualification; 0.5 if only in specific instances of negligence directors are disqualified (e.g., failure of financial reporting); equals 0 if negligent conduct itself is not necessary for disqualification.   |
| 17. Corporate governance code          | Equals 1 if companies have to disclose and explain whether they comply with a corporate governance code; equals 0.5 if this is only recommended; equals 0 otherwise.   |
| 18. Public enforcement of company law  | The following variables equal 0 if there is no power of public authority and 1 if public authority has power.<br>(1) Authorisation for director's self dealing of substantial transactions<br>(2) Authorisation for appointment of managers  |

<sup>9</sup> Even where the description of the variables does not mention it specifically, we have given intermediate scores wherever necessary.

<sup>10</sup> For approval of directors' conduct by the general meeting, the supervisory board, or independent board members see variables I 1 and I 9; for exclusion of liability in the articles see variable II 10.1.

<sup>11</sup> For preventive measures see e.g. variable II 3.

<sup>12</sup> Usually, the directors decide about the issuance of new shares. Pre-emptive right is perceived as an important protection against directors as it prevents them from disregarding the interests of shareholders in general. Of course, in some cases this may also be a method to protect minority against majority shareholders.

<sup>13</sup> For the requirements for a waiver (e.g., supermajority, good reason) see variables II 2 and II 9.

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|  | (3) Power to intervene in cases of prejudice to public interest or interest of the company for instance due to “mismanagement of company” or in cases of oppression of shareholders |
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| <b>Variables</b>                                | <b>Description<sup>14</sup></b>  |
|---|--|
| <b>II. Protection against other shareholder</b> |  |
| 1. Quorum <sup>15</sup>                         | Equals 1 if there is a 50 % quorum for the extraordinary shareholder meeting (when called for the first time); equals 0.5 if the quorum is 1/3; equals 1/4 if the quorum is 1/4. Equals 0 otherwise.   |
| 2. Supermajority requirements                   | Equals 1 if there are supermajority requirements (e.g., 2/3 or 3/4) for amendments of the articles of association, mergers, and voluntary liquidations; equals 0 if they do not exist at all.  |
| 3. One share – one vote <sup>16</sup>           | <ul style="list-style-type: none"> <li>(1) Default rule: Equals 1 if this principle exists as a default rule; equals 0 otherwise.</li> <li>(2) Prohibition of multiple voting rights (super voting rights): Equals 1 if there is a prohibition; equals 2/3 if only companies which already have multiple voting rights can keep them; equals 1/3 if state approval is necessary; equals 0 otherwise.</li> <li>(3) Prohibition of capped voting rights (voting right ceilings): Equals 1 if there is a prohibition; equals 2/3 if only companies which already have voting caps can keep them; equals 1/3 if state approval is necessary; equals 0 otherwise.</li> </ul>                    |
| 4. Cumulative voting                            | Equals 1 if shareholders can cast all their votes for one candidate standing for election to the board of directors or if there exists a mechanism of proportional representation in the board by which minority interests may name a proportional number of directors to the board (default or mandatory law); equals 0 otherwise.  |
| 5. Voting by interested shareholders prohibited | Equals 1 if a shareholder cannot vote if this vote favours him or her personally (i.e., only ‘disinterested shareholders’ can vote); equals 0 otherwise.   |
| 6. No squeeze out (freeze out)                  | Equals 0 if a shareholder holding 90 % or more can ‘squeeze out’ the minority; equals 1 otherwise.   |
| 7. Right to exit                                | <ul style="list-style-type: none"> <li>(1) Appraisal rights: Equals 1 if they exist for mergers, amendments of the articles and sales of major company assets; equals 0 if they do not exist at all.</li> <li>(2) Mandatory bid: Equals 1 if there is a mandatory bid for the entirety of shares in case of purchase of 30% or 1/3 of the shares; equals 0 if there is no mandatory bid at all.</li> <li>(3) Mandatory public offer: Equals 1 if there is a mandatory public offer for purchase of 10% or less of the shares; equals 0.5 if the acquirer has to make a mandatory public offer for acquiring more than 10% but less than 30 % of the shares; equals 0 otherwise.</li> </ul> |

<sup>14</sup> Even where the description of the variables does not mention it specifically, we have given intermediate scores wherever necessary.

<sup>15</sup> The purpose of requiring a substantial percentage of shareholders to constitute a valid quorum could be to prevent decisions of the general meeting which are not supported by a significant majority much like the supermajority requirements (see Lele & Siems, Shareholder Protection: A Leximetric Approach, Section D (1)(c)).

<sup>16</sup> Preference shares without voting rights are not addressed because they are feasible in all countries.

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|---|---|
| 8. Disclosure of major share ownership                | Equals 1 if shareholders who acquire at least 3 % of the companies capital have to disclose it; equals 0.75 if this concerns 5 % of the capital; equals 0.5 if this concerns 10 %; equals 0.25 if this concerns 25 %; equals 0 otherwise  |
| <b>Variables</b>                                      | <b>Description<sup>17</sup></b>   |
| 9. Oppressed minority                                 | <p>(1) Substantive law: Equals 0 if majority decisions of the general meeting have to be accepted by the outvoted minority; equals 1 if some kind of substantive control is possible (e.g., in cases of amendments to the articles of association, ratification of management misconduct, exclusion of the pre-emption right, related parties transactions, freeze outs); equals 0.5 if this control covers only flagrant abuses of majority power.</p> <p>(2) Shareholder action: Equals 1 if every shareholder can file a claim against a resolution by the general meeting because he or she regards it as void or voidable; equals 0.5 if there are hurdles such as a threshold of at least 10 % voting rights or cost rules; equals 0 if this kind of shareholder action does not exist.</p> |
| 10. Shareholder protection is mandatory <sup>18</sup> | <p>(1) Exclusion of directors duty of care (see variable I 13.1) in articles: equals 0 if possible and equals 1 otherwise.</p> <p>(2) Rules on duration of director's appointment (see variable I 12.1 and 2): equals 1 if mandatory and 0 otherwise.</p> <p>(3) Board composition (supervisory boards, non-executive directors) (see variable I 9.1 and 2): equals 1 if mandatory and 0 otherwise.</p> <p>(4) Other topics: equals 1 if there is the general rule that company law is mandatory; equals 0 if company law is in general just a "model off the shelf"; equals 0.5 if there is no general rule.</p>   |

<sup>17</sup> Even where the description of the variables does not mention it specifically, we have given intermediate scores wherever necessary.

<sup>18</sup> Note: Variables II 10.1-3 do not code the content of the law (this is already done in variables I 9.1-2, 12, 13.1) but only its nature, i.e. whether "mandatory" or "default".







|           |                |                |                |                |                |                |                |                |                |                |                |                |                |                |                |                |               |               |               |               |               |               |               |               |               |               |               |               |               |               |               |               |               |               |               |                |
|-----------|----------------|----------------|----------------|----------------|----------------|----------------|----------------|----------------|----------------|----------------|----------------|----------------|----------------|----------------|----------------|----------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|---------------|----------------|
| <b>8</b>  | 0              | 0              | 0              | 0              | 0              | 0              | 0              | 0              | 0              | 0              | 0              | 0              | 0              | 0              | 0              | 0              | $\frac{3}{4}$ | $\frac{3}{4}$ | $\frac{3}{4}$ | $\frac{3}{4}$ | $\frac{3}{4}$ | $\frac{3}{4}$ | $\frac{3}{4}$ | $\frac{3}{4}$ | $\frac{3}{4}$ | $\frac{3}{4}$ | $\frac{3}{4}$ | $\frac{3}{4}$ | $\frac{3}{4}$ | $\frac{3}{4}$ | $\frac{3}{4}$ | $\frac{3}{4}$ | $\frac{3}{4}$ | $\frac{3}{4}$ |               |                |
|           | $\frac{0}{71}$ | $\frac{0}{71}$ | $\frac{0}{71}$ | $\frac{0}{71}$ | $\frac{0}{71}$ | $\frac{0}{71}$ | $\frac{0}{71}$ | $\frac{0}{71}$ | $\frac{0}{71}$ | $\frac{0}{71}$ | $\frac{0}{71}$ | $\frac{0}{71}$ | $\frac{0}{71}$ | $\frac{0}{71}$ | $\frac{0}{71}$ | $\frac{0}{71}$ | 5             | 5             | 5             | 5             | 5             | 5             | 5             | 5             | 5             | 5             | 5             | 5             | 5             | 5             | 5             | 5             | 5             | 5             | 5             |                |
| <b>9</b>  | $\frac{1}{2}$  | $\frac{1}{2}$  | $\frac{1}{2}$  | $\frac{1}{2}$  | $\frac{1}{2}$  | $\frac{1}{2}$  | $\frac{1}{2}$  | $\frac{1}{2}$  | $\frac{1}{2}$  | $\frac{1}{2}$  | $\frac{1}{2}$  | $\frac{1}{2}$  | $\frac{1}{2}$  | $\frac{1}{2}$  | $\frac{1}{2}$  | $\frac{1}{2}$  | $\frac{1}{2}$ | $\frac{1}{2}$ | $\frac{1}{2}$ | $\frac{1}{2}$ | $\frac{1}{2}$ | $\frac{1}{2}$ | $\frac{1}{2}$ | $\frac{1}{2}$ | $\frac{1}{2}$ | $\frac{1}{2}$ | $\frac{1}{2}$ | $\frac{1}{2}$ | $\frac{1}{2}$ | $\frac{1}{2}$ | $\frac{1}{2}$ | $\frac{1}{2}$ | $\frac{1}{2}$ | $\frac{1}{2}$ | $\frac{1}{2}$ |                |
|           | $\frac{1}{73}$ | 1              | 1              | 1              | 1              | 1              | 1              | 1              | 1              | 1              | 1              | 1              | 1              | 1              | 1              | 1              | 1             | 1             | 1             | 1             | 1             | 1             | 1             | 1             | 1             | 1             | 1             | 1             | 1             | 1             | 1             | 1             | 1             | 1             | 1             | $\frac{1}{72}$ |
| <b>10</b> | $\frac{1}{74}$ | 1              | 1              | 1              | 1              | 1              | 1              | 1              | 1              | 1              | 1              | 1              | 1              | 1              | 1              | 1              | 1             | 1             | 1             | 1             | 1             | 1             | 1             | 1             | 1             | 1             | 1             | 1             | 1             | 1             | 1             | 1             | 1             | 1             | 1             |                |
|           | $\frac{1}{75}$ | 1              | 1              | 1              | 1              | 1              | 1              | 1              | 1              | 1              | 1              | 1              | 1              | 1              | 1              | 1              | 1             | 1             | 1             | 1             | 1             | 1             | 1             | 1             | 1             | 1             | 1             | 1             | 1             | 1             | 1             | 1             | 1             | 1             | 1             | 1              |
|           | $\frac{0}{76}$ | 0              | 0              | 0              | 0              | 0              | 0              | 0              | 0              | 0              | 0              | 0              | 0              | 0              | 0              | 0              | 0             | 0             | 0             | 0             | 0             | 0             | 0             | 0             | 0             | 0             | 0             | 0             | 0             | 0             | 0             | 0             | 0             | 0             | 0             | 0              |
|           | $\frac{1}{77}$ | 1              | 1              | 1              | 1              | 1              | 1              | 1              | 1              | 1              | 1              | 1              | 1              | 1              | 1              | 1              | 1             | 1             | 1             | 1             | 1             | 1             | 1             | 1             | 1             | 1             | 1             | 1             | 1             | 1             | 1             | 1             | 1             | 1             | 1             | 1              |
|           | <b>70</b>      | <b>71</b>      | <b>72</b>      | <b>73</b>      | <b>74</b>      | <b>75</b>      | <b>76</b>      | <b>77</b>      | <b>78</b>      | <b>79</b>      | <b>80</b>      | <b>81</b>      | <b>82</b>      | <b>83</b>      | <b>84</b>      | <b>85</b>      | <b>86</b>     | <b>87</b>     | <b>88</b>     | <b>89</b>     | <b>90</b>     | <b>91</b>     | <b>92</b>     | <b>93</b>     | <b>94</b>     | <b>95</b>     | <b>96</b>     | <b>97</b>     | <b>98</b>     | <b>99</b>     | <b>00</b>     | <b>01</b>     | <b>02</b>     | <b>03</b>     | <b>04</b>     | <b>05</b>      |

Shareholder Protection Germany<sup>78</sup>

|           | 70                | 71  | 72  | 73  | 74  | 75  | 76  | 77  | 78  | 79  | 80  | 81  | 82                | 83                | 84  | 85  | 86  | 87  | 88  | 89  | 90  | 91  | 92  | 93  | 94  | 95  | 96  | 97  | 98  | 99  | 00  | 01  | 02  | 03  | 04                | 05                 |     |
|-----------|-------------------|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-------------------|-------------------|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-------------------|--------------------|-----|
| <b>11</b> | 1 <sub>79</sub>   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1                 | 1                 | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1                 | 1                  | 1   |
|           | 1 <sub>80</sub>   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1                 | 1                 | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1                 | 1                  | 1   |
|           | 1 <sub>82</sub>   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1                 | 1                 | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1                 | 1                  | 1   |
|           | 0 <sub>83</sub>   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0                 | 1/2 <sub>84</sub> | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2               | 1/2                | 1/2 |
|           | 1/2 <sub>85</sub> | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2               | 1/2               | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2               | 1/2                | 1/2 |
|           | 1/2 <sub>86</sub> | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2               | 1/2               | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2               | 1/2                | 1/2 |
|           | 0 <sub>87</sub>   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0                 | 0                 | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0                 | 0                  | 0   |
| <b>2</b>  | 1/2 <sub>88</sub> | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2               | 1/2               | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2               | 1/2                |     |
|           | 5                 | 5   | 5   | 5   | 5   | 5   | 5   | 5   | 5   | 5   | 5   | 5   | 5                 | 5                 | 5   | 5   | 5   | 5   | 5   | 5   | 5   | 5   | 5   | 5   | 5   | 5   | 5   | 5   | 5   | 5   | 5   | 5   | 5   | 5   | 5                 | 5                  |     |
|           | 1 <sub>89</sub>   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1                 | 1                 | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1                 | 1                  | 1   |
|           | 1 <sub>90</sub>   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1                 | 1                 | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1                 | 1                  | 1   |
| <b>3</b>  | 1 <sub>91</sub>   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1                 | 1                 | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1                 | 1                  |     |
|           | 5                 | 5   | 5   | 5   | 5   | 5   | 5   | 5   | 5   | 5   | 5   | 5   | 5                 | 5                 | 5   | 5   | 5   | 5   | 5   | 5   | 5   | 5   | 5   | 5   | 5   | 5   | 5   | 5   | 5   | 5   | 5   | 5   | 5   | 5   | 5                 | 5                  |     |
|           | 1                 | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1                 | 1                 | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1                 | 1                  | 1   |
| <b>4</b>  | 1/2 <sub>92</sub> | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2               | 1/2               | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1   | 1   | 1   | 1   | 1   | 1   | 1                 | 1                  |     |
|           | 0 <sub>94</sub>   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0                 | 0                 | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 1/2 <sub>95</sub> | 1/2                | 1/2 |
|           | 0                 | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0                 | 0                 | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 1/2 <sub>96</sub> | 1/2                | 1/2 |
| <b>5</b>  | 1 <sub>97</sub>   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1                 | 1                 | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1                 | 1                  |     |
|           | 0                 | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 1/2 <sub>98</sub> | 1/2               | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2               | 1/2                | 1/2 |
| <b>6</b>  | 1 <sub>100</sub>  | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1                 | 1                 | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1                 | 1                  |     |
|           | 1 <sub>101</sub>  | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1                 | 1                 | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1                 | 1                  | 1   |
| <b>7</b>  | 0                 | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0                 | 0                 | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0                 | 0                  |     |
|           | 1 <sub>102</sub>  | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1                 | 1                 | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1                 | 1                  | 1   |
| <b>8</b>  | 1                 | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1                 | 1                 | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1                 | 1                  | 1   |
|           | 1 <sub>104</sub>  | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1                 | 1                 | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1                 | 1                  | 1   |
|           | 0                 | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0                 | 0                 | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0                 | 1/2 <sub>105</sub> | 1/2 |
| <b>9</b>  | 0                 | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0                 | 0                 | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0                 | 1/2 <sub>107</sub> | 1/2 |
|           | 0                 | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0                 | 0                 | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0                 | 1/2 <sub>106</sub> | 1/2 |





Shareholder Protection Index: India<sup>156</sup>

|           | 70                 | 71  | 72  | 73  | 74  | 75  | 76  | 77  | 78  | 79  | 80  | 81  | 82  | 83  | 84  | 85                 | 86  | 87  | 88                 | 89  | 90  | 91  | 92  | 93  | 94  | 95  | 96  | 97  | 98  | 99  | 00  | 01  | 02  | 03  | 04  | 05  |     |                    |                    |     |     |     |     |
|-----------|--------------------|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|--------------------|-----|-----|--------------------|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|--------------------|--------------------|-----|-----|-----|-----|
| <b>11</b> | 1 <sub>157</sub>   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1                  | 1   | 1   | 1                  | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1                  | 1                  |     |     |     |     |
|           | 1 <sub>158</sub>   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1                  | 1   | 1   | 1                  | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1                  | 1                  | 1   |     |     |     |
|           | 1/2 <sub>159</sub> | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2                | 1/2 | 1/2 | 1/2                | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2                | 1/2                | 1/2 |     |     |     |
|           | 1/4 <sub>160</sub> | 1/4 | 1/4 | 1/4 | 1/4 | 1/4 | 1/4 | 1/4 | 1/4 | 1/4 | 1/4 | 1/4 | 1/4 | 1/4 | 1/4 | 1/4                | 1/4 | 1/4 | 1/4                | 1/4 | 1/4 | 1/4 | 1/4 | 1/4 | 1/4 | 1/4 | 1/4 | 1/4 | 1/4 | 1/4 | 1/4 | 1/4 | 1/4 | 1/4 | 1/4 | 1/4 | 1/4 | 1/4                | 1/4                | 1/4 |     |     |     |
|           | 1/2 <sub>161</sub> | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2                | 1/2 | 1/2 | 1/2                | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2                | 1/2                | 1/2 |     |     |     |
|           | 1 <sub>162</sub>   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1                  | 1   | 1   | 1                  | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1                  | 1                  | 1   | 1   |     |     |
|           | 0 <sub>163</sub>   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0                  | 0   | 0   | 0                  | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0                  | 0                  | 0   | 0   |     |     |
| <b>2</b>  | 0 <sub>164</sub>   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0                  | 0   | 0   | 0                  | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0                  | 0                  | 0   |     |     |     |
|           | 20                 | 20  | 20  | 20  | 20  | 20  | 20  | 20  | 20  | 20  | 20  | 20  | 20  | 20  | 20  | 20                 | 20  | 20  | 20                 | 20  | 20  | 20  | 20  | 20  | 20  | 20  | 20  | 20  | 20  | 20  | 20  | 20  | 20  | 20  | 20  | 20  | 20  | 20                 | 20                 | 20  |     |     |     |
|           | 1 <sub>165</sub>   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1                  | 1   | 1   | 3/4 <sub>166</sub> | 3/4 | 3/4 | 3/4 | 3/4 | 3/4 | 3/4 | 3/4 | 3/4 | 3/4 | 3/4 | 3/4 | 3/4 | 3/4 | 3/4 | 3/4 | 3/4 | 3/4 | 3/4 | 3/4                | 4/5 <sub>167</sub> | 4/5 | 4/5 | 4/5 | 4/5 |
|           | 0 <sub>168</sub>   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0                  | 0   | 0   | 0                  | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0                  | 0                  | 0   | 0   |     |     |
| <b>3</b>  | 1/2 <sub>169</sub> | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2                | 1/2 | 1/2 | 1/2                | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2                | 1/2                | 1/2 |     |     |     |
|           | 10                 | 10  | 10  | 10  | 10  | 10  | 10  | 10  | 10  | 10  | 10  | 10  | 10  | 10  | 10  | 10                 | 10  | 10  | 10                 | 10  | 10  | 10  | 10  | 10  | 10  | 10  | 10  | 10  | 10  | 10  | 10  | 10  | 10  | 10  | 10  | 10  | 10  | 10                 | 10                 | 10  |     |     |     |
|           | 1 <sub>170</sub>   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1                  | 1   | 1   | 1                  | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1                  | 1                  | 1   | 1   |     |     |
| <b>4</b>  | 1/2 <sub>171</sub> | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2                | 1/2 | 1/2 | 3/8 <sub>172</sub> | 3/8 | 3/8 | 3/8 | 3/8 | 3/8 | 3/8 | 3/8 | 3/8 | 3/8 | 3/8 | 3/8 | 3/8 | 3/8 | 3/8 | 3/8 | 3/8 | 3/8 | 3/8 | 3/8                | 3/8                | 3/8 |     |     |     |
|           | 0                  | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 1/2 <sub>173</sub> | 1/2 | 1/2 | 1/2                | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 1/2 | 3/4 <sub>174</sub> | 7/8 <sub>175</sub> | 7/8 | 7/8 | 7/8 | 7/8 |
|           | 0                  | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0                  | 0   | 0   | 0                  | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0                  | 0                  | 0   | 0   |     |     |
| <b>5</b>  | 3/4 <sub>176</sub> | 3/4 | 3/4 | 3/4 | 3/4 | 3/4 | 3/4 | 3/4 | 3/4 | 3/4 | 3/4 | 3/4 | 3/4 | 3/4 | 3/4 | 3/4                | 3/4 | 3/4 | 3/4                | 3/4 | 3/4 | 3/4 | 3/4 | 3/4 | 3/4 | 3/4 | 3/4 | 3/4 | 3/4 | 3/4 | 3/4 | 3/4 | 3/4 | 3/4 | 3/4 | 3/4 | 3/4 | 3/4                | 3/4                | 3/4 |     |     |     |
|           | 1 <sub>177</sub>   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1                  | 1   | 1   | 1                  | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1                  | 1                  | 1   |     |     |     |
| <b>6</b>  | 1                  | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1                  | 1   | 1   | 1                  | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1   | 1                  | 1                  | 1   |     |     |     |
|           | 0 <sub>178</sub>   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0                  | 0   | 0   | 0                  | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0                  | 0                  | 0   | 0   |     |     |
| <b>7</b>  | 0                  | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0                  | 0   | 0   | 0                  | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0                  | 0                  | 0   |     |     |     |
|           | 0                  | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0                  | 0   | 0   | 0                  | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0   | 0                  | 0                  | 0   | 0   |     |     |



















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**France:**

<sup>1</sup> Main laws on shareholder protection: Loi no 66-537 du 24 juillet 1966 sur les sociétés commerciales (in 2000 repealed); since Ordonnance No. 2000-912 company law is (again) regulated in the Code de Commerce (subsequently amended, e.g., by Loi sur les nouvelles régulations économiques (NRE) no 2001-420 du 15 mai 2001); Décret no 67-236 sur les sociétés commerciales (as amended); Règlement général de l’Autorité des marchés financiers 2004; Code monétaire et financier 2000; Principes de gouvernement d’entreprise résultant de la consolidation des rapports conjoints de l’AFEP (Association Française des Entreprises Privées) et du MEDEF (Mouvement des Entreprises de France) 2003 (French Corporate Governance Principles).

<sup>2</sup> Loi 1966, art. 153; Code de Commerce 2000, art. L. 225-96.

<sup>3</sup> Loi 1966, art. 376; Code de Commerce 2000, art. L. 236-9.

<sup>4</sup> Loi 1966, arts. 180, 215; Code de Commerce 2000, arts. L. 225-129, 225-204.

<sup>5</sup> There is no explicit provision on sale of major parts of company assets. It is debated, first, whether a *de facto* measure constitutes a change in the object of business (as indicated in the articles), for which the general meeting is competent. Second, it is argued that the major assets can be equated with the whole assets (Loi 1966, art. 396 (no.4); Code de Commerce 2000, art. L. 237-8(no.4)) (see generally, Siems, *Die Konvergenz der Rechtssysteme im Recht der Aktionäre*, 2005, at 217). Since these cases are exceptions, and since there is no case law, deviation from the “0” score would, however, not be justified.

<sup>6</sup> The general meeting decides both approval of the annual accounts and the distribution of profits (Loi 1966, arts. 346, 347; Code de Commerce 2000, arts. L. 232-11, 232-12). However, there is some room for manoeuvre due to accounting law. Furthermore, interim dividends are possible (Loi 1966, art. 347; Code de Commerce 2000, arts. L. 232-12, Décret 1967, art. 200).

<sup>7</sup> Loi 1966, arts. 90, 134; Code de Commerce 2000, arts. L. 225-18, 225-75.

<sup>8</sup> Loi 1966, arts. 101 though 103; Code de Commerce 2000, arts. L. 225-38 though 40 (but exception for agreements relating to current operations entered under normal terms and conditions).

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<sup>9</sup> The number of shareholders that can make a topic the object of decision by the general meeting is usually 5% of the registered capital (Loi 1966, art. 160; Code de Commerce 2000, art. L. 225-105). There is also a graduated threshold, which for big companies may be 1 or 0.5 % (Décret 1967, art. 128). These companies (portion of capital more than 7.5. million euro) are the main focus of this study. Since Loi no 94-679 du 8 août 1994 the proposal right is also extended to shareholder associations (Loi 1996, art. 172-1; Code de Commerce 2000, art. L. 225-120).

<sup>10</sup> As note 9 above (see also Cools, *The Real Difference in Corporate Law between the United States and Continental Europe: Distribution of Powers*, 2004, p. 54, available at <http://ssrn.com/abstract=623286> and now published in 36 *Del. J. Corp. L.* 697 (2005)).

<sup>11</sup> See note 9 above.

<sup>12</sup> Loi 1966, art. 158(no.2); Code de Commerce 2000, art. L. 225-103(2)(no.2).

<sup>13</sup> Loi no 94-670 du 8 août 1994: also by shareholder associations possible.

<sup>14</sup> Loi no 2001-420 du 15 mai 2001 changed Code de Commerce 2000, art. L. 225-103(2)(no.2).

<sup>15</sup> Loi 1966, art. 158(2); Code de Commerce 2000, art. L. 225-103: shareholders have to request the court to appoint a *mandataire de justice*. The court has discretionary power in deciding whether the nomination of a representative is in the interest of the company (see Cools, *supra* note 10, at 38).

<sup>16</sup> Loi 1966, art. 161: Proxy can only be given to spouse or another shareholder (today: Code de Commerce 2000, art. L. 225-106).

<sup>17</sup> Loi 1966, art. 161(5) inserted by Loi no 83-3 du 3 janvier 1983; today: Code de Commerce 2000, art. L. 225-106(6), Décret 1967, art. 133(7)(c): possibility exists of giving “carte blanche”. This proxy in blank is a “spurious” management proxy, exercised by the chair of the general meeting in favour of the board’s proposed resolutions.

<sup>18</sup> Décret no 86-584 du 14 mars 1986 (in force since January 1988) inserted Décret 1967, art. 131-1: shareholders have the right to request a remote ballot form. Then, postal voting is possible (Loi 1966, art. 161-1 inserted by Loi no 83-3 du 3 janvier 1983; today: Code de Commerce 2000, art. L. 225-107).

<sup>19</sup> The notice of call (Décret 1967, art. 123) only contains the agenda. The text of draft resolutions must only be sent to the shareholders in case of proxies (Décret 1967, art. 133). Yet, shareholders of public companies can access the text of the draft resolutions in the *Bulletin des Annonces Légales Obligatoires* (Décret 1967, art. 130). Shareholders of all companies can request information about the text of the draft resolutions from the company itself (Décret 1967, arts. 135, 138, 139, 141; see also Loi 1966, art. 168(3); Code de Commerce 2000, art. L. 225-115(3)).

<sup>20</sup> Loi no 88-17 du 5 janvier 1988 inserted Loi 1966, art. 376(4); now: Code de Commerce 2000, art. L. 236-9(4).

<sup>21</sup> Décret 1967, art. 136: Shares are blocked if the company requires identification to take place before the meeting; Even in this case blockage is not full, since the shares can be sold off the exchange (Cools, *supra* note 10, at 20).

<sup>22</sup> Décret no 2002-803 du 3 mai 2002 changed Décret 1967, art. 136: now, in no case the sale of shares is excluded.

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<sup>23</sup> Loi no 84-148 du 1er mars 1984 inserted Loi 1966, art. 162(3); now: Code de Commerce 2000, art. L. 225-108(3): shareholders can send questions before the general meeting, to be answered at it.

<sup>24</sup> Loi no 84-148 du 1er mars 1984 inserted Loi 1966, art. 226-1; now: Code de Commerce 2000, art. L. 225-232: shareholders with at least 10% of the registered capital can submit written questions twice a year on any matter of such a nature as to threaten the continued operation of the company (for the answer see Décret 1967, art. 195-1).

<sup>25</sup> Loi no 94-679 du 8 août 1994 extended this right to shareholder associations (Loi 1996, art. 172-1; Code de Commerce 2000, art. L. 225-120).

<sup>26</sup> Loi no 2001-420 du 15 mai 2001 reduced the threshold (note 24 above) to 5 % (note: this reduction concerns also other rights, e.g., Code de Commerce 2000, art. L. 225-231: right to submit other questions).

<sup>27</sup> Loi 1966, art. 169; Code de Commerce 2000, art. L. 225-116; Décret 1967, arts. 140, 141, 145.

<sup>28</sup> Companies can choose between the one-tier and two-tier form of corporate governance (Loi 1966, art. 118; Code de Commerce 2000, art. L. 225-57). But even for one-tier companies the board cannot consist of executive directors only, because not more than 1/3 of the directors can be connected with the company through an employment contract (exception: co-determination) (Loi 1966, art. 93(2); Code de Commerce 2000, art. L. 225-22(2)). Yet, a score of '½' because the PDG (*président directeur général*) is not only the head of the management but also chairman of the board (Loi 1966, art. 113; Code de Commerce 2000, art. L. 225-51 and since Loi no 2001-420 du 15 mai 2001 Code de Commerce 2000, art. L. 225-51-1).

<sup>29</sup> Loi no 2001-420 du 15 mai 2001 modified the power of the PDG, but there is still not a total dissociation between the functions of chairman of the board and chief executive director.

<sup>30</sup> According to the French corporate governance principles a significant number of board members (no. 8.2), shall be independent. This can be regarded as the default rule because the corporate governance principles are in general applied by almost all companies (see note 53 below). The fact that many companies opt out of the independence requirement (see Storck, (2004) 1 ECFR 36 at 47) is therefore not coded in this variable.

<sup>31</sup> Because of the French corporate governance principles most listed companies have audit, compensation, and nomination committees (see Hebert (2004) JBL 656 at note 47). One third of the members of the audit committee (no. 14.1) and the majority of members of the compensation committee (no. 15.1) shall be independent.

<sup>32</sup> The general meeting has competence for the overall remuneration of the board (Loi 1966, art. 108; Code de Commerce 2000, art L. 225-45); The board then distributes this amount among its members (Décret 1967, art. 93). However, the remuneration of the PDG is determined by the board (Loi 1966, art. 110; Code de Commerce 2000, art. L. 225-47).

<sup>33</sup> Overall remuneration to be disclosed (see Hebert (2004) JBL 656 at 669).

<sup>34</sup> Viennot II recommends that annual report include a chapter disclosing compensation of officers (but only individual amount of attendance fees disclosed); includes description of payment policy.



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<sup>35</sup> Loi no 2001-420 du 15 mai 2001 inserted Code de Commerce 2000, arts. L. 225-102-1, 225-184.

<sup>36</sup> The remuneration of the PDG, which is determined by the board (Loi 1966, art. 110; Code de Commerce 2000, art. L. 225-47), may only be void if it is regarded as manifestly excessive or abusive; see Merle, *Droit commercial, Sociétés commerciales*, 9<sup>th</sup> edn., 2003, para. 420; Francis Lefebvre, *Mémento Sociétés commerciales*, 1999, para 1444.

<sup>37</sup> Loi no. 87-416 du 17 juin 1987 changed Loi 1966, arts. 208-1, 208-6, 208-8-1; now: Code de Commerce 2000, arts. L 225-177, 225-182, 225-185.

<sup>38</sup> Loi 1966, art. 90; Code de Commerce 2000, art. L. 225-18.

<sup>39</sup> No. 12 of the corporate governance principles since “Viennot II” (see note 53 below).

<sup>40</sup> Loi 1966, art. 160(3): dismissal was (and is) always possible (now: Code de Commerce 2002, art. L. 225-18(2); 225-105(3)). Vis-à-vis compensation upon dismissal, separate employment contract were inadmissible, unless this contract antedated the appointment by at least two years and related to actual employment. Furthermore, damages were only awarded in case of abusive revocation (see Arlt, Marie-Agnes, Frankreich, in: Susanne Kalss (ed.), *Vorstandshaftung in 15 europäischen Ländern*, Wien: Linde, 2005, 467 at p. 475 note 47)

<sup>41</sup> Loi no 94-126 du 11 février modified Loi 196, art. 160(3): this brought about a change in the possibility of claiming compensation upon dismissal, because, an employment contract with director to be admissible need not antedate the appointment by two years. Therefore, now it is (only) necessary that this occupation is distinct from the occupation as director.

<sup>42</sup> Code de Commerce 2000, art. L. 225-22(1) as amended by Loi no 2001-1168 du 11 décembre affirms the change from 1994.

<sup>43</sup> Liability without any restrictions (Loi 1966, art. 244; Commercial Code 2000, art. L. 225-251). Yet, one could also identify limits. According to Youssef Djehane, *Responsabilité des organes de la société et de surveillance en Europe: réflexions issues d'études de cas relatifs a la responsabilité des organes exécutifs en France*, *Zeitschrift für Schweizerisches Recht* 124 (2005), 523 these follow from an implicit business judgement rule (*droit à l'erreur*), reluctance to second guess corporate decision making (*le juge ne veut pas se substituer aux organes exécutifs des sociétés pour apprécier quel est l'intérêt social*), and discretion in ascertaining negligence. Since these limits are, however, innate for director's liability in all countries, deviation from the score of “1” is not justified.

<sup>44</sup> Loi 1966, arts. 101 *et seq.*; Commercial Code 2000, arts. L. 225-38 *et seq.*(self-dealing transactions, loans); furthermore there is a general fiduciary duty (“bonne foi”), see Guyon, *Droit des Affaires*, 10<sup>th</sup> edn., 1998, para. 324.

<sup>45</sup> Loi 1966, art. 245; today: Code de Commerce 2000, art. L. 225-252: Shareholder suit by single shareholder possible. There are also simplified representation provisions for an action by several shareholders (as a rule 5 %, Décret 1967, art. 200) and since 1994 (Loi no 94-679 du 8 août 1994) shareholder associations. However, from factual viewpoints, the shareholder suit has to date played hardly any role. This is because of questions of the burden of proof, but also and especially cost issues. It is particularly the lawyers' costs that are problematic, since the winner cannot in commercial

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courts demand them back from the loser. Since the shareholder who loses a suit has also no claim for reimbursement against the company, he is left burdened with his own lawyers' fees (contingency fees do not exist in France). In practice, therefore, a favourable alternative for shareholders is often to assert a claim for compensation for damages against members of the board through a so-called "action civile" in connection with criminal proceedings (see Merle, *supra* note 36, para. 416).

<sup>46</sup> The importance of shareholder suits may increase. First, a simplified procedure for injunctions may make enforcement easier (Code de Commerce 2000, art. L. 238-1 changed by Ordonnance no 2004-604 du 24 juin 2004). Second, the possibility for shareholder associations to combine shareholder votes and bring actions as representatives was facilitated (Loi no 2003-706 du 1er août 2003, art. 136 which amends Code monétaire et financier 2000, art. L. 452-1; *cf.* also Code de Commerce 2000, arts. L. 225-120, 225-252). Whether this *quasi* class action will acquire any practical importance is, however, not yet clear, because the shareholder association must itself bear the costs of activating shareholders.

<sup>47</sup> There is no explicit provision. The idea that a company is an "institution" (Code Civile, art. 1832: *instituée*) to some extent implies that the company serves social ends, and that the overall organisation with its manifold interests (*intérêt social*) matters. Yet, the law also talks about the company as a contract (Code Civil, art. 1832 and Code de Commerce 2000, art. L. 235-1: *contrat*). In general, management is entitled to discretion in its upholding of interests, so that it is possible that mainly the interests of shareholders are taken into account. This is also confirmed by the fact that since the late 1990s the argument that the *valeur actionnariale* is to be taken into account has been omnipresent (see Siems, *supra* note 5, at 236).

<sup>48</sup> Takeover defence comes about mostly preventively, since dual voting rights, vote caps, pre-emption rights and till recently also "golden shares" can considerably reduce the chance of a successful hostile takeover in the run-up to it. These, however, are not coded in this variable (but see, e.g., variables II 3). After the takeover bid there is no explicit duty of neutrality. Yet, the target must ensure that its actions, statements, and decisions do not harm the interest of the company as a whole or the principle of equal treatment of shareholders. Measures going beyond the ordinary conduct of business must also be notified to the regulatory authority. As a result, one can talk about a limited duty of neutrality (see Siems, *supra* note 5, at 241-2; Merle, *supra* note 36, para. 651).

<sup>49</sup> Loi no 89-531 du 2 août 1989 changed Loi 1966, art. 180(4), which is today Code de Commerce 2000, art. L. 225-129-3 (as amended by Ordonnance no 2004-604 du 24 juin 2005): the directors are now barred from any further use of an authorisation for a capital increase after the start of the takeover bid.

<sup>50</sup> Loi 1966, art. 183; Code de Commerce 2000, art. L. 225-132.

<sup>51</sup> Before 1985 only some criminal convictions had the consequence of disqualification; see Merle, *supra* note 36, para. 380.

<sup>52</sup> Personal bankruptcy or (just) disqualification according to Loi no 85-98 du janvier 1985, arts. 185, 192; Code de Commerce 2000, arts. L. 625-1, 625-8 requires one of the cases in Loi no 85-08, arts. 187-190, Code de Commerce, arts. L. 625-3 – 625-6. Usually, this, however, requires intent.

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<sup>53</sup> The rapports Viennot (1995 and 1999) and the rapport Bouton (2002) introduced the use of recommendations into French law. These recommendations have been consolidated in the *Principes de gouvernement d'entreprise résultant de la consolidation des rapports conjoints de l'AFEP (Association Française des Entreprises Privées) et du MEDEF (Mouvement des Entreprises de France)* (2003). According to no. 12 of these principles companies are also recommended to “comply or explain” the use of these principles. By 1999 this was already done by 92 % of the companies (see Monks & Minow, *Corporate Governance*, 2<sup>nd</sup> edn 2001, at p. 292).

<sup>54</sup> Loi no 84-148 du 1er mars 1984 has given the *ministère public* limited powers to act on behalf of the shareholders; Loi 1966, arts. 225, 226, 227; Code de Commerce 2000, arts. L. 225-230, 225-231, 225-233.

<sup>55</sup> Loi 1966, art. 153.

<sup>56</sup> Loi 94-679 du 8 août 1994 amended Loi 1966, art. 153; later Code de Commerce 2000, art. L. 225-96.

<sup>57</sup> Loi no. 2005-842 du 24 juillet 2005 amended Code de Commerce 200, art. L. 225-96.

<sup>58</sup> Loi 1966, arts. 153, 376, 239; Code de Commerce 2000, arts. L. 225-96, 236-9, 225-246.

<sup>59</sup> This follows *argumentum e contrario* from the other provisions (see notes 60, 61 below).

<sup>60</sup> Loi 1966, art. 175; Code de Commerce 2000, art. L 225-123: holders of registered shares can be given a double voting right in the articles of association, if the shares have been held for two years by the same owner.

<sup>61</sup> Loi 1966, art. 177; Code de Commerce 2000, art. L. 225-125.

<sup>62</sup> Cools, *supra* note 10, at 23-4: but possible in articles (i.e., opt in).

<sup>63</sup> Voting by interested shareholders was not restricted.

<sup>64</sup> Loi no 81-1162 du 30 décembre 1980 inserted Loi 1966, art. 157-1; now: Code de Commerce 2000, art. L. 225-101: restriction on voting in case of acquisition of assets of at least 10 % of the share capital within two years of registration. This is, however, usually not relevant for listed companies, which are the main focus of this study.

<sup>65</sup> Loi no 2001-420 du 15 mai 2001 amended Code de Commerce 2000, art. L. 225-38, 225-40: voting by interested shareholders if they hold more than 5 % (since Loi no 2003-706 du 1er août: 10 %) of the voting rights.

<sup>66</sup> Loi no 1993-1444 du 31 décembre 1993; then Règlement Général des Conseils des Marchés Financiers, art. 5-7-1 ; now Règlement général de l’Autorité des marchés financiers 2004, art 237-1.

<sup>67</sup> An explicit appraisal right by company law exists only in the case of a transfer restriction on shares (Loi 1966, art. 275; Code de Commerce 2000, art. L. 228-24). Yet, according to securities law, a public withdrawal procedure can operate where there are fundamental changes, such as changes of corporate form, mergers or divisions (since Loi du 2 août 1989: Règlement CBV, art. 5-5-5; then CMF Règlement général, art. 5-6-6; now Règlement général de l’Autorité des marchés financiers 2004, art. 236-6). It is, however, disputed whether in the event of conflict the majority shareholder is really affected by a legal duty to take over the shares, or else only a duty to notify the change to the regulatory

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authority (see Rock *et al.*, in Kraakman *et al.*, *The Anatomy of Corporate Law*, 2004, at 142; Cools, *supra* note 10, at 33).

<sup>68</sup> Loi 89-531 du 2 août 1989: mandatory bid in case of 1/3 of the target's shares since 1989; however, the bidder was only required to buy 2/3 of the shares (see Gardner (1992) ICCLR 93 at 96).

<sup>69</sup> Arrête du 15 mai 1992: Bidder is required to buy all shares; the mandatory bid was later regulated in Règlement Général des Conseils des Marchés Financiers (CMF), art. 5-5-2 and today in Règlement général de l'Autorité des marchés financiers 2004, art. 234-2.

<sup>70</sup> Private sale of control is not restricted. The provisions on *garantie du cours* (see, e.g., Merle, *supra* note 36, para. 653) only protect the minority by granting them a price guarantee.

<sup>71</sup> Loi no 87-416 du 17 juin 1987 changed Loi 1966, arts. 356, 356-1 (amended by Loi no. 89-531 du 2 août, Loi no. 96-597 du 2 juillet 1996, Loi no. 98-545 du 2 juillet 1998); now Code de Commerce 2000, arts. L. 233-6, 233-7 (amended by Ordonnance no 2004-604 du 24 juin 2004).

<sup>72</sup> Cass. comm. (Cour de Cassation, Chambre commerciale et financière) of 18.04.1961, JCP 1961 II, 69087 (*Piquard*): the concept of abuse of majority control forbids the taking of a decision against the overall company interest or for reasons of personal favouring of the majority over the minority. The exclusion of pre-emptive rights has become easier since Loi no 85-1321 du 14 décembre 1985 (new Loi 1966, arts. 186-1, 186-2); now Code de Commerce 2000, arts. L. 225-136, 225-137; and recently the amendments by Loi 2003-706 du 1er août 2005 and Ordonnance no 2004-604 du 24 juin 2004.

<sup>73</sup> Loi 1966, art. 360 *et seq.*; Code de Commerce 2000, arts. L. 235-1 *et seq.* on nullity of a decision; This does not concern the case of abuse of majority power. However, here too a decision may be null, or damages can be awarded (see Merle, *supra* note 36, para. 635; Cools, *supra* note 10, at 30).

<sup>74</sup> Loi 1966, art. 246; Code de Commerce 2000, art. L. 225-253: advance waiver of liability is not possible.

<sup>75</sup> Loi 1966, art. 90; Code de Commerce 2000, art. L. 225-18 is mandatory; see Dalloz, *Code de sociétés*, 21<sup>st</sup> edn., 2005, *Code de Commerce*, art. L. 225-18 para 14.

<sup>76</sup> The way the boards are structured is left to the company (choice between one and two tier model); independent directors are only addressed in the corporate governance guidelines.

<sup>77</sup> There is no explicit general provision in the company law on mandatory or default law. However, it is assumed that statutory company law constitutes, for reasons of protection of shareholders and third parties, an in principle comprehensive regulation, leaving scarcely any room for contractual freedom (*Cf.* D. Schmidt and Guyon in Lutter & Wiedemann, *Gestaltungsfreiheit und Gesellschaftsrecht*, 1998, at 291 *et seq.* and 297 *et seq.*). Although there are some trends which may indicate liberalisation, at least for public companies French company law is to a large extent mandatory.

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## Germany:

<sup>78</sup> Main laws on shareholder protection: AktG (German Law on Joint-Stock Companies), HGB (German Commercial Code), UmwG (German Transformation Act); WpHG (German Securities Trading Act), WpÜG (German Takeover Act), GCGC (German Corporate Governance Code); Main reforms: Gesetz über die Mitbestimmung der Arbeitnehmer (MitBestG), 4. 5. 1976, BGBl. I 1153; Gesetz zur Durchführung der Dritten Richtlinie des Rates der Europäischen Gemeinschaften zur Koordinierung des Gesellschaftsrechts (Verschmelzungsrichtlinie-Gesetz), 25. 10. 1982, BGBl. I 1425; Gesetz zur Durchführung der Vierten, Siebenten und Achten Richtlinie des Rates der Europäischen Gemeinschaften zur Koordinierung des Gesellschaftsrechts (Bilanzrichtlinien-Gesetz - BiRiLiG), 19. 12. 1985, BGBl. I 2355; Gesetz über den Wertpapierhandel und zur Änderung börsenrechtlicher und wertpapierrechtlicher Vorschriften (Zweites Finanzmarktförderungsgesetz), 26. 7. 1994, BGBl. I 1749; Gesetz für kleine Aktiengesellschaften und zur Deregulierung des Aktienrechts, 2. 8. 1994, BGBl. I 1961 (Kleine-AG-Gesetz); Gesetz zur Bereinigung des Umwandlungsrechts (UmwBerG), 28. 10. 1994, BGBl. I 3210; Gesetz zur weiteren Fortentwicklung des Finanzplatzes Deutschland (Drittes Finanzmarktförderungsgesetz), 24. 3. 1998, BGBl. I 529; Gesetz zur Kontrolle und Transparenz im Unternehmensbereich (KonTraG), 27. 4. 1998, BGBl. I 786; Gesetz zur Namensaktie and zur Erleichterung der Stimmrechtsausübung (NaStraG), 18. 1. 2001, BGBl. I 123; Unternehmensübernahme-Regelungsgesetz, 20.12.2001, BGBl. I 3822; Viertes Finanzmarktförderungsgesetz, 21.6. 2002, BGBl. I 2010; Transparenz- und Publizitätsgesetz (TransPuG), 19. 7. 2002, BGBl. I 2681; Gesetz zur Unternehmensintegrität und Modernisierung des Anfechtungsrechts (UMAG), 22. 9. 2005, BGBl. I 2802; Gesetz über die Offenlegung der Vorstandsvergütungen (VorstOG), 3. 8. 2005, BGBl. I 2267.

<sup>79</sup> § 119(4)(no.5) AktG.

<sup>80</sup> §§ 340, 353 AktG, see also Art. 7 of the 3<sup>rd</sup> Directive 78/855/EEC, Art. 5 of the 6<sup>th</sup> Directive 82/891/EEC.

<sup>81</sup> Now: §§ 13(1), 36(1), 125 UmwG.

<sup>82</sup> § 119(1)(no.6) AktG. This is the default rule. It is, however, possible to empower the board to take capital measures (§§ 182, 237 AktG).

<sup>83</sup> Only the sale of the whole assets required shareholder approval (§ 361 of the old AktG; now: § 179a AktG).

<sup>84</sup> Case law of the German Supreme Court based on the referral possibility in § 119(2) AktG: The management board is obliged to refer questions of conduct of business to the general meeting if serious interference with shareholders' rights and interests is likely. This is presumed if a sale accounts for ca. 80% of company assets (BGH, BGHZ 83, 122 (*Holz Müller*)); BGH, NJW 2004, 1860 (*Gelatine*)).

<sup>85</sup> The resolution for the annual dividend presupposes the adoption of the annual accounts. While the general meeting was competent for both decisions till 1937, it has since been responsible mostly only for the decision on use of the operating results (§§ 119(1)(no.2), 174(1) AktG). Adoption of the annual accounts is as a rule by the supervisory board (§ 172 AktG), unless it does not approve them or both boards resolve to leave adoption to the general meeting (§ 173

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AktG). Furthermore, management has considerable room for manoeuvre through the accounting provisions on ascertainment of profits (§§ 252-256, 279-283 HGB). However, interim dividends which could be distributed by the board only are not admissible (see Hüffer, Aktiengesetz, 2002, § 59 para 5).

<sup>86</sup> Half of the members of the supervisory board may not be elected by the shareholders because of employee co-determination (§ 96 AktG).

<sup>87</sup> But a transaction between members of the management board and the company has to be approved by the supervisory board (§ 112 AktG). This is, however, coded in the variable I 9 on board composition.

<sup>88</sup> § 122(2) AktG: 5% of the registered capital is needed.

<sup>89</sup> §§ 127, 126 AktG.

<sup>90</sup> §§ 122(2), 127, 126 AktG.

<sup>91</sup> § 122(1),(2) AktG: 5 %.

<sup>92</sup> A proxy to management was according to many voices inadmissible and therefore not used in practice (see Noack, (2001) ZIP 57 at 61-2).

<sup>93</sup> According to case law (OLG Karlsruhe, ZIP 1999, 750) and since NaStraG (2001), statutory law a proxy to the management is possible; It is *opinio juris* that by analogy with § 135(1)(s.2) AktG a management proxy can be used only if accompanied by binding instructions (Noack, (2001) ZIP 57 at 62). Yet, this was not examined in this variable.

<sup>94</sup> Usually, German shareholders appointed credit institutions as proxies. However, there was and is no general requirement for credit institutions to act as a proxy (cf. § 135(10) AktG).

<sup>95</sup> According to no. 2.3.4 of the GCGC (2002) exercising shareholders' voting rights shall be "facilitated" and the company shall "assist the shareholder in the use of proxies". Details are, however, not specified.

<sup>96</sup> A special regulation (Verordnung, 17. 6. 2003 (BGBl I S 885), which implements § 128(6) AktG, provides that credit institutions can ask for reimbursement of their costs.

<sup>97</sup> § 124(2)(s.2) AktG.

<sup>98</sup> §§ 340a *et seq.* AktG inserted by Verschmelzungsrichtlinie-Gesetz (1982).

<sup>99</sup> Since UmwBerG (1994): §§ 8, 63, 127, 192 UmwG.

<sup>100</sup> Continental company law is often accused of blocking trade in shares through the obligation to deposit them by a certain time before the start of the general meeting. This is not, however, accurate. In Germany a deposit obligation in the articles of association (§ 123(2),(3) AktG) only excludes exercise of voting rights by anyone who has not deposited their shares. Additionally, the UMAG (2005) replaces deposit by a mere notice.

<sup>101</sup> § 131 AktG.

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<sup>102</sup> § 67(5) AktG 1965; today: § 67(6) AktG.

<sup>103</sup> Since NaStraG (2001) shareholders in listed companies can no longer obtain information on fellow shareholders from the register of members (§ 67(6) AktG). The same applies to unlisted companies, unless a provision in the articles of association stipulates otherwise.

<sup>104</sup> Two tier system according to §§ 96, 95 AktG (since 1884 part of German company law).

<sup>105</sup> No. 5.4.2 of the GCGC (2002) states that not more than two members of the supervisory board shall be former members of the management board.

<sup>106</sup> Since 2005 the GCGC states that there shall be “an adequate number of independent members.”

<sup>107</sup> GCGC (2002): companies shall set up audit committees (No. 5.3.2); other committees can also be set up (No. 5.3.1); there are no special provisions on the independence of committees (No. 5.4) but note that committees are delegations from the supervisory only anyway.

<sup>108</sup> The normal remuneration of supervisory board members is set in the articles of association or by the general meeting (§ 113(1) AktG); Yet, more important (and usually higher) is the remuneration of the members of the management board. This is decided by the supervisory board (§ 87(1) AktG), unless there are stock options (this derives from the power of the general meeting for capital measures, see note 82 above).

<sup>109</sup> § 160(3)(no.8) AktG 1965: the total amount of compensation has to be disclosed in the report of the management.

<sup>110</sup> The BiRiLiG (1985) moved this provision to the German Commercial Code: § 272(1)(no.3),(3) HGB which is now § 285(no.9) HGB (rules on the explanatory notes of annual accounts).

<sup>111</sup> The TranPuG (1998) changed § 285(no.9) HGB. This change is, however, just a clarification (Regierungsentwurf TransPuG, BT-Drucks. 14/1869, at 53).

<sup>112</sup> Nos. 4.2.4, 5.4.5 of the GCGC recommend that the individual remuneration of all directors shall be disclosed. However, despite the general success of the GCGC (see von Werder, Talaulicar & Kolat, Compliance with the German Corporate Governance Code: an empirical analysis of the compliance statements by German listed companies, 13 Corporate Governance 178 (2005)), a significant number of companies opted out of this provision.

<sup>113</sup> The VorstOG (2005) made disclosure of individual remuneration compulsory.

<sup>114</sup> § 87(1) AktG: the remuneration of the members of the management board has to be reasonable in relationship to the duties of such member.

<sup>115</sup> § 192(2)(no.3) AktG as amended by KontraG (1998).

<sup>116</sup> The management and the supervisory board can be appointed for up to five years (§§ 84(1)(s.1), 102(1) AktG).

<sup>117</sup> No. 5.1.2 of the GCGC (2002): For first time appointments the maximum possible appointment period of five years should not be the rule.

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<sup>118</sup> The management board can be dismissed by the supervisory board only in the event of an important reason, which is presumed if the general meeting withdraws its confidence (§ 84(3) AktG). Dismissal of supervisory board members is, unless otherwise provided in the articles of association, possible only by three quarters of the votes cast, unless an important reason is present (§ 103(1),(3) AktG).

<sup>119</sup> According to § 93 AktG there is a comprehensive liability for negligence. A business judgement rule was inserted by UMAG (2005). However, it had always been the predominant view that the management board has discretion in company affairs (clarified by the German Supreme Court in BGHZ 135, 244).

<sup>120</sup> For example, § 88 AktG (prohibition to compete with the company), §§ 89, 115 AktG (prohibition to grant a credit to the board members), § 112 (self-dealing transactions). Furthermore, there is a general fiduciary duty (“Treupflicht”), see BGHZ 13, 188, 192; BGHZ 20, 239, 246; BGHZ 49, 30, 31; Fleischer WM 2003, 1045, 1046.

<sup>121</sup> According to § 147(1) AktG shareholders with 10% of the registered capital can enforce claims. Only a few special provisions in law on groups of companies have to date allowed a shareholder to sue directly (§§ 309(4), 310(4); 317(4), 318(4) AktG).

<sup>122</sup> KonTraG (1998) reduced the hurdle from 10 % to 5 % if facts suggest the suspicion of gross breach of duty (§ 147(3) AktG).

<sup>123</sup> The UMAG (2005) enables a shareholder minority with a 1% share of the registered capital or a stock-exchange value of €100,000 to bring action in its own name (§ 147a AktG).

<sup>124</sup> The prevailing view stresses that not only shareholder interests are to be taken into account (see, e.g., Mülbart, (1997) ZGR 129 at 144 *et seq.*). Until the 1965 reform, this position was still explicitly codified in a general-welfare clause (old § 76 AktG). But according to the prevailing opinion, even the repeal of this clause did not aim at any material change since according to the tenor of the ministerial draft it was anyway accepted that the management had to take account in its actions of the interests of shareholders, employees and the general public. A similar finding comes from focusing – as some advocate – on the enterprise interest or the “firm as such”. Thus, questions of the conduct of business ought not to concern maximising shareholders’ profit alone. Yet, since stakeholders cannot enforce it, it is eventually for the management board to balance the different interests.

<sup>125</sup> According to some academics there was a limited unwritten duty of neutrality prior to the Takeover Act (2001). However, there was no juridical confirmation of this position.

<sup>126</sup> The Takeover Act (inserted by the Unternehmensübernahme-Regelungsgesetz (2001)) lays down that after the filing of a takeover bid management must take the interests of the target company into account (§ 3(3) WpÜG). The legislative materials see this “interest of the firm” (see also No. 3.7 of the GCGK) in the sense of a stakeholder position, embracing *inter alia* the interests of shareholders and of employees.

<sup>127</sup> § 186(1)(s.1) AktG.



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<sup>128</sup> (1) GmbH-Novelle 1980 (Gesetz zur Änderung des GmbHG und anderer handelsrechtlicher Vorschriften v 4. 7. 80 (BGBl I 836), ÄndG 1980): (a) § 76 III 3 AktG with §§ 283(4), 283b(2) StGB: disqualification for member of the management board in case of conviction for certain insolvency crimes; in some cases negligence is sufficient; (b) § 76 III 4 AktG with § 35 GewO (Gewerbeordnung): disqualification for member of the management board possible if he/she also carries on its own trade (which is usually not the case), is unreliable and disqualification is necessary to protect the public interest or the employees; (2) for members of the supervisory board there are no provisions on disqualification (cf. § 100 AktG).

<sup>129</sup> § 161 AktG inserted by TransPuG (2002).

<sup>130</sup> Only in the exceptional case that the management board does not have the prescribed number of members, courts may intervene (§ 85 AktG).

<sup>131</sup> There is no general power to intervene (but only specific and limited competences, e.g., based on securities and insolvency law).

<sup>132</sup> § 179 (amendments of the articles of association), § 263(1)(no.2) (liquidations), § 340(2) AktG (mergers).

<sup>133</sup> Now: § 65(1) UmwG (mergers).

<sup>134</sup> §§ 12(2), 134(1)(s.1) AktG.

<sup>135</sup> § 12(2) AktG 1965: multiple voting rights that existed before 1965 remained valid; new multiple voting rights required state approval.

<sup>136</sup> § 12(2) AktG as amended by KonTraG (1998): existing multiple voting rights remained valid until 2003; new multiple voting rights cannot be granted.

<sup>137</sup> § 134(1)(s.2) AktG: voting caps possible.

<sup>138</sup> § 134(1)(s.2) AktG as amended by KonTraG (1998): existing voting caps remained valid until 2000; new shares with voting caps cannot be granted for listed companies (which are the focus of this study).

<sup>139</sup> Cumulative voting does not exist as a default or mandatory rule. However, according to some academics it can be provided in the articles of association (see Hüffer, *supra* note 85, § 133 para. 33).

<sup>140</sup> §§ 136, 142(1),(2), 243(2) AktG prohibits interested shareholder voting in some cases.

<sup>141</sup> Squeeze out inserted by Unternehmensübernahme-RegelungsG (2001): §§ 327a *et seq.* AktG (95 % threshold).

<sup>142</sup> Mandatory bid (§§ 35(1), 29(2) WpÜG) inserted by Unternehmensübernahme-Regelungsgesetz (2001).

<sup>143</sup> Private sale of control not limited in German company and takeover law (cf. §§ 1, 2(1) WpÜG which limits its scope to public offers).

<sup>144</sup> §§ 20, 21 AktG (25 % threshold).

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<sup>145</sup> § 21 WpHG (5 %) inserted by Zweites Finanzmarktförderungsgesetz (1994).

<sup>146</sup> For instance, exclusion of pre-emption rights is generally in the discretion of the general meeting; only abuse-test according to § 138 of the German Civil Code (BGB) (good morals provision), §§ 243 II, 53 a AktG (see Hüffer, supra note 85, § 186 para. 25).

<sup>147</sup> Case law according to which “good reason” for exclusion of pre-emption rights is necessary (see BGHZ 71, 40; BGHZ 83, 319); see now also § 186(4)(s.2) AktG.

<sup>148</sup> The exclusion of the pre-emption right for capital increases of listed companies has been facilitated by the Kleine-AG-Gesetz (1994) (new § 184(4)(s.4) AktG); There has also been case law which loosens the requirements on exclusion of the pre-emption right on authorised capital, since the authorisation need only describe the reasons for the exclusion abstractly (BGHZ 125, 239 (*Deutsche Bank*); BGHZ 136, 133 (*Siemens/Nold*)). Yet, coding of this is difficult, because in some decisions (which did not deal with pre-emption rights) the German Supreme Court has re-stated the fiduciary duty of shareholders (BGHZ 129, 136 = NJW 1995, 1739 (*Girmes*)).

<sup>149</sup> §§ 241 *et seq.* AktG.

<sup>150</sup> It could be argued that since 2001 this score should be downgraded because of the decisions of the German Supreme Court in BGHZ 146, 179 (*MEZ*); BGH, NJW 2001, 1428 (*Aqua-Butzke*) (in general, action can be brought against resolutions of the general meeting with which the wrongly refused information was connected. A problem with this is that these actions can block entry in the commercial register, bringing the danger of abuse of law. This has been restricted by the German Supreme Court; similar now UMAG (2005): § 243(4)(s.2) AktG).

<sup>151</sup> Liability cannot be excluded in the articles; see § 93(4) AktG.

<sup>152</sup> Company law is mandatory (see note 154 below).

<sup>153</sup> Company law is mandatory (see note 154 below).

<sup>154</sup> Company law mandatory unless otherwise provided (§ 23(4) AktG 1965; today: § 23(5) AktG).

<sup>155</sup> The Kleine-AG-Gesetz (1994) has led to some liberalisation. This concerns, however, mainly non-listed companies, which are not the focus of this study.

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**India:**

<sup>156</sup> Main laws on shareholder protection: Companies Act, 1956 (CA 1956) as amended from time to time; Table A Regulations: Schedule I of Companies Act, 1956; Securities Contract (Regulation) Act, 1956, Securities Contract (Regulation) Rules, 1957, Listing Agreement Form, in particular Clause 49 introduced in 2000; Securities and Exchange Board of India ('SEBI') Act, 1992; SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997; Companies (Appointment of Small Shareholders' Director) Rules, 2001; Companies (passing of the resolution by postal ballot) Rules, 2001; Companies {Disqualification of Directors under section 274(1)(g) of the Companies Act, 1956} Rules, 2003.

<sup>157</sup> CA 1956, S. 31.

<sup>158</sup> CA 1956, S. 391.

<sup>159</sup> CA 1956, S.94 (alteration of capital), S.100 (reduction of capital).

<sup>160</sup> CA 1956, S. 293 (1) (a). requires shareholders' approval in case of sale or disposal of "whole, or substantially the whole of the undertaking of the company, or where the company owns more than one undertaking, of the whole, or substantially the whole, of any such undertaking". Sale of a mere asset or property will not be sale of an undertaking. For a theoretical discussion of the meaning of the expression 'undertaking' see, *Re, Yellamma Cotton Woollen and Silk Mills Co. Ltd.*, (1970) 40 Com Cases 466. The expression 'undertaking' used in this section is liable to be interpreted to mean 'the unit', the business as a going concern, the activity of a company duly integrated with all its components in the form of assets and not merely some asset of the undertaking: *Dhanuka J. in P.S. Offshore Inter Land Services Pvt Ltd v Bombay Offshore Suppliers and Services Ltd* (1992) 75 Com Cases 583, (Bom). If the question arises as to whether the major capital assets of the company constitute the undertaking of the company, the courts do not seem to specify a qualifying percentage, but emphasise that the test to be applied would be to see 'whether the business of the company would be carried on effectively even after the disposal of the assets in question or whether a mere husk of the undertaking would remain after the disposal of the asset?'

<sup>161</sup> CA 1956, Schedule I, Table A, Art. 85: The Company in general meeting may declare dividends, but no dividend shall exceed the amount recommended by the board. Art.86: The Board may from time to time pay to the members such interim dividends as appear to it to be justified by the profits of the company.

<sup>162</sup> CA 1956, S.255(1) (b) and (2).

<sup>163</sup> There is no provision for shareholders approval for directors self-dealing but see notes for variable 18.1, 'approval of the Central Government' infra.

<sup>164</sup> CA 1956, S. 188 (2) [prescribes a hurdle of 20% or not less than 100 members contributing to paid-up capital of not less than Rs. 1 lakh].

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<sup>165</sup> CA 1956, S.257 (1) and S. 284 (2). S.257 entitles any member to propose the appointment of himself or another as a director by sending a special notice (14 days) at a general meeting. In the case of S.284, it entitles a member to propose appointment of someone instead of a director proposed to be removed under that section.

<sup>166</sup> Because a person proposing appointment of himself or another under S.257 (1) as amended by the Amendment Act of 1988 is now required to deposit a fee of Rs. 500/- which is refunded only if he/the person he proposes succeeds in getting elected as a director.

<sup>167</sup> Because the Amendment Act of 2000 has introduced new proviso to S. 252 (1), which facilitates election of a small shareholders' director. For more details see: Proviso to S. 252 (1) read with the Companies (Appointment of Small Shareholders' Director) Rules, 2001.

<sup>168</sup> CA 1956, S.188 (1).

<sup>169</sup> CA 1956, S.169 (4) (a).

<sup>170</sup> CA 1956, S.169 (6).

<sup>171</sup> CA 1956, s. 176 (Proxies) read with s.179 (Demand for poll) and Art 61 of Table A of Schedule I. Proxies have no right to speak at the general meeting and can participate in deciding only in the case of a written vote, unless the articles of association of the company provide otherwise [see CA 1956, s. 176(1) proviso (c)]. A poll could be demanded by at least 5 members having the right to vote on the resolution present in person or through proxy [S.179 (1) (a)].

<sup>172</sup> Because the position with regard to demand for poll has been marginally affected since the Amendment Act of 1988: now a poll can be demanded only by members present in person or through proxy, holding 1/10<sup>th</sup> voting power or shares of Rs. 50,000/- [Amended S.179 (1) (a)] as opposed to 5 members until 1987.

<sup>173</sup> Because Clause 34 (f) of the Listing Agreement as on 1985 (which is identical to the clause 34 (f) of the Listing Agreement of 2005) requires listed companies to send out proxy forms to shareholders and debenture holders in all cases, such proxy forms being so worded that a shareholder or debenture holder may vote either for or against each resolution.

<sup>174</sup> An improvement in the score is due to the Listing Agreement, Clause 49 Annexure 3 (d) as added by Circular No. SMDRP/Policy/Cir-10/2000 dated 21-2-2000: which mentions certain non-mandatory requirements which included postal ballot in case of certain resolutions (e.g. matters relating to alteration in the memorandum of association of the company, sale of whole or substantially the whole of the undertaking; sale of investments in the companies, where the shareholding or the voting rights of the company exceeds 25%; corporate restructuring, matters relating to change in management etc.). [Please note that the changes brought about by Clause 49 of Listing Agreement on corporate governance have been coded in this index from 2001, because although it was added by the SEBI, vide its circular dated 21-2-2000, its implementation was to occur from the year 2001. see circular no. SMDRP/POLICY/CIR-10/2000 dated 21-2-2000 for details of the implementation schedule as per the sizes of the companies].

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<sup>175</sup> CA 1956, S.192 A, introduced by the Amendment Act of 2000 w.e.f. 15/6/01 to be read with Companies (Passing of the Resolution by Postal Ballot) Rules, 2001 (introduced w.e.f. 10-05-2001) as amended on 11th October, 2001 provide that certain important resolutions specified in Rule 4 'shall' be passed by postal ballot [these include most of the important resolutions e.g. alteration in the Object Clause of Memorandum, certain alteration in the Articles of Associations, buy-back of own shares, sale of whole or substantially the whole of undertaking of a company, giving loans or extending guarantee or providing security in excess of the limit prescribed under sub-section (1) of section 372A; election of a director under sub-section (1) of section 252 etc.]. This has led to a further improvement in the score.

<sup>176</sup> CA 1956, S.31 read with S.189 (2). Notice of meeting for alteration of articles should disclose full facts and be accompanied by a copy of the proposed amendments: *Bimal Singh Kothari v. Muir Mills Co. Ltd.*, AIR 1952 Cal 645. Where a special resolution is sought to be passed adopting a new set of articles in lieu of the existing one, it is not necessary to send a copy of the entire set of new articles but sufficient particulars must be furnished of any alteration of rights, duties and powers, substantial changes in the remuneration of directors, or other managerial personnel and other matters which ought properly to be brought to the notice of the shareholders or are likely to affect the financial position of the company: *Bimal Singh Kothari v. Muir Mills Co. Ltd.*, AIR 1952 Cal 645; *Narayanlal Bansilal v. Maneckji Petit Mfg. Co.*, AIR 1931 Bom 354 etc.

<sup>177</sup> CA 1956, S. 393 (1) (a).

<sup>178</sup> There is no explicit right to ask questions. Although general question and answer sessions at the general meetings are usual.

<sup>179</sup> CA 1956 S. 163 (2) (a) and Section 153B. Access to the register of shareholders is possible by any member or debenture-holder without fee [S. 163 (2) (a)]. Where any shares in, or debentures of, a company are held in trust by any person (hereinafter referred to as the trustee), the trustee is required to make a declaration to the public trustee [S.153B (1) read with Ss. Sections 153A and 187B].

<sup>180</sup> An improvement in the score is due to the introduction of S.187C by the Amendment Act of 1974 (w.e.f. 1-2-1975); CA 1956 S. 163 (2) (a), Section 153B and the new S. 187C, which required a person whose name was in the register of members of a company as a holder of shares but who did not hold the beneficial interest in those shares to make (within 30 days) a declaration to the company specifying the name and other particulars of the person who holds beneficial interest in those shares and the company was required to make a note of such declaration in its register of members.

<sup>181</sup> A decrease in the score is attributable to the Amendment Act of 2000 (w.e.f. 13-12-2000), that has rendered the Sections 153A, 153B, 187B and 187C inoperative w.e.f. the enforcement of this amendment. As a result, the requirements of declaration about the ostensible or beneficial owner have been dispensed with. But in terms of CA 1956 S. 163 (2) (a) access to the register of shareholders is still possible by any member or debenture-holder without fee [S. 163 (2) (a)].

<sup>182</sup> It is not entirely clear, whether or not this right is affected by proxy rules, but in any case, considering the nominal fee for non-members to access register of members, functionally, this right is not affected by proxy rules, hence the

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score. See CA 1956 S. 163 (2) (b): access to the register of shareholders is possible by any person other than a member on payment of (Re.1/- until 1987 and) Rs.10/- (since 1988).

<sup>183</sup> Clause 49.I (A) of the Listing Agreement (as added by the SEBI, vide its circular no. SMDRP/POLICY/CIR-10/2000) requires the Board of directors of the company to have an optimum combination of executive and non-executive directors with not less than fifty percent of the board of directors comprising of non-executive directors..

<sup>184</sup> Clause 49.I (A) of the Listing Agreement (introduced from 2000) prescribes that where the Chairman of the Board is a non-executive director, at least one-third of the Board should comprise of independent directors and in case he is an executive director, at least half of the Board should comprise of independent directors.

<sup>185</sup> A new Section 292A inserted by the Amendment Act of 2000 (w.e.f. 13.12.2000) requires every public company having a paid up capital of 5 crores or more to constitute an “Audit Committee” of the Board of Directors of which at least two-thirds of the members shall be directors, other than managing or whole-time directors, hence the improvement in the score.

<sup>186</sup> Clause 49. II of the Listing Agreement requires a listed company to set up a qualified and independent “Audit Committee”. [Note that S.292A requires only those listed companies that have a paid up capital of 5 crores or more to constitute an “Audit Committee”.] Further, the non-mandatory requirements of Clause 49 of the Listing Agreement contained in Annexure 3 (now Annexure I D), suggests that the board may set up a remuneration committee, hence a further improvement in the score

<sup>187</sup> Changes to CA 1956, ‘Schedule XIII Part II, on Remuneration payable to Managing or whole-time Director or a Manager’ brought about by notification no. GSR 36 (E) inserted from 16-1-2002 suggest that at least in cases of companies not making profit or making inadequate profit, setting up of an independent Remuneration Committee is necessary to facilitate making of payments to these managerial personnel, hence a further marginal improvement in the score.

<sup>188</sup> CA 1956, S. 309. Remuneration of directors can be determined only by the articles of association or a resolution of the company in a general meeting (whether by ordinary resolution or if articles so require, by special resolution).

<sup>189</sup> Annual reports of companies have to furnish details about the remuneration to the directors as a whole, including salaries, commissions, and directors’ fees.

<sup>190</sup> Now Clause 49.IV Sub-clause (E) of Listing Agreement requires detailed disclosure of remuneration of directors in the section on corporate governance of the Annual Report.

<sup>191</sup> CA 1956, Ss. 198 and 309 (4).

<sup>192</sup> A new section 79A was introduced by the Companies (Amendment) Act, 1999 with effect from 31-10-1988, which enables companies to issue ‘sweat equity’ to employees and directors at a discount or for consideration other than cash – including ‘value additions by whatever name called’ – thus facilitating issuance of stock options for employees and directors to reward performance that has led to an improvement in the score.

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<sup>193</sup>See CA 1956 S.284 for dismissal of directors and S.318 for a possibility of claim by managing director or a director in the whole-time employment of the company for compensation in case of dismissal.

<sup>194</sup>Standard of skill and care: There are no objective standards of skill and care which will help in determining whether a director has been negligent. Instead, there are general principles which may be applied depending on the facts of each case. [see A. Ramaiya Guide to the Companies Act, 15th Edition: 2001 at pages 2570-2574, where number of English cases have been referred including *Norman v. Theodore Goddard* [1991] B.C.L.C 1027 and *D'Jan of London Ltd. Re* (1994) 1 BCLC 561 (CA), but not Indian cases on this direct point, apart from some older cases which seem to suggest elements of subjectivisation, e.g. *Govind Narayan Kakade v. Rangnath Gopal Rajopadhye* AIR 1930 Bom 572]. However, shareholders can bring action against the directors of a company to find them liable for conducting the affairs of the company in a manner prejudicial to public interest or in a manner oppressive to any member/s (CA 1956, section 397). They can also bring an action for finding the directors liable for mismanagement of the company (within the meaning of S.398). The criteria for bringing an action under S. 397 are narrower as compared to S. 398. See the decision of the Supreme Court in *Needle Industries (India) Ltd v. Needle Industries Newey (India) Holding Ltd* (1981) 51 Com Cases 743 (SC). Unlike S.397, for a successful action under S.398 the shareholders need not satisfy the court of circumstances necessitating winding up or even oppression of shareholders. It was recommended by the Company Law Committee to provide relief against mismanagement which cannot otherwise be suitably dealt with under any other provision of the Act. In order to grant relief under this section, it is enough if the affairs of the company are conducted in a manner prejudicial to the interests of the company or to the public interest. Cf. *Richardson & Cruddas Ltd v. Haridas Mundra*, (1959) 29 Com Cases 549: AIR 1959, Cal 695. See also the following cases for some instances of mismanagement for which relief was granted by courts under section 398: *Chander Krishan Gupta v. Pannalal Girdhari Lal Pvt. Ltd.* (1984) 55 Com Cases 702; *Malayalam Plantations (India) Ltd., Re.* (1991) 5 Corpt LA 361 (Ker); *Akbar Ali A. Kalvert v. Konkan Chemicals Pvt Ltd.* (1997) 88 Com Cases 245 (CLB); *AIR Asiatic Ltd., Re.* (1994) 3 Comp LJ 294 (CLB).

<sup>195</sup>Directors owe fiduciary duty to the company to act bona fide in the best interest of the company and to prefer its interests over their own where they conflict [see. A. Ramaiya supra at pg. 2520]. The Supreme Court has recognised the fiduciary position of directors in *Chevalier Iyyappan v. Dharmodayan Co., Trichur*, AIR 1966 SC 1017. See also *Needle (Industries) India Ltd. V. Needle Industries Newey (India) Holding Ltd* (1981) 51 Com Cases 743 (SC).

<sup>196</sup>Derivative suits: Ordinarily the directors of the company are the only persons who can conduct litigation in the name of the company (rule in *Foss v. Harbottle*) but there are certain well known exceptions to this rule in which cases the shareholders may take action. For instance, matters which are ultra vires (e.g. see *Jahangir Rustomki Modi v. Shamji Ladha*, (1867) 4 Bom OC 185; *Dr. Satya Charan Law v. Rameshshwar Prosad Bajoria* (1950) 20 Com Cases 39, AIR 1950 FC 133), acts constituting fraud on minority, where action of majority is illegal or where articles require super majority. See also *Shanti Prasad Jain v. Union of India*, (1973) 75 Bom LR 778 for when the right to start an action on the company's behalf in exceptional cases reverts to the general meeting.

Shareholders actions under S.397/398: CA S.399: The threshold for bringing shareholders' action under Ss. 397/398 is the possession of 1/10<sup>th</sup> of voting right or of the total number of its members or a minimum of 100 members whichever

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is less [S.399 (1) (a)]. However, the Central Government may, if in its opinion circumstances exist which make it just and equitable so to do, authorise any member/s of the company to apply to the Company Law Board under section 397 or 398, even if they don't constitute the requisite shareholding or number to take action under S.399 (1) (a) [See S.399 (4)]. Further, apart from an action u/Ss.397 or 398, in cases where the jurisdiction of civil courts over matters is not expressly or impliedly excluded by CA, 1956, shareholders may take action in ordinary civil courts which does not require the compliance of S.399 e.g. civil suit to challenge the validity of a notice calling a meeting: *Niranjan Singh v. Edward Ganj Public Welfare Association Ltd.*, (1977) 47 Com Cases 285 (P&H); to save the company from two warring factions among the Board of directors: *Jayanthi R. Padukone (Mrs.) v. I.C.D.S. Ltd.* AIR 1994 Kant 354.

<sup>197</sup>The principle that the board has to pursue the interests of the company as a whole is normally understood in such a way as to refer to the interests of the shareholders but a modern corporation under the Indian law has been seen as a 'social organisation which owes duties and responsibilities towards that society in which it operates' (see *National Textile Workers Union v. P.R. Ram Krishnan* AIR 1983 SC 75). A company is not only considered to be responsible towards shareholders but also towards workers, consumers and other members of the society and it should be guided by national and developmental policies (see *Surendra Nath: Shareholder's Rights and Protection Under Company Law*; Deep and Deep Publications: 1992: pg. 6-8).

<sup>198</sup> Clause 40. B of the Listing Agreement and now Regulation 23 of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997. In May 1990, the Clause 40 of the Listing Agreement was replaced by Clauses 40A and 40B, contained the principles of neutrality. Now, the Regulation 23 of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 issued by SEBI vide F.No. SEBI/LE/XVII/1/541/97 (w.e.f. 20-2-1997) contains the principles of strict neutrality.

<sup>199</sup> See CA 1956, S. 81, and since 2000 see also Clause 23 of the Listing Agreement.

<sup>200</sup>An improvement in the score is due to the introduction of CA 1956, S.274 (1) (g) to be read with Companies {Disqualification of Directors under section 274(1)(g) of the Companies Act, 1956} Rules, 2003. The provisions of Section 274 of the Companies Act, 1956 were amended by Companies (Amendment) Act, 2000 (w.e.f. 13-12-2000) and a new clause (g) was inserted to sub-section (1) of this section. As a result a director of a public company, which has made defaults in filing of annual accounts and annual returns and in repaying deposits/interests thereon on due date or redeeming its debentures on due date or in paying dividend for period specified in that section, is disqualified to be appointed as director of public companies for a period of five years.

<sup>201</sup>Voluntary Code: The Confederation of Indian Industries took an initiative in the area of corporate governance in the early 1990s and established a task force in 1995 to prepare a voluntary code of Corporate Governance in India. The draft of what is known as the 'Desirable Code of Corporate Governance' or 'Desirable Corporate Governance: A Code' was published in April 1997 and the final code was released in April 1998. (By 2000 over 25 leading and forward looking companies had already reviewed and/or complied with the voluntary Code.)



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<sup>202</sup> Listing Agreement, Clause 49.VII (now Clause 49.VI) and 49.VIII (now Clause 49.VII). As this requirement is now a part of the Listing Agreement having legal binding on listed companies to either comply or explain non-compliance, this has led to an improvement in the score.

<sup>203</sup> CA 1956, Ss. 295. Prior authorisation of the Central Government is necessary for loans etc. to directors (see S. 295 for details).

<sup>204</sup> With the introduction of Proviso to S.297 (1) by the Amendment Act of 1974 (w.e.f. 1-2-1975) in the case of companies with a paid up share capital of 1 crore or more, prior authorisation of the Central Government is also necessary for substantial contracts with directors (see S. 297 for details). CA 1956, Ss. 295 and 297 together now require prior authorisation of the Central Government for director's self dealing of substantial transactions, this has therefore led to an improvement in the score.

<sup>205</sup> CA 1956, Ss. 269, 388. The appointment of managerial personnel, including managing directors, whole-time directors or managers of a public limited company, required the prior approval of the Central Government when they were appointed for the first time but *note* that their re-appointment did not require any such approval.

<sup>206</sup> An improvement in the score is due to the amendments to S.269 of CA1956 by the Amendment Act of 1974 (w.e.f. 1-2-1975) read with S. 388 of CA1956. The amended S.269 extends the requirement of approval to re-appointments as well.

<sup>207</sup> A decrease in the score is attributable to Schedule XIII of CA 1956 and the amended S.269. With a view to give freedom to companies with respect to managerial appointments, the Amendment Act of 1988 introduced Schedule to the CA 1956 (w.e.f. 1-6-1988), the Schedule XIII and amended S.269. From the commencement of this Amendment Act (w.e.f. 1-6-1988), the requirement of prior approval of Central Government has been limited to cases of appointment not complying with the provisions of Schedule XIII. The said Schedule has been amended over the years (with sweeping changes in 1994, 2000 and then in 2002) to give greater freedom to companies in this regard inter alia by increasing the amount of remuneration that can be paid to the managerial personnel

<sup>208</sup> CA 1956, Ss. 400 & 401 to be read with Ss.397, 398. The central government can generally intervene for the protection of shareholders against oppression of shareholders or mismanagement of company which is prejudicial to public interest or interest of the company. (This includes powers of the Central Government (now delegated to Regional Directors), to make representations to the court [now the Company Law Board (CLB)] hearing an application u/Ss. 397/398 upon receiving notice of it u/S.400 or to itself apply to the court (now CLB) for an order under section 397 or 398 against oppression or mismanagement of affairs of a company, or cause an application to be made for such an order by any person authorised by it in this behalf u/S.401.)

<sup>209</sup> See CA 1956, S.174.

<sup>210</sup> CA, 1956, S. 31 (1), 391 (2), S.433 (a).

<sup>211</sup> CA 1956: Art 56 of Table A Regulations under Schedule I and S.87 (1) (b).

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<sup>212</sup> CA 1956, Ss. 88, 89.

<sup>213</sup> CA 1956, S. 88 read with S.90 and S.89.

<sup>214</sup> The introduction of S.86 (a) by the Amendment Act of 2000 (w.e.f. 13-12-2000) and other incidental changes, including deletion of S.88 read with Companies (Issue of Shares with Differential Voting Rights) Rules, 2001 has led to a decrease in the score.

<sup>215</sup> There is no mandatory law or even a default rule but CA 1956, S.265 merely provides an option to adopt proportional representation.

<sup>216</sup> The Amendment Act of 2000 has introduced new proviso to S. 252 (1) which facilitates election of a small shareholders' director, which has led to an improvement in the score. For more details see: Proviso to S. 252 (1) read with the Companies (Appointment of Small Shareholders' Director) Rules, 2001.

<sup>217</sup> See CA 1956, S.395.

<sup>218</sup> Clauses 40A and 40B (of the Listing Agreement) incorporated in May 1990. From November 1994 these requirements were contained in Regulation 9 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1994.

<sup>219</sup> A decrease in the score is due to the introduction of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997, which brought the trigger to 15% instead of 10%, see Regulation 21.

<sup>220</sup> The Clause 35 of the Listing Agreement as of 1985 required the company to file with the exchange after each AGM a schedule in the form prescribed by the exchange showing distribution separately for each kind of its securities listed on the exchange as at the date of the AGM and the names and holdings of large holders as required therein.

<sup>221</sup> An improvement in the score is due to the introduction of a new Clause 40A in the Listing Agreement Form in May 1990. According to this clause, any person acquiring 5% or more of the shares in a company was to notify the stock exchange of such holding. For position from 1994: see SEBI (Substantial Acquisition of Shares and Take-overs) Regulation, 1994 (Reg 6) and from 1997 see SEBI (Substantial Acquisition of Shares and Take-overs) Regulation, 1997 (Regulations 6 and 7).

<sup>222</sup> Minority shareholders in a company can bring action against the majority decisions of the general meeting if that amounts to the affairs of the company being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members (CA 1956, section 397). They can also bring an action for mismanagement of the company within the meaning of S.398. This includes circumstance in which a material change that has taken place in the management or control of the company, whether by an alteration in its Board of directors or manager, or in the ownership of the company's shares, or in any other manner whatsoever, and it is claimed that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to public interest or in a manner prejudicial to the interests of the company.

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Mere illegal, invalid or irregular acts by themselves, unless they are oppressive to any shareholder or prejudicial to the interests of the company or to public interest, cannot support a petition u/397. But a series of illegal acts following upon one another can, in the context, lead justifiably to the conclusion that they are a part of the same transaction, of which the object is to cause or commit the oppression of persons against whom these acts are directed: *Sheth Mohanlal Ganpatram v. Shri Sayaji Jubilee Cotton and Jute Mills Co. Ltd.*, (1964) 34 Com Cases 777 (Guj). The court only intervenes in very exceptional cases, e.g. where there is fraud, or oppression – ‘Thus, where anything has been done irregularly, which the company would by ordinary resolution do regularly, the court generally refuses to interfere at the suit of a minority’. *Bahoo J. Coyajee v. Shanta Genevieve Prommeret Parulekar*, (1991) 3 Bom LR 319.

Amending articles of association designed to enlarge strength of one group of directors to the prejudice of another: held oppressive: *Balasundaram (V.G.) v. New Theatres Carnatic Talkies Pvt. Ltd.* (1993) 77 Com Cases 324 (Mad). See also *Mathrubhumi Printing and Publishing Co. Ltd. v. Vardhaman Publishers Ltd.* (1992) 73 Com Cases 80 (Ker-DB)

Objection of small number of shareholder to a scheme or arrangement under S.391 (which includes mergers/divisions etc.): Interest of individual shareholder has to give way to the interest of the general body of shareholders and creditors. The scheme of amalgamation in this was opposed only by less than 2% of the members. The decision to merger had all round approval and was therefore allowed to be completed: *State Bank of India v. Alstom Power Boliers Ltd.*, (2003) 43 SCL 449 (Bom). See also *Shrinivas Fertilisers Ltd. V. Khaitan Chemicals & Fertilisers Ltd.*, (2003) 2 Com LJ 27 (MP); *Gujarat Lease Financing Ltd. Re.*, (2002) 50 CLA 150

For the issue of further capital and impropriety in right issues, see *Dipak G. Mehta v. Anupar Chemicals (India) Pvt. Ltd.* (1999) 98 Com Cases 575 (CLB-PB); *Needle (Industries) India Ltd. V. Needle Industries Newey (India) Holding Ltd* (1981) 51 Com Cases 743 (SC); *Namita Gupta v. Cachar Native Joint Stock Co.* (1999) 34 CLA 287.

In addition to the extraordinary and summary proceedings under Ss.397 and 398 of the CA 1956, the shareholders may under certain circumstances bring ordinary civil suits against majority decisions. Following are some instances of matters over which civil suits were allowed to be filed: to challenge the election of a director: *Niranjan Singh v. Edward Ganj public Welfare Association Ltd.*, (1977) 47 Com Cases 285 (P&H); Affirmed in (1981) 51 Com Cases 475 (P&H-DB); to challenge the appointment and removal of directors: *T.L. Aurora v. Ganga Ram Agarwal*, (1988) 63 Com Cases 736 (Del); for a declaration that a meeting was illegal, *Ravinder Kumar Jain v. Punjab Registered (Iron & Steel) Stockholders Association Ltd.*, (1978) 48 Com Cases 401 (P&H).

<sup>223</sup> The threshold for bringing shareholders’ action under Ss. 397/398 is the possession of 1/10<sup>th</sup> of voting right or 100 members [S.399 (1) (a)]. However, the Central Government may, if in its opinion circumstances exist which make it just and equitable so to do, authorise any member or members of the company to apply to the Company Law Board under section 397 or 398, even if they don’t constitute the requirement of minimum shareholding to sue under S.399 (1) (a) [Power of Central Government to relax requirements of 399: S.399 (4)]. Further, it is possible for shareholders to bring action against resolutions of the general meeting in the ordinary courts under certain circumstances. See note 75 supra, for instances of matters over which ordinary civil suits were allowed to be filed. Hence the score.

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<sup>224</sup> ‘Member not qualified may file a civil suit’: The Delhi High Court in *Spectrum Technologies USA Inc. v. Spectrum Power Generation Co. Ltd.*, 2002 CLC 539 (Delhi) held that: where the aggrieved member is not qualified for filing a petition because of his low shareholding and the Central Government’s order for relaxing the requirement in this case is also not available to him, his remedy would be to file a civil suit. However, since this is a Delhi High Court decision and since similar decisions were not found in other states, deviation from the “3/4” score was not justified.

<sup>225</sup> See CA, 1956: S. 201, Art 99 of Schedule I, Table A Regulations.

<sup>226</sup> CA, 1956, S.284 applies to all directors generally, by whomsoever and under whatsoever provision and in whatsoever manner appointed, and includes all those not retiring by rotation (namely, permanent directors as well, even if they may be appointed by articles), except a director appointed by the central government u/S. 408 and directors appointed by proportional representation.

<sup>227</sup> Because until 1999 there was no provision specifying the Board composition and Clause 49 of the Listing Agreement introduced since 2000 which prescribes ‘Board Composition’ adopts a comply or explain approach.

<sup>228</sup> There is no general rule, whilst some provisions of the CA,1956 are mandatory there are yet others that are merely directory.

### **United Kingdom:**

<sup>229</sup> Main laws on shareholder protection: Companies Act 1985 as amended by Companies Act 1989; Companies Table A Regulation 1985; Insolvency Act 1986; Company Directors Disqualification Act 1986; City Code on Takeovers and Mergers of the Panel on Takeovers and Mergers; Combined Code on Corporate Governance 2003; Financial Services and Markets Act 2000; UK Listing Rules (but the October 2005 version is not yet taken into account); Main previous laws: Companies Act 1948; Section 9 of the European Communities Act 1972; Companies Act 1980 implementing the Second EEC Directive; Companies Act 1981 implemented the Fourth EEC Directive; Cadbury Committee, Code of Best Practice, 1992 (applied since 1993); Greenbury Committee, Code of Best Practice, 1995 (applied since 1996); Hampel Committee, Combined Code of Best Practice, 1998 (applied since June 1998), 2003 amendments of the Combined Code (based on: Smith Report, Audit Committees Combined Code Guidance, 2003; Higgs Report, Review of the role and effectiveness of non-executive directors, 2003).

<sup>230</sup> CA 1948, ss. 10, 23; CA 1980 Sch. 3 paras 2, 6.

<sup>231</sup> CA 1985, ss. 9, 17.

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<sup>232</sup> CA 1948, ss. 206, 209; CA 1985, ss. 425, 427; see also Davies, *Modern Company Law*, 7<sup>th</sup> edn., 2003, at 799 on differences between British and continental practice.

<sup>233</sup> CA 1948, ss. 61(2), 66(1); now: CA 1985, 121, 135 for alteration and reduction of capital.

<sup>234</sup> CA 1980, s. 14; now: CA 1985 s. 80 for allotment of shares (background: art. 25 of the Capital Directive 77/91/EEC).

<sup>235</sup> As from 25 % of total assets involvement of the general meeting is required (Listing Rules 1984 (in force since 1985), s. 6.3.4; not yet in Listing Rules 1979-83, ch. 4.5): major class 1 transactions; Listing Rules, 1993 para. 10.37: super class 1 transactions).

<sup>236</sup> Table A 1948, art. 114; Table A 1985, art. 102: the general meeting adopts the dividends. Yet, profit distributed by the general meeting may not be higher than proposed by board. Furthermore, interim dividends are possible (Table A 1948, art. 115; Table A 1985, art. 103).

<sup>237</sup> Table A 1948, art. 89; Table A 1985, art. 73.

<sup>238</sup> Before 1948 there was a rule in the Table A that related parties transactions required shareholder approval. The 1948 reform deleted this provision; see generally Davies, *supra* note 232, at 391 et seq and 405 et seq.; However, according to the Listing Rules, there was and is a provision for approval of the general meeting for some transactions with related parties (Listing Rules 1979, ch. 4.8; Listing Rules 1984, s. 6.2: class 4 transactions; Listing Rules 1993, paras. 11.1(a),(b)(ii), 11.4(c).

<sup>239</sup> CA 1980, s. 48; CA 1985, s. 320 (exceptions in s. 321).

<sup>240</sup> CA 1948, s. 140; CA 1985, ss. 376, 377: 5 % or support from holders of not less than 100 shares on which there has been paid up an average sum of not less than £100.

<sup>241</sup> Table A 1948, art. 93; Table A 1985, art. 76(b).

<sup>242</sup> The shareholder minority has to bear the costs itself, although it can be possible for their motions to be sent out together with the invitation from the board (*Cf.* Ferran, *Company Law and Corporate Finance*, 1999, at 264 note 139; Davies, *supra* note 232, at 351-2.).

<sup>243</sup> CA 1948, ss. 132(1),134; CA 1985, ss. 368(2)(a), 370(3).

<sup>244</sup> CA 1948, ss. 132, 134; CA 1985, ss. 368, 370(3).

<sup>245</sup> CA 1948, s. 136; CA 1985, s. 372; see also Table A, art. 60; Listing Rules, paras. 9.26, 13.28, 13.29; but just  $\frac{3}{4}$  because proxies have no right to speak at the general meeting and can participate in deciding only in the case of a written vote (see CA 1985, s. 372(1),(2)(c); Table A 1985, arts. 46-52).

<sup>246</sup> Listing Rules 1979, ch. 2.12; Listing Rules 1984, s. 5.36; Listing Rules, para 13.28(a),(b): two-way proxy forms required; but management does not have to provide solicitation.

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<sup>247</sup> CA 1948 s. 136 (1); CA 1985 S.372 (6).

<sup>248</sup> CA 1948, s. 141; CA 1985, s. 378: the words “specifying the intention to propose a resolution” mean that the tenor or entire substance of the proposal must be given (for details see Davies, *supra* note 232, at 357-8); see also *Normandy v. Ind., Coope & Co.* [1908] 1 Ch 84 (for requirements which may follow from a provision in the articles).

<sup>249</sup> CA 1948, s. 207; CA 1985, s. 426,(2); this is different in Sch 15 B, s. 3(2) for the cases of CA 1985, s. 427A; these cases are, however, less frequent (see Davies, *supra* note 232, at 799)

<sup>250</sup> There is no explicit right to ask questions. Although general question and answer sessions at general meetings are usual, an explicit statutory provision for this was recently rejected, because the course of the general meeting is to continue to be left up to “best practice” (see Ferran, *supra* note 242, at 266).

<sup>251</sup> CA 1948, s. 113(1); CA 1985, s. 356; but due to widespread separation of registered ownership from economic ownership often useless (see, e.g., Stapledon & Bates, in McCahery et al. (eds.), *Corporate Governance Regimes – Convergence and Diversity* (2002) at 567).

<sup>252</sup> Code of Best Practice 1992, s. 1.3 (significant number of non-executive directors).

<sup>253</sup> Combined Code 1998, s. A.3.1 (1/3 non-executive directors).

<sup>254</sup> Combined Code 2003, s. A.3.2 (1/2 non-executive directors).

<sup>255</sup> Code of Best Practice 1992, s. 2.2 (majority of non-executive directors must be independent).

<sup>256</sup> Combined Code 2003, A.3.2 (at least half the board members must be independent).

<sup>257</sup> Code of Best Practice 1992, s. 4.3 (audit committee of at least three non-executive directors).

<sup>258</sup> Code of Best Practice 1995, s. A (remuneration committee of exclusively non-executive directors).

<sup>259</sup> Combined Code 1998, s. B.2.2 (all members of the remuneration committee independent), s. D.3.1 (half of the members of the audit committee independent); now: Combined Code 2003, s. B.2.1, s. C.3.1 (all members of the remuneration and audit committee independent).

<sup>260</sup> There is no statutory provision. The normal remuneration of board members is, however, decided by a general-meeting resolution or in the articles (see Davies, *supra* note 232, at 402; default rule). Other forms of remuneration are, however more important. In this respect, approval by the general meeting is in general not necessary; Yet, for stock-option plans the capital provisions apply (see notes 233, 234 above). Moreover there is Listing Rules, para. 13.13(a),(b) for shareholder meeting approval for employees’ share schemes and long term incentive schemes in which directors participate (but exception in para 13.13A).

<sup>261</sup> Advisory vote according to CA 1985, s. 241A UK-CA (inserted by The Directors’ Remuneration Report Regulations 2002, SI 2002 No. 1986).

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<sup>262</sup> CA 1948, s. 196(1)(a)(2) and CA 1985, Sch. 5, para. 22 (since CA 1989: CA 1985, Sch. 6, para. 1): disclosure of the overall remuneration; CA 1967, s. 6 and CA 1985, Sch. 5, paras. 24, 25 (since CA 1989: CA 1985, Sch. 6, paras. 3, 4(3)): disclosure of the emoluments of the chairman and the highest paid director (furthermore disclosure of other emoluments in bands); see also Code of Best Practice 1992, s. 3.2 (disclosure of total emoluments and those of the chairman and highest-paid UK director); The right to inspect the contract of services (CA 1967, s. 26; CA 1985, s. 318) is not taken into account because it does not play an important role for listed companies which are the main focus of this study;.

<sup>263</sup> Following the Greenbury Report, *supra* note 229, pp. 26-31: Listing Rules, para 12.43(x); Code of Best Practice 1995, s. B4; see also Cheffins, *Company Law*, 1997, p. 663.

<sup>264</sup> The Directors' Remuneration Report Regulations 2002 (SI 2002/1986): CA 1985, Sch. 7A and s. 234B, 234C: annual remuneration report.

<sup>265</sup> In theory, directors' remuneration can be attacked because of breach of fiduciary duties; However, this is unlikely to be a meaningful way to prevent excessive remuneration; see Cheffins, *supra* note 263, at 574.

<sup>266</sup> Code of Best Practice 1995, s.C6; now: Combined Code 2003, s. B.1.1.

<sup>267</sup> Table A 1948, art. 89; Table A 1985, art. 73 (not more than three years); see also Combined Code 2003, s. A.7.1.

<sup>268</sup> Dismissal without particular thresholds is possible (CA 1948, s. 184; CA 1985, s. 303). But there is often a financial burden on the firm where on appointment the member concluded a contract giving rise to a compensation claim upon dismissal. In particular, an agreement whereby the (ex-) director receives compensation is possible (CA 1948, s. 184(6); CA 1985, s. 303(5)). Moreover, members of the board may often agree on a separate service contract (Table A 1948, arts. 107, 108; Table A 1985, art. 84) with long notice periods, so that a compensation claim arises in the event of early dismissal.

<sup>269</sup> CA 1980, s. 47; CA 1985, s. 319: a contract with a period of more than five years can only be concluded with the assent of the general meeting.

<sup>270</sup> Code of Best Practice 1992, s. 3.1: a contract with a period of more than three years can only be concluded with the assent of the general meeting.

<sup>271</sup> Code of Best Practice 1995, s. D2 and Combined Code 1998, s. B.1.6: notice or contract periods should be one year or less.

<sup>272</sup> Duty of care based on common law (see, e.g., Davies, *supra* note 232, at 432 et seq.), Although there is no business judgement rule in the UK, many decisions indicated a similar subjectivisation of liability; see, e.g., *Re City Equitable Fire Insurance Co.* [1925] 1 Ch. 407 at 427; *Re Smith & Fawcett Ltd* [1942] Ch. 304 at 306; *Howard Smith Ltd v. Ampol Petroleum Ltd* [1974] A.C. 821 at 832. In general, it was said that there were only "light obligations of skill and diligence" (Davies, *ibid.*).

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<sup>273</sup> Since 1991 objectivisation and intensification of liability (see Davies, supra note 232, at 432-7; Len Sealy, Directors' Duties Revisited, (2001) 22 Company Lawyer 79, 82). The starting point was *Norman v. Theodore Goddard* [1991] B.C.L.C 1027 where Hoffmann J. draw on the wrongful trading provision of Insolvency Act 1986, s. 214.

<sup>274</sup> *Re D'Jan of London* [1994] 1 BCLC 561 (Hoffmann J. uses "objective test" of Insolvency Act 1986, s. 214(4)); *Bishopsgate Investment Management Ltd. v. Maxwell (No. 2)* [1994] 1 All ER 261 (Hoffmann J. states that Company Directors Disqualification Act 1986 has led to change in attitude to corporate governance).

<sup>275</sup> *Re Barings plc (No.5)* [1999] 1 BCLC 433, esp. at 486-489 (see also *Re Barings plc (No. 5)* [2000] 1 BCLC 523); *Re Landhurst Leasing plc* [1999] 1 BCLC 286: board members must not be passive; not enough to delegate or to rely on chairman. Although these were disqualification cases, they also have an indirect impact on duty of care (see Adrian Walters, Directors' Duties: The Impact of the Company Directors Disqualification Act 1986, (2000) 21 Company Lawyer 110).

<sup>276</sup> Companies (Audit, Investigations & Community Enterprise) Act 2004 (Ch 27) (in force since 2005): boards can grant directors extended indemnity or pay their defence costs. Although this law does not change directors' duties, it is taken into account nevertheless because it reduces the deterrence function of these duties.

<sup>277</sup> Duty of loyalty based on common law (see Davies, supra note 232, at 391-424); CA 1985, ss. 317, 319-322, 330-342 address specific transactions; a recent case (*Bhullar v Bhullar* [2003] 2 BCLC 241) can be understood as intensification but can also be reconciled with existing case law (see Armour [2004] CLJ 33).

<sup>278</sup> *Foss v. Harbottle* (1943) 2 Hare 461: it is in principle not possible for a shareholder to bring an action on behalf of the company (although there are some exceptions; see Boyle, Minority Shareholders' Remedies, 2002).

<sup>279</sup> According to CA 1980, s. 75 (now: CA 1985, ss. 459, 461) shareholders could, with court authorisation, sue on behalf of the company for compensation for damages. Yet, it could be said that this provision was only about discriminatory treatment so that an unfair conduct which affected all shareholders equally would not have been covered (Davies, supra note 232, at 513).

<sup>280</sup> CA 1989, sch. 19 amended CA 1985, s. 459: now it is clarified that CA 1985, s. 459 is about both cases of unfair conduct (note 279 above); However, there are still limits (and therefore the coding ½): First, the courts can relieve officers (*cf.* CA 1985, s. 744) from their liability if the breach of duty can in the circumstances be excused (CA 1985, s. 727; formerly CA 1948, s. 448). Second, there is the problem of costs. According to the "English rule" the loser has to pay the winner's costs. Thus, what is problematic is the risk the shareholder runs on loss of the suit. In this case, alongside his own costs and the high court fees, he also has to bear the opponent's lawyers' fees. Although there have been some changes and thus the possibility of a claim for reimbursement against the company, this has been counter-balanced by the requirement of court's approval for derivative actions (see Davies, supra note 232, at 454-5 on *Wallersteiner v. Moir* (No. 2) [1975] 1 All E.R 849 and the new Civil Procedure Rules).

<sup>281</sup> The principle that the board has to pursue the interests of the company as a whole is normally understood in such a way as to refer to the interests of the shareholders (see e.g. Ferran, supra note 242, at 125 *et seq.*; Davies, supra note



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232, at 491-2); But it is sometimes taken that the interests of the company as a separate entity may outweigh shareholders' interests (see e.g., Farrar, *Company Law*, 1998, at 14). And the courts rarely practise strict shareholder supremacy, but are instead increasingly recognising entitlements of other interests (*Cf.* Grantham (1998) 57 C.L.J. 554 at 567, 569 *et seq.*); generally, see also Armour et al., Shareholder Primacy and the Trajectory of UK Corporate Governance, (2003) 41 *British Journal of Industrial Relations* 531.

<sup>282</sup> Since 1980 some statutory provisions have explicitly taken into account employee interests (CA 1980, ss. 46, 74; now: CA 1985, ss. 309, 719; see also *Insolvency Act 1986*, s.187).

<sup>283</sup> *City Code*, General Principle 7 and Rule 21; the board neutrality principle has been part of the *Takeover Code* since its inception in 1968 (see E Stamp & C Marley, *Accounting Principles and the City Code: The Case for Reform*, 1970, 21).

<sup>284</sup> Pre-emptive rights according to listing rules; see Palmer's *Company Law Vol. II*, 22<sup>nd</sup> edn., 1976, p. 4012; *Listing Rules 1984*, Section 1, Chap. 2, para. 15; see also Section 5; Chap. 2, para. 38.

<sup>285</sup> CA 1980, s. 17; CA 1985, s. 89: pre-emption right in the event of cash capital increases because of Since EU Capital Directive 77/91/EEC.

<sup>286</sup> *Companies Act 1948*, ss. 187, 188: cause for disqualification limited to personal bankruptcy and conviction for fraud (see generally Leigh, *Disqualification Orders in Company and Insolvency Law*, (1986) 7 *Company Lawyer* 179).

<sup>287</sup> *Companies Act 1976*, s. 28; *Insolvency Act 1976*, s. 9: in addition to "personal bankruptcy and conviction for fraud" new grounds for disqualification of directors were introduced. Persons who were directors of companies with "persistent default in satisfying the reporting requirements of the Companies Acts, and ... proven cases of improper, reckless, or incompetent management", and "persons who had been directors of companies which successively became insolvent" were disqualified.

<sup>288</sup> *Insolvency Act 1985*, ss. 12-19 (into operation since 1986); now: *Company Directors Disqualification Act 1986*: enumerates different grounds for which directors may be disqualified which include the above as well as grounds like "if deemed unfit to be concerned in the management of a company".

<sup>289</sup> *Code of Best Practice 1992*, s. 3.7 (compliance since 1993); *Listing Rules*, para. 12.43A(c)(vii); today *Combined Code 2003*, Preamble point 4, Schedule C; the compliance level of the combined code is high (see, Arcort et al., *Corporate Governance in the UK: Is the Comply-or-Explain Approach Working?*, Working Paper 2005).

<sup>290</sup> CA 1948, ss. 165-175 (regarding appointment of outside inspectors); CA 1967, ss. 109-118); CA 1985, ss. 431-453 provides administrative remedies, which, e.g., may be used in cases of oppression of shareholders and mismanagement. However, only appointment of outside inspectors and investigation of companies documents is possible.

<sup>291</sup> CA 1948, s. 134(c); CA 1955, s. 370(4): just 2 shareholders have to be present.

<sup>292</sup> Amendment of articles: CA 1948, s. 141; CA 1985, s. 378(1) UK-CA; mergers: CA 1948, s. 206(2); CA 1985, s. 425(2); liquidations: 1986 *Insolvency Act 1985*, s.84(1)(b),(c).

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<sup>293</sup> Cf. Davies, *supra* note 232, at 619.

<sup>294</sup> Multiple voting rights are admissible *Cf.*, e.g., *Bushell v. Faith* [1970] A.C. 1099; Davies, *supra* note 232, at. 620-1.

<sup>295</sup> Voting caps are in general admissible. The Listing Rules only require disclosure (Listing Rules, para 6.B.5(a)). There still are some companies with voting caps in the UK (see Deminor, Application of the one share – one vote principle in Europe, 2005, p. 17).

<sup>296</sup> In general, voting is not subject to any formal restrictions (see *Carruth v. Imperial Chemical Industries Ltd* [1937] A.C. 707; Cheffins, *supra* note 263, at 238. However, independent shareholder approval is required for related parties transactions of substantial shareholders (i.e., shareholder with more than 10 % of the voting rights) (Listing Rules 1979, ch. 4.8; Listing Rules 1984, s. 6.1.4; Listing Rules 1993, para. 11.1(a),(b)(i), 11.4(d)).

<sup>297</sup> CA 1948, s. 209; CA 1985, ss. 429, 430 (90 %).

<sup>298</sup> There are no appraisal rights in British law; CA 1985, s. 461(2)(d) is different because it is necessary that the majority did not act lawfully (see variable II 9 for these cases).

<sup>299</sup> City Code, rule 9.1.

<sup>300</sup> The Rules Governing Substantial Acquisition of Shares do not require buyers to make a tender offer.

<sup>301</sup> CA 1967, s.33; CA 1976, s. 26(2); CA 1985, s. 199(2)(a) (usually 5 %).

<sup>302</sup> CA 1985, s. 199(2)(a) was changed by Companies Act 1989 (usually 3 %; in some special cases 10 %).

<sup>303</sup> A duty of loyalty by the majority is in principle not assumed, and also the statement that action should be “bona fide for the benefit of the company as a whole” is mostly not regarded as a significant limitation on majority power (*cf.* Cheffins, *supra* note 263, at 325-6; Modern Company Law: Final Report, 2001, paras. 7.52 *et seq.*). Yet, there is a general limit on “fraud on the minority”, which may operate for example in the event of amendments to the articles of association or the ratification of management misconduct (*Ebrahimi v. Westbourne Galleries Ltd* [1972] 2 All E.R. 492 at 500; Davies, *supra* note 232, at 438 *et seq.*, 673, 709 *et seq.*, 716-7). Furthermore, according to CA 1948, s. 210 (now: Insolvency Act 1986, s. 122) an oppressed minority can apply for a “just and equitable” winding up order. Finally, a majority shareholder may in some cases be a shadow director (CA 1985, s. 741(2)), and thus, to some extent, be treated as if he or she were a director.

<sup>304</sup> CA 1980, s. 75; CA 1985, s. 459; Insolvency Act 1986, s. 122(1)(g): Rule against unfair impairment of shareholder interests. CA 1980, s. 75(3), CA 1985, s. 461(2)(d) provides that unfair prejudice may give rise to an obligation to purchase its own shares. Additionally, if a purchase offer has previously been made, it may be harder to show unfair prejudice (see *Re a Company* (No. 00709 of 1992) [1999] 1 W.L.R. 1092 at 1107 (O’Neill v. Phillips)).

<sup>305</sup> See, e.g., *Edwards v. Halliwell* [1950] 2 All E.R. 1064 at 1067.

<sup>306</sup> Directors’ liability cannot be excluded in the articles in advance; only indemnification may be possible (see note 276 above).

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<sup>307</sup> Limits to the appointment are only based on the Table A and corporate governance codes (see note 267 above). However, companies cannot deviate from the CA 1985, s. 303 on the dismissal of directors.

<sup>308</sup> Board composition is only based on the Combined Code and its predecessors (see notes 252-256 above), hence not mandatory.

<sup>309</sup> In general, English company law did not use to be mandatory, although since 1948 a general trend towards increasingly mandatory law can be noted (*Cf.* Davies in Baums & Wymeersch (eds.), Shareholder Voting Rights and Practices in Europe and the United States, 1999, 331 at 344).

<sup>310</sup> The trend towards mandatory law has been enhanced by the accession to the EU and thus the influence of the EU company law directives. Relaxations are increasingly allowed for private companies (Companies Act 1989). The focus of this study is, however, on public companies.

#### **United States:**

<sup>311</sup> Main laws on shareholder protection: Delaware General Corporation Law (DGCL, major revision in 1967; frequent changes thereafter; unless otherwise stated the notes refer to the 2005 version); Securities Act of 1933 (SA 1934), ch. 38, 48 Stat. 7, codified at 15 USC secs. 77a-77m; Securities Exchange Act of 1934 (SEA 1934), ch. 404, 48 Stat. 881, codified at 15 USC secs. 78a-78kk; Rules of the SEC based on Securities Exchange Act of 1934 (SEC Rule), 17 CFR Parts 200-30; Sarbanes-Oxley Act (Public Company Accounting Reform and Investor Protection Act) of 30.07.2002, Pub. L. No. 107-204, 116 Stat. 745; Listed Company Manual of the New York Stock Exchange (NYSE Manual); Model Business Corporations Act (MBCA, for information purposes only).

<sup>312</sup> It has to be distinguished. First, with respect to an amendment to the certificate of incorporation, the general meeting has to be involved mandatorily, but the board of directors has to initiate such amendment (DGCL, § 242(b)(1); see also MBCA, § 10.03). Second, the by-laws can mostly be amended both by the general meeting and by the board (DGCL, § 109(a); to some extent the latter depends on a provision in the certificate of incorporation; see also MBCA, § 10.20). It is debatable whether and to what extent the certificate of incorporation can shape or restrict this dualism, and whether the board can reverse a decision of the general meeting (*Cf.* Hamermesh Corporate Democracy and Stockholder-Adopted By-Laws: Taking Back the Street?, (1998) 73 Tul. L. Rev. 409 at 413 et seq.).

<sup>313</sup> DGCL, § 251(c) (see also MBCA, § 11.05), but board of directors has to initiate (DGCL, § 251(b)). Shareholder approval can also be necessary because of NYSE Manual, § 312.03 (issuing of common stock in excess of 20 % of the voting power, or if it leads change of control of the issuer) (part of NYSE Manual since 1956/1960). However, approval is not necessary, if the corporation is the sole survivor and the number of shares issued does not increase by more than 20 %, or if in case of a short form merger the parent owns greater than ninety percent of the subsidiary

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(DGCL, §§ 251(f),(e),(g), 253). Furthermore, in case of triangular mergers it may be possible to do without the approval of the general meeting.

<sup>314</sup> Primary competence for capital measures lies with the board, so that as a rule it decides on its own responsibility about the issue of new shares or buybacks of shares. However, the general meeting enters in where the upper limit to shares set in the articles of incorporation is reached, since their amendment would then be required (DGCL, §§ 152, 154, 161; see also MBCA, §§ 6.01 et seq.). Companies listed at the NYSE must obtain the general meeting's assent for certain capital measures according to NYSE Manual, § 312.03 (see note 313 above).

<sup>315</sup> DGCL, § 271(a) approval in case of “substantially all of its property and assets”. The courts do not specify a particular qualifying percentage, but emphasise the qualitative and quantitative characteristics of the transaction at issue (*Gimbal v. Signal Companies*, 316 A.2d 599 (Del. Ch.) affirmed in part, 316 A.2d 619 (Del. 1974). In *Katz v. Bregman*, 431 A.2d 1274 (Del.Ch.1981) ca. 50 % was regarded as sufficient.

<sup>316</sup> DGCL, § 170: Directors decide about dividends (see also MBCA, § 6.40). Entitlement to a decision on distribution exists only in cases of abuse, something rarely presumed in public companies (see *Sinclair Oil Corp. v. Levien*, 280 A.2d 717 (Del. 1971); *Eshleman v. Keenan*, 22 Del. Ch. 82, 194 A. 40 (1937), aff'd, 23 Del. Ch. 234, 2 A.2d 904 (1938); *Treves v. Menzies*, 37 Del. Ch. 330, 142 A.2d 520 (1958)).

<sup>317</sup> DGCL, § 216(3).

<sup>318</sup> Shareholder participation is not required (cf. DGCL, § 144). However, there is an incentive for directors to submit these transactions to the general meeting, because in case of approval of the general meeting fairness may be presumed, the business judgement rule may apply, and/or only in case of “waste” this transaction may be regarded as a breach of loyalty (for the differences see Pinto & Branson, *Understanding Corporate Law*, 2<sup>nd</sup> ed., 2004, at 223-233; see also MBCA, § 8.61(b)); for Delaware see, e.g., *Keenan v. Eshleman*, Del. Supr., 2 A.2d 904 (1938); *Gottlieb v. Heyden Chem. Corp.*, Del.Supr., 91 A.2d 57, 58 (1952); *Fleigler v. Lawrence*, 361 A.2d 218 (Del. 1976); *Steiner v. Meyerson*, Del.Ch., C.A. No. 13139, 1995 WL 441999, Allen, C. (1995).

<sup>319</sup> Two communication possibilities are to be distinguished: First, by the shareholder communication rule (SEC Rule 14a-7) any shareholder may collect proxies for matters relating to the general meeting and thus affect its course. To enable contact with fellow shareholders, management may at its discretion either send the shareholder the list of other shareholders or pass on his communication to them. The problem is, however, that in either case the shareholder must bear the costs (coded in variable I 2.3, below). Secondly, shareholders who have held 1% of shares (or least \$ 2,000 in market value) for at least one year may require proxy documents to be included at company expense with the general documents for voting proxies (SEC Rule 14a-8(b)(1)). Particular areas are however excluded. In these cases only the cumbersome path via SEC Rule 14a-7 is possible.

<sup>320</sup> SEC Rule 14a-8(i)(8) excludes elections. However, SEC Rule 14a-7 (see previous note) is always possible; for costs see variable I 2.3.

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<sup>321</sup> Particular areas of law are excluded from SEC Rule 14a-8 (e.g. proposals relating to specific amounts of dividends, conflicts with company's proposal, directors' elections, and ordinary business operations). In these cases only the cumbersome path via SEC Rule 14a-7 is possible, which means that if the proposal is not successful, the shareholder has to bear the costs (only if the shareholder is successful reimbursement may be possible; cf. *Rosenfeld v. Fairchild Engine & Airplane Corp.*, 309 N.Y. 168, 128 N.E.2d 291 (1955)).

<sup>322</sup> In Delaware there is no statutory provision on this topic (different MBCA, § 7.02(a)(2)), so that it would have to be provided in the by-laws (cf. Cox & Hazen, *Corporations*, 2<sup>nd</sup> edn., 2003, at § 13.13).

<sup>323</sup> DGCL, § 212(b)-(e).

<sup>324</sup> NYSE Manual, § 402.04 (proxy solicitation required in order to afford shareholders a convenient method of voting) (the NYSE first mandated proxy voting in 1959); SEC Rule, 14a-4(b)(1) (two way proxies).

<sup>325</sup> Two communication possibilities are to be distinguished (see already notes 319-321): First, by the shareholder communication rule (SEC Rule 14a-7) any shareholder may collect proxies for matters relating to the general meeting and thus affect its course. To enable contact with fellow shareholders, management may at its discretion either send the shareholder the list of other shareholders or pass on his communication to them. The problem is, however, that in either case the shareholder must bear the costs. Secondly, shareholders who have held 1% of shares (or least \$ 2,000 in market value) for at least one year may require proxy documents to be included at company expense with the general documents for voting proxies (SEC Rule 14a-8). Particular areas are however excluded, such as proposals relating to specific amounts of dividends, conflicts with company's proposal, directors' elections, and ordinary business operations. In these cases only the cumbersome path via SEC Rule 14a-7 is possible, which means that if the proposal is not successful, the shareholder has to bear the costs (only if the shareholder is successful reimbursement may be possible; cf. *Rosenfeld v. Fairchild Engine & Airplane Corp.*, 309 N.Y. 168, 128 N.E.2d 291 (1955)).

<sup>326</sup> Until 1992 the SEC regarded compensation issues as "ordinary business operations", so that SEC Rule 14a-8 was not applicable. This was relaxed to non-binding shareholder proposals dealing with senior executive compensation by Reebok Int'l Ltd., SEC No-Action Letter, [1991-92 Transfer Binder] Fed. Sec. L. Rep. (CCH) P 76,131, at 79,338 (Mar. 16, 1992)).

<sup>327</sup> SEC, DataComm Indus., Inc., SEC No-Action Letter, [1998 Transfer Binder] Fed. Sec. L. Rep. (CCH) P 77,481, at 78,471 (Dec. 9, 1998): shareholders can use SEC Rule 14a-8 to propose bylaw amendments related to pay practices; Furthermore, since 1998 employment related matters that also implicate social concerns are proper matters for SEC Rule 14a-8 proposals (SEC Exchange Act Release No. 40019 of May 29, 1998; similar: *Amalgamated Clothing v. Wal-Mart Stores* 54 F.3d 69, 71 (2d Cir. 1995) contra SEC No-Action Letter 45 F.3d at 10 (1996)).

<sup>328</sup> July 2002: SEC allows shareholder proposals on all option plans to be included on the ballot (see Shareholder Activists Turn up the Heat After Enron, *Investor Rel. Bus.*, July 29, 2002, at 1).

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<sup>329</sup> SEC Schedule 14A (Proxy Statement Pursuant to Section 14(a) of the Securities Exchange Act of 1934), in particular Item 19; see also DGCL, § 242(b)(1): notice shall set forth such amendment in full or a brief summary of the changes to be effected thereby.

<sup>330</sup> SEC Schedule 14A (see note 329 above), item 14; Regulation M-A (17 CFR 229.1000 et seq.).

<sup>331</sup> See DGCL, § 213 (record date system).

<sup>332</sup> DGCL, § 220(b): all shareholders have a right of inspection for any proper purpose (see also MBCA, §§ 16.01(c), 16.02(b)(3),(c)). Additionally there was (is) a right to examine the books and records of the company under common law (*State ex rel. Cochran v. Penn-Beaver Oil Co.*, 34 Del. 81, 143 A. 257 (1926); *State ex rel. Healy v. Superior Oil Corp.*, 40 Del. 460, 13 A.2d 453 (1940); see also Cox & Hazen, *supra* note 322, at §§ 13.02-3. The problem with both of these rights is, however, that the economic owner is often hidden behind several layers of depositories, banks, and brokers.

<sup>333</sup> Since 1986: SEC Rule 14b-1(c): brokers and dealers provide the company with a list of their customers who are beneficial owners of the company's securities and who have not objected to disclosure of that information (NOBO-list); according to *Shamrock Assocs. v. Texas Am. Energy Corp.*, 517 A.2d 658 (Del. Ch. 1986) the shareholders soliciting proxies are also entitled to inspect this document.

<sup>334</sup> Contacting other shareholders was regarded as proxy solicitation, so that the costly proxy rules (see note 325 above) apply.

<sup>335</sup> Regulation of Communications Among Security Holders, Exchange Act Release No. 30,849, [1992 Tr. Binder] Fed. Sec. L. Rep. (CCH) § 85,002 (June 24, 1992); Exchange Act Release No. 31,326, [1992 Tr. Binder] Fed. Sec. L. Rep. (CCH) § 85,051 (Oct. 16, 1992) (codified at 17 C.F.R. 17 §§240.14a-1 to -103) made communication between shareholders easier because shareholders are no longer required to file proxy materials if they wish to communicate with other shareholders and do not seek proxy authority (SEC Rule 14a-2(b)(1)).

<sup>336</sup> Since NYSE Manual B-23 (1966): at least two independent directors.

<sup>337</sup> NYSE Manual, § 303A.01: half of the board members must be independent (approved by the SEC, Self-Regulatory Organizations; New York Stock Exchange, Inc. and National Association of Securities Dealers, Inc.; Order Approving Proposed Rule Changes (SR-NYSE-2002-33 and SR-NASD-2002-141), 68 Fed. Reg. 64154 (Nov. 12, 2003)).

<sup>338</sup> Since NYSE Manual B-23 (1966): at least two independent directors.

<sup>339</sup> Half of the board members shall be independent (see note 337 above).

<sup>340</sup> Since NYSE Manual 1978: audit committee composed of independent directors; note: The provision in DGCL, § 141(c)(2) (since 1996) is not relevant because it only authorises the board of directors to install committees.

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<sup>341</sup> Since *Weinberger v. UOP, Inc.*, 457 A.2d 701, 714-15 (Del. 1983) case law indicates that the use of independent committees has an influence on the standard of fairness of transactions involving conflict of interests (e.g. director's remuneration).

<sup>342</sup> Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103- 66, § 13,211, 107 Stat. 312, 449 (1993) (codified as amended at I.R.C. § 162(m)(4)(C)(i)): tax benefits of remuneration which exceeds \$1 million only if approved by an independent compensation committee (and the general meeting).

<sup>343</sup> Sarbanes Oxley Act 2002, § 301 requires the SEC to issue rules directing national securities exchanges to prohibit listing unless each member of the audit committee meets specified criteria for independence. The SEC issued its directions through Final Rule: Standards Relating to Listed Company Audit Committees, SEC Release Nos. 33-8220; 34-47654, 68 Fed. Reg. 18788 (16.04.2003); The NYSE implemented them in NYSE Manual, § 303A(5). Additionally, half of the members of the remuneration committee shall be independent (NYSE Manual, § 303A(5)) (approved by the SEC on Nov. 12, 2003, see note 337 above)).

<sup>344</sup> DGCL, § 141(h): in general board of directors sets compensation itself (see also MBCA, § 8.11). According to Delaware case law, approval of stock option plans by the general meeting is, however, fostered because it may protect directors from an alleged breach of fiduciary duty (cf. *Lewis v. Vogelstein*, 699 A.2d 327, 336 (Del. Ch. 1997)) (similar to other case law on conflict of interest transactions, see note 318 above). There were also two specific reasons for shareholder participation in securities law: First, SEA 1934, s. 16 imposes restrictions on short swing transactions between the issuer and a director or senior officer; however, exemption is possible according to SEC Rule 16(b)-3(d) if the general meeting approves these transactions. Second, according to NYSE Manual, § 312.03(a) the general meeting had to approve stock option plans unless they were "broadly based" (i.e., if, e.g., options are granted to directors, executives, and employees).

<sup>345</sup> Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103- 66, § 13,211, 107 Stat. 312, 449 (1993) (codified as amended at I.R.C. § 162(m)(4)(C)(ii)): tax benefits of remuneration which exceeds \$1 million only if approved by the general meeting (and an independent compensation committee).

<sup>346</sup> Exchange Act Release No. 34-36356, 60 Fed. Reg. 53,832 (1995) amends SEC Rule 16(b)-3(d) (see note 376 below): since 1996 board approval sufficient.

<sup>347</sup> Order Granting Approval to Proposed Rule Change by the New York Stock Exchange, Inc., Exchange Act Release No. 34-39839, available in 1998 WL 164369 (Apr. 8, 1998): SEC approves new and more extensive NYSE exception for "broadly based" plans (in particular, exclusive "safe harbour" for those plans in which 20% of the company's employees, half of whom must be neither officers nor directors, are eligible to participate).

<sup>348</sup> Order Approving NYSE and NASDAQ Proposed Rule Changes Relating to Equity Compensation Plans, Exchange Act Release No. 48,108, 68 Fed. Reg. 39,995 (July 3, 2003): NYSE Manual, §§ 312.03(a); 303A.08: shareholder approval of equity compensation plans necessary.

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<sup>349</sup> (At least) since Uniform and Integrated Reporting Requirements: Management Remuneration, [1978 Transfer Binder] FED. SEC. L. REP. (CCH) P 81,765; Uniform and Integrated Reporting Requirements: Directors and Executive Officers Management Remuneration, Legal Proceedings, Principal Security Holders and Security Holdings of Management; Amendments to Disclosure Forms and Regulations, [1978 Transfer Binder] FED. SEC. L. REP. (CCH) P 81,649: disclosure as to each of the five most highly compensated executive officers of the corporation if they received more than \$50,000 (but no further specification required).

<sup>350</sup> Executive Compensation Disclosure, Securities Act Release No. 696 2 Fed. Sec. L. Rep. (CCH) P85,056 (Oct. 16, 1992); Executive Compensation Disclosure, Exchange Act Release No. 33- 6962, 57 Fed. Reg. 48,126 (Oct. 21, 1992) (17 C.F.R. pts. 228, 229, 240, 249): summary compensation table with comprehensive disclosure of the compensation received by the five most highly compensated executive officers; see also Item 402(k) of SEC Regulation S-K.

<sup>351</sup> In SEC Release No. 33-8048 (December 21, 2001), Disclosure of Equity Compensation Plan Information, Securities Act Release No. 8048, Exchange Act Release No. 45,189, 67 Fed. Reg. 232, 232 (Jan. 2, 2002) (17 C.F.R. pt. 230): comprehensive disclosure of equity compensation plans; see also Item 201(d) of SEC Regulation S-K and Item 10 of Schedule 14A.

<sup>352</sup> In theory, the remuneration of directors (including executive directors) can be attacked because of breach of fiduciary duties (see also DGCL, § 144(a)(3)); However, this is unlikely to be a meaningful way to prevent excessive remuneration; see Cox and Hazen, *supra* note 322, at §§ 11.04-5; Cheffins, Will Executive Pay Globalise Among American Lines, (2003) 11 Corporate Governance 8 at 15; Cheffins, The Metamorphosis of “Germany Inc.”: The Case of Executive Pay, (2001) 49 Am. J. Comp. L. 497 at 527; I.R.C., §162(m)(4)(c), which concerns the tax deductibility of remuneration which exceeds \$1 million, is not coded here because is not applicable if a special procedure is applied (see notes 342 and 345 above).

<sup>353</sup> DGCL 1967, s. 122(15) empowers the corporation to “establish and carry out pension, profit sharing, stock option, stock purchase, stock bonus, retirement, benefit, incentive and compensation plans, trusts and provisions for any or all of its directors, officers, and employees”.

<sup>354</sup> DGCL, § 211(b); see also *Insituform of N. Am., Inc. v. Chandler*, 534 A.2d 257 (Del. Ch. 1987) (in the absence of certificate provisions providing otherwise, directors must be elected annually); but see variable II 10(2) on board entrenchment.

<sup>355</sup> DGCL, 141(k); see also MBCA, § 8.08; (general) compensation agreements as well as “golden parachutes” in the event of a change in corporate control are possible (but see also on the argument that “golden parachutes” help to reduce the conflict of interest between shareholders and managers in case of takeovers; Bruce A. Wolk, The Golden Parachute Provisions: Time for repeal?, 21 Va. Tax Rev. 125 (2001)); furthermore see variable II 10(2) on board entrenchment.

<sup>356</sup> Directors can be liable, but the business judgement rule gives them latitude.



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<sup>357</sup> *Smith v. Van Gorkum* 488 A.2d 858 (Del. Supr., 1985): independent directors liable for violating the duty of care; business judgement rule does not protect against grossly negligent decisions (on the reaction by the Delaware legislator see Variable II 10(1)).

<sup>358</sup> *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345 (Del. 1993): if a breach of the duty of care has been proven, the directors lose the protection of the business judgment rule (i.e. prima facie case of liability even without causation and a showing of injury; the burden is shifted to the directors to prove entire fairness (see also note 396, below)).

<sup>359</sup> DGCL, § 144 (self-dealing transactions); furthermore, there is general duty of loyalty (see Pinto & Branson, supra note 318, at 199 *et seq.*).

<sup>360</sup> Derivative suits are possible (Rule 23.1 of the Court of Chancery of the State of Delaware; see also Rule 23.1 Federal Rules of Civil Procedure). Their use is fostered because lawyers can agree on contingency fees and thus expect considerable gains if successful. This incentive is further enhanced by the possibility of a class action (cf. Rule 23 of the Court of Chancery of the State of Delaware). Moreover, the cost provisions for the litigating shareholder are favourable. The starting point is the “American rule”, according to which each party pays their own lawyers’ costs independently of the outcome of the trial. For shareholders often a claim for reimbursement against his own company is possible (see, e.g., *Gottlieb v. Heyden Chem. Corp.*, 34 Del. Ch. 436, 105 A.2d 461 (1954); *Tri State Mall Assocs. v. A.A.R. Realty Corp.*, 298 A.2d 368 (Del. Ch. 1972); *Baron v. Allied Artists Pictures Corp.*, 395 A.2d 375 (Del. Ch. 1978), *aff’d*, 413 A.2d 876 (Del. 1980); see also MBCA, § 7.46). Yet, there are also various requirements which have to be fulfilled (e.g., demand; review of special litigation committees; contemporaneous ownership rule; see also DGCL, § 327).

<sup>361</sup> *Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981) in case of a special litigation committee of companies the court will use its own independent business judgement (different New York Court of Appeals in *Auerbach v. Bennett* 47 N.Y.2d 619, 393 N.W.2d 994, 419 N.Y.S.2d 920 (1979), i.e. relatively high level of judicial scrutiny).

<sup>362</sup> *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984): the rule in *Zapata* is only applicable in demand-unnecessary cases, i.e. if there is reasonable doubt that the directors are disinterested and independent and the challenged transaction is otherwise the product of a valid exercise of business judgment. It is not necessary in cases where demand is refused (see also *Levine v. Smith*, 591 A.2d 194 (Del. 1991)); Furthermore, according to *Aronson*, there are strict demand requirements so that “demand is to be excused only sparingly at best” (Pinto & Branson, supra note 318, at 455).

<sup>363</sup> *In re Walt Disney Co.*, 825 A.2d 275 (Del. Ch. 2003) (Disney II) (regarding demand requirement); *In re Oracle Corp.*, 824 A.2d 917 (Del. Ch. 2003) (regarding independence of litigation committees); *In re Abbott Laboratories*, 325 F.3d 795 (7th Cir. 2003) (regarding demand requirement) “evidence a heightening of judicial scrutiny on directors in the wake of the corporate governance scandals” (Hern, (2005) 41 Willamette L. Rev. 207; for a different assessment see Reese & Herring (2005) 7 Del. L. Rev. 177); see also the decision in *Disney IV*, 2005 WL 2056651 (Del. Ch. 2005) in favour of the (former) director (Note, 119 Harv. L. Rev. 923 (2006)).

<sup>364</sup> In the US the traditional view puts maximisation of shareholders’ profit to the fore, so as to safeguard their investment decision and attract capital (cf. Cox & Hazen, supra note 322, at § 4.10; Hansmann & Kraakman, The End of History for Corporate Law, (2001) 88 Geo. L.J. 439 at 442). Yet, Dodd already maintained, in his famous debate with

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Berle, that management members were trustees of all those involved in the firm, not just the shareholders (Dodd, For Whom Are Corporate Managers Trustees?, (1932) 45 Harv. L. Rev. 1145; Berle, For Whom Corporate Managers Are Trustees: A Note, (1993) 45 Harv. L. Rev. 1365; for a good overview on the ongoing debate in the academia see Licht, The Maximands of Corporate Governance: A Theory of Values and Cognitive Style, (2004) 29 Del. J. Corp. L. 649 at 686 et seq.). The case law too sometimes acknowledges interests of stakeholders. (See *A. P. Smith Mfg Co. v. Barlow* 98 A.2d 581 (NJ 1953); *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985)). Donations to social organizations are also often permissible, at least because it may promote to the firm's profits (see Großfeld, in: Conard (ed.), International Encyclopaedia of Comparative Law, Chapter 4, 1971, at para. 4-135). Additionally, where decisions rhetorically focus on "shareholder supremacy", it is doubted whether they truly ensure a link with shareholder welfare (Smith, The Shareholder Primacy Norm, (1998) 23 J. Corp. L. 277 on *Dodge v. Ford Motor Co.*, 170 NW 668 (Mich. 1919)). Finally, the business judgement rule leaves significant discretion to take stakeholder interests into account.

<sup>365</sup> Federal securities law on tender offers (1968 Williams Act leading to § 14(d)-(f) US-SEA) is essentially confined to information duties and procedural regulations. To what extent defensive measures are possible is therefore based on state corporate law. Before 1985 the case law in Delaware was inconsistent (see Weiss & White, Of Econometrics and Indeterminacy: A Study of Investors' Reactions to "Changes" in Corporate Law, 75 Calif. L. Rev. 551, 601 (1987)).

<sup>366</sup> *Unocal Corp. v. Mesa Petroleum, Co.*, 493 A.2d 946 (Del. Supr. 1985) and *Moran v. Household Int'l, Inc.*, 500 A.2d 1346, 1350 (Del. 1985) indicate that boards have substantial discretion to react to takeovers due to (modified) business judgement rule (reasonable action possible; but shift in burden of proof).

<sup>367</sup> *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. Supr 1986) indicates some restraints on directors, namely: if change in control is inevitable, board has duty to maximise share value for the shareholders benefit (directors like auctioneers).

<sup>368</sup> Moderate "antitakeover statute" enacted in 1988; new DGCL, § 203. It is claimed that this new provision does not significantly impair shareholder interests (see Jahera & Pugh, State Takeover Legislation: The Case of Delaware, (1991) 7 Journal of Law, Economics, and Organization 410).

<sup>369</sup> *Revlon* standard (see note 367 above) relaxed in *Paramount Communications, Inc. v. Time, Inc.*, 1989 WL 79880 (Del Ch. 1989), because there was no planned break-up.

<sup>370</sup> *Paramount Communications, Inc. v. QVC Network, Inc.*, 637 A.2d 34 (Del. Ch. 1994): *Revlon* applied; shareholder choice.

<sup>371</sup> *Unitrin, Inc., v. American General Corp.*, 651 A.2d 1361 (Del. 1995) strict requirements only if defensive tactic was not draconian (in the instant case not found to be the case; target's defensive recapitalisation upheld).

<sup>372</sup> There is only an opt-in provision on pre-emptive rights (DGCL, § 102(b)(3); see also MBCA § 6.30 (a)). With closed companies the general duty of loyalty may mean in the individual case that the pre-emption right cannot be excluded (see MacNeil, Shareholders' Pre-emptive Rights, (2002) Journal of Banking Law 78 at 90 et seq.). These companies are, however, not the focus of this study.

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<sup>373</sup> Jayne W. Barnard, *The Securities Law Enforcement Remedies Act of 1989: Disenfranchising Shareholders in Order to Protect Them*, 65 *Notre Dame L. Rev.* 32, 54 n. 158 (1989): SEC bars directors without explicit reference to any statutory authorisation.

<sup>374</sup> Clarification by Securities Enforcement Remedies and Penny Stock Reform Act of 1990, Pub. L. No. 101-429, 104 Stat. 931 (1990): SEC can remove directors in case of substantial unfitness.

<sup>375</sup> Sarbanes-Oxley 2002, s. 305: SEC can remove directors in case of unfitness; see also Securities Act of 1933 §20(e) (2002); Securities Exchange Act of 1934 §21(d)(2) (2002).

<sup>376</sup> Sarbanes-Oxley Act 2002, § 406 (code of ethics); NYSE Manual, § 303A.09 (corporate governance guidelines) and s.303A.10 (code of business conduct and ethics) (approved by the SEC on Nov. 12, 2003; see note 337 above).

<sup>377</sup> As proxy voting is regulated in US securities law (see notes 324 and 325), the SEC can enforce (some) violations of this “company law topic” (in case of disclosure violation).

<sup>378</sup> The Sarbanes-Oxley Act 2002 and the current NYSE Manual contain many rules for the corporate governance of public companies, which can be enforced by the SEC.

<sup>379</sup> DGCL, § 216(1): majority of shares entitled to vote (default rule); see also MBCA, §§ 10.03(e), 11.04(e), 12.02(e), 14.02(e); According to NYSE Manual, § 310.00 “the Exchange gives careful consideration to provisions fixing any proportion less than a majority of the outstanding shares as the quorum for shareholders’ meetings”.

<sup>380</sup> DGCL, § 102(b)(4): supermajority voting provisions in the certificate of incorporation permitted but not required. As a surrogate Delaware focuses on the entire “outstanding stock of the corporation” for basic decisions (DGCL, §§ 242(b)(1), 251(c), 271(a), 275(b); the law of most other countries is different, see, e.g., § 133(1) of the German AktG; art 225-98 of the French Code de Commerce: capital represented at general meeting decisive).

<sup>381</sup> DGCL, § 212(a); see also MBCA, § 7.21(a).

<sup>382</sup> DGCL, §§ 151(a), 212(a): multiple voting rights possible; But listing at the NYSE excluded (see Douglas C. Michael, *Untenable Status of Corporate Governance Listing Standards Under the Securities Exchange Act*, 47 *Bus. Law.* 1461, 1463 n.12, 1464 n.15 (1992)). When the NYSE first proposed to repeal its voting rights listing standards in 1985, the SEC issued a ban on multiple voting rights (Voting Rights Listing Standards; Disenfranchisement Rule, 53 *Fed.Reg.* 26,376, 26,394 (1988), codified at 17 *CFR* § 240.19c-4 (1990)), which was, however, invalidated by the DC Circuit Court (*The Business Roundtable v. SEC*, 905 *F.2d* 406 (1990)). Yet, the verbatim counterpart adopted by the NYSE remained valid until 1994 (see Michael, *ibid.*, at note 70). Note: the rules of NASDAQ are different.

<sup>383</sup> NYSE Manual, §§ 313.00, 308.00 as amended on 05.05.1994 prohibits multiple voting rights. Yet, the new policy is more flexible than the SEC-Rule, and companies with existing dual class capital structures are generally permitted to issue additional shares of the existing super voting stock.

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<sup>384</sup> *Providence & Worcester Co. v. Baker*, 378 A.2d 121 (Del. 1977): voting caps may be possible because they are not expressly prohibited by the DGCL. The treatment of voting caps in securities law is the same as that of multiple voting rights (see note 382 above for details).

<sup>385</sup> See note 383 above.

<sup>386</sup> DGCL, § 214 (opt in).

<sup>387</sup> Voting is not subject to any formal restrictions (see van Ryn, *Capital and Securities of Marketable Share Companies*, in Conard (ed.), *International Encyclopaedia of Comparative Law* (1990), Chapter 5 II, para. 5-135); for an exception see MBCA, § 8.63(b).

<sup>388</sup> In case of conflict of interest transactions between a shareholder and his company approval of the disinterested shareholders can be useful because in these cases fairness of the transaction is presumed. This is similar to conflict of interest transactions by directors (see note 318 above). The relevance of approval by the disinterested majority of shareholders was emphasised by *Fleigler v. Lawrence*, 361 A.2d 218 (Del. 1976); see generally Enriques, *The Law on Corporate Directors' Self-Dealing: A Comparative Analysis*, (2000) 2 *International and Comparative Corporate Law Journal* 297 (in particular note 343); see also *Kahn v. Lynch Communication Sys., Inc.*, 638 A.2d 1110; (Del. 1994); *Kahn v. Lynch Communication Sys., Inc.*, 669 A.2d 79 (Del. 1995); MBCA, § 8.61(b)

<sup>389</sup> Though there are no special squeeze-out provisions (apart from SEC Rule 13e-3 on disclosure for going private transactions), in a merger by absorption where shareholders in the acquired company are paid off in cash (cash out merger), exclusion is in principle possible even with smaller majorities (see Gilson & Gordon, *Controlling Controlling Shareholders*, (2003) 152 *U. Penn. L. Rev.* 785 at 796 et seq.). In particular, this can be the case if a company owns more than 90 % of the shares, because then it is just a short-form merger (DGCL, § 253).

<sup>390</sup> DGCL, § 262(a),(b): appraisal rights in case of mergers (but exceptions). Opt-in for other measures possible (DGCL, § 262(c); since 1991), which is, however, not coded in this variable. If the corporation is listed on a national securities exchange, appraisal rights are usually not available ("market-out exception") (DGCL, § 262(b)(1)); see generally also MBCA, § 13.02; "quasi-appraisal rights" are addressed below (note 396) because they concern unlawful conduct.

<sup>391</sup> There is no mandatory bid. Fiduciary duties in case of sale of corporate control are only recognised to a limited extent for smaller companies (see Cox & Hazen, *supra* note 322, at §§ 12.01, 12.02). In Delaware, courts have repeatedly emphasised that controlling shareholders may obtain a premium for their shares which they need not share with other shareholders (see *In re Sea-Land Corp. S'holders Litig.*, No. 8453, 1987 WL 11283 (Del. Ch. 1987); *Harris v. Carter*, 582 A.2d 222, 234 (Del. Ch. 1990); *Thorpe v. CERBCO, Inc.*, 676 A.2d 436, 442 (Del. 1996)).

<sup>392</sup> The need to comply with the rules on tender offers (Williams Act 1968; Securities Exchange Act, Regulations 13D, 14D), does not lead to a mandatory public offer.

<sup>393</sup> SEA, § 13(d), Schedule 13D: 5 % → 0.75

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<sup>394</sup> In general, a strong majority rule applies, i.e. the minority has to accept the decision of the majority. However, the obligation to shareholder interests (see note 364 above) is related also to the interests of the shareholder minority (see Hansmann & Kraakman, supra note 364, at 442), and overlain particularly by the doctrine of minority oppression (see Smith, supra note 364, at 305 et seq.). Moreover, dominant shareholders have a duty of care or of fairness towards the minority, since they hold de facto controlling power over the company (see Cox & Hazen, supra note 322, at § 11.11). For Delaware reference can be made, for instance, to *Allied Chem. & Dye Corp. v. Steel & Tube Co. of Am.*, 14 Del. Ch. 1, 120 A. 486 (1923) (stockholders have fiduciary duty to other stockholders) and *Hartford Accident & Indem. Co. v. W.S. Dickey Clay Mfg. Co.*, 26 Del. Ch. 16, 21 A.2d 178 (1941), aff'd, 26 Del. Ch. 411, 24 A.2d 315 (1942) (right to amend must be exercised fairly and impartially).

<sup>395</sup> *Singer v. Magnavox* 380 A.2d 969 (Del. 1977): freeze-out requires business purpose test, i.e. it is not enough that the majority shareholder wants to eliminate the minority shareholders.

<sup>396</sup> *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983): no business purpose test and limit to the use of equitable relief, i.e. “quasi-appraisal” remedy only in case of fraud, misrepresentation, unfair dealing etc. (see also *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345 (Del. 1993)); Instead entire fairness test: fair dealing and fair price (modern methods of valuation taken into account).

<sup>397</sup> See *Goldman v. Postal Tel., Inc.*, 52 F. Supp. 763 (D. Del. 1943) (exercise of power to amend certificate of incorporation); *Barrett v. Denver Tramway Corp.*, 53 F. Supp. 198 (D. Del. 1943), aff'd, 146 F.2d 701 (3d Cir. 1944) (exercise of power granted to majority).

<sup>398</sup> 1986 amendment: DGCL, § 102(b)(7) (see also MBCA, § 2.02(b)(4)): directors' liability for monetary damages for breaches of duty of care can be excluded in certificate of incorporation.

<sup>399</sup> DGCL, § 141(d) allows staggered boards. In this case directors can only be removed for cause (DGCL, § 141(k)(1)).

<sup>400</sup> The rules on board composition (supra notes 336-339 above) are based on mandatory securities law (including Listing Rules, because they have to be regarded as mandatory in case of listing).

<sup>401</sup> DGCL § 102(b)(1) contains a general enabling clause. However, there are also mandatory rules and a debate on whether the predominant aspect of company law is not its mandatoriness (cf. Eisenberg, *The Structure of Corporate Law*, Colum. L. Rev. 89 (1989), 1461 at 1481-2). Moreover, mandatory federal securities law plays an important part, for instance, SEC Rule 14a, provides exhaustive mandatory rules on voting by proxy. Nevertheless, most parts of shareholder protection are default.

<sup>402</sup> The Sarbanes-Oxley Act 2002 and the current NYSE Manual contain many mandatory rules for the corporate governance of public companies., This results into considerable restrictions in the freedom to contract out of statutory law and prescribes very high regulatory requirements.