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WHAT CONNECTS AND WHAT DIFFERENTIATES THE CORPORATE GOVERNANCE SYSTEMS OF SELECTED COUNTRIES?

(Summary)

The aim of the article is to offer an outline of the most important factors responsible for the convergence or divergence of corporate governance systems on the basis of selected countries – the US, the UK, Germany, and Japan. The research should show that the governments of these countries are not interested in the convergence of the systems.

The article attempts to show corporate governance as a broad and complex area that still contains many ambiguities. Different classifications of corporate governance models have been presented, but most attention is given to the Anglo-American and Continental-Japanese models. Then the crucial factors implying convergence and divergence of corporate governance systems are indicated. It was found that states try to unify the systems mainly in the field of legal regulations, but they pay little attention to achieving convergence in practice. Japan was used as an example of a country that retains its cultural identity under the conditions of the Americanization of regulations. Culture and tradition are the main obstacles to the convergence of corporate governance models. In order to achieve the research objective, a critical analysis of the subject literature and the appropriate legal regulations was used.

Keywords: corporate governance; convergence; divergence; models
Classification JEL: G34, G38, K22, M14

1. Introduction

Although in recent decades corporate governance has become a key topic for legislation, practice, and academia in most countries, it still contains ambiguities that arouse controversies[1]. The theoretical exploration of corporate

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[1] **K.J. Hopt**, *Comparative corporate governance: the state of the art and international regulation*, The American Journal of Comparative Law 2011/59/1 (WINTER), Oxford University Press, Oxford, p. 6.

governance is relatively new, as the term has been in use only since the 1980s[2], but its practice goes back centuries – summaries of its problems may be found in the works of Homer and Shakespeare. Many aspects of corporate governance may be studied on examples of companies operating in the 18th century. Adam Smith's famous statement shows that he in his book *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776) summerised very well the essence of corporate governance, though he did not know the term. The 21st century promises to be the century of corporate governance as the focus shifts to the legitimacy and effectiveness of the wielding of power over corporate entities worldwide[3].

National institutional systems provide formal and informal rules to which domestic and foreign firms must adapt their governance and ownership structures[4]. Corporate governance systems are more-or-less country-specific frameworks that shape the patterns of influence that stakeholders exert on managerial decision-making[5]. The economic, legal, social, and cultural determinants lead to path-dependent developments in them[6].

It is possible to classify corporate governance models, taking into account the principal–agent or finance perspective, the myopic market view, the stakeholder view, and a critique of the abuse of executive power[7]. Another typology includes four ideal types of national governance model: a liberal type that promotes market dominance, a social rights type that sets social limits for market strategies, a developmental type in which market strategies are coordinated by the state and society, and a socialist type in which the state seeks to retain power and subsume market and society[8]. In this paper, the classification that distinguishes *'market-oriented'* (*shareholder-oriented*)

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2 **B.Tricker**, *Corporate Governance. Principles, Policies, and Practices*, Oxford University Press, Oxford 2015, p. 4.

3 **B. Tricker**, *Corporate Governance. Principles, Policies, and Practices*, Oxford University Press, Oxford 2009, pp. 7–8.

4 **K.J. Hopt**, *op. cit.*

5 **J.N. Gordon**, **W.G. Ringe** (eds.), *The Oxford Handbook of Law and Governance*, Oxford University Press, Oxford 2015, p. 3.1, The%20Oxford%20Handbook%20of%20Corporate%20Law%20and%20Governance%2

6 **D.M. Wright**, **D.S. Siegel**, **K. Keasy**, **I. Filatotchev**, *The Oxford Handbook of Corporate Governance*, Oxford University Press, Oxford 2013, p. 47.

7 **K. Keasey**, **S. Thompson**, **M. Wright** (eds.), *Corporate Governance: Accountability, Enterprise and International Comparisons*, Wiley and Sons 2005, pp. 2–3.

8 **R.V. Aguilera**, **W.Q. Judge**, **S.A. Terjesen**, *Corporate Governance Deviance*, Academy of Management Review 2018/43/1, pp. 87–109.

and *'network-oriented'* (*stakeholder-oriented*) systems of corporate governance[9] will be used[10].

The main characteristics of the *market-oriented systems*, which prevail in *Anglo-Saxon* countries, are a large capital market relative to GDP, the security and protection of property rights, a relatively small role for the state in the affairs of business, dispersed ownership, a unitary board of directors, and an active market for corporate control that serves as a mechanism for shareholders to influence managerial decision-making[11].

In the *network-oriented system,* oligarchic groups sway managerial decision-making via networks of relatively stable relationships. Corporations are seen as having obligations to society[12], financial markets are smaller and less

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9 In the chosen classification the very interesting Scandinavian model of corporate governance is not mentioned. It is characterized by three key features: diversity of ownership patterns, including controlling shareholdings, independent boards, and strong protection of minority investor interests. The fundamental principle of Nordic corporate governance is to provide the shareholder majority with strong powers to control the company while providing minority shareholders with effective protection against abuse of power by the majority. The system gives dominating shareholders the motivation and tools to act as engaged owners and take long-term responsibility for the company. The primary means to obtain this is a clear-cut and strictly hierarchical chain of command between the general meeting, the board, and the executive management. The convergence of the national systems is based on four pillars: (i) Supremacy of the general meeting to decide on any matters that do not expressly fall within the exclusive competence of another company organ; (ii) A non-executive board of directors appointed by, and fully subordinate to, the shareholders in the general meeting; (iii) An executive management function appointed by, and fully subordinate to, the board; and (iv) A statutory auditor appointed by, and reporting back primarily to, the shareholders in the general meeting. More information in: **P. Lekval** (ed.), *The Nordic Corporate Governance Model*, SNS Forlag, 2014, pp. 17, 52–53; https://www.sns.se/wp content/uploads/2016/07/the_nordic_corporate_governance_model_1.pdf

10 The Weimer and Pape classification is based upon eight related, yet discernible characteristics: (1) the prevailing concept of the firm, (2) the board system, (3) the salient stakeholders able to exert influence on managerial decision-making, (4) the importance of stock markets in the national economy, (5) the presence or absence of an external market for corporate control, (6) the ownership structure, (7) the extent to which executive compensation is dependent on corporate performance, and (8) the time horizon of economic relationships. **J. Weimer, J.C. Pape**, *A Taxonomy of Systems of Corporate Governance*, Corporate Governance: An International Review 1999/7/2, pp. 152–166.

11 **S. Thomsen**, **M. Conyon**, *Corporate Governance: Mechanisms and Systems*, McGraw-Hill Education 2012, p. 202; **H.B. Hansmann**, **R.H. Kraakman**, *The end of history for corporate law*, Georgetown Law Journal 2001/89/1, pp. 1–37.

12 **U.C. Braendle**, **J. Noll**, *On the Convergence of National Corporate Governance Systems*, The Journal of the Interdisciplinary Economics 2006/17, https://journals.sagepub.com/doi/abs/10.1177/02601079X06001700105

liquid, and the market for corporate control is weak. Bank and loan finance is widely used to fund companies, and banks wield influence on corporate affairs. Company law is typically rule-based.

The shareholder and the stakeholder models are not coherent, they compete with each other, and some important features distinguish them. Table 1 presents the main differences between the two models.

TABLE 1: *Conceptual differences between the shareholder and stakeholder perspective of corporate governance*

	Shareholder perspective	Stakeholder perspective
Purpose	*Maximise shareholder wealth*	*Pursue multiple objectives of parties with different interests*
Governance structure	*Managers are agents of the shareholders*	*Stakeholder-elected Board of Directors*
Governance process	*Control*	*Cooperation, Coordination and Conflict resolution*
Performance metrics	*Shareholder value sufficient to maintain investor commitment*	*Fair distribution of value created to maintain commitment of multiple stakeholders*
Risk holders	*Shareholders*	*All stakeholders*

Source: **E. Dennehy**, *Corporate governance – A stakeholder model*, International Journal of Business Governance and Ethics 2012/7/2, pp. 83–95, DOI: 10.1504/IJBGE.2012.047536

Corporate governance convergence refers to …*an increasing isomorphism in the governance practices of public corporations from different countries*[13] or more simply "going together" while divergence means "going apart". Researchers make a distinction between convergence in form (*de jure*), which relates to the increasing similarity in legal framework and institutions, and convergence in function (*de facto*), when countries with different rules and institutions are able to perform the same functions[14]. The latter is described as *decentralized, market-driven change at*

[13] **T. Yoshikawa**, **A.A. Rasheed**, *Convergence of corporate governance: critical review and future directions*, Corporate Governance: An International Review 2009/17/3, p. 389.

[14] **R. La Porta**, **F. Lopez-De-Silanes**, **A. Shleifer**, *Corporate ownership around the World*, Journal of Finance 1999/54/2; **R.J. Gilson**, **C.J. Milhaupt**, *Choice as regulatory reform: the case of Japanese corporate governance*, American Journal of Comparative Law 2005/53, pp. 343–377.

the firm level of corporate governance practices[15]. Convergence in form is regulator-driven and concerns centralized, country-level changes in corporate governance[16]. There is an institutional-level or firm-level dimension of convergence[17].

The article aims to offer an outline of the most important factors responsible for the convergence or divergence of corporate governance systems based on selected countries – the US, the UK, Germany, and Japan. The research should show that the governments of those countries are not interested in the convergence of the systems.

2. Characteristics of the selected models of corporate governance

2.1. The US and UK models of corporate governance

The US and the UK fit into the Anglo-American model, but there are significant differences between their corporate governance systems.

The US corporate governance is characterized by "strong managers and weak owners" (agency problem Type I)[18], so a system of effective governance that protects the interests of owners and minimizes agency costs is needed[19]. To protect investors, the effective capital market transactions are regulated by federal laws that lay down mandatory rules complemented by standards issued by securities exchanges[20]. The Securities and Exchange Commission (SEC) has become more involved with corporate governance issues, providing rules that require boards of listed corporations to have a majority of independent directors (insider-dominated boards have been rare for years), who are intended to monitor on behalf of shareholders, and to create three key committees composed exclusively of such directors[21]. Opportunistic behavior by managers is regulated

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15 **W. Drobetz**, **P.P. Momtaz**, *Corporate Governance in the European M&A Market*, Finance Research Letters, Elsevier 2019, https://www.sciencedirect.com/science/article/abs/pii/S1544612318306421?via%3Dihub

16 **T. Khanna**, **J. Kogan**, **K. Palepu**, *Globalization and similarities in corporate governance: a cross-country analysis*, The Review of Economics and Statistics 2006/88/1, pp. 69–90.

17 **T. Yoshikawa**, **A.A. Rasheed**, *op. cit.*, p. 4.

18 **R.V. Aguilera**, **G. Jackson**, *Comparative and International Corporate Governance*, The Academy of Management Annals 2010/4/1, p. 486; DOI: 10.1080/19416520.2010.495525

19 **S.Thomsen**, **M. Conyon**, *op. cit.*, p. 202.

20 **P. Masntysaari**, *Comparative Corporate Governance. Shareholders as a Rule-maker*, Springer, 2005, p. 4

21 **D.C. Clarke**, *Three Concepts of the Independent Director*, Delaware Journal of Corporate Law 2007/32, pp. 73–111, http://www.djcl.org/wp-content/uploads/2014/08/Three-Concepts-of-the-Independent-Director.pdf

on the corporate takeover market[22]. The threat of a potential hostile takeover, supported by managerial reputation on the labor market, induces managers to create value for shareholders. The introduction of performance-oriented executive compensation made managers focus on stock prices, but it turned out to be a rent-seeking device and a driver of short-termism. The solution to the agency problems of US corporations is too often based on excessive incentives for managers, too little investor responsibility, and too little scrutiny by boards[23].

Since the 1990s, institutional investors' ownership of shares and activism have increased, but the labor side of corporate governance has weakened[24]. Pension funds have moved outside companies, employees have no input in decision-making, and investments in workers are minimized[25]. In recent years, the US system has undergone an evolution from managerial capitalism to investor capitalism[26].

The UK's corporate governance model is principle-based. Codes of good practice, not the rule of law, determine board responsibilities. It follows the *comply or explain* approach, which allows companies to organize themselves best according to their own unique circumstances. Self-regulation is the underlying theme. Compliance is voluntary, with the sanctions being the exposure of corporate governance failings to the market and being delisted from the stock exchange. The role of the regulators is to ensure that investors have accurate information for their judgments[27].

Under the Combined Code, as the UK's Corporate Governance Code used to be known, at least half of the boards of listed companies should comprise non-executive independent directors, and audit and compensation committees are recommended. Institutional investors are the most important players[28]. The great impact they have put companies under pressure (now Combined Code) to divide the roles of the CEO – who is responsible for day-to-day management

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[22] **M. Jensen**, **W. Meckling**, *Theory of the Firm: Managerial Behavior, Agency Costs, and Owner-ship Structure*, Journal of Financial Economics 1976/3, pp. 305–360.

[23] **R.V. Augilera**, **G. Jackson**, *op. cit.*

[24] **M. Gelter**, *Comparative Corporate Governance: Old and New*, Fordham University School of Law 2016, March. 1, http://ssrn.com/abstract=2756038

[25] **E. Dennehy**, *op. cit.*, pp. 85–86.

[26] **G.F. Davis**, *Managed by the markets: How finance reshaped America*, Oxford University Press, Oxford 2009; **R.V. Aguileraa**, **G. Jackson**, *op. cit.*, p. 531.

[27] **M. Carneya**, **S. Estrinb**, **Z. Lianga**, **D. Shapiro**, *National institutional systems, foreign ownership and firm performance: The case of understudied countries*, Journal of World Business 2018, https://doi.org/10.1016/j.jwb.2018.03.003

[28] **S. Thomsen**, **M. Conyon**, *op. cit.*, p. 211.

– and the board's (preferably independent) chairman, whose role is to lead and coordinate the board meetings with the aim of fostering constructive dissent and not rubber-stamping the views of the management. The UK was the first country to introduce into the board a senior independent director[29] whose function is *... to provide a sounding board for the chairman and to serve as an intermediary for the other directors when necessary*[30].

The US and the UK models do not converge. The US model is *rule-based* while the UK model is *principles-based*. In the US model, the roles of the board chairman and the CEO are held by the same person, while in the UK model, they are separated. In the US, shareholders have little influence on the board while in the UK, shareholders can affect board actions. US companies are shareholder-oriented, while British ones are more stakeholder-oriented. Finally, the UK introduced into the board a senior independent director, while the US did not provide for that separation.

2.2. The Continental European and the Japanese Models

Germany has a stakeholder-oriented model (a bank-based economy or insider system) with a collective orientation towards profit maximization and strategic decision-making to ensure the long-term survival of the company[31]. In order to protect minority shareholders and creditors, companies are regulated by mandatory provisions of company law[32]. Corporate governance regulations are based largely on EU directives but with deep roots in German law[33]. The German model is characterized by a weak market for corporate control, large shareholders (often family), cross-holdings and bank monitoring, a two-tier (management

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29 Today nearly all FTSE 350 boards have adopted this unique system of divided leadership responsibilities.

30 *The UK Corporate Governance Code*, The Financial Reporting Council Limited 2018, p. 7, https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.PDF

31 **T. Yoshikawa**, **H. Zhu**, **P. Wang**, *National Governance System, Corporate Ownership, and Roles of Outside Directors: A Corporate Governance Bundle Perspective*, Corporate Governance: An International Review 2014/22/3, pp. 252–265.

32 **P. Masntysaari** *op. cit*., p. 4.

33 **J.J. du Plessis**, **B. Großfeld**, **I. Saenger**, **O. Sandrock**, *An Overview of German Business or Enterprise Law and the One-Tier and Two-Tier Board Systems Contrasted*, in: **J.J. du Plessis**, **B. Großfeld**, **C. Luttermann**, **I. Saenger**, **O. Sandrock**, **M. Casper**, *German Corporate Governance in International and European Context*, Springer–Verlag GmbH Germany 2017, pp. 3–5.

and supervision are clearly separated) board with codetermination[34] between shareholders and employees (the collective nature of the corporate culture), and very small sensitivity of managerial compensation to performance. The primary function of the supervisory board is to control the management board, including the appointment, dismissal, and remuneration of its members[35]. Banks monitor firms and have positive contribution to their restructuring if they are when they found in case they found themselves started to be in the financial distress. The long-term lending relationships give them considerable power, strengthened by their representation on the firms' supervisory board. However, banks have become less influential over time. State intervention in addressing the agency problem is emblematic of Germany[36]. The collective nature of this system also restricts excessive risk-taking and high executive remuneration, and it promotes stability and the long-term survival of the corporation. It encourages a system of employment for life and employee dedication. Cross-shareholding and interlocking directorships are prevalent. Corporations are characterized by strong owners, weak managers, and strong labor[37].

The internationalization of capital caused a reorganization of the capital market and increased emphasis on maximizing shareholders' value. A federal authority was created to supervise the financial market, rules on transparency and accountability were improved, and international accounting standards were adopted[38]. Rules restricting takeovers were removed, and a UK-style self-regulatory corporate governance code was introduced (in 2002) recommending the audit and nomination committees[39]. Though the changes signify a shift towards the shareholder model (supported by an increasing number of managers being trained in the US and UK), most of the defining core features of the corporate governance system remain unaltered, including co-determination, the two-tier board system, and collectivism as the principal objective of corporate

[34] The co-determination rules in Germany require one half of the supervisory board to represent labor, with employee representative directors elected through the trades unions, the other half to represent capital, elected by shareholders. It is a strong part of Germany's corporate culture as a collective society, ensuring the protection of public interest. **S. Thomsen**, **M. Conyon**, *op. cit.*

[35] **E. Dennehy**, *op. cit.*, p. 87.

[36] **B. Tricker**, *op. cit.*, pp. 185–186.

[37] **J. Weimer**, **J.C. Pape**, *op. cit.*

[38] **C. Lane**, *Changes in corporate governance of German corporations: Convergence to the Anglo-American model?*, Competition and Change 2003/7/2.

[39] **K.J. Hopt**, **P.C. Leyens**, *Board Models in Europe. Recent Developments of Internal Corporate Governance Structures in Germany, the United Kingdom, France, and Italy*, Law Working Paper 2004, No 18, http://www.ejtn.eu/PageFiles/6333/Board%20Models%20in%20Europe.pdf

enterprise[40]. German-organized capitalism is a blend of market practices and state intervention. The government is reluctant to institute shareholder-oriented rules and cultural and ideological changes[41]. In line with German tradition, labor market reforms are pro-labor, and the government is of the view that reforms must be consensual. As the system is inflexible and resistant to change, regulations instigating convergence towards the shareholder model are questionable[42].

In Japan, corporate governance is concerned with ensuring that firms are run in such a way that society's resources are used efficiently, taking into account a range of stakeholders[43]. The law is a mixture of mainly German and American legal traditions. The traditional model (the convoy system) is characterized by a high level of stock ownership by affiliated banks and companies with strong, long-term links. The related key players in corporate governance are the main bank, keiretsu (industrial groups linked by trading relationships, cross-shareholdings, and interlocking directorships), management, and government. The main bank holds shares in the companies of the group and has representatives on the boards of directors[44]. It is expected to provide crisis insurance in times of distress. Major shareholders protect the firm from the threat of hostile takeover bids. Boards of directors are composed almost entirely of insiders with privileged access to information and who exert influence on corporate decisions. As communities, companies have three "treasures" – lifetime employment, the seniority system, and corporate trade unions[45].

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40 **A. Shleifer**, **R.W. Vishny**, *A survey of corporate governance*, Journal of Finance 1997/52/2, pp. 737–783.

41 Some argue that the management board is dominated by top management and lacks the information inputs, advice, and wise counselling that can be provided by outside, independent, non-executive directors on the unitary board. Others question the effectiveness of supervisory boards, their lack of real power, and their ability effectively to control the management board. The representative character of the supervisory board provides the potential for conflicts of interest.

42 **G. Jackson**, **A. Moerke**, *Continuity and change in corporate governance: comparing Germany and Japan*, Corporate Governance: An International Review 2005/3/1, pp. 351–361.

43 **F. Allen**, **M. Zhao**, *The Corporate Governance Model of Japan: Shareholders are not Rulers*, Franklin Allen University of Pennsylvania and Mengxin Zhao Bentley College 2007, May 13. pp. 1–17, http://finance.wharton.upenn.edu/~allenf/download/Vita/Japan-Corporate-Governance.pdf; **R. Dore**, *Stock market capitalism: welfare capitalism: Japan and Germany versus the Anglo-Saxons*, Oxford University Press, Oxford 2000, p. 71; DOI: 10.1093/acprof:oso/9780199240623.001.0001

44 **M. Aoki**, **G. Jackson**, **H. Miyaajima** (eds.), *Corporate Governance in Japan*, Edward Elgar (Cambride University Press), Cambridge 2017; **U.C. Braendle**, **J. Noll**, *op. cit.*

45 **T. Inagami**, **D.H. Whittaker**, *The new community firm: Employment, governance and management reform in Japan*, Cambridge University Press, Cambridge 2005; DOI: 10.1017/CBO9780511488610

The Japanese model was thought to be a good alternative to the Anglo-American one, but the crisis that hit Japan at the end of the 20th century changed that view. The stagnation of the economy and the growing share of foreign investments initiated interest in the shareholder-oriented model[46].

The breakthrough year for the Japanese economy and corporate governance was 1997, when the government announced the *Big Bang* reform[47]. International regulations, especially American legislation, and corporate practice became the pattern for reforms that started the *Internal Americanization*[48].

Two waves of changes in Japanese corporate governance may be distinguished as a result of amendments to the *Commercial Code* and Company law in 2006 and 2015 and their consequences[49]. They implemented some of the Anglo-American laws which resulted in the publication of the following documents:

The 1st wave: directed towards increasing Japan's competitiveness on the international market

- 1997 – Big Bang Reform – Free, fair, open and global capital market;
- 2005 – the overall reform of the Companies Act;
- 2006 – *Commercial Code* – implemented US law into the Japanese legislative system – strengthening shareholders, accountability and corporate governance (Internal Americanization);
- 2007 – The Financial Instruments and Exchange Act (J – SOX);
- 2009 – a new version of *Principles of Corporate Governance for Listed Companies*.

The 2nd wave: directed towards the revitalization of Japan

- 2013 – *Japan's Revitalization Strategy* – the new era of Japanese corporate governance;
- 2014 – *Japan's Stewardship Code* (based on the *UK Stewardship Code* and *comply or explain*);

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46 **K. Ovsiannikov**, *Corporate Governance Reforms in Japan: Instilling the New Regime*, Cogent Business & Management 2017/4, pp. 1–16, https://doi.org/10.1080/23311975.2017.1300993

47 **Z. Shishido**, *The Turnaround of 1997: Changes in Japanese Corporate Law and Governance*, in: **M. Aoki**, **G. Jackson**, **H. Miyajima** (eds.), *Corporate Governance in Japan*, Oxford University Press, Oxford 2007.

48 **Z. Shishido**, *op. cit.*, p. 323.

49 **L. Nottage**, **L.Wolff**, **K. Anderson** (eds.), *Corporate Governance in the 21st Century: Japan's Gradual Transformation*, Edward Elgar Publishing 2009, p. 3; **Z. Shishido**, *Reform in Japanese Corporate Law and Corporate Governance: Current Changes in Historical Perspective*, The American Journal of Comparative Law 2001/49/1, pp. 653–678, http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=2081&context=facpubs

- 2015 – *Amendment of the Companies Act* and *Japan's Corporate Governance Code* (most important international corporate governance recommendations);
- 2015 – *Guidelines for the Prevention of Bribery of Foreign Public Officials* (*METI Guidelines*);
- 2016 – *The Tokyo Stock Exchange (TSE)*: *New Listing Guidebook for Foreign Companies* (comply or explain principle);
- 2016 – *Japan's Unfair Competition Prevention Act (UCPA)* compatible with the *US' Foreign Corrupt Practices Act* and *the United Kingdom's Bribery Act 2010*;
- 2016 – *TSE: Principles for Listed Companies Dealing with Corporate Malfeasance*.

The Principles of Corporate Governance for Listed Companies advocated the introduction of external directors to the boards and set criteria for their independence in line with international requirements and the *comply or explain* principle. As a result, Japan's model of corporate governance follows the logic of "networks", which mixes hierarchy-based and market-based elements of governance under a hybrid regulatory regime[50]. A good example of this is the board structure, as corporate law allows big firms to choose between the following:

- From 1890: *Audit & Supervisory Board* – a company with a board of statutory auditors (Kansayaku-kai);
- From 2003: *A Company with Three Committees* (3C) – *nomination, audit, and remuneration*;
- From 2015: *A Company with an Audit* and a *Supervisory Committee* (*New Governance System*).

Since 1896, the Kansayaku Board has been a traditional Japanese structure with no obligation to appoint outside directors[51]. The statutory auditors lack the power to appoint or remove directors and do not necessarily represent shareholder or employee interests since they are nominated by the board. Usually, they are internally promoted employees of the corporation who may attend directors meetings and receive regular reports from directors, but they do not vote. Their main functions are to monitor the board's compliance with the law and to review

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50 **J. Raupach-Sumiya**, *Reforming Japan's Corporate Governance System: Will the Markets gain Control?*, Deutsches Institut für Japanstudien Working Paper 00/2, Tokyo, Deutcher Institut für Japanstudien, pp. 1–45.

51 *The Corporate Auditor System in Japan*, Japan Audit and Supervisory Board Members Association 2007, http://www.kansa.or.jp/en/whats-new/the-corporate-auditor-system-in-japan.html

the financial statements. In 1993, this system was strengthened by extending the auditor's term of office and mandating that large companies have at least three auditors functioning as a board of audit. One member must be an outside director[52].

Since 2003, large Japanese firms may choose between the traditional auditor system and a committee system similar to the one adopted by listed US firms. The 3C board is created on the pattern of the American Sarbanes-Oxley Act (2002) but it is a challenge for Japanese corporations (accepted by only 2%). Previously, Japanese companies very seldom employed external directors, but now they must be the majority in each of the committees. Common charges against such a requirement are that outside directors are not well suited to perform a useful role in highly relational Japanese corporate affairs, and that finding suitable outside directors will be very difficult given the lack of experience with the practice[53]. The US's corporate governance ideology and values are not popular due to the reluctance of Japanese businessmen to directly monitor companies and to introduce managers' responsibilities towards shareholders[54]. The presidents of companies do not want to give up their power to appoint their successors, which interferes with the duties of the nomination committee. The new board is not compatible with Japanese corporate culture.

In 2013, the government adopted the Japan Revitalization Strategy and the *three arrows of Abenomics* (monetary easing, fiscal stimulus, and structural reforms), initiating the second wave of changes and a new era in the development of corporate governance. In 2015, the TSE amended the Companies Act and adopted a new corporate governance code. A new board structure was introduced – *the audit and supervision committee* – combining Japanese tradition and American practice[55]. The majority of the minimum three-person *Audit and Supervisory Committee* must be external directors. All directors are chosen by shareholders. Auditors have greater powers, and their position can be compared

[52] **A. Chizema**, **S. Yoshikatsu**, *The 'Company with Committees': Change or Continuity in Japanese Corporate Governance?*, Journal of Management Studies 2012/49:1, January, DOI: 10.1111/j.1467-6486.2011.01008.x

[53] *Ibidem.*

[54] **C.L. Ahmadjian**, *Foreign Investors and Corporate Governance Reform in Japan*, in: **M. Aoki**, **G. Jackson**, **H. Miyaajima**, *Corporate Governance in Japan*, Edward Elgar (Cambridge University Press), Cambridge 2007, pp. 125–150.

[55] **E.T. Masuda**, **T. Yoshida**, *New corporate governance structure: Company with audit and supervisory committee*, Masuda & Partners Law Office in Tokyo, 2016, 12 October, https://www.iflr1000.com/NewsAndAnalysis/New-corporate-governance-structure-Company-with-audit-and-supervisory-committee/Index/5997

to that of the traditional statutory auditors. This new system is more transparent in the separation of operational management from supervision, and it assigns an important role to external directors in corporate governance[56]. The government is making an effort to create an attractive environment for foreign investors but is not pressing for a change in the corporate culture and for a convergence of the systems.

Despite all the changes towards Americanization (which is more intense in Japan) and pressure from foreign investors, there is still a sharp contrast between the Japanese and German systems and the Anglo-American system. The main similarities between the German and Japanese models are stakeholder orientation, mandatory provisions of company law, the collective nature of the corporate culture, the important role of banks and employees, the weak market for corporate control, large shareholders (often families), cross-holdings, and bank monitoring. The main differences between the German and Japanese models concern the governance structures. Japanese companies may choose one of three governance structures, while German ones have no such possibility. The German two-tier governance structure consists of the supervisory board and the management board while the Japanese two-tier governance structure includes the board of directors and the board of statutory auditors. The two other governance forms do not exist in Germany. Although both systems are stakeholder-oriented, the Japanese corporate governance system is more corporate-oriented. The powers and roles of the external and internal directors, especially the independent directors, are quite different in both countries. In Japan, employees are not members of the board of directors. What connects them is substantial resistance to the Americanization[57] and the orientation towards increasing the effectiveness and competitiveness of their models.

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[56] **Lee Ch.**, **J. Allen**, *The Roles and Functions of Kansayaku Boards Compared to Audit Committees*, Asian Corporate Governance Association (ACGA), 2013, October. Hong Kong, https://www.acga-asia.org/ upload/files/advocacy/20170330102329_21.pdf

[57] **R.V. Aguilera**, **K.A. Desender**, **M. Lopez-Puertas Lamy**, **J. Ho Lee**, *The governance impact of a changing investor landscape*, Journal of International Business Studies 2017/48, pp. 195–221, DOI: 10.1057/s41267-016-0043-y

3. The main convergence and divergence factors of the corporate governance systems

3.1. The main convergence factors of the corporate governance systems

As noted earlier, convergence means *coming together,* and divergence is *moving apart*[58].

A preliminary analysis of the main factors of convergence and divergence will be now performed in order to discover which of them influence the traditional models of corporate governance most.

The widespread adoption of corporate governance reforms was stimulated through global governance and the *IMF*, *World Bank*, *OECD*, G-20 group of national leaders, and the *Financial Stability Board*[59]. However, the origin of the global reform movement was the internationally influential Cadbury Committee Report (1992)[60]. Codes of corporate governance best practice are now a common feature of stock-exchange listing rules (or national corporate law), generally following *the comply or explain* basis. A set of norms, adherence to which is voluntary, provide a channel for convergence[61]. Codes which are similar across countries lead to global convergence. Their diffusion is perceived as convergence towards the shareholder-oriented model[62].

The integration of financial markets is the primary driver of convergence of governance practice because of the entry into foreign capital markets[63]. In order to

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58 There is no space for the discussion concerning the definition of harmonization, convergence, hybridization and crossvergence.

59 *OECD Corporate Governance Factbook*, OECD 2017, p. 45, http://www.oecd.org/daf/ca/Corporate-Governance-Factbook.pdf

60 **A. Cadbury**, *The Report of The Committee on the Financial Aspects of Corporate Governance*, The Committee on the Financial Aspects of Corporate Governance and Gee and Co. Ltd, 1992.

61 **J.N. Gordon**, **W.G. Ringe** (eds.), *The Oxford Handbook of Law and Governance*, Oxford University Press, Oxford 2015, The%20Oxford%20Handbook%20of%20Corporate%20Law%20and%20Governance%2

62 **I. Haxhi**, **H.V. Ees**, *Explaining diversity in the worldwide diffusion of codes of good governance*, Journal of International Business Studies 2010/41/4, p. 723.

63 **E. Jeffers**, *Corporate governance: Toward converging models?*, Global Finance Journal 2005/16/2; **T. Khanna**, **K. Palepu**, *Globalization and Convergence in Corporate Governance: Evidence from Infosys and the Indian software Industry*, Journal of International Business Studies 2004/35, pp. 484–507; **S. Nestor**, **J.K. Thompson**, *Corporate Governance Patterns in OECD Economies: Is Convergence Under Way?*, OECD 2000, http://www.oecd.org/dataoecd/7/10/1931460.pdf

attract foreign institutional investors, it is necessary to comply with their expectations of good governance, disclosure, and respect for the rights of minority shareholders[64]. Governments competing to attract investors tend to introduce attractive regulations[65]. According to Tricker as each government tries to match what other countries do, convergence becomes inevitable[66]. The dominance of a shareholder-centered ideology of corporate law among the business, government, and legal elites in key commercial jurisdictions is also important[67]. Corporate governance fosters convergence, addressing problems that are faced by all corporations[68].

Cultural and institutional factors are pivotal in the outcome of corporate governance regulation, and they have significant implications for the convergence debate[69]. Factors such as globalization, the internationalization of markets, global competition, and deregulation are important drivers of changes in traditional models of corporate governance. Also, the ongoing competition among governance systems, the institutionalization of investments, and the harmonization of accounting rules[70] should be mentioned. Corporate internationalization contributes to convergence as firms develop a sort of internal culture that gradually grows away from uniquely national characteristics[71]. There is a belief that the increasing interaction between the players from different parts of the globe will lead to the gradual emergence of a single business culture[72].

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64 **T. Yoshikawa**, **A.A. Rasheed**, *op. cit*., pp. 7–8.

65 **D.K. Denis**, **J.J. McConnell**, *International Corporate Governance*, The Journal of Financial and Quantitative Analysis 2003/38/1, March, https://www.jstor.org/stable/4126762

66 **B. Tricker**, *op. cit*., p. 9.

67 **H. Hansmann**, **R. Kraakman**, *op. cit*.

68 **W. Drobetz**, **P.P. Momtaz**, *op. cit*.

69 **J. Groenewegen**, *Who should control the corporation? Insights from New and Original Institutional Economics*, Journal of Economic Issues 2004/38/2; **R.V. Aguilera and G. Jackson**, Corporate Governance – Business key messages. The Business and Industry Advisory Committee to the OECD 2018, 10 April, p. 6, http://biac.org/wp-content/uploads/2018/04/FIN-2018-04-10-Corporate-Governance-Strategy-Paper16.pdf

70 **P.W. Moerland**, *Alternatative disciplinary Mechanism in Different Corporate Systems*, Journal of Economic Behavior and Organization 1995/26/1; **P. Witt**, *The Competition of International Corporate Governance Systems – a German Perspective*, Management International Review 2004/44/3.

71 *Ibidem*.

72 **Ch. Kwok-bun**, **P.J. Peverelli**, *Cultural Hybridization: A Third Way Between Divergence and Convergence*, The Journal of New Paradigm Research, Volume 66, Issue 3–4, 2010, pp. 219–242, https://www.tandfonline.com/doi/abs/10.1080/02604021003680479?journalCode=gwof20

3.2. Factors impeding the convergence of corporate governance systems

Factors impeding the convergence of national governance systems (which differentiate them) include structure-driven and rule-driven path dependencies[73]. The corporate cultural values of each country and their impact on the corporate governance laws are among the most important ones. Their role within organizations is often critical for how governance principles are recognized and applied in practice, and the way people interact[74]. In the opinions of many authors, culture is a major mitigating factor against the convergence of corporate governance rules and principles[75].

Until 2008, the view was that states were altering their corporate governance rules and practices towards the Anglo-American model[76]. The fact that more companies were listed in the UK and US was viewed as a sign of the superiority of their corporate governance systems being most effective at allocating resources[77]. However, the collapse of Enron (2001) revealed that the US model was not only vulnerable to failure, but it also showed systemic weaknesses[78]. Its hegemony was finally cracked by the global financial crises, which delegitimized shareholder value orientation and the role of the US as a benchmark for international comparisons[79]. These events have now touched many other areas of international governance – the regulation of financial markets, accountability, and fairness[80].

73 **A. Licht**, *The mother of all path dependencies toward a cross-cultural theory of corporate governance system*, Delaware Journal of Corporate Law 2001/26/1, pp. 147–205, https://ssrn.com/abstract=266910

74 **G.A. Karolyi**, *The gravity of culture for finance*, Journal of Corporate Finance 2016/41, www.elsevier.com/ locate/jcorpfin; **Ch. Kwok-Bun**, **P.J. Peverelli**, *op. cit.*

75 **M.M. Siems**, *Convergence in corporate governance: a leximetric approach*, The Journal of Corporate Law 2010/35/4; **M. Carneya**, **S. Estrinb**, **Z. Lianga**, **D. Shapiro**, *op. cit.*; **D.M. Branson**, *The Very Uncertain Prospect of Global Convergence in Corporate Governance*, Cornell International Law Journal 2001/34/2.

76 **R.A. Ntongho**, *Culture and corporate governance convergence*, International Journal of Law and Management 2016/58/5, https://doi.org/10.1108/ IJLMA-04-2015-0016 Permanent link to this document, https://doi.org/10.1108/IJLMA-04-2015-0016

77 **R.J. Gilson**, *Globalizing Corporate Governance: Convergence of Form or Function*, in: *Convergence and Persistence in Corporate Governance*, in: **J.N. Gordon**, **M.J. Roe** (eds.), Harvard University, Massachusetts 2004; **H.B. Hansmann**, **R.H. Kraakman**, *op. cit.*

78 **G.F. Davis**, *op. cit*.

79 **C. Mayer**, *Corporate Governance, Competition and Performance*, Journal of Law and Society 1997/24/1.

80 **R.V. Aguilera**, **G. Jackson**, *op. cit*., p. 530; **Ch. Palkar**, **R.V. Lellapalli**, *Divergence or convergence: paradoxes in corporate governance?*, Corporate Governance 2015/15/5, https://doi.org/10.1108/CG-05-2015-0066

Institutional investors, who have become quite prominent, have created fears, defense movements, and they have increased protectionism in many countries, especially after the financial crisis. Governments, not wanting real Americanization, carefully and selectively adapt certain practices, tailoring them to suit local needs, and retaining many features of their existing practices. They are unwilling to abandon their existing systems and replace them with the Anglo-American model[81]. Firms have the same attitude, e.g., Sony and its followers of the Anglo-American model of corporate governance selectively adopted features to fit their own situations and did not adopt the US governance system as is[82].

The prevalence of different accounting standards has been a significant impediment to the free flow of capital across countries, and to the integration of capital markets. To solve that problem, the IASC has developed a core set of international accounting standards.

The above analysis shows that the topic of the convergence and divergence of the corporate governance systems and how they are assessed is very complicated. It is not easy to evaluate the character and scope of convergence. In my opinion, convergence in form (*de jure*), i.e., the one that may be controlled, currently prevails. Convergence in function (*de facto*) is market-driven, has a rather evolutionary character, and needs more time and effort. There are strong reasons for both directions of the development of the corporate governance models. The significant cultural differences that exist in the national systems mean that convergence in the true sense is currently not possible. However, Gilson et al. write that *we are likely to observe that neither convergence nor divergence, but the co-existence of both the forces for convergence and forces against them are in some state of uneasy equilibrium*[83]. Confirmation of that statement needs further research.

4. Conclusions

A comparative analysis of the corporate governance models of the chosen countries shows a great deal of convergence, but also path-dependent characteristics, stemming from the fundamental differences in the economic,

81 *The Convergence of Corporate Governance. Promise and Prospects…*, p. 27.

82 **R.J. Gilson**, **C.J. Milhaupt**, *Choice as regulatory reform: The case of Japanese corporate governance*, American Journal of Comparative Law 2005/53, pp. 343–377.

83 *Ibidem*, p. 16.

societal and cultural environment of the countries. In the US, rules are abundant and very developed, indicating exactly what the legal norms are; the European approach relies more on principles and the obligation to respect them, and they tend to consider that substance prevails over form.

History proves that the attractiveness of corporate governance models depends greatly on the performance and financial standing of the economies in which they function. During the period of the great development of Japan (the "Japanese miracle"), its model of corporate governance was considered to be the best (a benchmark). The burst of the financial bubble and long-lasting stagnation of the Japanese economy changed that opinion, and the Anglo-American model took that title. However, the big corporate scandals and then the financial crisis meant that it lost its hegemony in the world.

Currently, in my opinion, convergence in form (*de jure*), i.e., the one that may be controlled, prevails. The market-driven convergence in function (*de facto*) needs more time. However, firms do not act in a social vacuum; they are affected by numerous influences from the environment (e.g., the way firms compete, the extent of interference from the government, the employer–employee relationship, and tradition). The harmonization of regulations has encountered resistance because of the differences in national norms and traditions. The example of Japan used in this paper proves that culture is the main obstacle to the convergence of the national systems and the main factor that differentiates countries.

A literature review makes it possible to formulate conclusions that although governments adopt some features of the shareholder-oriented model of the US (it is the benchmark to follow) and the reforms are compliant with the requirements of institutional investors, they do not want to abandon their existing systems and replace them with the Anglo-American model. Quite often, the good practice codes are mainly a marketing instrument to tap international capital markets and keep institutions interested, but they do little to harm the dominant corporate governance system. As a result, the governance practices of the countries reflect increasing hybridization more than convergence. It is possible to say that the differences in the national systems mean that convergence in the true sense is now not possible.

Concluding, it may be stated that the most important factors connecting countries include:

– the globalization of governance, stimulated by the IMF, the World Bank, the OECD, the G-20 group and the FSB;
– the internationalization, deregulation, and integration of financial markets;
– corporate governance codes – e.g., the Cadbury Code (1992) the OECD (1999, 2004, 2015), following *the comply or explain* basis;

- the ongoing competition among governance systems, the globalization of competition, the institutionalization of investments, and the harmonization of accounting rules;
- cultural and institutional factors, and especially the development of an internal culture by corporations that gradually grows away from specific national characteristics;
- competition in attracting foreign institutional investors;
- the possibility to gain an international education, qualifications, and skills;
- the dominance of a shareholder-centered ideology of corporate law among the business, government, and legal elites in key commercial jurisdictions;
- addressing problems that are faced by all corporations.

Amongst the structure-driven and rule-driven factors that differentiate corporate governance models, the most important are the following.

- the loss of the benchmark – the dominant US model is no longer a benchmark because it proved to be vulnerable to failure and showed systemic weaknesses;
- resistance to the institutional investors' power is becoming more evident;
- governments are not interested in eliminating all obstacles to the free flow of capital across countries and to the full integration of capital markets;
- most of the international practices are being implemented on the "comply or explain" basis because governments are trying to retain traditional practices; however, in order to attract foreign capital, they must introduce the international regulations;
- the corporate cultural values of each country have a significant impact on the corporate governance regulations, as they influence how governance principles are recognized and applied in practice;
- culture (tradition) is a major mitigating factor against the convergence of corporate governance rules and principles.

When trying to assess which factors prevail – the connecting or differentiating ones – it should be stressed that it is not possible to predict how the two main systems of corporate governance will evolve. Both of them have survived for many decades, and it is not possible to indicate the best one, as both have shown some weaknesses. In my opinion, in the long term, a hybrid model of corporate governance may emerge that incorporates the best of both and offers the most effective and competitive institutional framework. However, in the immediate future, the diversity in cultural practices between states will ensure that corporate governance rules and practices will remain divergent.

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Magdalena JERZEMOWSKA

CO ŁĄCZY, A CO DZIELI SYSTEMY NADZORU KORPORACYJNEGO WYBRANYCH KRAJÓW?

(Streszczenie)

Celem artykułu jest poznanie najważniejszych czynników konwergencji i dywergencji systemów nadzoru korporacyjnego na podstawie USA, Zjednoczonego Królestwa, Niemiec i Japonii. Problemem badawczym jest pokazanie, że rządy tych krajów nie są zainteresowane konwergencją systemów *corporate governance.*

Artykuł stara się pokazać nadzór korporacyjny jako szeroki i złożony obszar nadal wzbudzający kontrowersje. Zaprezentowano w nim klasyfikacje modeli nadzoru korporacyjnego, koncentrując się na tym wyróżniającym model Anglo-Amerykański i Kontynentalno-Japoński. Następnie przedstawiono najważniejsze czynniki konwergencji i dywergencji systemów nadzoru korporacyjnego. Stwierdzono, że państwa starają się unifikować te systemy głównie w obszarze regulacji, niewielką uwagę przywiązując do osiągnięcia konwergencji w praktyce. Japonia jest przykładem kraju zachowującego odrębność kulturową w warunkach amerykanizacji regulacji. Kultura i tradycja są głównymi przeszkodami w konwergencji modeli nadzoru korporacyjnego.

Dla realizacji celu badawczego zastosowano metodę krytycznej analizy adekwatnej bibliografii.

Słowa kluczowe: nadzór korporacyjny; konwergencja; dywergencja; modele