German versus Nordic Board Models

Form, Function, and Convergence

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Abstract

Board structure is an important component of the individual governance of firms, and the appropriateness of the various models is one of the most debated issues in corporate governance today. A comparison of the Nordic and German approaches to the structure of corporate boards reveals stark conceptual differences, as emphasized by the 2014 Lekvall Report on the Nordic Corporate Governance Model. This article provides a conceptual comparison between the two approaches to board structure and confirms the fundamental divergence between both models. However, relying on a number of recent legal changes and developments in business practice, the article argues that board practices in the two systems effectively blur the structural distinction, and that board organization is converging in practice. It thereby contributes to the broader debates on functionality and comparative corporate law and governance.

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1. Introduction

The recent *Lekvall Report on The Nordic Corporate Governance Model* (2014) constantly emphasises the conceptual differences between the Nordic board model and its two main rivals: the German-style two-tier board and the UK/US one-tier board. In particular the German model comes off badly in the view of the Report's authors. Above all, the Report highlights the risk of management entrenchment under the German system, as the powers of both the shareholders and of the supervisory board are relatively limited (Lekvall 2014:59–60). By contrast, the Report praises the Nordic model for allocating strong residual power with the shareholders, essentially placing them at the top of the corporate hierarchy of command (Lekvall 2014:62–63). The effectiveness of shareholder control is ensured by a clear distribution of roles between board and executive management.

Behind the veil of conceptual dogma, practical realities often look different. This article argues that the two board models in the Nordic countries and in Germany are certainly conceptually distinct, but show a strong trend towards convergence in practical ways of board organisation. Both systems are moving towards a common ground where management and control are individually balanced between the different participants. This development is driven by business expediency on the one and by a set of legal changes over the past years on the other. The purpose of this article is to contribute to the wider debate on board structure and the role of boards in comparative corporate governance.

This article is organised as follows. Section 2 presents the German board model and gives us an idea of the place of the Supervisory Board in German corporate governance. Section 3 sketches out the main theoretical differences between the German approach and the Nordic board model. Subsequently, Section 4 develops the main argument of convergence by discussing a number of different examples of both board practice and changes to the legal framework of board organisation. As a side note, Section 5 enriches the debate by introducing the new Danish optional two-tier board structure and asks what the implications are for the convergence debate. Section 6 concludes.

2. The German board model

German public limited companies typically have three corporate 'organs' or bodies – a general meeting of shareholders, a Management Board (*Vorstand*) and a Supervisory Board (*Aufsichtsrat*). At the general meeting, shareholders exercise the rights granted to them by the company's articles of association and by the German Stock Corporation Act (*Aktiengesetz – AktG*). These include, among many other things, the election of the shareholders' representatives to the Supervisory Board. The Supervisory Board then appoints the Management Board.

The German system of corporate governance calls for a clear separation of duties between management and supervisory functions and therefore prohibits simultaneous membership in both boards. The *Management Board* is responsible for running the company on a day-to-day basis and for representing it in its dealings with third parties. Great emphasis is put on the fact that the Management Board is acting independently, without Supervisory Board or shareholders being allowed to interfere with management decisions. Unlike some other legal systems, the members of the Management Board including its chairman or speaker are regarded as peers and share a collective responsibility for all management decisions.

The *Supervisory Board* oversees the company's Management Board and appoints its members. Members of the Supervisory Board may generally not be involved in the day-to-day management of the company. However, the company's articles of incorporation must specify those matters of fundamental importance which may only be dealt with upon the prior consent of the Supervisory Board. The Supervisory Board may specify further matters which require its consent, but may not deprive the Management Board of its core management functions. Matters requiring such prior consent usually include decisions or actions having a fundamental impact on the assets, or the financial or profit situation of the company.

It is important to note, in this context, that the Supervisory Boards of major German companies (over 2,000 employees) are subject to employee quasi parity 'codetermination' and are comprised of representatives of the shareholders and employees. The chairman of the Supervisory Board is a representative of the shareholders, and the deputy chairman is typically a representative of the employees. In the event of a tie vote, the deciding vote is cast by the chairman.

With respect to the Supervisory Board, attention is paid to ensure that the board's composition in its entirety covers persons with a wide spectrum of experiences and expertise. German corporate governance also has several rules applicable to Supervisory Board members which are designed to ensure a certain degree of independence of the board members. In addition to prohibiting members of the Management Board from serving on the Supervisory Board, German law requires members of the Supervisory Board to act in the best interest of the company. They do not have to follow direction or instruction from third parties. Any service, consulting or similar agreements between the company and any of its board members must be approved by the Supervisory Board.

On the positive side, the two tier model is said to ensure a clear separation of powers: the management experts are charged with directly running the company and setting its strategy, whilst a separate group of controllers specialises in monitoring. The organisational and personal separation between the two functions is supposed to produce more objective monitoring and is less likely to be biased. Finally, supporters of the German separation model argue that the composition of the supervisory board succeeds in securing external input: representatives from other firms, banks and investors bring different views and expertise to the table, which may contribute to the firm's commercial success.

From other quarters, however, a number of serious criticisms have been voiced. Chief amongst them is the complaint that Supervisory Boards are too static and inflexible as their organisational framework does not allow for significant individual variation, to adjust it to the needs of each individual company. The personal and organisational separation between the two boards is said to prevent an efficient flow of information, in particular since the supervisory board is remote from the direct operations and only meets about six times per year on average (Ruhwedel 2012). Supervisory Board members may and do take on board appointments in several companies at a time, which arguably reduces their dedication and availability to each single company. Finally, critics argue that supervisory board members frequently lack specific expertise of the firms' line of business.

For better or worse, the German organisational structure was a deliberate choice of corporate legislation and has survived almost a century of reform attempts. One pattern of explanation for the separation of roles would be the objective to insulate the board from too powerful shareholder influence, given the tradition of concentrated ownership and large cross-shareholdings among German firms (see Barca and Becht 2001). Another justification could relate to the theory of the board as a 'mediating hierarch', in the sense that the board as an institution brokers the relationship between the various different constituencies affected by the corporation, and does not or should not exclusively serve the shareholders (Blair and Stout 1999; 2001).

In more recent times, some have argued for allowing more flexibility in the board structure, but the government currently shows little appetite for reform. One of the main reasons for its reluctance is certainly the strong role that employees have in the Supervisory Board, which would be difficult to integrate or to transpose into both a one-tier and a Nordic board structure.

3. Differences to the Nordic model

It may surprise many that the Nordic model initially does not appear to look very different from its German counterpart. First devised by a 1920s reform in Denmark (see Friis Hansen 2003:85 ff; Hansen 2015:89), the model also provides for two separate bodies, called a board of directors (*bestyrelse*) and an executive board (*direktion*). Whilst the executive board function is usually performed by a single person (the CEO) in some Nordic countries, Danish executive boards are normally composed of a group of executive officers.[1] When illustrating the two models graphically (see figure 1), they look surprisingly similar. What, then, are the conceptual differences between the two systems?

Different role and function

The major difference between the two models relates to the distinct role and function of the boards. The Supervisory Board in Germany is essentially only a control organ. It is, as the name suggests, only allowed to 'supervise' what the management board is doing – for the most part performing ex post control. It is barred from taking management decisions itself by express provision in the law (AktG § 111(4)). To be sure, the German supervisory board has some influence ex ante – in particular, it can and must establish a list of managerial issues that can only be decided with its consent, but it is not the primary decision maker involved in running the company.

The Nordic board of directors, by contrast, is the main body of management, equipped with own executive powers to enter into contracts on behalf of the company and to take business decisions. It is responsible for the overall management of the company's affairs, including its strategy, organisation and financial structure as well as the oversight of risk management and internal controls. Whilst the executive board is entrusted with the day-to-day running of the company, it has no powers to deal with extraordinary or far-reaching decisions, which remain the sole responsibility of the board.

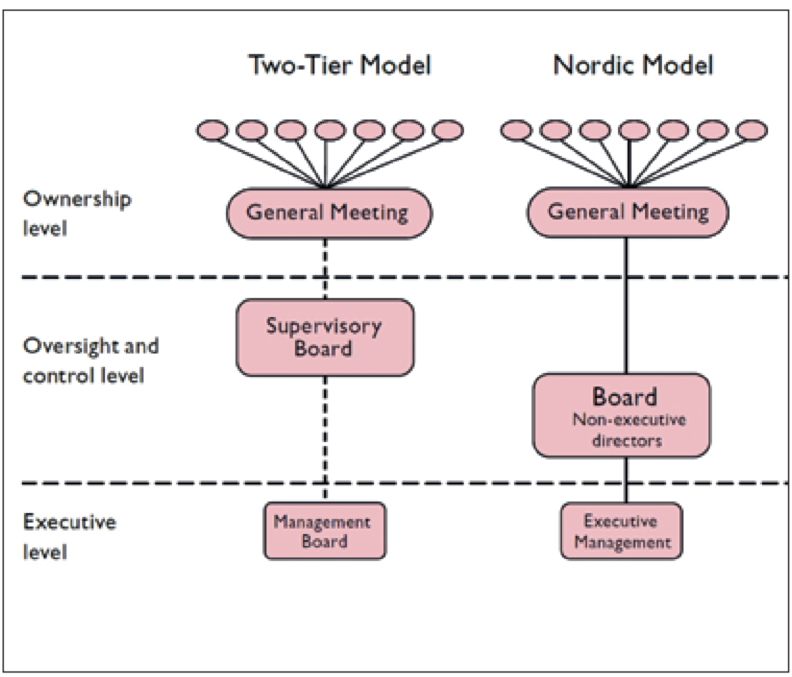

Figure 1. Comparison between German and Nordic board structure. Adapted from Lekvall (2014)

1 This is the reason we use the term 'executive board' in this context, following the terminology used by Committee on Corporate Governance (2014).

In other words, the Nordic board is not just a control organ, it is rather a supreme management and strategy setter for the corporation, which sits on top of the ancillary executive board and controls the latter at will. In addition, it is also charged with supervision of the executive board's activities.

Personal overlap

The second point of difference is simple: it concerns the question of whether a personal overlap between the two boards is possible. German law mandates a strict incompatibility between membership of the two boards (AktG § 105). By contrast, double mandates in both Nordic boards are generally possible, to some extent (Hansen 2015).

Hierarchy

The hallmark of the Nordic model is the strict hierarchy between the different levels of command (Hansen 2015). The shareholders' general meeting as the supreme body appoints and dismisses the board of directors, and can do this at will, i.e. without the need to provide reasons or explanations. The board of directors, in turn, has free discretion to hire and fire the members of the executive board. The executive board works, moreover, under the instructions of the board of directors and must follow and implement these instructions.

This is markedly different from the German model. Under German law, the Supervisory Board's task is only to 'supervise'. A Supervisory Board therefore does not stand in the same strict order of hierarchy as the Nordic board does. It is not allowed to instruct the Management Board specifically; rather, the Management Board leads the company under its own responsibility (Wirth et al 2010:99). It is in this logic that the Supervisory Board is not entitled to remove the Management Board at will: rather, a dismissal is only allowed for good cause. AktG § 84(3) requires an 'important reason' for dismissal and lists as examples a gross breach of duty, inability to manage the company properly or a withdrawal of confidence on the part of the general meeting.

Arguably, for purposes of a functional analysis, the presence of a hierarchical relationship between the different 'organs' or 'boards' is more important than the (formal) number of 'boards'. Whether a given corporate governance framework on a country or company level provides for one or two (or more) 'boards' is frequently only a matter of terminology and categorisation. What matters more is the relationship between these different 'boards'. Where a clear hierarchy exists between them, the higher board will always be able to control and instruct the lower level board, and will even be able to appoint its own representatives to the lower level. The higher level board (or, ultimately, the shareholders) are thus theoretically able to 'micromanage' the corporation and ensure that their perceptions and visions are in fact implemented. By contrast, a system that operates without hierarchy between boards or between shareholders and board puts the emphasis on independent managerial decision-making, insulating it from the controllers' influence.

It is there where the real difference lies between the German and the Nordic board systems. The German model vests great power in the hands of the Management Board, insulating it from the shareholders' direct influence. The Supervisory Board acts like an intermediate layer between the two. By contrast, the Nordic board is subject to ultimate control by the shareholders, and the Nordic board itself may instruct the firm's executive board. The two parts of the Nordic board thus appear like artificially separated, but remain subject to instructions from the higher level. This hierarchical relationship constitutes the key difference to the German model, where the two boards work truly independently from each other.

Conclusion

Given these fundamental differences, it appears that the two systems share more differences than commonalities. In particular the order of hierarchy between the two Nordic 'boards' appears to be a striking difference between the two models. In fact, as the hierarchy between board and senior management is a key feature of the Anglo-American one-tier model, the conclusion must be that the Nordic model shares strong similarities with the one-tier than with a two-tier system. As we saw above, the main contribution of the supervisory board then is that of an intermediate layer, insulating the management board from the direct influence of the shareholders: it breaks the chain of direct control and transforms the management board into a largely independent body. The Nordic board, by contrast, sits in a hierarchical chain of command. Conceptually speaking, function trumps form: despite being structurally similar and somehow German-inspired, the Nordic board model thus appears, from a functional perspective, closer to being a 'single' board with authority to run the company.[2]

4. Convergence in practice

Despite these fundamental conceptual differences, this article argues that board models are much closer in reality than the conceptual differences may suggest. In fact, practical experiences and legal changes over the past several years have driven a movement of convergence of board models all across Europe. This section illustrates this development by providing a number of practical examples.

Changing roles and functions

Contrary to what the above description may suggest, corporate practice reveals that both 'boards' have been changing their traditional roles over the past few decades. This is suggested by corporate board practice as well as a number of legal changes.

First, German supervisory boards have seen a strong tendency towards professionalization over recent years. When they were first set up in their current structure 80 years ago, they were conceived as a rather weak advisory body with limited tasks (Leyens 2006:130). This has changed dramatically over time. The function of the supervisory board is said to be much more that of a professional manager today, with a direct embeddedness into the firm's decision-making processes. Whilst many companies have felt pressure to adjust the role of their supervisory board for simple performance and commercial reasons, this development was spurred by legislative changes.

For example, a significant step was the 2002 adoption of a German Corporate Governance Code, which makes a number of best practice recommendations on a comply-or-explain basis with the express view of bringing German corporate governance standards into line with international developments (for the current version, see Regierungskommission Deutscher Corporate Governance Kodex 2015). Another change was the recent introduction of the requirement for companies to specify a catalogue of management decisions that require the supervisory board's ex ante consent. This catalogue is laid down in the company's articles of association and typically includes the main element of corporate strategy.

A final important development concerns the changing self-perception of the supervisory board and its objectives. For example, the growing professionalization of the supervisory board has led, over time, to a different understanding of what 'control' as the principal task of the supervisory board entails in substance. The earlier interpretation of an exclusive *ex post* control has thereby been gradually reversed in favour of 'control' that can be backwards and forward looking (Habersack 2014). Control thus includes continuous advice on matters of corporate strategy and on concrete planning of management projects. This change of perception has reinforced the general trend of a growing professionalization of the supervisory board and its much stronger involvement in questions of management and strategy. For example, it is common practice for Management Board members to attend the sessions of the supervisory board so as to improve the information flow and dialogue.

Conversely, in large Nordic companies, the role of the board has become somehow that of a monitoring institution. Due to the size of the operations, boards of directors nowadays tend to leave

2 Interestingly, the EU institutions tend to classify the Danish system as a 'two tier' system. See European Commission (2013).

managerial tasks to the executive board to a large degree, and their main task has become to monitor the exercise of these delegated powers (Davies and Hopt 2013:312). Nordic board members tend to sit on the board of several different companies at the same time, which does not allow them to devote all of their time to a single company. Rose (2005) for example, finds that Nordic board members simultaneously hold 5.2 other board positions on average, and board chairmen even 7.2 additional board positions. As a consequence, members of the board cannot engage fully and solely with the details of everyday business in each of the firms they are supposed to steer (see also, Committee on Corporate Governance 2014: 3.3). The board in large Nordic companies thereby morphs into a de facto control institution, with the only difference that it may always revoke the delegation of powers.

Further, it is becoming common practice that even those topics which are not delegated to the executive board tend to be prepared at the executive level, sometimes even in the form of draft resolutions which are then rubberstamped by the board. In some situations, members of the board of directors have neither sufficient time nor expertise to carefully study nor seriously study these proposals from the executive board.

Formation of committees

A second consideration to account for the growing convergence of board organisation is the increasing importance of board committees. Again, it is a combination of both practical necessity and legal encouragement to set up board committees. In addition, board committees have become an international standard in corporate governance so that international competitiveness and globalisation can also be said to be responsible for their popularity.

Board committees are separate sub-groups of the board that are tasked with particular, usually sensitive responsibilities. For large companies all over Europe, it has become common to set up such committees, irrespective of their general board structure. Thus, it is as common in Germany as in the Nordic company to have at least a remuneration committee, an audit committee, and a nomination committee. These subject matters are usually considered as concerning the most sensitive of the board's work, and the most likely to cause conflicts of interest. This is the reason why specific expertise and independence is required to carry out these tasks in a smaller group. It is widely accepted that a major part of the board's work is nowadays entrusted to such committees; as an international trend, they are therefore considered as a prime example of board convergence (Habersack 2014).

This development has been aided by legal developments. For example, the EU Audit Directive 2006/43/EC, implemented in the different Member States since 2008, requires all public-interest companies across the EU to form an audit committee. This committee is charged with monitoring the financial reporting process; and with controlling the effectiveness of the company's internal control, internal audit where applicable, and risk management systems. Similarly, the European Commission (2005; 2009) in its EU Recommendations 2005/162/EC and 2009/385/EC endorses the formation of nomination and remuneration committees in public companies across the continent. Although these recommendations are not binding, they have nevertheless had significant impact on the EU corporate landscape.

Board composition

Another area of convergence is the composition of the board. For example, the concept of independence of board members has taken its triumphal course throughout European boardrooms over the past several years, not least due to political endorsement and crisis reaction (Ringe 2013).

It was again the European Commission (2005) which initiated broader thinking on this issue in some Member States, including Germany. Whilst traditional perceptions of German corporate governance had not been strongly informed by independence criteria, the 2005 EU Recommendation triggered a widespread policy debate about the merits of the concept. The recommendations made by the German Corporate Governance Code now support the presence of independent supervisory board members, but make the concession that the Supervisory Board may itself determine how many independent members are an adequate number. The reluctance of German policy makers to this concept is explained by the fact that the structural separation of the two board 'tiers' should arguably fulfil many of the policy concerns that the EU Commission sought to achieve with promoting board independence. Further, board independence does not sit easily with the presence of employees on the board, in line with co-determination requirements for large companies ('Mitbestimmung').

Nordic lawmakers and regulators appear more open-minded towards board independence. A joint paper by the different Nordic corporate governance definers states that '[i]n line with generally accepted international standards, the codes or the listing rules of all Nordic countries stipulate that at least half, or a majority, of the Board members to be elected by the shareholders have to be independent' (Danish Corporate Governance Committee et al 2009). The Danish best practice standards recommend that at least half of the members of the board of directors be independent (Committee on Corporate Governance 2014). To be sure, the devil may lie in the detail of how 'independence' is specifically defined (Ringe 2013). This is where the Nordics struggle, as they do not agree on whether 'independence' encompasses 'independence from major shareholders' (see, e.g., the Swedish system).

Further, the Lekvall Report itself notes that, except for employee representatives, most boards of Nordic listed firms are comprised almost exclusively of non-executive directors (Lekvall 2014:53–54, 74–75). Best practice standards strongly endorse the personal separation between board and executive board, in particular a split between the Chairman of the board of directors and the CEO (Danish Corporate Governance Committee et al 2009).

It is submitted that these features taken together – personal separation, the presence of mostly non-executive, independent directors, whose work is mainly organized through a committee structure – bring the Nordic board model very close to the practical realities of a German supervisory board. Lekvall himself concludes that 'an important implication of this is a clear-cut division of duties and responsibilities between a monitoring and strategically steering board and a purely executive management function. This division of roles also serves to strengthen the integrity of the board vis-à-vis the executive function' (Lekvall 2014:17, 75).

EU influence

The shape of board structure and the board's role in corporate governance have been subject to numerous legal initiatives on the EU level. The slow but steady stream of measures that aim to align certain practices across the EU has also contributed to the growing comparability and convergence in the field.

We have already seen that the EU has adopted several measures in the field of accounting, certain board committees and board independence. This list could be extended by recent initiatives on corporate governance in financial institutions (European Commission 2010), the 'EU Corporate Governance Framework' (European Commission 2011), a Recommendation on corporate governance reporting (European Commission 2014a), and the pending revision of the EU Shareholder Rights Directive (European Commission 2014b). The sum of these (and more) initiatives is a gradual trend towards a common understanding of board function and role. Whilst none of these measures addresses board structure directly, they achieve a rather indirect regulation on the board's role. For example, the recent reform proposal for the Shareholder Rights Directive would, if adopted, assign responsibility for related party transactions to the shareholder meeting, rather than addressing the issue with internal board approval processes (as is currently the case in Germany). This type of action achieves, over time, a gradual conversion of the responsibilities that boards (and supervisory boards) are meant to accomplish.

The final example is an important one: since 2004, companies throughout the Union can choose to convert to the European legal form *Societas Europaea (SE)*. In the absence of a singular board structure, the founders of an SE can explicitly select either a one-tier or a two-tier board system. The mere existence of this instrument, which is becoming popular among German firms, and its freedom as to board organisation have already triggered a wide debate on the appropriateness of the traditional two-tier board structure.

As a side note, it is very much open to debate whether EU efforts at harmonising corporate laws are convincing or functional (Armour and Ringe 2011). Arguably, caution is required when subjecting relatively heterogeneous corporate and ownership landscapes to similar or even identical legal rules. Sceptics may take comfort in the fact that the centrepiece project for harmonisation of corporate governance structures, the so-called Fifth Directive, failed due to a lack of political consensus, as early as in the 1980s.

Accountability

Maybe the only remaining serious difference between the two board systems is the accountability of the board to the shareholders. The Lekvall Report is correct to emphasise that the shareholders have only limited direct power to interfere with board matters in the German system, and the possibilities of removing directors are restricted (Lekvall 2014:59–60). Described in more detail, the procedure is as follows: members of the management board can only be removed by the supervisory board for cause, AktG § 84(3), and the shareholders have no direct way of removing the management board or individual board members. It is only the members of the supervisory board who can be removed by the shareholders: this can be at will, but a 75 % majority is required, AktG § 103.[3]

This appears like a strict system with different layers of accountability. The practice is, however, somewhat richer than the first impression. First, the 75 % majority requirement to remove the supervisory board can be modified by the company's articles of association: on individual firm level, a lower majority may thus be sufficient. Secondly, and even more importantly, there is a possibility of direct shareholder influence on the management board: The shareholders can vote, with simple majority, to withdraw their confidence in individual members of the Management Board or the Management Board as a whole. Such withdrawal of confidence would then count as sufficient reason in the meaning of AktG § 84(3) to allow the Management Board's dismissal by the Supervisory Board. In such a case, the latter would not be legally obliged to dismiss the Management Board, but there would be high pressure on them to do so.

5. The new optional 'two-tier' model in the Nordics

Against the above claim of a general trend towards practical convergence, it surprised many that a recent reform in Denmark introduced an optional 'two tier' model German style into its corporation law (Friis Hansen 2009). Danish public firms can thus freely choose between the traditional Danish model, as discussed above, and a German-style board model which distinguishes between a 'Board of Supervisors' (*tilsynsråd*) and the (familiar) executive board (*direktion*) – with the important consequence that the *tilsynsråd* is only responsible for supervision (Krüger Andersen and Sørensen 2014). Although Finland knows of a comparable right of choice, the Danish move raises a number of broader issues, including the question of to what extent the 'Nordics' constitute a truly homogenous group, or whether they are showing trends of moving into different directions.

In any case, the reasons for the Danish reform step are a little in the dark. Part of the motivation seems to have been the desire to give companies more flexibility, and the insight that none of the two board systems appears to be superior. An-

3 Note that the power to remove members of the supervisory board only refers to those members who were elected by the shareholders, not the employee representatives.

other motivation seems to have been to replicate the existing choice for Danish-registered SEs (Societas Europaea, a pan-European corporate law form). More interesting is the argument of strategic thinking by Danish lawmakers who wanted to attract foreign (German) investment into Denmark by offering them a familiar organisational environment. And finally, commentators see the growing competition between (corporate) legal systems in the EU internal market as responsible for the move.

Two points are noteworthy about this development. First, as we have seen, the traditional Nordic board structure is already sufficiently flexible so as to allow for the individual creation of a *de facto* two-tier system on the firm level: by simply delegating most management tasks to the executive board. This can happen without the need for an additional legislative option. Understood in this way, this suggests that window-dressing was the main reason behind the legal change. Secondly, the risk is that Danish lawmakers have been overzealous by establishing a two-tier system that imposes stricter separation than the German original. As I argue above, the German two-tier system, as a consequence of legal reform and changed business practices, has become much more flexible than it used to be. The new Danish two-tier thus appears more like a copy of the historical law on the books, rather than an integration of a system that has matured through practice (similarly, Krüger Andersen and Sørensen 2014; but see Hansen 2014).

As a side note, the Danish Corporate Governance Standards, as revised after the reform, prefer the traditional Nordic board model and explicitly recommend firms not to make use of the new option: 'In the view of the Committee, [listed companies] should have a board of directors and an executive board, as this structure provides constructive and value-creating interaction between the two governing bodies. Consequently […], the Committee has chosen to use the designations known so far for the governing bodies: board of directors and executive board' (Committee on Corporate Governance 2014: 8). This public endorsement is effectively a death knell for the new two-tier option. And in fact, only a very small number of Danish firms have made use of the two-tier option thus far.

Some reassurance may come from France, where firms were allowed to choose, by law, between a one tier and a two tier board since 1966. Research has revealed that only a small number of firms choose the two-tier board, but if so, then mostly for good reasons; further, the larger the firm, the more likely the choice of the two-tier system (see Belot et al 2015). It appears that companies make reflected choices, and that the functionality of a two-tier board may make sense depending on the size of the firm or its business sector. Granting choice may thus be a value-enhancing way forward after all.

6. Conclusion

This article has argued that, despite large conceptual differences, the practice of board organisation in both the Nordic countries and in Germany is on a trend of convergence. This is a function of both a number of legal changes, mainly driven by the European Union, and by practical necessities and common board practice. The presence of board committees, independent directors, personal functional separation and delegation of matters to the executive board in the Nordics are matched by a growing professionalization of the German supervisory board and its increasingly assertive, strategy-formulating role. Remaining differences include in particular the accountability of the board towards shareholders, although we have seen that the dichotomy between a clear hierarchy here and board insulation there is not an exhaustive description, and that practical realities are similar even here.

These observations contribute to the ongoing debate on the most functional board organisation and the trend towards a choice-based model. But it is important to consider the wider consequences for corporate governance. The structure of board organisation always has immediate repercussions on the role of the shareholders. Where the board is strong, the shareholders are weak, and conversely. A discussion on board organisation is, as we have seen, therefore automatically a debate on the proper role of shareholders.

Again, perspectives differ. The German board structure with its partial insulation of the Management Board is explained with an attempt to achieve a counterbalance against the country's traditionally very strong shareholders. This may have to be reconsidered following recent trends towards a dispersion of the large equity blocks and the beginning erosion of the 'Deutschland AG' (Ringe 2015).

The Nordic model, by contrast, is considered as a 'selling point' for investment in the Nordics: it grants the shareholders far-reaching powers to control the board and to take active influence in the company's strategy (Lekvall 2014:63). At times where the lack of shareholder engagement is deplorable and regulators worldwide are searching for solutions on how to incentivise 'active owners', the Nordic model may turn out to be a stimulating example of a workable approach. However, the 'Nordic Corporate Governance Model' must be careful to counterbalance powerful shareholders with substantial minority protection. And too strong shareholders may not be desirable either: overly incentivised boards were arguably partially responsible for some of the irresponsible risks that financial institutions entered into, leading to the financial crisis of 2008/09 (Beltratti and Stulz 2012).

References

Armour, J. & Ringe, W.G. (2011). European company law 1999–2010: Renaissance and crisis. *Common Market Law Review* 48, 125–174.

Barca, F. & Becht, M. (Eds.) (2001). *The Control of Corporate Europe*. Oxford University Press.

Belot, F., Ginglinger, E., Slovin, M. B., & Sushka, M. E. (2014). Freedom of choice between unitary and two-tier boards: An empirical analysis. *Journal of Financial Economics* 112, 364–385.

Beltratti, A. & Stulz, R. M. (2012). The credit crisis around the globe: Why did some banks perform better? *Journal of Financial Economics* 105, 1–17.

Blair M. & Stout, L. (1999). A team production theory of corporate law. *Virginia Law Review* 85, 247–328.

Blair M. & Stout, L. (2001). Director accountability and the mediating role of the corporate board. *Washington University Law Quarterly* 79, 403–447.

Committee on Corporate Governance (2014). *Recommendations on Corporate Governance*. Available at https://corporategovernance.dk/recommendations-corporate-governance.

Danish Corporate Governance Committee, Finnish Securities Market Association, Icelandic Committee on Corporate Governance, Norwegian Corporate Governance Board, and Swedish Corporate Governance Board (2009). *Corporate Governance in the Nordic Countries*. Available at http://www.corporategovernanceboard.se/media/28287/nordic%20cg%20booklet%20-%20final%20web%20version.pdf>.

Davies, P.L., & Hopt, K.J. (2013). Corporate boards in Europe – Accountability and convergence. *American Journal of Comparative Law* 61, 301–375.

European Commission (2005). *Commission Recommendation of 15 February 2005 on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board*. OJ L52/51.

European Commission (2009). *Commission Recommendation 2009/385/EC of 30 April 2009 complementing Recommendations 2004/913/EC and 2005/162/EC as regards the regime for the remuneration of directors of listed companies*. OJ L120/28.

European Commission (2010). *Green Paper: Corporate governance in financial institutions and remuneration policies*. COM(2010) 284 final.

European Commission (2011). *Green Paper: The Corporate Governance Framework*. COM(2011) 164 final.

European Commission (2013). *National Factsheet Gender Balance in Boards – Denmark*. Available at http://ec.europa.eu/justice/gender-equality/files/womenonboards/womenonboards-factsheet-dk_en.pdf.

European Commission (2014a). *Commission Recommendation 2014/208/EU of 9 April 2014 on the quality of corporate governance reporting ('comply or explain')*. OJ L109/43.

European Commission (2014b). *Proposal for a Directive of the European Parliament and of the Council amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement and Directive 2013/34/EU as regards certain elements of the corporate governance statement*. COM(2014) 213 final.

Friis Hansen, S. (2003). Ledelsesstrukturen i danske SE-selskaber. In: Iversen, B. (Ed.). *Juridiske emner ved Syddansk Universitet 2003*. Jurist- og Økonomforbundets Forlag, 73–95.

Friis Hansen, S. (2009). Ledelsesstrukturen i danske aktieselskaber efter 2009-reformen af aktie- og anpartsselskabsloven. In Pedersen, H.V.G. (Ed.). *Juridiske emner ved Syddansk Universitet 2009*. Jurist- og Økonomforbundets Forlag, 123–137.

Habersack, M. (2014). Commentary on § 111 AktG. In Goette, W. et al. (Eds.). *Münchener Kommentar zum Aktiengesetz*. 4th Edition. C.H. Beck.

Hansen, J.L. (2014). Tilsynsrådet i dansk ret – Svar til NTS 2013:4. *Nordisk Tidsskrift for Selskabsret*, 20–28.

Hansen, J.L. (2015). The role of shareholders in public companies in the Nordic countries. In Fleischer, H., Hansen, J.L., & Ringe, W.G. (Eds.). *German and Nordic Perspectives on Company Law and Capital Markets Law*. Mohr Siebeck, 81–110.

Krüger Andersen, P. & Sørensen, E.J.B. (2014). The Danish supervisory board – A German model? Fleischer, H., Hansen, J.L., & Ringe, W.G. (Eds.). *German and Nordic Perspectives on Company Law and Capital Markets Law*. Mohr Siebeck, 129–153.

Lekvall, P. (Ed.) (2014). *The Nordic Corporate Governance Model*. SNS Förlag.

Leyens, P. (2006). *Information des Aufsichtsrats. Ökonomisch-funktionale Analyse und Rechtsvergleich zum englischen Board*. Mohr Siebeck.

Regierungskommission Deutscher Corporate Governance Kodex (2015). *German Corporate Governance Code, as amended on May 5, 2015 (English version)*. Available at http://www.dcgk.de//files/dcgk/usercontent/en/download/code/2015-05-05_Corporate_Governance_Code_EN.pdf.

Ringe, W.G. (2013). Independent directors: After the crisis. *European Business Organization Law Review* 14, 401–424.

Ringe, W.G. (2015). Changing law and ownership patterns in Germany: Corporate governance and the erosion of Deutschland AG. *American Journal of Comparative Law* 63, 493–538.

Rose, C. (2005). The composition of semi-two-tier corporate boards and firm performance. *Corporate Governance: An International Review* 13, 691–701.

Ruhwedel, P. (2012). *Aufsichtsrats-Score 2012 – Studie zu Effizienz, Besetzung, Transparenz und Vergütung der DAX- und MDAX-Aufsichtsräte*.

Wirth, G., Arnold, M., Morshäuser, R., & Greene, M. (2010). *Corporate Law in Germany*. 2nd Edition. C.H. Beck.