Short-termism in company and capital markets law
– History of idea, comparative law, law and economics –

The most basic and distinctive function of the company (Aktiengesellschaft, AG) is to transform private savings into permanent investment capital and thereby facilitate large business projects in private economic responsibility. In order to accomplish this, the investment and planning horizon of the managing directors, who run a permanent enterprise, must be decoupled from those of the investors, who typically want to remain flexible. Tp this end, a public listing allows for an arbitrarily short investment in a company that runs a permanent business. The company can nevertheless – so the idea – act for the long term, because, in isolation, the transfer of shares on the secondary market neither affects its capitalization nor its creditworthiness. However, this decoupling-mechanism is subject to breaking points, which result from the permanent accountability of the company to the shareholders and the capital market. Against this background, since the advent of the modern publicly traded company, jurisprudence, economics and politics are concerned that the public company comes under excessive short-term pressures, to the detriment of economy and society.

The present work does not intend to offer final solutions for the lively debate about this problem which is concisely called *short-termism* or *myopia*, but rather wants to counteract the common tendency in this field to put the cart before the horse. Indeed, the changeable legal and economic debate about *short-termism* has not been systematically studied neither in Germany nor abroad. The present work closes this research gap. For the first time, it examines the controversy about *short-termism* and thereby about how to safeguard the purpose of the public company, one of the *great debates in company law*, in a comprehensive way combining the history of law and ideas, comparative law and law and economics. At the same time, it recounts the history of the reception of an internationally efficacious topos in company and capital markets law: It shows how this topos has been developed and for which legal questions, matters and interests it has been used at different points in time and today. Such a deep understanding is key to deal with the problem of *short-termism* properly, because it significantly contributes to assess the often rather zeitgeisty range of opinions adequately and to capitalise on the economic and comparative pool of experience.

Indeed, the discussion about *short-termism* in company and capital markets law is almost as old as the modern public company itself. In this debate, law and economics interact almost consistently and in manifold ways. The discussion in economics has a long history of ideas itself, which the present work traces back until to *Adam Smith*. It shows that, for a long time leading economists explained the problem of *short-termism* with recourse to psychology, before institutional factors came to the fore. In this respect, *Keynes* inspired many works of modern theory. Furthermore, modern economics is of decisive aid to define the problem of *short-termism*, which typically remains undone from a legal perspective (*1st part*).

Debates about *short-termism* often give rise to power struggles between conflicting interests about existing law, because possible measures against short-term influences in public companies affect the needs and concerns of important stakeholders. If is therefore essential to examine causes in economic history, driving forces and conflicting interest in order to develop a clear understanding of a problem that to some seems “notably undefined” and

dependent from the eye of the beholder. At the same time, it promises new insights and ideas to analyse the instruments for insulation against short-term pressures that have been discussed, researched and tried so far, as well as the related arguments and experience. The present work does this for Germany in the European context starting with the Weimar Republic, going on to the concept of a Neo-American capitalism opposing a Rhine Model, debates about German and European takeover laws, the KonTraG of 1998 and the "locusts debate" of the 2000s. The United Kingdom is examined since the 1930s with many influential committees and reports as well as controversies about institutional investors, takeovers, non-executive (outside, independent) directors and the purpose of the company. In the United States, there were several waves of discussion since the 1970s which dealt with *short-termism* as a mistake of management, as a defect caused by investors and as result from a failure of regulation or conventional theory, respectively (*2nd part*).

Further insights can be gained by having recourse to the modern economic theory about *short-termism*, which has developed in parallel to and in close connection with the legal debate until the financial crisis. It leads into a multiverse of theories that reveals with rigorous mathematically based lines of thought possible points where *short-termism* might arise. At the same time, it is shown that its models are subject to important limitations. Nevertheless, taken together, they allow for delineating fields that are more and less prone to *short-termism* (*3rd part*).

Since the financial crisis of 2007, *short-termism* is one of the contemporary problems discussed most fiercely and widely around the world. In the "tsunami of regulation" after the financial crisis, the containment of *short-termism* is, for the first time simultaneously in jurisdictions of different legal families, a central topos in terms of legal policy in company and capital markets law. The present work examines in a comparative way the discussions in different jurisdictions, the actions taken, their background and the experiences gained, as a basis for further research and as practical aid for legal policy. It focuses in particular on international trendsetters and trend amplifiers, the United States (i. a. hearings to the Dodd-Frank Act, continuing fronts of the takeover controversy, proxy access), the United Kingdom (in particular Walker Review, Kay Report and Stewardship Code), France (i. a. generalisation of a time-phased double voting right and reform of the law on takeovers), the law of the European Union (i. a. reform of the transparency directive and the shareholder rights directive) and Germany (in particular: reform of directors' pay, changeable history of quarterly reporting). This lays the basis for refining individual components, whose regulatory levels are shown, and, at the same time, makes the first steps towards a theory of the regulation of time horizons in company and capital markets law (*4th part*).