

Table of Contents

1 Introduction	1
2 Comparative Law and Corporate Governance	9
2.1 Introduction	9
2.2 The Comparative Legal Method in General	10
2.3 Comparative Corporate Governance in Particular	15
2.3.1 Introduction.....	15
2.3.2 The Objectives of Corporate Governance.....	16
2.3.3 The Choice of a Social Need.....	16
2.3.4 The Choice of a Social Need and the Amount of Rules.....	18
2.3.5 The Choice of a Narrow Social Need.....	19
2.3.6 Rules on Governance and Rules on Constraints on Governance	21
2.3.7 The Legal Nature of Companies and the Organisation of Firms.....	22
2.3.8 The Sources and Nature of Rules	34
3 The Law of the European Union.....	35
3.1 The Legal Basis	35
3.2 The Harmonisation of Corporate Governance Rules	37
3.2.1. The General Approach in the Past	37
3.2.2 Reasons for Harmonisation in the Future.....	38
3.2.3 The Effect of the Sarbanes-Oxley Act	44
3.2.4 The Present Approach to Harmonisation	47
3.3 Freedom to Choose the Company Form in the EU.....	53
3.4. The European Company	58
3.4.1 Introduction.....	58
3.4.2. The Applicable Rules in General	60
3.4.3 Party Autonomy under the SE Regulation	64
3.4.4 The Basic Governance Structure under the SE Regulation.....	66
3.5 Conclusion	77
4 The United Kingdom.....	79
4.1 General Remarks	79
4.1.1 Introduction.....	79
4.1.2 The Most Important Legal Forms of Business Organisation	81
4.1.3 Sources.....	82
4.1.4 The Extent of Party Autonomy in Rule-making	86
4.2 Basic Governance Structure	93

4.2.1 Introduction.....	93
4.2.2 General Meeting of Shareholders	94
4.2.3 Board of Directors.....	95
4.2.4 Managing Director.....	100
4.2.5 Company Secretary.....	101
4.2.6 The Location of Management.....	104
4.3 The Importance of Articles of Association.....	105
4.3.1 Introduction.....	105
4.3.2 Parties Bound by the Memorandum and Articles	105
4.3.3 Enforcement by Shareholders	112
4.4 The General Meeting and Internal Management	114
4.4.1 Introduction.....	114
4.4.2 Division of Powers: General Remarks	114
4.4.3 Procedure of Decision-making.....	116
4.4.4 The Memorandum and Articles of Association	120
4.4.5 Decisions on Management Matters.....	122
4.4.6 The Appointment, Remuneration and Removal of Managers.....	135
4.5 Agreements and Internal Management.....	143
4.5.1 Introduction.....	143
4.5.2 Unanimous Consent	143
4.5.3 Shareholders' Agreements	146
4.5.4 Shareholders' Agreements with the Company.....	149
4.6 Disclosure, Remedies and Management Duties	151
4.6.1 Introduction.....	151
4.6.2 Disclosure of Information	152
4.6.3 Shareholder Remedies	159
4.6.4 Right to Sue: General Remarks.....	166
4.6.5 Proceedings Brought by Shareholders for Breach of Duty	169
4.6.6 Other Shareholder Remedies	179
4.6.7 The Duties of Board Members.....	181
4.6.8 The Duties of Sub-board Managers	191
4.6.9 The Duties of Company Secretary	196
4.6.10 Auditors' Duties.....	198
4.6.11 Shareholders' Duties.....	202
4.7 Shareholders and Dealings with Third Parties.....	202
4.7.1 Introduction.....	202
4.7.2 Representation of the Company: General Remarks	203
4.7.3 Company Acting through its Board of Directors	204
4.7.4 Company Acting through Other Representatives.....	206
4.7.5 Shareholders as a Rule-maker.....	210
4.8 The Governance of Groups in the UK.....	216
4.8.1 Introduction.....	216
4.8.2 Legislation on Groups.....	217
4.8.3 The Effect of the Group Structure on the Scope of Rules.....	218
4.8.4 The Parent Company as a Rule-maker in the Subsidiary	221
4.8.5 Duties of the Board of the Subsidiary Company.....	222

4.8.6 Duties of the Board of the Parent Company	224
4.8.7 Duty of Board Members to Supervise Outsourced Activities	225
4.8.8 Duties of Outside Managers	226
4.9 Constraints on the Exercise of Shareholders' Powers	226
4.9.1 Introduction	226
4.9.2 Constraints on Voting	228
4.9.3 Enforcement of the Constitution of the Company	233
4.9.4 Constraints on Other Acts	233
4.9.5 Fraud on the Minority	234
4.9.6 Groups	234
4.9.7 Sanctions Against Shareholders	237
5 Germany	239
5.1 General Remarks	239
5.1.1 Introduction	239
5.1.2 The Most Important Legal Forms of Business Organisation	242
5.1.3 Sources	243
5.1.4 The Extent of Party Autonomy in Rule-making	246
5.2 Basic Governance Structure	250
5.2.1 Introduction	250
5.2.2 The General Meeting	250
5.2.3 The Two-tier System	252
5.2.4 The Management Board	253
5.2.5 The Supervisory Board	261
5.2.6 Prokurist	271
5.2.7 The Location of Management	271
5.3 The Importance of Statutory Rules	272
5.3.1 Introduction	272
5.3.2 Effect on Board Members and the Statutory Auditor	273
5.3.3 Effect on Sub-board Managers and Employees	276
5.3.4 Derogation from the Aktiengesetz	276
5.4 The General Meeting and Internal Management	277
5.4.1 Introduction	277
5.4.2 General Remarks on the Division of Powers	278
5.4.3 Procedure of Decision-making	279
5.4.4 Articles of Association	284
5.4.5 Decisions on Management Matters	287
5.4.6 The Appointment, Removal and Remuneration of Managers	296
5.5 Agreements and Internal Management	305
5.6 Disclosure, Remedies and Management Duties	306
5.6.1 Introduction	306
5.6.2 The Rights of Shareholders to Disclosure of Information	307
5.6.3 Shareholder Remedies	316
5.6.4 Penal Sanctions	336
5.6.5 The Duties of Management Bodies	339
5.6.6 The Liability and Management Duties of Sub-board Managers	348

5.6.7 The Liability and Duties of Statutory Auditors.....	352
5.7 The Role of Individual Shareholders.....	353
5.8 Shareholders and Dealings with Third Parties.....	354
5.8.1 Introduction.....	354
5.8.2 Representation of the Company by its Shareholders	355
5.8.3 Representation of the Company by Other Representatives.....	355
5.8.4 Shareholders as a Rule-maker.....	358
5.8.5 Statutory Provisions on the Representation of the Company.....	360
5.9 The Governance of Groups in Germany.....	362
5.9.1 Introduction.....	362
5.9.2 Fiduciary Duties of Group Members	363
5.9.3 The GmbH	364
5.9.4 Co-determination in Groups.....	365
5.9.5 Konzernrecht.....	366
5.9.6 Shareholders' Rights to Disclosure of Information in Company Groups.....	373
5.9.7 Shareholder Remedies in Company Groups	374
5.10 Constraints on the Exercise of Shareholders' Powers	379
5.10.1 Introduction.....	379
5.10.2 Duty of Loyalty.....	380
5.10.3 The Right to Contest Resolutions of the General Meeting	380
5.10.4 Capped Voting, Restrictions on the Use of Proxy Votes	384
5.10.5 Liability.....	385
6 Comparison.....	389
6.1 General Remarks	389
6.2 Convergence	393
6.3 Fundamental differences.....	394
6.4 Conflicts between models.....	395
6.5 Basic Governance Structure	397
6.5.1 Germany	397
6.5.2 The United Kingdom	398
6.5.3 Two-tier Boards and Board Structures.....	399
6.5.4 The Fundamental Problems of UK Company Law	401
6.5.5 Commission Recommendation on the Role of Directors.....	404
6.5.6 The SE Company	406
6.6 Shareholders and Internal Management	407
6.6.1 Articles of Association.....	407
6.6.2 Appointment of Managers	408
6.6.3 Decisions on Management Matters in General	409
6.6.4 Shareholder Remedies	410
6.6.5 Legal Costs	412
6.6.6 Management Duties	413
6.6.7 Stakeholders' Interests	413
6.6.8 Voting	414
6.7 Proximity and Objectivity in Monitoring	415

6.7.1 Approximation of Laws	416
6.7.2 Germany.....	416
6.7.3 The United Kingdom	418
6.7.4 Authorities as Objective Monitors	419
6.8 Consensus.....	419
6.9 Which Monitoring Model is Better?.....	421
6.10 Constraints on the Exercise of Shareholders' Powers	423
6.11 Groups	423
6.12 Government Policy on Enforcement.....	426
6.12.1 Private Enforcement.....	426
6.12.2 Self-enforcement.....	426
6.12.3 Self-governance of the Business Organisation.....	427
6.12.4 Public Enforcement.....	428
References.....	431