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# **Examples of Long-Term And Short-Term Decision-Making in the UK, Delaware and Germany- Gap-Filling Exercise in the Context of the Shareholder v. Stakeholder Debate and Share Ownership Structure of the Company**

Katarzyna Chalackiewicz-Ladna<sup>1</sup>

## **Abstract**

This paper explores the extent to which the law in the UK, Delaware and Germany imposes an obligation on directors of solvent public companies to take into account the long-term consequences of their decisions while establishing the content and scope of long-termism in these three legal systems. This research draws on the academic literature and performs a gap-filling exercise by identifying examples of long-term decision-making in these jurisdictions, as well as examples of decision-making and conduct that is not long-term in nature. In the gap-filling exercise, case studies are presented in the context of (i) the contemporary shareholder v. stakeholder debate in corporate governance scholarship and (ii) the relevance of the share ownership structure of the company. These two important debates are used as variables to cast light on the ambit of the notion of long-termism, and the structural differences and similarities between the corporate governance systems and concepts of long-termism in the UK, Delaware and Germany.

## **1. Introduction**

Consideration of the relevance of the long-term and short-term consequences of corporate decision-making is still very much on the agenda on the both sides of the Atlantic. Short-termism generally refers to a tendency to overvalue short-term rewards and gains, which leads to an under-appreciation of long-term value creation,<sup>2</sup> for example, investments in research. In principle, primary legislation and soft law encourage long-termism in some shape or form; however, they do not offer much guidance on how the role of long-term interests in the decision-making processes of company directors should be understood. Long-termism is an open-ended construct by its very nature; it requires further interpretation if it is to be meaningful. Therefore, this article centres upon an examination of the secondary legal

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<sup>1</sup> Dr Katarzyna Chalackiewicz-Ladna, PhD (Edinburgh University) is currently working as a Research Associate and Graduate Teaching Assistant at the University of Glasgow and Tutor at the University of Edinburgh. Email: kchalac2@exseed.ed.ac.uk. I am extremely grateful to Mr David Cabrelli and Prof Laura Macgregor for their generous comments on the earlier drafts. All errors are mine own. Comments are welcome.

<sup>2</sup> Kevin Lavery, *Managerial Myopia or Systemic Short-termism? The Importance of Managerial Systems in Valuing the Long Term* 42 Management Decision 949, 949 (2004).

sources, i.e. the academic literature, and whether it can cast any light on the parameters of the notion of long-termism in its current incarnation.

The aim of this paper is to build up a normative theory and to conduct a normative gap-filling exercise, in order to develop the taxonomy of managerial long-termism in the UK, Germany and Delaware. This objective will be pursued by adopting hypothetical decisions/case studies, which will be used to determine what long-termism means. Such case studies furnish practical examples of long- and short-termism in the jurisdictions under review while allowing the interrelationships between corporate governance mechanisms to be stressed and identified. Two instruments have been chosen from which these case studies are then derived:

- (1) the shareholder v. stakeholder debate, which centres upon an examination of the question of to whom directors owe their duties, i.e. only to the shareholders in terms of the former theory, or to the non-member stakeholders as well, according to the stakeholder value theory; and
- (2) the predominant share ownership structure of public corporations in the jurisdictions under review. Publicly traded corporations have either a concentrated or a dispersed ownership structure and therefore these differences will affect how the board acts, the structure and orientation of its company law, and to whom it is accountable.

Other factors also serve to influence the concept of long-termism and can be identified. However, the idea is to limit the drawing out of the case studies to the two variables listed above at (1) and (2), which function as auxiliary aids to assist in identifying examples of long-term decision-making in these three jurisdictions. These tools can be used as proxies that emphasise the structural differences in the corporate governance systems in the UK, Delaware and Germany. Firstly, ascertaining the objectives of the corporation (1) and determining whose interests are paramount is fundamental, as this inevitably influences our understanding of long-term decision-making. The time horizon of decision-making can be established only subsequently, when it is clear whose interests should prevail through the medium of corporate action. Secondly, different ownership structures (2) have a bearing on the company's goals, the constitutional division of power within the company and the nature, content and orientation of their corporate laws, since they affect the pressures brought to bear

on the decision-making processes of the directors or managers in such corporations. This, in turn, enables contrasting examples of long-termism or short-termism to be identified within that contextual framework.

The approach adopted in this article is not without its limitations. Due to differences between the jurisdictions in corporate objective and share ownership structure of the corporations, not all of the presented examples will hold in every jurisdiction. As such, the kinds of country-specific decisions, which are held to amount to examples of long-term conduct, may vary as a result of the diverse corporate governance systems, legal families and commercial cultures present in each of the jurisdictions under review. This will be addressed and pointed out throughout the course of the discussion. What is more, the main drawback associated with the case studies is the inherent subjectivity of the notion of long-termism: it is almost impossible to arrive at final conclusions regarding the content of this notion. The main objective of this paper is to overcome this obstacle and present a well-developed conception of long-term decision-making.

The argument unfolds as follows. To start with, section 2 explains methodology applied and the choice of jurisdictions. Section 3 summarises the extent to which currently the law in the UK, Delaware and Germany imposes duties on the directors of solvent public companies to consider the long-term consequences of their decisions. Section 4 focuses on how the shareholder primacy and the stakeholder theories help us to map the nature and scope of the long-term norm through the identification of case studies. Each case study starts with a brief introduction on the origins and relevance of a particular scenario. Solutions within particular jurisdictions are then presented and it is stated whether a particular decision is an example of long- or short-termism. These are followed by comparative conclusions for each case study. Section 5 presents further cases studies and discusses the impact of share ownership structures within the parameters of long-termism. The structure of the gap-filling exercise is similar to that adopted in section 4 above. Finally, comparative conclusions regarding both instruments, i.e. the shareholder v. stakeholder debate and share ownership structure will be provided in section 6.

## **2. Methodology and Jurisdictions under Review**

### **2.1 Methodology**

This paper is comparative in character. Comparison is an ideal tool, not only for getting a deeper knowledge of the law of a particular or various jurisdictions, but the juxtaposition of

different solutions allows us to put them into a broader perspective and context, which in turn results in a more thorough and comprehensive understanding of the law in general. In spite of the undeniable merits of comparative law, problems emerge when choosing an appropriate method for comparison. Currently, the approaches include ‘traditional approach,’<sup>3</sup> ‘functional method,’<sup>4</sup> or ‘common core studies.’<sup>5</sup>

Taking into account the different approaches to comparative methodology and the subject of this research, the functional method has been chosen, as it emphasises that institutions that actually have a similar function must be compared and not the ones that seem similar on the surface.<sup>6</sup> However, the functional method has a disadvantage for this research in that it arguably concentrates too much attention on the similarities between legal systems.<sup>7</sup> Hence, the functional method is not useful if it is the only approach employed. This research focuses on evaluating the concept of long-termism considering both similarities and differences, rather than concentrating only on emphasising similarities. This is necessary and is the most reasonable approach, which allows identifying the examples of divergence or convergence between the legal systems. This research might conclude that the three jurisdictions apply similar solutions; however, the presumption of similarity is not the aim of this study. Importantly, few scholars promote the study of both similarities and differences;<sup>8</sup> but currently it is far from clear whether the construction of similarities and differences is the method itself or a modified version of the functional method. To conclude, the proper balance between a functional method and looking for similarities and differences<sup>9</sup> is considered the best approach for this study and the techniques employed will adequately and effectively fulfil the aims of this paper.

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<sup>3</sup> Known also as a ‘black letter’ comparison, it engages in comparative law through the ‘law as a rule’ approach. Esin Örüçü, *Developing Comparative Law* in Esin Örüçü, David Nelken (eds), *Comparative Law: A Handbook*, 49 (Oxford: Hart, 2007).

<sup>4</sup> Konrad Zweigert, Hein Kötz, *An Introduction to Comparative Law*, 32ff (Oxford: Clarendon Press, 1998).

<sup>5</sup> It aims at describing commonalities among legal systems hidden below apparent differences. Ugo Mattei et al., *Schlesinger’s Comparative Law: Cases, Text, Materials*, 98 (New York: Foundation Press: Thomson Reuters, 2009).

<sup>6</sup> Zweigert and Kötz, *supra* n 4, 50.

<sup>7</sup> *ibid* 34, 40.

<sup>8</sup> See for example: Gerhard Dannemann, *Similarities or Differences?* in Mathias Reimann and Reinhard Zimmermann, *The Oxford Handbook of Comparative Law*, 384 ff (Oxford; New York: Oxford University Press, 2006).

<sup>9</sup> The approach applied in this research resembles the one formulated by Reitz. John Reitz, *How to do Comparative Law* 46 *American Journal of Comparative Law* 617, 620 (1998).

## 2.2 Jurisdictions under Review

UK, German and Delaware law are compared in this research since ‘long-termism’ is a dynamic concept in each of them in different ways and at different levels. The topic is particularly well-discussed in the Anglo-American literature. The UK has been chosen because the Companies Act 2006<sup>10</sup> introduced a duty enjoining directors to promote the success of the company.<sup>11</sup> Delaware law was selected as a proxy for US law since it is a leading common law jurisdiction in the US – 66% of all Fortune 500 companies and more than 50% of companies whose securities trade on the main exchanges, e.g. the NYSE or NASDAQ<sup>12</sup> are incorporated in Delaware. Furthermore, Germany was chosen, as it is believed to have an ‘in-built tendency to long-termism’<sup>13</sup> due to stakeholder value approach.

The three jurisdictions have been chosen not only because they are influential, but also because they are very attractive from a comparative perspective. There are some substantial dissimilarities between UK and Delaware law, on the one hand, and German law, on the other – which have the potential to affect the parameters of long-termism. UK and Delaware law belong to the common law tradition with a well-developed body of case law, whilst Germany inherited the civil law tradition – the legal culture of which is to rely on code-based regulation. This study not only points out the similarities and differences between the UK and Delaware on the one hand and Germany on the other, it also compares both common law jurisdictions regarding the parameters of long-termism and identifies different attitudes towards this concept in the UK and Delaware.

Overall, the study of these systems will allow not only a better understanding of the notion of long-termism during the decision-making processes in these jurisdictions, but will also cast some light on the management of the companies in general and identify any patterns in that respect. Broader, general debates in comparative company law (i.e. the discussion on the differences regarding the share ownership structure and corporate objective) will be scrutinised within the context of the UK, Delaware and German law.

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<sup>10</sup> Companies Act 2006 c 46 (henceforth: ‘CA 2006’).

<sup>11</sup> s 172 CA 2006.

<sup>12</sup> DLA Piper, *Delaware Corporate Law and Litigation: What Happened in 2014 and What it Means for You in 2015*, 3 (12 January 2015)

<[www.dlapiper.com/~media/Files/Insights/Publications/2015/01/FINAL20142015AnnualDelawareCorporateLitigationReview.pdf](http://www.dlapiper.com/~media/Files/Insights/Publications/2015/01/FINAL20142015AnnualDelawareCorporateLitigationReview.pdf)> accessed 12 December 2016.

<sup>13</sup> John Plender, *Giving People a Stake in the Future* 31 Long Range Planning 211 (1998).

### 3. Long-termism in Directors' Duties – Primary Legislation and Soft Law

#### 3.1. Introduction

This section discusses briefly the function of long-termism within the current legal frameworks of the UK, Delaware and Germany. The position in the UK, Delaware and Germany will be presented in turn.

#### 3.2. The UK

The debate on long-term decision-making in the UK concentrates on s. 172 CA 2006 – the duty to promote the success of the company. Based on this provision the paramount task of the directors of solvent companies is to ‘promote the success of the company for the benefit of its members as a whole’ and only subsequently they are entitled to take into account any other factors – ‘likely consequences of any decision in the long term’ among them.<sup>14</sup> The long-term perspective is not associated directly with the success of the company and has only a secondary importance. Not only the relevance of long-termism is debatable, but also the meaning of this concept is unclear. The legislator has left to the directors the subjective decision on what long-termism means in specific situations.<sup>15</sup> Furthermore, the fundamental problem with the practical effectiveness of s. 172 CA 2006 would seem to be that its terms are not enforceable by non-shareholding stakeholders.<sup>16</sup> Moreover, long-termism is underlined (but not explained) on several occasions in the UK Corporate Governance Code,<sup>17</sup> in the context of a general discussion of the purpose of corporate governance,<sup>18</sup> the central role of the board<sup>19</sup> and the importance of regulating executive directors’ remuneration.<sup>20</sup> To

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<sup>14</sup> s 172 (1) (a) CA 2006. Section 172(1) is known as ‘enlightened shareholder value’ (ESV) – CA 2006, c 46, Explanatory Notes, Commentary on s 172 subs 325

<[www.legislation.gov.uk/ukpga/2006/46/notes/division/6/2](http://www.legislation.gov.uk/ukpga/2006/46/notes/division/6/2)> accessed 12 December 2016.

<sup>15</sup> It is worth underlining that currently the Government is trying to improve the UK’s corporate governance framework. Among other things, there is an intention to introduce secondary legislation (which is expected to be in force by June 2018) to require all companies of significant size (private as well as public) to explain how their directors comply with the requirements of s 172 CA 2006. However, there is no discussion about the meaning of long-termism under s 172. See: BEIS, *Corporate Governance Reform: The Government Response to the Green Paper Consultation*, 4 and 6 (August 2017)

<[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/640470/corporate-governance-reform-government-response.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/640470/corporate-governance-reform-government-response.pdf)> accessed 15 November 2017.

<sup>16</sup> Andrew Keay, *Moving Towards Stakeholderism? Enlightened Shareholder Value, Constituency Statutes and More: Much Ado About Little?* 22 (1) *European Business Law Review* 1, 33-36 (2011).

<sup>17</sup> Henceforth: ‘UK Code,’ April 2016, Financial Reporting Council (‘FRC’).

<sup>18</sup> UK Code 1.

<sup>19</sup> A.1 Main Principle *ibid.*

<sup>20</sup> D.1 Main Principle *ibid.*

sum up, the lack of any precise definition, or at least some guidance as to what is meant by it, makes the parameters of long-termism in the UK difficult to grasp.

### 3.3. Delaware

There is no statutory provision similar to section 172(1) CA 2006 that would directly relate to the relevance of ‘the likely consequences of any decision in the long term’ in Delaware law. Nor does the Delaware General Corporation Law<sup>21</sup> offer any guidance of what factors directors should consider in their decision-making processes. At the same time the soft law instruments in the US clearly encourage long-term shareholder value as a key corporate objective; however, without explaining the content and scope of this notion. To start with, the ‘American Law Institute Principles of Corporate Governance’ promotes long-run profitability and long-term shareholder value.<sup>22</sup> Secondly, the ‘Key Agreed Principles to Strengthen Corporate Governance for U.S. Publicly Traded Companies’ pursue long-term shareholder value creation.<sup>23</sup> Finally, the recent ‘Commonsense Corporate Governance Principles’ – principles set up by a group of executives of leading prominent public corporations – aim at long-term orientated governance.<sup>24</sup>

In this context, it is surprising to note that the discussion in the American law and economics literature on the relevance of long-term considerations and especially on the significance of long-term orientated shareholder value is thriving. To illustrate that point, Mitchell stresses that the maximisation of the short-term stock price and the avoidance of long-term accountability is a characteristic of the American corporation.<sup>25</sup> Furthermore, according to Hansmann and Kraakman, it is obvious that an increase in long-term shareholder value is an indisputably valid corporate objective.<sup>26</sup> To sum up, the rich discussion on long-termism that has taken place indicates that it is (or ought to be) an important feature of

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<sup>21</sup> Henceforth: ‘DGCL.’

<sup>22</sup> American Law Institute, *Principles of Corporate Governance: Analysis and Recommendations*, 57 (St. Paul, Minn.: American Law Institute Publishers, 1994).

<sup>23</sup> National Association of Corporate Directors, *Key Agreed Principles to Strengthen Corporate Governance for U.S. Publicly Traded Companies*, 4 (2011) <[www.nacdonline.org/files/PDF/KEY%20AGREED%20PRINCIPLES%202011.pdf](http://www.nacdonline.org/files/PDF/KEY%20AGREED%20PRINCIPLES%202011.pdf)> accessed 12 December 2016.

<sup>24</sup> Commonsense Corporate Governance Principles <[www.governanceprinciples.org/wp-content/uploads/2016/07/GovernancePrinciples\\_Principles.pdf](http://www.governanceprinciples.org/wp-content/uploads/2016/07/GovernancePrinciples_Principles.pdf)> accessed 12 December 2016.

<sup>25</sup> Lawrence Mitchell, *Corporate Irresponsibility: America's Newest Export*, 52 (New Haven, Conn.: Yale University Press, 2001).

<sup>26</sup> Henry Hansmann and Reinier Kraakman, *The End of History for Corporate Law* 89 *Georgia Law Journal* 439, 439 (2001).

Delaware law. However, the criticism that is levelled in this article is that the current discussion seems to be mainly theoretical.

### 3.4. Germany

The academic literature on German law suggests that long-termism is embedded within the German system of corporate governance,<sup>27</sup> despite the lack of provisions similar to s. 172 CA 2006. The debate in Germany is generally focused on new provisions on remuneration of members of the management board in a listed company.<sup>28</sup> According to the AktG '[t]he remuneration system of listed companies shall be aimed at the company's sustainable development (*nachhaltige Unternehmensentwicklung*).'<sup>29</sup> The subsequent provision adds that '[t]he calculation basis of variable remuneration components in the listed company should therefore be several years long (...).'<sup>30</sup> These two provisions, the guidelines on determining the levels of remuneration, are critical for encouraging forward thinking during decision-making processes in public German companies. Neither the legislation nor the Explanatory Notes to the Act<sup>31</sup> elaborate on the terms 'sustainable development'<sup>32</sup> or 'several years.' Hence, it must be decided on a case-by-case basis how to understand the sustainable development of the company and without doubt, there is an element of discretion in this respect.

Also, the need for the corporation's sustainable development (expressed as 'sustainable creation of value' and 'sustainable growth') is clearly visible in the German Corporate Governance Code, but only in a general manner, without any guidance on the meaning of this notion.<sup>33</sup> Moreover, the notion of future-orientated and longer-lasting management is extensively underlined in the German literature and is clearly more evident

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<sup>27</sup> Marcus Roth, *Corporate Boards in Germany* in Paul Davies et al. (eds.), *Corporate Boards in Law and Practice: A Comparative Analysis in Europe*, 361 (Oxford: Oxford University Press, 2013).

<sup>28</sup> §87(1) Aktiengesetz, as of 6 September 1965 (BGBl I, 1089) (henceforth: 'AktG'). Translation as at 1 December 2011, by Norton Rose <nortonrose.com/files/german-stock-corporation-act-2010-english-translation-pdf-59656.pdf> accessed 12 December 2016.

<sup>29</sup> §87(1)2 AktG. The term '*nachhaltige Unternehmensentwicklung*' can also be translated as 'lasting increase in value of the company.'

<sup>30</sup> §87(1)3 AktG.

<sup>31</sup> Explanatory Notes, *Beschlussempfehlung und Bericht des Rechtsausschusses* (17 June 2009) BT-Drucks 16/13433 <<http://dip21.bundestag.de/dip21/btd/16/134/1613433.pdf>> accessed 12 December 2016.

<sup>32</sup> In this paper, 'sustainability' is perceived as advocating responsible balance between the environmental, social and economic goals in the companies. See: Benjamin Richardson and Beate Sjaafjell, *Capitalism, the Sustainability Crisis and the Limitations of Current Business Governance* in Beate Sjaafjell and Benjamin Richardson, *Company Law and Sustainability – Legal Barriers and Opportunities*, 20 (Cambridge: Cambridge University Press, 2015).

<sup>33</sup> §4.1.1, §4.2.3 and §5.4.6 German Corporate Governance Code, as amended on 7 February 2017 (*Deutscher Corporate Governance Kodex*) (henceforth: 'Kodex').

than in the UK or Delaware.<sup>34</sup> However, even if it is at the heart of decision-making in Germany, the content and scope of long-termism remains unclear.

### **3.5. Interim Conclusion**

In sum, the purpose of long-termism in the jurisdictions under review is to encourage forward thinking by directors, which in turn contributes towards more responsible decision-making. Nevertheless, the effectiveness of long-termism in practice remains questionable owing to the lack of content and scope afforded by the concept. Therefore, to identify and sketch out the parameters of long-termism in the UK, Delaware and Germany, practical examples of long- and short-termism will be presented by reference to both the primary and secondary sources.

## **4. Gap-filling Exercise in the Context of Shareholder v. Stakeholder Theories**

### **4.1. Shareholder Primacy and Stakeholder Theory – Introduction**

Two concepts of the corporation currently predominate. The first treats the corporation as an economic entity whose purpose is to maximise shareholder value and the second perceives it as a social institution having the aim of furthering the interests of the corporation itself within the wider society in which it operates. These are referred to as the shareholder and the stakeholder value approaches, respectively. The former is traditionally identified with Anglo-American jurisdictions and these countries are often caricatured as shareholder primacy systems. On the other hand, one of the most notable representatives of the stakeholder value approach is Germany.

In this paper, it is argued that the content of long-termism is inevitably linked to the chosen corporate objective, i.e. to the notion of whose interests should prevail in a company. Diverse corporate objectives mean that the company's long- and short-term interests are perceived differently. In a shareholder-orientated jurisdiction, long-termism will be identified with long-term shareholder value, whilst in a stakeholder jurisdiction; it will be identified with the interests of various stakeholder groups. These concepts differ fundamentally: long-term orientated shareholder value will not always be beneficial for the corporation at large and long-term orientated stakeholder value might aim to achieve different objectives. Traditionally, the stakeholder value theory has been seen as more long-term focused and the shareholder approach has been accused of having an intrinsic short-term bias. This fosters a

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<sup>34</sup> See e.g.: Uwe Hüffer and Jens Koch, *Aktiengesetz*, §87 (München: C.H. Beck, 2016); Gerald Spindler, in Wulf Goette et al. (eds), *Münchener Kommentar Aktiengesetz* §87 (München: C.H. Beck/Franz Vahlen, 2014) (author's translation).

debate about whether the stakeholder-orientated countries are the ultimate exemplars of long-termism or whether perhaps shareholder-focused jurisdictions simply regard long-termism differently. Whether these distinct corporate objectives influence the parameters of long-termism will be reviewed, as will the common perceptions about the jurisdictions under review, e.g. Germany is generally perceived as more stakeholder-orientated and therefore more long-term focused, whilst the UK and Delaware are treated as rather more shareholder and short-term concentrated.

This section will first introduce the general background on shareholder v. stakeholder theories in the countries under review. Five case studies taken from the academic literature will then be presented to elaborate further upon the impact of corporate objectives on the content of long-termism during decision-making processes. These case studies focus on share price, decision to reduce carbon emissions from a company's plant, excessive marketing, lack of focus on environmental and health and safety issues and promotion of cultural, social and civic aims. The case studies present practical examples of what is, and what is not, long-term decision-making with a justification. Each case study has relevance to the shareholder v. stakeholder debate. An explanation is offered of why a particular decision is an example of long- or short-termism in each jurisdiction, whether it is likely to constitute a lawful activity there, and how likely it is that it will be taken. For short-term decisions and potential breaches of directors' duties, s. 172 CA 2006 and the relevant sections in the other jurisdictions will be considered.<sup>35</sup> Concluding remarks are offered at the end of each case study.

#### **4.1.1. The Shareholder Primacy Theory**

##### *Assessment of the concept*

One of the main justifications for the shareholder value approach is the theory that '[m]aximising value for shareholders is the right social goal for corporations, because it is equivalent to maximising the overall wealth created by the corporation.'<sup>36</sup> Friedman claims that the company's directors are merely the shareholders' agents, so their sole purpose should be to maximise the shareholders' wealth.<sup>37</sup> The shareholder value approach is often identified as one of the obstacles to a long-term approach, as it is accused of promoting short-termism

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<sup>35</sup> The breach of different directors' duties is not precluded.

<sup>36</sup> Margaret Blair, *In the Best Interest of the Corporation: Directors' Duties in the Wake of the Global Financial Crisis* in: Thomas Clarke, Douglas Branson (eds.), *The SAGE Handbook of Corporate Governance*, 63ff (Los Angeles, California: SAGE Publications, 2012).

<sup>37</sup> Milton Friedman, *A Friedman Doctrine: The Social Responsibility of Business is to Increase its Profits* (New York Times Magazine, 13 September 1970).

and fixation on profits for shareholders.<sup>38</sup> However, there are also voices that long-term shareholder value can be distinguished and that it provokes positive connotations.<sup>39</sup> Finally, Rappaport suggests that it is not the concept of shareholder value itself that is problematic, but its misapplication.<sup>40</sup>

### *Position in the US and UK*

The dominant theory in Anglo-American jurisdictions has been, certainly since the 1970s, the shareholder primacy theory.<sup>41</sup> That should not be taken to mean that the UK and US legal position are equivalent. The shareholder value theory is predominantly perceived as a proper decision-making norm in the US and Delaware in general.<sup>42</sup> The Supreme Court of Michigan in *Dodge v. Ford Motor Company* underlined the shareholder wealth maximization principle in 1919.<sup>43</sup>

The approach in the US can be contrasted with the position in the UK. As it was underlined in the section 3.2 above, in the UK s. 172 CA 2006 adopts the enlightened shareholder value (ESV) model. In the first instance, directors should focus on promoting the success of the company for the benefit of its members and only subsequently are they entitled to take into account any other factors – long-term interests among them.<sup>44</sup> There are also voices that this model forges a “third way” that merges elements of the shareholder and the stakeholder approaches.<sup>45</sup> However, this description of ESV is rejected in this paper and it is argued that the approach adopted in s. 172 CA 2006 is simply another incarnation of the shareholder primacy theory. This position is rooted in the fact that the interests of the shareholders are paramount and the consideration of non-shareholders’ interests is subordinated to the interests of shareholders.

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<sup>38</sup> Andrew Keay, *Getting to Grips with the Shareholder Value Theory in Corporate Law* 39 *Common Law World Review* 358, 376 (2010).

<sup>39</sup> Michael Jensen, *Value Maximization, Stakeholder Theory and the Corporate Objective Function* 22(1) *Journal of Applied Corporate Finance* 32, 32 (2010).

<sup>40</sup> Alfred Rappaport, *The Economics of Short-Term Performance Obsession* 61(3) *Financial Analysts Journal* 65, 72 (2005).

<sup>41</sup> Keay, *supra* n 16, 1-2.

<sup>42</sup> Leo Strine Jr, *Our Continuing Struggle with the Idea that For-profit Corporations Seek Profit* 47 *Wake Forest Law Review* 135, 147 fn 34 (2012).

<sup>43</sup> *Dodge v. Ford Motor Co.* 170 NW 668 (Mich 1919).

<sup>44</sup> s 172 (1) (a) CA 2006.

<sup>45</sup> Cynthia Williams and John Conley, *An Emerging Third Way? The Erosion of the Anglo-American Shareholder Value Construct* 38 *Cornell International Law Journal* 493, 496 (2005).

### 4.1.2. The Stakeholder Theory

#### *Evaluation of the theory*

Stakeholder theory dictates that the interests of all of the various stakeholders in a firm, including the shareholders, should be taken into account during the decision-making process.<sup>46</sup> Freeman famously stated that a stakeholder should be understood as ‘any group or individual who can affect or is affected by the achievement of an organization’s purpose.’<sup>47</sup> The theory that stakeholder value approach is long-term focused does not go unchallenged. Clearly, non-shareholders among stakeholders do not always appear to be focused on the long-term. They are linked with the company via contracts and arguably, they are risk-averse, which may cost the company in terms of its ability to attract new investment and stay competitive in the modern business world.<sup>48</sup> Overall, the main criticism of the stakeholder theory is that it is not possible to define whose interests should actually be taken into consideration. It is feared that directors use the stakeholder theory as an excuse for bad management. To illustrate that point, Easterbrook and Fischel famously stated that ‘a manager told to serve two masters (a little for the equity holders, a little for the community) has been freed of both and is answerable to neither.’<sup>49</sup>

#### *The stakeholder theory in Germany*

The German corporate governance system is traditionally recognised as being stakeholder oriented. Nevertheless, there is no agreement among German commentators as to whether the stakeholder value approach is indeed the current corporate objective in Germany.<sup>50</sup> Despite mandatory co-determination rules, the AktG no longer explicitly refers to non-shareholder interests, as had been the case under the now repealed §70 (1) 1937 *Aktiengesetz*. In Germany, the duties are owed to the company and members of both management and supervisory boards are obliged to serve ‘the interests of the enterprise’

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<sup>46</sup> Jensen, *supra* n 39, 32.

<sup>47</sup> R Edward Freeman, *Strategic Management: A Stakeholder Approach*, 53 (Boston: Pitman, 1984).

<sup>48</sup> Shuangge Wen, *Shareholder Primacy and Corporate Governance: Legal Aspects, Practices and Future Direction*, 222 (London: Routledge, Taylor & Francis Group, 2013).

<sup>49</sup> Frank Easterbrook and Daniel Fischel, *The Economic Structure of Corporate Law*, 38 (Cambridge, Mass.; London: Harvard University Press, 1996).

<sup>50</sup> Klaus Hopt, *Comparative Corporate Governance: The State of the Art and International Regulation* in: Fleckner et al. (eds), *Comparative Corporate Governance: A Functional and International Analysis*, 41 (Cambridge: Cambridge University Press, 2013).

(*Unternehmensinteresse*).<sup>51</sup> This notion is not clear, and hence debate surrounds the corporate objective.

However, there are convincing arguments that the German legal system leans heavily towards the stakeholder theory. Firstly, §4.1.1 of the Kodex explicitly states that the management board is obliged to act in the interest of the whole enterprise and to take into account the interests of shareholders, employees and other stakeholders with the objective of achieving sustainable creation of value. Secondly, the interpretation of the expression ‘interests of the enterprise’ suggests that stakeholder theory is expressive of the overarching corporate objective. In the first few years after the *Aktiengesetz* was implemented in 1965, the broad concept of ‘the enterprise per se’ dominated – i.e. the interests of all stakeholders should be taken into account.<sup>52</sup> In the late 1970s and early 1980s, the debate concentrated on the Co-determination Act from 1976 and its influences on the AktG.<sup>53</sup> Today the stakeholder-orientated approach produces mixed views. Nevertheless, the predominant view seems to be that the management exercises broad decision-making powers and the interests of shareholders (assets), employees (labour), and the general public (public welfare) should be respected.<sup>54</sup>

#### **4.1.3. Conclusions**

Taking into account the discussion immediately above, it appears that in practice Germany differs from the two other jurisdictions, because the management board here is more incentivised to consider other factors and interests. They are encouraged to look at the enterprise in a more holistic way. Overall, despite some voices to the contrary, there is a tendency in the academic literature to assume that Germany, as leaning towards the stakeholder value approach, is more long-term focused in comparison to the UK and Delaware. Hence, the gap-filling exercise conducted in this paper will assist in determining the extent to which Germany actually prioritises long-term decision-making.

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<sup>51</sup> This concept was developed by the courts. See: BGH 25.02. 1982 – II ZR 174/80 – BGHZ 83, 122, 134; BGH, 12.03. 1990 – II ZR 179/89 – BGHZ 110, 323, 334.

<sup>52</sup> Holger Fleischer, in: Gerald Spindler, Eberhard Stilz (eds.), *Kommentar zum Aktiengesetz* (München: C.H. Beck, 2015) §76 mn. 25 (author’s translation).

<sup>53</sup> *ibid* §76 mn. 26.

<sup>54</sup> Hüffer and Koch, *supra* n 34, §76 mn. 28.

## 4.2. Examples of Long- and Short-Term Decision-Making: A Series of Case Studies

### 4.2.1 Case Study 1: A Focus on Share Price

#### 4.2.1.1 Introduction

An emphasis on the share price is commonly identified as a leading example of short-termism in the academic literature.<sup>55</sup> This case study draws on this academic literature. This case study is linked both to the shareholder v. stakeholder debate and to the ownership structure of the company. However, it is more appropriate to present it in the context of the discussion of corporate objectives since a decision to focus on the share price vividly illustrates the concerns related to the issue of whose interests should prevail in the company.

In shareholder primacy jurisdictions, it is generally expected that directors will concentrate on share price maximisation, whereas in stakeholder-orientated jurisdictions, this inclination is presumed to be weaker, as in the latter directors cannot focus exclusively on the interests of the shareholders. Therefore, concentration on the share price should be theoretically more widespread in the UK and Delaware than in Germany as it is less likely that it constitutes a breach of a director's duty in the former. Does this mean that a focus on share price constitutes an example of long-term thinking in the Anglo-American jurisdictions? With each of those questions in mind, the discussion turns first to consideration of the position in Delaware law.

#### 4.2.1.2 Delaware

Concentration on the share price in Delaware reflects the widespread shareholder value principle. Hence, such decision would most likely be supported by shareholders in Delaware – from their perspective it can be a justified and profitable decision. There is only one problem; over-emphasis on share price is the embodiment of short-term behaviour. Does focussing on the short-term impede decision-making in Delaware? Strine's findings support the claim that the law in Delaware does not oblige directors to maximise short-term profits for shareholders, but rather by virtue of a duty of loyalty it does require them 'to pursue a good faith strategy to maximise profits for the shareholders.'<sup>56</sup> Consequently, directors are

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<sup>55</sup> See e.g. Luca Cerioni, *The Success of the Company in s. 172(1) of the UK Companies Act 2006: Towards an 'Enlightened Directors' Primacy?* 4 *Original Law Review* 1, 3 (2008); BIS, *Summary of Responses: A Long-Term Focus for Corporate Britain*, para. 14 (March 2011) <[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/207536/11-797-summary-responses-long-term-focus-corporate-britain.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/207536/11-797-summary-responses-long-term-focus-corporate-britain.pdf)> accessed 12 December 2016.

<sup>56</sup> Strine *supra* n 42, 155.

not obliged to maximise short-term profits, but at the same time they are not forbidden to do so. Thus, arguably a short-term decision to focus on share price appears to be consistent with the corporate objectives under the company law of Delaware.

Since board members exercise broad decision-making powers in Delaware, is it accurate to say that they are somehow incentivised by other non-legal factors – such as the market – to maximise the corporation’s share price? On the one hand, they cannot be forced to do so, especially as shareholders are weak in Delaware<sup>57</sup> and cannot really threaten the board, if their objectives differ (long-term oriented shareholders and short-term orientated directors and vice versa), unless they are able to gather the majority of the shares and remove the board or director.<sup>58</sup> On the other hand, directors will be personally interested in keeping the share price high. Hu argues aptly that because a poor share price may cause them to be replaced (or not re-elected), board members have an incentive to keep the stock price high, sometimes without analysing whether this will actually promote the success of the company.<sup>59</sup> Thus, not only pressures from shareholders (whether they are effective is a different question) combined with their often short-term involvement in the company, but also market drivers exert pressure on directors to achieve quick results.

At the same time, it is worth stressing that the shareholder primacy orientation in Delaware, with its over-emphasis on short-term profits, such as a focus on share price, is widely criticised in the literature. In this context, it is noted that short-termism can be identified with the managerial obsession with current profitability.<sup>60</sup> Lydenberg emphasises that an excessive focus on short-term profits has various detrimental effects including the misallocation of assets, the dangerous volatility of financial markets and the diversion of productive resources to repairing environmental and social damage.<sup>61</sup> Without a doubt, considering factors other than shareholders’ immediate profits and an occasional willingness to sacrifice them is an indication of long-term thinking.

To sum up, Delaware law supplies a strong incentive for directors to take decisions that concentrate solely on the growth of the share price, while considering the diffusion of shareholder value. The recent criticism in the US of this policy does not seem to have

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<sup>57</sup> See section 5.1.2 below.

<sup>58</sup> §141 (k) DGCL.

<sup>59</sup> Henry Hu, *Risk, Time, and Fiduciary Principles in Corporate Investment* 38 *UCLA Law Review* 277, 332-333 (1990).

<sup>60</sup> Lawrence Mitchell, *A Critical Look at Corporate Governance* 45 *Vanderbilt Law Review* 1263, 1283 (1992).

<sup>61</sup> Stephen Lydenberg, *Long-term Investing: A Proposal for how to Define and Implement Long-term Investing*, 47 (2007) *Summit on the Future of the Corporation Paper Series on Corporate Design* <[www.corporation2020.org/pdfs/SummitPaperSeries.pdf](http://www.corporation2020.org/pdfs/SummitPaperSeries.pdf)> accessed 12 December 2016.

changed this. A decision to focus on share price does not appear to constitute an unlawful activity in itself but it can contribute to a possible breach of directors' duties if it is detrimental to the company. The business judgment rule will protect directors if their decisions are not particularly successful since the courts in Delaware are not going to second-guess the decisions of a well-motivated, non-biased fiduciary, if he is acting in good faith.<sup>62</sup>

#### **4.2.1.3 Germany**

A focus solely on share price is most likely to constitute an example of short-term thinking under German law. Management boards have wide decision-making powers according to §76 (1) AktG. It seems that the board can decide to focus only on share price, especially when it is under the strong influence of the majority shareholder;<sup>63</sup> although, in general, the board is not bound by any instructions from shareholders. However, the majority shareholder is less likely to put short-term pressure on the board – the evidence suggests that shareholders in the blockholding jurisdictions tend to have longer time-horizons.<sup>64</sup> Further, in the prevailing view, shared also by the author of this paper, plural goals must be decisive for the management board during decision-making. Hence, clearly exercising discretion means properly evaluating the coincidence of the interests of the company and its enterprise.

Moreover, in Germany management board's discretionary powers are limited by the duty to ensure the lasting profitability and continued existence of the corporation.<sup>65</sup> Therefore, the reasonable realisation of profits rather than profit maximisation is a principal aim of the management board. The board is strongly encouraged to have regard to the longer lasting development of the company and therefore, the focus on the share price is not a top priority. In other words, German law provides weaker incentives for decisions to focus on the share price. It is the view of this author, thinking only of the share price will usually preclude the lasting profitability of the corporation. This is the case, because concentrating on share price might result in a loosening of focus on the corporation in general, cutting production costs or employee benefits.

Concentrating only on the share price is also not consistent with the corporate objective in Germany as it favours the interests of only one group, i.e. the shareholders. Since

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<sup>62</sup> *Smith v. Van Gorkom* 488 A.2d 858 (Del 1985) 872 (Justice Horsey).

<sup>63</sup> See section 5.1.2 below.

<sup>64</sup> *ibid.*

<sup>65</sup> See: Spindler, *supra* n 34, §76 mn. 94. However, it is worth underlining that the AktG requires only that the management board ensures the continued existence of the corporation (§91(2) AktG) and prepares the report on the profitability of the company (§90(1) 2 AktG). 'Lasting profitability' is not explicitly mentioned in the legislation, but underlined only by the commentators.

there is no ranking of interests, the corporate objective is not solely identified with shareholders' interests. Further support for this claim is supplied by Baums who explicitly emphasises that under German law: '[t]here is no duty to maximise the value of the shares' and that the interests of various stakeholders must be taken into account.<sup>66</sup> Consequently, concentrating on the share price alone is more likely to constitute an example of short-termism under German law, which is more evident than under Delaware and UK law. In jurisdictions leaning towards the stakeholder value approach, there is a greater likelihood that a focus on the company's share price constitutes a breach of directors' duties than in a shareholder-orientated country. This does not prevent directors from taking such a decision, as it is not illegal in itself. If taken, such a business decision is protected under the business judgment rule in Germany, but only if the management board can establish that the decision was based on appropriate information and that they were acting in the best interests of the company.<sup>67</sup>

#### **4.2.1.4 The UK**

The concentration by the board of directors in the UK only on share price during the decision-making processes is an example of short-termism. As explained earlier, it is striking how focused the ESV principle is on the shareholder value model. A long-term approach, although encouraged by the CA 2006 and promoted in the literature, is not enforceable. Thus, it is argued that these decisions will be popular with the shareholders if they are profitable for them. If these conditions are met, it is likely that short-term decisions will be taken, as UK law affords strong incentives for such a decision. The answer is not that clear however, if there are conflicts of interests between the board and shareholders. In the end, directors are responsible for the running of the company and they will take the decision to concentrate on share price or not and it will depend on their management style, goals and the position of shareholders within the company. The other question is whether concentrating on the share price is really beneficial for shareholders, if it considers only immediate profits and does not pay enough attention to long-term effects. Without a doubt, it might be profitable for shareholders in the short run; however, concentrating solely on the share price constitutes an

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<sup>66</sup> Theodor Baums, *Corporate Governance in Germany – System and Current Developments*, 5 (Arbeitspapiere Goethe Universität, 1998).

<[www.jura.uni-frankfurt.de/43029805/paper70.pdf](http://www.jura.uni-frankfurt.de/43029805/paper70.pdf)> accessed 12 December 2016.

<sup>67</sup> See: §93(1)2 AktG and §3.8 Kodex.

example of short-term thinking in the UK and such decisions are detrimental for shareholders in the longer perspective.

Similar to the position in Delaware, this example of short-termism in the UK is not as strong as it is under German law, because arguably the decision to focus on share price is more consistent with the corporate objective in the Anglo-American jurisdictions. This does not constitute an obvious breach of directors' duties in the UK, but it definitely contributes to one, if the decision does not promote the success of the company. UK law does not incorporate the business judgment rule; however, only instances of serious mismanagement can be actionable.<sup>68</sup> Hence, the mere fact that a particular decision is unsuccessful is not enough to render a director liable in law.

The decision to focus solely on share price has been criticised in the UK literature. In a consultation on 'A Long-Term Focus for Corporate Britain,' some respondents acknowledged problems with the short-term measures of company performance such as earnings per share and total shareholder return.<sup>69</sup> Further, clearly an increase in the share price cannot be the objective of the company in itself. The increase in share price 'can only be significant, over time, as one of the *signals* of the company's long-term increase in values.'<sup>70</sup>

#### **4.2.1.5 Conclusions**

A focus on the company's share price is likely to be an example of lawful managerial conduct in all three jurisdictions. It can only contribute to a breach of directors' duties if the given decision is not taken in the best interests of the company. This case study confirms that it cannot be argued that any given corporate objective obliges directors to focus on the share price. However, the shareholder value principle creates much greater scope and justification for directors to focus solely on the maximisation of the share price. Therefore, it is more likely that there is greater incentive for such decisions to be taken in Delaware and in the UK than in Germany.

The discussion of this kind of case demonstrates that the sole focus on share price has been criticised in all three jurisdictions. The consensus view seems to be that such decisions constitute examples of short-term thinking. Although in general profit generation by companies is justified, it is strongly underlined in the literature that the companies should

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<sup>68</sup> CA 2006 Explanatory Notes, *supra* n 14, Commentary on s 172, subs 328.

<sup>69</sup> BIS, *Summary of Responses*, *supra* n 55, para. 14.

<sup>70</sup> Cerioni, *supra* n 55, 3 [emphasis in original].

achieve their purpose within the overarching purpose of sustainable development.<sup>71</sup> A decision to focus on share price constitutes a stronger example of short-termism in Germany since it is not consistent with the corporate objective there. Focus on the share price is also an example of short-termism in jurisdictions leaning towards the shareholder value theory – because, although it is beneficial for shareholders, such decision-making brings only immediate profits and its further impact on the company is difficult to estimate. Does it undermine the shareholder value principle in these jurisdictions? There is certainly no evidence for that.

## **4.2.2 Case Study 2: A Decision to Reduce Carbon Emissions from a Company's Plant**

### **4.2.2.1 Introduction**

This example is taken from an article by Blair in which she describes a state of affairs where a board has decided to act aggressively to reduce carbon emission from a company's plant (without specifying what the type of company is).<sup>72</sup> In order to make this case study more convincing, it is assumed here that the hypothetical companies in Delaware, Germany and UK each have the same corporate purpose. That corporate purpose is of a company manufacturing cars where arguably, the carbon footprint is high<sup>73</sup> and owing to that fact, the reduction of carbon emissions is a vital decision.

Reducing carbon emissions suggests consideration of environmental and community interests.<sup>74</sup> Such decision is not immediately linked to profit maximisation; it rather suggests some costs for the corporation and/or investment in new technologies. In general, this is an example of corporate social responsibility (CSR).<sup>75</sup> However, if the action is justified and well planned it might be profitable for shareholders. Certainly, factors other than the shareholders' interests were taken into account during this decision-making process and this

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<sup>71</sup> Beate Sjafjell and Jukka Mahonen, *Upgrading the Nordic Corporate Governance Model for Sustainable Companies* 11(2) European Company Law 58, 59 (2014).

<sup>72</sup> Blair, *supra* n 36, 71.

<sup>73</sup> See e.g.: Mike Berners-Lee et al., *What's the Carbon Footprint of ...a New Car?* (The Guardian, 23 September 2010) <[www.theguardian.com/environment/green-living-blog/2010/sep/23/carbon-footprint-new-car](http://www.theguardian.com/environment/green-living-blog/2010/sep/23/carbon-footprint-new-car)> accessed 12 December 2016.

<sup>74</sup> This case study does not scrutinise the environmental law regulations like for instance the Kyoto Protocol. For the discussion on carbon emission management see: Janek Ratnatunga, Kashi Balachandran, *Carbon Emissions Management and the Financial Implications of Sustainability* in Paulo Taticchi et al. (eds.), *Corporate Sustainability*, 59ff (Berlin, Heidelberg: Springer-Verlag, 2013).

<sup>75</sup> According to the European Commission, CSR requires companies 'to integrate social, environmental, ethical, human rights and consumer concerns into their business operations and core strategy.' Communication from the Commission, *A renewed EU strategy 2011-14 for Corporate Social Responsibility* COM(2011) 681 final, s. 3.1 (2011). See also: Marina Nehme and Claudia Wee, *Tracing the Historical Development of Corporate Social Responsibility and Corporate Social Reporting* 15 James Cook University Law Review 129 (2008).

is the main justification for introducing this case study. The ability to look beyond the shareholders' interests is in line with the discussion of the shareholder v. stakeholder issue, i.e. this example epitomises the corporate objective debate particularly well. Would a decision to reduce carbon emissions be acceptable in all three jurisdictions? The topic of the reduction of carbon emissions in the context of the law of Delaware, Germany and the UK will now be addressed.

#### **4.2.2.2 Delaware**

As far as Delaware law is concerned, the decision described by Blair would likely be lawful, as the board exercises broad decision-making powers and it is entitled to reduce carbon emissions. This can only occur under the condition that this decision is also beneficial for shareholders. Hence, arguably this jurisdiction supplies weak incentives for this kind of decision. Overall, Delaware law is quite clear that additional interests can only be pursued when the shareholders' interests are also met. Strine, for example, finds a tendency to consider the interests of other stakeholders to be equal with the interests of shareholders 'a tad naive and tiring.'<sup>76</sup> The decision to reduce carbon emissions appears to be an example of long-term thinking, as it arguably goes beyond the immediate shareholders' profits. The assumption is made that the decision has been diligently thought-out and the effects of this reduction duly considered.

If it satisfies the interests of the shareholders and it was taken in the best interest of the company, the board's decision to reduce carbon emissions is a lawful activity and should not contribute to a breach of the directors' duties. The business judgment rule appears to protect well-motivated and rational decisions, even if they do not maximise shareholder value. Clearly, this approach allows directors in Delaware to consider aims beyond profit maximisation. Thus, the consideration of the interests of other stakeholders or long-term factors is permitted, providing the interests of shareholders are satisfied, but it cannot stand as a sole justification for a decision. The fact that the reduction of carbon emissions might be beneficial for both the environment and the public in general is a bonus. The reduction of carbon emissions might be beneficial for shareholders in terms of their leadership role in the environment protection, as Blair describes, but in the longer-term this also yields financial profits. The aim of long-term share value maximisation is self-evident and it seems to be encouraged in Delaware.

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<sup>76</sup> Leo Strine Jr, *Making it Easier for Directors to "Do the Right Thing"?* 4 Harvard Business Law Review 235, 235 (2014).

### 4.2.2.3 Germany

A decision to reduce carbon emissions is likely to be an example of long-termism under German law. Such decision is arguably not only taken to promote the immediate interests of shareholders but also considers the interests of other stakeholders. The reduction of the carbon emissions should generally positively influence the company in the long run and thus the decision to do so is socially responsible. Siemens, in its Sustainability Report of 2011, informs that the company reduced carbon dioxide emissions by 22% compared to 2006 when the established target was 20%. Sustainability was articulated as ‘our guiding principle [which] creates major business opportunities for our company.’<sup>77</sup> Hence, this is not a hypothetical example but a real decision taken by a German company.

As previously noted the discretionary powers of the management board are limited in Germany by the duty of ensuring lasting profitability and the continued existence of the corporation. Hüffer and Koch argue that the concept of lasting profitability corresponds primarily to the interests of the shareholders as investors and it also serves the interests of the employees and public welfare since the public interest cannot rely on economic entities that are unprofitable in the long-term. They also distinguish lasting profitability from short-term profit maximisation.<sup>78</sup> This suggests that lasting profitability is not connected to short-term profits and hence directors are discouraged from concentrating on it. If it contributes to the lasting profitability of the company and goes beyond short-term profits, a decision to reduce carbon emissions is likely to be consistent with the country’s corporate objective and will likely be lawful. There is a greater incentive for such a decision to be taken and it is highly unlikely that it will constitute a breach of directors’ duties in Germany. Even if the decision is ultimately unsuccessful, the management board can hide behind the shield of the business judgment rule unless it can be proved that it did not act in the best interests of the company.

Is the position under German law any different from that applicable in the UK and Delaware? The decision-making process in Germany appears to involve a greater degree of balancing of the interests of various stakeholders than is the case in the UK or Delaware. This decision appears to be more natural in Germany than in the other two jurisdictions. This case study demonstrates also that in a stakeholder jurisdiction, at least theoretically, the law

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<sup>77</sup> Siemens Sustainability Report 2011 (Press Release Munich, 21 May 2012) <[www.siemens.com/press/en/pressrelease/?press=/en/pressrelease/2012/corporate/axx20120525.htm](http://www.siemens.com/press/en/pressrelease/?press=/en/pressrelease/2012/corporate/axx20120525.htm)> accessed 12 December 2016.

<sup>78</sup> Hüffer and Koch, *supra* n 34, §76 mn. 34-35.

provides greater scope for different points of view to be considered, the situation is analysed from different perspectives and the decision is more comprehensive.

#### **4.2.2.4 The UK**

Under UK law, the given illustration should also provide an example of long-termism. The decision to reduce carbon emissions is most likely to be an investment that will contribute in the future development of the company as a whole and not only to an increase in the shareholder value. This decision might be favourable to the enterprise and the various stakeholders listed in s. 172 CA 2006 in the long-run. Before making a decision, the board must scrutinise whether it is beneficial to shareholders as a whole, as this is the paramount objective under the Companies Act 2006. Shareholders' interests are a key concern for directors and directors are accountable only to them, but this decision has also some chance of being consistent with the ESV principle promoted in the Companies Act.

It is argued in this paper that the decision to reduce carbon emissions most likely will constitute a lawful activity and if it is considered to increase shareholder value, the law affords incentives for such a decision to be taken. As such, it would be difficult to claim a breach of directors' duties. Further, as far as UK law is concerned, the decision to act to reduce emissions will be encouraged in the literature, insofar as it goes 'beyond routine day-to-day operations' – meaning that it is actually 'a *strategic* decision' which considers, 'by using the available information, the consequences in the long-run of the intended course of action.'<sup>79</sup> However, at the same time and similar to the position in Delaware, the UK law supplies quite weak incentives for such decision, in a sense that it depends only on whether it will be beneficial for shareholders, as the other factors are of lesser importance.

#### **4.2.2.5 Conclusions**

The conclusion regarding the nature of such a decision appears to be very similar under these three jurisdictions: it would be permissible in all of them and it seems to be a sustainable long-term investment for the company. The background and justification for the decision is slightly different in each jurisdiction though. In Delaware and UK law, the decision is taken primarily because it serves the interests of the shareholders. If it is also beneficial to other stakeholders, it is even better, but this is not an essential condition and rather an additional

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<sup>79</sup> Cerioni, *supra* n 55, 4 [emphasis in original].

benefit.<sup>80</sup> Arguably, the decision-making process under German law requires the balancing of different interests. Hence, it is naturally a stronger example of long-termism under German law, as it is more in line with the corporate objective there.

### **4.2.3 Case study 3: Excessive Marketing**

#### **4.2.3.1 Introduction**

The next issue to be analysed is the time horizon of a decision to concentrate on excessive marketing. Excessive,<sup>81</sup> and therefore, detrimental marketing, could be the outcome where a professional hired by the company is incompetent. In this case, the main claim would be by the company against the third party in charge of the excessive marketing campaign. This case study, however, does not analyse this issue and instead concentrates on a board's decision to over-promote the company. The following analysis is based on the assumption that the hypothetical companies in the UK, Delaware and Germany all have the same corporate purpose. They are deemed to be medium-sized, pharmaceutical companies.

Companies all over the world invest in marketing. A decision to do so cannot be identified with specific corporate objectives and a question arises about how this decision fits in with the company's corporate objective and whether it is more likely to be taken in one jurisdiction than another. Obviously, this decision affects shareholders. If the marketing is carried out successfully, they will be the first to see its effects. Marketing will also have an effect on other stakeholders. The excessive marketing scenario is inspired by the following case described in the Kay Review:

In the 1970s, Glaxo made a successful long-term investment in the development and promotion of Zantac which created a British world leader in pharmaceuticals. In the 1990s, however, the company – in common with other global pharmaceutical companies – appears to have given relatively too much attention to marketing and to the acquisition of other pharmaceutical businesses, and not enough to the fundamental research on which long-term success in this industry

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<sup>80</sup> Millon evaluates the potential for CSR to stimulate environmental sustainability, as the law is currently inadequate for this task. It is stated that the 'ethical' CSR model is ineffective in the shareholder primacy jurisdictions. In contrast, the 'strategic' CSR – with investment in stakeholder well-being in order to promote the company's long-run economic viability – seems to be more effective; however not without limitations. First, shareholders may still object such investment and secondly it will only be possible if the company generates profits. David Millon, *Corporate Social Responsibility and Environmental Sustainability* in Beate Sjaafjell, Benjamin Richardson, *Company Law and Sustainability – Legal Barriers and Opportunities*, 35ff (Cambridge: Cambridge University Press, 2015).

<sup>81</sup> Meaning 'too much or too great' – see: Oxford Dictionary for the Business World, 283 (Oxford, New York: Oxford University Press, 1993).

depends. The long-term damage resulting from such misdirection was exemplified in the \$3bn fine imposed by the US regulatory authorities as this report went to press.<sup>82</sup>

This case shows that too much focus on marketing and the purchasing of other businesses and not enough attention to key research were the reasons for the long-term damage that Glaxo suffered. It was a risky and unreasonable decision. The reasoning presented in the Kay Review, despite its subjectivity in relating to the Glaxo case, constitutes an evaluation that can be used by the boards in each legal system during the decision-making process in order to avoid destructive decisions. Excessive marketing might be the result of a spontaneous, one-off decision or of an erroneous longer-term strategy. According to the Kay Review, bad long-term decisions provide examples of short-termism, which can manifest itself in hyperactivity.

<sup>83</sup> Excessive marketing – understood as an over-concentration on the issues related to marketing – could be an example of it.

The question arises as to why companies decide to promote their products and services excessively. The justifications for such decisions can vary. A lack of funds for the development of new products might be one of the reasons why a company focuses on marketing established products rather than on developing new ones.<sup>84</sup> Another reason might be a conviction that it is actually beneficial for the company and for example used to promote a newly established, developing or failing corporation or perceived as a way of attracting new investments. In the pharmaceutical industry, where competition is high, advertisement of a product is vital.

The other justification for associating excessive marketing negatively comes from online marketing. The survey shows that half of online customers connect to a brand via social network. However, a third of social media users disconnected from these brands subsequently (mostly because of aggressive adverts) and then associate them negatively.<sup>85</sup> Does excessive marketing always contribute to long-term damage and does it always constitute a short-term decision? Every case and every company is different, so an unequivocal answer is impossible. Naturally, as such, excessive marketing will not always have negative consequences for a company. For example, provocative and excessive

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<sup>82</sup> *The Kay Review of the UK Equity Markets and Long-Term Decision Making: Final Report*, para. 1.26 (2012) <[www.bis.gov.uk/kayreview](http://www.bis.gov.uk/kayreview)> accessed 12 December 2016.

<sup>83</sup> *ibid.*, paras. 1.1,1.2., 1.24.

<sup>84</sup> *ibid.* para. 1.24.

<sup>85</sup> See: David Mielach, *Slow and Steady Wins the (Social Media Marketing) Race* (Business News Daily, 23 March 2012) <[www.businessnewsdaily.com/2247-social-media-backfire.html](http://www.businessnewsdaily.com/2247-social-media-backfire.html)> accessed 12 December 2016.

marketing of the photographer Oliviero Toscani made Benetton famous and successful in the eighties.<sup>86</sup>

On balance, what is the value of a case study on excessive marketing, knowing the contradictory opinions on it? Overall, a decision to invest excessively in marketing is negatively regarded and portrayed as a short-term decision in this paper, because it concentrates on one factor only. From a company's perspective, sustainable development is key. Hence, over-concentration on one factor, like marketing for instance, is condemned as being too risky for the company. The decision to market excessively is portrayed as a short-term decision both if it aims at immediate profit maximisation by shareholders or if it seeks to achieve goals other than immediate profit maximisation. The topic of marketing in the UK, Delaware and Germany is now examined in greater detail, in order to scrutinise whether there are any differences in the perception of it.

#### **4.2.3.2 The UK and Delaware**

Taking into account all of these points, it is rather unlikely that a decision to promote excessive marketing would form part of the content of a long-term principle in any of the jurisdictions under review. Although criticised in the Kay Review, it appears more likely to be taken in shareholder-orientated jurisdictions such as the UK and Delaware, than in Germany. Shareholders are arguably less risk-averse than the other stakeholders and therefore more likely to support and approve risky decisions.<sup>87</sup> Excessive marketing is thus more likely to be perceived as a positive or necessary decision for the company, even if its development is not sufficiently balanced or there is not enough money to invest in research or staff. Therefore, arguably there are greater incentives for this decision to be taken in the UK and Delaware.

Despite their superficial similarities, the position under UK and Delaware law is not identical. Delaware leans the most towards shareholder primacy: the interests of only one group will be considered by the powerful boards there. UK law likewise recognises the ultimate interests of shareholders, but the interests of other stakeholders are also taken into account, although not enforceable. More consideration (at least in theory) is given to the

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<sup>86</sup> See: Rosie Tomkins, *Oliviero Toscani: 'There are no Shocking Pictures, only Shocking Reality'* (CNN, 19 August 2010)

<<http://edition.cnn.com/2010/WORLD/europe/08/13/oliviero.toscani/index.html>> accessed 12 December 2016.

<sup>87</sup> Wen, *supra* n 48, 222.

interests of other stakeholders in comparison with Delaware. Therefore, there are fewer incentives for such decision to be taken in the UK.

It is reasonable to argue that excessive marketing is a lawful activity in both jurisdictions, although it might contribute to a breach of directors' duties. In the UK, directors can only be sued according to s. 172 CA 2006 if it can be proved that they did not promote the success of the company for the benefit of its members as a whole. In Delaware, even unfavourable directors' decisions are protected by the business judgment rule unless the plaintiff can prove that a director did not act in good faith and in the honest belief that the action taken was in the best interests of the company.<sup>88</sup> This will be extremely challenging.

#### **4.2.3.3 Germany**

In Germany, the interests of various stakeholders should be considered before decisions are taken. As has been established in the previous case studies, in Germany a decision can be taken only if it serves the continued existence and long-term (or lasting) profitability of the company. At this point, it is essential to underline an important remark made by Hohaus and Weber. These authors correctly argue that a lasting increase in value can be achieved through both long-term and short-term incentives: it is important that in the end, long-term incentives are generated and a lasting increase in value is achieved.<sup>89</sup> Hence, short-term management strategies are naturally also allowed under German law given that they aim towards a subsequent creation of value for the company. Nevertheless, it is unrealistic to expect that the decision to focus excessively on marketing in the case of an average corporation will contribute to the lasting profitability of the company. Moreover, it will be difficult to prove that such a decision balances the interests of various stakeholders, contributes towards consistent development and was taken in the best interests of the company. A decision to focus excessively on marketing is a strong example of short-termism under German law. There are weaker incentives for excessive marketing in Germany and as such, it is less likely that such decision would be taken there since it is not consistent with the corporate objective. It is not an unlawful activity in itself but it might contribute to a breach of the directors' duties. If the marketing strategy is unsuccessful, the members of the management board will find protection under the business judgment rule unless they did not act in the best interests of the company.

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<sup>88</sup> *Smith v. Van Gorkom* 872 (Justice Horsey).

<sup>89</sup> Benedikt Hohaus et al., in Oliver Lücke and Bernhard Schaub (eds), *Beck'sches Mandatshandbuch Vorstand der AG*, 448 (München: C.H. Beck, 2010) (author's translation).

#### **4.2.3.4 Conclusions**

Can it be argued that ‘appropriate’ marketing (i.e. reasonable and balanced marketing) will be a positive decision for a company in the longer-term? It is extremely hard to distinguish between destructive and favourable marketing and to define what constitutes appropriate marketing. It seems more likely that balanced and well-planned marketing will contribute to the long-term sustainable development of companies in every jurisdiction.<sup>90</sup>

This case study highlights the importance of well-balanced and well-thought-out decision-making and the dangers associated with disproportionate decisions. However, it should also be noted that extreme (and short-term) decisions are not always harmful. Decisions may not always be negatively (or short-term) orientated: the context is important. It is reasonable to assume that the word ‘excessive’ evokes negative associations. Greater incentives are supplied by the law in the UK and Delaware than in Germany to take a decision that focuses on excessive marketing, but it appears to be a lawful activity in all three jurisdictions and it can only contribute to the breach of duties.

#### **4.2.4 Case Study 4: A Lack of Focus on Environmental and Health and Safety Issues**

##### **4.2.4.1 Introduction**

The next case study draws its inspiration from the BP oil spill of 20 April 2010 in the Gulf of Mexico, which was connected to a lack of focus on environmental and health and safety issues. The BP oil spill case was discussed in the Kay Review<sup>91</sup> and in the academic literature.<sup>92</sup> An examination of different factors that are not immediately linked to profit maximisation is particularly interesting in the context of stakeholder v. shareholder discussions. It illustrates how these debates evaluate the broader factors against the corporate objective. That environmental and health and safety arguments should be of critical importance for corporations or for society as a whole is rarely challenged. This case study also shows how focusing on these factors contributes to the long-term development of the

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<sup>90</sup> Sustainable marketing is portrayed as ‘an attempt to broaden the concept of marketing beyond simple economic (monetary) development; it seeks to give marketing a morality and accountability.’ Lynette Ryals, *Issues in Sustainable Marketing* in David Grayson, Nadine Exter, *Cranfield on Corporate Sustainability*, 119 (Sheffield England: Greenleaf Publishing, 2012).

<sup>91</sup> *Kay Review*, supra n 82, ch 1.

<sup>92</sup> Strine, supra n 42, 136-139; Nick Lin-Hi et al., *The Relationship between Corporate Governance, Global Governance, and Sustainable Profits: Lessons Learned from BP* 11 (5) *Corporate Governance: The International Journal of Business in Society* 571 (2011).

company. The environmental and health and safety issues in the UK, in Delaware and in Germany will now be reviewed.

#### 4.2.4.2 The UK

There is evidence that BP was aware of some safety concerns prior to the accident but these risks were ignored for economic reasons.<sup>93</sup> The Kay Review argued that BP's insufficient concern for environmental and health issues and cost pressures contributed to a series of accidents in North America of which the one in the Gulf of Mexico was only the most infamous.<sup>94</sup> The spill had many negative consequences. Undeniably, not only did BP suffer direct financial losses, but also damage to its image. BP's internal investigation concluded that 'no single cause was responsible for the accident.'<sup>95</sup> The evidence suggests that focussing on short-term profits and disregarding environmental and health and safety issues are among the possible reasons for the disaster. Lin-Hi and Blumberg noted that BP the oil spill did not happen because of bad governance rules or an absence of rules, but that instead it was a result of an improper incorporation of these rules into the running of the company.<sup>96</sup> It is also the view of this author that corporate sustainability was not safeguarded in BP, in the sense that the company was willing to take excessive risks in order to generate immediate profits, rather than realise sustainable,<sup>97</sup> i.e. long-term profits.

Hence, it is pertinent to note that the BP oil spill case is an example of a short-term decision under UK law, as it has been taken to generate profits and presumably, the long-term effects or wider factors were not properly analysed. Section 172 (1) (d) underlines the importance of the 'impact of the company's operations on the community and the environment,' but the board is only obliged to 'have regard' to these factors. Thus, the paramount importance of the shareholders' interests suggests that UK law might supply reasonably strong incentives for environmental and health and safety issues to be disregarded. A lack of focus on these issues can contribute to a breach of directors' duties only if there is a failure to comply with any other legal duty imposed on the directors.

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<sup>93</sup> Congress of the United States, *Official letter to BP CEO Tony Hayward* (2010) <<http://online.wsj.com/public/resources/documents/WSJ-20100614-LetterToHayward.pdf>> accessed 12 December 2016.

<sup>94</sup> *Kay Review*, supra n 82, para. 1.22.

<sup>95</sup> <http://www.bp.com/en/global/corporate/gulf-of-mexico-restoration/investigations-and-legal-proceedings.html>> accessed 12 December 2017.

<sup>96</sup> Lin-Hi et al., supra n 92, 574.

<sup>97</sup> *ibid.*

It is understandable that a decision to concentrate on environmental issues might have been unpopular with shareholders, as it is quite unlikely that it would produce immediate profits. On balance, the BP oil spill case proves the contrary. This case is presented here to educate stakeholders, inasmuch as it shows that it is indeed in shareholders' and directors' interests to recognise these issues, as otherwise this oversight might generate costs, result in the failure of profits to materialise, and potentially diminish shareholder value.

Overall, the accident in the Gulf of Mexico shows that decisions that undervalue environmental and health and safety issues can have serious, negative consequences for companies. A lack of focus on environmental and health and safety issues is a sign of short-term thinking under UK law and, in the case of BP; it obviously harmed the company's reputation. As such, consideration of health and safety and environmental factors would likely constitute an example of long-term thinking in the given scenario.

#### **4.2.4.3 Delaware**

Under Delaware law, a lack of consideration of environmental and health and safety issues is likely to be treated as an example of short-termism. Importantly, Strine claims that this case emphasises 'a natural tendency to pay attention to short-term profits over long-term risks.'<sup>98</sup> In practice, however, it is highly likely that the interests of shareholders rather than the condition of the environment would be of paramount importance in this jurisdiction. In this context, Strine points out correctly that ultimately it is expected that managers are accountable to shareholders regardless of 'community values.'<sup>99</sup> Although it may be negatively regarded in the local communities or in the literature, any decision that fails to consider environmental factors is still likely to be consistent with Delaware's corporate objective (assuming the director can prove that he was acting in the best interests of the corporation). Thus, in Delaware there are greater incentives for the board to disregard environmental and health & safety issues in comparison to two other systems. In contrast to the UK, consideration of the environmental issues is not even articulated in this jurisdiction's legislation.

Moving now to the board's responsibility, directors' decisions are protected in Delaware by the business judgment rule. Obviously, this rule cannot save directors from a finding of a breach of duty if they favour their own personal interests and are not acting in the best interests of the company. Nonetheless, this case scenario shows that a disregard for

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<sup>98</sup> Strine, *supra* n 42, 138.

<sup>99</sup> *ibid.* 145.

environmental and health and safety issues can contribute to a breach of directors' duties. It is argued that a change of focus from short-term to long-term shareholder value, apart from consideration of the wider factors (which is not mandatory in Delaware), makes a contribution towards minimising the risk of taking such decisions under Delaware law in the future.

#### 4.2.4.4 Germany

Although shareholders' interests are vital under German law, its tendency to safeguard the interests of wider stakeholders affected by corporate conduct means that it would arguably be more reluctant to put environmental and health and safety issues at stake (even if they cannot be the sole point of reference). Hopt has argued consistently that shareholders are the equity investors, and since they take the business risks, their interests should prevail.<sup>100</sup> Therefore, it might be argued that under German law directors might have taken the decision because they wanted to concentrate on profit maximisation for shareholders. In the case of BP, that decision was not really taken in the shareholders' best interests; it was detrimental to them and at the same time it undervalued environmental and health and safety issues. Hopt's argument has also been criticised in the literature as creditors and employees also bear certain risks.<sup>101</sup> There is a strong line of argument that invokes the concept of the benefit of the corporation: the management board is obliged to pursue the interests of the entire corporation and not individual shareholders.<sup>102</sup> Therefore, the argument under German law is clearly that the undervaluation of environmental and health and safety issues benefits neither the corporation as a whole nor individual stakeholders and it is inconsistent with the corporate objective. Seen from this perspective, the incentives for such a decision to be taken under German law are weaker, as demonstrated by the secondary literature; if this is the case, it would be clearly an example of short-termism, as it concentrates on the shareholders' short-term gains. It is also probable that it might contribute to a breach of directors' duties, if the management board was not acting in the best interests of the company or did not fulfil other duties. This, in turn, would prevent a member of the management board from relying on the business judgment rule to shield him/her from liability.

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<sup>100</sup> Klaus Hopt, *Vergleichende Corporate Governance – Forschung und International Regulierung* 175 *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* 444, 477 (2011) (author's translation).

<sup>101</sup> Spindler, *supra* n 34, §76 mn. 72.

<sup>102</sup> *ibid.*

#### **4.2.4.5 Conclusions**

The BP oil spill case caused public outrage. The hope is that this unfortunate incident will encourage corporations all over the world, and especially directors,<sup>103</sup> to pay more attention to the consequences of their management's decisions and their effects in the longer and shorter term. The most important conclusion is that there is a link between consideration of broader factors, the consequences of directors' decisions in the long-term and good corporate governance. The concentration only on net profits can be very costly. The lack of focus on environmental and health and safety issues is likely to be an example of short-term thinking, in all jurisdictions and in slightly stronger terms in German law. Although a lack of consideration of environmental and health and safety issues does not itself constitute a breach of directors' duties, it can contribute to this breach considerably.

#### **4.2.5 Case Study 5: Promotion of Cultural, Social and Civic Aims**

##### **4.2.5.1 Introduction**

The final issue to be analysed in this section is whether the decision to promote cultural, social and civic aims has a long-term or short-term impact on a company. Consideration of these aims appears to be even more loosely connected to the contribution to the company's financial growth, making their prioritisation by a company much more controversial. It does not usually bring any immediate profits for the company. Promotion of all these social aims is only possible when the company is doing well and when there are some funds allocated for it. Therefore, the question arises whether it is beneficial for the directors of a company to take such a decision, how great the incentives are for it and whether both shareholder and stakeholder-orientated jurisdictions are likely to support it. It is argued that this decision might be beneficial for the company in any jurisdiction, if it supports rational aims and when it is well thought through. The justification for it might be that it is a long-term investment for the company. If it is successful, the investment will generate positive effects for the company and it will improve its image. In this section, the discussion centres on whether any particular corporate objective is more likely to furnish an opportunity to justify such a decision. The legal position in Germany, the UK and Delaware will be analysed in turn.

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<sup>103</sup> Clarke offers in depth analysis of the role of directors (and especially non-executive directors) in promoting sustainability. Blanaid Clarke, *The Role of Board Directors in Promoting Environmental Sustainability* in Beate Sjaafjell, Benjamin Richardson, *Company Law and Sustainability – Legal Barriers and Opportunities*, 148ff (Cambridge: Cambridge University Press, 2015).

#### 4.2.5.2 Germany

This final scenario is inspired by German case law. There is evidence that German case law acknowledges the importance of cultural, social and civic aims. In a prominent judgment from 2001, the BGH stated that not all financial contributions supporting art, science, social services or sport made by the management board constitute a breach of §266 StGB (Criminal Code) on embezzlement and breach of trust.<sup>104</sup> The ultimate aim of being a ‘good corporate citizen’ is to improve the company’s financial situation.<sup>105</sup> The financial and not-for-profit goals are not perceived as contradictory but complementary and it is emphasised that companies also use sponsorship of cultural and sporting events for advertising purposes, without economic justification.<sup>106</sup> The German courts have also emphasised the interests of the enterprise as a binding guiding principle for the management board.<sup>107</sup> In another case, the BGH noted that the management board does not possess unlimited liberty to contribute towards cultural, social and civic aims. The management board should act, first of all, in the interests of the enterprise, ensuring that any disposal of company’s assets is consistent with the duty of loyalty.<sup>108</sup>

These cases suggest that social aims cannot constitute the only justification for the decision since decisions should above all serve the interests of the enterprise. However, the directors’ duties are not breached in cases when the board supports social goals.<sup>109</sup> It has been stressed on many occasions in this paper that the management board must always act in the best interests of the company and ensure its lasting existence and success. Therefore, clearly, if this condition is fulfilled, the management board is protected by the business judgment rule and it can also promote cultural, social and civic aims. It is pertinent to note that supporting broad social aims can contribute towards this long-term profit rule.

Being a ‘good corporate citizen,’ apart from its charitable role, might be beneficial for the company in the longer term. In Germany, assuming the condition that this decision is well thought through, it is highly likely that it will constitute a positive long-term investment, an example of long-term decision-making and that such a decision will not constitute a breach of directors’ duties. Hence, clearly the German law incentivises the board to promote cultural,

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<sup>104</sup> BGH, 06.12.01 – 1StR 215/01 – BGHSt 47, 187 (author’s translation).

<sup>105</sup> *ibid*, 195.

<sup>106</sup> *ibid*.

<sup>107</sup> BVerGE 50, 290, 374; *similarly* BGH 29.01.1962 – II ZR 1/61, BGHZ 36, 296, 306, 310 (author’s translation).

<sup>108</sup> BGHSt 21.12.05 – 3StR 470/04 - BGHSt 50, 331, 338, 339 (author’s translation).

<sup>109</sup> Hüffer and Koch, *supra* n 34, §76 mn. 35.

social and civic aims. It is a distinctive feature of the German jurisdiction that, although the financial situation of a company is without doubt of paramount importance under German law, non-financial goals are also prioritised (maybe only in theory). Such an approach may well lead towards the more balanced development for the company, which is one of the prerequisites of long-term decision-making.

#### **4.2.5.3 The UK and Delaware**

The position in the other two jurisdictions is slightly different. Consideration of cultural, social and civic aims does not attract as many court rulings in Delaware or in the UK in the context of the directors' duties. The decision to support cultural, social and civic aims can also be taken under UK and Delaware law; however, in these systems incentives for such decisions are weaker and not as obvious as under German law. These reflections bring to mind the notion of corporate social responsibility, and its role under UK and Delaware law.

Traditionally it is argued that under Delaware law corporations should be run in order to maximise shareholder value. If a decision that promotes social, civil and cultural aims does not contribute to shareholder profit maximisation, it is less likely that it will be taken. However, if the decision is beneficial for shareholders, it is more possible to be taken and if taken, most likely it will be an example of long-termism. Hence, Delaware law supplies reasonably weak incentives for such a decision. To illustrate this point, Eisenberg claims that General Motors benefits in the same way from sponsoring documentaries for public television as it would from 'a conventional corporate commercial.'<sup>110</sup> Eisenberg frankly states that 'frequently a corporation can earn greater profits by appearing to be philanthropic than by appearing to maximize.'<sup>111</sup> As such, despite the shareholder value orientation of Delaware law, the promotion of social, cultural or civic aims naturally also constitutes a lawful activity. What is more, the business judgment rule in Delaware generally protects decisions that promote interests other than profit maximisation if such decisions are justified and well thought out.

The position under UK law differs slightly. The ESV principle requires consideration of various factors. At least in theory, the board in the UK is strongly encouraged to consider these broader social aims. Therefore, in comparison with Delaware law, the incentives for the

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<sup>110</sup> Melvin Eisenberg, *Corporate Conduct That Does Not Maximize Shareholder Gain: Legal Conduct, Ethical Conduct, The Penumbra Effect, Reciprocity, the Prisoner's Dilemma, Sheep's Clothing, Social Conduct, and Disclosure* 28 *Stetson Law Review* 1, 14 (1998).

<sup>111</sup> *ibid* 16.

promotion of cultural, social and civic aims in UK law are stronger. Despite that, it is likely that the final result will be similar to the position in Delaware. The cultural, social and civic aims can only be taken into account if they are beneficial for the shareholders. This point is clearly illustrated in the *Parke v Daily News (No. 2)*,<sup>112</sup> where it was held that a company's funds cannot be applied in making ex gratia payments to the company's workers. In general, all transactions must benefit the company, i.e. its shareholders.

Arguably, shareholders will profit from this decision if it enhances the company's corporate reputation. In the case of the promotion of cultural, social and civic aims, that would possibly happen in the longer-term. Nevertheless, as it does not generate immediate profits, the UK law supplies weaker incentives for the promotion of social, cultural and civic aims. This decision will be a lawful activity, unless it can be proved that directors were not aiming to promote the company's success.

#### **4.2.5.4 Conclusions**

Decisions that promote cultural, social and civic aims can be taken in all three jurisdictions, without necessarily generating a breach of directors' duties. However, past experience and the characteristics of German law suggest that it is more probable that they will be taken in this jurisdiction, since the incentives supplied by the law are stronger. If a decision is justified and reasonable it is very likely that it will constitute an example of long-term thinking in all legal systems. The common feature under the three jurisdictions is that social aims cannot constitute the only justification during the decision-making process. A decision must also be economically viable in the sense that it contributes to the company's economic and financial development. The difference between the jurisdictions consists in the extent to which these social aims are considered. Arguably, they are of higher importance under German law than under the two other jurisdictions but the UK's s. 172 CA 2006 explicitly underlines the importance of wider factors in decision making, so it ranks above Delaware law.

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<sup>112</sup> *Parke v Daily News (No. 2)* [1962] Ch 927.

## 5. Share Ownership Structure and the Parameters of Long-Termism.

### 5.1. Share Ownership Structure in the Countries under Review

#### 5.1.1. Introduction

Having marshalled the shareholder v. stakeholder debate in section 4 as a means of drawing up specific examples of long-term and short-term decision-making, the discussion now turns to an analysis of share ownership structures in companies. This section scrutinises whether there is an interrelationship between ownership structure and the parameters of long-termism. It evaluates how various forms of shareholder ownership influence the time horizon of the board's decision-making. The nature and structure of share ownership of public corporations differs worldwide. Publicly traded corporations traditionally have either concentrated or dispersed patterns of share ownership.<sup>113</sup> The common law jurisdictions of the UK and the US are characterised as predominantly dispersed shareholding jurisdictions, which are sometimes also referred to as 'outsider' or 'arm's length systems.'<sup>114</sup> The continental European civil law jurisdictions, like Germany, are described as concentrated (blockholding) shareholding structures or 'insider' systems.<sup>115</sup>

This section will first provide more details to clarify the underpinnings of the agency problem and the link between it and the parameters of long-termism. Subsequently, it will present two practical examples of long- and short-termism in the form of case studies (i.e. focus on a dividend growth and investment in research). By introducing the case studies and comparing their practical effects in the UK, Delaware and Germany, this section will shed some light on the content of long-termism. The structure of the gap-filling exercise is similar to that adopted in section 4 above. The origins of the case study and its connections with the debate on share ownership structure of the company will be presented. Weight will be ascribed to whether a particular decision constitutes an example of long- or short-termism in each jurisdiction and how likely it is that it will be taken. The lawfulness of these decisions will be examined and in the case of short-term decisions and a potential breach of directors'

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<sup>113</sup> Rafael La Porta et al., *Corporate Ownership around the World* 54(2) *Journal of Finance* 471, 471-472 (1999).

<sup>114</sup> Brian Cheffins, *Putting Britain on the Roe Map: The Emergence of the Berle – Means Corporation in the United Kingdom*, in Joseph McCahery et al., *Corporate Governance Regimes, Convergence and Diversity*, 148-149, 151 (Oxford: Oxford University Press, 2002).

<sup>115</sup> Mark Roe, *Some Differences in the Corporation Structure in Germany, Japan, and the United States* 102 *Yale Law Journal* 1927, 1936 (1993).

duties, a breach of s. 172 CA 2006 and the relevant sections in the other jurisdictions is assessed.<sup>116</sup> Finally, each case study offers comparative conclusions.

### **5.1.2 The Agency Problem and the Parameters of Long-termism**

A discussion on share ownership structure is inevitably connected to the different distributions of the ‘agency problem’ or ‘agency costs.’ When one party – the agent – is enjoined to act on behalf of another party – the principal – there is the danger that he will act in his own personal interest rather than pursue the interests of the principal.<sup>117</sup> The agency problem prevalent in the dispersed common law jurisdictions – like the UK and Delaware – is called a ‘vertical’ problem. It involves the conflict between the firm’s owners, i.e. shareholders as a class (principals) and its hired managers (agents). Efficiency reasons suggest conferring extensive powers on the board of directors rather than allocating them to the shareholders. The central problem is whether the board will act in its own personal or shareholders’ interests.<sup>118</sup> In a concentrated shareholding structure, like Germany, the agency problem is ‘horizontal,’ involving a conflict between the owners who possess the majority interest in the company (agents) and the minority owners (principals). The main agency problem ensures that the interests of the former are prioritised at the expense of the latter.<sup>119</sup>

This brings us to the central issue of this section: whether there is a link between the share ownership structure and agency problems on the one hand and the content of long-termism on the other. There are two observations to be made here. Firstly, the tensions in play during the decision-making processes adopted by directors will differ according to whether a jurisdiction is an ‘outsider’ or ‘insider’ system. The UK and Delaware jurisdictions suffer from conflicts of interests between directors and shareholders. The directors exercise broad-decision making powers and therefore the danger arises that they will pursue their own short-term interests rather than the interests of the shareholders. Shareholders in these jurisdictions are weak and dispersed with divergent interests. If investors are short-term orientated, managers will also be incentivised to act in the short-term.<sup>120</sup> On the other hand, if shareholders are long-term focused and directors short-term orientated or the other way

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<sup>116</sup> The breach of different directors’ duties is not precluded.

<sup>117</sup> John Armour et al., *Agency Problems and Legal Strategies*, in Reinier Kraakman et al., *The Anatomy of Corporate Law: A Comparative and Functional Approach*, 29 (Oxford: Oxford University Press, 2017).

<sup>118</sup> Klaus Hopt et al., *Corporate Boards in Europe – Accountability and Convergence* 61 *American Journal of Comparative Law* 301, 303-304 (2013).

<sup>119</sup> Mark Roe, *The Institutions of Corporate Governance*, in Claude Ménard et al. (eds), *Handbook of New Institutional Economics*, 372-375 (Berlin: Springer, 2008).

<sup>120</sup> Therese Strand, *Short-termism in the European Union* 22(1) *Columbia Journal of European Law* 15, 29 (2015).

round, shareholders might struggle to convince the board to follow their advice. Shareholders might exert pressure to oust the board, but they would need the support of other shareholders for such a course of action to succeed. Alternatively, they might leave the company by selling their shares on the open market, which is a much easier option. In the dispersed ownership jurisdictions, it is more beneficial for shareholders to be apathetic and sell out, because of the high costs of monitoring management.<sup>121</sup>

In Germany, management boards are strongly influenced by the dominant shareholders who may take advantage of their control to undermine minority shareholders' interests. This suggests that in Germany a majority shareholder is most likely to be a major source of short-termism during decision-making, as the board is less powerful. Although they provide a source of short-termism, minority shareholders exert less impact on the decision-making process. It is not claimed here that conflicts between majority and minority shareholders are less harmful, but it is observed that they are less visible in the context of decision-making by the board. Large shareholders are therefore in a very good position to influence the decision-making process. It is questionable whether they will promote their own interests, the interests of the other shareholders or the wealth of the company as a whole. Shareholders in the blockholding jurisdictions are characterised as having longer time-horizons and this increases the scope of opportunity for the management board to invest for the long-term.<sup>122</sup> However, long-term controlling investors are not without their shortcomings. For instance, long-term investments are often associated with a focus on growth in market share, at the cost of a lower rate of return on equity investment.<sup>123</sup> It is difficult to state unambiguously that concentrated ownership jurisdiction is *per se* more long-term focused. The interests of majority shareholders can vary. However, the decision-making process in a concentrated ownership jurisdiction appears to be aligned more closely with the interests of majority shareholders rather than directors and it is less likely that the particular, short-term interests of directors will prevail. Therefore, it is pertinent to note that the goals pursued by majority shareholders should be uniform, coherent and thereby more long-term orientated. Majority shareholders, being more long-term focused, are less likely to put short-term pressure on the management board.

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<sup>121</sup> Wen, *supra* n 48, 37.

<sup>122</sup> William Bratton, Joseph McCahery, *Comparative Corporate Governance and Barriers to Global Cross Reference*, in Joseph McCahery et al., *Corporate Governance Regimes, Convergence and Diversity*, 27 (Oxford: Oxford University Press, 2002).

<sup>123</sup> *ibid.*

The second issue to address is whether it is more likely that a board will act on its own and/or short-term interests in concentrated or dispersed ownership jurisdictions. Although it is difficult to generalise and still directors are fiduciaries, they are more powerful in dispersed ownership systems. Directors in the UK and Delaware might pursue their own interests more often and hence, there is a danger that they will have more opportunities to promote short-term goals there rather than the interests of the company as a whole. In comparison, concentrated shareholders are able to take effective decisions themselves. A management board is a decision-making body in Germany and large shareholders can more effectively demand accountability for the decisions taken by it. Therefore, in a concentrated jurisdiction, a key issue is whether these large shareholders are acting in their own interests or whether they are pursuing the interests of the shareholders as a whole.<sup>124</sup> It is not the case that short-termism does not exist in concentrated jurisdictions. Rather, it is argued here that short-termism traditionally arises from internal distortions of the corporation. The board is less powerful and it will have fewer options to promote its own short-term interests.

### **5.1.3. Conclusions**

The variable of ‘share ownership structure’ adds another layer to the discussion on the content of long-termism. It can be used as a means of demonstrating how the interplay of various groups, e.g. majority v. minority shareholders (in Germany) and the board of directors and shareholders as a class (in the UK and Delaware) can influence the decision-making process in the corporations and the content of long-termism. The theory of agency problems suggests that tensions arising between shareholders and directors in companies operating in dispersed ownership jurisdictions are more likely to be a source of short-termism during decision-making processes. The agency problem in concentrated jurisdictions does not affect decision-making directly. However, undeniably, it has an indirect effect as powerful, majority shareholders influence the board significantly. The case-based approach adopted in this paper aims to analyse whether this theoretical analysis correctly predicts reality.

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<sup>124</sup> Hopt et al., supra n 118, 303-304.

## 5.2. Practical Examples of Long- and Short-Termism

### 5.2.1 Case study 1: A Focus on Dividend Growth

#### 5.2.1.1 Introduction

This section examines the extent to which boards of directors are involved in the distribution of dividends, and especially whether such decision constitutes an example of long-term or short-term thinking. It also analyses whether a decision to focus on dividend growth is especially aligned with a particular share ownership structure in any given jurisdiction. A decision to focus on dividend growth is pivotal for shareholders, as it suggests financial benefits. At the same time, the distribution of profits or investment of these profits in research, development or any other purposes determines the future of the whole company.<sup>125</sup> The distribution of dividends is mentioned in the context of differentiating between long-term and short-term decision-making<sup>126</sup> and this case study is derived from these discussions in the academic literature.

The decision to focus on dividend growth is presented in the context of the share ownership structure debate as it illustrates not only difficulties related to the corporate objective but also depicts particularly well the different agency problems which arise within companies in these jurisdictions. This case study concentrates on the tensions within the company among different groups regarding the distribution of dividends. A corporate decision to focus on dividend growth in Delaware, the UK and Germany will now be addressed.

#### 5.2.1.2 Delaware

Pursuant to the DGCL, the board of directors exercises broad decision-making powers unless the certificate of incorporation of the corporation provides otherwise.<sup>127</sup> Delaware traditionally embraces shareholder primacy combined with director primacy.<sup>128</sup> The board has the default powers regarding the declaration and payment of dividends within the limits

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<sup>125</sup> For the analysis of reasons why companies are actually paying dividends see: Fischer Black, *The Dividend Puzzle* 2(2) *Journal of Portfolio Management* 5 (1976); H Kent Baker et al., *Revisiting the Dividend Puzzle: Do all of the Pieces Now Fit?* 11 *Review of Financial Economics* 241, 243-247 (2002).

<sup>126</sup> See e.g.: Andrew Keay, *The Duty to Promote the Success of the Company: Is it Fit for Purpose?* 23 (2010) Centre for Business Law and Practice School of Law, University of Leeds, Working Paper <[www.law.leeds.ac.uk/assets/files/research/events/directors-duties/keay-the-duty-to-promote-the-success.pdf](http://www.law.leeds.ac.uk/assets/files/research/events/directors-duties/keay-the-duty-to-promote-the-success.pdf)> accessed 12 December 2016.

<sup>127</sup> §141 (a) (1) DGCL.

<sup>128</sup> Stephen Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance* 97 *Northwestern University Law Review* 547, 550 (2003).

of the law.<sup>129</sup> The main agency problem in Delaware occurs between the board of directors and shareholders as a class. Since directors are solely responsible for dividend distribution and shareholders are generally interested in dividend growth, divergent interests might lead to tensions. As established in section 4 above, the corporate objective in Delaware is to maximise shareholder wealth. It is quite clear that shareholders are interested in dividend growth even if it does not translate into a company's sustainable development<sup>130</sup> or has negative consequences. Managing for the long term is at the same time often 'antithetical' for the board, as directors 'only have a temporary interest in the company, primarily limited to their time in the job' and they are not rewarded for making long-term plans, as their successors will be likely to benefit from them.<sup>131</sup> Therefore, it is not only the directors' duty to maximise shareholder wealth but it will be usually beneficial for directors to produce immediate profits for shareholders. The board is not only solely responsible for the distribution of dividends, but they also have more space to pursue their own interests. It is likely that directors might choose to focus on dividend growth in Delaware and they are strongly incentivised to do so, although shareholders are weak.

If it is the only or the main justification for a decision, the payment of excessive dividends is likely to constitute an example of short-termism. It is a challenge to determine how much profit directors can distribute and not be accused of short-termism though. For example, the distribution of all annual profits at one extreme end of the spectrum would indicate short-term thinking. Other cases are harder to define and it is almost impossible to state objectively how the dividend should be ascertained, in order to constitute an example of long-termism, apart from saying that such distributions should be balanced and reasonable.

If directors are not willing to increase dividend growth, is it likely that shareholders will put short-term pressure on directors and demand earnings growth? It is quite likely that shareholders will pressurise the board but they might struggle to do so effectively, as the diffused ownership structure means that the shareholders are weak and their interests are less coherent, more diverse and particular. Although arguably profit maximisation may unite them

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<sup>129</sup> §170 (a) (1), (2) DGCL. See also §171 – 174 DGCL.

<sup>130</sup> However, the recent research points out that companies in the US which adopted sustainability policies significantly outperform their counterparts over the long-term, both in terms of stock market as well as accounting performance. Robert Eccles et al., *The Impact of Corporate Sustainability on Organizational Processes and Performance* (2011) Harvard Business School Working Paper <<http://ssrn.com/abstract=1964011>> accessed 3 March 2017.

<sup>131</sup> Andrew Keay, *The Global Financial Crisis: Risk, Shareholder Pressure and Short-termism in Financial Institutions. Does Enlightened Shareholder Value Offer a Panacea?* 10 (2011) Centre for Business Law and Practice School of Law, University of Leeds Working Paper <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1839305](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1839305)> accessed 12 December 2016.

eventually, alternatively they can leave the company by selling their shares. Shareholders will also find it difficult to remove a director, unless they can coalesce sufficient shareholder support to command a majority of the shares.<sup>132</sup>

Due to the directors' broad decision-making powers in shaping the dividend distribution in Delaware, abuses that lead to short-term decisions are likely. It is also highly unlikely that focus on dividend growth itself will constitute a breach of directors' duties, if directors are acting in the best interest of the company and they are fulfilling other duties. The business judgment rule suggests that courts are not going to second-guess the decision of a well-motivated and non-conflicted director. Nevertheless, concentration solely on dividend growth has been criticised in the literature. For instance, Greenfield emphasises that a company will be focusing on the short-term when it cuts research and development in order to increase dividends or retains 'earnings temporarily at a cost to the long-term health of the company.'<sup>133</sup> This is a vivid juxtaposition of short-term and long-term decision-making.

### 5.2.1.3 The UK

The board of directors in the UK does not enjoy such broad decision-making powers as directors under Delaware law regarding dividend distribution. The CA 2006 discusses dividends and their distribution only to a limited extent. According to s. 830 (1) and (2) CA 2006, a company may only make a distribution out of profits available for the purpose.<sup>134</sup> The creditor protection rules in the UK are in line with art. 17 of the Second Company Law Directive that distributions below subscribed capital are impermissible.<sup>135</sup> The Companies Act 2006 also states that '[e]xcept in the case of a company entitled to the small companies exemption, the [directors'] report must state the amount (if any) that the directors recommend should be paid by way of dividend.'<sup>136</sup>

The division of power between the board and shareholders regarding distributing dividends is left to be determined by the company's articles of association. Every company in

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<sup>132</sup> §141 (k) DGCL.

<sup>133</sup> Kent Greenfield, *The Origins and Costs of Short-Term Management*, 28 (2009) 2nd Summit on the Future of the Corporation: Restoring the Primacy of the Real Economy <<http://summit2020.org/paper-series.htm>> accessed 12 December 2016.

<sup>134</sup> Section 831 (1), (2) CA 2006 stipulates when a public company can make a distribution and s 829 contains a definition of distribution.

<sup>135</sup> Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 54 of the Treaty on the Functioning of the European Union, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent Text with EEA relevance.

<sup>136</sup> s 416 (3) CA 2006.

the UK can establish its own procedure regarding the distribution of profits. Thus, in theory, a company can arrange this in any form it likes and the board can be solely responsible. Davies et al. note though that it is unlikely that a board will be left to decide about the profits by itself (except interim dividends). If the articles are silent about the distribution of dividends, then shareholders alone will be responsible.<sup>137</sup> However, companies can decide to incorporate Model Articles. According to these Model Articles, if the shareholders and the board of directors are currently involved in the distribution of dividends, the board plays a substantial role in the process. Importantly, the board initiates a decision on whether a dividend should be declared or profits should be affirmed and invested.<sup>138</sup> The shareholders' role is to affirm or reject such proposal as according to the articles, they declare the dividend – an ordinary resolution<sup>139</sup> is required – and the directors may decide to pay interim dividends.<sup>140</sup> Further, '[t]he directors may pay at intervals any dividend payable at a fixed rate if it appears to them that the profits available for distribution justify the payment.'<sup>141</sup>

The Model Articles allow shareholders by special resolution to 'direct the directors to take, or refrain from taking, specified actions.'<sup>142</sup> As such, with a 75% vote referred to as a special resolution, the shareholders can oblige the directors to declare a dividend, i.e. initiate a proposal themselves to declare a dividend. It is questionable, whether shareholders will be able to exercise their rights effectively due to the dispersed share ownership structure of most listed public limited companies in the UK, e.g. the collective action and co-ordination costs will likely be too high to marshal sufficient support.

Taking into account all of the above, the board in the UK is actively engaged in the actual distribution of dividends and exercises quite broad decision-making powers in that respect. However, the board is not as powerful as in Delaware and shareholders clearly have more influence to shape the board's decision-making. Similar to the position in Delaware, conflicts regarding dividend distribution are likely to arise between these actors. This epitomises the agency problem in dispersed jurisdictions. Undeniably, tensions between the board and shareholders in some instances are very likely. In particular, the argument put forward by Keay is compelling that long term plans and investments can make directors'

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<sup>137</sup> Paul Davies et al., *Gower and Davies' Principles of Modern Company Law*, 280 (London: Sweet & Maxwell, 2016).

<sup>138</sup> Reg. 70 (2) Model Articles for Public Companies, incorporated on or after 28 April 2013.

<sup>139</sup> According to s 282 (1) CA 2006 '[a]n ordinary resolution of the members (or of a class of members) of a company means a resolution that is passed by a simple majority.'

<sup>140</sup> Reg. 70 (1) Model Articles.

<sup>141</sup> Reg. 70 (6) *ibid.*

<sup>142</sup> Reg. 4 (1) *ibid.*

performance look ‘decidedly average, as the share price might not increase and higher dividends would not be paid as quickly as if short-term plans were implemented.’<sup>143</sup> Therefore, it is the view of this author that in the UK, it might be tempting for the board to focus on dividend growth and produce immediate profits for shareholders – there are strong incentives in place for a decision to be taken to focus on dividend growth in this system. Some directors might however prefer to reinvest the profit. Further, it is highly likely that shareholders will also be interested in dividend distribution. In comparison to Delaware, shareholders in the UK might be slightly more successful in putting pressure on the board. Although shareholders are diffuse and traditionally perceived as weak, their influence on dividend distribution is higher in the UK, since they must approve the payment of a dividend by ordinary resolution. The board acting in the name of the company and investing for instance in the development of the company can meet with lack of shareholders’ approval if they prefer to receive a large dividend pay-out immediately. According to s. 168 (1) CA 2006, a director can be removed by an ordinary resolution if shareholders are not happy with decisions in relation to dividends. The shareholders’ influence on the board will depend on whether the former have at their disposal the required majority or can successfully pressurise the board in a different way. In a dispersed share ownership corporate governance system such as the UK, this is extremely unlikely.

Overall, the directors’ paramount duty is to promote the success of the company for the benefit of the members as a whole. Hence, even if the dividend policy is not beneficial for the company, it can contribute to a breach of directors’ duties only when it can be proved that the directors were not acting in the best interests of the company and when they are not complying with other duties. Nevertheless, on balance focusing solely on dividend growth should be perceived as an example of short-termism. It is criticised in the UK. Chapman aptly highlights that if the board uses limited company funds to finance the payment of dividends and share buybacks that might constitute a short-termist action.<sup>144</sup> In contrast, a decision to distribute the profits sensibly would be more justified, and is more likely to constitute an example of long-term thinking.

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<sup>143</sup> Keay, *supra* n 131, 24.

<sup>144</sup> John Chapman, *Time to Tackle UK Short-termism* (Financial Times, 27 May 2012).

#### 5.2.1.4 Germany

In Germany, decisions on the appropriation of distributable profits are left to the shareholders.<sup>145</sup> These provisions are mandatory and §119 (1) 2 AktG notes that the shareholders' meeting shall resolve on all matters including the appropriation of distributable profits. This rule is repeated in §174 (1) 1 AktG which provides that such resolution shall specify in detail the appropriation of distributable profits, including in particular: the amount of distributable profits, the amount to be distributed to shareholders, the amounts to be transferred to profit reserves, any profit carried forward, and any additional expense resulting from such resolution.<sup>146</sup> The Second Company Law Directive prohibits distribution of profits below subscribed capital not only in the UK but also in Germany. According to the AktG, '[d]ividends may not be paid for as long as the legal reserve and the capital reserve in aggregate do not amount to 10 per cent of the share capital.'<sup>147</sup> Shareholders in Germany have more control over dividend distributions than in the UK or Delaware. Neither the management board nor the supervisory board is involved in deciding on the amount of dividends. However, the management board submits to the supervisory board a proposal regarding how to pay dividends out of distributable profits that is 'intended to be presented to the shareholders' meeting.'<sup>148</sup> Every member of the supervisory board is 'entitled to take cognisance of the documents submitted' by the management board.<sup>149</sup> Further, §58 (2) 1 AktG provides that the management board and the supervisory board approve the annual financial statements. The management board is also obliged to supervise the distribution carefully, as according to §93 (3) 2 AktG the members of the management board are liable for damages if contrary to the AktG 'shareholders are paid interest or dividends.'

According to the current law, the management board in Germany can only suggest how the profit should be distributed and it is able to influence the process to a limited extent. The board's point of view does not have to be considered by the shareholders and its role is definitely weaker in that respect than the board in the UK or Delaware. The fact that the board is accountable extensively to shareholders and closely overseen by the supervisory board means that its impact on the distribution of profits should be concentrated more on the interests of the company as a whole and arguably on the benefits to the majority shareholders.

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<sup>145</sup> §119 (1) 2; §174 (1) 1 AktG.

<sup>146</sup> §174 (2) *ibid.*

<sup>147</sup> §233 (1) 1 *ibid.*

<sup>148</sup> §170 (2) 1 and 2 *ibid.*

<sup>149</sup> §170 (3) 1 *ibid.*

The majority shareholders are more long-term focused than the shareholders in dispersed jurisdictions, thus the management board in Germany should be also more long-term orientated, as it will be subject to less short-term pressure from shareholders. This confirms the theoretical analysis that Germany suffers from a horizontal agency problem; conflicts are likely to take place between majority and minority shareholders, as they might have different visions regarding profit distribution.

Because the board does not have much impact on the distribution of profits in Germany, this case study is not relevant in the context of managerial long-term decision-making. As such, owing to the marginal role of the management board, it does not contribute towards establishing the parameters of the managerial long-termism in Germany. Nevertheless, at the same time it is evident that at least dividend distribution will not be a source of managerial short-termism in Germany.

#### **5.2.1.5 Conclusions**

A balanced and responsible distribution of profits is likely to constitute a long-term decision that should be more beneficial for the company as a whole. Concentrating solely on dividend growth is likely to be an example of short-termism. This case study confirms that mechanisms regarding dividend distribution differ in the jurisdictions under review. Focus on the dividend distribution constitutes a clear example of short-termism in the UK and Delaware due to their dispersed ownership structure and the existence of the main agency conflicts between directors/managers and shareholders. In Delaware, directors are solely responsible for dividend distribution and in the UK, both shareholders and directors are involved in the process. In both jurisdictions, the distribution of dividends inevitably will lead to tensions between directors and shareholders, as a result of different goals and investment perspectives. Although criticised, such decision is likely to be a lawful activity in these systems. In Germany, on the other hand, the management board influences the distribution of dividends only in a very limited way. Hence, the decision on dividend policy is not that important in the context of the board's decision-making or parameters of the long-termism.

### **5.2.2 Case study 2: Investment in Research**

#### **5.2.2.1 Introduction**

The first case study shows that focussing solely on dividend growth is likely to constitute an example of short-termism, at least in dispersed ownership jurisdictions. This is often

contrasted with a decision to invest in research and development, which will be the subject of the current case study.<sup>150</sup> The decision to focus on research differs a lot from the first case study as it discusses discretionary expenses and it centres less on the company's immediate financial growth. This is commonly supported in the literature and generally identified with long-term considerations and investment.<sup>151</sup> Naturally, decisions could turn out to be successful or unsuccessful. Interestingly, Jackson and Petraki argue that managers can be said to have a long-term orientation if they choose to invest in research and development of the company. On the other hand, the authors note that it can be 'inherently risky in the sense that future benefits are uncertain.'<sup>152</sup>

In any case, a lack of immediate profits is likely to be the reason behind a lower popularity of this decision among shareholders – especially when their profits are decreasing – and the boards might be reluctant to take them. The Kay Review suggests that there is a decline in the UK in investment in research and development as a percentage of GDP since 1992. Comparatively, the US is the leader and Germany is the runner-up.<sup>153</sup> This case study looks at the connection between a decision to invest in research and the share ownership structure of the company and whether it is more likely for this decision to be taken in one jurisdiction or another. The topic of investment in research in Germany, the UK and Delaware will now be analysed in greater detail.

### 5.2.2.2 Germany

A number of incentives exist for a managerial decision to invest in research to be treated favourably under German law. Such conduct appears to be consistent with the corporate objective in this jurisdiction – assuming that the research is reasonable, it focuses on the lasting creation of value and it serves the interests of shareholders, employees and the general public. If this is the case, it will constitute a strong example of long-termism and would be encouraged in the academic literature. Secondly, if the management board is acting in the best interests of the company and is not breaching other duties, the decision is unlikely to

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<sup>150</sup> Sarah Kiarie, *At Crossroads: Shareholder Value, Stakeholder Value and Enlightened Shareholder Value: Which Road Should the United Kingdom Take?* 17(11) *International Company and Commercial Law Review* 329, 334 (2006).

<sup>151</sup> Long-term investment does not only imply investment time horizons, but also its sustainability. See: Sigurt Vitols, *Long-term Investment and the Sustainable Company: A Stakeholder Perspective*, vol. III, 12 (Brussels: ETUI, 2015).

<sup>152</sup> Gregory Jackson, Anastasia Petraki, *Understanding Short-Termism: The Role of Corporate Governance*, Glasshouse Forum, 18 (2011)

<[www.sofi-goettingen.de/fileadmin/Textarchiv/WIP2/Praesentationen/jackson-petraki\\_short-termism.pdf](http://www.sofi-goettingen.de/fileadmin/Textarchiv/WIP2/Praesentationen/jackson-petraki_short-termism.pdf)> accessed 12 December 2016.

<sup>153</sup> *Kay Review*, supra n 82, para. 1.8 and fig 2.

constitute a breach of directors' duties or contribute to the breach even if it is unsuccessful in the end. The board will be also protected by the business judgment rule.

Further, it is worth noting that the 'time preference conflict' (*Zeitpräferenzkonflikt*) arises also in Germany between top management and shareholders as they often pursue different goals – Kräkel notes that 'younger top managers have a strong preference for the present and they prefer short-term investments as they have just bought a house or got married.'<sup>154</sup> Clearly, the management board can invest in research or decide against it, even if the majority shareholders oppose it. The board enjoys wide decision-making powers in managing the company, which means that it is not bound by any instructions from the other bodies or shareholders.<sup>155</sup> At the same time, they are obliged to evaluate individual interests during decision-making and weigh them against connected risks.<sup>156</sup> Furthermore, the board might be personally incentivised to invest in research. Their remuneration depends on the lasting development of the enterprise.<sup>157</sup> The Higher Regional Court (*Frankfurt Oberlandesgericht*) acknowledged in a recent ruling that broad decision-making powers entitle the management board to take decisions that happen to be contrary to the interests of the majority shareholders.<sup>158</sup>

Nevertheless, it is likely that the majority shareholders will influence the decisions taken by the board in this concentrated jurisdiction and the interests of minority shareholders are likely to be marginalised. Wirth et al. argue convincingly that the management board does not have the power to withstand the strong influence of majority shareholders.<sup>159</sup> Although it is not responsible for the management of the company, in practice the shareholders' meeting influences its running. The management board must obtain the approval of the shareholders on many occasions and this reduces its autonomy. It is worth underlining though that shareholders in Germany are not entitled to remove a member of the management board, as according to §84 (3) 1 AktG, this is within the competence of the supervisory board only.<sup>160</sup>

Fleisher notes that directors might feel incentivised 'to take advantage of their superior information and to misappropriate corporate resources' on the ground that direct

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<sup>154</sup> Matthias Kräkel, *Organisation und Management*, 280-281 (Mohr Siebeck, 2007) (author's translation).

<sup>155</sup> BGH, 23.06.1997 – II ZR 132/93 – BGHZ 136, 133, 140 (author's translation).

<sup>156</sup> *ARAG v Garmenbeck* 244, 253; BGH, 4.07.1977 – II ZR 150/75 – BGHZ, 69, 207, 213; BGH, 14.01.1980 – II ZR 218/78, BGH NJW 1980, 1630, 1629.

<sup>157</sup> §87 (1) 2 AktG.

<sup>158</sup> OLG Frankfurt 17.8.11 – 13 U 100/10, CCZ 2012, 236, 238 (author's translation).

<sup>159</sup> Gerhard Wirth et al., *Corporate Law in Germany*, 99 (München: C.H. Beck, 2010).

<sup>160</sup> However, clearly this provision does not oblige the supervisory board to act upon shareholders' request to remove a director.

monitoring of the directors by the shareholders is often prohibitively costly.<sup>161</sup> Naturally, the foregoing argument applies to all three jurisdictions under scrutiny. This tendency is more visible in the UK and especially in Delaware, due to the stronger position of the board in these jurisdictions, in comparison with Germany. As a consequence, the management board in Germany, due to its less active role, has fewer opportunities to promote its own interests.

Majority shareholders are likely to be the key body in deciding on investing in research. This confirms the distribution of the agency problem in concentrated jurisdictions; however, in accordance with the corporate objective of companies under German law, the other stakeholders' interests must be also considered. The crucial question in the present context is whether the powerful majority shareholders would be interested in investing in research. The interests of the majority shareholders will not always be identical to the interests of the enterprise as a whole. However, it appears that they will be more convergent and consistent with them than the interests of dispersed, individual shareholders. The majority shareholders are usually involved in the running of the company and they understand the relationships within and outside the company well; hence, they should be more interested in the company's sustainable development and balanced growth. It is more likely that they will present a vision of the corporation that is more integrated and therefore long-term focused. This vision should also embrace investment in research.

### **5.2.2.3 The UK**

Many commentators in the UK encourage boards to invest in research, pointing out that it is likely to contribute to the long-term success of the company. For instance, according to Parkinson, '[l]ong term profitability may depend on investing in research and development, capital equipment, and training.'<sup>162</sup> Investment in research is traditionally perceived as a long-term decision in the UK. Naturally, it can also have detrimental effects for the company and some companies plough significant resources into research and development, the motive behind that investment may very well be rooted in short-term considerations. In the UK, there are slightly fewer incentives for such a decision than under German law. UK boards enjoy broad decision-making powers on how to promote the interests (and success) of the company and will also play a key role in deciding about investment in research and development. In

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<sup>161</sup> Holger Fleischer, *The Responsibility of the Management and of the Board and its Enforcement* in Guido Ferrarini et al. (eds), *Reforming Company and Takeover Law in Europe*, 379 (Oxford: Oxford University Press, 2004).

<sup>162</sup> John Parkinson, *Corporate Power and Responsibility: Issues in the Theory of Company Law*, 90 (Oxford: Clarendon, 1993).

comparison to Germany, the board has more opportunities to pursue their own interests, owing to the dispersed nature of the shareholder body. Naturally, the main role of the board is to fulfil the corporate objective and ensure the protection of shareholders' interests. It is questionable whether dispersed and diffuse shareholders will effectively put pressure on the board, if the latter wants to pursue different goals. Diffuse shareholders tend to be rather passive and weak in corporate governance and exercise their powers via the 'exit' choice and other market forces.<sup>163</sup>

Overall, the tensions regarding any possible investments in research will arise in the UK between the board and shareholders and it is argued that in this system the board's approach towards investment in research is in the end crucial. How likely is that the boards will support the long-term development path of the company? Undeniably, some will be interested in pursuing this goal. However, it appears that in general, the board will be more interested in short-term investments and short-term profits, as this is clear evidence that they are successful managers and it makes their performance look better in the eyes of shareholders. If directors decide to invest in research or development, their decision will be most likely lawful. Dispersed shareholders that oppose investment in research might struggle to pressurise the board. As long as directors act in the best interest of the company and they do not breach any of their legal duties, the courts are unlikely to investigate *ex post facto* the substance of a business decision such as investment in research that turns out to be unsuccessful and unprofitable.

#### **5.2.2.4 Delaware**

In the US, investment in research has mostly positive connotations and it is believed that in general it contributes towards the long-term success of companies. According to Strine, the paramount objective for the for-profit corporation is 'the generation of durable wealth for its stockholders through fundamentally sound economic activity' and long-term endeavours like investment in research and development are one of the prerequisites for building durable wealth.<sup>164</sup> Undeniably, some research investments can be unsuccessful. One of the main arguments against short-termism is that it discourages investments that offer a long-term

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<sup>163</sup> Wen, *supra* n 48, 37.

<sup>164</sup> Leo Strine Jr, *One Fundamental Corporate Governance Question We Face: Can Corporations Be Managed for the Long Term Unless Their Powerful Electorates Also Act and Think Long Term?* 66 *Business Lawyer* 1, 2-3 (2010).

payback. Lavery contrasts decisions that concentrate on short-term gains (maximising quarterly profits) with long-term strategies, like for instance investment in basic research.<sup>165</sup>

The decision to invest in research is likely to constitute an example of long-termism in Delaware as its objective goes beyond short-term profit maximisation. The solution under Delaware law mirrors to a great extent the position under the UK law, with the main agency conflicts arising between the board and the shareholders as a whole. Like the UK, Delaware has a dispersed ownership structure and also mostly the board will be mainly responsible there for determining whether the company will invest in research. The board in Delaware enjoys an even stronger position than in the UK.<sup>166</sup> Thus, it will depend even more heavily on the board whether a long-term strategy as an investment in research will be pursued and shareholders in Delaware will find it harder than in the UK to pressurise the board to act in their interests, if directors are not willing to pursue their goals.

In conclusion, is it likely that the board in Delaware will invest in research? The Kay Review suggests that investment in research is actually thriving in the US.<sup>167</sup> Still, it might be difficult for the board to stand the short-term profits pressure, especially taking into account its corporate objective. The board of directors that exercises broad decision-making powers and is obliged to contribute to the shareholders' profit maximisation might find it tempting and personally beneficial to promote decisions that give short-term profit rather than those which are long-term investments. There is a danger that investment in research and development will not be very popular in Delaware, because it does not bring immediate financial benefits to the shareholders. The incentives in Delaware to invest in research are average, at the most. If the board decides to invest in research, it seems unlikely that such a decision will be challenged based on a breach of directors' duties; of course, this is assuming that the board acts in the best interests of the company and they do not breach the no-conflict and no-profit rules. The business judgment rule will protect well-meaning and rational decisions even if they do not maximise shareholder value and the investment turns out unsuccessful. The plaintiff will have to prove that one of the applicable duties was breached.

#### **5.2.2.5 Conclusions**

This case study underlines that a decision to invest in research is generally positively associated, is likely to be a lawful activity and constitutes an example of long-termism in all

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<sup>165</sup> Lavery, *supra* n 2, 949.

<sup>166</sup> §141 (k) DGCL.

<sup>167</sup> *Kay Review*, *supra* n 82, para. 1.8.

three systems. In light of the share ownership patterns of the company in each of the three jurisdictions, it seems that there are much greater incentives for such a decision to be made in a concentrated, rather than a dispersed, ownership jurisdiction. It constitutes a stronger and a more vivid example of long-termism under German law due to the important role of the generally longer-term orientated majority shareholder in the decision-making process. In contrast, the board of directors – which is the body that is legally responsible for investment in research in the UK and Delaware – is in general more short-term focused.

## **6. Conclusions Regarding the Gap-Filling Exercise**

### **6.1 Introduction**

It is now possible to piece together a better account of the content and nature of long-termism. The case studies were presented in this paper to identify country-specific examples of both long-term and short-term decision-making. The case studies were drawn from two significant issues in corporate law scholarship, namely from the literature on the shareholder v. stakeholder theory debate and the secondary sources that address the relevance of the share ownership structure of a jurisdiction. This paper links the concept of long termism with the corporate objective and the agency problems within companies in these jurisdictions. The aim was to scrutinise these debates separately to identify and emphasise their influence on long-termism. This concluding section is structured as follows. First, the table that summarises and illustrates the case studies and their findings is presented and its structure is explained. This is followed by comparative comments on the parameters of long-termism. Finally, some general comments on the notion of long-termism will be presented.

### **6.2 The Table**

The analysis of the orientation of the seven case studies can be illustrated in a simple table:

**Table 1: Summary of the case studies**

<b>Jurisdiction</b>	<b>Long-term or short-term decision</b>	<b>Does it constitute a lawful activity or contribute to a breach of directors' duties?</b>	<b>- Does the law provide strong, average or weak incentives for such a decision to be taken? - Is it consistent with the corporate objective? /Does it confirm differences regarding agency problems? - Is it encouraged or criticised in the literature?</b>
<b>Case study 1 – decision to focus on the share price</b>			
Delaware	short-term decision	Likely to be a lawful activity but might contribute to a breach.	Strong incentives, especially if beneficial for shareholders. Criticised in the literature.
UK	example of short-termism	Lawful activity in general, can contribute to a breach.	Strong incentives for such decision, appears to be consistent with the shareholder value maximisation (as long-term considerations and ESV are encouraged but not obligatory). Criticised in the literature.
Germany	strong example of short-termism	It does not constitute illegal activity itself. However, it contributes strongly to a breach of directors' duties and more so, than in the shareholder-orientated jurisdictions.	German law provides weaker incentives for decisions to focus on the share price; not consistent with the corporate objective and it is criticised in the literature.
<b>Case study 2 - decision to aggressively reduce the carbon emissions from a company's plant</b>			
Delaware	long-term decision	Likely to be a lawful activity.	Weaker incentives – can only be taken if beneficial for shareholders. Consideration of long-term factors generally encouraged in the literature but the other factors can only be looked at if it is in the shareholders' interests.
UK	long-term decision	Likely to be a lawful activity.	Weaker incentives – can only be taken if beneficial for shareholders; it appears to be consistent with the ESV. Long-term investments generally praised in the literature but lack of evidence on this specific example.
Germany	strong example of long-	Likely to be a lawful activity.	There are greater incentives for this decision to be taken in Germany than in other jurisdictions. Consistent with

	termism		the corporate objective. Sustainable development generally advocated in the literature, but lack of evidence on this specific example.
<b>Case study 3 – excessive marketing</b>			
Delaware	example of short-termism	Likely to be a lawful activity, however it might contribute to a breach of duty.	There are greater incentives for this decision, especially if beneficial for the shareholders.
UK	example of short-termism	Likely to be a lawful activity, however it could contribute to a breach.	There are incentives for this decision, however fewer than in Delaware; likely to be beneficial for shareholders and not consistent with the ESV. Criticised in the literature.
Germany	strong example of short-termism	It does not constitute an unlawful activity in itself, but could contribute to a breach.	There are fewer incentives provided by the law for this decision to be taken in Germany, or encouraged in the literature as weighing different interests is crucial. It does not seem to be consistent with the corporate objective.
<b>Case study 4 – a lack of focus on environmental and health and safety issues</b>			
Delaware	example of short-termism	It does not constitute an unlawful activity in itself, but could contribute to a breach.	There are greater incentives for this decision to be taken, consistent with corporate objective if it contributes to shareholder wealth maximisation. Criticised in the literature.
UK	example of short-termism	Unlikely to be a sole cause for the breach of directors' duties but it could contribute to it.	The UK law supplies reasonably strong incentives for such decision (but weaker than in Delaware); decision consistent with the letter but not with the spirit of the corporate objective. Heavily criticised in the literature.
Germany	stronger example of short-termism	It does not constitute illegal activity itself. However, it contributes stronger to the breach of directors' duties than in the shareholder-orientated jurisdictions.	Inconsistent with the corporate objective – hence fewer incentives; less likely to be encouraged in the literature.
<b>Case study 5 – promotion of cultural, social and civic aims</b>			
Delaware	example of long-termism	Likely to be a lawful activity.	Weak incentives, but decision possible if profitable for shareholders (in one way or another). In general, supported

			in the literature.
UK	example of long-termism	Likely to be a lawful activity.	Incentives are weaker than in Germany but stronger than in Delaware, decision possible if profitable for shareholders; other factors considered subsequently. Supported in the literature.
Germany	strong example of long-termism	Highly unlikely to contribute to a breach.	The law furnishes strong incentives for such decisions; consistent with corporate objective (however, social aims cannot be only justification for the decision, it must be beneficial for the enterprise) and supported in the literature.
<b>Case study 6 – a focus on dividend growth</b>			
Delaware	example of short-termism	Unlikely to be a sole cause for the breach of directors' duties but it could contribute to it.	Agency problems between the board and shareholders as a class; directors solely responsible for dividend distribution. Strong incentives to focus on dividend growth despite weak shareholders. Abuses that lead to short-term decisions are likely. Criticised in the literature.
UK	example of short-termism	Unlikely to be a sole cause for the breach of directors' duties but it could contribute to it.	Shared division of power between the board and shareholders regarding distribution of dividends. Strong incentives to focus on dividend growth, despite dispersed ownership, shareholders are likely to put stronger pressure on the board than in Delaware. Decision criticised in the literature.
Germany	N/A	N/A	Shareholders mainly responsible for dividend distribution and only a limited role for management; confirms agency conflicts between majority and minority shareholders. Due to shareholders' leading role not relevant in terms of the parameters of managerial long-termism in Germany. At the same time shows, that one source of short-termism appears to be excluded or at least limited.
<b>Case study 7 – investment in research</b>			
Delaware	example of long-termism	Unlikely to constitute a breach.	The strongest position of the board among all jurisdictions and arguably the strongest short-term pressures –

			fewer incentives for the decision to be taken. Nevertheless, supported in the literature.
UK	example of long-termism	Unlikely to constitute a breach.	Encouraged in the literature. The board has a key role in deciding about investment in research and it is more interested in short-term investments. Shareholders are dispersed but stronger than in Delaware. Such decision is possible, fewer incentives than under German, but more than under Delaware law.
Germany	strong example of long-termism	Unlikely to constitute a breach.	The law supplies strong incentives for this decision. Long-term investments likely to be encouraged in the literature, lack of evidence on this specific example though. Due to strong influence of the majority shareholder on the board, the former attitude towards investment in research is crucial.

This table contains four columns: firstly, information on jurisdiction, secondly, an indication as to whether this is an example of short-termism or long-termism. Subsequently, whether a given decision is a lawful activity and/or has a chance to contribute to the breach is analysed. The last column addresses whether there are weak or strong incentives furnished by the law for such a decision to be taken, whether it is encouraged or criticised in the literature and finally if it is consistent with the corporate objective (cases 1-5) or confirms differences regarding agency problems (cases 6 and 7). The table also specifies each case study that has been analysed. It is not surprising that the second column is crucial in the discussion on the content and scope of long-termism. The third and fourth columns are also important as they indicate differences and similarities between jurisdictions and they present the notion of long-termism in a broader context. Moreover, currently the academic literature is the main source of evaluation whether the decision is an example of long- or short-termism; hence, it is vital to underline if it is criticised or encouraged by commentators.

### 6.3 Conclusions

The dearth of sources in the area of decision-making in all three jurisdictions indicates that it is difficult for directors or management boards to judge whether a specific decision is long-term or short-term. It is a feature of all jurisdictions that legislation draws the legal command

as a standard and the courts are left to intervene at a later date to define long-termism in greater detail. Certainly, there is no need for a static definition of long-termism and there are also positive consequences associated with the fact that the notion is not precise, as it can be used flexibly in different contexts and situations. However, there should be more guidelines regarding its breadth. The principal conclusion that emerges in this paper refers to long-termism being a flexible standard; hence, it must be evaluated in a specific case scenario. Creation of a list of factors or criteria that constitute a long-term managerial decision-making in every given situation is not possible. Case by case analysis enables us to put this subjective notion in context. It is argued strongly in this paper that it is the best way to establish the parameters of long-termism. Nevertheless, the case-based approach is not flawless, as without background knowledge it is difficult to estimate why decisions are taken.

Of the seven case studies, three represent examples of long-termism and there are four examples of short-termism. The case studies have shown that jurisdictions are almost unanimous in the classification of examples, with the exception of the case regarding the decision to focus on dividend growth, which is not relevant in terms of managerial time-horizons in Germany. However, the clarity of the examples and the probability that the decision will be taken differ. The case studies underline that long-termism is widely advertised and promoted in the academic literature and in general, it has positive associations. In principle, in all three jurisdictions the academic literature promotes long-term, sustainable development, notwithstanding that in practice, short-term decisions are likely to be taken. This is clearly illustrated in the case studies, which focus on the share price, dividend growth and the decision that fails to consider environmental and health and safety issues. Consideration of the long-term consequences involves an analysis of the positive and negative consequences of the decision – deliberation of the whole impact of a particular decision on the company.

On balance, decisions to focus on share price and on dividend growth constitute the clearest examples of short-termism and the decision to invest in research is the most vivid example of long-termism. A focus on short-term profits is the main feature of short-termism according to the case studies (case studies 1, 4, 6). Further, the case study on excessive marketing underlines that short-termism is perceived as an over-concentration on one factor. The decisions to reduce carbon emissions, to promote social goals and to invest in research epitomise long-termism; thus, future investments are key features of long-termism. The other examples of long-term investments are ‘spending on employee training or the propensity to

retain staff during economic downturns.’<sup>168</sup> It is almost impossible to state unambiguously which long-term investment will be beneficial for the particular company. As the case study on investment in research shows, such a decision can be also risky.

A decision, which is not a form of long-term decision-making, is likely to be an example of short-termism. For instance, the case study on environmental and health and safety issues indicates that a lack of focus on these factors is likely to amount to a short-term decision. At the same time, it demonstrates that there is a link between consideration of broader factors and long-termism. Examples of short-termism are more frequent than examples of long-termism, if correctly identified; they can be useful in determining the content of long-termism, by indicating what type of behaviour should be avoided.

It is still unclear whether short-term decisions are actually detrimental to long-term value creation<sup>169</sup> and the meaning of short-termism is far from clear. Nevertheless, the gap-filling exercise confirms that short-termism often involves decision-making of a quality that is less than the highest standard – which is difficult to demonstrate empirically. Focussing on short-term factors is unlikely to constitute the sole basis for a breach of directors’ duties, if disinterested directors act in good faith in the best interests of the company. The case studies show that it can at the most contribute to a breach. This makes it more difficult to determine the standard of a decision taken.

The general pattern is that decisions that are considered as long-term decisions/investments are better balanced and have a more inclusive and holistic character. In the jurisdictions under scrutiny, long-termism is associated with the following words: reasonableness, well-thought through decision, balanced development, and decisions going beyond immediate profits and short-term shareholders’ interests. Long-termism is associated with forward thinking; consideration of what is profitable not only here and now but also in the future. It is worth recalling that long-termism is not the same as a successful decision. At the same time, unsuccessful decisions can be a result of short-termism, long-termism but also other external factors. This paper now presents some general comments on the notion of long-termism in a comparative perspective.

#### **6.4 Some General Thoughts**

Apart from enriching the discussion on the content of long-termism during directors’ decision-making, the analysis produced by the case studies also illustrates how complex the

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<sup>168</sup> Jackson, Petraki, *supra* n 152, 19, fn 4.

<sup>169</sup> *ibid* 17.

concept of long-termism is and why the perception of it varies between jurisdictions. The framework above can be illustrated in the following terms:

**Table 2: General framework**

<b>Jurisdiction</b>	<b>Delaware</b>	<b>the UK</b>	<b>Germany</b>
<b>Corporate objective</b>	shareholder value maximisation	shareholder value maximisation and ESV	leaning towards stakeholderism
<b>Directors'/management board's decision-making powers</b>	wide powers	wide powers	wide powers
<b>Agency conflicts</b>	directors v. shareholders as a class	directors v. shareholders as a class	majority v. minority shareholders
	Very strong position of directors in this dispersed ownership jurisdiction; diffused shareholders	Strong position of directors in this dispersed ownership jurisdiction; diffused shareholders, but more empowered than in Delaware	Strong position of majority shareholder that is likely to influence the board
<b>Conclusions</b>	Directors have more power to pursue their own interests	Directors have more power to pursue their own interests	Less power for the board to pursue their own interests
	Tensions between the board and shareholders on the one hand and the shareholder value maximisation principle on the other means that short-term decisions are more likely	Tensions between the board and shareholders on the one hand and the shareholder value maximisation principle on the other means that short-term decisions are more likely	Influence of the majority shareholder on the decision-making and the fact that decision should involve some consideration of the interests of various stakeholders means that long-term decisions are more likely

The dichotomy between the UK and Delaware, on the one hand and Germany on the other is vivid. Similar results for the UK and Delaware were expected owing to their complementary corporate objectives and share ownership structures. However, the case studies also show that the results are not the same in these jurisdictions, because of the relatively stronger position of the board in Delaware and the application of the ESV principle in the UK. The

encouragement afforded by the ESV principle to address a wider range of factors in the UK places it somewhere between Delaware and Germany in a notional spectrum. In general, long-termism in the UK and Delaware is associated more strongly with shareholder interests and in Germany with balancing the interests of various stakeholders. Hence, it is evident that long-termism is perceived differently in these jurisdictions.

On balance, it cannot be unequivocally stated that the stakeholder-orientated countries are the ultimate exemplars of long-term decision making. However, short-term decisions are more likely to be taken in the UK and Delaware due to the shareholder value maximisation rule and the agency conflicts between the board and shareholders that are likely to create more short-term pressures. In the same vein, Jackson and Petraki argue that in the Anglo-Saxon jurisdictions the agency conflicts and shareholder value maximisation feed short-termism.<sup>170</sup> Further, a study carried out in the 1990s on the role of corporate performance measures and incentive schemes in Germany and in the UK revealed that ‘a smaller German equity market and a closer relationship between banks and their corporate clients’ supports a longer-term approach in German companies.<sup>171</sup> What is more, an emphasis on secure employment and seniority pay in Germany after the Second World War ‘explains an in-built tendency towards long-termism which contributed to higher levels of investment than in the English-speaking countries.’<sup>172</sup>

Overall, there seems to be a compelling reason to argue that Germany offers greater long-term protection, as the legal system values the continuing development of the company and a lasting increase in value. Not only the corporate objective but also less visible, considerable agency conflicts during decision-making and share ownership structure with a strong position of arguably more long-term orientated majority shareholder, demonstrate that examples of long-termism (and also short-termism) are stronger in Germany.

Referring back to the corporate objective in Germany, consideration of the interests of various stakeholders appears more long-term orientated, as different points of view are taken into consideration. The decision is then analysed from different perspectives and the decision is more comprehensive. As a consequence, the perspective in a stakeholder jurisdiction is longer, fuller and more far-reaching, even if particular employees, creditors or shareholders might have only temporary relationships with the company, or occasionally put short-term

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<sup>170</sup> Jackson, Petraki, *supra* n 152, 49.

<sup>171</sup> Jeffrey Coates et al., *Challenging Short-termism: The Role of Corporate Performance Measurement Systems in the UK and Germany*, 1 (CIMA Publishing, 1996).

<sup>172</sup> Plender, *supra* n 13, 211.

pressure on the management board. The practice of considering the interests of various stakeholders' groups make managerial decision-making more accurate and all-embracing.

On balance, the critique of the stakeholder theory that this theory is too broad to be of much use, because it is not possible to define whose interests should actually be taken into consideration, must be rebutted at this point. Consideration (or balancing) of the interests of various stakeholders is more strongly underlined in Germany, in comparison to the UK and Delaware. However, as the ultimate task of the management board in Germany is ensuring the company's profitability (expressed as 'appropriate profit realisation' rather than 'profit maximisation'), it is somewhat stretching matters to argue that the corporate objective in Germany is too vague.

Nevertheless, clearly the long-term approach will also have negative implications. Long-term orientation in the blockholder jurisdictions, like Germany, means that this system will suffer from an excessive growth focus, as it is not aiming at shareholder value maximisation. At the same time, market systems like the UK and Delaware are prone to short-termism as they do not concentrate on long-term project, but they are able to deliver shareholder value.<sup>173</sup> Bratton and McCahery argue that each system's investment minus is also its plus and vice versa, which confirms the hypothesis of equal fitness.<sup>174</sup> To sum up, the aim of this article was to clarify the content and scope of long-termism, using the shareholder v. stakeholder debate and share ownership structure of the company as instrumental devices.

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<sup>173</sup> Bratton, McCahery, *supra* n 122, 29.

<sup>174</sup> *ibid* 28-29.